HRLN

WRITINGS ON HUMAN RIGHTS, LAW AND SOCIETY IN INDIA

A COMBAT LAW ANTHOLOGY

EDITED BY **HARSH DOBHAL**

HUMAN RIGHTS LAW NETWORK, INDIA

For

K Balagopal

&

K G Kannabiran

who continue to live...

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A COMBAT LAW ANTHOLOGY

SELECTIONS FROM COMBAT LAW (2002-2010)

EDITED BY HARSH DOBHAL

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INDIA

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Harsh Dobhal

Introduction

Human Rights, Law and Society

Starting in 2002 as a bimonthly, *Combat Law* has been publishing in-depth articles that combine facts and analysis on legal, social and political issues. Functioning without the constraints of the commercial media, the publication has been able to devote the necessary space to issues of importance at the local, national and global levels. As a bimonthly, it has been able to escape the pressures of headline grabbing breaking news that afflict the dailies and the weeklies and hence it has consistently focused on issues of long term importance. Free of other commercial pressures that incline the mainstream media to a conciliatory caution, *Combat Law* has been able to cover these issues fearlessly and without prejudice in support of the innumerable victims of the State, market and sections of society. Because of its independence, the publication has been able to maintain a rigorous standard of impartial scrutiny that allows both the facts and the authors to speak for themselves. Thus the bimonthly has provided its readers with sharp insights into some of the most pressing legal, social and human rights issues of our times.

We have tried to engage in an active, meaningful discussion in order to foster a climate for legal and social activism in pursuit of crafting a more democratic, just and equitable society. Our writers comprise experts, lawyers, professors, students and journalists who more often are also activists, and are amongst the leaders in their fields.

The purpose of this reader is to bring together a compilation of thematically grouped articles from *Combat Law*. There are themes to which, because of their very nature as matters vital to the institutions of State and society, *Combat Law* has returned from time to time. Because of the persistence of these problems and the sturdy quality of the writing it is possible, by revisiting these articles, to observe long term trends and patterns. This reader consists of articles that cover certain sets of problems over several years so as to present them in their historical coherence. These enduring themes are listed below.

COMMUNALISM

IN THE SIX DECADES since independence and the attendant expansion in mass politics, the country has witnessed hundreds of communal riots, some of which escalated into carnage. Major political parties in India both at the central and state levels have been involved in both visible and clandestine ways in facilitating, fueling and even engineering many of them. This deepening of communal tendencies has been accompanied by some long term changes. The most striking of these is the extent to which liberalisation and globalisation have destabilised society and deprived large numbers of people of their familiar livelihoods involving traditional skills. Even as large numbers of such people are dislocated and forced to migrate to cities as low wage semi-skilled workers, a spirit of mutual religious hostility has also spread across urban and peri-urban India, not just in the large cities but also in thousands of small towns. Communal outfits have spread their influence and mass-base across the country and the problem has now become so routine that it reaches the news media only when a large-scale riot erupts. Though the problem has acquired gargantuan proportions in recent years, we do not yet have adequate laws in place to deal with and protect people from communal and targeted crime, or for making persons in positions of public authority accountable and providing just, fair and equitable reparation to all affected persons. The set of articles in this section delves into the nature and character of the communal consciousness and the deficiencies of the institutional responses to it.

CRIMINAL JUSTICE

IN AN AGE when the market has deposed politics and technocrats who peddle the theory and practice of growth rule the roost, the poor stand little chance of securing any justice, as even the judiciary too falls prey to reformist and restructuring zeal. This is part of the process of making all organs and branches of the state responsive to a market economy that has been seized by the corporates and the plutocrats, not just of India but of many other parts of the world. In the process criminal justice has become more lopsided than it ever was in the past. Crooks of various description stalk the corridors of power even after they have been implicated in crimes of various description, while under-trials who have not been charged for any crime languish in overcrowded jails for years and sometimes even decades. Criminal justice is for all practical purposes dead. Political leaders whose culpability in organizing communal crimes is common knowledge are to be found unpunished. Business tycoons whose involvement in financial and other crimes are clearly evident are rarely to be found serving sentence and well connected murderers go scot free at the behest of their patrons. But there is no criminal law protection for those who are not well connected, whether they are guilty of big or small crimes. The higher judiciary seems to have overturned its own protective rulings of the past diluting the guarantees provided under the Constitution.

DALITS

EVEN TODAY, 62 years after the promulgation of the Constitution, and despite several laws, large numbers of Dalits are no more than untouchables, condemened to a menial existence, deprived of ordinary necessities and denied the most elementary dignity. Though in places their numbers are large enough to get them political attention as vote banks and despite some all-India and state level laws, the forms of discrimination that they are subjected to, which could range from outright killings to the more subtle emotional and psychological forms of daily or casual oppression, continue to this day. The political rhetoric has over the years incorporated the issues of Dalit justice, the political sphere has to a degree accommodated some Dalit leaders and the number of Dalits in administration has increased, thanks to affirmative action, but, most glaringly, rural society in large parts of the country is yet to come to terms with the need to mend its old ways. The SC/ST (Prevention of Atrocities) Act, aimed at eliminating atrocities against Dalits, incorporating provisions for the protection, compensation and rehabilitation of the victims of caste bias and providing for severe punishment to the perpetrators of violence, was passed more than two decades ago. But, like all other well-meaning legislation, this law is for the most part more ornamental than substantive, its implementation routinely falling through the cracks of the police and judicial administration.

DISABILITY

IT IS A WELL KNOWN fact that in India disabled persons live in severely inadequate conditions. They are denied employment opportunities. Basic services like access to education and health are denied to them. They lack recreation and sporting facilities and cannot participate in the cultural lives of their communities. When they get work, the conditions of employment and the workplace are unjust and unfavourable. Public facilities are designed without any heed to the needs of the disabled. The denial of civil and political rights too remains a major area of concern. There are very few laws protecting the disabled and guaranteeing them life opportunities that give them a chance to lead a meaningful life. In addition, they also face social discrimination from a very early age. While some schools have programmes that enable certain kinds of disabled children to get some education, there are few systematic measures designed to bring about the necessary change in social attitudes. A 'rights based approach' to enable access to these rights is gaining momentum but the road ahead is long and difficult. Legal provisions to protect the disabled and prevent discrimination along with adequate systems and institutions for enforcement can help bring about transformations in the social value system. The articles in this section highlight the disadvantages that the disabled labour under in India and point to the legal and other measures and mechanisms that need to be put in place so that the disabled can live a life with dignity.

ENVIRONMENT

THE INDIAN STATE seems to actively create disasters by periodically uprooting and displacing tens of thousands of its own people in the name of development. While the displaced people are consigned to a pitiable life of dislocation and loss, the displacing project is celebrated as one more wonder of shining India that covers up with technological gigantism the wreckage and the rubble of an environment that has been destroyed forever. The government is working as a collaborator with predatory corporations, compromising the food security and livelihood of millions of its own people at the altar of international trade and development. Once, during the 80s and the 90s, a sensitive judiciary examined environmental issues with the seriousness and gravity they merited. Since then everything, including jurisprudence, has been discarded in the interest of a growth rate that enriches the rich and attracts international attention. Consequently, as

recent judgments attest, the courts too have joined the development bandwagon, even when the cost borne by the environment and the poor are so obviously evident. This section examines some of these development projects and the judicial pronouncements thereof.

HEALTHCARE

TRADITIONALLY, in a welfare state, the responsibility for providing low cost and, if need be, free healthcare, lies with the State. However, the welfare State is under sustained attack by free market advocates world over and India is no exception. In a globalised world, driven by the insatiable drive for profit-making and market monopolies, exorbitant medical costs and high drug prices are pushing millions to the brink of a manufactured disaster. Healthcare has become an economic activity and even as hospitals mushroom across the country, access to healthcare is declining for the vast majority of the citizens. Universal primary healthcare as envisaged in the Alma Ata Declaration of 1978 has been abandoned in favour of privatised multi-speciality hospitals located in urban centres.

Under pressure from the international financial institutions, state expenditure on healthcare has been drastically reduced. As a result people are forced to forego medical attention since it is no longer affordable to low income families. Though the judiciary has been receptive to the medical needs of the people and has recognised the right to health and healthcare as a fundamental right, globalisation and free markets pose a challenge which needs to be addressed judicially as well as politically. This section turns a critical eye on the developments in the health sector and related institutional response to it in the last two decades.

KASHMIR

OVER TWO DECADES have elapsed since the Valley has been stalked by fear and violence and the unending imbroglio has not only ruined the economy but also turned the ‘paradise on earth’ into a dreaded, militarised zone where widows and orphans abound. In this period over 60,000 people have been killed, thousands have gone missing and hundreds have been brutally tortured. A staggering 50,000 or more have been orphaned. Thousands of women have become widows, many do not know the fate of their husbands or young sons who were whisked away by the military or the armed militia. Caught between two sides the people of the valley have suffered, though not in silence. Periodically anger spills over into protests and the governments at the centre and the state make some symbolic gestures before the gruesome conflict resumes again. Systematic armed violence has become an industry to which all participants are committed, leaving the common citizens of the valley without the necessary channels to voice their sentiments. There is no end in sight to this raging war in which impunity, loss of liberty and security are the hallmarks. The articles in this section present the situation in the valley from human rights point of view.

LABOUR

THE RELATIVELY HUMANE and compassionate elements of the policy vis-à-vis the working class since independence has become a relic of the past. The courts have been swayed by the new economic policies guided by the demands of globalisation and privatisation resulting in the gradual decline of the impact of labour laws. As a result, the work-force today is overwhelmingly in the unprotected informal sector, employed largely as casual labour, without working hour regulation, minimum wage guarantee or benefit coverage of any kind, resulting in large numbers of daily wage worker earning the bulk of their income through overtime work. Women are not even provided the necessary facilities, there are no crèches for working mothers and in many shopfloors even urinal visits are highly restricted. Accident insurance is not part of

the work contract and by and large injuries lead to immediate dismissal without compensation.

Collective wage negotiation is limited to the unionised workforce in the formal sector, and even there this is not always a right since the rules of union formation work against those who want to join or form unions that are not recognised by management. Workplace hygiene is not regulated and even basic protection is not given where work involves toxic material. It is doubtless that these measures enable profitability for industries but the price that is paid in terms of democratic rights is incalculable. If one takes the long view and the interests of the preservation and consolidation of a democratic system, it does not take long to realise that the short-term victory over the working people will inevitably result in the long-term undermining of democracy itself. The working class will find other ways and methods of getting even with capitalists. This is precisely what a well-designed legal system is structured to avoid.

PATENT

IT IS IRONICAL that patents were originally intended to be governmental incentives to innovators to prevent secrecy and encourage disclosure of inventions in exchange for limited legal protection. Today, patent laws serve exactly the opposite purpose as tools of monopolisation. As is the case with most aspects of neo-liberal policies in India, the new patent laws are not about globalisation of India's trade interests; these are about the Indianisation of western (read American) global trade interests. Patent protection afforded to large corporations has stifled innovation and the effects are felt the most in vital sectors like pharmaceuticals and agriculture. In the pharmaceutical sector the cost of non-generic drugs still under patent is so exorbitantly high that it is beyond the means of even the middle class. The paradox of the international patent regime, to which national patent policies and enforcement mechanisms are increasingly being aligned, is that the astronomical cost and pricing structure that it encourages piracy and bootlegging, most visibly seen in the manufacture of spurious drugs, imitation software, replicated music and even fake seeds. Crucial sectors like agriculture have been handed over to ruthless and unethical corporations which are allowed to hoodwink innocent farmers into surrendering their land to branded seeds from which they cannot escape once they are locked in. Submitting to the current western patent regime is a clear case of the government forfeiting the interests of consumers and producers to monopoly capitalists and is not something that can be justified on any count whatsoever. This section examines the evolution of this law and implication of the patent regime for Indian citizens.

RIGHT TO EDUCATION

IN A POOR COUNTRY like India the only way to make education accessible to poor is through free and heavily subsidised education. Under the present socio-economic conditions children up to 18 years should get free and compulsory education. But an overview of India's education policy and the direction it has taken over decades reveals that free market seems to be the State's main answer to education where corporate capital and privileged sections of society come out as the only winners. It is in the context that The Right to Education Act, which lacks a transformational vision, is geared towards preparing foot soldiers for the global market. In fact, it is quite clear that there is no longer an education policy ever since the way was paved for the entry of large capital into education. Like health, education today is an economic activity and there are today very few educationists in a field dominated by education investors, capitalists and profiteers.

Education across the world has rarely been democratic, having been structured to reproduce the class system. But today the pre-existing disparities have widened to such an extent that clear demarcations have emerged between the segment meant to produce the upper white collar class, the ordinary white collar class

and the blue collar class. Merit, the favourite catchword of the class that has monopolized the so-called meritorious heights of the economy, has nothing to with any of this. Rich people can buy their way into medical, engineering and other professional colleges while the children of the poor go to ill-equipped schools where the education is so rudimentary that they cannot aspire to get a decent higher qualification later on that will help them get a secure job in the new economy. And this is not to count the millions who have no access to even these ramshackle schools.

The Supreme Court's recent ruling is a step towards universalizing education but even the little that this judgement gives to the poor is under attack by the media and the education capitalists. Unless the government steps in with increased investments at the school level there is little opportunity for the poor to access the highly subsidised professional institutions that today are the monopoly of rich Indians. The articles in this section cover the tragedy of privatised education and government dereliction in India.

RIGHT TO FOOD

IN THE LAND of the high growth people die of slow hunger and nothing happens. There is nothing that the government and the architects of the new economy can do, except assert that people can live on 28 rupees a day and hence do not need to be included in the subsidised public distribution system. Meanwhile government procured foodgrain rots in public warehouses but due to some perverse calculation these cannot be given to starving people. The free market in agricultural produce has given the farmer nothing except debt bondage, and given the poor consumer nothing except sustained hunger. Much as the authorities have statistically reduced statistical poverty the reality is that poverty has increased under liberalisation even as more and more land is diverted to non-food agriculture and more and more food is diverted to the recreational consumption of the Indian elite.

Whenever there is any criticism of hunger in India, there are always plenty of scapegoats to blame—the population pressure, the land-man ratio, the carrying capacity and so on. Food is one area in which the higher judiciary has intervened, thanks to the campaign launched by various organisations, including Human Rights Law Network, and *Combat Law*. This section talks about rotting grains in godowns and people dying of slow hunger and entrenched malnutrition.

RIGHT TO HOUSING

IN 1997, in the Nawab Khans case, the Supreme Court ruled that "it is the duty of the State to construct houses at reasonable rates and make them easily accessible to poor. The State has the constitutional duty to provide shelter to make the right to life meaningful." Dealing with the aspect of encroaching, the Supreme Court said, "the mere fact that encroachers have approached this court would be no ground to dismiss their cases. Where the poor have resided in an area for a long time, the State ought to frame schemes and allocate land and resources for rehabilitating the urban poor."

But as India is rapidly urbanizing, the housing situation remains dismal. Today in urban centres all across the country settlements of poor immigrants are proliferating. These structures are made of flimsy material that is highly inflammable and gets easily washed away in the rain and which offer little protection from either heat or cold. Each of these tiny houses is overcrowded with a large number of occupants. They lack legal water supply or electricity and there is no authorised sewerage leading to severely unhygienic living conditions that lead to high rates of morbidity and mortality. They suffer periodic bouts of epidemic diseases, especially in the summer and monsoon months. There are those who cannot afford even this accommodation. Such people live inside big drainage pipes and abandoned water tanks. Below them are the pavement dwellers, who have no shelter whatsoever and who die in all seasons of the year from constant

exposure to pollution and the elements. When a new urban project is initiated these people are ousted en masse. In almost all urban centres the government urban and housing development bodies have abdicated their mandate in favour of private companies.

Today, locality markets and low and middle income housing projects of the kind that were prevalent till the early 1990s have given way to private sector commercial and residential complexes that are built on prime agricultural land and which are affordable only to the very rich. These complexes are often serviced by poor people who live in temporary dwellings on the outskirts. This collection of articles looks at the changes in the economy and sociology of housing in India in the last two decades.

RIGHT TO INFORMATION

WITHHOLDING INFORMATION is a form of concentrating power and the babus of India, native replicas of their colonial predecessors, have always used their power to create and control information as a means to dominate citizens and convert rights into favours. Government rules are never publicised openly so that it becomes the privilege of middle men. Since rules are not openly known they can be bent at will by those who own them because public scrutiny of such private dispensations is precluded. Public office is thus converted into personal fiefdom through secrecy. A large part of the corruption that has become more and more rampant is attributable to the hoarding of information by a nexus of bureaucrats, commission agents, brokers, middlemen, politicians, businessmen and their hired goons.

In large parts of India, both urban and rural, both literate and illiterate people are affected by the clandestine functioning of public authorities. The State intervenes more and more in the lives of people through paperwork of all kinds, from identity cards to ration cards, PAN cards, election cards, caste certificates, birth certificates, death certificates, house certificates, exam certificates, domicile certificates, no-objection certificates and so on and so forth. These are the services that must be made most accessible to citizens, especially to the poor since they cannot afford to forego days of income in the futile and frustrated pursuit of these essential documents. In addition there are other kinds of official information that are held in the utmost secrecy by the functionaries of the State and their select coterie of beneficiaries. These include such processes as public hearings regarding projects, disbursement of financial aid, eligibility based benefit schemes and so on.

It is in this context that the RTI has the potential to become a powerful tool for checking corruption, misuse and the denial of other rights to the people. It has become a focal point for galvanising support not just among the middle classes but also by grass-roots organisations and many campaigns have achieved remarkable success. This is what the bureaucracy and its allies and beneficiaries really fear. This accounts for why in some parts of India RTI activists have been killed, because when public information is made public too many beneficiaries of the culture of secrecy have too much to lose. If this Act acquires the necessary potency, it could be a revolutionary instrument in the hands of the people.

SPECIAL ECONOMIC ZONES (SEZs)

FOR TWO DECADES now 'growth-at-any-cost' has been the prevalent economic model in India. The cost to the country or to the sections negatively affected by growth is never taken into consideration in the headlong pursuit of growth measured mathematically on purely monetary calculations. An egregious instance of establishing the mechanisms of this kind of loss-making growth is the now famous Special Economic Zone, imitated from Dengist China. The cost of this new brand of industrialisation is falling on the marginalised, Indian farmers and tribals. Under this brutal philosophy of growth-led destruction, those who do not belong to the modern economy are currently not human beings and can therefore be uprooted

and ousted until they learn to become sufficiently modern. This is a philosophy that has found favour with administrators, businessmen and even some kinds of leftist economists who argue that just compensation will take care of the dislocation. What they do not seem to realise is that everything that is vital to a community, its homes, its society, its sacred places, its fundamental connection to the earth, its ancestral traditions, its memories, its source of livelihood and the relevance of all its collective knowledge is destroyed and no amount of just compensation can take care of such things.

The social destruction of the community and the mental destruction of the individual are consequences that even well trained economists and very senior administrators cannot rectify over generations. But the callousness of an age that destroys the many to profit the few is such that no thought is wasted on those who bear the cost of the country's GDP. And, to add insult to their injury, all environmental safeguards are abandoned, labour protection diluted, all security considerations are discarded and tax exemptions are handed out to the industrialists who can export their products and earn hard currency and propel growth. The human cost is never monetized and profitability is calculated only on the basis of monetary costs. The recolonisation of India is being led today by zealous Indians. This set of articles looks at the enormous and incalculable costs of this process of export-led growth.

SOUTH ASIA

IN THE RECENT YEARS, India's neighbouring countries have witnessed an upsurge in people's movements for assertion of their rights in the face of oppression by the State. Nepal saw an unprecedented people's revolution in 2006 after decades of suffering at the hands of the king and his security forces. *Combat Law* came out with a special issue on Nepal in 2006 after our team travelled across the Himalayan nation conducting fact findings, interviews and documenting testimonies of victims of torture and relatives of extra-judicial killings. Similarly, a special issue was brought out on the Tibetan struggle for independence in the face of Chinese occupation. The articles in this section are chosen from these special issues. Other writings focus on 'war against terrorism' and widespread human rights abuses, impunity characterised by disappearances, abductions, extrajudicial killings and torture in Sri Lanka. Articles on the protracted struggle for identity by the Chakmas of Chittagong Hill Tracts of Bangladesh and rights movement in Pakistan have also been carried in this section.

STATE REPRESSION

IN INDIA the demand for enacting new, more stringent legislations to tackle terrorism and violence by the radical left is getting increasingly vociferous among an influential section of the populace. While more and more innocent persons have become victims of unrestrained police action, the conviction rate under even a draconian law like TADA has been abysmally low, below 2 percent in fact. On the other hand, the number of killings in response to terrorism is exceptionally high. Tough laws encourage a corollary moral environment in which the threshold of tolerance for impunity by the state is raised, because the imperatives of the situation are deemed to require it. In effect, what it means is that the special laws do not prevent terror and rarely punish the guilty. If tougher law could solve the problem, then why did it not prevent the terror attack on Parliament, despite the fact that POTA was in place? Why did MCOCA fail to prevent 7/11 in Maharashtra? Why does militancy in the northeast not subside despite 50 years of AFSPA. Why does Jammu and Kashmir periodically burst into flames?

These are grave questions that need to be answered by the stalwarts who want to engage in counter-terrorism through the most severe legislation. It is precisely through such incremental accumulation of powers that the State discards judicial redress and victimises its critics even when they are not engaged in any

conspiracy of violence. On many occasions the victims are not even the critics of the State but merely innocent citizens who are sacrificed to the higher needs of the nation and the personal ambitions of state functionaries. This set of articles analyses this creeping authoritarianism of the counter-terrorist State.

TRAFFICKING

AT A TIME commodification has reached heights it has never before scaled in history, it is only obvious that human beings should also become commodities capable of being bought and sold in the international market. Of the different forms of trafficking, most commonly women, girls and boys are traded for sex work. There is a strong international as also national current which feels that the trafficking discourse, as is being perceived popularly, totally lacks any rights perspective from the sex workers point of view and is highly moralistic. This school of thought feels that while deceitful and coercive entry of women into sex trade needs to be opposed, one needs to also look at sex work as an exercise of choice by many women. They also feel that the present discourse is driven, apart from high strung morality, by anti-immigration policies of a number of western countries. As a result of this moralistic and immigration management approach sex workers are left without any rights whatsoever, without any financial or medical protection, leaving them vulnerable as they also lack family support. The approach to trafficking and sex work in general needs to change so that sex workers have rights that protect them from exploitation by middle men and clients and so that they have benefits that will take care of them when they are no longer capable of earning an income because of old age or illness. The articles in this section address both the issues of coercive trafficking and the rights for sex workers.

ADIVASIS

INDIA'S FORESTS are generally considered as uninhabited and undisturbed by human beings, a 'wilderness' policed and protected by the forest and conservation authorities, meant either for exploitation by state forest departments or private lobbies and to which the original forest dwellers or forest dependent people have no occupancy or usufruct rights. However, such notions are far from the reality. 'Human-free wilderness' does not exist except in remote areas. More than four million people live inside sanctuaries and national parks (leave alone the far larger reserved forest areas). Entire communities, especially tribal people, have evolved in and with the forests. These communities have faced a century of brutal repression by the forest authorities, starting with the introduction of British forest policies which have continued into independent India. The contradictions of India's forest and environment policies are numerous. On the one hand forests are destroyed to make way for various development projects and on the other forest dependent people are denied access to their traditional rights in the forests in the name of forest protection. The forest department has historically employed tribal labour for extracting forest resources which were formerly called minor forest products and which have since been renamed non-timber forest products. These products earn enormous revenue for the forest department, yet at the same time the persistent policy of the department is to keep these same people who have a deep understanding of forest ecosystems away from protected areas. In general the lives of tribal communities have been disrupted in many areas by the creeping intrusion of the State and the market, leading to loss of knowledge or loss of relevance of their knowledge. This section analyses the predicament of India's tribal population vis-a-vis the State and market forces.

WOMEN

WOMEN MAKE UP HALF of humanity, yet the conditions in which they live in India are for the most part abysmal. They face discrimination from a very early age, even before they are born when we consider that abnormally high percentage of women who suffer from chronic childhood malnutrition which affects them during childbirth and which also affects the health of their children. They face discrimination in education and at the workplace since female labour is paid less than male labour. Most of all, they face physical danger since there are many situations at the work place, in public places and at homes, where they are subject to harassment and sexual assault.

There are a few laws in place to deal with harassment, discrimination and sexual assault, but these are not enforced effectively. Besides, there are a range of situations that the law cannot comprehend and hence cannot be addressed legally. In addition, there is the weapon of rape that is used not only against women but also against the communities from which they come. For instance, in cases of caste antagonism, rape is a routine technique of retaliation that upper caste groups use against assertive lower caste groups. Likewise the State also uses rape as a weapon to make communities submit to its will. Rape is a routine procedure in counter-insurgency operations in India. In the state of Manipur, rape has become so associated with military that few years back a group of women of different age groups stripped themselves naked and walked to the headquarters of the army regiment and asked the soldiers to rape them. This was so shocking an incident that it became international news. Despite such graphic protests, there is still no respite from such shameful national tactics. The articles in this section provide a cross-sectional picture of the condition of women in India and analyse relevant laws.

WTO

THE WTO, which today is somewhat a defunct international body, attempted to create supra-national regime of international trade designed to benefit the rich nations of the world. Country after country committed itself to these unequal arrangements of word trade, which were deemed to be both irreversible and inevitable. Submitting to the WTO involved removing internal subsidies, privatising public utilities, removing every barrier to unequal trade and generally aligning national legislation and policy with the requirements of western dominated international trade. This ambitious organisation sought to set itself up over national governments and subordinated national sovereignty to multinational corporate profit. Among its most brutal aims was to remove all protection for farmers in poor countries so that cheap and subsidised developed country food could be dumped in markets across the world. At the point at which WTO talks first collapsed in Cancun in 2003 on the question of opening up third world agricultural markets, OECD countries were spending approximately one billion US dollars a day on subsidizing their own farmers. Yet WTO required third world countries with large agrarian populations to discard subsidy and open up the market for agricultural commodities by removing all physical and fiscal barriers. Fortunately, even after almost 10 years, the WTO has not been able to make any progress since the collapse of negotiations in Cancun, particularly after the economic crisis of 2008 when multilateralism has gradually been giving way to bilateralism. But in the meanwhile, the WTO did manage to do a lot of harm by sacrificing the poor to the ambitions of the rich and its effects across a wide spectrum of economic activity and society.

There is little likelihood of this multilateral organisation ever regaining its former power, yet it is useful to look at the institutional forms through which globalisation undermined national sovereignty and caused havoc. The articles in this section evaluate this process.

This collection of reports and essays provide both contemporary and historical perspectives on a range of issues that are vital for the formulation and implementation of laws, policies and programmes that are oriented towards social justice. This collection includes both short and long articles varying in length and form. It includes reportage, legal analysis and essays. These articles were included because they have a long shelf life. This reader will be useful to not only legal practitioners but also to activists, academics, students, journalists and public intellectuals who are interested in an alternative and progressive viewpoint and who wish to understand, interpret and change the world they live in.

Harsh Dobhal
December, 2011

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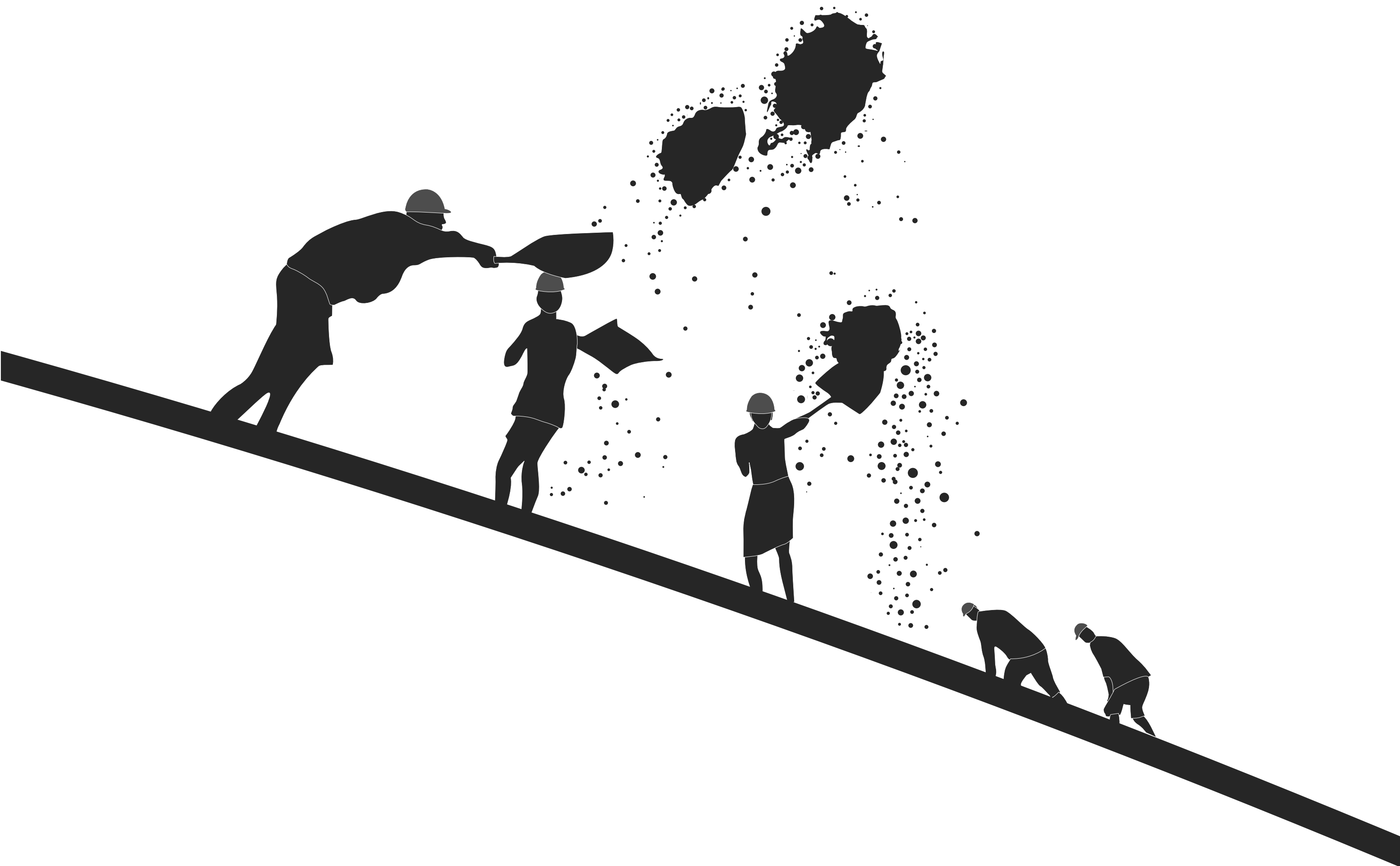

SECTION 1

It is unfortunate that in six decades after independence, the country has witnessed hundreds of communal riots. While the unfolding of the process of globalization in the last two decades has robbed a huge number of people of their livelihoods, fundamentalism has pervaded vast sections of society, with communal outfits spreading their influence and mass-base across the country.

The problem has acquired a Frankensteinian proportion in recent years. Yet, we are far from having a law in place that can protect all persons from communal and targeted crime, making persons in positions of public authority accountable and providing just, fair and equitable reparation to all affected persons.

Reflections on Gujarat Pradesh of Hindu Rashtra

The economic relation between the adivasis and the Muslims in rural north Gujarat is of the kind that most radical analysts have deemed to be sufficient to justify a violent class struggle. And that is just how the VHP is likely to project it as in the coming days – an explanation for adivasi participation in the violence that could be quite embarrassing for radical analysts. It is time for radical analysts to give up simplistic assumptions and modes of analysis, not for the sake of the VHP, but for possible progress in human affairs.

K BALAGOPAL

The predominant emotion as one leaves Gujarat is that of fear. Not the fear that the Vishwa Hindu Parishad has been watching what you have been doing there and will catch up with you and cut you up or burn you alive. It may, but if you have been a human rights activist long enough, you have come to terms with the idea that you could be killed some day. Nor that the next time half an opportunity offers itself, the Vishwa Hindu Parishad will kill more Muslims in Gujarat. It will, but they could be killed by an earthquake, any way.

It is the fear of how much hatred human hearts can be filled with, and how easily. Forget about burning human beings alive and prancing gleefully around as the tortured flesh thrashes about. Forget also about cutting open a pregnant woman's womb to burn the foetus. Such people are at least killing something alive. Can you imagine the state of mind that digs up an old grave, pours petrol on to the presumed remains of a long dead Muslim and sets it aflame? The common Hindu's hatred for anything to do with Muslims, an intense and inflamed hatred, is the only thing alive in Gujarat today. Don't talk to the Sangh parivar cadre. They are barely human anyway. Talk to the clerk in an office, to the housewife, to the taxi driver, to the college-going student. Most of them spew venom. One feels sorry for saying this of a whole people. One has, of course, met a handful of Gujarati Hindus who are different. Not only English-speaking liberals of Ahmedabad and Vadodara, but also farmers and labourers. But they are just that, a bare fistful. Cutting across divisions of caste, class, gender, town and country, Gujarat is one mass of hatred for Muslims. The history of the state, dominated over the last few years by the Sangh parivar, has come to this.

CAN ONE TEACH?

Radical-minded people feel insecure about such questions, for they could be fatal to our utopian dreams. But while dreams are all right, and probably also necessary, we should have the honesty to pare them down to realistic dimensions. If hatred is so easy to build and love so difficult, and an uneasy tolerance the most we achieve when we work for love, how utopian can our dreams afford to be? This is, of course, a very big question. So big that leftist analysis of Nazism in Europe, of which there have been tomes upon tomes, never faced it honestly. Not even Erich Fromm, who came closest to looking it in the face but backed out in the last moment.

But there are smaller and equally uncomfortable questions. The participation of adivasis and dalits in the rioting, looting and killing is one such. Some initial reports said that where adivasis participated in the violence, they neither raped nor killed but only looted the property. To be fair to such views, there was perhaps not much information available at that time. The view appears to have based itself upon the events of the Chotaudepur area of Vadodara district. But in Chotaudepur, even the non-adivasis did not rape or kill. They too only looted the property of the Muslims.

In all the areas along the north-eastern border of the state (Sabarkantha, Panchmahals, Dahod and Chotaudepur) there was sizeable participation of adivasis along with non-adivasis in the violence. The two were part of the same mob in most cases, with the non-adivasis leading. In some places, the mobs only looted and burnt. In some places there was rape and murder too. A break up of the violence into that which the adivasis did and that which the others did may not be easy. The most gory incidents of mass rape in the entire Gujarat carnage (at least so far as we know now) took place at Fatehpura in Dahod district, where the mob consisted of a large number of adivasis of neighbouring villages, along with the non-adivasis of Fatehpura. It was said by some NGOs of Ahmedabad that only the nonadivasis raped women and the adivasis only looted the property. That may be true, for the non-adivasis being locals to the village may well have reserved that 'privilege' to themselves, but one would like to know if the opinion is based on something more reliable than political faith. In Fatehpura itself, the Muslims in the refugee camp do not make such a clear distinction, though there is a general feeling among the Muslims that the adivasis are not bad by themselves, but are misguided by the Hindus of the Sangh parivar. At Sanjeli in the same district the Muslims fleeing from the mob (of nonadivasis and adivasis) which attacked their houses in the town were obstructed all along the way, and many were stoned, pulled out from their vehicles, hacked with swords and burnt and killed by the rampaging mob many of whom had their faces half-masked. The taluka of Kallol in the Panchmahals saw a large amount of violence including about a hundred killings by mobs that included both nonadivasis and adivasis. Again, in both the cases, a break up of who did what may not be easy.

Sabarkantha is a district where there were a number of incidents of adivasis helping and sheltering Muslims attacked by Hindu mobs. There were also a number of cases where dalits saved Muslims in this district. However kshatriyas too played a role in protecting Muslims in some of these villages. What was at work there was not the presumed democratic character of dalits and adivasis, but in all probability, what has been called the KHAM strategy of the Congress Party, which still has sizeable influence in Sabarkantha.

What is more striking than the observations of progressive-minded people based on their assumptions about what ought to have been the response of adivasis and dalits, is the hesitation voiced by many Muslims in the refugee camps in condemning the adivasis who attacked them. Since the hesitation, which is near-universal, could not be motivated by considerations of 'political correctness' (to use an obnoxious expression that has become current in recent times) it must be attributed to some thing real. Most of the victims insist that the adivasis were misled by the Sangh parivar leaders. But 'misled' can have more than one meaning, and not all of them carry the same political significance.

Both in Panchmahals and Sabarkantha it is said that in some of the villages the Sangh parivar leaders told the adivasis that there was a government order to loot. (But of course, there was!) This was buttressed by TV images of people looting freely in Ahmedabad with the police looking on. The adivasis took the permission to heart – the northern districts of Gujarat have seen three successive drought years – and in some villages, after looting Muslims shops, they fell upon Hindu shops as well. At Piplod in Dahod district, the police had to step in and put an end to the unauthorised looting of Hindu shops. Even where there was no mention of a government order, the widespread news and TV

images of Muslims' property being looted without obstruction from the police was incentive enough to the poor to try their luck. Though it did not always end up with the looters turning their attention to Hindu property after finishing with the Muslims, the Hindus appear to be scared that the adivasis who have tasted loot will not stop there.

But not all the participation of adivasis was as innocent as that. Which takes us to the other meaning of the expression 'misled'. The Vanavasi Kalyan Samiti of the Vishwa Hindu Parishad has made considerable inroads into the adivasi areas. When asked what activity they offer to the adivasis, an old Sangh parivar man at Chotaudepur says: "We tell them to campaign against drink in their villages and undertake bhajans of Hindu deities". 'Murtis' of Ganesh are distributed free of cost to the adivasis. It is said that every adivasi village has at least one VHP activist. The search for an identity that has accompanied the growth of education among the adivasis has been filled by the Sangh parivar, says an adivasi MLA, himself a Congressman. The poisonous parivar has done an able job of it. The adivasis are in the process made to feel that they are Hindus, in the specific hate-filled sense in which that term is understood by the Sangh parivar. As a (Muslim) principal of a predominantly adivasi college near Chotaudepur puts it: "The new convert to Islam is always more ferocious in defending the religion than the traditional Muslim, and the same could be happening to the adivasis". If he is right, there could be a very serious problem here that 'political correctness' had better comprehend.

Of course, the newly educated adivasis' search for an identity could have reached a different shore. We should, then, ask ourselves why no democratic movement has ever achieved even a toe-hold in the vast adivasi area of Gujarat and much of neighbouring Rajasthan. Standing there and looking at Delhi, Somnath Chatterjee's otherwise impressive speech in parliament could not but sound hollow. What is the point in thundering at Delhi, having left the field free in the adivasi hamlets for the Vishwa Hindu Parishad? This is not a comment on only Somnath Chatterjee's party, but on the entire democratic movement of the country.

Dalit participation in the violence at Ahmedabad (in particular) is even less ambiguous. A large number of dalit youth took direct part in the gruesome violence of that city. And it is the dalits who have suffered most in the little retaliation the Muslims have indulged in. The only non-Muslim relief camps (there are about five of them in Ahmedabad) are populated predominantly by dalits. As with the adivasis, the dalits too have been left by all of us for the VHP to prey upon. There is almost no dalit movement in Gujarat, nor has the left movement any base worth speaking of. The Bahujan Samaj Party's role in coming to the aid of the BJP when even a character like Chandrababu Naidu in the fullness of his crooked mind thought it prudent to declare his dissatisfaction, is of a piece with the strategy of the biggest Ambedkarite party in the country: to keep Mayawati in power at Lucknow is the substance of their Ambedkarism as of now. Poor Babasaheb must be turning over and over again in his grave.

But the Vishwa Hindu Parishad is slowly beginning to articulate an explanation for adivasi participation in the violence that could be quite embarrassing for radical analysts. The VHP's office secretary at Godhra in the Panchmahals, who sits cross-legged on the floor with an ugly chopper hanging on the wall behind him, says it was (in effect, for he has not yet learnt to use the expression) class struggle. The economic relation between adivasis and Muslims in rural north Gujarat is of the kind that most of us have often deemed to be sufficient to justify a violent class struggle. Where the Muslims are farmers, as in Dahod district, the adivasis are labourers or sharecroppers working for them. Where the Muslims are rural traders and transporters, as in Sabarkantha district, the adivasis buy, sell and borrow money from them. It is beyond doubt that if the VHP had not been the instigator, and/or the victims had not been a community perceived as an injured minority at the national level, many of us would have interpreted the adivasi violence against Muslims in rural Gujarat as class struggle, and then the question would not have been why adivasis participated in the violence (we would have then called it struggle and not rioting) but why it died out without achieving much, etc. The Sangh parivar has some former leftists with it who will no doubt make an issue of this in the coming days. Have not instances of adivasi or Muslim tenants revolting against caste Hindu landowners been interpreted by radical analysts as ('objectively speaking') class struggles, even if they took a communal form? Will the analysis change merely because the upper caste Hindus are now egging on the adivasis, and the exploiter is a Muslim? Soon we will have some Swapan Dasgupta asking this question, and it is doubtful that any amount

of dialectics will help us wriggle out. What is needed is not some novel sophistry, but a resolve to give up simplistic assumptions and simplistic modes of analysis, not for the sake of the VHP, but for the sake of a possible progress in human affairs.

Let us come back to the hatred. The most sickening thing about the Sangh parivar is its absolute unreasonableness. Gujarat as a whole is infected with this characteristic now. It is the Muslims who suffered immeasurably in the carnage, but it is the Muslims who are now held to be the obstacle to the return of peace. And where there is Muslim, terrorist and Pakistan cannot be far behind. The triad Muslim terrorist-Pakistan, with all its six permutations, quickly enters any discussion of when people of Gujarat expect normalcy to return. "Pakistan is sending men and money, and therefore there will be no peace" is the commonest view in the matter. The exact amount Pakistan is believed to have sent is mentioned: Rs two crore. Advani puts the official stamp of approval on this by talking in parliament almost from day one about Pakistan-sponsored terrorists entering the relief camps. (The home minister of India never had anything to say about what put the Muslims in the relief camps in the first place.) The Delhi police, who obligingly make arrests of Lashkar-e-Toiba militants at Lal Qila/Chandni Chowk whenever the government needs it, forthwith make a few arrests, and of course the dreaded 'jehadi' militants confess in no time that they indeed had planned to go to Gujarat to create mayhem. The novelty this time is that they are said to have got printed for themselves cards showing them as human rights activists! If this evident nonsense is an indication that the government wants put an end to human rights activism vis-a-vis Gujarat, that is a compliment it is paying to the only good thing that has happened after February 28: not only human rights groups as such, but every one concerned about human rights has been to Gujarat, and a considerable protest has been generated across the country.

The mood of the unrepentant rulers of Gujarat and India – and Gujarati society in general – is that they are all set to fight Muslim terrorism ready to burst out from the refugee camps. The refugees themselves are more worried about when they will be able to get back and rebuild their lives. They have lost their dwellings, they have lost their household property, the traders among them have lost their tempos, trucks, and other articles of trade, and the farmers among them are worried about their land that is ready for being grabbed in the villages. In many places the assailants are openly saying that the victims will not be allowed to come back unless they shave their beards, discontinue the 'azaan', and promise that they will not insist on observing religious customs that the Hindus find annoying. In some places it was made clear that the refugees, if they wish to come back, will hereafter have to forswear any trade that will hurt the interests of the Hindu competitors. (This is what the RSS said at Bangalore some time ago, is it not? That the best guarantee for Muslims is the good will of the Hindus, purchased at whatever cost. Well, it is being implemented in Gujarat now.) Obscene slogans have been scribbled on the walls of idgahs, dargahs and masjids – where they have not been demolished, that is. At Khetbrahma, a taluka headquarters town in Sabarkantha district, the assailants who cleared the town of all Muslims, put up a notice with the ungrammatical threat: 'Muslim no allowed'. And in village after village one finds a welcome sign painted in ochre colour and signed Vishwa Hindu Parishad, reading: 'You are welcome to village such and-such of district such-and-such of Gujarat Pradesh in Hindu Rashtra'. The Muslims have to walk back from the camps into such villages. But not only the rulers of the country and Gujarat but Gujarati society as a whole is prepared to see only terrorists and Pakistan agents in them. Blinded by hate, driven to self-validating propaganda by their sense of guilt, building an alibi in advance for the further and complete ghettoisation of the Muslims that is to come: it could be any and all of these reasons.

But why talk only of Gujarat and Gujaratis? One startling revelation that Narendra Modi achieved with his criminal brazenness is that a very larger number of Hindus all over the country harbour an extraordinary hatred for Muslims. Gujarat is different only in degree. Until Narendra Modi called this hatred the revolt of the long-suffering Hindus, it was not thought fit to express it. Now that a lawfully elected head of government has said so and continues to head the government, it is no longer felt necessary to hide the hatred, and they are all speaking out. It is said by the post-structuralists that giving a thing a name is essential for making it an object of knowledge. It is also true that giving a wretched feeling a respectable name is essential for making it a subject of acceptable discourse and practice. That is Narendra Modi's great contribution to the demise of Indian civilisation.

It was said after September 11 last year that the world will never be the same again. One of the many irreversible changes wrought by September 11 is that it has become civilised thereafter to hate Muslims, and to talk of Islam vs civilisation. February 28 this year borrows from that American achievement. If, after all, current history is the saga of civilisation pitted against Islam, slaughtering Muslims can only be a contribution to the cause of civilisation. It was left to Narendra Modi to realise this, and to signal to Hindus that they need no longer feel ashamed of their secret hatred for Muslims. That is why the Sangh parivar gang admires him next only to George Bush.

We are asked to believe that Hindus have so become bitter only because secular-minded people have never understood the deep historical hurt Hindus are suffering from. One must confess to some scepticism. Hatred of one's neighbour does not require such deep historical causes. It is enough if the neighbour insists on being different and thereby offers himself as the cause of all one's frustrations and failures. The real sin of Muslims is just that: they insist on being different. I am talking here of the ordinary Muslim, and not the handful of maniacs who believe that all Muslims shall live only in Islamic regimes, and that divine state of affairs will be achieved with Kalashnikovs. And the real sin of the secular-minded people is that we say they have the right to be different.

What other meaning can there be for the insistence that if the refugees wish to come back to the village, they must remove the beard, shut off the hateful azaan and not wear the skull cap? Sadly, it is these hate-filled minds that speak incessantly of the great tolerance of the Hindus. What is this great tolerance that cannot bear the only people who are really different? This country is being overtaken by small-minded and hate-filled men who are bluffing and blackmailing the country into accepting their perverse logic. It is true that those who stand for secularism and democracy have some soul-searching to do; not for their alleged indifference to the great Hindu sense of historical injury, but for having allowed these goons to occupy so much space in our society.

— January-February 2010

More Teeth to Police, Not Victims

"The Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005" simply relegates victims to a footnote. For instance, when it comes to sexual violence, it does not recognise the fact that the nature of atrocities committed against women during riots is radically different from those committed during 'normal' times.

COLIN GONSALVES

The UPA government has done it again! The Communal Violence Bill is astonishingly poor, having been drafted in ignorance of the two draft Bills proposed by civil society groups after extensive consultations with NGOs. The focus is on increasing police power instead of empowering civil society to initiate and control prosecutions when communal crimes occur. Given that the government is the principal wrongdoer in many instances the thrust of the legislation is misplaced.

FATAL FLAWS

The Act is that it cannot come into force in a state unless the state government issues notification to that effect. Once notified, the Act cannot be invoked even when communal crimes take place unless the state or the central government decides to declare an area "communally disturbed." Therefore, if the state government refuses to issue a notification bringing the proposed statute into force or if the state government refuses to declare an area communally disturbed, the Act will not apply. All opposition governments could ignore this statute completely. Moreover, a state government may issue a notification bringing the statute into force in the state and yet render it sterile by not issuing notifications declaring certain areas to be "communally disturbed areas."

The Act fundamentally misunderstands what the term "communal riot" has come to signify in the Indian context, which is precisely why it cannot adequately provide for the prevention or alleviation of communal riots. Communal riots in India are not mutual violence between two communities analogous to a miniature civil war. They are the attack of one community by another with substantial collusion of the government at the local, district and state levels. If one understands a communal riot to be a mutual clash, then the natural response is to increase the discretion and power of the state government in order to control and mediate the conflict. However, if one understands communal riots to occur with the complicity of the state government, then the augmentation of State power simply puts more weapons into the hands of communal forces, creating the possibility for increasingly violent attacks and increasingly unjust State response. This Bill does exactly that, and as a result must be wholly rejected.

Law is often created in ignorance of existing power relations in a society, particularly between the sexes. Communal violence in the prevention, commission and rehabilitation stages is always framed in the power relation, and is especially cruel in its use of the woman's body as a battlefield. Women are particularly targeted and intimidated by the hate speech that precedes a riot, they are subject to most brutal violence during the riot, and they face the greatest difficulty in the rehabilitation stages. This Bill relegates their suffering to an afterthought, and even then is woefully inadequate in fulfilling its insufficient objectives.

In terms of flaw 1, Section 1 (4) is the culprit for the first flaw, which is as under:

"The provisions of this Act, except Chapters II to VI (both inclusive) shall come into force in the states on such date as the central government may, by notification in the office gazette, appoint… and the provisions of chapters II to VI (both inclusive), shall come into force in a state as the state government may by notification, appoint…"

The principal issue is Parliament's legislative competence to make a law in respect of communal crimes, which according to some, is covered by Entry 1 (Public Order) of List II of the Seventh Schedule of the Constitution framed under Article 246. Only the state governments, it is contended, have the legislative competence to make laws in respect of communal crimes.

However, the "Public Order" question is confined to disorders of a lesser gravity than communal crimes and is necessarily restricted disorders whose impact is felt only at the state level. Article 245 (I) restricts the legislative power of state legislatures to laws having application within the territorial limits of the state.

Communal crimes have grown enormously in their nature and geographical spread. Apart from riots that have taken place on an ever increasing scale, often bordering on genocide; the spread of hate in educational institutions throughout the country, the social and economic boycotts, ghettoisation, stigmatisation and victimisation, all indicate that communal crimes have reached such a stage that they undermine the secular fabric of the Indian State.

A similar argument was used by the central government to justify the enactment of what was called "anti-terrorism legislation" - TADA and POTA. It may be recalled that even the possession of a weapon in a notified area, as in Sanjay Dutt's case, could attract charges under these statutes. Communal crimes are arguably as grave as "terrorist crimes" in today's situation. The same logic could, therefore, apply to the effect that the control of communal crimes falls within the legislative competence of the central government. If this is correct, the concurrence of the state government for the enactment of legislation and the punishment of communal crimes is not necessary.

In Kartar Singh vs state of Punjab - 1994 3 SCC 569 - the Supreme Court held: "Having regard to the limitation placed by Article 245 (I) on the legislative power of the legislature of the state in the matter of enactment of laws having application within the territorial limits of the state only, the ambit of the field of legislation with respect to 'public order' under Entry 1 in the State List has to be confined to disorders of lesser gravity having an impact within the boundaries of the state. Activities of a more serious nature which threaten the security and integrity of the country as a whole would not be within the legislative field assigned to the states under Entry 1 of the State List but would fall within the ambit of Entry 1 of the Union List relating to defence of India and in any event under the residuary power conferred on Parliament under Article 248 read with Entry 97 of the Union List." (Para 66)

There is a feeble attempt in Chapter XI to assert the primacy of the central government where a situation exists corresponding to section 3 above mentioned, i.e., where communal violence is taking place on such a large-scale that there is an imminent threat to the secular fabric, unity, integrity or internal security of India. Then and only then, is the central government empowered to direct the state government to take measures. If the state government does not take such measures the central government may issue a notification declaring any area within the state as a communally disturbed area. Even then the central government cannot deploy armed forces without the request of the state government! Section 55 (3) is critical:

"(3)Where the central government is of the opinion that the directions issued under sub-section (2) are not followed, it may take such action as is necessary including:

(b) the deployment of armed forces, to prevent and control communal violence, on a request having been received from the state government to do so."

NARROW DEFINITION

The proposed Act can only be invoked in the most extreme circumstances where there is criminal violence resulting in death or destruction of property and danger to the unity of India. There is a myriad of serious communal crimes which may not result in death, such as rape, and which are not considered to endanger to the unity of the country. All these crimes fall outside the ambit of the Bill. Even if such circumstances do exist the section only prescribes that the government 'may' act. On the face of it, the duty to act is not mandatory.

The offending part of the Bill is Chapter II, the relevant parts of which are set out below:

"3. (I) Whenever the state government is of the opinion that one or more scheduled offences are being committed in any area by- any person or group of persons-

a. in such manner and on such a scale which involves the use of criminal force or violence against any group, caste or community resulting in death or destruction of property and;
b. such use of criminal force or violence is committed with a view to create disharmony or feelings of enmity, hatred or ill-will between different groups, castes or communities; and
c. unless immediate steps are taken there will be danger to the secular fabric, integrity, unity or internal security of India

It may, by notification:

i) declare such area to be a communally disturbed area

(3) Where any area has been notified as communally disturbed area under sub-section (l), it shall be lawful for the state government to take all measures, which may be necessary to deal with the situation in such area…

(2) If the state government is of the opinion that assistance of the central government is required for controlling the communal violence, it may request the central government to deploy armed forces of the Union to control the communal violence.

SEXUAL VIOLENCE

The Bill contains no special provision for the prosecution or rehabilitation of offenders and victims of sexual violence. The bill fails to be cognisant of the radically different nature of sexual assault during peacetime and during communal riots. The particularly brutal sexual violence committed en mass during communal riots testifies to the genocidal intent of the crime, and thus should be treated appropriately by any legislation seeking to address communal violence.

The bill must further recognise the specific types of sexual violence seen during communal violence, including genital or mammary mutilation, insertion of objects into the women's body, cutting out of the uterus etc., that are not covered under the existing IPC provisions for rape (Section 375). These offences must be held in equal standing with the other types of sexual violence already covered by the IPC. Finally, there is no special provision for women in the rehabilitation section of the Bill, despite pervasive evidence of their continuous and abject suffering as a result of communal violence. There are no special provisions that allow survivors of sexual violence to more easily record FIRs, avail of counselling or medical treatment among other things. There are no specific standards of proof laid out by the Bill that take into account the unique obstacles women face in the aftermath of communal violence.

COMMUNAL CRIMES

Section 2(l) read with the Schedule indicates that crimes covered by this Bill are offences as set out in the Indian Penal Code, the Arms Act 1959, the Explosives Act, 1884, the Prevention of Damage to Public Property Act 1984, the Places of Worship (Special Provisions) Act, 1991, and the Religious Institutions (Prevention of Misuse) Act, 1988. The Bill does not propose to include any of the communal crimes so frequently noticed in riot after riot. Gender violence including the insertion of objects in the genitals, social and economic boycotts, forcible evictions, restraint on access to public spaces, residential segregation, deprivation of access to food and medicines, enforced disappearances, interference with the right to education, using religious weapons and ceremonies to intimidate, interference with police work, advocating the destruction of a religious structure, are woefully absent in the Bill. All that the Bill provides for in chapter IV, is for enhanced punishment for the commission of already defined offences under other statutes.

A special section on communal crimes against women and children is sorely needed to cover sexual violence, penetrative assault, sexual slavery, enforced prostitution, forced pregnancies, enforced sterilisation and other forms of sexual violence. The rules of evidence

need to be modified so that the victim is not further victimised during the trial.

UNNECESSARY SECTIONS

Chapter III deals with the prevention of communal violence. Chapter V deals with investigation of offences. Chapter VI deals with the setting up of special courts. Apart from minor changes, these provisions already exist in the Criminal Procedure Code and, in any case, it is doubtful whether it is necessary at all to include these provisions in this proposed special Act. Chapter III, for example, relates to the prevention of communal violence and appears to empower the district magistrate to prevent the breach of peace by, inter alia, curbing processions, externing persons, regulating the use of loudspeakers, seizing arms, detaining persons and conducting searches. This is largely a cosmetic section because the police, in any case, have the powers to do all these things under the Criminal Procedure Code and various other criminal statutes in force today.

A chapter on preventive action to be taken by the authorities along the lines of the SC/ST Atrocities Act is certainly needed. Immediately on receiving information, the officials should visit the area, establish a police outpost, begin patrolling with special police forces and form vigilance committees.

VICTIMS' RIGHTS

There are, of course, the wishy-washy Chapters VII and VIII requiring government to plan and coordinate relief and rehabilitation measures through the setting up of state and district communal disturbance relief and rehabilitation councils but these chapters fall far short of enunciating victim's rights enforceable in court. Chapter X of the Bill deals with compensation to be paid to the victims but restricts the compensation to the amount of fine payable under the Code, which is generally very small. In the Communal Crimes Bill, 2007, submitted by the Human Rights Law Network (HRLN) and ANHAD to the government, the suggested sections made it mandatory for the government to set up relief camps, pay subsistence allowance, pay substantial compensation and provide reasonable rehabilitation including alternative sites and housing and to reconstruct the destroyed places of worship at government's expense. All these victims' rights are missing in the present Bill.

When the state does not protect the lives and properties of the minorities during communal carnages, should the victim not have a right to compensation and alternative livelihoods at the cost of the State? An answer to this was expected in the statute. Is a relief camp to lie at the discretion of government and NGOs with shabby provisions being made on a temporary basis, or is it a right of the victim to be provided immediate relief according to well-established norms?

Once again, had government cared to look at the Atrocities Act, it would have noticed the provisions relating to the collective fine where the community harbouring the aggressors could be substantially fined and the money used for the payment of compensation.

There is no provision in the Bill relating to the duties of authorities after the riots take place. A section is necessary requiring the authorities to provide immediate relief and protection from further acts of violence, to prepare a list of victims and their losses, and to provide for legal aid, allowances, and facilities during legal proceedings. Likewise, provisions are required to enable the arrest and detention of people engaging in hate speech and to enable the court to shift the investigation to the CBI in cases of involvement of the local police in the communal crime.

The Supreme Court has recently held that social statutes must be accompanied by a financial memorandum. This is to ensure that government puts its money where its mouth is. The Government of India is accustomed to enacting grand legislation without allocating resources for its implementation. In this regard the financial memorandum of the Bill makes for interesting reading:

"As involvement of expenditure depends mainly on the occurrence of communal violence, it is difficult to make an estimate of the expenditure, both recurring and non - recurring, from the Consolidated Fund of India."

It is thus clear that the Government of India intends to make no financial provision whatsoever for the relief and rehabilitation of the victims of communal crimes.

WITNESS PROTECTION

The witness protection provision—Section 32—has been drafted without application of mind as to the Law Commission's recommendations. The usual pathetic provisions reappear, covering only the holding of proceedings at protected places and the shielding of the

identity of the witnesses. The main aspects of modern day witness protection, which include the shielding of the witness from the accused, compensation of the witness for the trauma suffered during the crime and trial, creation of new identities and a new life for the witness, are all missing. Genuine witness protection includes a substantial financial commitment of the state to care for the witness and her family in secrecy, often for the rest of their lives.

IMMUNITY FOR PUBLIC SERVANTS

Section 17, which grants immunity to the police and the army, is particularly insensitive. Although the section provides for the punishment of public servants who break the law, two things must be noticed. Under the Indian Penal Code the punishment for such offences committed by public servants is more severe than the maximum sentence of one year with the alternative of a fine presecribed in the Bill. Secondly, Section 17(2) retains the requirement of sanction by state government for prosecution of public servants. The provision is as under:

"(2) Notwithstanding anything contained in the Code, no court shall take cognisance of an offence under this section except with the previous section of the state government."

Various commissions of enquiries including the Justice Ranganath Mishra Commission (Delhi riots), the Justice Raghuvir Dayal Commission (Ahmednagar riots), the Justice Jagmohan Reddy Commission (Ahmedabad riots), the Justice DP Madan Commission (Bhiwandi riots), the Justice Joseph Vithyathil Commission (Tellicheri riots), the Justice. J. Narain, SK Ghosh and SQ Rizvi Commission (Jamshedpur riots), the Justice RCP Sinha and SS Hasan Commission (Bhagalpur riots), and the Justice Srikrishna Commission (Bombay riots), have found the police and civil authorities passive or partisan and conniving with communal elements.

A chapter is necessary to punish police persons, paramilitary forces and members of the armed forces for their involvement in communal crimes particularly when FIRs are not registered or registered improperly, when security is not provided to minorities under attack, when destruction of property is not prevented and when inadequate forces are deployed. Where the officers stand firm — and there were many such fine examples of bravery even in Gujarat — the rioters are quickly diffused and dispersed. No communal riot can take place without the support of the police and the security forces. They must be severely punished for not doing their duty.

The abject failure of the criminal justice system because of the insidious role of the police and the public prosecutors, who often side with the accused, needs special legislative attention. After the last racial riots in Britain, the McPhearson Committee recommended that complaints be registered at places other than police stations and suggested ways of overcoming 'institutionalised racism'. Sections are required for the punishment of policemen who fail to record complaints and conduct investigations properly. Complaints ought to be able to be registered electronically.

Recognising the role of the police in communal riots, it is critical that the immunity granted under sections 195, 196 and 197 of the Criminal Procedure Code be omitted in any statute on communal crimes. No junior officer should be allowed to take the defence that he was ordered by his superior to commit the crime. Nor should any commanding officer be allowed to take the defence that he was unaware of the crimes that were committed on his beat.

Similarly, public prosecutors who side with the accused persons and enable them to be released on bail or are instrumental in their acquittal ought to also come under legislative scrutiny. A section is necessary to make it mandatory for the trial judge who finds the performance of the prosecutor unsatisfactory to remove him from the case.

Politicians must come in for special mention in the legislation. Any minister interfering with police work by shielding the accused, misdirecting the police investigation or by preventing relief from reaching the victims should be treated as a common criminal. His ministerial status should afford him no protection in law.

All in all, this is a policeman's Bill oriented to increasing police power with no care for the victim.

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State has no Religion

Court decisions generally have lacked strong measures to penalise religious fundamentalism. On the contrary, as some of the decisions indicate, the judiciary seems to permit social ostracism, boycott of minorities and ghettoisation based on caste and religion. In a democracy like ours the State has no religion.

COLIN GONSALVES

There are hardly any decisions of the high courts or the Supreme Court that have come down heavily on people and parties spreading communal hatred. The judgments are generally full of pious sentiments and the lofty ideals of secularism, but lack practical measures penalising religious fundamentalists. Because of a lack of concern by the Apex Court, there has rarely been a successful prosecution of rioters. The anti-Sikh riots in Delhi in 1984, the anti-Muslim riots in Mumbai in 1993, and the anti-Muslim riots in Gujarat in 2002 are some of the most glaring examples.

In 1962, in the case of Sardar Syedna Taher Saifuddin Saheb v. State of Bombay (AIR 1962 SC 853), the Supreme Court, struck down a statute outlawing the practice of excommunication by the Syedna, the head of the Dawoodi-Bohras, as going beyond the provisions of Articles 25(2)(b) of the Constitution. The majority judgment held that not only could the Syedna expel members from the religious life of the community, but that the loss of some civil rights of the excommunicated member was acceptable as a "necessary consequence of excommunication." The court further held that "the fact that civil rights of a person are affected by the exercise of the fundamental right under Article 26(b) is of no consequence."

In his strong and correct dissent, Chief Justice Sinha noted: "The right of excommunication is not a purely religious matter. The effect of the excommunication or expulsion from the community is that the expelled person is excluded from the exercise of rights in connection not only with places of worship but also from burying the dead in the community burial ground and other rights to property belonging to the community, which are all disputes of a civil nature and are not purely religious matters.

"The Act is intended to do away with all that mischief of treating a human being as a pariah, and of depriving him of his human dignity and of his right to follow the dictates of his own conscience. The Act is thus aimed at fulfilment of the individual liberty of conscience guaranteed by Art.25(1) of the Constitution, and not in derogation of it.

"The position of an excommunicated person becomes that of an untouchable in his community, and if that is so, the Act in declaring such practices to be void has only carried out the strict injunction of Art.17 of the Constitution, by which untouchability has been abolished and its practice in any form forbidden. The Article further provides that the enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law."

THREE DECISIONS

Between 1976 and 1986 there were three important decisions of the Supreme Court that deal firmly with the issue of secularism.

In Z.B. Bukhari v. B.R. Mehra (1976 2 SCC 17) the court laid down, for the first time, that a secular State must be neutral or impartial – "The term secular is used to distinguish all that is done in this world without seeking the intervention of … a … Divine Power. Secularism is … quite independent of … religion. The Secular State … is neutral or impartial"

Then in 1980 in Baburao Patel v. State (1980 2 SCC 402) the Supreme Court held that the scope of section 153-A(1)(a) of the Indian Penal Code 1980, which dealt with promotion of feeling of enmity, hatred or ill-will between religious groups or communities, was not only confined to such promotion on grounds of religion alone but also covers other grounds such

as race, place of birth, residence, language, caste or community.

Thereafter, in 1986 in the case of Bijoe Emmanuel v. State of Kerala (1986 3 SCC 615) a controversy arose when three school children who were Jehovah's witnesses – a sect of Christians – were expelled from a school in Kerala because they refused to sing the national anthem. The complaint reached the Supreme Court which ruled that "the expulsion of children from school for the reason that because of their conscientiously held religious faith, they did not join in the singing of the national anthem, though they stood up respectfully when it was sung, is a violation of their fundamental right under Article 25 'to freedom of conscience and freely to profess, practice and propagate religion.' They cannot be denied that right on the ground that the appellants belonged to a religious denomination and not a separate religion."

1994: CONTROVERSIAL YEAR

A nine-judge constitutional court in S.R. Bommai v. Union of India (1994 3 SCC) held that "[t]he State stands aloof from religion. Matters which are purely religious are left personal to the individual and the secular part is taken charge by the State. … State is neither pro-particular religion nor anti-particular religion. It stands aloof[.]"

But in the same year, in a retrogressive decision in Ismail Faruqui v. UOI (1994 6 SCC 360), the majority of the judges let pass the acquisition of the mosque at Ayodhya holding that "a mosque is not an essential part of the practice of the religion of Islam."

The minority judgment of Justice Ahmedi and Justice Bharucha is of interest. Not only did it reiterate the position that the State has no religion, it also recorded the fact that the State would not have honoured the opinion of the Supreme Court by rebuilding a mosque, had the Supreme Court held that there was originally on the disputed site a mosque and not a temple.

To make matters worse came Mohd. Islam v. Union of India (1994 (6) SCC 442), which demonstrated just how lightly the Supreme Court takes the issue of communal riots. For having disobeyed the orders of the Supreme Court and allowing the demolition of the Babri Masjid, Kalyan Singh, the then chief minister of U.P., was convicted and sentenced to a "token imprisonment of one day" and a fine of Rs.2000 to be paid within a period of two months.

1996: TUMULTUOUS YEAR

Despite Hindutva being the main plank of the communal forces, the Supreme Court in Manohar Joshi v. N.B. Patil (1996 (1) SCC 169) said "however despicable be such a statement (that the first Hindu State will be established in Maharashtra) it cannot be said to amount to an appeal for votes on the ground of religion."

The Judges of the Bombay High Court had correctly held that because Manohar Joshi campaigned on the basis of his party programme which made "Hindutva" the main plank he was guilty of the charge of corrupt practices within the meaning of section 123 of the R.P. Act and it declared his election void. The result of the Bombay High Court decision was that a candidate of a political party was bound by the programme of that party and if the programme of that party was a communal programme the stigma of the corruption charge would attach both to the party as well as to the individual. This is correct way to look at the law and to stamp out communalism in elections.

The Bombay High Court was correct in its judgment. A contrary progressive trend was noticed in Bal Thackray v. P.K. Kunte (1996. 1. SCC 130). The returned candidate Dr. Ramesh Yeshwant Prabhoo was present in all the three meetings in which speeches were given by Bal Thackray. The Supreme Court held:

"The appeal made to the voters by Bal Thackray in his aforesaid speech was a clear appeal to the Hindu voters to vote for Dr. Ramesh Prabhoo because he is a Hindu. The clear import of … each of the three speeches is to this effect. The first speech also makes derogatory reference to Muslims by calling them 'snake' and referring to them as '*lande*' (derogatory term used for those practicing circumcision). The language used in the context, amounted to an attempt to promote feelings of enmity or hatred between the Hindus and the Muslims on the ground of religion. The first speech, therefore, also constitutes the corrupt practice under sub-section (3-A).

"Our conclusion is that all the three speeches of Bal Thackray amount to corrupt practice under [the law]… . Since the appeal made to the voters in these speeches was to vote for Dr. Ramesh Prabhoo on the ground of his religion as a Hindu and the appeal was made with the consent of the candidate Dr. Ramesh Prabhoo, he is guilty of these corrupt practices. For the same reason, Bal Thackray also is guilty of these corrupt practices and, therefore, liable to be named in accordance with

section 99 of the R.P. Act of which due compliance has been made in the present case."

The last decision of 1996 was A.S. Narayana Deeshitalyu v. State of A.P.(1996 9 SCC 548) where the court held:

'The right to religion guaranteed under Article 25 or 26 is not an absolute or unfettered right… they are subject to reform on social welfare by appropriate legislation by the State… The Court therefore while interpreting Article 25 and 26 strikes a careful balance between… matters… which are essential and integral part and those which are not… and the need for the State to regulate or control in the interests of the community."

CONVERSIONS

An early significant decision of relevance to conversions came in Rev. Stainislaus v. State of Madhya Pradesh (1977 I SCC 677). The controversy related to the Madhya Pradesh Dharma Swatantraya Adhiniyam, 1968, and a similar statute in Orissa which sought to penalise conversions based on force and fraud. The M.P. High Court held this Act constitutional, the Orissa High Court held otherwise. The challenge reached the Supreme Court

"Article 25(1) by giving the right to propagate one's religion, does not give the right to convert another person… but to transmit or spread one's religion by the exposition of its tenets.

"What is penalised is conversion by force, fraud or by allurement. The other element is that every person has a right to profess his own religion and to act according to it. Any interference with that right of the other person by resorting to conversion by force, fraud or allurement can, in our opinion, be said to contravene Article 25(1) of the Constitution of India, as the Article guarantees religious freedom subject to public health. As such, we do not find that the provisions of Sections 3, 4 and 5 of the M.P. Dharma Swatantrya Adhinyam, 1968 are violative of Article 25(1) of the Constitution of India. On the other hand, it guarantees that religious freedom to one and all including those who might be amenable to conversion by force, fraud or allurement. As such, the Act, in our opinion, guarantees equality of religious freedom to all, much less can it be said to encroach upon the religious freedom of any particular individual."

The meaning of guarantee under Article 25 of the Constitution came up for consideration in this Court in Ratilal Panachand Gandhi v. State of Bombay (1954 S.C.R. 2055) and it was held as follows:

"Thus, subject to the restrictions which this Article imposes, every person has a fundamental right under our Constitution not merely to entertain such religious belief as may be approved of by his judgment or conscience but to exhibit his belief and ideas in such overt acts as are enjoined or sanctioned by his religion and further to propagate his religious views for the edification of others.

The Acts therefore clearly provide for the maintenance of public order for if forcible conversion had not been prohibited, that would have created public disorder in the State".

RESTRICTIONS

In Om Prakash v. State of U.P. (2004 3 SCC 402), a petition was filed in the Allahabad High Court challenging the government notification prohibiting the sale of eggs within the municipal limits of Rishikesh on the ground that the notifications imposed unreasonable restrictions affecting the rights of parties under Article 19(1)(g) of the Constitution. The High Court upheld the notification even though it was pointed out that the eggs sold contained no chicks, on the ground that "the welfare of the people was paramount." The High Court's dismissal of the case was appealed to the Supreme Court.

In its decision, the Supreme Court refers to its earlier decision in State of Maharashtra v. H. N. Rao. In Rao, S. 385 of the Bombay Municipal Corporation Act was challenged because it affected Dalits by imposing restrictions on dealing with the skin and carcasses of animals within the municipal limits. The Supreme Court dismissed the challenge, relying almost exclusively on the customs and traditions of the dominant community with no regard to the livelihood of the Dalits. Similarly, in deciding Om Prakash, the court again used the dominant community as the reference The court held that Haridwar and Rishikesh were "pilgrim centres" and "[a] major section of the society in the three towns considers it desirable that vegetarian atmosphere is maintained in the three towns for the inhabitants and the pilgrims." With no factual basis, the court went on to say that "it is a matter of common knowledge that members of several communities in India are strictly vegetarian and shun meat, fish and eggs. In the three

towns people mostly assemble for spiritual attainment and religious practices. Maintenance of clean and congenial atmosphere in all the religious places is in common interest. Peculiar culture of the three towns justifies complete restriction on trade and dealing in non-vegetarian items including eggs within the municipal limits.' The court's drawing of doubtful conclusions without any factual basis regarding vegetarianism being widespread in the city of Rishikesh is especially ironic in the light of recent studies indicating that the majority of Indians are, in fact, non-vegetarian and that the notion of Indian society being vegetarian is largely a myth.

State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat (2005 8 SCC 534) was an astonishing case relating to cow slaughter. The State of Bombay had enacted the Bombay Animal Preservation Act, 1948, prohibiting the slaughter of animals which were useful for milch, breeding or agricultural purposes. This Act was extended to the State of Gujarat by the Bombay Animal Preservation (Gujarat Extension and Amendment) Act, 1961. This Act was amended in 1994 by the Bombay Animal Preservation (Gujarat Amendment) Act, 1994. This statute was challenged by the representative bodies of Kureshis. The *Akhil Bharat Krishi Goseva Sangh*, the *Hinsa Virodhak Sangh*, the *Jeevan Jagriti Trust* and the *Gujarat Prantiya Arya Pratinidhi Sabha* were impleaded as party respondents. The High Court allowed the writ petition and struck down the impugned legislation as ultra-vires the Constitution holding that the statute imposed an unreasonable restriction on fundamental rights. The challenge to the constitutional validity of the legislation was founded on three grounds. That the total ban offended the religion of the Muslims as the sacrifice of a cow on a particular day is sanctioned by Islam. Secondly, that such a ban offended the fundamental rights of the *Kasais* (butchers) under Art. 19(1)(g) and was not a reasonable and valid restriction on their right. Thirdly, that a total ban was not in the interest of the general public.

Chief Justice S.R. Das speaking for the constitutional bench held that the total ban on the slaughter of cows and calves of cows and she-buffaloes was valid. The constitutional bench further held that the total ban on the slaughter of she-buffaloes or breeding calves or working bullocks so long as they are capable of being used as milch or draught cattle was also valid. However, the constitutional bench held that a total ban on the slaughter of she-buffaloes, calves and bullocks after they cease to be incapable of yielding milk or breeding or working could not be supported as reasonable and in the interests of the general public and was invalid.

It appears that in this case, the first ground of challenge namely, that the sacrifice of a cow sanctioned by Islam was turned down by the court due to the meagre material placed before the court. It appears that no one specially competent to expound the religious tenets of Islam filed an affidavit making reference to any particular Surah of the Holy Quran which requires the sacrifice of a cow. The Constitutional Bench, in this case, concluded that the cow progeny ceased to be useful as a draught cattle after a certain age.

In Haji Usmanbhai Hasanbhai Qureshi v. State of Gujarat (1986 3 SCC 12) a ban on the slaughter of bulls and bullocks below the age of 16 years was challenged. The Supreme Court held on facts that with the improvement of scientific methods of cattle-breeding, cattle remain useful even above the age of 16 and hence the cut-off period of 16 years was held to be reasonable restriction and the prohibition on slaughter of bulls and bullocks below the age of 16 years was upheld.

In the latest case of State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat (2005 8 SCC 534), a Constitutional Bench of five judges in 2005 felt that the issue of cow slaughter was sufficiently important an issue to justify the constitution of a bench of seven Justices. Reference was made to Art. 48 of the Constitution of India requiring the State to take steps towards prohibiting slaughter of cattle. Reference was made to Art. 51-A requiring the State to have compassion for living creatures. It was then said in paragraph 50 that cow dung would enable the farmers to avoid the use of chemicals. In a country where human beings are neglected by the State when they grow old and they die of hunger in thousands, the Supreme Court displayed rare compassion for the aged cattle. "A cattle which has served human beings is entitled to compassion in its old age. It will be an act of reprehensible ingratitude to condemn cattle in its old age as useless. We have to remember: the meek and weak need more protection and compassion."

How ironic that while petitions relating to people rotting in prisons on drummed-up charges, cases of extreme exploitation of labour, and reams of other petitions relating to the poor remain pending for years in the Supreme Court, this utterly frivolous issue of cow-slaughter took several weeks and the valuable time of seven highly skilled justices of the Supreme Court.

The larger bench was constituted in order to get over the findings of the Supreme Court in Mohd. Hanif Qureshi v. State of Bihar (1959 SCR 629) which had concluded as follows. First, the maintenance of useless cattle involves a wasteful drain on the nation's cattle feed. Second, the total ban on cattle slaughter would seriously dislocate though not completely stop the business of a considerable section of butchers and hide merchants. Third, the ban would deprive a large section of the people of their staple food and protein diet. And fourth, the preservation of useless cattle by establishment of *gosadan* is not a practical proposition "as they are like concentration camps where cattle are left to die a slow death."

According to the seven judge bench, the findings of the Supreme Court delivered in 1958 was no longer valid as "constitutional jurisprudence has indeed changed from what it was in 1958. Our socio-economic scenario has progressed from being gloomy to a shining one, full of hopes and expectations."

Then, in an unbelievable waste of time and public money, seven erudite Justices began to look into data relating to the shortage of fodder, the production of cowdung and urine and other factual matters of grave constitutional and national importance. They concluded that the main source of staple food is vegetables and that the poor would not suffer on account of a ban on slaughter. They disagreed with the findings of the Supreme Court in Mohd. Hanif Qureshi's case relating to the conditions of the *gosadans* and concluded without any actual data or other evidence that the "*gosadans* and *goshalas* are being maintained." This is again a conclusion of doubtful truth value. Aged cattle are generally left to rot and the conditions of the *gosadans* are truly pathetic even today.

Of particular interest is the emphatic dissent of Justice A.K. Mathur who held that there was no need to overrule the earlier decisions of the Supreme Court that have held the field from 1958 because the ground realities have not materially changed. He held that "the unanimous opinion of the experts is that after the age of 15, bulls, bullocks and buffaloes are no longer useful for breeding, draught and other purposes and whatever little use they may have is greatly offset by the economic disadvantage of feeding and maintaining unserviceable cattle." The data produced before the Supreme Court according to Justice Mathur showed that after 16 years, urine, cowdung and draught ability is substantially reduced. The data produced before the Court was not such as to justify the reversal of the earlier decisions of the Court. The Judge could not understand as to how the interests of the public at large would be advanced by depriving butchers of their profession. Relying on the principle of stare decisis he protested that the law should "not be so fickle that it changes with change of guard. If the courts start changing their views frequently, then there will be a lack of certainty in the law and it is not good for the health of the nation."

In *Akhil Bharat Goseva Sangh* (3) v. State of Andhra Pradesh (2006 4 SCC 162), a two judge bench of the Supreme Court distinguished the constitutional bench decision in State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat and refused to stop Al Kabir Exports Ltd. from slaughtering cattle and exporting meat. Al Kabir was given permission by the central government to slaughter old and useless buffaloes. Some organisations opposed the setting up of the slaughter-house. The state government constituted the Krishnan Committee to examine the matter and report to the High Court. The Krishnan Committee found that fundamentalist organisations had opposed the establishment of the slaughter-house. After extensively referring to the constitutional bench decision of the Supreme Court in State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat, the Supreme Court held, "it is true that it has been held the total prohibition of cow and cow progeny slaughter may be justified. However, it has not been held in that decision that laws and policies which permit such slaughter are unconstitutional."

LAND AND HOUSING

In Zoroastrian Cooperative Housing Society v. District Registrar (2005 5 SCC 632), the cooperative society was given certain lands by the Government of Bombay on which residential premises were made and the society made a bye-law that the owners of the plots or bungalows who were from the Parsi community could not sell them to any non-Parsi. A dispute arose when a member attempted to transfer the property to a non-Parsi and the board appointed under the Bombay Co-operative Societies Act informed the society that it could not restrict its membership only to the Parsi community.

The Supreme Court held that for the promotion of a housing society there should be 'a bond of common habits and common usage among the members

which should strengthen their neighbourly feelings, their loyal adherence to the will of the society. In India, this bond was most frequently found in a community or caste …"

It was submitted by the society that members have a right to be associated only with those whom they consider eligible and the right to deny admission to those with whom they do not want to associate and that this right cannot be interfered with by the registrar appointed under the Act. The Supreme Court agreed with the society, holding that it was not permissible for the State government to compel the society to amend its bye-laws, even though the registrar was empowered under the Act to direct amendment. This is because, according to the Supreme Court, the paramount consideration was the interest of the society, not the public interest.

This conclusion is utterly wrong. The interest of a cooperative society must yield to the interest of society as a whole. If according to the public interest, maintaining a heterogeneous composition is needed rather than having sections of the public cordon themselves off into caste or religious conclaves like an apartheid system, then surely the registrar's action restraining the society from insisting that only Parsis can come into the society was reasonable. The conclusion of the Supreme Court, that notwithstanding public interest, the interest of the society is paramount has laid the legal foundation for the caste and communal ghettoisation of India. In Gujarat, for example, Muslims have been forced to leave cooperative societies which are today all-Hindu societies. Is it constitutionally permissible for the society to enforce through its bye-laws a social boycott of Muslims? Will it be legitimate to have areas of a city which are Hindu only or Muslim only? Is it in the public interest that such an apartheid system be allowed to proliferate?

The Supreme Court concluded, "We are satisfied that by introducing a theory of what the Court considers to be public policy a society registered under the cooperative societies act cannot be directed to admit a member who is not qualified in terms of the bye-laws."

Then in para 25, the Court recognises the dangerous abyss into which it has fallen:

"It is true that it is very tempting to accept an argument that Arts. 14 and 15 prevent any discrimination based on religion or origin in the matter of equal treatment or employment and to apply the same even in respect of a cooperative society. Courts have to be cautious in trying to ride the unruly horse of public policy. It is not possible to import one's inherent abhorrence to religious groups or other groups coming together to form what learned counsel for the respondents called ghettoes. It is true that our Constitution has set goals for ourselves and one such goal is the doing away with discrimination based on religion or sex. But that goal has to be achieved by legislative intervention and not by the Court. The doctrine of public policy could be applied only to clear and undeniable cases of harm to the public, although, theoretically, it was permissible to evolve a new head of public policy in exceptional circumstances, such a cause would be inadvisable in the interest of stability of society. It is open to the community to try to preserve its culture and way of life. We have cooperative societies of religious groups who believe in vegetarianism. It will be impermissible to thrust upon the society persons who are regular consumers of non-vegetarian food. Maybe, it is time to legislate or bring about changes in the Cooperative Societies Acts."

With these words the Supreme Court declined to exercise jurisdiction vested in the Court and failed to recognise a matter of grave public interest. By this decision, ghettoisation based on caste and religion and the social ostracism and boycott of the minorities has now become permissible.

— May-June 2007

The 'Globalised Modern' Takes to Religion

In an era of globalisation, where a certain brand of modernity is being forced on us, conservative Hindutva forces are pushing their 'swadeshi' agenda among the middle-classes.

K N PANNIKAR

Words often disguise what they really mean, particularly when they form part of an ideological effort in pursuit of hegemony. Globalisation is such a word that is a euphemism for domination. It suggests something entirely different from what it actually attempts to achieve. When innocently interpreted, it represents an ideal process of equal sharing and voluntary participation. Yet, it needs no ingenuity to discern that any relationship in the contemporary global order of uneven development cannot be unequal. The history of capitalism as a world order denotes its inevitable tendency to promote differentiation and domination.

When post-colonial societies without "post-coloniality" are being re-integrated into a global order, it could only ensure the subordination of the economically weaker countries. Therefore, for countries like India, globalisation only heralds subjection. It might for America, Japan and Germany, hold forth exciting possibilities. But to expect the same for the weak in the world like India, Bangladesh, and other post-colonial countries in Africa and Latin America, is to hope for the impossible. For them globalisation does not augur freedom and progress; instead it would ensure the necessary climate for domination and hegemonisation by the consortium of world capitalist countries. Therefore, it is necessary to question the very notion of globalisation and demystify it, as it currently has an ideological veneer that masks its real import for the third world countries.

WHY GLOBALISATION?

That globalisation became a programme only in the 90s and not in the 50s and 60s is of some significance. It actually emerged from the ashes of a bipolar world. The collapse of the socialist bloc paved the way for the capitalist forces to launch a new era of conquest. They had no opposition, only themselves to contend with. The best and easy way is to share the spoils and hence the universal outlook of contemporary capital.

Resistance to this movement of capital would be normally expected from countries like India that has, since Independence, adopted self-reliance as the cornerstone of its economic policy. What is happening now is the reverse, which requires some explanation. The Nehru-

vian perspective of development with an elaborate permit-licence system was galling to the self-seeking bourgeoisie and middle-class pining for an existence defined by the values of consumerism. They envisioned emancipation in liberalisation and possibilities for their uninhibited growth in globalisation.

It was eloquently articulated by an advocate of structural adjustment and vice-chairman of a multi-national corporation when he described liberalisation as 'second freedom'. The new freedom is limited to the bourgeoisie and inconsequential, except in adverse terms, to the majority of Indians. The irrepressible enthusiasm of this ideologue of the bourgeoisie is nothing but compradorism on behalf of international capital. At any rate, the Indian bourgeoisie is a willing and enthusiastic partner in the process of globalisation, without, however, realising its long-term consequences.

Apart from the economic rationale, including the filtration effects for the poor, the Indian bourgeoisie and its ideologues advance two arguments in favour of globalisation. The first underlines the folly of isolationism, particularly in the context of the technological revolution-taking place in the world. The second involves the interconnection between globalisation and modernity, as the former alone would give access to what the West has achieved and is achieving.

That isolationism is politically and morally indefensible, and culturally debilitating, is a familiar argument. In the past, colonial conquerors and their 'native' compradors have often invoked it. When the European powers extended their trading activities to Asia, Africa, and Latin America, they emphasised their civilising mission. They packaged their expansionist designs in the guise of international relations and possible benefits from integration to a world economy. Countries like China and Japan, who had lived for centuries in self-sufficiency and warded off outsiders through a closed-door policy, were forced to accept trade and investment. Contrary to promises of prosperity the integration with the world market that colonialism accomplished, led to impoverishment and exploitation. The colonial experience is proof enough that integration per se is not advantageous. What is crucial is the relative strength that determines who gains and who loses. Like the colonial experience, power differential is the crux of globalisation too. The second is an alluring argument, particularly for the middle classes. Rajiv Gandhi's slogan of taking the country to the twenty-first century has by now become a well-worn cliché. To the middle classes, however, it meant access to the products of the industrialised West, with which they had identified their sense of modernity. They look upon globalisation as an opportunity to organise a 'modern' lifestyle based on the products of advanced capitalist countries — the computer, the consumer goods, the works. The franchise shops, from McDonald's and Kentucky Fried Chicken to Levi's and Marsh, sprouting all over the country seem to satisfy the appetite of the affluent for the 'modern'. This imposed 'modernity' is both superficial and paradoxical.

In Mumbai, the most modern metropolis of India, 62 percent of the population lives in huts and on pavements, without any sanitation facilities and drinking water. There is something fundamentally wrong with this concept of modernity that equates the interests of the nation with that of a miniscule section of the society. Those who critique modernity solely from the point of view of being western should turn their attention inward, particularly because the modernity globalisation is seeking to usher in, is likely to intensify this disparity.

CULTURAL IMPLICATIONS

Culture appears to be an arena in which multinational organisations are particularly active. It is reminiscent of the Bible preceding trade during the first stage of colonialism. The powerful cultural onslaught the third world countries are experiencing today is an attempt to establish cultural imperialism — culture as imperialism — as a precursor to an all-embracing domination. Through the imposition of the culture of capitalism, the third world countries are trained to prepare the ground for, in Theodore Adorno's phrase, an 'administered world', to which corporate capital would have easy access. The cultural imperialism thus provides the groundwork for exploiting the market potential of the third world countries. Not that alone, the cultural products of the advanced capitalist bloc are themselves a driving force behind the contemporary cultural invasion. The culture industry is fast expanding in the capitalist West — from pornography to pizza. In recent times there is a shift in investment in North America in favour of the culture industry, the immense potential of which is being realised by corporate giants. James Petras, who has done in-depth studies of the culture industry, has calculated that one out of five of the richest North Americans derives his/her wealth from mass

media. The television, newspapers, fast foods, soft drinks, clothes and innumerable other cultural artefacts are proving to be attractive fields for capital. To be profitable they have to find new outlets too. The cultural onslaught is intended to pave the way for these cultural products to conquer new territories.

The current cultural invasion has two indefinite dimensions: hegemonisation on the one hand, and instrumentality on the other. The cognition of either of these dimensions alone does not comprehend the total reality. Globalisation achieves much more than cultural imperialism: it foregrounds culture as an instrument of imperialism. In other words, culture acts both as a sword and mask. The cultural presence of advanced capitalism in third world countries contributes in myriad ways to capitalist hegemony by creating an ideological climate for the forces of globalisation to operate. It would be useful to draw upon the insights provided by Antonio Gramsci in his analysis of culture and politics to understand this phenomenon. Particularly useful is Gramsci's concept of commonsense, which is the uncritical and largely unconscious way in which a person perceives the world. The cultural, social and political behaviour of each individual and group is influenced by this commonsense. Gramsci argues that leading groups in a society try "to transcend a particular form of commonsense and to create another which is close to the conception of the world of the leading group". The forces of globalisation and their compradors in India are precisely engaged in such a task.

The existing cultural commonsense in India has evolved from her historical experience and is drawn from a variety of sources. It is heterogeneous in character, and plural in manifestation. The social and cultural practices and behaviour, which admit of diversity, reflect these qualities. Unlike the capitalist West, there is no standardisation. Be it food, dress, entertainment or gestures — almost all aspects of daily life — the rich legacy of a vibrant culture is apparent. Through the new cultural infrastructure fabricated by global forces, indigenous commonsense is being marginalised and projected as anachronistic. It is sought to be replaced by the commonsense of the advanced capital which privileges practices and behaviour linked with the products of advanced capitalism. The rationale for this displacement is the 'universal' character of the cultural commonsense of the advanced capital. The globalisation it is argued, affords the opportunity to internalise the universal culture and thus to become a part of larger whole. This, to say the least, is a pretext concealing the interests of the dominant forces. Like the bourgeoisie at the time of the capitalist transition universalising its culture as the ideal for the third world countries.

The cultural infrastructure the global forces are currently fabricating in India would pave the way for the internalisation of 'universal' culture. The active collaboration of the bourgeoisie facilitates its realisation. The bourgeoisie is not only helping the dissemination of the values and tastes of the dominant culture but also contributing to its legitimacy. So are the Indian middle classes. The cultural transformation they have undergone during the colonial period had opened up the possibilities of what the West could offer them. They were disappointed that Independence did not give them the necessary freedom to pursue the utopia. The opportunity has now been offered by globalisation and therefore they have not only welcomed the 'universal' culture but have also become conduits for its free flow.

The principle the bourgeoisie and the middle classes often invoke is the freedom of choice. They hold that they are voluntarily striking out a new path for our society. It is necessary, as Gandhiji has said, to allow wind to come through windows. It is equally necessary that we refuse to be blown off our feet. Today the option to close the windows if we so desire does not exist. The initiative does not rest with us. Rather than free cultural interaction, cultural hegemonisation based upon power differential and economic disparities is the evolving scenario. The freedom of choice is an illusion, even if culture operates with an aura of neutrality, as global forces do not exercise direct political control. The marginalisation of indigenous cultural practices is an inevitable outcome. The marginalisation however, is only the beginning, it leads eventually to fossilisation.

The cultural invasion represented by the rapid intrusion of the electronic media tends to create the impression that the global forces are only introducing new cultural element. The opposition, therefore, is confined to the new which militates against values Indian. This is quite misleading, as the global forces are working through the Indian shell by appropriating indigenous cultural forms and practices.

TWO DIMENSIONS

The appropriation has two important dimensions: construction and Commodification. For quite some time

there has been massive investment by several global agencies in the study of various forms of culture. There are innumerable projects probing the popular culture forms, imparting to them meanings unfamiliar to the people. It is reminiscent of the construction of Indian culture by orientalism that in the final analysis served the interests of colonialism. Similarly, the efforts of the destructionists and post-modernists to decontextualise and dehistoricise culture are directly contributing to the hegemony of cultural imperialism. By dissociating culture from their sources of origin the new constructions snap its umbilical cord and thus create space for the global forces to operate. The appropriation of indigenous culture and its Commodification are two sides of the same coin. The cultural operators have been slowly but steadily moving into the terrain of popular culture, turning it into commodities for the global media to satisfy the cultural curiosity and sense of superiority of their audiences. The dances of the tribals, the harvest songs of the peasants, the martial arts of the rural folks, and innumerable other art forms are plucked out of context, enacted in studios, and presented as exotic and primitive practices. Ultimately, it is likely they will exist only in their commodified incarnation, thereby losing their original form, content and context. Given the proliferation of the electronic media, artificial production of culture would replace organic production. To the indigenous society the consequences of this tendency is the possible loss of its creative potential, as its culture would be transformed into popularised culture. The ensuing cultural fossilisation would be difficult to stem.

Given the ongoing manoeuvres of global forces to subordinate India to their interests, fossilisation has important political implications. Since the Indian bourgeoisie has surrendered to the Bretton-Woods institutions, the resistance to imperialist onslaught has to emerge from outside the state. Led by the Left forces political opposition has been voiced through mobilisation of the potential for resistance inherent in the cultural domain has not been sufficiently realised. Culture, as Amilcar Cabral, the African freedom fighter and thinker, has argued is the area in which initial resistance against all forms of domination finds expression.

It would also continue in different forms ranging from quotidian practices to mobilisation in armed revolts. During the medieval times, when organised opposition was difficult, new cultural forms emerged to further the anti-colonial struggle. The possibilities of resistance, thus inherent in the arena of culture, are being undermined by global forces through appropriation and commodification. Moreover, this impinges upon power relations within the society as well. The cultural homogenisation occurring today would also be detrimental to cultural resistance against dominant classes within the society. The support of the bourgeoisie to the 'universal' culture serves its own political interest.

COMMUNAL RESULTS

Whether globalisation would promote or impede communalism and religious fundamentalism is a crucial question for India. Fundamentalism has been, in many countries, a response to imperial intrusion. Often, as Edward Said has argued, it is a "private refuge". In India, the situation is qualitatively different. There is an impression created by the 'swadeshi' slogan of the RSS that the forces of Hindutva would defend the economic sovereignty of the country. The BJP has been more than ambivalent on the subject and, judging by their performance, they had in fact taken the opposite course.

At the same time, the process of globalisation is deepening the communal consciousness. The early impulses that generated communalism were posited in the cultural crisis experienced by the middle class. The members of this class had imbibed a superficial sense of modernity, adopting 'western-modern' as their lifestyle. Yet, they were in search of their roots, which they uncritically located in their primordial identities. The imposed global modernity would sharpen this dichotomy and the 'globalised modern' would find solace in religiosity, superstition and obscurantism. Since the Hindutva forces exploit the latter for political purposes, this emerging scenario is welcome to them. As for the global forces, the sacred and the secular could be differentiated if it does not conflict with their quest for freedom of economic operations. Thus there is a convergence of interest. Therefore, a distinct possibility of a collusion between the communal and global-imperial forces exists. The globalisation would enable Hindutva to usher in 'modernity' without interfering with the secular sections of the ruling classes appear to be impervious to this possible nexus which could destroy the foundations of the Republic.

— May-June 2007

Mainstreaming 'Otherness'

The media does not merely inform, it goes beyond, into constructing meanings through a montage of messages that often reinforce and create communal stereotypes.

SUKUMAR MURALIDHARAN

The media function in society was for long studied almost exclusively in terms of a 'transmission' model, which emphasised the autonomy of the institution and the anonymity of its audience. Its central focus was the influence exerted by the media on social perceptions, through a process of 'indoctrination'.

The passage of years has brought in a more sensitive approach, which concerns itself not with the transmission of a message that is passively absorbed by a mass of recipients, but with the meanings attached to the message at the point of reception. In this sense, the modern sociology of the media tends to view it as an apparatus, or more so, a process, of creating shared meanings that an audience can identify with, that equip them with the vocabulary and the empirical knowledge to engage in a public conversation. The media is not just about answering a community's needs for information; it is as much about constituting that community.

To the extent that "communities" are defined by negative association, the media would reflect, sometimes subtly though often rather crudely, the perceptions of "otherness" without which communal boundaries would remain uncomfortably fluid. But there are also sections of the media that claim to represent a "national" perspective, untainted by narrow pulls of community loyalty. Penetrating the subtleties of the "national" media discourse is often a challenge, since it succeeds in most cases, in disguising communal predilections in the pretence of a larger solidarity.

Several of these features emerge from a comparison between two crucial reference points in India's recent history, when the communal virus was rampant. The first is the period between 1990 and 1992, when the country was convulsed by the conflict over the Babri Masjid at Ayodhya. If the media in most parts of the country was guilty of not opposing the communal adventurism of the Hindutva forces with sufficient passion or principle, the media in the Hindi speaking region was engaged actively in abetting them. This is no subjective judgment, since it was the firmly established view of the Press Council of India, which in 1990 went into the news coverage and editorial comment of four of the largest Hindi language dailies and passed severe strictures against all of them.

Moving forward from those dark days to 2002 and the communal carnage of Gujarat, another pattern of media conduct is evident. With the exception of the Gujarati press – where a clear tilt was evident towards blaming the victims, towards lurid exaggeration and incite-

ment to violence – the rest of the press nation-wide, both in English and the *bhasha*, earned wide credit for their unflinching portrayal of the brutalities of Gujarat. Indeed, the pressure was severe enough for the Gujarat Chief Minister Narendra Modi to lash out at the media for creating what he called "secular riots". If it could elicit this manner of a response from the man widely identified as the architect of the carnage, then the media must have been doing something right.

There had evidently been a significant cultural change in the media over the preceding 12 years, especially in the Hindi language press. The crucial factor here could well be the tremendous growth in the reach of the Hindi press since the days of Ayodhya. One estimate puts the total number of readers of Hindi dailies in 1990 at around 7.8 million. By the year 2001, it was over 21 million. Today, the two leading newspapers in Hindi alone, are estimated to have a total readership of 40 million. This quantitative explosion has led to significant qualitative changes.

The need to bring larger numbers of readers on board, for one thing, has induced Hindi newspapers to go beyond traditional notions of audience taste and take in cross-community interests. There is a theory in the sociology of the media, which likens the daily ritual of reading a newspaper to the erstwhile practice of prayer, a mass ceremony which individuals in their social isolation pursue, without direct knowledge of others who are similarly engaged. But the implicit knowledge that others too are going through that mass ceremony serves as a form of social solidarity. In this sense, the growth of the Hindi language press in the 1990s may be both the cause and consequence of these emerging new forms of communal solidarity.

At the same time, there are other forms of social exclusions, other kinds of particularities, that are unstated premises of media functioning. It is not necessary to go any further than the news coverage and editorial comment on the Rajindar Sachar Committee report on the status of India's Muslims, to grasp the processes through which this works.

The presentation of the Sachar report in Parliament, coincided with an outbreak of violence in Maharashtra over the vandalisation of a statue of Dr BR Ambedkar in Uttar Pradesh. The country's largest English-language newspaper, The Times of India (ToI), confined the Sachar report to the news digest section, occupying about three column-centimetres on the first page. Considerably more attention was devoted to the violence of the dalit protests in Maharashtra, with the picture of a train that had been set afire between Mumbai and Pune getting marquee space on the front page.

Both the Sachar Committee and the dalit protests earned significant space in the inner pages of the ToI that day, with the latter enjoying by far the greater prominence. What the ToI chose to put front and centre in its coverage of Sachar was the government's uncertain resolve about introducing reservations in education and employment for the minorities. Thus the issue of the institutionalised discrimination suffered by the Muslim minority was transformed in the ToI discourse into a concern over keeping India's enclaves of modernity secure from the ingress of the underprivileged.

Where the dalit protests in Maharashtra were concerned, perceptive media critics have pointed out that the consistent refrain of the mainstream press, in both English and the bhasha, was the inherent violence of the dalit agitators and the ease with which they could be provoked into serious acts of depredation. There were oblique references to the Khairlanji massacre of September 29, 2006 in the Vidarbha region of Maharashtra — in which four members of a dalit family, a mother and three children, including a visually challenged young man, were killed — as a contributory factor in the upwelling of dalit rage. But no effort was in evidence to make amends for a shocking record of media neglect of the egregious crime.

Indeed, the record of the media since the massacre was to underplay it, to not see in it the unrelenting social prejudice and persecution that the dalits suffer, but to cast it as a regrettable case of moral vigilantism carried to excess. And it speaks eloquently of the blinkers that the media willingly dons on account of ownership pressures and the social conditioning of its staff, that it took a dalit-owned newspaper in Maharashtra to investigate and bring the crime to light after weeks of arduous effort.

Similar acts of wilful social blindness were in evidence in the media's approach to the Sachar Committee findings. There could be various alibis offered for the relative inattention with which the report was received by the media. It could well be argued that the social and educational handicaps of the Muslim community are not exactly a news flash. Again, those familiar with the dynamics of competition in the newspaper business,

might ascribe the relative neglect of the Sachar committee to another factor. The Indian Express (IE), had as the media jargon has it, "scooped" the main findings of the Sachar Committee well over a month before its report was formally presented. The IE coverage appeared in a compact series of articles on the front page, through the last week of October. The newspaper then chose to pronounce its final editorial verdict on the issue by urging the political leadership to acknowledge the undeniable verity, that economic growth was the way out of social backwardness. In effect, the IE succeeded in submerging the complexity of the Sachar Committee's findings in a simplistic nostrum much favoured in today's neo-liberal climate.

While the IE was constructing this narrative of discrimination on its news pages and paying obeisance to the virtues of globalisation editorially, a quite different picture of willing thraldom to superstition and a stubborn refusal to adopt modernity, was being assembled in another quarter of the print media. Between October 24 and 29, 2006, the ToI carried no fewer than six articles – of which two were on the front page and one on the editorial page – on the case of Imrana, the young woman who had been raped by her father-in-law and stigmatised by the Muslim clergy for her temerity in seeking to bring the criminal to account.

On October 25, 2006, the ToI ran a story on Imrana on page one, right alongside another one on the confusion within the Muslim community about when precisely the Eid festivities were to be observed. This latter story led off with a description of the subjectivity underlying the identification of the precise date and the tension that this set up with modern notions of objectivity. The Imrana story and the accompanying article on Eid enjoyed roughly the same priority in terms of space allocation and placement. But these stories were topped off by a large photograph, occupying marquee space on the front page, which showed the touring Pakistani cricket team offering Eid prayers at their port of call in Chandigarh. The picture was rather boldly captioned: "Champions of the faith?"

With this rather bizarre juxtaposition of stories and visuals, the ToI managed within about a third of the space on its front page, to reinforce several stereotypes about the Muslim community, not least among these being their supposedly extra-territorial loyalties.

Yet the ToI could not remain oblivious to the news emerging from another quarter on the findings of the Sachar report. On November 4, 2006, it ran an editorial on the main findings of the committee. It began by deprecating the policy of reservations as a "blunt instrument" that failed to address the roots of the problem. Instead, other forms of "positive discrimination" could be thought of, including building "quality schools" and "providing healthcare" in "backward districts" that have high settlement densities of Muslims, dalits or tribals. Government contracts again, could be preferentially allocated to these disadvantaged social groups, to "facilitate their participation in the modern economy". In turn, the ToI chose to place a special onus on the "Muslim leadership" to "encourage the community to take to modern education in larger numbers".

Article 350A of the Constitution mandates precisely this manner of positive discrimination in favour of minority communities where State investments in education are concerned. Backward area development policies adopted by the central government, not to mention various states, have also sought, without overtly assuming the colours of a class or community-based approach, to direct attention preferentially towards regions of economic stagnancy. The ToI has shown admirable percipience in waking up to the reality that backward areas are in most parts of the country, also predominantly populated by people who would fall within the broad rubric of "backward classes". But this realisation is not informed by any effort to understand why backward area development policies have also proved fairly ineffective in redressing disparities, indeed, why they have proven an even blunter instrument than reservations.

On November 8, 2006, the ToI carried an article on Islamic schools or madarsas, on its editorial page. Titled "Beyond Terror", the article argued that the debate on these institutions had remained for too long confined to the issue of terrorism, but because the Muslim community was under pressure in times of global concern over the issue, it had responded with a spirited defence of these institutions and the learning they imparted, as uniquely imbued with a moral and spiritual sensibility. This attitude in turn simply evaded the reality that the madarsas have a tendency to "promote a narrow, insular mindset". And as long as security concerns remained the principal impulse behind the debate, there was little chance that matters of immense import to the "welfare of millions of children studying in madarsas" would be addressed.

Though not formally released at the time this article was published, many of the key findings of the Sachar Committee were in the public domain by then. On the issue of madarsas, the conclusions were fairly clear: fewer than four percent of Muslim children in the school-going age group attended these institutions; at an all-India level, their number is not the "millions" as the commentator in the ToI suggested, but just marginally over one million. Far from being an institution of choice, madarsas were "often the last recourse of Muslims especially those who lack the economic resources to bear the costs of schooling". And for all the odium heaped on them, madarsas had very often been found to "have indeed provided schooling to Muslim children where the State (had) failed them".

Granted, the commentator in the ToI could not possibly have reflected all these findings in their complexity since they were yet to be made public in an official sense. But to admit that gaps exist in the level of public information is one thing, to leapfrog into realms of conjecture, quite another. A few inconvenient facts could not evidently stand in the way of constructing what seemed a compelling narrative of social backwardness by choice among the Mulsim community.

It was mid-November by the time the ToI returned on its news pages, to the theme of the Sachar Committee. On November 17, it reported that the committee's recommendations had put the ruling coalition, the United Progressive Alliance (UPA), in a "fix". The following day, it frontpaged a report arguing that the committee's recommendation that the Muslim share in several vital sectors be increased, would in effect "give rise to the demand for a community quota leading to a fullscale political confrontation". Having begun its coverage of the Sachar report by viewing it through the prism of the reservations issue, the ToI undoubtedly saw no reason to change course when more details were available.

To look at the media today is to look at a complex, dynamic and evolving scenario, to consider a quantitative explosion that has not quite been accompanied by a corresponding qualitative change. While the media can be relied upon to raise its voice against overt and violent attacks on minority communities, its resolve in dealing with systemic discrimination that is less visible, is not quite so clear. Some of the rougher edges that were evident in the early-1990s may well have been ironed out. That was the time that the Muslim minority was portrayed as the legatees of the numerous abuses that India's culture and civilisation had suffered in the past. Today, they are portrayed as an impediment to the glittering promises of modernity that lie in the future for India.

— May-June 2007

Can Judiciary Provide Hope?

Despite the laws, has our judiciary been able to address the contentious issues related to communalism? When the Shiv Sena supremo emits vitriol against Muslims or 'outsiders' from other parts of India, the law of the land lets him go scot-free. And how come after every bout of 'organised' communal violence governments seem so non-serious about commission of enquiries.

MIHIR DESAI

The two biggest threats faced by the Indian society today are neo-liberal globalisation and communalism. Communal politics has been an incipient threat since more than 100 years but over the years it has acquired a Frankensteinian proportion and presently we are in a situation where it has seeped into every aspect of our lives with growing vigour.

Both majority and minority communalism need to be opposed and fought against. However, majority communalism is always the bigger danger because of the sheer numbers and also because the State structures almost invariably support majority communalism and thus provide it with the bite which minority communalism does not have. This, of course, does not mean that we can ignore minority communalism as under the guise of religious freedom it can be very oppressive for its own community members, women's oppression being the primary example.

Riots and communal carnage are the most gruesome outcomes of communalism but what is equally important is the way communalisation of society and State takes place in what can be euphemistically called 'peace times'. In India, recently, we have witnessed this through distortion of textbooks and other methods to saffronise the educational system, uncontrolled hate speech, paranoia around conversions and the phobia around 'Islamic terrorism'. Despite repeated facts and figures establishing that Muslims are virtually last on the economic rung in the country, the absurd theory of 'Muslim appeasement' is lapped up by a large section of the society.

This article looks at the legal structures and the judicial responses to some aspects of communalism.

HATE SPEECH

It is well-known that communal hatred spreads through vitriolic speeches and acerbic writings. The recent case of the Bharatiya Janata Party CD at the time of UP elections is a case in point. While freedom of speech and expression is a guaranteed fundamental right, it is subject to reasonable restrictions.

The Indian Penal Code has a number of provisions penalising spiteful speeches. Sections 153A and B as also Sections 295A and 505 criminalise writings and speeches made against a religious community or against their religion. Unfortunately, under Section 196 of the Criminal Procedure Code, cognisance of such offences cannot be taken by any court without the prior sanction of the State. This sanction is hardly ever given. For instance, during the Gujarat carnage, Narendra Modi made hateful speeches against Indian Muslims. Sanction to prosecute him was sought by various groups. Unfortunately, this was not given.

In Baburao Patel's case, the court was concerned with a journalist who wrote an article that Muslims were a violent race and committed to plunder, loot and rape. The court held that the article was not a political thesis but an attempt to promote feelings of enmity. He was sentenced to four months' imprisonment.

However, in JB D'souza's case, the Bombay High Court gave a shocking decision. The issue concerned sanction to prosecute *Samna* the mouthpiece of Shiv Sena. Bal Thackray had been writing vitriolic articles during the Mumbai riots of 1992 -93. Sample one of his writings: "These *mohallas* are inhabitated by fanatical Muslims. They are loyal to Pakistan. Riots occur only in those *mohallas* and cities with a growing Muslim population. It is clear from this fact that the rootcause of riots lies in the Muslim community and its attitude. …Riots breakout wherever Muslims enjoy domination… Twenty five crore Muslims loyal to Pakistan will stage insurrection."

The court surprisingly found that this was not directed at all to the Muslims but only at traitorous Muslims and held that there was no violation of S. 153A or B. Election laws also restrict hate speech and even its milder varieties such as canvassing for votes on the basis of one's religion. Dr Ramesh Prabhoo, a Shiv Sena candidate in Mumbai, once famously stated during elections, "You will find Hindu temples underneath if all the mosques are dug out. Anybody who stands against the Hindus should be showered or worshipped with shoes." He was tried under the Representation of the People Act, 1951, which works in a similar way to the penal code in preventing the incitement of enmity between the people of India and appeals to religion at election time. The Supreme Court, in their decision on this and a collection of other cases known as the Hindutva judgments, ruled that while blatantly hateful comments such as Dr Prabhoo's violated the law, that appealing to Hindutva at election time was not necessarily a corrupt electoral practice, and perfectly legal.[1]

While there are sufficient legal provisions dealing with hate speech in actual practice they have been ineffective.

CONVERSIONS

One of the most contentious issues concerns religious conversions. It involves two aspects. First is the right of an individual to change her/his own religion. Second is the right of an individual or group to persuade somebody else to change his/her religion. The two components are thus, freedom to convert oneself and the freedom to convert others. Traditionally, the first component has gone under the name of 'freedom of conscience' while the second component has been perceived as 'right to convert'.Article 25 of the Constitution deals with both freedom of conscience as also the right to convert. "Articles 25. Freedom of conscience and free profession, practice and propagation of religion — Subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and right to freely profess, practice and propagate religion."

The Constitution of India, under Article 25, guarantees the 'freedom of conscience' which has been interpreted to include the right not merely to believe in whatever religion one wants but even to change one's religion. A person is entitled to believe in a given religion, to change her religion or not to believe in any religion at all. The freedom of conscience is absolute. Nobody, not even the State, can tell me what I should believe in. I may believe in equality for all or I may believe that dalits do not deserve to be treated as equals. I may believe that everybody should have the right to worship any god they choose or I may believe that Muslims do not deserve to be on the face of this earth. My beliefs cannot be controlled by anybody. I cannot be punished for the beliefs I hold. The State and my obligations to the society come into picture only when these beliefs start acquiring the form of communication or practices which are restricted or prohibited under the law. Since Independence, five states, Arunachal Pradesh, Madhya Pradesh, Gujarat, Rajasthan and Orissa, have passed laws dealing with religious conversions. These laws have been invariably styled as 'Freedom of Religion' laws.

These laws are classic examples of how supposedly harmless provisions of law, in actual reality, are meant and used for devious and ulterior motives. None of these laws prohibit conversions per se. Voluntary conversions are still permitted. What is prohibited is forcible conversion, conversion by fraud, conversion by inducement, etc. On paper, one cannot have any problem with such provisions, but the implementation of these laws makes them almost draconian.

Under all these laws, intimation of conversions have to be given to the authorities, a reality which virtually leads to a situation where the Right-wing fanatics land up at the houses of those converting or in churches threatening and beating up the concerned individuals. In practice, these laws stop even totally voluntary conversions. In fact, the Gujarat law requires prior permission of the authorities before conversion can be effected. The Orissa and Madhya Pradesh laws were challenged in a case before the Supreme Court but the court refused to strike down these laws as unconstitutional.

VIOLENT CONFLICTS

As yet, there are no special laws dealing with communal violence and this is dealt with under the ordinary criminal laws such as the Indian Penal Code and various Police Acts. Though the laws on paper are somewhat adequate, their implementation, to say the least, is tardy. During the past major conflagrations in Delhi (1984), Bombay (1993) and Gujarat (2002), it has been observed that deliberate attempt has been made by the State authorities to scuttle the rule of law. Turning a blind eye to communal propaganda, refusal to take down complaints, failure to use adequate force for controlling mobs, doctored post-mortems and absolutely tardy investigations have led to virtually no convictions. The relief and rehabilitation packages are also highly deficient and barely reach the victims.

Despite this, the victims have no option but to use the legal machinery. It is, therefore, important for groups and activists working on the issue of religious intolerance to know the various legal provisions, understand their limitations and work out ways of making them more effective.

After every major conflagration, an enquiry commission has been set up under the Commissions of Enquiry Act. Most of these commissions have invariably found the Right-wing groups and police guilty of violence and conspiracy as also the failure to take action. Unfortunately, under the Act, the findings of the commission are not binding and governments by and large have failed to take any action on these commissions.

The recommendations of Srikrishna Commission which conducted an enquiry into the Bombay riots of 1992-93 are a good example. Though the commission squarely held individual policeman and Shiv Sena leaders responsible for the riots none of them have been convicted. It is only rarely, like in the Best Bakery case, that convictions take place.

Besides, the existing laws do not adequately deal with command responsibility of higher-ups and clearly a law is needed to pin them down, to provide adequate relief and rehabilitation and to ensure speedy trials of these cases. Though the present central government has prepared a draft bill for this purpose, it is more of an eye-wash.

— May-June 2007

Endnote

1. Dr Ramesh Yaswant Prabhoo v. Shri Prabhakar Hasinath Kunte & Others; Bal Thackray v. Shri Prabhakar Hasinath Kunte & Others, (1996) 1 SCC 130, AIR 1996 SC 1113.

Carnivorous Flower: Bringing Adivasis Within 'Communal' Fold

Philanthropy is the new dubious card being played by the sangh parivar. At the core of this strategy lies education that is being used as a tool to convert unemployed adivasi youth.

SHANKAR GOPALAKRISHNAN & PRIYA SREENIVASA

Over the last 20 years, there has been no section of Indian society that has seen as rapid a growth of Rashtriya Swayam Sewak Sangh (RSS)-affiliated organisations as the adivasis or tribals. Across central India, RSS and sangh parivar outfits have been spreading at a very rapid rate, establishing a political hold. Obviously – though far from the only – the reflection is found in the electoral gains of the BJP in these areas.

These developments reflect a long-term strategy, aimed at building a mass base in line with what appears to be a 'fascist' agenda through a conscious process of cadre-building and organisational expansion. This article explores this strategy and provides some insights not only into the politics of the adivasi areas, but into the very nature of the growing trends that has the potential to lead to the emergence of 'fascist' politics in India.

TRIBALS UNDER SIEGE

To understand this phenomenon, we first have to note the political situation in adivasi and forest areas. India's most marginalised communities, adivasis live in a situation of extreme poverty and destitution which is – contrary to common perception – by no means accidental. It has been produced by systematic and steadily intensifying seizures of their resources over the past centuries. Over the past 150 years, this seizure has taken a particularly virulent form, starting with forest laws that seized adivasi homelands and continuing into the essentially colonial and extractive relationship that both the British and post-independence Indian governments have had with the adivasi areas. Forced displacement, evictions, and the operation of mining and other destructive industries have resulted in millions of people losing their homes and livelihoods.

This reality has in turn had consequences for the political forces in adivasi areas. Since the late 19th century, these areas have seen some of the biggest uprisings against British and post-colonial Indian rule, uprisings that in the northeast have now become decades-long civil wars. The brutal repression of local resistance, the continued practice of extracting resources from adivasi areas and the cultural and geographical isolation of tribal belts has meant that these people remain not only economically but also politically marginalised. They are often grouped with the dalits but the adivasi participation in mainstream politics is rarely through parties that claim to represent adivasis as a community (with the exception, to some extent, of Jharkhand). Rather, in parliamentary politics, they were largely loyal voters of the Congress.

However, the same factors have also meant that these areas have become home to most of the radical political movements of India. Of the three major communist uprisings at the time of Independence, two – Talasari and Telengana – had large-scale adivasi participation. Today, the forests and tribal areas have become the stronghold of Maoist organisations on the one hand and of non-party political formations on the other.

Yet, it is not only radical forces of the left that have established themselves in tribal areas; it is also radical forces of the right, namely the sangh parivar that has taken roots here. The historical factors outlined above account to some extent for the decision of the parivar to focus on tribals for organisational expansion. And it is for this reason that the parivar's strategy in these areas, as we shall see, has focused in a large measure on organisation building rather than on the kind of orchestrated violence seen elsewhere.

TRENDS OF 'HINDUISATION'

Before coming to the sangh parivar's own strategies, there is one other factor which must also be taken into account. For most of the 19th and 20th centuries, the only outside social and religious actor in most adivasi areas were Christian missionaries. The relationship between these missionaries and the local community's own culture and traditions varied very widely, ranging from friendly syncretism to open hostility, but in many areas did not lead to large-scale conversions. In recent times, however, their spread has been matched -- and in all likelihood exceeded -- by the much more rapid spread of revivalist Hindu sects, whose agenda must also be seen as closely related to that of the sangh parivar.

A good case study of the activities of such sects was seen by one of us during her time with *Kashtakari* Sanghatna, an adivasi mass organisation working in Thane district. In this area, three sects in particular – known as the *Nirankari, Jai Gurudev* and *Satgurudev* sects – have been expanding. These sects all claim to be preaching the teachings of different *babas*, but share a number of common features. First, they are highly organised. Preachers travel through the villages and spread the teachings, which are followed by weekly *satsangs*, often run by local villagers, and regular public meetings addressed by the *babas*. Weekly handbills and newsletters were also circulated which were read out at meetings and *satsangs*.

Second, and of more interest, is the type of Hinduism that is preached by these sects. A heavy emphasis is placed on notions of purity, which are expressed through vegetarianism, a ban on alcohol and a practice of eating separately from others. New practices of gender segregation – such as women covering their heads – are also promoted. *Satsangs* and *babas* preach a notion of a formless god, to be worshipped by communal singing and prayer. In this sense these sects bear more resemblance to the *advaita* school than to any practice of mainstream Hinduism.

Moreover, these are all ideas that were hitherto entirely absent from adivasi culture. Contrary to frequent claims that adivasis are "essentially Hindus", the spirituality of adivasi cultures is entirely distinct from that of Brahminical Hinduism. Typically, adivasi communities worship nature deities and ancestral spirits that vary from area to area, not the gods and goddesses of the Hindu pantheon. Interpenetration and acculturation have in many cases led to mixtures of Hindu practices with traditional religion, but the two are by no means the same.

The introduction of Brahminical notions of 'purity' by these sects has a particularly destructive effect, in that it implicitly leads to a notion of hierarchy and division within communities. This breaks community solidarity in a society that has traditionally been highly egalitarian and centred around community institutions. It also has natural parallels to the ideology of the sangh parivar, paving the way for the entry of these organisations.

Finally, one should note that adivasis do not join these sects purely out of ideological sympathy.

Meanwhile, the total lack of acknowledgment of adivasis' own traditions, and the propaganda offensive in schools and through the media that denigrates and silences these traditions, further enhances the attractiveness of sects that claim to teach how to be a "good person" in the eyes of 'mainstream' society.

SANGH STRATEGY

In order to build their base in these areas, the RSS and its affiliates have resorted to a number of strategies historically. Since the 1960s, a steady penetration into adivasi belts has been attempted by the Vishwa Hindu Parishad (VHP) and the Vanvasi Kalyan Ashram (VKA) by imitation of what was seen as the Christian missionaries' model – entry into tribal areas through 'service'. Like the missionaries, the sangh parivar has focused on education and health, setting up clinics, mobile health vans and schools in adivasi areas. The VKA has also made an concerted effort to set up hostels for young adivasi schoolchildren who have to stay away from home. These service initiatives have steadily expanded and built up a name, a presence and a degree of support for sangh parivar organisations in these areas. The hostels in particular served an even more important function – they became centres for cadre building and sangh parivar ideological training, with many of their students and graduates going on to become cadre of the Vanvasi Kalyan Ashram, the VHP and other sangh affiliates.

The latest such initiative of the sangh parivar both continues with this trend, but also marks a qualitatively new phase. Since the mid-1990's, much of the educational and organisational effort of the VKA and the VHP has gone into the setting up of 'ekal vidyalayas' (one teacher schools) in adivasi areas. The ekal

vidyalayas are ostensibly informal schools, set up for adivasi children who have dropped out of mainstream schools (in a similar manner to 'bridge' schools elsewhere). They are supposed to have a single teacher, be run in an informal manner and involve interactive cross-class education. The number of ekal vidyalayas across the country, according to the official statistics on their website (which, as we shall see, are not necessarily accurate) is roughly 31,000.

In our time in *Kashtakari Sanghatna*, some information about the functioning of ekal vidyalaya schools became available, both from an encounter between the organisation and the schools and from some interviews with ekal vidyalaya teachers. An ekal vidyalaya 'school' consists solely of an '*acharya*' (teacher), since there is no infrastructure provided. These '*acharyas*' were paid Rs. 300 or Rs. 500 a month in that area. There is generally one *acharya* per *pada* (hamlet), and the *acharya* is expected to conduct class several times a week for a few hours in the evening. The target group is school dropouts who have completed the fourth standard. Above the *acharyas* come *anchal pramukhs* and, in turn, *zilla pramukhs*, whose role is selection and training of *acharyas*, supervision of the schools and making payments. Officially, *acharyas* are to be chosen by a *'gram samiti'* but no such samitis appeared to exist in that area. Contrary also to claims that the ekal vidyalayas are closely monitored, there were at least two such schools which had ceased to function – because of intervention by the *Sanghatna* – but whose *acharyas* continued to draw their salaries for another six months.

The *acharyas* are trained in a series of steps: initially, a five day training *shibir* (camp), then a three month 'probation' during which schools are to be conducted but no salary is paid, and finally a ten-day training *shibir* before the youth formally become acharyas. After this, monthly meetings take place and further *shibirs* are held every three months or so. The content of the training is unclear, but formal teacher training and educational skills were rarely reported. Some elements that did emerge were a stress on the idea of "*vanvasis*" (as opposed to adivasis), the history of the RSS and the Sangh, and a stress that the purpose of ekal vidyalayas is *"gaon vikas."* Anti-Christian and anti-Muslim propaganda, such as talk of forced conversions and terrorism, also formed part of the training, but not the sole focus.

The broad curriculum of the *vidyalayas* seemed to be a mix of formal elements, including Marathi and Sanskrit, and non-formal education through 'games', religious songs and about the 'Hindu dharm'. The material to be taught in the *vidyalayas* was specified in a weekly newsletter sent out by the Vanvasi Kalyan Ashram, which specifies what subjects should be taught for that week. The acharyas are also given books at the initial training; we obtained copies of two of them. One was a history of the RSS and its work, and the other a book of songs and stories on the Sangh ideology.

The impact of the schools on the children themselves is unclear. Most people in the villages were either completely unaware of or indifferent to their functioning. An evaluation of the ekal vidyalayas for the HRD Ministry found that no lists existed of children who had attended ekal vidyalayas and that, in many areas, children who were enrolled and attending the formal government school were listed as dropouts attending the ekal vidyalayas.

EKAL VIDYALAYA POLITICS

What makes the ekal vidyalayas different from earlier initiatives? The lack of interest in training the teachers in education, the apparent lack of a clear curriculum, and the failure to monitor schools all seem to indicate that the sangh's chief interest in setting up ekal vidyalayas is not in the actual running of the school. This is in sharp contrast to Vidya Bharati or other educational efforts of the sangh, where indoctrination of schoolchildren is a key aspect of the project.

So why do ekal vidyalayas exist? We would argue that their purpose is in fact not education alone. Equally if not more important than the impact on the children is the impact on the youth who are recruited as *acharyas*. The ekal vidyalayas address a key lacuna in the sangh strategy for adivasi areas: the lack of a village level presence. By providing an entry point to attract and train educated adivasi youth, who typically form the nucleus of any political formation, the ekal vidyalayas act as a recruiting base for sangh cadre.

There are several features that would draw adivasi youth into ekal vidyalays. First, a strong push is made at the local level to portray the ekal vidyalayas as "apolitical" and concerned solely with *"gaon vikas"* (village development), and the youth were told that they would be dismissed if they joined any political organisation or party. An oath is also administered that, among other things, promises that ekal vidyalaya teachers will work

for the nation and will not discriminate on caste or religious grounds. For the youth who may not sympathise with the sangh ideology and not wish to be identified with the RSS or the BJP, this makes entry into the ekal vidyalayas seem non-controversial.

The second and more basic attraction is simple – the provision of a regular salary. In adivasi areas, unemployment among the educated youth runs at extremely high levels, and the prospect of a salaried job paying Rs. 300 a month is not a small thing.

These two attractions then provide the sangh access to the educated youth of the area. The gradual introduction of Hindutva ideology then becomes easier, and the indoctrination far more effective, than otherwise. The result is the gradual development of a cadre base among youth with recruits in literally every village, an organisational feat that any political group would envy.

MONEY, MONEY, MONEY

Since so much of the sangh agenda for adivasi areas is built around 'service', a key question arises: where do the resources for this work come from? Donations and informal fundraising no doubt play a large part, but there are two other sources: government funding and foreign funding.

Under the NDA government, heavy central and state government funding of sangh parivar activities took place. The Ministry of Human Resources Development, to their credit, suspended all funding and then halted it in April 2005. But the Ministry of Tribal Affairs continues to fund sangh parivar organisations as is evident from its website.

An even larger source of funding is foreign donations. Reports by Awaaz South Asia Watch (in the UK) and the Campaign to Stop Funding Hate (in the US) have exposed the fact that very large sums of money are raised in these countries by sangh parivar affiliates, generally in the name of either disaster relief or 'development' efforts. The two groups primarily engaged in these activities are the India Development and Relief Fund, in North America, and Sewa International elsewhere. Using the fact that Vanvasi Kalyan Ashram, Sewa Bharati and other Sangh affiliates are registered NGOs, this money is then transferred into their accounts and used for supporting sangh service activities.

A very large proportion of this money is transferred into adivasi areas. Ekal vidyalayas in particular have a separate funding structure, with money funnelled through the Ekal Vidyalaya Foundation, Friends of the Tribal Society and other registered sangh NGO's. Ekal vidyalayas also receive a lot of attention in the fundraising itself, where they are – in an uncanny parallel to what occurs in the villages – projected as apolitical and culturally sensitive "alternative schools."

But it should be recognised, as a final note, that this foreign funding is all arguably illegal. Section 5 of the Foreign Currency (Regulation) Act bans any foreign funding of organisations notified as being "of a political nature" without central government permission. The RSS, the VHP, the Akhil Bharatiya Vidyarthi Parishad and the Rashtra Sevika Samiti have been notified as such. Hence, channelling foreign funding to them directly or indirectly contravenes the FCRA. Since the overlap between RSS affiliates and the parent organisation is very high, the foreign fundraising described above violates the spirit of the Act and ought therefore to be considered illegal.

THE IMPACTS

What impact have these strategies had? The slow organisation buliding that the sangh has engaged in has already created a serious mass impact. The largest mass mobilisations of the sangh since the 2002 genocide in Gujarat have all occurred in adivasi areas. In December 2005, the VHP and the Vanvasi Kalyan Ashram organised a so-called *"Shabari Kumbh Mela"* in the Dangs district of Gujarat, claiming that the word 'Dangs' is a corruption of *'Dandakaranya'* and that the adivasi character Shabari in the *Ramayana* was in fact from this region. Approximately, one lakh people were mobilised for this 'new' kumbh by the sangh parivar, though not all of this number were adivasis.

Similarly, in eastern India, Jharkhand, Orissa and Chhattisgarh have seen repeated mobilisations in the last few years in the name of fighting 'conversions.' *Ghar vapsi* rallies ('returning home' ceremonies where Christian adivasis are ostensibly converted to Hinduism) have reportedly mobilised at least one lakh people on several occasions in Jharkhand and Orissa. Within Orissa, Phulbani district has seen annual rallies, most recently addressed by the Shankaracharya of Puri. In different areas, the mobilising strategy varies. In western Orissa, Christian tribals are targeted, exploiting resentment against their slightly higher educational and social status. In southern Orissa, the targets tend to be

be Dalits. In Jharkhand, efforts have been made to hijack traditional adivasi festivals and worship by the sangh parivar as 'lost' Hindu festivals. The sheer size of these mobilisations, together with the electoral sweep of the BJP in many of these areas, reflects a growing mass base for the sangh parivar.

SALWA JUDUM

But sangh work has not been limited to mobilising against minorities. Perhaps the most deadly manifestation of sangh involvement in recent years has been the 'salwa judum', the so-called "peace movement" formed in Chhattisgarh to fight the Maoists. The salwa judum is a state sponsored militia, armed and organised by the Chhattisgarh government and intended to attack the Maoist strongholds in Dantewada district of southern Chhattisgarh. Salwa judum operations consist of armed mob attacks on villages, who are forced to come to 'relief camps' on the roads while their villages are destroyed, as part of a campaign to deprive the Maoists of their support base. The camps in turn have no facilities for survival and tens of thousands of people are forced to subsist with little water and no food. While driven by the state government's anti-Maoist security agenda, salwa judum is also reportedly supported by industrial houses seeking access and control over the rich minerals and resources of the region. What has not emerged in as much detail, however, is the involvement of Hindutva groups in the salwa judum.

Notwithstanding the ostensible leadership of a Congress politician, it is generally accepted that the salwa judum was essentially a brainchild of the BJP. In an article recently circulated, Abhay Xaxa points out that, prior to the onset of salwa judum itself, the VHP and the VKA had already sent a large number of cadre into the fringes of the Maoist controlled areas to spread their message. Ekal vidyalayas were also opened in large numbers. Xaxa also argues that the dynamics of salwa judum bear a very strong resemblance to the tactics used in the *ghar vapsi* mobilisations, the brainchild of VKA leader Dilip Singh Judeo. In addition to these points, it is also known that VKA workers are involved in the camps, while most other organisations are kept out by the government.

Why should the sangh get involved in an operation such as salwa judum? To answer that, we have to stop seeing the RSS from the lens of secularism alone. As a fascist force – not merely a 'communal' one – the sangh has never limited its perspective to attacking minorities. The primary goal of fascism is the creation of an authoritarian, militaristic society; the attack on minorities is a facet of this, but hardly the only one. Equally critical is the repression and destruction of any movement towards liberation by the oppressed sections of society. Indeed, from its founding days the leaders of the RSS have always named three groups as their fundamental enemies, namely Muslims, Christians – and "Communists."

FIGHT AGAINST FASCISM

In the frequent equation that is drawn between communalism, fascism and anti-secularism in India's political discourse, we tend to forget that the sangh parivar is not an ideological force alone. It is a family of political organisations, whose primary activity – like that of any organisation – is consolidating its support base and extending its organisational structure. In no other sector of society is this as glaringly clear as in the adivasi areas. Responding to the sangh at the stage of violence or public displays of force is, in the case of adivasi belts, far too late. If we are to respond, we must do so now, at the stage when there is still a slim possibility of blocking the organisational consolidation of these forces. The fight here is not against anti-minority hatred alone; it is against fascism, the spread of fascist organisations and the horrific violence that they create.

Adivasis are called '*vanvasis*' by the sangh parivar, another part of the project to erase the history of adivasis as indigenous peoples.

— May-June 2007

Blood and Ashes

So were Ishrat Jahan and her colleagues murdered in a 'fake encounter'? Like Sohrabuddin Sheikh and his wife? Were others too victims of these extra-judicial murders? And how come the Narendra Modi regime seemed totally clueless? The fake encounter in Gujarat might open up a ghastly pandora's box of how a communalised hate-lab can manufacture its own brand of killers — in khaki.

AMIT SENGUPTA

What do you say about a successful hate laboratory where rank communalists have entrenched themselves across layers of governance and there is not a single window of secular justice and hope? So, while 'terrorists' are bumped off routinely without a trace and often in brazenly mysterious and diabolical circumstances, with the media often dogmatically toeing the establishment line, what about accountability of the top brass in the political and police establishment in the clear case of a fake encounter, as that of Sohrabuddin Sheikh and later his wife and sole witness Tulsiram Prajapati?

And what should be the nature of justice of the mass murderers — of S-6 in Godhra or Gujarat genocide 2002?

Witness the illustrious career of the Director-General of Police, Gujarat, PC Pande, promoted by Modi despite a rather uncanny track record. Pande, the then police chief of the city, allowed Ahmedabad to burn as killer mobs, often led by Vishwa Hindu Parishad (VHP) and Bajrang Dal, murdered men and children, raped women, looted and plundered shops and homes after the Godhra train killings. With the then VHP top gun Gordhan Zadaphia as home minister, and RSS pracharak Narendra Modi at the helm, Pande and his police force, as several independent reports, tribunals and media exposes, and also cell phone records have proved, allowed the mobs to go berserk in a pre-meditated, pre-planned, meticulously designed, State-sponsored massacre.

There are cell phone records of BJP-VHP leaders in police control rooms, and even Zadaphia was reportedly directly involved. There were reports that Pande met former Congress MP Ehsan Jafri and assured him of police protection – and soon after the mob came and burnt scores of people in the Gulberg society in Ahmedabad, hacking them to pieces. Jafri's wife saw her husband and others being butchered. Pande's police was nowhere around.

In Naroda Patiya in the city, survivors of the genocide have accused BJP-VHP leaders Mayaben Kodnani, Babu Bajrangi and Jaydeep Patel of openly instigating and manipulating

the mobs during the carnage. Bajrangi single-handedly stopped Parzania in Gujarat, while targeting young girls and boys in Ahmedabad, especially Muslims, as the top moral cop, even while the Gujarat police looked the other way. Indeed, BJP MP Babubhai Katara, an old RSS hand from Dahod, caught in the massive nexus of human trafficking recently, and his son, have reportedly been accused in the Gujarat killings. And how come the RSS-BJP top brass and the Gujarat police had no clue of this flourishing racket?

So what is so surprising about the fake encounter of Sohrabuddin Sheikh and his wife Kausar Bi in a state that has seen a spate of fake encounters since Modi unleashed his politics of mass elimination and collective phobia? Several Muslims killed in encounters have been branded as terrorists in a state where Modi and his followers have openly asked Indian Muslims to go to Pakistan: remember his xenophobic election campaign where he targeted the Muslims of Gujarat even while abusing Miyan Musharraf?

The theoretical premise of this hate lab is wonderfully designed, like an architect who plans a town: you organise State-sponsored massacres, you put Muslims in jail, you jail them under POTA, you allow the killers and rapists to go scot-free because most of them are your Sangh Parivar chums, you don't punish the communalised police, you push thousands into refugee camps and leave them to their condemned fate, you dismantle the refugee camps arbitrarily leaving thousands homeless and exiled in their own land; you block or delay FIRs or judicial processes, you block their economy and livelihood, you degrade them socially and culturally, you reduce them into helpless caricatures; you bribe witnesses to turn them hostile as in the Zahira Sheikh case, you tell the survivors – take back your complaints and we will forgive you; you create demographic, geographic, ethnic fragmentations as in Fascist Germany or Zionist Israel, you create a vicious climate of phobia and terror and push Indian Muslims into a terrorised, ghettoised corner so that there is not an iota of democracy, justice or self dignity, indeed, there is no hope at all. They are second-class citizens in their own country and they better accept that. And they can go to hell.

Meanwhile, even as the 'secular' Congress-led UPA, backed by the Left, plays blind, deaf and mute, and doesn't move one inch against the Modi regime and its vicious, anti-constitutional, extra constitutional apparatus, Modi declares himself a development man, 'vikas purush' – eyeing a cosy spot at the Centre – even posing himself as a future prime minister. This is secular democracy redefined. You have done that and been there. You have succeeded in creating several Auschwitzes in Gujarat. The totalitarian hate-lab is blooming, flourishing, expanding. Hence, now, dial 'd' for development.

Indeed, when the political establishment is run by rank communalists who abhor the constitutional principles of both democracy and secularism, when large sections of the police force, bureaucracy and law enforcement agencies have become communalised, with a section of compromised and unscrupulous officers at the helm, who have willfully allowed mobs to kill, rape and take over the city, and often scuttled the process of justice, how do you explain the Gujarat government's sudden high moral ground in 'surrendering' two top cops of the infamous Anti-Terrorist Squad (ATS) — their premier, patriotic, encounter specialist outfit?

ATS head DG Vanzara (now DG, Border Range, Gujarat), SP, Intelligence, Rajkumar Pandian, and MN Dinesh Kumar, SP, Alwar, Rajasthan, have been implicated in the 'fake encounter' death of Sohrabuddin Sheikh on November 26, 2005. Three other low level cops have been arrested, including the one who gave graphic details to investigation officer Geeta Johri. Vanzara was reportedly the blue-eyed boy of Narendra Modi. Now there are unverified allegations of the 'invisible hands' of both Modi and Home Minister Amit Shah behind the killing, that a "gang of contract killers" are calling the shots in Gujarat's powerful echelons, that old skeletons of dead bodies are tumbling over. BJP dissenter Nalin Bhat has even demanded that all the 10-odd 'encounters' carried out by Vanzara and his team be brought under the CBI scanner. There are stories and allegations that Vanzara was only following orders from above. All the old cold-blooded encounters, including that of Ishrat Jahan and three others, and young Sameer Pathan are being dug up. If the Gujarat police story of 'Mission Modi Assassination' to justify the killings turns out to be wrong, Modi and his top political and police brass, will rediscover the incredible realism of facing difficult charges.

The arrests have apparently been initiated after a report by Geeta Johri IG, CID, (Crime), who concluded that Sheikh's killing was a clear case of fake encounter. She conducted the probe after a Supreme

Court directive and submitted her report in December 2006. So why did the state government choose to ignore the findings for so long? And why and how was the investigation taken away from Johri and handed over to another officer, who actually arrested the top cops and took the Gujarat government and its police chief by surprise?

Indeed, even in the Gujarat police, honest and secular police officers are feeling suffocated and reportedly there is a virtual divide. This was reflected during the 2002 carnage also, and Modi did not really take it kindly when some police officials and administrators refused to allow the Hindutva gangs to go berserk and kept law and order tightly under control. Top cop Sreekumar fought a relentless and solitary battle against Modi after the carnage, but, obviously, he was not alone who shared the outrage: some police officials were apparently uncomfortable of police complicity with the 'overtly communal' BJP-government and the Hindutva mobs during and after the 2002 genocide. Besides, the theory doing the rounds is that the Gujarat government is opposing a CBI enquiry because the chief minister and home minister's role in the fake encounter will become transparent. And with it, all the other encounters in which Modi was often the so-called target.

Now there is evidence emerging that even Sheikh's wife Kausarbi was "raped and killed". There are investigation reports that she was taken to a farmhouse near Gandhinagar and killed on the night of November 28, after Sheikh was killed on November 26, 2005. Her body was later carted to Vanzara's home village of Ilol in Himmatnagar, after elaborate preparations, and burnt. At least one cop was reportedly present when her body was burnt. That she was raped in the farmhouse has also been reported, following which she apparently became 'hysterical' (how much more sick can this get?). Thus she had to be eliminated.

Even the sole witness, reportedly a police informer, has been murdered. So how come a top 'anti-terrorist' cop and his senior colleagues and juniors, covering territories across two states, chasing a Hyderabad-Sangli bus, went about this ghastly ritual of extra-judicial 'kidnapping', killing, rape, killings, before keeping them illegally as hostages in shady farmhouses, in that order, and then burning Kausarbi's body and eliminating all traces of her remains, over some days and nights through some complicated procedures, across some distances, with a crane in tow and a pile of wood and a camouflaged well, a few private 'borrowed' vehicles and a farmhouse of a local BJP leader — and the intelligence apparatus of the Modi regime, its top police brass, its bureaucracy and its home ministry had no clue?

There are now unconfirmed stories of Sheikh, allegedly a small time extortionist, being bumped off because he knew too much about certain inside dealings, that he was part of a conspiracy involving a sleazy CD, that his family had old linkages with the BJP in Rajasthan, that his family was in the marble trade and mother is a sarpanch in a village, that he got into trouble because of the marble-trade extortions; crucially, that he knew too much, was used and bumped off. But these reports are still unconnected and unconfirmed and the thread weaving it into a credible story is still in a twilight zone. Surely, the CID investigation, Geeta Johri's final report, and a proper CBI enquiry without the interference of the Gujarat police and government will open the lid on these gruesome and elaborate killings. Besides, it will open the ghastly pandora's box of several other encounter killings, which, uncannily, look rather familiar in form and content.

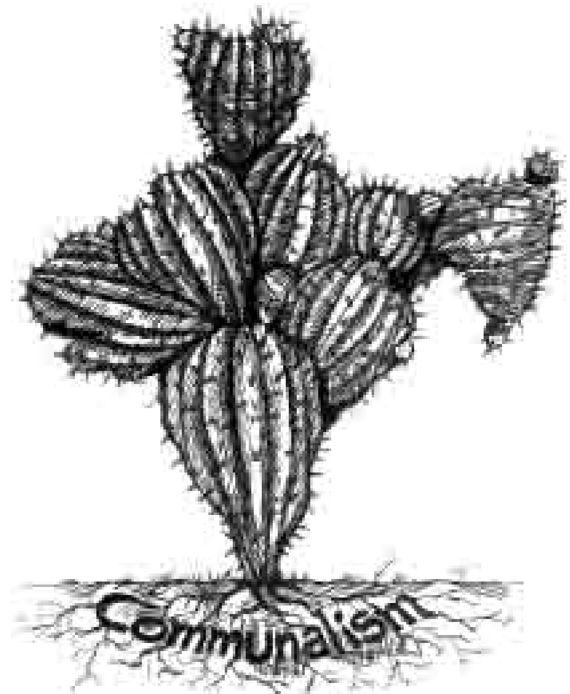
Remember the cold-blooded killings of a young girl Ishrat Jahan from Mumbra and three other 'fidayeen terrorists' in Ahmedabad on June 15, 2004? We were told then that they were on a "mission" to assassinate Modi. Here's an excerpt from the report documented by a national civil liberties fact-finding team: "According to the police, only one 'terrorist' had stepped out and there was only one AK-56 and two pistols found among the four of them. It is indeed surprising that about 20-member strong two police teams which had surrounded the car and were well armed with AK-47 rifles and several revolvers could not capture any of them. The use of force by the police has to be commensurate with the force used by the opposite group, which does not seem to be the case in this incident. This raises doubts about their intentions which seem to be directly eliminating the accused, instead of subjecting them to the due process of law for punishing the guilty…"

"If, on the other hand, the terrorists are said to have fired 42 rounds at the police teams, as the police claim, how is it possible that there were no injuries or bullet marks on a single policeman? The absence of injury suffered by the policemen makes it difficult to establish their claim that they fired at the terrorists in self-defence…"

So were Ishrat Jahan and her colleagues murdered in a 'fake encounter'? Like Sohrabuddin Sheikh and his wife? Were others too victims of these extra-judicial murders? How come 'terrorists' are always killed and never captured which can surely lead to their networks and save 'other potential targets'? How come cops never get injured or fatally wounded? How is it that most of them are on a mission to kill Modi and are linked with Pakistani Islamic groups and are almost always total failures? How come the same cops are always involved in the same kind of encounters? Isn't this method of encounters much too predictable, one-dimensional and unilinear? And is it possible that the political establishment, from the chief minister to his home minister and others, the top intelligence, police and administrative brass, are totally unaware of these autonomous police actions?

Will the truth ever come out? Will justice ever overcome injustice? Or will it be buried in the black hole of the thirsty 'well of Indian democracy', like that ill-fated well in Vanzara's village where Kausarbi's ashes has been apparently buried, to eliminate evidence.

— May-June 2007



This Success is Scarred

Journalist Dionne Bunsha's meticulous reportage of the Gujarat carnage enters the labyrinths of a laboratory where the smell of hate is coloured with human blood and fear and alienation stalks the landscape like a condemned minority report.

HARSH DOBHAL

If the Gujarat experiment was a 'success', as declared by Ashok Singhal after the massacre of over 2,000 plus Muslims, following 'successful' election victory of the BJP in the state, and the consolidation of Narendra Modi as the Hindutva Hriday Samrat of the RSS/VHP/Bajrang Dal/BJP, Dionne Bunsha's Scarred: Experiments with Violence in Gujarat, is a serious journalistic attempt to expose the frightening reality behind this 'success'. This is a larger political design of organised State sponsored violence executed with meticulous precision as in the post-Godhra carnage, or the threat of violence as State terrorism as it was recently enacted in Vadodara, when the UPA-led Centre acted quickly and stopped the perverse show. Clearly, this is manufactured consent, strategic xenophobia and the total isolation and alienation of the minority communities as second class citizens. The book brings out well-researched, scary details of this 'successful' experiment in Modi's lab of hate politics. The fascist strategy of electoral benefits that the perpetrators of Gujarat carnage are seeking in Gujarat and all over India.

A painstakingly documented book, Scarred gives clinical details of the methodical manner in which these 'success' incidents were action-replayed: "When our houses were being stoned, the police asked us to come out. We thought they would rescue us. Instead, they let the mob surround us on all sides... The mob threw petrol and set people on fire. I hid behind a wall and could see my parents in flames. Someone hit me on the head and I fell unconscious. When I woke up, everything and everyone was in ashes," says Javed Sheikh of Naroda Patiya, Ahmedabad.

Javed's story is not a stray incident. It's part of a macabre pattern. In case after case, as Bunsha's book documents in detail, victims were trapped, smashed, cut into pieces, pierced with trishuls or rods and set on fire. Women were raped, gang-raped, wombs of pregnant women scooped up and infants murdered brutally, as has been documented in several media reports, films and books. Organised, systematic attacks on Muslims, people locked up inside, their houses set on fire and human beings roasted alive. There are too many gory tales of the savagery that continued for days in Gandhi's Gujarat.

The author has recorded testimonies of inhumanity in relief camp after relief camp, making it crystal clear that during the violence, the perpetrators of this crime had the backing of

the State. Those who sought police help were told that they had no orders to help them. The government, which could have controlled the entire situation, displayed a totally partisan attitude by not acting or deliberately delaying action to prevent the carnage, or even, shamefully, tacitly or overtly backing the killer mobs. For Narendra Modi, who violated every conceivable norm of the Indian Constitution, political convention or decency, "every action has a reaction".

However, do we have definite answers as to who had started the fire at Godhra? The author says, "Actually, there is no clear evidence to show that the burning of the Sabarmati Express was a pre-meditated terrorist act. In fact, it might have been the result of a fight on the railway platform that escalated into gruesome violence. There is no clear-cut conclusion either way. It is unlikely that we will ever know the truth about Godhra because of the political implications. But even if it was a terrorist attack, does it justify the killing of 1,000 (?) other people who had nothing to do with the crime? Because of a handful of criminals, can we punish all those who follow the same religion? By the same logic, do the actions of the Gujarat rioters damn all those of the Hindu faith?" But Modi has already declared (and so had L K Advani) that what happened in Godhra was a terrorist act carried out by a group of terrorists, a deliberate lie that was used as an excuse for attacking innocent Muslims everywhere else in the state.

What clearly comes out in Scarred is the fact that it was not a communal riot and there was no clash between two communities. Rather, it was a well-planned, systematic, methodical attack on Muslims, sponsored and organised by the Narendra Modi government with RSS fronts in the vanguard. And the attacks were not confined to Muslim ghettos only, but also politicians, judges, police officials, the rich and the poor, hoteliers, businessmen, urban women and children, anyone who happened to be Muslim. The middle class of Gujarat actively participated in looting Muslim shops. "There are less obvious victims of the riots too — top police officers who happened to be Muslims — they were forced to watch helplessly while the city burned. Their high-ranking positions meant little in that period. They were not even posted on official duty, and as thousands called begging to be saved, they couldn't do much to help. Their own safety was fragile and the buildings they lived in were attacked."

A riot would mean some sort of resistance from another community, some semblance of this resistance, or retaliation; but in the case of the Gujarat genocide, many Muslims were not allowed to even escape and were barbarically trapped in their homes, raped or lynched and turned into ashes. In the case of a riot, both sides suffer losses and, more importantly, both can turn to the State for help. But in Gujarat, Muslims alone had been under attack, cornered, massacred. This was truly a successful experiment in ethnic cleansing by the neo-Nazi forces, champions of unrestrained bestial carnage unleashed on Muslim civilians, led by BJP/RSS and its fronts.

The book also documents the situation in Gujarat three years after the carnage, the slow and painful process of recovery for the victims in a hostile environment, where, as Bunsha says in post-script, "let's not forget that the minorities in Gujarat still feel under siege. There is still a lot of insecurity. People hesitate to stand up for their rights. Segregation exists right from homes to classrooms to hospitals." And if you are a Muslim, the police can barge into your room and brand you as a criminal or terrorist. For many survivors, time seems to have come to a standstill with no hope for justice as the perpetrators of communal violence are only not punished but the Gujarat government has shamelessly closed down all the cases for 'no evidence'. Consequently, the criminals not only roam around freely and fearlessly, but often celebrate their 'victory' by publicly flaunting their muscles. Thousands of survivors who fled their homes have not returned back while victims seeking justice feared for their safety; they either faced arrest or threat of intimidation.

"The book is a great tribute to those who have undergone unimaginable suffering, and is an excellent attempt to provide a place in history to those known and unknown victims who lost their life in Gujarat's communal riots in 2002... No amount of patience can bring what we have lost back to us. The very least we expect by way of consolation is justice, however delayed. I pray that all those who read this book will take a vow to wipe out hate and jealousy from their hearts to prevent such ghastly events from happening." — Zakia A Jafri, widow of late Ashan Jafri, an ex-member of Parliament who was lynched by a mob outside his house in Gulberg society in Ahmedabad.

— June-July 2006

History Through the Prism of Constructed Identity

Shivaji, a Maharashtrian figure, has been selectively valorized by parochial and downright communal elements in Maharashtra, especially over the past two and a half decades. The narrow world view that these forces represent would prefer to forget the bitter struggle this ruler had to undertake with the entrenched Brahminical hierarchy at the time. The story of his coronation, as detailed by eminent historialns, is a sorry tale of how even a man who saw such tremendous success and popularity in his lifetime had to hunt down a Brahmin priest from Benares to perform the 'purification' and thread ceremony that could effect legitimacy of his coronation.

TEESTA SETALVAD

The singular failure of the Indian elite, post Independence, to handle our past and our history, honestly or creatively, has been taken to extreme proportions in the NCERT's brazen attempts to delete those portions of history texts that 'harm or hurt community sentiments.' Individual and collective histories are to be subject to the prism of community identity alone, and decisions in that regard are to be taken by the vociferous brokers of that identity in the public sphere.

Maharashtra, a region with a vibrant, radical and reformist tradition, which has always challenged deep caste hierarchies and barriers, has been an unfortunate victim of a narrow parochialism for over two decades now.

A curious dichotomy prevails here. On the one hand, fairly radical publications, including the Complete Works, of Jyotiba Phule, Sahu Maharaj and Dr Babasaheb Ambedkar are published officially by the publications division of the Maharashtra government. And on the other hand, there is a rigid reluctance to allow the state government textbooks to reflect open and non- parochial ideas and writings.

One area the Indian state has always maintained strong clutches of control over, is what may or may not transpire within the classroom, especially related to the sensitive subject of history.

Khoj - Education for a Plural India Programme, has been working in the area of alternate curricular content of history and social studies for over seven years now. As part of this research, an experiment is being applied through some private schools in Mumbai, which entails

rewriting and enhancing many parts of the SSC (Maharashtra State Secondary School syllabus).

The handbook for history teachers - worked out in collaboration with teachers from the Don Bosco Schools - traces the entire period of local history to world history, and also deals with regional history in detail. The section on Shivaji is dealt with in a balanced and rational manner. It also deals with, among other things, the caste background of Shivaji and his rise to control and glory despite these restrictive factors. Besides, the handbook also deals with the character of Afzal Khan in a balanced manner. These are the sections that have raised the hackles of the self-styled guardians of public morality.

The entire country has been privy to an intense debate on the issue of the partisan and narrow readings, and interpretations of the past. Maharashtra - at present ruled by the 'secular' Congress-NCP combine, but shackled by the rabid Shiv Sena - saw an outburst of intimidation and unreasoned rhetoric over the introduction of an alternate handbook that dealt with Shivaji in a balanced and rational manner.

THE REAL SHIVAJI

Shivaji, a Maharashtrian figure, has been selectively valourized by parochial and downright communal elements in Maharashtra, especially over the past two and a half decades. These elements have consistently used threat tactics, bullying and intimidation on any efforts to change the orientation in the official text, even towards the Maharashtra State Text Book Board, to that attempted reworking of history in tune with the 1986 Education Policy.

The narrow world view that these forces represent would prefer to forget the bitter struggle this ruler had to undertake with the entrenched Brahminical hierarchy at the time. The story of his coronation (detailed by eminent historians Sardesai and Sarkar, see boxes) is a sorry tale of how even a man who saw such tremendous success and popularity in his lifetime had to hunt down a Brahmin priest from Benares to perform the 'purification' and thread ceremony that could effect legitimacy on his coronation. Moreover, the services of the Brahmin priesthood that consented to the exercise, had to be compensated with significant monetary largesse.

Sectarian and divisive outfits like the Hindu Mahasabha, the RSS and the Shiv Sena have used intimidation to gloss over these historical facts periodically. A rich alternate tradition in Maharashtra has, through the works of Jayant Gadkari, N. R. Pathak, Govind Pansare and Sharad Patil, periodically resurrected the real Shivaji. Veteran trade unionist S. A. Dange in a famous lecture called Tyanche Shivaji, Aamche Shivaji (delivered to workers), protested in the late '50s against the manipulation of Shivaji into a 'Hindu' ruler, deliberately ignoring significant efforts made by him within his kingdom to give equal status to persons of different religious persuasions.

For the Shiv Sena, through its crude but popular audio cassettes of Marathi povadas (folk songs), the battle between Shivaji and Afzal Khan is a metaphor for (and justification of) their current politics - demonization of the Muslim minority, and the legitimization of the violence used against them.

THE DON BOSCO EPISODE

In the light of this, it is particularly educative to see how the organs of the state - both the police and the state education department - functioned after the Shiv Sena doled out its threat to the school management.

On the morning of September 17, 2001 after one or two parents had failed to intimidate the school into withdrawing the handbooks - a Shiv Sena Board outside the school displayed the outfit's intention of bringing a protest march (morcha) against 'derogatory remarks against Shivaji by calling him a Shudra' and hurting religious sentiments! The moment the school contacted me as the author of the handbook, I said that we should offer to refer the 'controversial' part to a committee of experts, but that intimidation and threats to the school should be withdrawn.

We made vain attempts to get protection for the school - given the violent antecedents of the Shiv Sena - from the police.

However, instead of supporting this stand for dialogue and rationality taken by the school management, the local police played a proactive role in demanding an apology from the school before the protest. The result: on the morning of the protest on September 19, 2001, local Shiv Sainiks assembled and dispersed, having achieved a 'victory.' Even more interesting is the role played by the state education department under a 'secular' combine on that day. Representatives of the department approached the school management and extracted an assurance that the book would be withdrawn.

Jadunath Sarkar - The Evils of Caste

Teesta Setalvad has researched Shivaji extensively. Here are excerpts from the work of one of the oldest authorities on the Marathas, the historian Jadunath Sarkar. In two books on the issue, the historian has dealt with the ticklish issue of caste that affected Shivaji's acceptance as a formal ruler:

'A deep study of Maratha society, indeed of society throughout India, reveals some facts which it is considered patriotism to ignore. We realize that the greatest obstacles to Shivaji's success were not Mughals or Adil Shahis, Siddis or Feringis, but his own countrymen. First, we cannot be blind to the truth that the dominant factor in Indian life - even today, no less than in the seventeenth century - is caste, and neither religion nor country. By caste must not be understood the four broad divisions of the Hindus, which exist only in the text-books and the airy philosophical generalisations, delivered from platforms. The caste that really counts, the division that is a living force, is the sub-division and sub-sub-division into innumerable small groups called shakhas or branches (more correctly twigs or I should say, leaves, they are so many!) into which each caste is split up and within which alone marrying and giving in marriage, eating and drinking together take place...

And each of these smallest sub-divisions of the Brahman caste is separated from the other sub-divisions as completely as it is from an altogether different caste like the Vaishya or Shudra, e.g., the Kanyakubja and Sarayupari Brahmans of northern India, the Konkanastha and Deshastha of Maharashtra.

Personal Jealousy Hindering Shivaji

Shivaji was not contented with all his con-quests of territory and vaults full of looted treasure, so long as he was not recognised as a Kshatriya, entitled to wear the sacred thread and to have the Vedic hymns chanted at his domestic rites. The Brahmans alone could give him such recognition, and though they swallowed the sacred thread, they boggled at the Vedokta. The result was a rupture... Whichever side had the rights of the case, one thing is certain, namely, that this internally torn community had not the sine qua non of a nation. Nor did Maharashtra acquire that sine qua non ever after. The Peshwas were Brahmans from Konkan, and the Brahmans of the upland (Desh) despised them as less pure in blood. The result was that the state policy of Maharashtra under the Peshwas, instead of being directed to national ends, was now degraded into upholding the prestige of one family or social sub-division.

Shivaji had, besides, almost to the end of his days, to struggle against the jealousy, scorn, indifference and even opposition of certain Maratha families, his equals in caste sub-division and once in fortune and social position, whom he had now outdistanced. The Bhonsle Savants of Vadi, the Jadavs of Sindhkhed, the Mores of Javli, and (to a lesser extent) the Nimbalkars, despised and kept aloof from the upstart grandson of that Maloji whom some old men still living remembered to have seen tilling his fields like a Kunbi! Shivaji's own brother Vyankoji fought against him during the Mughal invasion of Bijapur in 1666.

Shivaji's religious toleration and equal treatment of all subjects: He stands on a lofty pedestal in the hall of the worthies of history, not because he was a Hindu champion, but because he was an ideal householder, an ideal king, and an unrivalled nation-builder. He was devoted to his mother, loving to his children, true to his wives, and scrupulously pure in his relations with other women. Even the most beautiful female captive of war was addressed by him as his mother. Free from all vices and indolence in his private life, he displayed the highest genius as a king and as an organiser. In that age of religious bigotry, he followed a policy of the most liberal toleration for all creeds.'

— House of Shivaji by Jadunath Sarkar

Three major issues related to the conduct of public servants arise from the controversy, and all have become the subject matter of complaints by the management and the author before the Maharashtra State Human Rights Commission and the Maharashtra State Minorities Commission.

One is the conduct of the police, both visibly and behind the scenes. Secondly, there is the question of the state education department seeking to control alternate and dynamic renderings of history, as also experiments in the creative teaching of history. Thirdly, and critically, is the deep- rooted caste bias or hegemony evident in the interpretation of all Indian history that affects the factual position regarding Shivaji's caste background. The barriers that he faced are well-documented historical research. It is taboo, however, to bring them before young and inquiring minds, and herein lies the issue of state controls on independent historical thought and research. Through all of Monday, September 17, 2001, despite repeated efforts by the school management to

contact the local police station for protection from the Shiv Sena, the DCP S.S. Khemkar refused to respond. The matter cannot be seen in isolation without considering the fear and terror that an outfit like the Shiv Sena generates in Mumbai.

Only weeks before this incident, Shiv Sainiks had displayed their political character by destroying the Singhania hospital in Thane, north of Mumbai. The hospital was burned down and two patients on life support systems died as a result. The provocation? Their leader, Anand Dighe had died there! The police watched silently as the mob proceeded with its agenda of complete destruction - the hospital has since been closed down and its employees rendered jobless. These were the antecedents of the Shiv Sena that threatened Don Bosco, Borivili with its agitation. In the week of this agitation, women Shiv Sainiks had stormed into the chambers of the Mumbai Municipal Commissioner and roughed him up. Yet what does the police do in these circumstances to reassure a school which young children attend?

Despite it being made clear repeatedly by the school management and the author that the issue was open for dialogue and discussion, the police, through the local DCP S.S. Khemkar, pressurized the school into completely withdrawing the handbook. Section 144 (order against assembly with weapons) was in force due to the tensions following the events in the USA. In spite of this, instead of prevailing upon the Shiv Sena to stop their demonstration, which given their proclivities, could turn violent, the Commissioner, through the DCP, used his physical presence at the school, threats and intimidation to simply make the school 'apologize' to the Shiv Sena and promise to 'withdraw' the book.

Serious questions on the rule of law and the duties of both the police and the state education department are raised here. One, the intimidation / threat / protest was declared by the Shiv Sena (with its well known background) against its target - a school - a minority institution with impeccable standards. Instead of controlling the offenders through lawful means, the police target the institution that is facing intimidation.

The same approach was followed by the 'second state functionary, the State Education Department. Under law and the codes governing the SSC school board, there is nothing to prevent schools from using material to enhance the syllabus. And yet the state government responds to the Shiv Sena intimidation with suspicious promptness. Maharashtra, like other states in the country, has seen the mushrooming of several thousand institutions run by the RSS / VHP that freely introduce supplementary texts, which spread hatred and division. Does the state government, under 'secular' dispensations, ever dare to send them an investigatory note? Why is it that efforts to rationalize history and cleanse it of the cobwebs of bigotry, pose such a challenge to our institutions? Why are those who blatantly promote bigotry and stereotypes not seen as the real threats?

THE LEGAL SITUATION

The matter presently lies before the Maharashtra State Human Rights Commission. Meanwhile, in a parallel move, the Borivili police station has instituted an investigation under the Indian Penal Code against the author of the book. The police also claim to have approached the state government for sanction to prosecute the author for 'outraging communal harmony!'

According to the Code that binds schools in the state, the section on 'Curriculum-Syllabus - Regulation 42' says: 'Schools shall follow the syllabuses laid down or specifically permitted by the Department for use in classes V-VII and by the Maharashtra State Board of Secondary and Higher Secondary Education for classes VII-X and FYJC- SYJC or by the Council for ISC Examination as the case may be, from time to time.' The restriction is to simply adhere to the guidelines in the syllabus. There are special regulations under the Code that allow for the adoption of variations or of alternative curricula Rule 43.1: 'The managements of schools may have the freedom, within the general framework of the curriculum, to adopt variations so far as the syllabus for classes V-VII is concerned, provided that such variations are brought to the notice of the Deputy Director and are duly approved by him. All such cases will be fully reported by the Deputy Director concerned to the Director.' 43.2: 'Managements of schools may adopt alternative curricula for standards V-VII with the previous sanction of the Director, provided the curricula conform generally to the main objectives underlying the curriculum prescribed by the Department.'

Text-Books Rule 44.1: 'Schools shall not use text-books, copy-books or atlases other than those sanctioned by the Department, Maharashtra State Board of Secondary and Higher Secondary Education or the Council for Indian School Certificate Examination, as the case may be. Heads of schools are free to prescribe any suitable

The Story of Shivaji's Coronation

Apart from Jadunath Sarkar, the historian Govind Sakharam Sardesai's New History of the Marathas, too, notes the ticklish issues surrounding Shivaji's coronation.

'The Coronation;

By the beginning of 1673 the idea of a public coronation began to mate-rialise, and when preparations were fully completed, the event took place at fort Raigad, on Saturday 5, June 1674, the day of the sun's entering the constellation Leo.
The orthodox Brahman opinion was not favourable to Shivaji's claim to be recognised as a Kshatriya by blood, although he had proved this claim by action. More than a thousand years had passed since such a ceremony was last performed, and on that account men's memories had been entirely dimmed.'

— New History of The Marathas by Govind Sakharam Sardesai.

books for supplementary reading, subject to the general instructions, if any, of the Director. For subject and standards for which there are no books on the sanctioned list, schools may use any suitable books with the previous approval of the appropriate authority.'

INTERNATIONAL LAW

International law too encourages individuals to have free access to independent research and material. Both the International Covenant of Economic, Social and Cultural Rights, and the International Covenant of Civic and Political Rights accord these rights to a citizen.

The International Covenant of Economic, Social and Cultural Rights, is fairly explicit in this regard.

Article 13.1 states: 'The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace. 3: The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions. 4: No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.' Article 15. 1 states: 'The States Parties to the present Covenant recognize the right of everyone: (a) to take part in cultural life; (b) to enjoy the benefits of scientific progress and its applications; (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. 2: The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture. 3: The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.'

In essence, this covenant of international law gives citizens, groups and educational institutions the inherent right to pursue ideas and thoughts with freedom of conscience, unshackled by restrictive national regulations and standards. It is evident that Indian statutory law lags reluctantly behind. More importantly, attitudes regarding free thought and free association - guaranteed as they are in the very formation of the National and State Human Rights Commissions - are sorely wanting. Governments are reluctant to create such bodies, and thereafter grant them adequate powers. Wings of state find them just another encumbrance as they will have to be accountable to them later.

— April-May 2002

SECTION 2

In an age when politics is giving way to market, poor stand lesser chance as judiciary too undergoes restructuring. This is called for to suit the needs of market economy where billionaire's right to remain super rich and plight of the most impoverished to be super-poor are going to be accepted. Criminal Justice seems well and truly dead. The criminal law protection of accused persons has been diluted over the years in order to make it almost nugatory. It has disintegrated because of the higher judiciary's rulings that overrule not only their own affirmations made in the past but also guarantees provided under the Constitution to protect an individual's life and liberty.

The NHRC on Salwa Judum: A Most Friendly Inquiry

The Supreme Court, which is hearing writ petitions on the Salwa Judum in Chhattisgarh, asked the National Human Rights Commission to constitute a fact finding committee that would prepare a report on allegations “relating to violation of human rights by the Naxalites and Salwa Judum”. The report, prepared by a group set up by the police wing of the NHRC, makes no pretence of neutrality or objectivity. It reads like a partisan statement, whose tone and tenor is to protect the Salwa Judum and its image from being tarnished by allegations of crime.

K BALAGOPAL

The Salwa Judum phenomenon has occasioned a number of reports, most of them strongly critical and the patronage it gets from the state in Chhattisgarh. Not many who know the situation in Dantewada (now Dantewada and Bijapur) districts of the state and who are fair-minded would quarrel with the criticism, though there can be and there are differences in the assessment of what exactly the Salwa Judum signifies. But the fair-minded observer would be disturbed by the almost total absence of any critical comment on the Maoists in most of the reports.

While the fair-minded would only be disturbed, any partisan of counter-insurgency as practised in the jungles and villages of south Bastar could be expected to find it intolerable, and it was always a matter of time before someone would come out with a vengeful parody of the discomfiting silence. Such a parody has now come out, but its author is not some crony of Mahendra Karma but the National Human Rights Commission (NHRC). The report produced by the NHRC after conducting an inquiry as directed by the Supreme Court easily signifies the lowest point in that institution's decade and a half of existence.

The Supreme Court has been hearing two writ petitions questioning the collusive impunity given to the private militia known as Salwa Judum by the government of Chhattisgarh. Some of the petitioners are concerned outsiders who have personally visited the affected areas and seen the situation for themselves. And some are local people, tribal residents of the affected area. They set out in detail the vicious violence of the Salwa Judum and the State's complicity with it. Anyone who knows anything about Dantewada post-June 2005 knows that whole villages have been set on fire and hundreds of people have been massacred by the Salwa Judum in villages lying along a wide swathe running along the south and south-west of the undivided Dantewada district, abutting Khammam district of Andhra Pradesh.

FACT FINDING COMMITTEE

The Supreme Court felt it necessary to have a report on the allegations ("relating to violation of human rights by the Naxalites and the Salwa Judum and living conditions in the refugee colonies"), and chose the NHRC to do the job. The Court did not ask for conclusive investigation of the complaint, offence by offence. It asked the NHRC to examine/verify the allegations by appointing "an appropriate fact finding committee with such members as it deems fit". The NHRC need not have appointed a committee out of its own members. It could have chosen persons of some experience in such matters, and fairness of mind. Or it could have formed a committee of insiders consisting of its members with a judicial/administrative background. For reasons best known to it, however, the NHRC directed its police wing to constitute a fact finding committee. The director general (investigation) of the NHRC, perhaps inevitably, constituted a team consisting of three officers of the Indian police service (IPS) and other lesser police functionaries under his supervision.

It was an unfortunate choice on all counts, and the report shows that in ample measure. Police officers, retired or in service, corrupt or upright, have generally expressed great appreciation of Salwa Judum. Forever looking at armed insurgencies from the point of view of armed counter-insurgency, they have seen in them an ideal tool: a vigilante group of tribal communities that can be passed off as a people's uprising and conveniently endowed with the impunity required to do the State's dirty work. The report shows that mere employment

in the NHRC does nothing to change a policeman's (or woman's) spots. A human rights perspective on insurgency or armed militancy, whether it has a slight or a substantial popular base, is not easy for even the most steadfast democrat. Policemen and women with their occupational distaste for usurpation of their excusive monopoly of weapons will be the last to arrive at it. To constitute a team consisting wholly of police officers to enquire into the Dantewada (we will employ this as short for Dantewada and Bijapur) situation was a most unhappy decision, and tells poorly of the NHRC's understanding of its task.

The report makes no pretence of neutrality or objectivity. It has a 13-page introduction which is mostly a harsh comment on the Naxalites, described at the very outset as a "menace", followed by a five-page chapter titled "human rights violations by the Naxalites". The third chapter of just one and a half pages is on "human rights violations by Salwa Judum" and another one and a half pages on the "role of the local police, security forces and SPOs". It concludes almost regretfully that the Salwa Judum is no longer able to function outside the relief camps. And then there is a lengthy chapter running into 67 pages titled "findings" which gives the report of the team's investigation into the allegations listed in the writ petitions.

MAOIST ACTIONS

It may be added that the Maoists did nothing to lessen the prejudice. While the enquiry was going on, they blew up high tension electricity transmission lines plunging the entire region (four districts, to be precise) in darkness for about 10 days. It was a senseless thing to have done at any time, but a foolish act to boot when an enquiry by the NHRC into the very allegations the Maoists have been making for about three years was on. Those who are not familiar with their ways may find it strange that they chose just this time to do indulge in such destruction, but such want of appositeness is not strange or new with them. Whether they admit to it or not, such expression of contempt of institutions and processes of public justice under the State is quite common with the Maoists, though it has never prevented them from demanding enquiries and lawful action by such institutions against perpetrators of what they believe to be injustice. The NHRC team's strong prejudice against the Naxalites comes through in every sentence of the sections dealing with them. In fact, reading the report, one would be at a loss to know why the Naxalites are at all there: it appears that their only activity has been to oppress the people. The minimum of credit normally given to them even by the unsympathetic middle class, namely that they put an end to extortion by unscrupulous traders and corrupt civil servants, finds no place in the report. An allegation which those who have spent many more days in the area than the NHRC team have never heard finds place in the report, namely that "as per the diktat of the Naxalites, none of the tribal children was allowed to continue his/her education beyond the fifth standard". It is almost certainly an invention of the roadside relief camps. Interestingly, the statements against the Naxalites are listed out without necessarily prefixing them with a suitably cautious "alleged" or "supposed" (of the 16 allegations listed out in the first three pages of the report, only one is graced with the prefix "alleged" and another with "reported"), but about the large mass of tribals from Chhattisgarh who have run away to Andhra Pradesh it is said that they were "allegedly" displaced by the Salwa Judum. Could they have gone on a picnic?

The prejudice comes out most starkly in the reference to tendu patta in paragraph 1.29. It is stated about the adivasis that "Tendu leaves are the most important source of their income", which is substantially true. It is then added that "the control exercised by the Naxalites over the collection and fixation of tendu patta rates also caused indignation amongst the tribals". Between these two statements there should, in all fairness, be two more. One, the terrible exploitation of tribals by the tendu patta contractors who got the strenuous job of collecting the jungle leaf done for a pittance before the Naxalites entered the picture. Two, the fact that Naxalite intervention increased the payment manifold (about 50 times, in fact) over the period of 20 to 25 years that they have been active in the area. This is not an exorbitant increase wrought by putting the gun to the head, but a just increase commensurate with the labour involved in the task of collecting the leaf, even if, as often as not, it was achieved by putting a gun to the contractor's head rather than any agitation by the leaf-pickers. In any case this has boosted the disposable income in the hands of tribals substantially and has been the single-most important economic benefit the adivasis have got from the presence and the organisation of the Naxalites. If nobody in the relief camps or the villages of Dantewada told the NHRC's fact finding

team of this, then it must be concluded that nobody was willing or in a position to tell the truth.

It is true that in addition to higher wage rate for picking the leaf the Naxalites also demanded and took "party fund" from the contractors, and that in the last couple of years before the rise of the Salwa Judum the tendu patta contractors withdrew from the business over considerable areas to counter the pressure put upon them by the Naxalites. It is also true that in the year 2005 the government of Chhattisgarh decided to dispense with the contractor in the tendu patta business and replace him by cooperative societies of the tribals themselves, against which the Naxalites gave a call for strike, asking the adivasis to stop picking the leaf. This could well have led to some "indignation" such as that referred to by the NHRC's report. But this way of putting it would give a very different picture than that conveyed by the report.

The origin of the Salwa Judum is explained in terms that the Chhattisgarh government has been propagating most vigorously. It is located in the gathering of adivasi people in the village of Karkeli (wrongly spelled as Kankeli) in Bijapur district in the summer of 2005 pursuant to the arrest of the village youth in the aftermath of the blowing up of the Central Reserve Police Force vehicle by the Maoists on May 5. It is said that the people expressed resentment at such armed actions which bring repression upon their heads and constitute a grave threat to the life and liberty of able-bodied youth. This incident should be regarded as beyond controversy since a Maoist-inspired publication also speaks of the resentment. Though the said publication does not say so, this seems to have been followed by meetings of tribal people at some villages nearby, such as Tadmendri, Usikapatnam, Ambeli, etc. The issue of harassment faced by the adivasi people at the hands of the police, who claimed to be pursuing Maoists, was discussed by these gatherings and it appears that many blamed the Maoists for giving an opportunity to the police by their unilateral acts of violence.

GROWTH OF SALWA JUDUM

But the Salwa Judum did not grow by itself by a multiplication of such meetings. It grew only after Mahendra Karma, a corrupt and over-bearing tribal leader of the Congress party, who has an ancient grouse against the Maoists and is a veteran of two Jan Jagran Abhiyans, entered the picture to create a "movement" out of these instances of resentment. And from his entry onwards, it is better described as a lynch-mob than as a movement. The mob raided villages, forced the people to join it on pain of death or burning of their dwellings, and forced the most new recruits to compromise themselves by committing murder or arson in the next village against adivasi people just such as themselves.

There is no doubt that at all times the Salwa Judum has consisted of some people who have a real grouse against the Maoists, for which the Maoists have certainly given cause, but it has swelled its numbers by such methods. And its main task has been to clear the villages, first of Maoist sympathisers and then of all the people, so that the terrain would be free for the security forces to hunt and flush out the Maoists. This is a very conscious decision taken by Mahendra Karma and aided by the administration which set up or allowed the setting up of the camps which came up as a rash all over the south and south-west of the then undivided district of Dantewada. The members of the NHRC team, all of them experienced police officers, surely cannot pretend ignorance of this tried and tested method of counter-insurgency, which has been followed by many a state, including our own in Mizoram? They do know, and therefore strenuously avoid any interpretation of the Salwa Judum that would even remotely suggest such parallels. It is depicted instead as an adivasi people's protest movement against Naxalite oppression, "an outburst of the pent-up feelings of the tribals who suffered for long at the hands of the Naxalites", "the peaceful movement by the villagers against the Naxalites" which was "bloodied by Naxalite attacks".

The lengthy chapter titled "findings" sets out the results of the investigation done by the NHRC team into individual allegations contained in the writ petitions, and those received from the people during the team's visit. A first reading gives the impression that many of the allegations made by the petitioners before the Supreme Court are unfounded. But a more careful reading tells a more complex story. In some cases the local people of the concerned village are reported to have said to the NHRC team that the facts underlying the allegation are not true, and therefore a conclusion is recorded that it is false. In other cases the report says that the village concerned is deserted or burnt down or that the local people have expressed ignorance of the matter, or that they have said that the whereabouts of the persons alleged to have been killed are not known.

In such cases the conclusion drawn is that the allegation is "not substantiated".

To take just one instance, paragraphs 6.46, 6.46.1 and 6.46.2 deal with the allegation of the petitioners that one Dallu Raut of Markapal was killed by the Salwa Judum or security forces. The NHRC team interacts with the villagers from Markapal at the Bairamgarh camp, and it is confirmed that Dallu Raut indeed died. But while they say it was the Naxalites who killed him, in "cross-questioning some of them stated that he had been killed by the Naga battalion". The report adds that there is no police record at all of his killing, and concludes that in the result "the allegation that Dallu Raut was killed by the Salwa Judum or security forces could not be substantiated".

RESPONSIBILITIES OF A PROBE

But who is to substantiate it? Investigation – since investigation is what the NHRC team has set out to do – is not an adversarial game played by the complainant and the investigator, where the investigator challenges the complainant to prove to allegation and triumphantly records his/her failure in case evidence is not forthcoming. In the trial of a criminal case in a court, the law as we follow in our country does say that the complainant caries the burden of proving the allegation, and the case will fail if the complainant fails to do so, but no law or legal principle says that this applies to the investigation of an offence. It is for the investigator to find out what happened to the person whose whereabouts are not known, how the deserted village got to be deserted, and how the burnt village got to be burnt down, etc.

The report of the NHRC reveals no such effort. They have not even enquired with the local police as to what investigation has been done about the burnt remains of a village. Or whether they know anything at all about the whereabouts of the missing persons. Or who in their opinion as investigators caused the killing of a dead body found in the villages or the jungle. Without so much as talking to the salaried investigators of offences appointed by the state of Chhattisgarh how did they record that a complaint could not be verified or substantiated? If the team found no time to pursue their investigation beyond talking to the people found in the village concerned, if such village is still habitable and habited, it should have recorded that it is in no position to draw any conclusion. It cannot conclude that the complaint is "unsubstantiated" or not verifiable. The fact that having dismissed most of the allegations in such manner, the report at the end adds that cases of missing persons must be investigated, does not set right the totally misleading impression that the "findings" give. In some cases, where the allegation is that a person has been killed by the Salwa Judum, the report finds that the person has died in an "encounter" and declares that the allegation is false. Indeed, in the conclusion it is specifically stated that many of the persons listed by the petitioners as victims of the Salwa Judum are "Naxalites killed in encounters with the security forces". It is found "significant" that many of the names listed by the petitioners as victims of the State/Salwa Judum violence are found in a list of martyrs published by the Maoists which was recovered in a police raid. It is not clear what is significant about that. Why should not a victim of Salwa Judum violence be regarded as a martyr by the Naxalites? What difference does it make to the complaint if such a victim turns out to have been an activist of some Maoist forum such as the Dandakaranya Adivasi Kisan Mazdoor Sanghatana?

SALWA JUDUM AND ARMED FORCES

Equally importantly, the opinion that someone officially declared to have been killed in action by the security forces should not be described as a victim of Salwa Judum violence begs the question central to the whole case: has any distinction ever been maintained in Dantewada between the Salwa Judum and the police/armed forces? The NHRC team does not answer the question with evidence, but pleads very strenuously in favour of such a distinction. It is said at more than one point that the Salwa Judum should not be confused with the police or armed forces operating in the area, even with the special police officers (SPOs) who have in fact been picked from out of the most active participants of the Salwa Judum "movement". This is where the report reads like a partisan statement of the case and not an impartial fact finding. In fact, the dominant tone and tenor of the report is to protect the Salwa Judum and its image from being tarnished by allegations of crime. Even where it becomes necessary to admit that the Salwa Judum has committed some offences, it is hedged by a hurried caveat that the Naxalites did worse. Where it becomes necessary to recognise that the police have not registered any offence against the Salwa Judum it is again quickly added that even before the Salwa Judum entered the scene, many crimes commit-

ted by the Naxalites would go unreported because the people were afraid to complain. This certainly does not answer the complaint, because the police never desisted from registering a crime in the context of Naxalite offences of which they had information for the reason that no one gave a complaint. In the case of Salwa Judum even murder and arson in public within the sight of the police have gone unrecorded.

TACTIC OF COUNTER-INSURGENCY

But to be fair to the NHRC team, they are not partial to this particular creation of Mahendra Karma but to the principle underlying it: a valuable tactic of counter-insurgency in the eyes of the police, which should not be delegitimised even if it means overlooking evident instances of violation of the canons of the rule of law. Even such a routine experience which every visitor has had, namely, the stopping and checking of vehicles and collection of a toll by the Salwa Judum, is not acknowledged. That is also said to be "not substantiated". Well, one can only say that if the NHRC team had gone around without police escort, they themselves would have been stopped and checked, which is the best type of substantiation. And if they had gone around in a vehicle with an Andhra Pradesh registration, as many were constrained to, they would have experienced a trepidation that would have ruled out the conclusion that this is no different from the joyous collection of money at festival times, said to have been "traditionally done by tribals in Bastar since many years". (Do not even non-tribal villagers indulge in such innocent if irritating pastimes in other states? And have the police not distinguished this from extortion?)

One fact must have struck the NHRC team, who are trained investigators, one presumes. Where the allegation of an atrocity is refuted categorically by the people in the Dantewada villages they visited, it is on the basis of clear statements, right or wrong. Where its truth is a possibility, the information given by the villagers is vague and uncertain. And the specific information given by displaced people whom the team met across the border in Andhra Pradesh turns out to be more solid than the petitioners' allegations. A very clear request was made to the NHRC before its team set out to do the enquiry, that public hearings be held in Eturnagaram and Bhadrachalam, the scheduled area headquarters of Warangal and Khammam districts of Andhra Pradesh, respectively, after giving public notice. The reason is that the severest victims of Salwa Judum have run away to these two districts and there is greater likelihood of the team getting frank views and candid information here than within the sight and hearing of the Salwa Judum across the border. For, those who are left behind in the villages of Dantewada are those who are with the Salwa Judum or those who have decided to live with the Salwa Judum. This, by the way, may well account for a part though not all of the negative views heard by the NHRC team in the villages of Dantewada. There was no response to this request from the NHRC.

However, while a sub-team of the NHRC team visited a few villages in Andhra Pradesh without public intimation, a public hearing was held in Cherla in Khammam district, which is away from the area of the largest concentration of displaced people's settlements in the district, and is inaccessible to those in Warangal. In that hearing the statements of a few of the displaced persons were recorded. The NHRC team may not have realised it, but the people who came before them at Cherla are Telugu-speaking tribes from across the border who are not among the worst victims of the Salwa Judum. The worst victims are the tribal community described as Muria in Chhattisgarh and Gotti Koya or Gutti Koya in Andhra Pradesh. A systematic gathering of their stories would have counter-balanced the views heard in the camps and the villages of Dantewada.

The team had the opportunity of hearing only one batch of them, in the sitting held at Dantewada on June 10, 2008. People from Nendra who were driven into Andhra Pradesh by the Salwa Judum gave their testimonies, but the report treats their statements with scepticism. This need not surprise any one because even the reluctance of the displaced persons living in wretched conditions in Andhra Pradesh to return to Chhattisgarh is found "intriguing" because the NHRC team believes that the Salwa Judum "is no longer its original self" (which seems to contradict the view expressed elsewhere in the report that the Salwa Judum was always a benign people's movement). Though continued "apprehensions" regarding Salwa Judum are not ruled out as a reason, that obviously does not account for the intriguing character of the reluctance. The real motive is suspected to be that the Naxalites do not want them to go back and be won over by the State and the Salwa Judum. Predetermined conclusions could go no farther.

— January-February 2010

Right to Legal Aid

If the persons accused of terror crimes are not the real wrongdoers and their conviction takes place due to the absence of lawyers to defend them, the naïve public may heave a sigh of relief thinking that the criminals have been incarcerated whereas dangerous elements may be roaming free. It is precisely when the accusations are grave and of a political nature, as indeed most terrorist crimes are, that the constitutional safeguards of legal aid be more strenuously enforced.

COLIN GONSALVES

The bomb blast in the court premises of Uttar Pradesh and the subsequent speeches of lawyers at meetings exhorting their colleagues not to appear for the accused in the resultant bomb blast cases once again raises the critical issue of legal aid for the accused in cases relating to terrorism. There was a similar attempt made in Gujarat after the Godhra incident where there was a strenuous attempt made to pass a resolution at the Bar to the effect that no lawyer would appear for the Godhra accused. It must be said to the credit of the lawyers in Uttar Pradesh that attempts to pass a similar resolution have, at least at the time of the writing of this article, been thwarted by others who, in the finest tradition of the Bar, have argued that every accused person has a right to legal aid which is not premised upon the nature of the offence. In fact, more serious the offence more urgent becomes the need for legal aid.

In Hoskot's case, interpreting Article 39(a) of the Constitution, the Supreme Court held that it was mandatory for the state to provide free legal aid. This requirement was not satisfied by the appointment of a junior lawyer. The accused were to be fully informed about their rights and preferably provided with legal assistance of their choice. Reasonable remuneration was to be paid to the lawyer. Free transcripts of the relevant documents were to be given and facilities extended for the filing of an appeal.

In Ranchod Mathur's case, the Supreme Court held that indigence could never be a ground for refusing legal aid. The court condemned the practice of sessions judges not appointing advocates for the poor accused even in grave cases. What was needed, the court said, were competent counsels not patronising gestures such as assigning raw entrants to the Bar.

Lawyers who argue that persons accused of committing a terrorist offence are not worthy of legal representation misunderstand the nature of a criminal trial and the constitutional requirements of legal aid. If a person may be falsely accused of a minor offence surely that con-

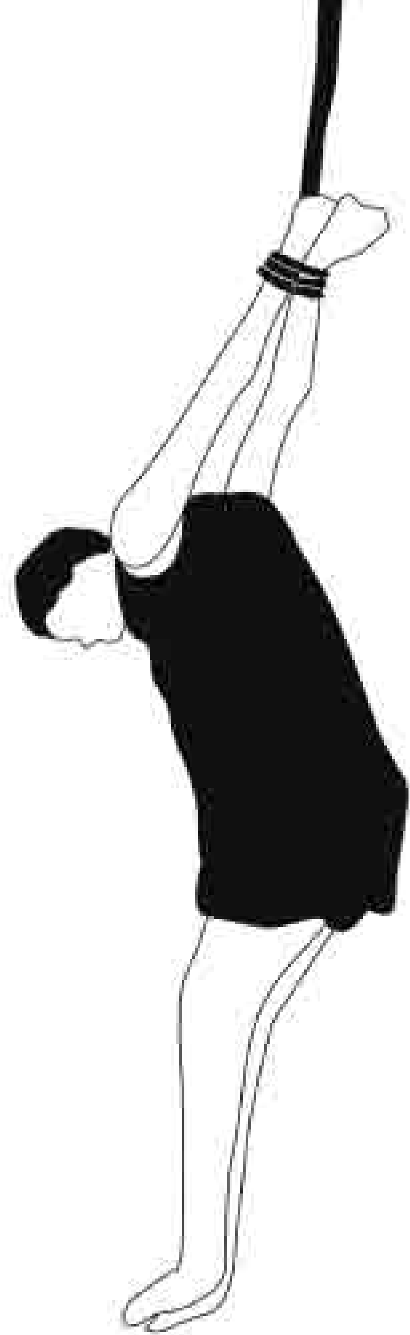
tingency is possible even for a serious crime. In fact, it could be said that in serious crimes of political nature the tendency of the police and the state to rope in persons unconnected with the crime only to settle old political scores, is more acute.

Likewise, where a terrorist crime is given a communal hue by the media and politicians, there could well be a tendency for the police to arrest persons without evidence merely because they belong to a particular community and had, on some earlier occasion, a brush with the law. It is precisely when the accusations are grave and of a political nature, as indeed most terrorist crimes are, that the constitutional safeguard of legal aid be more strenuously enforced. There is much case on the proposition that in capital cases senior counsels ought to be provided by the court if the accused is indigent.

The second error made by those who advocate a boycott of the accused relates to the nature of a criminal trial. The purpose of a criminal trial is not the punishment of the accused but the discovery of truth. The adversarial system has been designed to break down false cases, uncover lies and thereby do justice to persons falsely accused by the police. Even a well-meanings police officer acting bonafide could come to a genuine conclusion that a person is guilty of a crime and yet discover during trial that he has made a terrible mistake. The role of a lawyer in such a system is critical. Without a lawyer a criminal trial would be a farce.

The consequences of a wrong conviction are disastrous for the rest of the society. If the persons accused in the UP bomb blast cases are not the real wrongdoers and their conviction takes place due to the absence of lawyers to defend them, the naïve public may heave a sigh of relief thinking that the criminals have been incarcerated, whereas dangerous elements may be roaming free. The price for such shortcuts is always paid by society such that it bears the burden of a criminal justice system without justice. This is why legal aid is constitutionally provided not merely for the accused but for the safety of the whole of society.

— January-April 2009



Sacrificing Rights for Development

There can be little doubt that the judiciary has failed to protect the socio-economic rights of the common people. The courts have also allowed sacrificing civil liberties on the ground of 'State security' by upholding the constitutional validity of several highly draconian legislations. Part of this can be explained by looking at the class structure of the Indian judiciary.

PRASHANT BHUSHAN

Anyone familiar with India would be aware of the remarkable paradoxes of the country characterised by obscene wealth in the hands of a few "billionaires" among whom are four of the ten richest men in the world, existing side by side with appalling poverty where more than 78 percent of the population lives on less than Rs 20 (45 cents) per day. The paradox of a "Shining India" comprising of the largest force of IT and financial services professionals aspiring to make India an economic "superpower", living alongside the largest slum population in the world who live without electricity, running water and sanitation, amidst unimaginable filth. More than 100,000 farmers have committed suicide in the country in the past ten years. It ranks lower than many Sub Saharan countries in the Human Development Index.

In 1991, India adopted the World Bank-IMF model of "Structural Adjustment", popularly known as the LPG programme, characterised by liberalisation, privatisation and globalisation. Since then, the rate of GDP growth increased substantially from 3-4 percent to reach 9 percent in 2007-08. During this period the number of millionaires increased manifold as did the average income of the top ten percent of the population. The number of persons living in acute poverty during the same period however continued to grow. The Arjun Sengupta report shows that 78 percent of the Indian population (836 Million) now lives on less than Rs 20 (45 cents) per day.[i] The average availability of nutrition to people also declined during the same period, most clearly indicating that this spurt in growth, far from being inclusive, was achieved at the expense of the poor and marginalised sections of society. According to one of India's leading economists, Utsa Patnaik, "Expenditure data from the National Sample Survey Organisation's 61st Round (2004-05) shows that rural and urban per capita cloth consumption, real food expenditure, and calorie intake have all declined from their already low levels since 1993-94. This country remains a Republic of Hunger with a larger proportion of ordinary people being relentlessly pushed down to worse nutritional status. As the tables show, the proportion of rural population unable to access 2,400 calories daily climbed from 75 percent in 1993-94 to a record high of 87 percent by 2004-05. The corresponding percentages for urban India, where the nutrition norm is lower at 2,100 calories, are 57 percent and 64.5 percent." [ii]

That was not surprising, since a lot of this "growth" was achieved by acquiring the traditional lands of poor farmers, particularly tribals, for mining, real estate projects and "Special Economic Zones", promoted by business houses. As the rich/poor divide increased during this period, we have seen the growth in the strength of Left wing Maoist insurgencies that now control a significant part of the country.

In an attempt to deal with this numbing poverty of the majority of the people who are unable to even access the judicial system of the country, the Supreme Court, 30 years ago, created a new jurisdiction that has come to be known as "Public Interest Litigation (PIL)". The basis of this jurisdiction was the creative and expansive interpretation of the Article 21 right to life and liberty. The court declared that the fundamental right to life did not merely guarantee citizens the right to an animal existence or merely protection from being put to arbitrary and unreasonable bodily harm by the state, but to live a life of dignity. This meant that citizens had the right to food, water, shelter, education and health etc., which were all

progressively declared by the Supreme Court to be part of Article 21. In a further innovation, the court also declared that Article 21 also encompasses the right to live in a clean and decent environment. The court also declared these rights to be enforceable and by a series of judgements mainly during the 1980s it directed the executive to provide these basic amenities in various ways.[iii] Thus, it declared that it had the Constitutional right and the duty to direct the government to provide these amenities if citizens were deprived of them. Not only this, it also liberalised the concept of Locus Standi, by declaring, that in a country like India, where the majority of citizens are too poor and without resources to approach the courts themselves, anyone could approach the courts on their behalf pro bono. The PIL revolution, as it came to be known, initially generated great hope that the courts would force the executive to adhere to the Constitutional mandate of fashioning India as a "Socialist, Secular, Democratic, Republic." During the 1980s, there were several path-breaking judgements from the courts that kept this hope alive.

There were judgements liberalising civil liberties. It was held that handcuffing of prisoners and undertrials was inhuman and a violation of their Article 21 rights.[iv] It was held in Maneka Gandhi's case[v] that a person could not be deprived of her passport without notice and a hearing. In several cases, the court laid down extensive guidelines about the treatment of prisoners and undertrials, particularly women.[vi] However in the infamous *Habeas Corpus* case during the emergency of 1975-77, when fundamental rights had been suspended, the court held that even a writ of Habeas Corpus did not lie during an emergency, even against illegal detention.[vii] More recently, in the 1990s the court also laid down extensive salutary guidelines about the manner in which the police could deal with people while carrying out arrests.[viii] It also held that in a case of torture in police custody, the courts exercising writ jurisdiction could also directly award compensation to the victim or his family and also order the prosecution of the offender.[ix]

However from the mid 1990s, we can see that the court has often sacrificed civil liberties on the ground of "State security". This is apparent in the manner in which it has upheld the Constitutional validity of several highly draconian legislations such as the Armed Forces Special Powers Act (AFSPA), The Terrorist and Disruptive Activities Act (TADA) and the Prevention of Terrorism Act (POTA).[x] The impunity given to the security forces under the AFSPA has enabled them to torture, rape and kill thousands of people in Kashmir and the north east (where the Act is in force), without any accountability. TADA and POTA both contained provisions making confessions made in police custody admissible and made it virtually impossible for anyone accused under the Acts to get bail. Though TADA and POTA have been repealed, similar provisions have been engrafted in the Unlawful Activities Prevention Act (UAPA) (without, however, the admissibility of police confessions). Under the cover of the Maoist insurgency, the police have been increasingly resorting to targeting human rights activists under these draconian laws. One of the cases which illustrates the increasingly illiberal attitude of the Supreme Court towards civil liberties is the much publicised case of Dr Binayak Sen. He is an internationally celebrated medical practitioner from a premier medical college of the country, who has spent his life in setting up community health clinics in some of the most backward tribal areas of India, where there were no public health facilities. He was awarded the prestigious Jonathan Mann award for public health services. While working there, he came across many cases of gross human rights abuses of the tribals at the hands of police and a private mercenary army called Salwa Judum that is funded and armed by the state. He therefore also started working with the People's Union for Civil liberties as its general secretary for the state of Chhattisgarh. In May 2007, he was arrested under the Unlawful Activities Act and the Chhattisgarh Public Security Act on the charge of having carried out two letters from a Maoist in jail to his comrade outside. Sen had been meeting him in connection with his medical condition as well as his complaints of human rights violations in jail. None of these letters are alleged to contain any subversive material. Yet he is charged with having assisted a member of a banned organisation. For the last 22 months, the Supreme Court has denied him bail while the trial drags on. Though more than 22 Nobel laureates from around the world had appealed for his release, the court did not even deem it fit to even give a reason for refusing bail and rejected his bail by a one word order "Dismissed". This case strikingly illustrates the illiberal attitude of the Apex Court towards the civil liberties of the poor and underprivileged, including those who work for them.

This attitude is also apparent in a recent judgement

of the Supreme Court by which it struck down the Constitutional validity of the Illegal Migrants (Determination by Tribunals) Act, which had been enacted to provide for a judicial tribunal to determine any dispute regarding the nationality of a person. Prior to that, the police used the draconian 'Foreigners Act' to harass and deport anyone (particularly poor Bengali Muslims) accusing them of being foreigners, without affording any recourse to a judicial determination of any dispute on that. Those challenging the IMDT Act had alleged that the protracted proceedings before a judicial tribunal were coming in the way of the summary deportation of persons accused by the police of being foreigners.[xi]

Being conscious that an Act of Parliament could only be struck down if Parliament lacked legislative competence to enact it, or if it violated a specific provision of the Constitution, the court opined that the Act violates Article 355 of the Constitution, which mandates the Central government to protect the states against external aggression and internal disturbance! It went on to say that the onerous provisions of the Act and rules makes it virtually impossible to expel foreigners and therefore the Act encourages infiltration of illegal migrants from Bangladesh, which amounts to external aggression against India!

The court also ruled that the applicability of the IMDT Act only to Assam made it discriminatory and violative of Article 14, since other states did not have to adhere to the more stringent provisions of the IMDT Act before pushing out persons designated as foreigners. In saying so, the court completely overlooked the fact that the IMDT Act as such was applicable throughout India. However, the government had not notified it for other parts of the country except Assam. But that was an executive lapse and other pending petitions sought precisely the direction from the court – that the government be directed to notify the IMDT Act for other parts of the country. If the tribunals under the Act were not acting expeditiously (which courts hardly even do), they could have directed the government to take whatever steps were required to fix it.

In fact one would have expected the Supreme Court that is constitutionally mandated to protect the fundamental rights of citizens, to have declared the Foreigners Act unconstitutional, as it allows the authorities to throw out citizens alleged to be foreigners, without a judicial determination. Instead, the court says, "A deep analysis of the IMDT Act and the rules made thereunder would reveal that they have been purposely so enacted or made so as to give shelter or protection to illegal migrants who came to Assam from Bangladesh on or after March 25, 1971 rather than to identify and deport them." Clearly, this judgement reflects an authoritarian and fascist mindset that the police must have the authority to throw out anyone they want without the impediment of independent judicial scrutiny. And this, coming from the court that had been fully informed about the high handed and inhuman manner in which the authorities had been treating citizens under the Foreigners Act, is atrocious. The court's attitude completely justifies the observation contained in the report of the Citizen's Campaign for Preserving Democracy, where it was said, "Right from roundup and arrest, to the supposed 'hearing' and deportation, no lawful procedure is being followed by the authorities. The entire process contributes to and manifests criminalisation and communalisation of the state and the corruption of its legal and judicial institutions".

Another clearly noticeable trend is that the court has been often liberal in making grand pronouncements about rights—it is often slow to implement them. In many cases, the actions of the court betray an ambiguity about the seriousness of its beliefs in those rights. For example, in DK Basu's judgement[xii] on the rights of arrestees and detainees has been wantonly flouted by the authorities, but rarely has the court applied the principles of Nilabati Bahera[xiii] in awarding compensation to the victims or ordering the punishment of offending police officers. The wide gap between the rights declared by the court and their actual implementation is evident even more starkly in the judgements on socio-economic and environmental rights.

In the 1980's, the Supreme Court, in case after case, while liberally construing Article 21, held that it includes the right to shelterxiv, the right to food[xv], the right to education[xvi], the right to health care[xvii] and the right of street vendors to earn a livelihood by hawking on the streets.[xviii]

In Olga Tellis[xix], the court held that pavement dwellers residing on the public pavements of Mumbai had a right to hearing before they were to be evicted by the municipal authorities and a right of resettlement if they were evicted. In Bandhua Mukti Morcha,[xx] the court held that workers can't be held bondage because of loans that they or their ancestors had taken from their employers. The court has gone on to hold that in-

ternational covenants that India had signed could be read into municipal law for invoking socio-economic rights from the Article[xxi]. Thus in Vishaka, 21 the court issued various binding guidelines to prevent the sexual harassment of women.

The court has, however, been most inventive in using Article 21 to create the right to environmental protection. In a series of judgments, it held that the right to a clean and healthy environment is also a part of Article 21. While doing so, individual benches of the court used their own subjective understanding of what was needed for a healthy and clean environment. Some important principles were also evolved, such as the precautionary principle. The principle was stated thus:

"The precautionary principle suggests that where there is an identifiable risk of serious or irreversible harm, including, for example, extinction of species, widespread toxic pollution or major threats to essential ecological processes, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment."

It is also explained that if the environmental risks being run by regulatory inaction are in some way "uncertain but non-negligible", then regulatory action is justified. This will lead to the question as to what is the "non-negligible risk". In such a situation, the burden of proof is to be placed on those attempting to alter the status quo. They are to discharge this burden by showing the absence of a "reasonable ecological or medical concern". That is the required standard of proof. The result would be that if insufficient evidence is presented by them to alleviate concern about the level of uncertainty, then the presumption should operate in favour of environmental protection."[xxii]

In several judgements, the court ordered stoppage of polluting effluents into various rivers, closing down of polluting industries near the Taj and in Delhi, forcible conversion of all commercial vehicles plying in Delhi to compressed natural gas fuel, clearing of the ridge in Delhi of all structures, etc. And then there is a long running case regarding deforestation[xxiii] (TN Godavarman) in which a permanent bench has been constituted, which sits almost every week consisting of the chief justice and two other judges. This bench made a series of orders to stop non-forest activities in forest areas and even to close down saw mills in and around forest areas in the country. It even passed an order declaring that no non-forest activity could be carried out in a forest area without the permission of the court.[xxiv] The Forest Conservation Act 1980 required the permission of the central government for such non-forest activity in forest areas. In this case, the court by judicial fiat mandated the permission of the court for permitting such activity in any forest area of the country. Thus, each case has to come to the Supreme Court for permission. However, before examining a case the court directed them to be examined by an expert committee set up by the Court, known as the Centrally Empowered Committee, whose advice the court normally follows. However, the court's action in such matters has often been whimsical, with poor tribals getting short shrift while powerful corporates get favourable treatment.

If one examines the recent record of the Supreme Court in its environmental activism, two trends are immediately clear. First, when environmental protection comes into conflict with socio-economic rights of the poor and the marginalised, the poor usually get short shrift and secondly, when environmental protection comes into conflict with powerful vested commercial and corporate interests or what is perceived by the court to be "development", environmental protection usually get short shrift.

As the court's powers increased with the widening use of Public Interest Litigation (PIL), the executive also began to view it as a handy method for the government to do what it wants to do under the cover of the court, without having to be made democratically accountable for its acts. Thus, if the poor slum dwellers were to be removed to make way for fancy apartments, shopping malls or 5 star hotels, the courts were found as a convenient tool. The government was afraid to take responsibility for such decisions because of the fear of democratic backlash in the next election (fortunately the poor also have equal votes as the rich). The courts were ever willing to clothe such "unpopular decisions" with the authority of law, since they are not accountable, democratically or otherwise. Howard Zinn, author of *A People's History of the United States,* puts it beautifully: "The Rule of Law does not do away with unequal distribution of wealth and power, but reinforces that inequality with the authority of law. It allocates wealth and poverty in such indirect and complicated ways as to leave the victim bewildered."

In the last few years, tens of thousands of slum dwellers living in Delhi and Mumbai have been evicted

by the high courts of respective cities on the ground that they were polluting the environment. The Delhi High Court passed orders to demolish more than 40,000 temporary slum dwellings on the banks of Yamuna on the presumed ground that they were polluting the river though there was no such evidence to prove that. The demolition was ordered without serving notice to the slum dwellers and no alternative housing was allocated. This deprived them of shelter and thus violated their Article 21 rights as declared by the Supreme Court in Chameli Singh's case.[xxv] The Supreme Court refused to stop demolitions that effectively threw the poor slum dwellers out on the streets in the searing heat of the summer. However, when the same land was thereafter sought for the construction of fancy apartments, complexes and shopping malls (ostensibly for the commonwealth games), the Supreme Court did not deem it fit to stop the construction. This was in complete violation of the norms of the environmental protection agency that no permanent structures could be set up on the riverbanks. Infact, the Supreme Court stayed the order of the Delhi High Court that ordered further investigation into the matter by another expert committee.

The same double standards were apparent in the case of Delhi ridge which was ordered to be cleared by the Supreme Court of all structures, including temporary shanties housing poor people, on the ground that it was ecologically sensitive[xxvi] (MC Mehta) and part of the lungs of Delhi. However, when five star hotels and shopping malls were constructed on the same ridge without any environmental clearance, which was required by the law, the court did not stop the construction and allowed them to come up on the same land where small temporary dwelling units of the poor were not allowed. The Court went on to say in its judgement:

"Had such parties inkling of an idea that such clearances were not obtained by DDA, they would not have invested such huge sums of money. The stand that wherever constructions have been made unauthorisedly demolition is the only option cannot apply to the present cases, more particularly, when they unlike, where some private individuals or private limited companies or firms being allotted to have made contraventions, are corporate bodies and institutions and the question of their having indulged in any malpractices in getting the approval or sanction does not arise."[xxvii]

The recent attitude of the court towards slum dwellers is summarised by the observation of Justice BN Kirpal in Almitra Patel's case[xxviii] in which he said in the context of giving alternative land to evicted slum dwellers, "Rewarding an encroacher on public land with free alternate site is like giving a reward to a pickpocket." So in the eyes of the court, large corporates cannot indulge in malpractice and slum dwellers are pickpockets!

India has a large tribal population which has traditionally lived within forests and their rights have not been recognised or declared for more than a century with the result that many of them continue to live in forests that have been declared as reserve or protected forests, without declaration of their rights, in them. Recently, Parliament passed the Forest Rights Act giving rights to forest dwellers over the land on which they were residing for more than a certain number of years. This Act has been stayed by several high courts on the ground that this will lead to destruction of forests, however, forests have been best preserved mostly in these areas where forest dwelling tribes have been living. However, the Supreme Court has been very solicitous towards large corporates like Posco and Vedanta in allowing them mining leases in large tracts of pristine forestland. This was allowed by the Court, despite the fact that these mining leases in forestlands would displace thousands of tribal families and that the Supreme Court's own expert committee had strongly recommended against giving these leases on environmental grounds.[xxix]

In the Narmada Bachao Andolan (NBA) case,[xxx] Justice Bharucha, pointed out that the Sardar Sarovar Dam project was proceeding without a comprehensive environmental appraisal and without the necessary environmental impact studies. The majority of judges still went on to approve the project and allowed it to go on without any comprehensive environmental impact assessment that was compulsory even according to the governments' rules and notifications. The underlying reasons and ideology behind the subordination of the cause of the environment to the cause of "development", is also evident from the majority judgement. There are several passages in the majority judgement, extolling the virtues of the kind of development brought in by large dams. The judgement goes on to gratuitously emphasise the myth that the Bhakra dam was responsible for the green revolution in the country.

This came despite the fact that the court had specifically restrained the petitioner, NBA, from making any submissions on the pros and cons of large dams. The court also went on to make disparaging remarks against the NBA as being an anti-development organisation.

The same subordination of environmental interests to the cause of "development" is evident in the Supreme Court's judgement in the Tehri Dam case,[xxxi] where the government's own expert committee had given an elaborate report pointing out a series of violations on which the ministry of environment had given environmental clearances to the project. The committee pointed out that a number of studies that were necessary to evaluate the environmental impact of the project had not been conducted and had recommended that these be immediately conducted. Justice Dharmadhikari held that in order to ensure compliance with the conditions of environmental clearance, it was necessary to constitute an independent expert committee that would monitor the compliance with these conditions, and further construction of the dam could only proceed only after the expert committee agrees. The majority judges, however, did not even bother to ensure compliance with the conditions of environmental clearance of the project. Again, the judgement makes remarks extolling the virtues of development projects like such large dams.

This attitude showing the court favouring "development" over the rights of ousted or the environment is most clearly evident in the manner in which the court has sought to push the mega project called "interlinking of rivers". On Independence Day in 2003, a paragraph was added in the President's speech that interlinking of rivers could perhaps solve the problems of floods and drought in the country. This paragraph was enough for a lawyer appointed by the Supreme Court as amicus curiae (to assist the court) in the Yamuna pollution case to file a short application praying that the court should direct the government to take up this project. As if on cue, the Bench headed by the then Chief Justice BN Kirpal issued notices to all the states and the Centre. On the next day of hearing, which was the day before the retirement of the then chief justice, an order was passed which is now effectively being treated by the government as a direction by the court to undertake this project and complete it within the shortest possible time. The order noted that only the Union of India and the state of Tamil Nadu had filed responses to the notice issued by the court. It stated that the Union of India pointed out that the project would cost Rs 5,60,000 crores, would take 43 years, and would need the consent of the states. Tamil Nadu had filed an innocuous affidavit, virtually saying nothing. The court noted that no other state had filed any affidavit and therefore it could be assumed that none had any objection to the implementation of this project! After orally noting, that funds cannot be any constraint for the government for a project in national interest, the court observed in its order that the project should be completed within ten years! It also went on to advise the government that in case consent was not forthcoming from the states, the government should consider passing a legislation to obviate consent of the states for this project.

All this for a project which will displace hundreds of thousands of people, have unprecedented environmental consequences and would require funds equal to the total irrigation budget of the country for the next 44 years. And all this without hearing any interested party, not even the states, without any discussion or debate whatsoever, without completing even feasibility studies, leave aside the question of social, environmental, economic or optimality assessments!

In Tata Housing Development Company vs Goa Foundation,[xxxii] the court again went against the report of its own expert committee in allowing the construction of a housing colony on land that had been held by the committee to be forestland. The court held that the committee had wrongly classified this land as forestland, by holding that the committee had deviated from its own norms. The court also relied on the reports of some other private experts filed by the Tata Housing Development Company. Without entering into an elaborate discussion of the merits of this judgement, it may only be noted, that such microscopic examination of a report of the court's own expert committee has never been done at the instance of a poor or weak petitioner. For example, the court did not critically examine or interfere with the report and recommendations of the centrally empowered committee appointed by the court, regarding fishing by poor local fishermen in the Jambudvip islands. The court's orders based on the committee's report had effectively deprived hundreds of poor fishermen of their livelihood who were using the Jambudvip islands.

Individual judges according to their own subjective preferences have whimsically applied the right to environmental protection without clear principles guiding

them about the circumstances in which the court could issue a mandamus for environmental protection.

The trend of recent cases, therefore, suggests that (1) the court has often subordinated civil liberties to the perceived imperative of state security, particularly in the context of the recent "war on terror", (2) the courts' liberal and expansive pronouncements on socio-economic rights under Article 21 have not been matched by a determination to implement those rights, (3) that since the liberalisation of the Indian economy, even the courts' rhetoric on socio-economic rights have been weakening, (4) that very often the court has itself ordered the violation of those rights, violating in the process even the principles of natural justice, (5) that whenever socio-economic rights of the poor come in conflict with environmental protection, the court has usually subordinated those rights to environmental protection, (6) that whenever environmental protection comes into conflict with what is perceived by the court to be "development" or powerful commercial vested interests, environmental protection is usually subordinated at the altar of "development", or such powerful interests. There are several exceptional judgements that defy these trends, particularly from the high courts.

All the above seriously calls into question the commitment of the Indian courts to the rights of the poor and to the constitutional imperative of creating an egalitarian socialist republic. There can be little doubt that the Indian courts have failed to protect the socio-economic rights of the common people of India who constitute the vast majority of the Indian population. Part of the reason for this undoubtedly lies in the class structure of the Indian judiciary. The higher judiciary in India almost invariably comes from the elite section of the society and has become a self-appointing and self-perpetuating oligarchy. The Indian judges appoint themselves with the help of a remarkably self-serving judgment by which the power of appointment was appropriated from the government by the judiciary. In the absence of any transparency or even any method or system in the manner of appointments, the process lends itself to large-scale arbitrariness and nepotism. No criterion has been established for choosing and selecting judges. The understanding of, or the sensitivity towards the problems and concerns of the poor is certainly not desired in the selection of the judges. On top of this, there is no accountability of the higher judiciary in India. There is no performance audit of judges by which they could be made accountable for their conduct. Even public criticism of judges has often been held to be contempt of court. They have also virtually insulated themselves from the Right to Information Act. It is, therefore, not surprising that the common people of India do not regard the judiciary as an institution that offers the hope of justice to them. Many have indeed come to regard it as the last bastion of an entrenched oligarchy that rules the country.

— January-April 2009

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xxiii. TN Godavarman Thirumulkpad v. Union of India, WP(C)No. 202/95
xxiv TN Godavarman Thirumulkpad v. Union of India, AIR 1999 SC 2420
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xxx. Narmada Bachao Andolan v. Union of India and Ors., (2000) 10 SCC 664
xxxi. ND Jayal vs. UOI, (2003) 7 SCALE 54
xxxii. TATA Housing Development Company v. Goa Foundation, (2003) 7 SCALE 589

Judiciary: Heavy Odds, Meagre Resources

Not only does the executive refuse to appoint more judges, but government also drags its feet in giving them allowances for books, library and residence. The result is that the justice delivery system is badly hit. So much so that the presiding officer of an important tribunal in Delhi is forced to hold hearings from inside his car as there is no office for him to hold court. The appalling state of affairs has virtually choked the entire judicial system, courtesy executive and legislature.

COLIN GONSALVES

In a speech delivered by the then Chief Justice of India, Shri RC Lahoti, on Law Day – November 26, 2004, the chief justice had praised the judiciary for "carrying a phenomenal burden which perhaps no other judiciary in the world has had to shoulder."[i] "If there are more and more cases in courts", he had said, "that is because we have a population explosion, we have a more complex and friction-prone society, our dispute resolution and conciliation system are bereft of efficacy, we have increasingly greater awareness of rights, and perhaps because we have more injustice and more arbitrariness in our midst." He warned that the courts could not "afford to turn a blind eye or a deaf ear to the rank injustices" merely because the courts are already full of litigation and because that would cause the people to have less confidence in the courts and cause a decline in the credibility that the courts have come to enjoy.

Recently, the Chief Justice of India the Hon'ble Shri KG Balakrishnan, in his speech on judicial reforms at a seminar, rebutted the accusations made by the executive to the effect that judges were responsible for the delay in the disposal of cases. He pointed out that even with a network of 14,000 courts and a working strength of 12,500 judges handling four crore cases, each judge was required to deal with 4,000 cases which is extremely high.

In its 120th report submitted on January 31, 1987 the law commission recommended that India ought to have 107 judges per million by the year 2000, the ratio achieved by USA in 1981. It also recommended that India should have 50 judges per million population by 1992. These recommendations were endorsed by a standing committee of Parliament in its 85th report submitted in 2002.

The chief justices complained that the judiciary was held responsible for the mounting arrears of court cases even though it has no control over the allocation of resources and cannot

create additional courts, appoint adequate court staff or augment court infrastructure.

At the chief justices' conference held in 2007, the high courts found that the institution of civil cases in the high courts far exceeded the disposal despite the increase in the rate of disposal. On an average a high court judge disposes off 2,374 cases and a subordinate court disposes 1,346 cases in a year. The chief Justices' conference concluded that if the existing strength of judges wasn't adequate even to dispose of cases equal to the number of new cases filed, then the backlog couldn't be wiped out without the appointment of a large number of judges. In fact, the backlog is likely to increase.

The judiciary correctly identified the very poor financial allocations made by the executive as the root cause of the problem. Apart from Delhi, every state government provided for less than one percent of its budget for the judiciary. Delhi was the only exception with a figure of 1.3 percent. The tenth plan (2002-2007), allocation was only Rs 700 crores, which is 0.07% of the total plan outlay of Rs 8,93,183 crores. The chief justices' conference concluded that, " Such meagre allocations are grossly inadequate to meet the requirements of the judiciary. Governments, therefore, need to allocate additional funds for adequate manpower."[ii] The national commission to review the working of the Constitution noted, in its report submitted to the government in 2002 that the five-year plans and the finance commission had made no separate provision for funds for the judiciary for several decades.

At the joint conference of the chief justices of the high courts and chief ministers of the states held in September 2004 in Delhi it was pointed out by the Chief Justice of India that, "during the eighth plan (1992-97), the Centre spent Rs 110 crores on improving infrastructure such as constructing courtrooms, etc. In the ninth plan (1997-2002), the Centre released Rs 385 crores for fulfilling priority demands of the judiciary. This was 0.07 percent of the Centre's ninth plan expenditure of Rs 5,41,207 crores. During the tenth plan (2002-2007), the allocation is Rs 700 crores, which is 0.078 percent of the total plan outlay of Rs 8,93,183 crores. The experience shows that these meagre allocations of 0.07 percent and 0.078 percent by the planning commission in the ninth and tenth plans respectively are totally inadequate."[iii] To add insult to injury the plan allocations and the allocation of the central grant was conditioned upon the state governments making a matching allocation.

The chief justices recommended that expenditure on the judiciary should come from planned funds, and that funds generated by the courts ought to be kept in a separate account and the high courts be given both financial autonomy as well as expert financial assistance. Though this was a long-standing demand of the judiciary "governments have been reluctant to grant complete financial autonomy to the high court."[iv]

Chief Justice KG Balakrishnan in his presentation on judicial reforms in 2008[v] countered the criticism of the President of India and the Speaker of the Lok Sabha to the effect that the judiciary was responsible for the delays. A large number of cases pending in courts have the governments as a party indicating that lack of proper administration was the reason why citizens are driven to litigation. "Weak and inefficient revenue administration"[vi] has resulted in a, "poor land rights recording system"[vii] which was the main reason for the institution of a large number of cases.

Secondly, financial institutions had filed a large number of cases seeking to recover money through criminal proceedings by using the Negotiable Instruments Act, thus converting the courts into " collecting agents for these financial institutions"[viii]. Many of these institutions are privately owned by people engaged in giving usurious loans. As a result the trial of ordinary criminal cases is seriously hampered.

Thirdly, since insurance companies do not follow a fair procedure of acknowledging liability and disbursing amounts before the victims come to courts, there are a large number of motor accident claims pending before various tribunals.

Fourthly, there are a huge number of land acquisition cases in courts because of mal-administration in land acquisition cases where "the amounts awarded by land acquisition officer has never been reasonable or proper"[ix] and as a result, " the parties are driven to litigation in a large number of cases."

In criminal cases the chief justices identified the" tardy and inefficient"[x] investigations resulting in a huge delay in the filing of chargesheets as one of the reasons for delay in the disposal of criminal cases." Inept policing and weak prosecutions are hugely responsible for slowing down and protracting the criminal trials in many courts."[xi]

Fifth, the financial impact of legislation is not as-

sessed in India as is done in all developed countries. There, every statute is required to have a financial memorandum making provision for extra courts, extra staff, extra judges and the like. Statutes in India are merrily enacted without any such financial memorandum. This puts a huge additional burden on the existing courts and increases the delay in the delivery of justice. Recently it was reported in a Delhi newspaper that there was no space for a tribunal and so the judge began operating from his car. Lack of proper accommodation for courts and the residence of judges have been repeatedly brought to the notice of governments. Numerous complaints have been made to the government about the inadequate staff including stenos without whom a judge simply cannot work. When these complaints were brought to the notice of the executive by the judiciary they were dismissed out of hand by the executive using language like "rejected", "considered not feasible" and "matter is receiving consideration by the government. "The chief justices found these responses "lacking in propriety and courtesy."

At this stage it would be relevant to look at the three decisions of the Supreme Court in the All India Judges Association case. In the first case in 1992 the Supreme Court had to intervene on as simple an issue as law books for judges and, in the face of executive apathy ordered a provision of Rs 200 a month for law books for a judge. The Supreme Court pointed out, "that what is collected as court fee at least be spent on the administration of Justice instead of being utilised as a source of general revenue of states."[xii]

In the second All India Judges Association case in 1993 the Supreme Court dealt with a review petition filed by the governments questioning the right of the judiciary to determine the service conditions of the judges and claiming that the directives involved "a very heavy financial outlay" which the governments could not afford. Characterising the attitude of the governments as hostile, the Supreme Court pointed out that from as far back as 1958 the law commission of India in its 14th report lamented, "though we have been pouring money into a number of activities, the administration of justice has not seemed to be of enough importance to deserve more financial assistance. On the contrary, in a number of states not only had the administration of justice been starved so as to affect its efficiency, but it has also been made to yield revenue to the State."[xiii]

Dealing with the argument that the financial burden was heavy, the Supreme Court found that compared to the planned and non-planned expenditure, the burden was "negligible"[xiv]. Secondly, "when the duties are obligatory no grievance could be heard that they cast a financial burden"[xv]. The court castigated the governments for opposing the direction for the provision of law books to judges. " It is difficult to understand the attitude of State Governments…it is like asking artisans to work without their tools"[xvi]. Regarding the accommodation of judges the Supreme Court found that there was, in 1993, a shortage of 5,000 houses indicating that half of the judicial officers in the country were without proper accommodation.

In the third All India Judges Association case[xvii] the Supreme Court enforced the recommendations of the first national judicial pay commission, which was constituted in 1996 by the central government. The commission noted that the expenditure on the judiciary was, "relatively low" being not more than 0.2 percent of the GNP.

— May-June 2008

Endnotes

i Speech delivered by Chief Justice R C Lahoti on 26th November 2004
ii Pg 256, Agenda Item No.3, chief justices conference-2007
iii Speech delivered by Chief Justice R C Lahoti on 26th November 2004
iv Pg 629, Agenda Item No. 11, chief justices conference-2007
v Speech delivered by Chief Justice KG Balakrishnan in the All-India seminar on "judicial reform" on February 23 & 24, 2008
vi Pg 4, Speech delivered by Chief Justice KG Balakrishnan in the All-India seminar on "judicial reform"
vii ibid
viii ibid
ix Pg 5, Speech given by Chief Justice KG Balakrishnan in the All-India seminar on "judicial reform"
x Pg 5, Speech given by Chief Justice KG Balakrishnan in the All-India seminar on "judicial reform"
xi Pg 6, Speech given by Chief Justice KG Balakrishnan in the All-India seminar on "judicial reform"
xii (1992) 1 SCC 119
xiii (1993) 4 SCC 288
xiv ibid
xv ibid
xvi ibid
xvii (2002) 4 SCC 247

Juveniles and Jails

Despite legislation to protect juvenile prisoners, children continue to languish in prisons. Identifying juveniles, removing them from the criminal justice system and bringing them within the folds of the juvenile justice system should be given the priority it deserves.

MAHARUKH ADENWALLA

On November 14, 2003, Umesh was convicted for life by the Sessions Court Mumbai. He was arrested for murder in April 1999. The offence had been committed a few days prior to the arrest. On April 12, 2004, the Bombay High Court declared Umesh a juvenile and released him forthwith. It took the criminal justice system five years to recognise Umesh's juvenility as he languished in prison, both as an undertrial and convict, in absolute violation of the law. The medical examination report of Sassoon General Hospital, Pune showed Umesh to have been at the highest 15 years and at the lowest 13 years on the date of offence. The apathy of the system is reflected in the fact that all the functionaries, that is, the police, the magistrate, the jailor and the sessions judge, failed to recognise and treat Umesh as a juvenile as is mandated under the law. Umesh is just one of the numerous instances of a juvenile being denied the protection of the juvenile legislation and being kept in jail.

JUVENILE LEGISLATION

From the early 1920s, when states enacted their Children Acts, legislation provided for juvenile offenders and adult offenders to be treated differently. Juvenile legislation has always focused on reformation and rehabilitation instead of penalising the child. It is not the past misdemeanors of the child, but his future welfare that concerns the juvenile justice system. To ensure this philosophy it was felt that instead of placing young offenders in police lock-up or jail, it was necessary to place them in a specialised setting that would optimise his development. Furthermore, there is a danger of the child being unduly influenced by hardened criminals and being abused at their hands, if allowed to co-mingle. Most importantly the harsh treatment meted out to inmates in police lock-ups and jails would not be treatment commensurate to the juvenile's age.

The embargo on incarcerating juveniles in jail has, as aforementioned, been in the law books since the Children Acts. Separate detention facilities were established for placement of child offenders. For example, under the Bombay Children Act 1948, children found to have committed an offence were placed in classifying centres , and those pending inquiry were detained in approved centres. The Children Act 1960, applicable in Union Territories, provided for the establishment and maintenance of Observation Homes "for the temporary reception of children during the pendency of any inquiry regarding them under this Act" and

for special schools to be opened "for the reception of delinquent children under this Act". A "delinquent child" under the Children Act is a child who has been found to have committed an offence.

The Juvenile Justice Act 1986 was passed to bring about uniformity on this subject throughout the country. The legislative intent as stated in the statement of objects and reasons was, inter alia, "to lay down a uniform legal framework for juvenile justice in the country so as to ensure that no child under any circumstances is lodged in jail or police lock-up." Under the 1986 Act, observation homes were to be established and maintained for "the temporary reception of juveniles during the pendency of any inquiry regarding them under this Act", and special homes for the reception of delinquent juveniles. This Act specifically states that no delinquent juvenile shall be sentenced to imprisonment. The Juvenile Justice (Care and Protection of Children) Act, 2000 has similar provisions as the 1986 Act with regards to detention of juveniles in conflict with law in observation homes and special homes.

The international community has also acknowledged the importance of keeping juvenile offenders separate from adult offenders. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice has in Part Five dealt with "institutional treatment", and under clause 26.3 states, "Juveniles in institutions shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults." There is an identical provision under these Rules for juveniles under detention pending trial. The underlying principle being that segregation of juveniles and adult offenders is necessary as otherwise there is a danger of juveniles getting "criminaly contaminated".

SUPREME COURT INTERVENTIONS

Despite statutes prohibiting placement of juveniles in jail, they are routinely shown as adults on arrest, kept in police lock-ups and jails, their trials are conducted before regular criminal courts, and they are convicted and sentenced to imprisonment, sometimes even life imprisonment. The Supreme Court has repeatedly been called upon to examine the issue of juveniles in jail. In 1986, Sheela Barse petitioned the Supreme Court seeking "release of children below the age of 18 years detained in jails in different states of the country". The same year, the Supreme Court criticised the practice of keeping children in jail and ordered state governments to establish observation homes so that juvenile offenders could be placed there pending their inquiries. In that judgment, it has also attempted to give reasons as to why juveniles should not be kept in jail.

"If a child is a national asset, it is the duty of the State to look after the child with a view to ensuring full development of its personality. That is why all the statutes dealing with children provide that a child shall not be kept in jail. Even apart from the statutory prescription, it is elementary that a jail is hardly a place where a juvenile should be kept. There can be no doubt that incarceration in jail would have the effect of dwarfing the development of the child, exposing him to baneful influences, coarsening his conscience and alienating him from the society. It is a matter of regret that despite statutory provisions and frequent exhortations by social scientists, there are still a large number of children in different jails in the country as is now evident from the reports of the survey made by the district judges pursuant to our order dated 15 April, 1986. Even where children are accused of offences, they must not be kept in jails. It is no answer on the part of the states to urge that the ward in the jail where the children are kept is separate from the ward in which the other prisoners are detained. It is the atmosphere of the jail which has a highly injurious effect on the mind of the child, estranging him from the society and breeding in him aversion bordering on hatred against a system which keeps him in jail. We would therefore like once again to impress upon the state governments that they must set up necessary remand homes and observation homes where children accused of an offence can be lodged pending investigation and trial. On no account should the children be kept in jail and if a state government has not got sufficient accommodation in its remand homes or observation homes, the children should be released on bail instead of being subjected to incarceration in jail."

In Gopinath Ghosh vs. State of West Bengal , the accused for the first time before the Supreme Court claimed that he was below 18 years on the date of commission of the offence and was therefore to be treated as a child under the West Bengal Children Act, 1959. Whilst upholding the plea of Gopinath, the apex court noted the recent tendency of the plea of juvenility being raised for the first time before them and obligated the magistrate to conduct an age determination inquiry if

the accused produced before him appears to be 21 years or below. The criminal manual issued by High Courts direct magistrates and judges to ascertain the age of youthful offenders when in doubt.

"*All Courts should, whenever a youthful offender or a party is produced before them, take steps to ascertain his age. If the age given by the Police does not appear to be correct from the appearance of the offender or party, and if the police cannot produce satisfactory evidence regarding his age, the court should consider the desirability of sending the offender or party to the medical officer for the verification of his age before proceeding with the case.*"

It continues to say in Chapter VIII titled "Child and Young Offenders" that the best evidence of age is the entry in the births and death register, but when such evidence is not available the accused should be medically examined, and a definite finding with regard to age should be recorded by the magistrate in each case, and if the accused on inquiry is found to be a juvenile, the matter should be transferred to the juvenile court.

In Bhola Bhagat's case, the Supreme Court, whilst entertaining a plea under the Bihar Children Act, has directed courts to conduct an age determination inquiry whenever an accused claims to be a juvenile and return a finding regarding age prior to proceeding with the criminal case. "We expect the High Courts and subordinate courts to deal with such cases with more sensitivity, as otherwise the object of the Acts would be frustrated and the effort of the legislature to reform the delinquent child and reclaim him as a useful member of the society would be frustrated." In Sanjay Suri & Anr. vs. Delhi Administration, Delhi & Anr. , the Supreme Court has urged magistrates and trial judges to specify the date of the accused on a warrant, and jailors to refuse to accept warrant if the age of the prisoner is not mentioned.

JUVENILES AND ERRING OFFCIALS

Although the legislature and the judiciary have made it clear that no juvenile should be detained in jail, juvenility remains undetected, and minors continue to languish in jail thanks to erring officials. Detention is always coupled with the juvenile being, in all other aspects too, included within the criminal justice system. Juveniles are declined the safeguards of juvenile legislation, such as socio-legal approach of the juvenile justice board, completion of inquiry within four months, and mandatory granting of bail except in certain prescribed circumstances. Stringent measures must be taken to make erring functionaries responsible for denying a juvenile the protection of a progressive legislation. The judiciary should show the way by awarding compensation to the accused or convict who has belatedly been declared a juvenile, for the injury caused to him because the procedure established under law was not followed, thus encroaching on his personal liberty. Such compensation should be jointly payable by the investigating officer, the jailor, the magistrate, the session judge and any other functionary who has neglected to ascertain the age of the accused, thereby keeping a juvenile in jail.

It is only when the system is made accountable that any positive change will be noticed. There should be a regular scrutiny of police lock-ups and jails by independent persons, such as lawyers, doctors, social workers, along with a legal aid lawyer, to identify juveniles and help them expeditiously raise the plea of juvenility. Visitors are appointed not only to voice the problems faced by inmates, but also to explore solutions along with the state government, especially with regards to that which deprives the prisoner of his entitlement. To ensure that the plea of juvenility can be raised at the earliest and precious years saved, it is necessary that those accused are not placed in a position where they have to engage a private lawyer. They should instead, have the services of a competent legal aid lawyer from the time of first production. Juvenile justice should be included in the curriculum of law colleges and judicial officers training institute. Awareness should also be created amongst prisoners about juvenile legislation so that juveniles wrongly incarcerated in jail may themselves inform magistrates or judges about their being under 18 years on the date of offence.

CONCLUSION

Identifying juveniles, removing them from the criminal justice system, and bringing them within the folds of the juvenile justice system should be given the priority it deserves. With the 2006 amendment to the Juvenile Justice (Care and Protection of Children) Act, 2000, the identifying of juveniles in jail has become more significant. At this stage it is important to comprehend who is the person that is to be treated as a juvenile under prevailing juvenile legislation. Section 2(l) of the 2000 Act as amended in 2006 defines "juvenile in conflict with law" to mean a juvenile who is alleged to have committed an offence and has not completed 18 years

of age as on the date of commission of such offence. This Act has increased the age of juvenility in case of a boy from below 16 years to below 18 years, and the amendment has made retrospective such increase in age of juvenility. The effect of retrospectivity is that protection of juvenile legislation is to be accorded to all persons who have committed offences when below 18 years of age irrespective of the date on which such offence was committed, or whether their cases are pending or disposed of. Hence, persons above 16 years of age who had been treated as adults under the 1986 Act are to be identified and brought under the ambit of juvenile legislation, even if the offence was committed prior to the 2006 amendment. This is not an easy task, but it is also not an impossible task and should be taken up by respective state governments on a war footing.

—March-April 2008

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Access to Justice in Globalised Economy

In an age when politics is giving way to market, poor stand little chance as judiciary too undergoes restructuring. This is called for to suit the needs of market economy where billionaire's right to remain super rich and plight of the most impoverished to be super-poor are going to be accepted.

UPENDRA BAXI

Allow me to make one general and extended preliminary remark concerning the overall theme of this conference: 'Equity and Equality in a Market Economy.' This is indeed a puzzling theme because central to the notion of the market itself are two institutions of law: the right to private property, in all its sacrosanctity, over the means of production and the right of freedom to contract. Both these notions put together signify the Rule by Capital, not any conception of the Rule of Law guided by equity and equality, conceived either constitutionally or in terms of basic human rights and fundamental freedoms. Once we accept the right to private property in the means of production, we also accept more or less the right of the billionaires to remain super-rich and the plight of the most impoverished to be super-poor. We further accept that both the freedom to own property and freedom of contract imply the *right to inflict lawful harm on others*.

The elegant expression 'market economy' conceals more than it reveals. To understand it rather fully, we need to grasp the distinction between production and seduction. The French postmodernist thinker Jean Braudillard, in his small monograph *The Mirror of Production*, educated us in the meaning of this distinction: production makes invisible things *visible*; in contrast seduction makes the previously visible things *invisible*. We must surely ask what the Indian Constitution thus produced and the seduction now entailed in the current 'Age of Reforms.'

For one thing, the labours of Indian constitution-makers made fully legible many contradictions between social, economic, and political life, about which Babasaheb Ambedkar spoke about so movingly at the moment of the adoption of the Constitution. His speech concerning the 'life of contradictions' frequently adorns the discourse of the Supreme Court of India. These contradictions were specifically highlighted by the proclamation of the values of equitable social development in a postcolonial India paired with a grudging insertion of Article 31 rights to private property. The history of judicial interpretation and constitutional amendments –- from the First to the 44th Amendment — archives fully the endeavour to regulate private property in the means of production in the name of equity and equality offered by state regulation. True, the 44th Amendment finally abolished the right to property, or rather demoted it to a status of merely a constitutional right. But this came too late and constituted too little to serve the cause of equality and equity in constitutional development. I cannot pursue this enormous narrative today, save to remind us all that the Indian Supreme Court has now fully reverted to its adjudicatory policy stance in the first three decades of Indian constitutional interpretation which entrenched contract and property above all fundamental rights. Five out of the six stories that I present later fully illustrate this trend.

The seduction occurs when the preambulatory values, the fundamental rights of the masses of Indian impoverished, and the Directive Principles of State Policy, and Fundamental Duties of all Citizens, are rendered relatively invisible by apex policy-makers and summit Justices alike. The Directives in particular represent a vision of constitutional development ill suited to the contemporary era of economic reforms.

We have been asked variously, however, at the inaugural occasion yesterday the ways in which Indian legal education, research, and profession, even the judiciary, may service the

needs of globalised market. The learned Prime Minister urged us to realise that the 'legal world has become a global village' and that globalisation signifies vast opportunities for us all to become world–class players in the global 'markets of law.' He urged us to improve 'the quality of public discourse' to serve the 'needs of the country.' But overall these needs remained defined and described in terms of India as a global market player. **In effect, the learned Prime Minister, and Honourable Law Minister asked law students, teachers, and professionals, not so much to become *soldiers of justice* but rather to act as the *cohorts of global capitalism.***

At least, that is how I received their entirely understandable message! I suspect on a close listening of the speech of the learned Chief Justice that he may have had some partial caveats to offer but I remain unsure and request your cooperation in understanding his subtexts a little better.

I sincerely hope that I am entirely wrong in receiving the overall message of the inaugural session that contained two rather contradictory messages: the rule of law should remain global capital friendly as well as human rights friendly. I simply do not know, nor can tell, how this may ever be accomplished. I will have to exit this thematic now, given the time-constraints, but I hope that what now follows may perhaps illustrate the oxymoronic nature of the principal theme of our discussion. Let me at the very outset say that the term 'access to justice' is as mystical as the expression 'globalised economy.'

Careful readers of the recently disconcluded WTO Doha Round will surely share this perception. One of the key categories there involved was NAMA-- 'Non-Agricultural Market Access'-- aiming at worldwide elimination of tariff and non-tariff barriers on free trade. As we know, the US-based Zero Tariff Coalition chaired by an executive from Dow Chemical, demanded zero tariffs in a large number of crucial sectors including even sporting goods, toys, wood machinery, and wood products! As some critics explain this, NAMA 'is a dream vehicle for corporations seeking a global rollback of taxes and regulations.' As we also know, the G90 (a grouping of the WTO's 90 percent poorest nations) expressed all kinds of fears concerning the risk that unbridled global competition may pose to their infant industries and small firms. They articulated apprehensions that zero tariff would escalate further the crisis of de-industrialisation, unemployment and poverty and result in a kind of 'search and destroy mission' for natural resources inherent in NAMA as promoted by global capital. They proposed various measures calling for information labelling, export restrictions on natural resources, and sustainable producers being 'dumped' on by cheap imports and in effect for articulation of 'popular sovereignty' over the right to regulate market access.

The notion of 'globalised economy' then signifies new forms of predation by global capital. Globalisation here refers to a new form of *colonisation without colonisers;* put another way, a new form of what I describe elsewhere as '*conquest globalisation*.' Its earlier forms consisted in directly visible and massive appropriation of territories, resources, and peoples; the current incarnation remains even more sinister because the similar planned appropriation is rendered almost *invisible*.

The task of critique concerning so-called globalised economy consists in devising historically accurate ways that establish a common identity between the East India Company and its lethal lineal descendants, the contemporary personifications of multinational capital, via the MNCs and their normative cohorts, the International Financial Institutions. These now use the languages of access and claim that such access remains essential to achievement of global justice! The tasks of human rights and new social movements also thereby stand defined by the slogan: *Justice consists in a resolute denial of such access.*

The massive difficulties confronting this task stands posed by what Professor Leslie Sklair names insightfully as the 'new universal globalising middle class,' a segment of which stands here assembled at this Conference. We all seem, almost without exception, to believe that the new form of conquest globalisation is a *good thing*, after all. We all use computers, cell phones, the internet, the I-Pod, the DVDs, and related devices. We all believe that that the digital and biotech revolution remain *more emancipative* than the 'socialist' revolutions of the yesteryear. We all have stories to tell about how access to cyberspace facilitates the formation of new human rights and social action/movement solidarities. And we believe that if contemporary technologies of globalisation create new problems, these at the same moment remain endowed with the future prowess of techofixes that will necessarily solve these. In this, we remain consciously or otherwise *juristic/juridical/judicial*

technophiles, in turn promoting forms of *techno-politics* as a crucial dimension of the so-called 'good governance.' Through all these, and related moves, uncritically celebrating the 'globalised economy' in everyday action we remain complicit with conquest globalisation.

We all are constantly fed with the propaganda that the 'network society' aided by the digital revolutions facilitates access to sources of information hitherto previously unimaginable and if there may exist any digital divides, processes are already under way to bridge or at least abridge it. Like all propaganda, this represents a kernel of truth. But also by the same token this also overstates the claims of equal access to knowledge and information in cyberspace. As the illuminating corpus of Professor Manuel Castells shows, the rise of the network society may not always favour access to *justice*; in fact, it may indeed promote forms of global violence and injustice. And Professor Peter Drahos alerts us, indwells in the infinite *promise* of democratisation of information also the peril of some new orders of ' *informational feudalism*.'

Even when lacking the luxury of time on this occasion to elaborate in any detail the promise and the peril of the new informational capitalism now firmly in place, please allow me to make one remark: the dominant in civil society and the state in so many domains of the so-called 'globalised economy' simply, starkly, and with vast orders of politics of cruelty, trump the human rights claims of the dominated; vast masses of human beings remain condemned to a preoccupation merely with cheating their ways into daily survival. Put simply, they remain simply, and unconscionably, priced out of the constantly otherwise expansive globalised 'access talk.'

Contemporary globalisation assumes many forms, where legal and judicial globalisations play a major role. Legal globalisation consists of many 'things'. It signifies the modernisation of the metropolitan legal profession, lending it a competitive edge in the world markets for legal services. In the process, some vice chancellors of the elite national law schools serve important roles in advising on matters of constitutional change, economic policy and law reform even as they prepare their students for absorption into corporate practice. Legal globalisation also refers to new law reform agenda shaping the course of the three 'Ds' of economic globalisation: de-nationalization, disinvestment, and deregulation. Prominent on this agenda remain the shaping of new regulatory institutions, processes, and cultures; increased emphasis on alternate dispute resolution; simplification of investment and commercial law; and tendency towards accelerated growth of 'flexible labour markets'. Law reform, especially the efficiency of the administration of justice, becomes more visibly the instrument of the new economic policy. A process curiously named as 'far globalisation' generates some important legal changes such as the employment guarantee scheme act, the more vigorous enforcement of child labour laws, regime of protection of consumer rights, and of the right to information. Legal globalisation, overall, serves and promotes the needs of the new globalising middle classes of India.

I believe that we must raise a related question concerning the global social origins of all this newly fangled access to justice talk. Who/which are the forces, managers, and agents of the globalised access to justice talk? And how may we characterise their 'original intent'? To put the matter rather summarily, it seems to me crystal-clear that the manifold labours of the international and regional financial institutions, the triadic communities of states — the United States, the European Union and Japan -- and the now deeply fractured WTO -- signify by 'access' simply the potential for penetration of third world markets of labour and capital in modes that make these safer for the community of multinational corporations and direct foreign investors. In this vision, postcolonial national constitutions and its laws, manifest themselves as obstacles to access to the flows of global capitalism. Thus, these now remain heavily subject (as Professors Stephen Gill and David Schneiderman painstakingly remind us) to the newly minted prowess of the newly emergent yet fully robust 'new economic constitutionalism.'

Allow me to bring home the tragedy of all our access talk in the context of judicial globalisation. In the sparse but important literature on the subject, judicial globalisation suggests a new order of comity and cooperation among the world's apex courts and justices. At the first sight, there is little objectionable with the idea that apex justices of different jurisdictions ought to meet with each other and learn from each other's achievements and dilemmas, or that they become a cooperative 'community' pursuing the tasks of national and global justice. But often these simple-looking ideas carry some hidden agenda. Judicial comity is often tinged with hegemony, and at times simple domination.

Thus, for example, Judge Keenan in the Bhopal Case deferred to the competence of the Indian courts to decide the complex situation of mass disaster caused by the Union Carbide Corporation; Keenan went so far as to register a desire that he wished the Indian judiciary to stand tall in complex mass torts adjudication! The sting in the tail was this: any damage award remained subject to 'due process' requirement and it was left completely open to a New York equivalent of Indian Small Causes Court to decide finally whether the Indian Supreme Court was capable of any correct understanding of this requirement! **Judicial globalisation, in sum, means subservience of the South apex courts by the hegemonic North judicial fora.** I have in my Hague Academy Lecture (2000) more fully illustrated this dimension of judicial globalisation.

Judicial globalisation further occurs in the name of 'good governance' which requires an intense reform of justicing under the auspices of governmental and inter-governmental aid and development agencies. Again in principle un-objectionable, such auspices often take over the agenda of law reform and reform of judicial administration, and shape them in accordance with their economic and strategic needs. In particular stands promoted the idea of judicial self-restraint in policy matters of trade liberalisation, direct foreign investment, the establishment of company towns, free trade economic zones, and flexible labour markets.

Although 'structural adjustment' is a notion that primarily extends to International Financial Institutions induced conditionalities that swallow the hard-won independence of postcolonial nations [1], and this notion is not thus far covertly extended to apex adjudicatory power, prowess, and process. I here suggest that the World Bank/IMF/UNDP, and related, programs of 'good governance' *understandably,* if not *justifiably*, promote structural adjustment of judicial activism. These covertly address, as well as overall seek to entrench, market-friendly, trade-related forms of judicial interpretation and governance. Judicial self-restraint concerning macro-economic policy as the basis of adjudicatory policy stands proselytised by the already hyper-globalised Indian appellate Bar. Understandably, the processes of judicial appointment preclude any serious regard for the elevation of noticeably outspoken judicial critics of Indian globalisation. No longer may the judicial collegium already in place dare nominate a potential Krishna Iyer, D.A. Desai, Chinnappa Reddy, or even a Bhagwati!

Before I proceed with six stories, please allow me to say that I remain an unabashed votary of judicial activism, Indian-style, which it remained my privilege to foster and further via social action litigation. In word (in my writings) and in deed (in my interventions/appearances before the Supreme Court of India), I have celebrated the many avatars of Indian judicial activism variously. For example, I have described judicial activism as transforming the Supreme Court of India as the Supreme Court for the impoverished masses of Indian-citizens; I have celebrated judicial activism as an essential chemotherapy for the cancerous Indian body politic. I have described in vivid detail, and applauded, the ways in which activist Indian Justices have proceeded to invent a new jurisdiction (which I name as the 'epistolary' jurisdiction), established new forms of appellate fact-finding (notably via the device of socio-legal citizen commissions of enquiry), re-scripted fundamental rights considered and rejected by constitution-makers for inclusion in Part III (such as 'due process,' right to speedy trial and to bail)' and enunciated new galaxies of human rights (such as the right to privacy and dignity, livelihood, environmental integrity, information and participation). The many–splendoured distinctive achievements of social action litigation have already, and continue to, fully assist the processes of re-democratisation' of the Indian constitutional polity.

I need to reiterate all this out of any naïve authorial vanity but as an act of resistance to the forms of legal and judicial globalisation, which now foster the art of organised public amnesia, even concerning the new styles and habits of the now-taken-for-granted ways of judicial governance of India. At the same moment, it also needs to be said that celebration differs from panegyric orgies, rituals that serve no worthwhile ends than those pandering narcissisms of the moment.

I have been critical of some adjudicatory policies and outcomes. In this, I am not in any way singular. Activist scholarship everywhere, but more poignantly in the Indian conjuncture, serves its cause well by abstaining from performances of judicial sycophancy, in any case prohibited by Article 51-A of the Constitution that urges all Indian citizens to develop 'scientific temper', 'spirit' of critical enquiry and social reform', and above all the virtue of 'excellence' in all 'walks of life'. In sum, this virtue casts a responsibility on all Indian citizens to expose mediocrity in adjudicative policy and

performance. The Constitution then requires of both apex judicial actors and their critics to shun mediocrity and pursue excellence; these remain in real life, I acknowledge, difficult virtues to practice.

Allow me, in this milieu, to proceed with my six stories! The first story relates to the constitutionality of some globalisation induced trade/aid/grant conditionalities. The Supreme Court had indeed developed the doctrine of 'unconstitutional conditions' (notably by the exertions of Justice Mathew) and the later doctrines concerning unconstitutional disappointment of legitimate expectations and of prohibition of unjust enrichment. All these doctrines, in sum, dignified strict judicial scrutiny of macro and micro economic/development policies that adversely impacted on equality/equity or human rights and fundamental freedoms of the most vulnerable classes of Indian citizens. These doctrines now lie buried five fathoms deep.

My first story concerns the activist challenge to India's accession to the WTO impugned on the ground that it violated not just Part III provisions but also the basic structure of the Constitution, an eminently well-crafted judicial doctrine [put in the Onida-TV advert as 'owner's pride and neighbour's envy'.] The Bombay High Court rather blithely dismissed the contention! On one reading of its judgment, the Court, overall, asked the petitioners to return to its powers as and when any such deleterious impact became more manifest! Unlike the classic discourse concerning the certification of the interim constitution where the South African Constitutional Court subjected it to the test of basic principles, the Court did not even seek to match the blood-group of the WTO agreements, especially the TRIPS, with Parts III and IV of the Constitution. It is no consolation, though in a different context, for us to know that the Philippines Supreme Court likewise abstained/ abdicated its role. **May I suggest that we read this decisional stance as the first step towards the structural adjustment of judicial review power, process, and activism?** To steal a famous phrase from Ronald Dworkin, the eminent Court acts here as a '*deputy*' to the legislators, let alone as '*deputy* legislator.'

A second momentous development towards the structural adjustment of judicial role, and activism, occurs through the entirely unconscionable and unconstitutional judicial orders decreeing the infamous Bhopal settlement. Should you find these words too harsh, I invite your attention to the text of these orders. The Court there not merely reduces the compensable amount from the Indian government computed US 3 billion dollar to 470 million dollar but also grants the Union Carbide full immunity from criminal proceedings and surrogates the Indian government as a fully-fledged fiduciary clone of that multinational, and all its world-wide affine, in regard to all civil action in India and at world at large! Our efforts at review petition saved the Court, at least partially, of the ignominy of a 'done deal' providing criminal immunity to Union Carbide.

I have written rather extensively concerning this astonishingly anguishing adjudicatory performance but also been responsible for review petitions that ultimately, but effetely, quash some of these immunities/impunities. Twenty-one years since, and I cannot speak of this without a lump in my heart; the catastrophic victims remain staggeringly re-victimised. For the present occasion, this narrative suggests a judicially induced/managed transition room; the paradigm of the universal human rights of all suffering peoples to that of trade-related, market-friendly human rights paradigm.

A third story concerning structural adjustment of judicial activism stands presented in the determined reversal of the proud labour jurisprudence of the Supreme Court itself. The juristic and juridical labours of Krishna Iyer, D.A. Desai, Chinnappa Reddy M. P. Thakkar, and in earlier times of Subba Rao and Gajendragadkar, even a Hidyatullah, are now reversed by many a hurried stoke of insensitive judicial pen! A 2006 decision of the Supreme Court [2] even goes so far as to '*denude*' all prior contrary decisions of their authoritative status! This sweeping dismissal of prior binding precedents signifies an entirely unaccountable and rather unprecedented judicial technique in the annals of the Indian as well as the Commonwealth judiciary! The learned Justice who writes the principal opinion even goes so far as to suggest that his predecessors laboured under a misimpression that ours was a *socialist* constitution!

This eminent judge compelled a momentous jurisprudential anxiety for me in my Warwick location. I scourged the histories of recent amendments to ascertain whether some recent constitutional amendments had after all deleted this 42nd Amendment insertion to

the Preamble to the Constitution! Allow me to bring to you the *good* news that this preambulatory recital has survived the ravages of contemporary Indian globalisation! The bad news is that this now for the Supreme Court of India makes not a *tattle of difference!*

I am not saying at all the later Justices may not feel free to dissent from their predecessors. Nor am I saying that the predecessors may claim any prophetic wisdom over the future of constitutional development. However, I do wish to suggest with the fullest constitutional sincerity that in doing so they remain fully accountable at the bar of public reason. And in this respect they altogether seem now to collectively fail.

A fourth narrative of structural adjustment of judicial power stands furnished by the Supreme Court's momentously meandering jurisprudence concerning the Narmada Dam construction. At one decisional moment, we are told that the height of the dam may not be raised without the most solicitous regard for the human rights, and human futures, of the ousted project affected citizen-peoples. At another decisional moment stands enacted the unconstitutional pari passu principle, under whose auspices submergence may actually occur with some indeterminate regard for relief, rehabilitation, and resettlement. At a third moment, the affected citizen-peoples stand somehow assured that the Court is not powerless to render justice to them even as submergence occurs. Who knows what a fourth moment may after all turn out to be? The present writing on the judicial wall fully suggests the possibility that the Court may terminally declare that the tasks of relief, resettlement, and rehabilitations stand almost fully and magically accomplished!

A fifth story of the structurally adjusted judicial role and 'responsibility' stands now furnished by the judicially mandated/mediated/sanctioned urban demolition drives that cruelly impose themselves on the bloodied bodies of the urban impoverished. Some recent judicial performances go so far as to fully suggest a total reversal of human rights to dignity and livelihood, which the Court itself since the Eighties so painstaking evolved. Some court orders go so far as to mandate, under the pain of contumacious conduct, any human rights-oriented intervention against the enforced demolitions. The impoverished urban evacuees stand denied all rights of constitutional due process, including access to their erstwhile meagre belongings. The bulldozers remove the last sight of their existence as documented citizens; all evidence of title and occupation (including the only 'passport' they possess by way of pattas, their inchoate 'title' deeds, and prominently their ration cards) stand maliciously and wantonly destroyed.

Not too long ago during the 1975-76 imposition of the internal Emergency, such happenings were poignantly described as emergency excesses. Today, these somehow constitute the badges of good governance! Surely, structural adjustment of judicial activism, or judicial globalisation Indian-style, thus with a single-minded consistency, now produces with some irreversible human rights destructive globalising intendment some new judicial productions of the estates of Indian human *rightlessness*.

A sixth story concerns the harsh way in which the Indian Supreme Court dealt with the 'contempt' committed by Zahira Sheikh. She signifies a multiple-produced series of texts of victimage constituted severally: first, as an eye-witness to the destruction by arson of her own kin and affine by the Hindutva mobs; second, as news/views 'commodity' in hyperglobalising Indian mass media; third, as a resource appropriated by local politicians and by some activists alike and fourth as a commodity in the heavily mass media inflected markets of human rights and social movement activism. Overall here, a deeply traumatised victim of organised political catastrophe, or holocaust, stands compelled by the force of circumstance to make contradictory statements that finally decree her fate as a contumacious Indian citizen worthy only of the most severe punishment in the annals of contempt jurisprudence.

The same Court, however, remained largely lenient in its regard for Chief Minister Kalyan Singh for an objectively presented far worse egregious contumacious conduct leading to the demolition of the Babri Masjid and the communal carnage that followed. It also remained lenient for Arundhati Roy, a historically belated NBA activist figuration, marshalling the full range of powers of International Union of Journalists, and Shiv Shankar, a former Union Law Minister, for a while marshalling the power of judicial elevation. Their egregious contumacious conduct was thought eligible for the otherwise rather relaxed standards of contempt punishment. Yet, the Supreme Court leaned heavily on Zahira. How may we understand this judicial asymmetry

in our, or indeed in any access talk, save by the fact that that high political status was simply not available to Zahira? To depict the scenario thus is not to present any mean-mouthed mode of attributing any class differential in access to justice. Yet in discharging my citizen responsibility acting under Part IV-A fundamental duties of Indian citizens requires me to highlight the different strokes of the judicial exercise of contempt power, which also mark some enormous differentials of access to free speech under the Indian Constitution.

How indeed may one fully grasp the forms of politico-judicial toleration of contumacious performances that in fact enact different standards for highly placed political figures as compared with ordinary and hapless citizens? Is it also the case as well that some new walls of difference thus erected between globalised and de-globalised Indian citizens? How may we at all grasp the enactment of different tolerance thresholds for public-spirited criticism of adjudicatory styles and performances that now so fully enact some contradictory, dual, even multiple, standards of differential access to justice, as an aspect of freedom of speech and expression, even amidst the most traumatically devastating moments?

There is simply no way to 'conclude' this agonised presentation, save by saying that the access talk remains a part of the *problem*, not a part of any *solution*. To reiterate, any approach to solution must at least respond to the following types of questions: How may we *de-globalise* judicial access, that is, ensure that the overseas and national capital does not ride roughshod over the livelihood and dignity rights of the working classes? How may we ensure that in the making of new Indian global cities, and the enclaves/fortresses of special economic zones, the same range of lived human rights to the migrant and urban impoverished citizens? How may we pour democratic and constitutional content to the borrowed and imposed languages of 'good governance'? How long may the masses of impoverished Indian citizens be treated as mere *objects* of development policies that reproduce the lives of Indian citizens as receptacles of obscene political *waste*? How far ought the new economic policy remain effectively a human rights-neutral domain of national governance by elected officials as well the unelected ones (most notably the Justices)? How may we all endeavour together for the restoration of the glory of the Supreme Court of India which finally converted itself, in the halcyon days of democratisation of access, as the Supreme Court for all hapless Indian citizens?

Perhaps, I may sound to you as calling for a Jurassic-park-type revival of Indian judicial activism of the seventies and eighties. You may well want to regard me as a jurisprudential dinosaur. So be it. For weal or woe, I am unable to make any coherent sense of our access talk otherwise.

Perhaps not; I invite summarily the gesture of Jean Francois Lyotard in his *Peregrination: Law, Form, and Event* when he speaks to us thus:

"How may we understand then the descent into the substrata of necessity, to seek out there the most the meaning of the most irrational of historic effects [that resists the [construction of] the incomprehensible and complete tableau of reality… [that listens]… to the obscure passions, the arrogance of leaders, the sadness of workers, the humiliation of peasants, and of the colonised the anger and the bewilderment of revolt; the bewilderment, too, of thought [that invites] again the thread of class in the imbroglio of events."

Justice Goswami once spoke of the Indian Supreme Court as the 'last refuge for the bewildered and the oppressed'. Perhaps, a globalising Indian Supreme Court needs to recover this increasingly lost adjudicatory estate?

Excerpts from Professor Upendra Baxi's speech made at the golden jubilee of Indian law Institute, New Delhi.

— November-December 2007

A Just Society Through Just Laws

Giving sort of powers to the police, convicting people even where a judge has a reasonable doubt as to the guilt of the accused is a thin edge of the wedge. What we then start doing is compromising the judicial system. We need an independent judiciary that can stand against the government in case needed to uphold justice.

JUSTICE MOHAMMED ZAKERIA YAKOOB

Once after becoming a lawyer, I was sitting outside a court in South Africa waiting for my case to be called. The applicant was to be brought to the court. He was virtually treated as nobody. Had a white applicant been called he would have been named as Mr-so-and-so with polite courtesy. I sat back seeing junior lawyers as they scurried around to cross-examine state witnesses who were like magistrates and judges only in the sense they were whites. White prosecutors cross examining the applicant and accused were often assisted by the court. It was a normal practice for judges and magistrates during the days of apartheid. In relation to black accused the assumption used to be that the person must be guilty and in relation to white accused the assumption was that the accused may not be guilty.

And that became a problem as the criminal justice system operated horribly in relation to the African people despite the fact that we had a principle which said that the State must prove its case beyond reasonable doubt. So the fundamental point I want to make is that the designation of the onus in a piece of legislation is not the end of the matter, it is only the beginning and a fair trial means much more than incorporating matters related to an offence into pieces of law.

Another important thing in those days were political trials. Political trials in Africa are highly complicated. They are held far away from the accused person's home so that there could be no one there to support and defend. They were held very quickly so that there is no opportunity given to the people to prepare their defence. They were held in consequence of evidence given by the people in detention and our apartheid style judges never took it particularly seriously. There were confessions taken which were alleged to have been freely and voluntarily made. All those confessions were admitted despite fairly strong evidence in many cases to the contrary. So political trials in the country represented a travesty of justice and the court system.

It was in this context that we had to draft our Constitution in relation to the fair trail provisions of our constitution. We came from a society where the justice system was manipulated to ensure segregation, discrimination, and to ensure that poor people continued to be

treated as if they were animals. That is the context. And we have the context where the negotiators of the constitution themselves as a part of the African National Congress had been victims of political trials which had been badly handled and many of them had been political prisoners before. So they understood, better than anybody else, having been victims themselves how police's improper conduct can result in injustice and impropriety. And, therefore, we made it perfectly clear that, we in our country would never tolerate a system in which there would be any injustice at all not on the basis of constitutional provisions but on the basis of these other hidden things. So we regarded the achievements of a non-racial society as fundamentally important to the achievement of justice because unless the society itself was non-racial we could not have justice at all. So the reconstruction of our society and the reconstruction of our criminal system began with our Constitution, our Constitution which made it perfectly clear that all rights were interdependent and interrelated and therefore the fair criminal trial right, too, was not a right which was to be taken independently of all other rights. It had to be taken in conjunction with the right to equality.

But before I get to the fair trial right, there were certain values entrenched in section 1 of our Constitution that made it perfectly clear that this Constitution stands for the dignity of human being, the achievement of equality and advancement of all human rights and freedoms. It made it clear that it stood for the abolition of sexism and racism and made it quite clear that our Constitution stood for the supremacy of the Constitution and the rule of law. So in our country it is not only the Constitution that is supreme but also the rule of law. And these principles have been entrenched in our Constitution to a greater degree than all others. The rest of the bill of rights can be amended with a 2/3rd majority subject to certain conditions but these values, these principles, this particular section can amended only with a 75% majority. So these principles are fairly important because we believe that the fair trial provisions are in fact concerned with the dignity, equality and freedom of all human beings.

And now we come to the fair trial provision which has been in our Constitution. There are many people in our society who have commented on the fair trial provisions of our Constitution, saying said that this has been taken rather too far. Police have claimed that it is the fair trial provision which has been the cause of absence of convictions and so on. People have said that the fair trial provision means that our Constitution caters more to the people who are accused than people who are victims. This is an argument advanced all over the world.

The first problem is, how do you view the accused people. If you view accused people as people who are guilty as the Malimath report in the Indian case does then obviously you have adopted a different approach. You would say that these people are guilty and they must not go free. It is a difficult assumption to make as it is an assumption which is against the presumption of innocence. You assume that there is no smoke without fire. You assume that there must be something and therefore there is something essentially wrong with acquittals.

Yet, I want to say something about proving a case beyond a reasonable doubt and what it means. The Malimath report regarded this with some circumspection and came to the conclusion that what is required is that once the court is convinced it is alright. Now the ridiculousness of this proposition can only be understood if we introspect just a little bit about what proof beyond a reasonable doubt means. What it means is this; it doesn't mean that the judge doesn't arrive at the truth, it doesn't mean that the judge is God and decides whether something happened or did not happen. It is absolutely impossible for a human being listening to the witnesses to decide whether something that has been said is true or not. Chasing after the truth and trying to discover the truth is an impossible thing. Only God knows the truth and nobody else does. How can a judge ever presume what is the truth. All a judge can ever decide is to say whether the case brought before him has proof beyond reasonable doubt from the point of view of the evidence he has heard. Therefore the search for the truth to me is something, which is utterly unachievable and nonsensical. In the end you are a human being, you hear the evidence brought before you and decide whether the case has been proved beyond reasonable doubt or not. But again what does that mean? That simply means that if a judge has reasonable doubt after hearing all the evidence about whether the person committed the offence, the person must be acquitted. What is required for an acquittal is that the judge must have not just a mere simple doubt, a vague doubt but the judge must experience a reasonable

doubt in relation to whether the accused is guilty before the judge acquits the accused.

What are the government, the judiciary and Malimath saying? Are they saying here that the judges and magistrates must convict accused persons even if they have a reasonable doubt in relation to whether the conviction is proper or not? That is what truth beyond a reasonable doubt means and we must not get caught up with expressions like balance of probability and reasonable doubt. Let us take the Malimath proposition. He says that if there is proof beyond reasonable doubt then the judge must be convinced. He doesn't understand the onus. How can a judge be convinced that the accused did it on the one hand and have reasonable doubt on the other. You cannot be convinced if you have a reasonable doubt. So anybody who says that you must replace reasonable doubt with another onus that the judge must be convinced is talking nonsense because a judge cannot be convinced if a he has a reasonable doubt.

So the real question that we have to answer is whether we want a society, for our sake and not for the sake of the accused, or in India where we want to say to our judges that please convict these people even though you have a reasonable doubt as to the guilt of the accused. I don't know about all of you but I don't want to live in this kind of a society, I don't think even the judges want to live in that society.

If you abandon this principle and say that judges must convict even if they have reasonable doubt, what you are saying is that the police allegation and the police suspicion that they are guilty is worth more than the reasonable doubt of the judge having heard all the evidence. What you are saying is that the judgement of the police officer is more important than the judgement of the court. And if that is so, why are there courts anyway? Then why have courts if they are going to work on the basis of the judgement of the police that is more important. So let the police decide whether the person is guilty or not. In the end giving this sort of a power to the police, convicting people even where a judge has a reasonable doubt as to the guilt of the accused is a thin edge of the wedge. What we then start doing is compromising the judicial system. What I think is that you need to have an independent judiciary that can stand against the government in case this is needed to uphold justice.

— July-August 2007

Clear the Jails First

The arbitrary powers to keep a person confined without a guilty verdict is necessary for a State and its police that want to rule by terror. Unfortunately, that's what we follow. Significantly, those who languish in jails are poor people, Dalits, Adivasis and Muslims. Unless serious reforms are implemented, things are not going to improve.

COLIN GONSALVES

The Code of Criminal Procedure (Amendment) Act, 2005 has been welcomed in the national media as heralding the release of 50,000 undertrials many of whom have been languishing in jails for years without their trials even beginning. Nothing could be farther from the truth. The amendment is, in fact, a reversal of the Supreme Court decisions from 1996 onwards in the Common Cause and the Raj Deo Sharma cases.

In the Common Cause cases in 1996, the Supreme Court found that in many cases where the persons were accused of minor offences, proceedings were kept pending for years. The poor languished in jail for long periods because there was no one to bail them out. The criminal justice system operated as an engine of "oppression". The Supreme Court then directed that, depending on the seriousness of the alleged crime, those in jail for a period of six months to one year would be released either on bail or personal bond, provided their trials were pending for one to two years.

The Supreme Court then issued directions for the closure of cases and the discharge of the accused. Cases where trials had not commenced for specific periods of time were to be closed. Cases relating to corruption, smuggling, terrorism and the like were exempted. It was clarified that the accused would not be permitted to deliberately delay the criminal proceedings and then take advantage of the time limits fixed.

In the Raj Deo Sharma cases in 1998 the Supreme Court referred to its 1980 decision in the Hussainara Khatoon case where the Supreme Court held that "financial constraints and priorities in expenditure would not enable the government to avoid its duty to ensure speedy trial to the accused". The Court thereafter proceeded to issue guidelines for the closure of prosecution evidence and the release of the accused on bail after a certain period of time. It was clarified that "no trial could be allowed to prolong indefinitely due to the lethargy of the prosecuting agency".

Despite these directions given by the Supreme Court ten years ago, the criminal courts failed to release persons on bail and close trials.

The law was reviewed by a Constitutional Bench of the Supreme Court in P Ramachandra Rao's case in 2004 where the directions relating to the closure of cases and the fixing of

time limits for trials were set aside saying that it was "neither advisable nor practicable" to do so. As a result, the rot in the criminal justice system deepened and from time to time pathetic stories emerged in the national media on undertrials languishing in jails for decades, but nothing was done.

The present criminal amendment is a reversal of the guidelines laid down in the Common Cause and the Raj Deo Sharma cases, first of all because they do not lay down any time limit for a criminal trial to end. Secondly, whereas in the earlier decision an accused was entitled to be released on bail or personal bond after being in jail for six months to a year depending upon the seriousness of the crime alleged, now that has been enhanced to half the period of possible incarceration i.e. one-and-a-half to three-and-a-half years. If under the earlier decisions of the Supreme Court undertrials were not released there is no reason for us to believe that under a more stringent regime, justice will be done.

There are over 250,000 undertrials languishing in jails even though the law presumes them innocent unless convicted. In many cases despite years going by the trials have not begun. Seven out of every ten persons in jail are in this situation. Overcrowding in jails is routine, in some jails as high as 300 percent. Inmates sleep in shifts. Possibly no country in the democratic world keeps its people behind bars in the manner India does. The overwhelming majority of those incarcerated are poor, Dalits, Adivasis and Muslims. That the system operates harshly against these sections is an understatement. It operates only against these people.

The reluctance of the State to clear the jails of the poor is more by design rather than accident. The arbitrary powers to keep a person confined without a guilty verdict is necessary for a State and its police that rules by terror. The Criminal justice system is not really interested in the determination of truth ensconced in the final verdict, rather it is a massive arbitrary system of preventive detention where the ultimate verdict is of no concern as long as the accused picked up by the police languish many years in jail prior to acquittal. Those who criticise the State for the low rate of conviction miss this point; that conviction was never the intention of the police in the first place. This accounts for the sloppy state of forensic investigation and the reliance placed on the *lathi* over the law.

The other changes brought about by the criminal amendment are also equally vague or dangerous. The amendment in 50-A of the CrPC introduces the Supreme Court's guidelines in DK Basu's case but leaves out the crucial element of giving notice to the family of the person being arrested in writing. This was important because the police routinely lie about giving notice verbally. The amendment to Section 53 is positively dangerous because it seeks to introduce in a sly manner lie detector and narco-analysis tests as admissible in evidence.

In most democratic countries these tests are deemed to be of dubious merit and are not admissible. The amendment to Section 122 seeks to strengthen police power in chapter cases by incarcerating people purely on the basis of suspicion. As the law stands today such persons are to be released on them signing a bond for good behaviour. Now the magistrate will be empowered to ask for sureties which is complicated and difficult for the accused to obtain.

Thousands of poor people are languishing in jail under this Section. Section 291-A is designed to prevent the magistrate who supervises the test identification parade, the cornerstone of a criminal trial, from being summoned to give evidence in court. These are the negative changes sought to be introduced by the criminal amendment.

A better way out for the State is to declare an amnesty and to clear the jails of 100,000 poor prisoners on Independence Day.

— July-August 2007

Rot in the Prisons

Applying even the most retrogressive standards, Indian prisoners are the pits — a level of perversity matched only by our pious, moralistic and sanctimonious preachings abroad. In the land of Gandhi and non-violence, prisons remain depraved and brutish. Internally the prisoners rot.

COLIN GONSALVES

The level of barbarism in respect of a nation's treatment of its prisoners is perhaps more uniform than we Indians expect. Developed and developing countries alike treat their convicts with a kind of depravity, which speaks volumes for the nature of contemporary civilisation and their attitudes towards the human person. Applying even the most retrogressive standards, Indian prisoners are the pits — a level of perversity matched only by our pious, moralistic and sanctimonious preachings abroad. In the land of Gandhi and non-violence, prisons remain depraved and brutish. Internally the prisoners rot.

Rape, buggery, torture, custody without legal sanction, bars and fetters, detention far in excess of the sentence, solitary confinement, lunacy, the brutalising of children, women and casuals, drug trafficking and prostitution rackets run by the superintendents are but the daily routine of prison life. Pulling out eyes as in the Bhagalpur blinding case or the pushing of batons up the anus of prisoners as in Batra's case is perhaps Sunday's schedule.

If the complete absence of human rights moorings in India has escaped notice, it is only because the State has through law and *lathi* shrouded the prison system with an iron curtain through which only those may pass who have no hope of returning. And while the press, the public and social activists are debarred, the Courts turn a blind eye. While crores of rupees are spent in esoteric research of dubious standards with manuscripts thrown into the dustbin after the degrees are awarded, not a thing is done about prison research. As a consequence, the criminalisation of the prison administration proceeds apace and is the main factor contributing to the hardening of the offender and to the inmates' physical and psychological breakdown.

Apart from the human rights issue, the Indian State has so little intelligence that it cannot comprehend that in purely bourgeois terms it is neither economically feasible nor practical to have such a large part of the population fettered and decapacitated.

Judicial reforms have been slow - too slow. In the 1980's it merged with the forenso-personal history of one man whom all associated with the struggle for civil liberties and human rights must stand up and applaud - Krishna Iyer, a former Justice of the Supreme

Court who even after retirement championed the cause with renewed fervour. His decisions describe his struggle against the tide of foul precedent, colonial prison regulations and a defiant lower judiciary not only unwilling to accept his views but also uniformly subservient to the prison administration and the police. In the Seventies and early Eighties he transformed Indian prison jurisprudence and a few other judges inspired by him contributed to this change. By the time of his retirement in the mid eighties, he had led India through a decade of forensic change. But he left a sad man noticing in powerless retirement the flouting of his decisions by the decision of the criminals in uniform. The passage of time settles all things and India returned to its normal state - the eccentric has passed on.

The ebb tide set in. Whereas in the cases of Hussainara Khatoon and Motiram, the Court had spoken against high bail amounts for poverty stricken accused and had recommended their enlargement on bail on personal bond and even without sureties, today millions of people are jailed pending trial because they are either too illiterate to apply for bail or too poor to furnish the bail amount. Notwithstanding Hoskot's case legal aid remains on paper with more money spent on committees, reports and seminars than on legal aid itself. Sheela Barse's case likewise indicates the flagging interest in public interest matters. Now the right of the press to interview prisoners has been couched in a language as vague as to practically operate against the press. Despite Khan's case, prisoners are often denied access to newspapers and books. Despite Walcott's case the awarding of prison punishments is like the emperor's fiat. Despite Mallik's case children are brutalised on par with adults. The International Year of the Child saw seminars organised and films made but no children released.

All the recommendations laid down in Batra's case and Kaushik's case are ignored. Overcrowding has increased many times over. The Board of Visitors is a bloody farce. The Prison Manual and other regulations are kept top secret and even defending advocates find it impossible to lay their hands on one. Liberal visits by family members depend on bribe money. The ombudsmanic task of policing the police that Krishna Iyer advocated is now an impossibility. The standard minimum rules for treatment of prisoners are not only not followed but the rules cannot be found, Section 235(2) 248(2) of the Criminal Procedure Code in respect of more humane sentences is overlooked despite Giasuddin's case and Santa Singh's case. Despite Varghese's case poverty stricken, indigent debtors are jailed. Notwithstanding the Prison reforms enhancement of wages case convicts perform slave labour on notional or illusory wages.

If, as in Nandini Satpathy's case, the methods, manners and morals of the police force were a measure of a government's real refinement, ours would be a tyranny. Censorship of correspondence contrary to the directions in Madhukar Jambhale's case, the solitary confinement contrary to the directions in Sunil Batra's case thrive. Likewise, bar fetters are commonly used. And the accused are tied together like cattle and paraded to Court through the streets in defiance of the decision in Shukla's case. The little Hitler found lingering around Tihar Jail in Batra's case is now fully grown and well fed. Despite Sah's and Hongray's case compensation is rarely awarded. In the face of Veena Sethi's case, mentally disturbed persons are maltreated and rendered insane. The 'hope and trust' placed in the prison administration and the police by the Supreme Court have turned out to be a joke. Even after Barse's case women's rights are not implemented. Despite Nabachandra's case remand is done as a matter of rote. Nothing changes in India - ever.

As we age, Krishna Iyer's passions recede in the memory of bench and bar. A new conservatism has taken over. Once again judicial apathy and unconcern fuel prison sadness.

His decisions are largely, therefore, of academic interest, perhaps the only merit of the decisions being, as Justice Hughes once said, that they are, "an appeal to the brooding spirit of the law (and) to the intelligence of a future day."

They display overall certain common trends and characteristics. Firstly, that judicial standards in human rights are uniformly pathetic and secondly that judges in India are universally unwilling to punish prison officials and policemen even in the face of cast iron evidence of major offences committed by them.

Judicial reluctance, administrative callousness and the absence of any State recognition of white collar crime, takes India rapidly towards the precipice where the working class find themselves brutalised and isolated and the justice system is seen by all - as it essentially is - as a class weapon perpetually perpetrating injustice.

As this happens the story foretold by Krishna Iyer in Veena Sethi's case may well come true; "One day the cry and despair of large number of people would shake the very foundation of our society and imperil the entire democratic structure. When that happens we shall have only ourselves to blame.

— July-August 2007

Terrorism of the Police Kind

Neither the State nor organisations like the NHRC are looking at the issue of police high-handedness, bias and extremities of the law that often take the toll of common man's human rights. Unless we seriously address this issue, the State machinery will continue to persecute, torture and execute innocent people in the name of order.

K BALAGOPAL

Sadly, extra-judicial killings, disappearances and incidents of torture in custody are growing every year throughout the country. In Andhra Pradesh alone police torture, custody deaths and fake encounters have become so rampant as to create dread among people. If one tours the bordering districts of the state, one invariably comes across stories of torture and arrests of common people because of alleged Naxalite connections. People narrate stories of being threatened into revealing whatever information they have to escape being handed over to the Andhra Police. Such is the reputation of the police that people will reveal just about anything only to escape the 'infamous' torture at their hands.

Jammu & Kashmir and Punjab are two states where cases of disappearance run into thousands. Torture is common. Electric shocks given to sensitive parts of the human body is a very common form of torture in Andhra Pradesh. Even more than physical beating, people dread these electric shocks because these destroy a victim's individuality for life.

The police, the army and the paramilitary forces are able to commit offences and get away with them. Anyone can commit an offence but not everyone can get away with it. This getting away is what amounts to impunity. The forces of the State as well as privileged gangs like the Salva Judum in Chhattisgarh are able to get away with them. They have impunity; they commit offences and get away with it. The reason why this goes on year after year, decade after decade, is that neither the political executive nor the judiciary wants to put an end to it.

Our High Courts and Supreme Court by Article 226 give a wider jurisdiction than the English writ jurisdiction. India does require a wider jurisdiction than the English writ jurisdiction. Why have our courts slavishly followed that principle? They could have institutionalised a different way of looking at it as Article 226 is wide enough to do so but they have chosen not to. They resort to a strange measure of asking the victim to file a private complaint in case of being unjustifiably victimised by police. There is no such way of taking up private complaints in criminal court.

The magistrate has different ways of taking cognisance. One of the ways of taking cognisance is on a complaint made by someone. Even a phone call received by the magistrate is sufficient to take cognisance. To equate them as equally efficacious ways of initiating prosecu-

tion does not make any sense. Prosecution requires investigation. An ordinary citizen does not have any power to search someone's house, to seize any object from anyone, to take anybody into custody or interrogate the person. A citizen probably doesn't even have the power to ask a forensic expert to submit a report on anything. How is then a citizen supposed to prosecute privately? It is not as if the courts do not know this, they do but they have decided not to go beyond this. *Habeas corpus* for them is to convert illegal custody into legal custody and they don't want to go beyond that.

Other institutions like the National Human Rights Commission (NHRC) have also been equally hesitant. As far as torture is concerned, the IPC itself penalises it. You do not require a new law to say that torture for the purpose of extracting information is an offence, as it is an offence under the IPC. If it results in serious injury, the punishment can go up to 10 years of imprisonment, as it is a serious offence under the IPC.

Thirty years ago the Law Commission made a recommendation, "if somebody dies in police custody, there shall be a presumption in law that his death has been caused by the police." Thirty years hence, we still don't find this amendment incorporated in the law today. Amendments that strengthen human rights are seldom allowed. In the proposed 2006 amendments to the CrPC, the DK Basu guidelines have been incorporated. These guidelines spell out the course of action the police are supposed to take. Yet it does not provide for punishing and prosecuting those police officers who violate the guidelines. It is at par with any other rule or procedure laid down in the CrPC.

We still do not have a set method to follow. There is no initial arrest memo. An arrest memo is the one thing they have adopted from all the DK Basu guidelines. Such a memo is issued on the day they decide to produce the person in court. He may have been in custody for 10-15 days but the day he is produced in court, they produce a memo and obtain signatures very lawfully, following the DK Basu guidelines, from the father/mother/wife and the arrestee's relative knows that if he/she doesn't sign, the person in custody will face the hell and may never see the court. Hence they sign.

Thus DK Basu guidelines have unfortunately, become a way of sanctifying illegal arrests. If tomorrow a person has to go to court, the court will say that your own wife or family member have signed to affirm that you were arrested on the date mentioned and not 10 days before. The real question is who will prosecute? We all know that in this country to prosecute a police officer and survive is almost impossible. It is a part of impunity that police officers are allowed to wreak vengeance and the State prefers to remain a quiet bystander.

Law allows the NHRC to have its own investigative machinery. The NHRC can use it to investigate the offences of human rights violation on registering complaints. This is provided for both the State Human Rights Commissions (SHRCs) and the NHRC. But the investigative machinery of NHRC has a top-heavy structure. People like retired DGs of police or other high ranking former police officers are appointed. Sadly, they can give orders with best of intentions but cannot investigate cases of human rights violations themselves. The need is to appoint inspectors or sub-inspectors of police who can actually investigate. In order that all serious allegations of human rights violation can be investigated, a sufficient number of such people need to be recruited. It should be ensured that this force should be recruited separately and not made out of transferred officers from the central or state police forces. The NHRC has now become an agency that only holds seminars like any other debating forum. It has the power to investigate and make recommendations but the utilisation of these powers still remains a far cry. The NHRC should take all cases of human rights violation under its purview and investigate and not limit itself to the case of violation by the paramilitary or police forces. Since the NHRC does not seem inclined to do so, torture goes on with impunity.

A separate offence of custodial death can be created as happened with dowry death cases. They are no more categorised as culpable homicide or murder. An altogether separate offence, with a presumption clause has been created given the nature and scale of dowry deaths. The courts will never take initiative in these matters because the courts, as much as the political executive, want impunity. And so despite all the sacrifices and efforts of human rights activists in Punjab and J&K, these issues remain unresolved and disappearances continue.

The standard answer given by the authorities is that people cross the LoC to get weapons to fight the Indian forces and, thus, thought to have disappeared. Police is neither asked nor do they answer how a person taken in custody could cross LoC unless he escapes from custody. A common plea that police take is that there is public sanction for what we do. In the Chambal valley, we are

told that the police are regarded as heroes. They are a brand name there. But if in 1968, 1000 so-called dacoits were killed by them in the Chambal valley and in 2007 the killings are still going on. This means that something is definitely wrong somewhere. Public sanction to all these actions is flaunted to justify torture and extra-judicial encounter. If not a sizeable section, a highly articulate one does believe that a tough police force is required.

This maybe because of the opinion that is being manufactured, or general sense of insecurity among people. Whatever may be the reason, there is a strong feeling among public mainly middle classes that the criminal justice system is lax. They believe that talks of human rights increases crime and disorder, diminishes security and, thus, the police have to be tough. And only tough police can prevent, say harassment of young college going women by goons. They may well ask for such police force throughout the country that can catch the culprits and parade them naked through the streets. Unless we are able to satisfactorily answer this element of the consciousness held by whichever section of the public, we as human right activists will simply end up simply having dialogues without much meaning.

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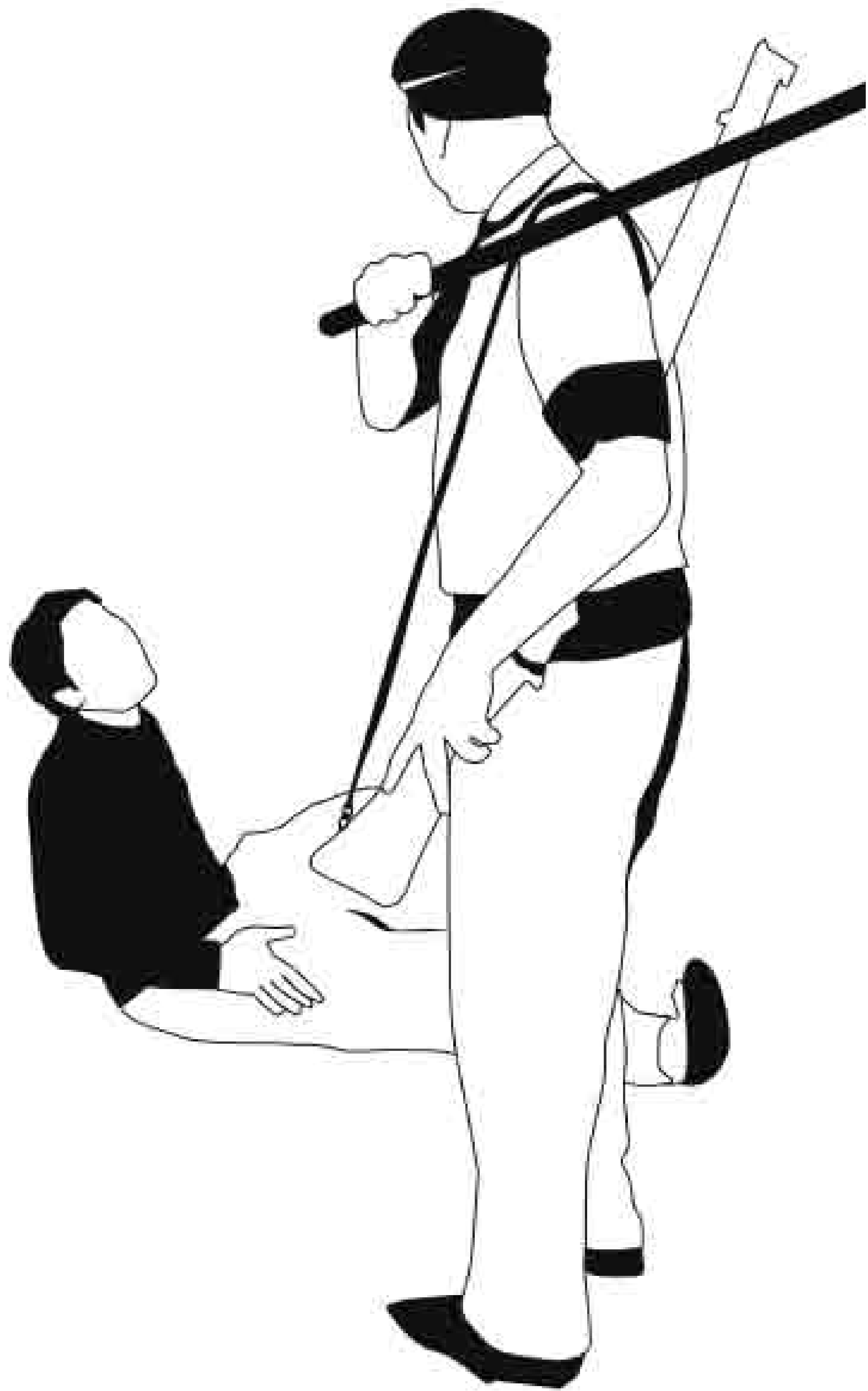


The Injustice of Ignorance

The Report of the Committee on Reforms of Criminal Justice System construes 'the demands of the times' in terms of what a handful and handpicked individuals conceive these to be! Ironically, these in turn, stand equated with 'the aspirations of the people of India'. Thereby, a great opportunity for law reform stands squandered.

UPENDRA BAXI

No one knows quite why the Government of India decided to establish the Committee on Reforms of Criminal Justice System (CJS) now. The report acknowledges this. Everyone knows that the CJS 'in India was about to collapse'. High rate of pendency and low rate of conviction have made crime a profitable business (Para 1.3). This form of rather ancient knowledge justifies now a comprehensive review by yet another expert committee!

Even so, given this precocious self-image, the committee would have served the historic role far better with a much greater measure of deliberation. The report nowhere shows any understanding of why the official and popular response rate was so indifferent, or to put the matter somewhat strongly so abysmally low. Had this something to do with the ways in which the questionnaire stood formulated and administered? Did the committee, with all its professed expertise, fail to command a measure of legitimacy with states and assorted respondents? How may we understand that only seven states, ruled by regimes often different from the ruling national coalition, responded to the questionnaire? Why was the follow-up for recalcitrant respondents so effete and counterproductive? Why did only 284, out of 3,164, individuals respond? Why did so many High Courts, despite directives from the Chief Justice of India, fail to furnish the information in the required format (Para 1.10)? Why, out of the many respondent legal luminaries (a peculiarly embarrassing Indian legal phrase) were most predictably Delhi-based (Para 1.15)? The Report dutifully mentions communicative failures but is silent on the causes for it, even when proceeding boldly with its far-reaching recommendations!

It is, indeed, unsurprising that the report is unabashedly elitist in the worst sense of that term. It construes 'the demands of the times' in terms of what a handful, and handpicked, individuals conceive these to be! These in turn stand equated with 'the aspirations of the people of India'!

SHODDY RESEARCH

At most times, its 'findings' at best summon the depth of newspaper headlines and indifferently composed edit pages. At so many places, it is guilty of what lawyers name as *suppressio veri* (suppression of truth) and *suggestion falsi* (making manifestly false suggestions).

I take here just one major example concerning the way the report sculpts the constitutional demise of the right to silence. It summarily concludes that …*drawing of adverse inference against the accused on his silence will not offend the fundamental right granted by Article 20(3) of the Constitution as it does not involve any testimonial compulsion. Therefore, the committee is in favour of amending the code to provide for appropriate inferences from the silence of the accused. (Para 3.40)*

The argument that such a provision may run afoul of Article 21 due process rights shrivels in the report to a pre - Maneka Gandhi interpretation that merely confined Article 21 rights to life and liberty to subjection by 'procedure established by law'. The Malimath Committee thus operates on an obsolete understanding of Indian constitutional jurisprudence. It is another matter that any law student in a good law school who made a similar argument would have failed to obtain pass marks!

This 'precious' recommendation stands accompanied by two caveats: first, only the court may frame and put questions; second, 'the accused will not be administered oath and he will

not be liable for punishment for refusal to answer questions or for giving false answers'. What is new is not the prospect of the court putting the questions; what is new is the recommendation that the accused may now run risks of the adverse inference being drawn from the exercise of the right to silence. According to the committee, this does not amount to testimonial compulsion violative of rights to fair trial and to life and liberty! Not understanding of Indian constitutionalism but poorly researched comparative jurisprudence guides this report. It relies primarily on two decisions of the European Court of Human Rights: Murray and Condron. Neither supports this sweeping recommendation. In Murray the accused did not testify on oath; in Condron the accused did so. The latter involved the issue of directions given by justices to the jury, a situation of little or no juristic relevance to the Indian situation. Indeed, the court observed in the latter case:

The government observed that the following safeguards must also not be overlooked in assessing whether it was appropriate to leave the jury with the possibility of drawing an adverse inference from the applicants' silence at the police station: the burden of proof rested with the prosecution throughout to prove the applicants' guilt beyond reasonable doubt; the jury were specifically directed that the applicants' silence could not on its own prove their guilt; the trial judge had to satisfy himself that there was a case to answer before directing the jury on the issue of the applicants' silence; the jury could only draw an adverse inference if they were sure beyond reasonable doubt that the applicants' silence during police interview could only sensibly be attributed to their having no answer or none that would stand up to cross-examination; finally, the jury were under no duty to draw an adverse inference.

This necessarily long quote underscores that 'the burden of proof' governed by the absolute standard of guilt beyond reasonable doubt, a standard that the report considers ripe for demolition in Indian criminal justice administration! Under the United Kingdom's own submissions, the trial judge 'had to satisfy himself that there was a case to answer', a much higher threshold than commended by the report which merely contents itself with the mere fact of charges being framed for trial. The jury may draw an adverse inference 'if they were sure beyond reasonable doubt' but the Malimath Report will give judges a much greater human rights adverse latitude. Besides, these cases insist on the impermissibility of drawing adverse inference because the accused exercises the right to silence; or when there is little evidence that justifies drawing such inference. Indeed, these decisions establish the power to draw such inference only upon reasoned and justifiable conclusion in the full, considered weight of available evidence. This discretionary power becomes available primarily when the accused chooses to testify under oath and then too under the most stringent circumstances, eminently reviewable under the national and regional human rights monitoring systems.

The fifteenth hand, head note type reading of these cases that masquerades as comparative law research render the committee's comparative jurisprudence citations deeply suspect. It is improbable that the learned members of the committee had the slender most understanding of this jurisprudence. Its references to United Kingdom jurisprudence are deeply manifestly flawed. Indeed, its citation to Australian jurisprudence is stunning if only because it is bereft of a Bill of Rights. In addition, it offers scant evidence, even by way of citational support, of jurisprudence of the United States, Canada, France and Italy! In this arc of ignorance, it is too much to ask of the committee to have the slightest familiarity with comparative criminal and human rights jurisprudence . Indeed, the committee shows little regard for the text and interpretation of the right to fair trial in supranational and international human rights conventions.

The Malimath Committee, furthermore, ignores the differential access to legal services available to the Indian accused. The grudging departures from the right to silence in the more 'developed' Euro-American system remain secure in a residual welfare state, which still bears staggering financial burdens of providing effective and equitable defence counsel services to the accused. In contrast, even a perfunctory look at the Union and state budgets for legal services would have shown fully the human and human rights costs already borne by the disenfranchised Indian peoples caught in the web of CJS. The committee egregiously regards the meagre Indian legal state services as a functional equivalent to highly professional, and exorbitant, provision of right to counsel. It needed only a small reality check to realise fully the cruel imbalance between the Indian legal aid appointed counsel for the impoverished accused pitted against the might of public prosecution and the reign of torture and terror of custodial regimes.

PRESUMPTION OF INNOCENCE

The report insists that there is something flawed about the presumption of innocence and seeks to modify the standard of burden of proof. However, its analysis on either score remains inchoate, or put more sharply the learned committee does not give much evidence of what it is really talking about! It expresses a profound disquiet concerning the doctrine of presumption of innocence.

Armed with the authority of a contextual observations from Professor Glanville Williams (Para 5.14/5.15), the report speaks of 'unmerited acquittals' of 'the large percentage of acquittals of guilty persons' and blithely asserts that:

More the number of acquittals of the guilty, more are the criminals that are let loose on the society to commit more crimes. They would do this with greater daring for they know by their own experience that there is no chance of their being punished. (Para 5.16)

As far as the committee's understanding of Professor Glanville Williams is correct, this is a most specious sort of reasoning, to say the least. How does one already know that '*criminals*' remain actually acquitted under the sway of presumption of innocence? Surely, such a view logically entails the notion that the epistemology of due process (that is requirements of knowledge inherent to determination of criminality) is wrong. To reach that result, one has to prejudge, outside any established legal process, the accused as necessarily guilty by their mere ascription of that status to them, a result that so astute a thinker would not have intended!

How may we come to know, further, that many accused/convicted persons regard the presumption of innocence as licence of committing more crimes with impunity? The report does not cite a single study (there is no question of course of its commissioning such a study), which verifies its conclusions. It does not conduct a stratified survey of acquittal and recidivist population that, for example, would have verified/ disverified the proposition. Such a study will have to verify the key assumption that the sample population actually holds the operational belief that the presumption of innocence will inexorably set them free every time they embark on criminal conduct.

Put another way, in thus ritually underscoring the presumption of innocence; courts do not, in fact, actually perform the task of acquitting ten guilty to save one innocent person. In each case, judges and courts have to decide on guilt or innocence of the accused on facts and arguments before them. To reiterate, the maxim does not actually describe the fact that 10 guilty persons actually stand acquitted lest one innocent person suffer; rather it reiterates that courts do not somehow presume that 10 out of 11 persons are actually guilty of crimes alleged. The report seeks to, subvert under the banner of its involuted invention of a new criminal justice commonsense, this precious rhetorical power of the maxim.

This new commonsense is further flavoured by populist rhetoric. The committee blandly asserts that 'criminals' acquitted under presumption of innocence

[M]ay occupy important and sensitive position in public life. If criminals start ruling the country one can imagine the consequences. (Para 5.16).

This dire prospect, some may say, in agreement with the committee, has happened! The already, and unfortunately for the Malimath Committee, richly available, reports, such as the Vohra Committee (and electoral reforms under the auspices of the Election Commission) do not place, as does this report, the blame on the operation of the doctrine of presumption of innocence. They find approaches to solution of the problem in reforms of electoral system and greater insistence on accountability mechanisms for corruption in high places. Even when these make recommendations concerning CJS reform, they do not go so far as to advocate abolition, or fundamental modification, of the doctrine.

The more fundamental difficulty with the report is its *blithe* assumption that each accused may be guilty unless he/ she proves innocence. Haunted by the scepter of the ten '*guilty*' set free in order to save one innocent person, the committee here claims for itself an extraordinary epistemic privilege. It already knows that the 10 acquitted persons are actually 'guilty' persons, in advance of a due process based trial and appellate process! This is a staggeringly astonishing proposition, a gift of prophecy given to six members of a randomly constituted committee by an arbitrary regime!

'GBRD'

The report is preeminently agonised by this heavy burden of the standard of proof. However, one looks in vain for the sources of this agonising!

A formidable obstacle to understanding its meandering discourse is the fact that committee is not quite

sure of its target. On the one hand, it bemoans this standard necessarily stemming from the doctrine of the presumption of innocence; on the other hand, the committee itself acknowledges at several places that the standard is not absolute'. Legislative derogations and deviations, it notes, have been held constitutional when impugned at the bar of due process rights under Article 21 of the Constitution (Para. 5.6-5.8). Indeed, it asserts and demonstrates that the standard is 'becoming flexible' (Para 5.18). What then is the problematic that the committee seeks to address? To this question, the report provides no answer at all!

Something, we are asked to take in an act of *faith*, is *wrong* with the standard/burden of proof. That 'something' stands described with deep indifference. We are educated (without any detailed narration) that 'proof beyond reasonable doubt' is not a 'standard of universal application'; 'France has not adopted this Standard' (Para 5.22). What *follows* from this comparative jurisprudence tidbit? Going back to 1867, we are educated and entertained by the fact that section 4 of Public Gambling Act dispenses with this standard. What follows then from this colonial history gossip? The report says that times have changed.

Now there is a sea change … People now-a-days are better informed. The Press, the radio, the television, films, and various type of literature have enormous influence in educating and making people aware of the different ways of committing crimes. They use sophisticated weapons and employ techniques so as not to leave any trace of evidence that may implicate them. The accused are becoming more daring and reckless. The level of morality has gone down and regard for truth is waning.

…It looks as though the criminals are emerging stronger than the law enforcing agency. (Para 5.28)

What follows from this set of platitudes is simply the *ipse dixit* (something is true merely because we say it is!) that the standard of proof needs modification. Law reform measures backed only by platitudes, gossip, and slogans constitute the gravest threat there is today to human rights in the administration of criminal justice. In any event, the report is determined even to change the existing 'flexible' standard of proof beyond reasonable doubt. In Para 5.30, it suggests that we adopt a different standard that of 'clear and convincing' proof. This, according to the committee, is the golden mean between the 'preponderance of probability' standard in civil adjudication and 'beyond the reasonable doubt' standard in criminal cases. The latter, the report maintains, is too 'subjective'; it is unclear how the proposed standard will be any the less so. It recommends (Para 5.13(iii) at page 270) that Section 3 of the Evidence Act be modified to read that:

In criminal cases, unless otherwise provided, a fact is said to be proved when, after considering the matters before it, the court is convinced that it is true.

To ensure that proof beyond reasonable doubt standard does not surface ever again in the annals of Indian adjudication, the committee further recommends that the proposed amendment 'shall have effect notwithstanding anything contained to the contrary in any judgement order or decision of any court'. Lawyers term this as an 'ouster clause', a provision designed to eliminate judicial power. The Indian Supreme Court has often pronounced on the validity of such clauses; there is no doubt that were such a clause legislated, its validity will be impugned both under the ordinary jurisprudence and under the doctrine of the basic structure of the constitution, which frowns upon abridgement of judicial power. The Malimath Committee, which specialises in the genre of 'fly-now-pay -later' law reform, stands unperturbed by this prospect.

It is both conceivable and likely that the proposed amendment will operationally result in de facto judicial recourse to the disfavoured lesser standard of preponderance of probabilities. No careful Court will of course justify its decision by an overt recourse to this language; but it may indeed find that the fact is true precisely because it thinks that the preponderance of probability is sufficient to justify judicial conviction. The report does not attend to this probability; this default is fraught with danger to human rights in the administration of criminal justice, especially when the scope of the additional amendment ousting altogether judicial discourse concerning the earlier standard is borne fully in view. This tinkering with CJS postulates may only be grasped when we understand the logic of partial amendment of the adversary system that the report wholeheartedly enunciates.

TOWARDS HYBRID SYSTEM OF CJ

I believe that the actual text of the report disrupts the deceptive exercise of selective incorporation of 'good' features of the 'inquisitorial' system. Volume one provides us with a rather undifferentiated picture of the inquisitorial 'system'; the only evidence we have of the

committee's direct understanding of inquisitorial system is contained in Appendix 10, volume 2 . Volume two focuses on only one jurisdiction: France. Even here, the narrative is somewhat sloppy. The committee was informed that the 'prosecution has to prove the case beyond reasonable doubt' (Volume 2, Page 378); if so, one fails to understand why it recommends dispensation from this standard and burden of proof.

The committee notes further that the system of judicial verification of truth is not precedent-based; 'earlier decisions' do not constitute precedents and are rarely cited. France seems to have a jury system even for criminal appeals. How may selective incorporation relate to the jury - free and precedent happy Indian CJS is not a question that at all interests the committee! What appeals to it is the fact (or rumour?) that in France cases are disposed off expeditiously 'within one day or two years depending upon the nature and complexity of the case'. Would selective incorporation deliver this desideratum for Indian CJS?

In France, the 'highest court will not go in the merits of the case'; how may we adopt this even selectively without fundamentally altering the code of judicial review powers under the actually existing Indian Constitution? In France, the offices of magistrates and prosecutors remain interchangeable; is this transformation desirable and feasible for India? If so, the report owed us a fuller enunciation. The atmosphere in French courts is 'solemn' and brisk compared with 'the busy atmosphere of the court that we find in India'. What follows? The committee further finds on a flying visit further that that the '[p]eople in France seem to be happy and satisfied with the quality of justice administered in their country' (Page 378). It did not of course meet the French people. Upon this caricature of popular contentment is based the overall recommendation of selective incorporation ! So invigorating are the effects of the holiday in Paris that the committee simply refuses to listen to the disquiet expressed by several High Courts concerning the 'switchover' .

Given all this, it is difficult to grasp the notion of selective incorporation from 'inquisitorial' systems. What is really proposed is full-scale dilution of the adversarial system, as it now exists. Charged with the duty to find truth and invested with enormous new powers to direct the investigation, as well as the attenuation of right to silence and presumption of innocence, judges and courts may well begin to read their obligation to find the truth as their duty to increase the conviction rate.

In sum, the committee proposes fundamental renovation of the Indian criminal justice system both by stealth and by sloth. By stealth, because it seeks to smuggle inquisitorial system under the guise of improving the present adversarial one, by sloth, because it is simply not bothered to carefully and responsibly attend to the craft and task of transition this entailed. This furnishes a very sad and poignant symptom, after more than five decades of the Indian independence, of half-baked law reform processes, which can only aggravate the crises of the future of human rights in India. It is even more unfortunate than incumbent union law minister signals his advance commitment to the Malimath Committee that he will 'implement the reforms' that it may suggest! (See 'Acknowledgement' to the report). Veritably, this is law reform by way of carte blanche!

OFFENCES, ARREST, ... AND BAIL

The 'terror stricken victims' stand here conceived as victims of routine, not politically animated, mayhem, murder, arson, and rape. There is, as far as I espy, *not a single recommendation* here that may take within its reach suspects or accused belonging to the political classes. However, it nowhere stresses the need to combat (save the general endorsement of prior recommendation that India needs to revamp its colonially inherited Indian Police Act: Para 7.31) custodial violence, torture, and tyranny.

EXCEPTIONAL LAWS

Indian political parties, irrespective of ideological hue and complexion cannot disclaim responsibility for induction of criminals into election processes. The criminals' (sic) support the political parties in all possible ways to either continue in or to assume power.Politicians not merely hire anti-social elements to assist them in elections…but also to eliminate their rivals.

Murder of political workers, activists, etc., by political rivals are assuming a serious proportion. The bonding between political parties and organised crimes complete.(Para 17.16.7)

The committee does not make a single specific or direct suggestion for weakening this bonding! Its focus on 'economic' crimes and crimes of terrorism also does not quite suggest ways that break this bonding.

In the circumstances, its lamentation concerning

the nexus between politics and organised crime remains merely a cascade of crocodile tears. The report does not fully recognise that much before 9/11, and almost since the Indian Independence, Indian peoples experienced a whole encyclopedia of violation of basic human rights in response to forms of political insurgency, often branded as terrorism. The report does not concern itself with this institutionalised ambivalence . Rather, it veers towards juridical institutionalisation of regime/state paranoia. Put another way, its underlying message, extremely worrisome, is that a more than half a century old distinction between everyday criminal justice system and the exceptional measures stands ready for constitutional erasure.

Given the extraordinary developments of regime sponsored violence and xenophobia in Gujarat 2002, and since then, one knows what pernicious communalistic distinctions may be drawn between 'nationalist' (like the Vishwa Hindu Parishad) and 'anti-national' (necessarily Muslim) organisations receiving foreign funds. This stands even more aggravated by the report's purple prose concerning Indian Muslim 'underworld' (Para 18.10) and Pakistan aided terrorism (Para 19.4/19.5). The report grievously errs in its wholly one-eyed presentation, which unfortunately seems to suggest that anti-national activities remain an inherent proclivity of named and marked communities. To be sure, the committee did not intend this. But the text thus writ large unfortunately raises unintended, and politically violent, implications in the current political milieu.

The missile 'anti-national' stands often hurled recklessly, and with impunity, against conscientious and decent citizens who seek to perform their constitutional obligations under Part IV-A of the Indian Constitution. Any constitutionally oriented CJS reform should accord some space and place for the protection of their fundamental rights in their performance of their fundamental duties. The report, sadly, misses a precious opportunity for redemocratising the Indian CJS .

MISCELANIA

This essay does not attempt to dignify further a whole host of related recommendations made by the committee. Some recommendations have the quality of the Sermon on the Mount.

Some chapters are simply vacuous. The report remains perfunctory in its treatment of the problem of perjury, and leads nowhere (Pages 154-155). So remains the curious and inconclusive twaddle concerning arrears in courts (Chapter 13), which despite the appearance of solidity in the proposed scheme for eradicating arrears (Para 13.6.1) does not show any responsive understanding of causation of arrears, despite the analysis available in my *Crisis of the Indian Legal System* published as early as 1982! It commends 'commitment and aggressive pursuit at all levels' and suggests that requisite finance, manpower, and infrastructure should be made available without cringing' (Page 166). One can only say: Amen! Surely, this high-minded preaching is bereft of all pertinence when unaccompanied by a minuscule understanding of the histories of economics, and the political economy, of justicing in India!

Chapter 19 concerning policing in India does not add much to the wearisome stockpile of national reports concerning reform of the Indian police! Indeed, its prose raises serious doubts concerning the integrity of reading of past materials.

Some recommendations for the reform of Indian Penal Code stand made almost absent-mindedly. Para 16.4, for example, describes (without any data) Section 498A as a 'heartless provision' because it makes offences of cruelty against married women non-bailable and non-compoundable. Curiously, the report assumes that for 'the Indian woman marriage is a sacred tie' even in the context of matrimonial and domestic cruelty and violence and the creation of the offence makes her 'fall from the frying pan to fire' because she remains always economically dependant (Para 16.4.3). It goes so far as to aver that a 'less tolerant and impulsive woman may lodge an FIR even on a trivial act'! (Para 16.4.4). Further, the section 'helps neither the wife nor the husband' (Para 16.4.4). From such *ex cathedra* 'reasoning', the report recommends that the offence should be both bailable and compoundable to give 'a chance to the spouses to come together' (Para 16.4.5). This is indeed a crazy quilt!

The committee has not attempted to examine statistically and sociologically the problem of the social impact of the operation of this section; it recycles instead staid and offensive patriarchal assumptions. Even as pleading of special patriarchal interests, it fails to make any case for the changes it mindlessly proposes. The same cavalier approach is manifest when it recommends that a 'suitable provision be incorporated in the (Criminal Procedure) Code for fixing a reasonable period for

presenting FIR' in rape cases (Para 16.7). It is hard to believe that the committee makes this recommendation even after the experience of Gujarat 2002, where only three FIRs represent prosecutorial vigour amidst massive violation of women in the regime sponsored pogrom. The report adds insult to injury for the violated women.

IN LIEU OF A CONCLUSION

I had the privilege of knowing Justice Malimath and at least one member of the committee, vice chancellor Madhava Menon, for well over two decades. *Nothing* will please me more than a full-scale demonstration of *how* and *where* I may have actually misread, or *misconstrued*, the report.

However, this essay assails their performance in my role as a co-citizen animated entirely by Article 51-A obligation of all citizens to develop the sprit of scientific temper and excellence in all forms of public endeavour. The learned members of the committee, I believe, have done considerable disservice to their own public eminence and worse still to the cause of CJS reform by their cavalier and lackadaisical approach to grave issues of law reform. A great opportunity for law reform here stands thus extravagantly squandered. Even its more sensible suggestions stand encoded in an ideology of criminal justice system reformation ill suited, and dysfunctional, to the future of human rights in India.

Critique of Malimath Committee report which was first published by Amnesty International and read out and discussed at a national consultation on criminal justice in New Delhi.

— July-August 2007

Tinkering, Trivialising, Trashing Law

As criminality saps the body politic, a few privileged smart alecks are toying with the idea of reforming criminal justice system. The policy documents of previous and this government, however, expose a criminal justice policy which has not incorporated any thinking about distributive justice policy or victim justice policy or even a prisoner justice policy.

B B PANDE

It appears that of late the criminal justice system reform idea has caught the fancy of the Indian ruling classes. The earlier NDA government had constituted the Malimath Committee for Criminal Justice Reform (2003) with a view to stemming the near total breakdown of the Indian Criminal Justice system, through its over-wide six-point terms of reference. As a sequel several of the Malimath Committee recommendations have already found their way into the procedural and substantive criminal law of the country. Recently the *Fifth report of the Second Administrative Reform Commission on Public Order* under the chairmanship of Veerappa Moiley (June 2007) has in chapter 7 made elaborate recommendations on 'Reforms in the Criminal Justice System', as an aspect of comprehensive reforms for securing better public order. The last in this series is the *Draft National Policy on Criminal Justice* prepared by a committee appointed by the ministry of home affairs, Government of India (March 2007). But the paradox is, while we are busy finding new ways, and means of effecting CJS reforms, the process of 'Criminalisation of Politics' goes on uninterrupted, making a farce of the reform idea itself. Still, it shall be our endeavour to identify the core thrust of the proposed Draft National Policy on Criminal Justice (DNP) and the tasks it is likely to achieve, in the following pages.

A PLAIN READING OF THE DNP

The 47-page DNP followed by a 13-page summary is divided into six parts or chapters. The first chapter that is titled as 'Constructing a National Policy: A Prefatory Note' is devoted to three issues, namely 'Composition, Terms of Reference and Methodology', 'Criminal Justice: Concept and Concerns' and 'Elements of a National Policy'. The second chapter titled as 'Criminal Justice Policy and Good Governance' is divided in seven parts, namely 'Preamble', 'Fresh approach to Crime and Criminal Justice', 'De-criminalisation and Diversion', 'A Victim Orientation to Criminal Justice', 'Multiple Codes based on Re-Classified Crimes', 'Federal/Joint Sector in Criminal Justice', 'Sentence and Sentencing'. The third chapter is titled as 'Policy Issues in Criminal Procedure and Administration'. Under this chapter fourteen issues devoted to criminal procedure matters are discussed. Chapter four is titled as 'Criminal Justice Policy vis-a-vis the Weaker Sections. The six issues discussed under this chapter are, namely 'Impact of Right to Equality and Social Justice', 'Criminal Justice and Children', 'Criminal Justice and Women', 'Criminal Justice involving Dalits and Tribals', 'Criminal Justice and Persons with Disabilities', 'Special Monitoring Cell in the Department of Criminal Justice'. Chapter five is titled as 'New Sector of concern in Criminal Justice Administration'. Under this also six issues are discussed, namely 'Criminal Justice and Communal Conflicts', 'Criminal Justice and Economic Security', 'Corruption and Criminal Justice', 'Media Involvement in Criminal Justice', Criminal Justice and Civil society' and 'Criminal Justice and International Legal Order'. The sixth chapter is titled as 'Planned Development of Social Defence'. This chapter has focussed on five issues, namely 'A National Strategy to Reduce Crime', 'A National Commission on Criminal Justice', 'Department of Criminal Justice at Centre and States', 'A Bureau of Criminal Justice Statistics', 'Criminal Justice, part of Planned Development.' The summary at the end comprises of fifty summing-ups of the issues discussed in the earlier chapters.

DE-CODING THE DNP

The DNP would be analysed here in terms of its three major aspects, namely (a) the philosophical aspects, (b) the substantive aspects and (c) the procedural aspects. The philosophy of the DNP can be best located in the prefatory note (pp 3 to 7), the preamble (p 9), causes for popular dissatisfaction with criminal justice (p. 17), national strategy to reduce crime (pp.42 to 44), etc.

The committee, comprising of an academic (the chairperson), two bureaucrats, one lawyer and a retired police officer has coined its own conception of 'Criminal Justice' and its aims in these terms: "Its object is the maintenance of public order and peace, protection of the rights of the victims as well as persons in conflict with the law, punishment and rehabilitation of those adjudged guilty of committing crimes and generally protecting life and property through prevention of crime." (p 4 para 2.1). The committee considers 'criminal justice' as the "primary obligation of the State". In the same vein the committee clarifies "Rule of Law, democracy, development and human rights are dependent on the degree of success that governments are able to achieve on the criminal justice front. Even national security is nowadays linked to the maintenance of internal security. Given such critical importance for social defence and national integrity, the need for a coherent, coordinated long-term policy on criminal justice is obvious and urgent." (p 4 para 2.1)

What are the indicators of the proposed DNP? "Crime control and criminal justice management are the products of an efficient, effective and fair criminal justice system" (p 4 para 4.2). Further it is said: "It is important that each of these sub-systems also accomplish a desirable degree of efficiency and effectiveness in supporting the mission of freedom from crime." (p 4 para 2.2).

For culling out the philosophy the Committee's perception of crime are very significant which is reflected in the following observation: "In fact crime today makes the stability of state itself at stake" (p 6 para 3.4). In the same vein "India, which is the worst victim of terrorists violence is still showing great deal of patience in the hope that wisdom will prevail and violence will abate" (p 6 para 3.4). The committee goes on to speak on behalf of the suffering citizen thus: "Citizen wants security at any cost. They do not want to see that the state overprotects some and leaves the rest to their fate under a system which consistently fails to fulfil its obligation." (p 7 para 3.6; emphasis supplied). The committee identifies the existing situation as crisis situation, that is why it observes: "Proper balance has to be achieved between the law and liberty in the interest of safeguarding democracy itself, against the onslaughts by forces of anarchy and disorder." (p 7 para 3.5)

Furthermore, the philosophy of the DNP can also be gathered from its pre-occupation with the reduction in the number of crimes. The committee views "crime is a threat to freedom and democracy" (p 42 para 1.1), therefore the reduction of its incidence ought to be an integral aspect of the DNP. Thus the national policy appears to be fully wedded to a repressive crime control philosophy that views crime as a threat to national security and stability. The repressive philosophy is sustained by fear and anxiety associated with terrorism and other extremist criminal behaviours. The argument of 'fear of crime' is so central to the DNP that it almost suggests a review of the due process and constitutional guarantees in the words of the committee itself: "However, much the "Crime control model" of criminal justice, may appear appropriate in certain situations, it may not be possible to accommodate drastic changes to the 'due process model" currently institutionalised in our system of criminal justice." (p 6 para 3.3) The substantive aspects of the DNP often mark a departure from the philosophical aspect, particularly the ideas suggested in chapters two, four, five and six. For example, chapter two that proposes an idea of a new look to the policy of criminalisation, including use of techniques of diversion, decriminalisation, reclassification of crimes, etc, hardly go well with the conservative philosophy expounded earlier. Similarly, and even more importantly, the concern shown for the weaker sections like children, women, scheduled castes and STs and persons with disabilities requires a criminal justice policy that looks beyond 'terrorism' and 'forces of anarchy and disorder' syndrome. However, even if suggested without serious thought, a policy designed to incorporate the substantive issues raised in the aforesaid chapters is certainly most welcome aspect of the DNP.

The procedural aspects of the DNP are mostly located in the chapter three that has touched upon a wide range of fourteen procedural issues. Of these the following deserve a special mention:

(a) Search for truth as the ideal of criminal justice
(b) Standard of proof in criminal cases
(c) Confessions and statements to police
(d) Discarding right to silence

Like the Malimath Committee, the DNP appear to be obsessed with the 'search for truth' as the new mantra for criminal procedure. It laments that the normal operation of the adversarial system works to the detriment of the victim and the society, therefore, there is a need to incorporate 'search for truth' as a new ideal in a preamble to the procedural law. The DNP seems to be suggesting a shift in adversarial system presumptions when it suggests: "The object is not to stifle procedures nor to compromise them to the advantage of one party or other; the object is to remind everyone in the game that procedures are intended to be fair to both sides while not letting it defeat the ends of justice itself" (p 18 para 2.2). In the above observation the DNP appears to be convinced that the existing procedure favours one party and that it is leading to the defeat the ends of justice.

The DNP at 20 para 3.2 has taken a very casual view of standard or proof in these words: "The concept of "Proof beyond reasonable doubt" is an axiom evolved by judges following Anglo-American jurisprudence which over a period of time was clear in the minds of judges and lawyers. The said concept has, however, been blunted by the passage of time. The judges and lawyers are seen to be interpreting it by different yardsticks." We had heard that the overuse leads to the refinement of the concept, but the committee wants us to believe that the concept gets 'blunted' by repeated reliance upon it. It may be mentioned here that the standard of proof evolved by the Anglo-American courts over a long period of time has become an integral aspect of the due process guarantees that have crystallised into a normative system, so well articulated by Herbert L Packer in his classic *Limits of the Criminal Sanction (1968)*.

In respect of confessions and statements to the police the DNP is inclined to view the police, particularly the higher ranks, in a new light that will do away with the philosophy of treating every evidence coming from police source as tainted. The DNP at p 22 para 6.1 observes: "To cut out such evidence totally on ground that whatever is given by the police is not admissible is neither logical nor prudent, particularly when there are technological or procedural guarantees to ensure the voluntary character of such statements." It may be true that physical verification through video-conference may ensure voluntarily-ness to some extent, but the subtle or the passive threat emanating from the police may not be easily detectable in ordinary confessions before the camera. Perhaps because of the over-bearing role of the police or the investigating officer Section 217 of the Criminal Procedure Act of South Africa, thus: "Provided:

(a) that a confession made to a peace officer, other than a magistrate or justice, or in the case of a peace officer referred to in Section 334, *a confession made to such a peace officer which relates to an offence with reference to which such peace officer is authorised to exercise any power conferred upon him under that section, shall not be admissible ion evidence unless confirmed and reduced to writing in the presence of a magistrate or justice* ...." (emphasis supplied). Similar caution against the use of such evidence also flows from the US Supreme Court landmark ruling in *Miranda vs Arizona* (384 US 436 (1966)). The United Nations Special Rapporteur on Torture, Mr Nowak, had at the end of his visit to China in December 2005 pointed out the perniciousness of the prevalent forced confessions before the police and strongly recommended the abolition of provisions such as Section 306 of the Chinese Criminal Law that makes it an offence for a lawyer to counsel his client to repudiate a forced confession.

The DNP questions the existing right to silence, perfectly in line with the Malimath Committee and an added support from FS Nariman *(India's legal System: Can it be saved", Penguin (2006)*. The right to silence matter has been very elaborately discussed by the Law Commission of India in its 180th report (2002), that prefers to highlight the constitutionality of the right, flowing from Articles 20(3) and 21 of the Constitution. The commission observed in this vein, thus: "The law in India appears to be the same as in USA and Canada. In view of the provisions of clause (3) of Art.20 and the requirement of fair procedure under Art. 21 and the provisions of ICCPR to which India is a party and taking into account the problems faced by the courts in the UK, we are firmly of the view that it will not only be impractical to introduce the changes which have been made in UK but any such changes would also be contrary to constitutional provisions."

Just to remind those who are parading the 'novel' idea of discarding the right to silence, the 1898 Criminal Procedure Code in Section 342 (2) did give freedom to the judge to draw adverse inference in these terms:

"Section 342 (2) the accused shall not render himself liable to punishment by refusing to answer questions or by giving false answers to them; but the court and the jury (if any) may draw such inference from such refusal or answers as it thinks fit." But the 1973 Code

of Criminal Procedure dropped this provision because of its direct conflict with Art. 20(3). Therefore, the test is, do we favour rule of the Constitution or the rule of exigency? Perhaps the renowned constitutionalist like Nariman would like to say in this context: the society must move on, the constitutional guarantees can wait.

APPRECIATING THE DNP

(a) Its high degree of philosophical ambivalence

The DNP appears to be taking diverse philosophical stands on various criminal justice issues. When it comes to understanding and appreciation of the contemporary crime reality it is given in to conservative crime control philosophy that identifies crime as: "forces of anarchy and disorder" - against which: "citizen wants security at any cost." But in chapters two and four the DNP appears to be toeing a totally new philosophy, when it suggests a new look to criminalisation or 'Criminal justice and children' 'Criminal Justice and Women, etc. The underlying philosophy of the policy issues raised in these chapters is bound to be due-process-oriented and liberal in their thrust. May be the different chapters were done under different moods and periods of time, but they do create serious problems when it comes to drawing a meaning out of the DNP.

(b) Its softness vis-a-vis 'State Lawlessness' and other 'Power Crimes'

Steven Box (Power, Crime and Mystification (1983)) had warned long ago "for too long too many people have been socialised to see crime and criminals through the eyes of the state" (p 14). Therefore, the DNP has to look to the 'otherside' as well as bring within its crime radar the emerging phenomenon of corporate crime and police crime. In particular police encounters and lawlessness are influencing the common citizens' perception of crime most profoundly and that ought not to be ignored for developing a holistic crime policy.

(c) Without going into the process of depowerment through criminalisation how can you effectively 'decriminalise' or 're-classify crimes?

Criminalisation of the poor and the weaker sections is a well known phenomenon throughout the history of criminal law the world over. Therefore, if at this historical juncture the DNP decides to reverse the process, it must first appropriately, understand what it is trying to undo.

(d) An authentic DNP has to be a democratic exercise that not only elicits the view of the largest numbers of 'wise men', but also has to believe in peoples who have a real stake in a healthy criminal justice policy

But the bane of our criminal justice reform exercise is its isolation from the people for whom it is ultimately meant. In the words of Steven Box again: "The Public seems to have little awareness of the democratic principles and the rights and duties these impose on the citizens. The state seems determined not to relieve this ignorance but actually compounds it further by introducing or firming up 'authoritarian' control devices."

ANYWAY, WHO CARES FOR A DNP?

Ideally, the DNP should have served as a meaningful guideline for the legislatures, the executive and the judiciary. But in the existing state of things when some of the best throughout suggestions mooted out by the official law reform suggesting body, the Law Commission of India, on several criminal justice issues lie unheeded and unimplemented, when most of the progressive recommendations, like that of the Police Commission (1979-81) and Prison Committee (1980-82) remain in cold storage for so long, what is the guarantee that the DNP would influence the course of legislative power in the near future? Similarly, the executive that is increasingly getting used to lawless ways of action in situations of 'war' as well as 'peace' is much less likely to rely upon the DNP for its day-to-day functioning. The judiciary that has the responsibility of implementing the laws, may find the DNP of some use, here and there, but the possibilities of its drawing any substantial strength from the DNP are too indirect and remote.

Therefore, why must the Ministry have undertaken the exercise of coming out with a DNP?

The only plausible explanation is that like the previous NDA government that kept its eyes wide open for locating 'bad guys' who are out to destroy our society, the present government has also shown keenness to appear a "good-guy" that is out to protect the society against the 'bad-guys'. Therefore, every opportunity of painting the 'bad-guys' with the darkest hue is to be utilised. 'Darker' the bad-guys the good-guys appear brighter through simple contrast. That is what appears to be the easiest explanation for a tearing hurry to have a criminal justice policy, without even thinking about distributive justice policy, or victim justice policy or even a prisoner justice policy.

— July-August 2007

JUSTICE

JUSTICE

Tragic Decline of Criminal Jurisprudence

Cops have been successful in cajoling the media to tout law as too lame to curb crime, or deal with hardened and tough criminals. Thus, the criminal justice system appears to be impatiently trying to achieve not only a higher rate of convictions but also negating past precedents set by the Supreme Court whereby persons accused by the police got a fair chance to prove their innocence. Now the legal protection of accused persons has all but disintegrated because of the higher judiciary's rulings that write off not only their own affirmations made in the past but also guarantees provided under the Constitution to protect an individual's life and liberty.

DHAIRYASHEEL PATIL

The dismantling of the criminal law protection of the accused is said to have started about 15 years ago. It began with the perception within the judiciary at the highest levels that criminal law protection was too extensive and needed to be reviewed. It was fuelled in large part by the systematic campaign carried out by senior police officers who came on national television boldly berating the judiciary for taking a hyper technical human rights view, thus letting off criminals at the drop of the hat. The appearance of senior police officers on television right across the country was not accidental but part of a sinister conspiracy to destroy the criminal justice system by shaking the confidence of the higher judiciary in their own system. And to achieve this, policemen appealed to the public in prominent cases saying that while they have captured dreaded criminals and terrorists, the judiciary was letting them out on bail or acquitting them because of notions of fairness, ignoring the victims of theses crimes.

The police often referred to the low rate of conviction in IPC cases presenting false information to the public on numerous TV programmes. The public was told that the rate of conviction was as low as 10 percent whereas in fact conviction in IPC cases was about 50 percent. It was often said that conviction in TADA cases was a mere five percent forgetting that the vast majority of TADA accused were kept as undertrials for five years or more before their trials began. Thus, even if they were ultimately acquitted, innocent persons spent at least five years incarcerated.

Judges, of course, cannot come on prime time television pointing out that it was due to the appalling level of investigation of crimes and corruption in the investigation process, that acquittals take place. Thus, the ideological campaign ultimately had its intended effect. Judges were apparently embarrassed at the low rate of convictions. The public perception, not criminal justice, was uppermost in their minds. At some stage, the judiciary decided that it was necessary to push up the rate of convictions, come what may. This is how we have come to live in the decade of the dismantling of the criminal law protection of the accused. What matters is not criminal justice or criminal jurisprudence. What is most important is that people perceived as being criminals should be put behind bars, denied bail and given the stiffest possible sentence, perhaps even the death sentence. That a judge should entertain reasonable doubt as to the guilt of the accused now plays second fiddle. An overarching objective was to be achieved and that was to change the public's view of the judiciary in criminal trials and to clearly show that the courts were tough on criminals. That this objective could be achieved in another manner which would be in tune with the Constitution as well as protect the rights of the accused persons was never discussed. The constitutional law protection for accused persons was undermined in case after case in a hasty rush to change the common man's perceived view of the judiciary. Nobody bothered to introspect and ask the question as to whether the view perceived was a general one or one relating to the upper middle classes. The vast majority of the poor in any case see the criminal justice system as a great engine of oppression where torture is widespread and condoned by the judiciary and innocent people are roped in while rich get away scot-free. Ultimately, upper middle class opinion held sway and the agenda of the legal system was guided more by how the system would be portrayed in the media than by the desire to uphold constitutional values. It is often unpopular to uphold the Constitution particularly when it is implemented in respect of poor and working class people.

THE DILUTION OF CRIMINAL LAW

The dilution of the criminal law was brought about in strange ways. First of all, the principle that precedents must be adhered to and that decisions of larger benches must be followed by smaller benches even if they disagree was departed from. Decisions of larger benches, even constitutional bench decisions were departed from on the grounds that such a view was "technical" or that the ratio of the larger bench was "only a rule of prudence" or "merely a rule of caution". But criminal law is, at its core, a set of technical rules and procedures that require a judge to be prudent and cautious and which lay down the path by which a judge is able to determine what constitutes reasonable doubt. Once these technical rules are discarded and a judge becomes imprudent and rash, the "beyond reasonable doubt" standard is thrown to the winds and a judge basically does what he likes. He is then able to convict or acquit on the basis of what he may find to be true in a subjective manner or on some sort of gut feeling. When such a development takes place, the rule of law goes into a tailspin. We have, indeed, set out on such dangerous course.

The obliteration of decades of binding precedents of coordinate benches and even larger benches of the Supreme Court takes place when a coordinate bench or a smaller bench side steps a binding precedent of the Supreme Court without referring the issue for determination to a larger bench. That decision then is followed in a series of cases. On being cited in case after case this effectively sets aside the earlier binding precedent.

This is not to argue that reforms were not necessary. They certainly were. But for reforms a certain degree of transparency, consultation and deliberation is absolutely necessary. It is not upto individuals to take it upon themselves to depart from decades of well established law and procedure and bring about change in an arbitrary and ad hoc fashion. Nor is it permissible to bring about reforms that have the effect of undermining criminal law jurisprudence itself.

Reform of the criminal justice system does not mean the dilution of standards and the lowering of the Bar. It means the raising of the standards of the police and the public prosecutors so that they are able to meet the high standards set by the Supreme Court through its earlier judgments. Sadly, things have proceeded in the opposite direction. It is assumed that the police and public prosecutors will continue to be inept and corrupt. The question then is posed of speeding up of the system and increasing the rate of convictions while assuming that the appallingly low level of investigations must necessarily remain the same. In doing so the judiciary has lost a marvellous opportunity to radically reform police investigations and has instead taken the high standards of criminal law jurisprudence down to the level of the police. And thereby a grave disservice is caused not only to accused persons but also to the public at large. They run the risk of facing indiscriminate arrests, prosecutions and convictions on ever increasing scale. Secondly, the police could read the clear signal to do business as usual. Whatever little desire there was, within the police force, to make the investigations of crimes a professional affair dissipated.

Yet the Malimath Report on criminal justice reforms in India suggested precisely such a change. It came in for widespread criticism. Government of India rejected its recommendations. To change criminal law standards requires substantial amendments in the Criminal Procedure Code and the Indian Penal Code. The executive chose not to make such changes. But the legal system went ahead nevertheless bringing about sweeping changes.

POLICEMEN AS PANCHAS

In G Srinivas Goud vs State of AP 2005(8) SCC 183 a two-judge bench of the Supreme Court held that:

"there is no bar in law for a policeman to act as a panch witness".

SEALING NOT DONE ON THE SPOT

In State of Maharastra vs BC Raghani 2001(9) SCC 1 the Supreme Court held that it was unnecessary to "make a mountain out of a molehill" merely because the seized weapons were not sealed on the spot and were subsequently displayed at a press conference. "We are of the opinion that the trial court adopted a technical approach in appreciating the factum of recovery of weapons" and wrongly held that the evidence relating to the seizure will have to be totally kept aside, the Supreme Court held.

The Constitutional Bench decision in the case of Kartar Singh versus State of Punjab 1994(3) SCC 569, not followed by smaller Benches of the Supreme Court thereafter.

In Kartar Singh's case, the Supreme Court abdicated doing its duty as a Constitutional Court and was more concerned with executive issues presented in an

exaggerated and one-sided fashion. Whereas the executive is concerned with the issue of terrorism per se and is not concerned with balance between terrorist acts on the one hand and the protection of the human rights of accused persons on the other hand, the Supreme Court is concerned precisely with this balance. Para 21 to 23 of the decision and subsequent paragraphs as well are couched in intemperate language more suitable for politicians rather than judges.

In Para 83 of the judgment the Supreme Court concludes that the provisions of TADA including the provision for the setting up of designated courts "all postulate the concept of speedy trial in spirit under TADA". Immediately thereafter in Para 85 the Court admits, "In fact, lot of cases are coming before the courts for quashing of proceedings on the ground of inordinate and undue delay".

Referring to Section 15 of TADA which made certain confessions made to police officers admissible in evidence, the Supreme Court held in Para 254:

"In view of the legal position vesting authority on higher police officer to record the confession hitherto enjoyed by the judicial officer in the normal procedure, we state that there should be no breach of procedure and the accepted norms of recording the confession which should reflect only the true and voluntary statement…"(Page 680)

The Court came to the conclusion even though the court was aware of the fact that torture was widespread in India, the Court observed:

"… we cannot avoid but saying that we - with the years of experience both at the Bar and on the Bench - have frequently dealt with cases of atrocity and brutality practised by some overzealous police officers resorting to inhuman, barbaric, archaic and drastic methods of treating the suspects in their anxiety to collect evidence by hook or by crook and wrenching a decision in their favour. We remorsefully like to state that on a few occasions even custodial deaths caused during interrogation are brought to our notice. We are very much distressed and deeply concerned about the oppressive behaviour and the most degrading and despicable practice adopted by some of the police officers." (page 679)

"It is heart-rending to note that day in and day out we come across with the news of blood-curdling incidents of police brutality and atrocities, alleged to have been committed, in utter disregard and in all breaches of humanitarian law and universal human rights as well as in total negation of the constitutional guarantees and human decency." (Page 711)

Now if this is the situation in India, namely, that torture is the principle forensic tool of the police and is extensively used, and as a result confessions to a police officer have never been held to be admissible right through the British period and upto the enactment of TADA, what was the evidence before the Supreme Court on the basis of which they could conclude that it would be legitimate to repose faith in senior police officers because they would be less inclined to use torture? In fact, there was no such evidence. The Supreme Court concluded that confessions made to senior police officers were admissible based on no evidence at all to justify the departure from a rule of law and practice that govern criminal trials for over 100 years. There was also no evidence before Supreme Court that the police practice of torture had declined in any manner. In fact, a perusal of decisions of the Supreme Court could possibly indicate precisely the opposite i.e. an increasing use of torture by the police during investigation of crimes, as manifested in custodial violence cases.

The Supreme Court also concluded that a confession made by a person before a police officer is also admissible against the co-accused. Refer to Sukhmant Singh v/s State-2003 AllMR (CR) 2365.

Rule 15 of the Terrorists and Disruptive Activities (Prevention) Rules, 1987 lays down in detail how confessions are to be taken and recorded. In particular the rule requires the police officer to make a certificate in writing to the effect that the confession was taken in his presence and the record contains a full and true account of the confession and that it was voluntarily made. Referring to the Acts and Rules regarding confessions the Supreme Court held,

"we strongly feel that there must be some severe safeguards which should be scrupulously observed while recording a confession".

We will now show how, in the following cases smaller benches of the Supreme Court disregarded the directives of the Constitutional Bench and held that the safeguards and the guidelines are directory and not mandatory.

A digression at this point is in order. Despite the binding decision of the Constitution Bench in Kartar Singh's case above mentioned, in Jameel Ahmed versus state of Rajasthan - 2003(9) SCC 673 - a two judge Bench of the Supreme Court without reference to the

observations of the Constitutional Bench above mentioned held as under:

"Rule 15(5) does not ascribe any role to the CMM or the CJM of either perusing the said statement or making any endorsement or applying his mind to these statements. It merely converts the said courts into a post office for further transmission to the Designated Court concerned, therefore, the object of the rule is to see that the statement recorded under Section 15 of the Act leaves the custody of the recorder of the statement at the earliest so that the statement has a safer probative value. In our opinion, transmission of the recorded confessional statement under Section 15 of the Act to the CMM or the CJM under Rule 15(5) is only directory and not mandatory." (Page 688)

Going back to Kartar Singh's case, the Supreme Court then rejected the argument that it would be improper to empower the Executive Magistrates to record confessions under Section 15 of TADA, since they cannot be expected to have judicial integrity and independence.

Justice K Ramaswamy made an extraordinary dissent. Referring to section 25 of the Evidence Act which excluded confessions made to the police as evidence he said that it

"rests upon the principle that it is dangerous to depend upon a confession made to a police officer which cannot extricate itself from the suspicion that it might have been produced by the exercise of coercion." (page 724).

Justice Ramaswamy held:

"While the Code and Evidence Act seek to avoid inherent suspicion of a police officer obtaining confession from the accused, does the same dust not cloud the vision of superior police officer? Does such a procedure not shock the conscience of a conscientious man and smell of unfairness? Would it be just and fair to entrust the same duty by employing non obstante clause Section 15(1)? Whether mere incantation by employing non-obstante clause cures the vice of afore enumeration and becomes valid under Articles 14 and 21? My answer is "NO", "absolute no, no". The constitutional human rights perspectives projected hereinbefore; the history of working of the relevant provisions in the Evidence Act and the wisdom behind Section 164 of the Code ignites inherent invalidity of sub-section (1) of Section 15 and the court would little afford to turn Nelson's blind eye to the above scenario and blissfully bank on Section 114 III.(e) of the Evidence Act that official Acts are done according to law and put the seal that sub-section (1) of Section 15 of the Act passes off the test of fair procedure and is constitutionally valid". (page 731)… Conferment of judicial powers on the police will erode public confidence in the administration of justice… It not only sullies the stream of justice at its source but also chills the confidence of the general public and erodes the efficacy of the rule of law." (page 732).

Dealing with the argument that senior officers may be trusted to record confessions, he said:

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

Justice Sahai also dissented saying:

"Killing of democracy by gun and bomb should not be permitted by a State but in doing so the State has to be vigilant not to use methods which may be counter-productive. Care must be taken to distinguish between the terrorist and the innocent. If the State adopts indiscriminate measures of repression resulting in obliterating the distinction between the offender and the innocent and its measures are repressive to such an extent where it might not be easy to decipher one from the other, it would be totally incompatible with liberal

values of humanity, equality, liberty and justice. ... Measures adopted by the State should be to create confidence and faith in the government and democratic accountability should be so maintained that every action of the government be weighed in the scale of rule of law." (page 753)

"A police officer is trained to achieve the result irrespective of means and method which is employed to achieve it. So long the goal is achieved the means are irrelevant and this philosophy does not change by hierarchy of the officers. A sub-Inspector of the police may be uncouth in his approach and harsh in his behaviour as compared to a superintendent of police or additional superintendent of police or any higher officer. But the basic philosophy of the two remains the same. The Inspector of police is as much interested in achieving the result by securing confession of an accused person as the superintendent of police. By their training and approach they are different. Procedural fairness does not have much meaning for them. It may appear unfortunate that even after Independence a force which was created to implement harsh and Draconian laws of imperial regime, ruthlessly and mercilessly, has not changed much even in people regime. Dignity of the individual and liberty of person - the basic philosophy of Constitution - has still not percolated and reached the bottom of the hierarchy as the constabulary is still not accountable to public and unlike British police it is highly centralised administrative instrumentality meant to wield its stick and spread awe by harsh voice more for the executive than for the law and society."

"A confession made to a police officer is suspect even in England and America. But it has been made admissible subject to the safeguards mentioned above. Why? Because what is provided by Section 26 of the Evidence Act stands substituted by presence of lawyer or near relatives". (Page 762).

"Further a confession made to a police officer for an offence committed irrespective of its nature in non-notified area is inadmissible. But the same police officer is beyond reproach when it comes to a notified area. An offence under TADA is considered to be more serious as compared to one under Indian Penal Code or any other Act. Normally graver the offence more strict the procedural interpretation. But here it is just otherwise. What is inadmissible for a murder under Section 302 is admissible even against a person who abets or is possessed of the arms under Section 5 of the Act. How the methods applied by police in extracting confession has been deprecated by this Court in series of decisions need not be reproduced. But all that changed overnight when TADA was enacted. Giving power to police officer to record confession may be in line with what is being done in England and America. But that requires a change in outlook by the police. Before doing so the police force by education and training has to be made aware of their duties and responsibilities, as observed by Police Commission. The defect lies not in the personnel but in the culture. In a country where few are under law and there is no accountability, the cultural climate was not conducive for such a drastic change. Even when there was no Article 21, Article 20(3) and Article 14 of the Constitution any confession to police officer was inadmissible. It has been the established procedure for more than a century and an essential part of criminal jurisprudence. It was, therefore, necessary to bring about change in outlook before making a provision the merits of which are attempted to be justified on law existing in other countries." (page 762) ... Section 15 of the TADA throws all established norms only because it is recorded by a high police officer. In my opinion our social environment was not mature for such a drastic change as has been effected by Section 15. It is destructive of basic values of the constitutional guarantees." (page 763)

Confessions recorded under TADA admissible even if accused acquitted of all TADA charges!

In State vs Nalini - JT 1999 (4) SC 106 - a three Judge of the Supreme Court held:

"The admissibility of the confessional statement would continue to hold good even if the accused is acquitted under TADA offences."

This is a shocking proposition of law. Confessions to a police officer were made admissible in evidence for the first time under TADA to meet the exigencies arising out of terrorist offences. Now, even if those offences were not made out the confessional statements would continue to be admissible in evidence for prosecution under normal criminal law where such evidence is not admissible had TADA not been applied. In this manner confessions before a police officer became admissible in evidence under normal criminal law, without the legislature making any amendment in the Code.

In Nalini's case the doubt expressed by the Supreme Court in Bilal Ahmed Kaloo vs state of AP - JT 1997 7 SC 272 - was overruled. In Bilal's case the

Supreme Court held that the confessions made before a police officer under TADA were admissible in evidence even when the accused is acquitted of offences under TADA.

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

"We are, however, constrained to record our doubt as regards the state of law as declared by the three-judge bench of this Court in Nalini (supra)

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

However, the five-judge Constitutional Bench in Prakash Kumar vs state of Gujarat - JT 2005 11 SC 209 - upheld the ratio of Nalini's case.

RECORDING OF CONFESSIONS

In the case of Nazir Ahmed vs King Emperor AIR 1936 PC 253 the Privy Council held that confessions recorded by a magistrate acting under Section 164 had to be recorded in the manner prescribed under the Section and the Standing Orders and in no other way. In that case the magistrate had not recorded the confession as required by law and tendered his oral evidence of the confession made by the accused. It was held that the confession was inadmissible and the accused was acquitted. This was followed in state of UP v/s Singhara Singh reported in AIR 1964 SC 358. Recent smaller benches of the Supreme Court have disregarded the precedent set in Nazir Ahmed's case as in 1998 (1) Bom Cr Cases 631.

CHANCE WITNESS

In a long line of decisions starting from Puran vs State of Punjab - AIR 1953 SC 459 - the Supreme Court had rejected the evidence of what was called "nature's call witnesses" who allegedly appeared at the crime scene out of the blue with the explanation that they were at the crime scene by chance while attending the call of nature. In a startling reversal the Supreme Court has in state of UP versus Farid Khan 2005(9) SCC 103 taken the contrary view without any reference to the preceding case law to the contrary. The Supreme Court held:

"However, the High Court disbelieved his evidence on two counts - firstly on the ground that he was previously convicted in a criminal case and was sentenced to four years' imprisonment. This, according to the High Court, was a valid ground to discard his evidence. Another ground to disbelieve the evidence of PW 2 Sharif was that he must have been a chance witness and his explanation that he was going to the shop of Safi may not have been true as there were several other "beedi" manufacturers in that locality nearest to his house. Of course, the evidence of a witness, who has got a criminal background, is to be viewed with caution. But if such an evidence gets sufficient corroboration from the evidence of other witnesses, there is nothing wrong in accepting such evidence." (Page 106)

In Puran vs state of Punjab, the abovementioned, the three-judge bench of the Supreme Court held:

"In these circumstances it could not be said that the Sessions Judge was in error when he rejected the evidence of this witness and described him as a chance witness. Such witnesses have the habit of appearing suddenly on the scene when something is happening and then of disappearing after noticing the occurrence about which they are called later on to give evidence." (Page 460)

BLOOD TEST

In a long line of decisions the Supreme Court had acquitted the accused on account of deficiencies in the investigation, such as the failure of the police to show that the blood stains on the recovered articles corresponded with the blood of the deceased. In a shocking reversal, and once again without referring to the earlier case law,

the Supreme Court convicted an accused person even though there was nothing to show that the blood stains on the lungi recovered belonged to the deceased. Not only that the Supreme Court breached the right to silence of the accused persons and in the face of a grossly incompetent investigation used an adverse inference drawn on account of the silence of the accused to convict him. The Supreme Court held as under:

"As noted above and as seen from the mahazar, the deceased had suffered bleeding injuries and the lungis seized by the investigating agency from the accused contained bloodstains. The Serologist has opined that the bloodstains are of a human being but was not able to establish the blood group. As noted above, learned counsel for the appellant had contended that in the absence of such identification of the blood group the stains found on the lungi would not in any manner inculpate the accused in the crime. We do not think this argument can be accepted. The accused has admitted that the *lungis* belonged to him and were seized from him, for that matter he says he gave the *lungis* to the investigating officer but he has not explained how the bloodstains which are at least proved to be human blood came to be there on the *lungis*. The absence of any explanation in this regard would only strengthen the prosecution case that blood must have stained the lungis at the time of the attack on the deceased." (page 188)

In Kansa Behera vs state of Orissa - 1987 3 SCC 480 - the Supreme Court held:

"As regards the recovery of a shirt or a *dhoti* with bloodstains which according to the serologist's report were stained with human blood but there is no evidence in the report of the serologist about the group of the blood and, therefore, it could not positively be connected with the deceased. In the evidence of the investigating officer or in the report, it is not clearly mentioned as to what were the dimensions of stains of blood. Few small bloodstains on the clothes of a person may even be of his own blood especially if it is a villager putting on these clothes and living in village. The evidence about the blood group is only conclusive to connect the bloodstains with the deceased. That evidence is absent and in this view of the matter, in our opinion even this is not a circumstance on the basis of which any interference could be drawn." (Page 484)

RE-EXAMINATION

Despite a long line of decisions starting from Chanan Singh v/s state of Haryana 1971 SCC (Cr) 714 to the effect that re examination of witnesses in a criminal trial on behalf of the prosecution must be confined to clarification of ambiguities which may have emerged during the cross examination, the Supreme Court in the case of Rammi versus State of MP 1999(8) SCC 649 held without reference to the previous case law as under:

"There is an erroneous impression that re-examination should be confined to clarification of ambiguities which have been brought down in cross-examination. No doubt, ambiguities can be resolved through re-examination. But that is not the only function of the re-examiner. If the party who called the witness feels that explanation is required for any matter referred to in cross examination he has the liberty to put any question in re-examination to get the explanation. The public prosecutor should formulate his questions for that purpose. Explanation may be required either when the ambiguity remains regarding any answer elicited during cross-examination or even otherwise. If the public prosecutor feels that certain answers require more elucidation from the witness he has the freedom and the right to put such questions as he deems necessary for that purpose, subject of course to the control of the court in accordance with the other provisions. But the court cannot direct him to confine his questions to ambiguities alone which arose in cross-examination.

Even if the public prosecutor feels that new matters should be elicited from the witness he can do so, in which case the only requirement is that he must secure permission of the court. If the court thinks that such new matters are necessary for proving any material fact, courts must be liberal in granting permission to put necessary questions.

A public prosecutor who is attentive during cross-examination cannot but be sensitive to discern which answer in cross-examination requires explanation. An efficient public prosecutor would gather up such answers falling from the mouth of a witness during cross examination and formulate necessary questions to be put in re-examination. There is no warrant that re-examination should be limited to one or two questions. If the exigency requires any number of questions can be asked in re-examination." (Page 655)

DYING DECLARATION

In a number of decisions culminating in Paparambaka Rosamma versus state of AP 1999(7) SCC 695 Supreme Court repeatedly held that where a doctor was present, the magistrate may record a dying declaration but it is imperative that the doctor certify that the injured was in a fit state of mind at the time of making the declaration. In Paparambaka's case the Supreme Court held:"In our opinion, in the absence of a medical certification that the injured was in a fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a magistrate who opined that the injured was in a fit state of mind at the time of making a declaration." (Page 701) … In medical science two stages namely conscious and a fit state of mind are distinct and are not synonymous. One may be conscious but not necessary in a fit state of mind. This distinction was overlooked by the courts below". (page 702)

Earlier, in Mani Ram versus state of MP 1994 (Supp) 2 SCC 539 the Supreme Court similarly held:

"… in a case of this nature, particularly when the declarant was in the hospital itself, it was the duty of the person who recorded the dying declaration to do so in the presence of the doctor after duly being certified by the doctor that the declarant was conscious and in senses and was in a fit condition to make the declaration. These are some of the important requirements which have to be observed". (Page 540)

Both the three-judge Bench decisions in Paparambaka's case as well as the decision in Mani Ram's case was departed from by the Supreme Court in Koli Chunilal Savji versus state of Gujarat - 1999 (9) SCC 562 - in the following fashion:

"In the case of Mani Ram versus state of MP, no doubt this Court has held that when the declarant was in the hospital itself, it was the duty of the person who recorded the dying declaration to do so in the presence of the doctor and after being duly certified by the doctor that the declarant was conscious and in his senses and was in a fit condition to make the declaration. In the said case the Court also thought it unsafe to rely upon the dying declaration on account of the aforesaid infirmity and interfered with the judgment of the High Court. But the aforesaid requirements are a mere rule of prudence and the ultimate test is whether the dying declaration can be held to be truthful one and voluntarily given." (page 566)

Ultimately, a Constitutional Bench of the Supreme Court was formed, and in Laxman versus state of Maharashtra - 2002(6) SCC 710 - the Constitutional Bench referring to its decision in Paparambaka's case held that the view that a doctor's certificate stating that the injured was in a fit state of mind to make a statement was necessary for a dying declaration to be relied upon, was a view "too broadly stated and is not the correct enunciation of law". (Page 715)

SEALING

In innumerable decisions culminating in Amarjeet Singh versus state of Punjab (a three-judge bench decision) 1995 (supp) 3 SCC 217 -- the Supreme Court repeatedly held that sealing has to be done on the spot by the investigation officer and that non-sealing of the articles recovered or seized would be considered a serious infirmity. In Amarjeet Singh's case the Supreme Court held:

"The non-sealing of the revolver on the spot is a serious infirmity because the possibility of tampering with the weapon cannot be ruled out." (page 218).

All this long line of precedents was discarded by the Supreme Court in 2002 Cr LJ 944, once again without noting judgments to the contrary, by criticising the approach as "a technical approach" and condemned the trial court for making "a mountain out of a mole hill on such a frivolous ground". (Page 34). The Supreme Court held as under:

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

Thereafter in Ganesh Lal versus state of Rajasthan - 2002(1) SCC 731- a similar observation on law is recorded:"In such a situation, merely because the articles were not sealed at the places of seizure but were sealed at the police station, the recovery and seizure do not become doubtful." (Page 736)

Similarly in Rajendra Kumar vs state of Rajasthan - 2004 SCC (Cri) 713, where a submission was made by counsel for the accused to the effect that the bangles allegedly recovered were not sealed. The Court held:

"We do not think much importance can be attached to the fact that these bangles were not sealed at the time when recovery was made." (Page 716)

ARREST OF FEMALES

Departing from a long tradition of not arresting

women at night and not arresting women in the absence of a female constable, the Supreme Court in state of Maharashtra versus Christian Community Welfare Council of India - 2003(8) SCC 546 - held:

"Herein we notice that the mandate issued by the High Court prevents the police from arresting a lady without the presence of a lady constable. The said direction also prohibits the arrest of a lady after sunset and before sunrise under any circumstances. While we do agree with the object behind the direction issued by the High Court in sub-para (vii) of the operative part of its judgment, we think a strict compliance with the said direction, in a given circumstance, would cause practical difficulties to the investigating agency and might even give room for evading the process of law by unscrupulous accused. While it is necessary to protect the female sought to be arrested by the police from police misdeeds, it may not be always possible and practical to have the presence of a lady constable when the necessity for such arrest arises, therefore, we think this direction issued requires some modification without disturbing the object behind the same. We think the object will be served if a direction is issued to the arresting authority that while arresting a female person, all efforts should be made to keep a lady constable present but in the circumstances where the arresting officers are reasonably satisfied that such presence of a lady constable is not available or possible and/or the delay in arresting caused by securing the presence of a lady constable would impede the course of investigation, such arresting officer for reasons to be recorded either before the arrest or immediately after the arrest be permitted to arrest a female person for lawful reasons at any time of the day or night depending on the circumstances of the case even without the presence of a lady constable." (page 549)

EXAGGERATION BY WITNESSES

In their desire to push up the rate of conviction lies, exaggeration, embroidery and emballishments have become intrinsically mixed up with admissible evidence against the accused in criminal trials. Normally, in any other jurisdiction, the evidence of witnesses who lie or exaggerate would never be the basis of a conviction. The evidence would be frowned upon. In most jurisdictions in America or Europe, the evidence would be discarded lock, stock and barrel. In India however, the Supreme Court has laid down a very low standard for accepting untruthful evidence against accused persons. In SA Gaffar Khan versus VR Dhoble - 2003(7) SCC 749 - the Supreme Court held as under:

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

In a subsequent case Gangadhar Behera & Ors vs state of Orissa - 2003 SCC (Cri) 32, the Supreme Court went even further holding:

"Even if a major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, his conviction can be maintained." (Page 42)

These observations of the two-judge Bench of the Supreme Court are directly contrary to coordinate benches and even larger benches. In case after case, the Supreme Court has held that if a witness is found lying then it would be very hazardous to rely on part of his evidence while rejecting the other part. The notion of separating chaff from the grain is alien to criminal law jurisprudence and cannot be used in the context of witnesses who are lying and exaggerating and certainly not in the case of witnesses whose testimony has been found substantially false.

In the case of RP Thakur versus state of Bihar - 1974 (3) SCC 664 - Supreme Court held:

"If Nakuldeo could involve one person falsely, one has to find a strong reason for accepting his testimony implicating the others." (page 665)

Similarly in Suraj Mal versus State - 1979(4) SCC 725 - the Supreme Court held:

"It is well-settled that where witnesses make two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances no conviction can

be based on the evidence of such witnesses … In other words, the evidence of witnesses against Ram Narain and the appellant was inseparable and indivisible." (page 726)

POTA

In Kartar Singh's case, the Supreme Court was called upon to decide a challenge to the constitutional validity of TADA. In the Peoples Union for Civil Liberties versus Union of India 2004(9) SCC 580, the Supreme Court decided the constitutional validity of the Prevention of Terrorism Act, 2002. By the time the case came to be decided on the December 16, 2003, there were widespread protests against the misuse of TADA and the roping in of innocent people. When this was brought to the notice of Supreme Court at the beginning of the hearing the Supreme Court held:

"Another issue that the petitioners have raised at the threshold is the alleged misuse of TADA and the large number of acquittals of the accused charged under TADA. Here we would like to point out that this Court cannot go into and examine the "need" of POTA. It is a matter of policy. Once legislation is passed the government has an obligation to exercise all available options to prevent terrorism within the bounds of the Constitution. Moreover, we would like to point out that this Court has repeatedly held that mere possibility of abuse cannot be counted as a ground for denying the vesting of powers or for declaring a statute unconstitutional". (page 598)

As in Kartar Singh's case the Supreme Court missed the bus. The issue was not "a mere possibility of abuse" but rather one of persistent and rampant abuse of a statute. As stated earlier, while the Supreme Court was hearing the case, there were widespread allegations of misuse of POTA and there were numerous articles appearing in the newspapers on the misuse of POTA by the authorities. In circumstances where the petitioners are in a position to demonstrate that the statute and the misuse of the statute are so intrinsically interwoven that it is impossible for any court to deal with one without the other, was it permissible for the Supreme Court to dismiss the challenge and ignore widespread misuse of the statute in a summary manner? Ultimately, Government of India itself accepted that POTA was widely misused and that there was widespread public dissatisfaction with the Act. The Act was repealed. POTA was considered, as was TADA, as a black period of criminal law jurisprudence. Yet the Supreme Court in both the instances gave these repressive statutes a clean chit.

When it was argued that lawyers and journalists who are bound by their code of conduct and ethics to maintain confidentiality with respect to matters covered by lawyer - client and journalist - source privilege, the Supreme Court dismissed this off-hand as under:

"It is settled position of law that a journalist or lawyer does not have a sacrosanct right to withhold information regarding crime under the guise of professional ethics… There is also no law that permits a newspaper or a journalist to withhold relevant information from courts though they have been given such power by virtue of Section 15(2) of the Press Council Act, 1978 as against the Press Council… Of course the investigating officers will be circumspect and cautious in requiring them to disclose information. In the process of obtaining information, if any right of a citizen is violated, nothing prevents him from resorting to other legal remedies." (page 603)

Dealing with Section 32 of POTA which made it admissible confessions made to a police officer and also dealing with Section 32(4) and (5) which require the confession to be sent to magistrate, the Supreme Court held:

"In our considered opinion the provision that requires producing such a person before the Magistrate is an additional safeguard. It gives that person an opportunity to rethink over his confession. Moreover, the Magistrate's responsibility to record the statement and the enquiry about the torture and provision for subsequent medical treatment makes the provision safer." (page 612)

In the earlier section dealing with TADA we had demonstrated how smaller benches of the Supreme Court disregarded the Constitutional Bench decision in Kartar Singh's case holding that the guidelines laid down by the Court in that case were to be scrupulously followed. Now in the POTA case we have set out the finding of the Supreme Court above mentioned only to demonstrate that subsequent smaller benches of the Supreme Court departed from this binding observation in the PUCL case to hold that the magistrate has virtually no role to play and almost acts only as a post office.

MEDICAL VS OCULAR EVIDENCE

In a series of decisions starting with NB Mitra vs SC

Roy - AIR 1960 SC 706 - the Supreme Court has acquitted accused persons when the medical evidence was explicit and the ocular evidence was clearly at variance with the medical evidence. There are no doubt cases where the two, despite apparent contradiction, can be reconciled. However in cases where there is a clear contradiction which cannot be explained reasonably, the Supreme Court has repeatedly held that the benefit of doubt will go to the accused persons. Now in a startling reversal, once again without reference to binding precedent, the Supreme Court has, in Gangadhar Behera & Ors vs state of Orissa - 2003 SCC (Cr) 32, held:

"At this juncture, it would be appropriate to deal with the plea that ocular evidence and medical evidence are at variance. It would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant." (Page 44) This two-judge bench decision is directly contrary to the three-judge bench decision in Mitra's case above-mentioned where the magistrate made a direction to the Jury as under:

"Now, gentlemen, when a medical witness is called as an expert he is not witness of fact. Medical evidence of an expert is evidence of opinion, not of fact. Where there are alleged eyewitnesses of physical violence which is said to have caused the hurt, the value of medical evidence by prosecution is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence, or any medical evidence which the defence might itself chose to bring is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Therefore, you must remember this particular point of view that if you believe the eyewitnesses, then there is no question of having it supported by medical evidence, unless the medical evidence again in its turn goes so far that it completely rules out all possibility that such injuries could take place in the manner alleged by the prosecution and that is a point which you should bear in mind, because if you accept the evidence of the eye-witnesses, no question of further considering the medical evidence arises at all." (Page 1034)

The three-judge bench of the Supreme Court disagreed:

"I do not think that the direction is either correct or complete. It is incorrect, because a medical witness who performs a post-mortem examination is a witness of fact, though he also gives an opinion on certain aspects of the case. Further, the value of a medical witness is not merely a check upon the testimony of eye-witnesses; it is also independent testimony, because it may establish certain facts quite apart from the other oral evidence. If a person is shot at close range, the marks of tattooing found by the medical witness would show that the range was small, quite apart from any other opinion of his. Similarly, fractures of bones, depth and size of the wounds, would show the nature of the weapon used. It is wrong to say that it is only opinion evidence; it is often direct evidence of the facts found upon the victim's person." (Page 1034)

Similarly in Mohar Singh vs state of Punjab - 1981 Supp. SCC 18 - the Supreme Court had held:

"In view of this glaring inconsistency between the ocular and medical evidence, it will be extremely unsafe and hazardous to maintain the conviction of the appellants on such evidence." (Page 20)

REPORT TO THE MAGISTRATE

Section 157 CrPC requires the Officer in charge of a police station to "forthwith" send a report to the magistrate on the police receiving information in respect of the commission of an offence. There is a long line of binding precedent of the Supreme Court (AIR 1976 SC 2423, AIR 1980 SC 638) to the effect that a late dispatch of the report to the magistrate could provide a basis for suspicion that the FIR was the result of consultation and deliberation and that it was recorded later than the date and time mentioned.

However, in state of J&K vs S Mohan Singh - 2006 9SCC 272, where the crime is said to have occurred on 23.7.85 at 6 pm, the FIR was lodged at 7.20 pm and a copy of the FIR was received by the magistrate on the next day at 12.45 pm the Supreme Court held:

"In our view, copy of the first information report was sent to the magistrate at the earliest on the next day in the court and there was no delay, much less inordinate one, in sending the same to the magistrate." (Page 275)

Similarly in Anil Rai versus state of Bihar - AIR 2001 SC 3713 - the Supreme Court introduced a new concept namely "extraordinary delay". Without refer-

ence to the previous case law, the law on the point is changed in the following manner:

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

NAMES OF WITNESSES OMITTED

The Supreme Court has held repeatedly that if the name of the witnesses are omitted in the FIR, unless a plausible explanation is given, the omission could be treated as a ground to doubt the evidence. In Marudanal Augusti versus state of Kerala - 1980(4) SCC 425 - the Supreme Court acquitted the accused persons because though it was stated in the Court evidence that they had witnessed the assault, they were not mentioned at all in the FIR. To the contrary, however, in Rajkishore Jha vs. state of Bihar - 2003 11 SCC 519, the Supreme Court held:

"The High Court has noted that the names of witnesses do not appear in the first information report. That by itself cannot be a ground to doubt their evidence." (Page 520) Similarly in Anil Rai versus state of Bihar - AIR 2001 SC 3173 - the Supreme Court held that the non-inclusion of the names of the witnesses in the FIR could have been on account of the fact that the wife who had lodged the FIR was perturbed on the murder of her husband.

THE CASE OF THE DEFENCE

In a striking unsettling of well settled criminal law procedure and jurisprudence, not referred to in the judgment, the Supreme Court has, in Tarun Bora vs state of Assam - 2002 SCC (CRI) 1568 - observed as under:In cross-examination the witness stated as under:

"Accused Tarun Bora did not blind my eyes nor he assaulted me."

This part of cross-examination is suggestive of the presence of accused Tarun Bora in the whole episode. This will clearly suggest the presence of the accused Tarun Bora as admitted. The only denial is that the accused did not participate in blindfolding the eyes of the witness nor assaulted him. (Page 1572)

We have already noticed that in the cross-examination of PW 1, a suggestion was put to him that the appellant Tarun Bora had neither participated in blindfolding him nor assaulted him. This is clearly indicative of the presence of the appellant and participation in the kidnapping episode." (Page 1573) Similar is the case reported in 2002 SCC (Cr) 217.

INADMISSIBLE EVIDENCE

In BS Panchal vs state of Gujarat - AIR 2001 Supreme Court 1158 - the Supreme Court began by remarking:

"We have reached the stage when no effort shall be spared to speed up trials in the Criminal Courts."

The Court then went on to observe:

"It is an archaic practice that during the evidence collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the Court does not proceed further without passing order on such objection." (Page 1158)

"Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item or oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the judge or magistrate can keep such evidence excluded from consideration. There is no illegality in adopting such a course." (Page 1159)

There are major problems with this approach. First, in all jurisdictions trial court judges are expected to deal with the objections on the spot in criminal trials. There was no evidence before the Supreme Court to indicate that the practice of deciding objections as to admissibility of evidence there and then, was "archaic". This observation is based more out of frustration than a serious attempt to deal with delays in criminal trials. Secondly, recording all objections and proceeding nevertheless in a criminal trial may cause grave prejudice to the accused and bias the mind of the judge as inadmissible evidence may come on record, albeit temporarily. Thirdly, it allows the judge to be mechanical in his approach and behave more as a recorder of evidence

rather than an adjudicator. It is one thing to say that complex issues relating to admissibility of evidence may be temporarily postponed after recording the objections. It is an entirely different thing to lay down a rule of this sort for every objection.

STANDARD LOWERED

In a startling departure from the well established standard of proof for criminal cases of "beyond reasonable doubt" the Delhi High Court has, without reference to binding case law to the contrary now lowered the standard to "moral certainity". In Alamgir vs state - 2003 1 SCC 21 - a two-judge bench of the Supreme Court while noticing that a High Court had defined the standard thus chose to leave it alone:

"Incidentally, the High Court did emphasise on the true and correct meaning of the phraseology "reasonable doubt" to be attributed thereon and it is on this score, the High Court records:

'Modern thinking is in favour of the view that proof beyond a reasonable doubt is the same as proof which affords moral certainty to the judge'."

We are, however, not expressing any opinion with regard thereto." (Page 26) This is directly contrary to the Constitutional Bench's decision in Haricharan Kurmi vs state of Bihar - AIR 1964 SC 1184 - where the constitutional bench categorically said:

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

ACCUSED DO NOT FIGURE

Once again contrary to a long line of binding precedent to the effect that if the names of the accused do not figure in the statements made to the police during investigation, then normally such an omission could possibly cast a doubt on the prosecution case. However, in Alamgir versus State - 2003(1) SCC 21 - the Supreme Court held:

"Admittedly, this piece of evidence was not available in the statement of the witness under Section 161 CrPC, but does it take away the nature and character of the evidence in the event there is some omission on the part of the police official? Would that be taken recourse to as amounting to rejection of an otherwise creditworthy and acceptable evidence - the answer, in our view cannot but be in the negative." (page 27)

CONFESSIONS AGAINST CO-ACCUSED

We start with the three-judge Bench decision of the Supreme Court in Kashmira Singh versus state of Madhya Pradesh - AIR 1952 SC 159 - where it was held as under:

"The confession of an accused person is not evidence in the ordinary sense of the term as defined in S. 3. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshall the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept. (page 159)

As regards its use in the corroboration of accomplices and approvers, a co-accused who confesses is naturally an accomplice and the danger of using the testimony of one accomplice to corroborate another has repeatedly been pointed out. The danger is in no way lessened when the "evidence" is not on oath and cannot be tested by cross-examination. Prudence will dictate the same rule of caution in the case of a witness who though not an accomplice is regarded by the judge as having no greater probative value.

It follows that the testimony of an accomplice can in law be used to corroborate another though it ought not to be so used save in exceptional circumstances and for reasons disclosed. The tendency to include the innocent with the guilty is peculiarly prevalent in India and it is very difficult for the court to guard against the danger. The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on independent evidence which in some measures implicates such accused." (page 159)

The three-judge bench decision in Nathu versus state of Uttar Pradesh - AIR 1956 SC 56 - where it was held therein: "… that such statements were not evidence as defined in S. 3 of the Evidence Act, that no conviction could be founded thereon, but that if there was other evidence on which a conviction could be based, they could be referred to as lending assurance to that conclusion and for fortifying it." (Page 154)

This was followed by another three-judge Bench decision in Ram Chandra versus state of UP - AIR 1957 SC 381 - where the Court held:

"Under S. 30 confession of a co-accused can only be taken into consideration but it not in itself substantive evidence." (Page 560)

Then we have the decision of the Constitutional Bench of the Supreme Court in the case of Haricharan Kurmi versus state of Bihar - AIR 1964 SC 1184 - where the Supreme Court held that:

"... in dealing with a case against an accused person, the court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. (para 12)

Thus, the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence." (page 844)

Directly contrary to this line of binding precedent is a decision of the two-judge Bench in K Hashim versus state of TN - 2005(1) SCC 237 - where the Supreme Court held:

"If it is found credible and cogent, the court can record a conviction even on the uncorroborated testimony of an accomplice." (Page 247)

FALSE DEFENCE AS EVIDENCE

There is a plethora of binding precedents to the effect that a false defence can never be taken as substantive evidence. In the case of circumstantial evidence, it is only when the chain of circumstances is complete that a false defence can at best be considered an additional circumstance. In Shankerlal G Dixit versus state of Maharashtra - 1981(2) SCC 35 - it was held:

"… falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused." (page 43)

Directly contrary to this is the two-judge Bench decision in state of Maharashtra versus Suresh - 2000(1) SCC 471 - where the Supreme Court held:

"A false answer offered by the accused when his attention was drawn to the aforesaid circumstance renders that circumstance capable of inculpating him. In a situation like this such a false answer can also be counted as providing "a missing link" for completing the chain." (page 480)

This was followed by another two-judge Bench in Mani Kumar Thapa versus state of Sikkim - 2002(7) SCC 157 - where the Supreme Court held:

"If the said principle in law is to be accepted, the statement of the appellant made under Section 313 CrPC being palpably false and there being cogent evidence adduced by the prosecution to show that the appellant had given two other versions as to the incident of 12.2.1988, we will have to proceed on the basis that the appellant has not explained the inculpating circumstances established by the prosecution against him which would form an additional link in the chain of circumstances." (page 167)

CONDONATION OF TORTURE

In Kamalanantha vs state of TN - 2005 5 SCC 194 - the women who had alleged that they were raped stated: "After the police beat us, myself and other girl informed that we were raped by Premanandha. " In a shocking condonation of torture making admissible evidence taken after beating of the witnesses by the police, the Supreme Court held:

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

EXTRA-JUDICIAL CONFESSIONS

A study of the criminal law reports from 2001 onwards shows an increasing tendency of the superior courts to use extra-judicial confessions as substantive evidence in the conviction of the accused, on par with other forms of evidence. The latest is Ram Singh vs Sonia - 2007 2 SCC (Crl.) 1. This is contrary to a long line of binding precedent holding, as in Rahim Beg vs state of UP - 1972 3 SCC 759 - that "the evidence of the extra judicial confession is a weak piece of evidence." (Page 765)

162 CrPC STATEMENTS

The superior courts are increasingly inclined to brush aside objections relating to statements made in court which are improvements from the statements made to the police during investigation. In a long line of decisions, as in Yudhishtir vs state of MP - 1971 3 SCC 436 - the Supreme Court has originally held that crucial omissions in the statements to the police must be considered an improvement and may make the evidence before the court to be considered as "false and unacceptable". (Page 439)

— July-August 2007

Rule of Law - A Fugitive

Increasing corruption and brazen bending of the judiciary by people holding public offices intensifies the need for courts to innovate ways to secure a corruption free government by providing them with a stable, fearless and free system of administration of justice. More so because we are left with the ordinary criminal law to deal with political leaders who committed crimes which are in abuse of their powers.

K G KANNABIRAN

In a democracy political opponents play an important role both inside the house and outside the House" observed the Supreme Court while dealing with a transfer application filed by Dravida Munetra Kazhagam of a case pending before the Special Court against the reigning Chief Minister of Tamil Nadu, Jayalalithaa. The Court went on to observe political opponents do perform a role in a democracy. They are really interested in the administration of justice and are a party interested in the matters of transfer of a case from one court to another within the Sate and to a court in another State under the jurisdiction of the High Court of that state. In fact the principle of transfer of cases is a statutory recognition of more than one principle of natural justice.

The Supreme Court in this case found that the Public Prosecutor and defence counsel were working in tandem in subverting the judicial processes by recalling around seventy eight witnesses and for securing permission to answer interrogatories addressed to her in lieu of her presence in court to explain incriminating evidence to the court as an accused under 313 of Criminal Procedure Code.

I remember in the early stages of my practice in a family dispute before the High Court on its Original Side, a Minister of the Madras Government filed a petition that he be examined on commission on the ground he being a minister he may not find time attend the court to give evidence. He was a witness not an accused. The court rejected the petition admonishing the minister quite sternly by pointing out that it is a very elementary duty of a citizen to give evidence in a court when called upon to do so. What rings in my ear still is the prophetic sentence the learned judge used. He pointed out that the lessons of history should not be forgotten that in the antechambers of democracy dwells despotism. That kind of inter institutional discipline is slowly giving way to indulgence leading to the present state of decay.

Little incursions permitted indulgently by the people and the courts led to a grotesque caricature of democracy we are living with to day. If the party or person at the

helm of affairs is corrupt, the kind of massive appropriation of which Jayalalithaa is accused, - 65 to 66 crores of disproportionate wealth- cannot be acquired without wrecking the constitutional machinery. Corruption has the insidious quality of destruction of governance of the society as the termite has. Corrupt governments are a hundred times more dangerous than terrorist violence and in fact terrorist violence thrives in corrupt governments. It is not terrorism that is destructive of governance but the massive corruption we have been reading about and living with.

Once the Supreme Court comes to the view that justice is not possible in the courts in Tamil Nadu in cases against the reigning Chief Minister will mere transfer orders meet the ends of justice? It has been found by the Court that the Chief Minister has been subverting the judicial process. It is different from the ordinary run of cases courts deal with.

The issue of constitutional morality is also involved in such cases. It would have been a case for impeachment if that procedure were available. An impeachment doesn't foreclose a prosecution under ordinary law. It is a crime committed by the head of the government calling for the evolution of a different set of principles to insulate the community against these depredations. A criminal prosecution deals with an indictment of a crime without reference to and without interfering with the political status a criminal holds. An accused Chief Minister facing the trial in his/her courts was a situation which was not contemplated at all and so not provided for. We do not have separate category of political offences committed by power wielders and a law to try these political offenders. This should be in addition to prosecution of crimes under ordinary law.

Soon after the Emergency of 1975 and in the wake and as response to the Report of Shah Commission, our politicians of all hues made some feeble efforts to discipline their conduct while in office. They however were not willing to legislate on their political status while under trial and the political consequence on conviction for their foul deeds while in office. Special Courts Act was passed in the wake of the findings given by the Shah Commission. In these fifty years of Independence no honest effort has been made to contain misgovernance. In the Special Court Bill debate in the Supreme Court Justice Chandrachud observed "Parliamentary democracy will see its halcyon days in India when law will provide for speedy trial of all offenders who misuse the public office held by them. Purity in public life is a desired goal at all times and in all situations, emergency or no emergency" and Justice Iyer wrote "the impact of 'summit'crimes in the Third World setting is more terrible than Watergate syndrome as perceptive social scientists have unmasked. Corruption and repression –cousins in such situations- hijack developmental process" and goes on to state that this process leads only to erosion of confidence of the people in the constitutional value system and processes. Murtuza Fazl Ali J in V C Shukla's case said that the Act is a permanent one, This Act however was not to remain for long in the Statute Book. As soon as Mrs. Gandhi came to power without even a murmur of protest this Act was repealed as having become infructuous!

So we are left with the ordinary criminal law to deal with crimes by political leaders who committed crimes, which are in abuse of their powers. The essential preconditions for a successful prosecution are an impartial and independent investigation into the crime. and an equally independent prosecuting agency. These are the sine qua non for a functioning criminal justice system. The chapter on investigation in the Criminal Procedure Code proceeds on the assumption of an independent and impartial investigation into crimes reported. The provisions of the Code dealing with the powers and duties of the Public Prosecutor emphasize the independence of the Public Prosecutor. There is a catena of cases of the Supreme Court emphasizing the importance of the role of these two agencies if the criminal justice is to make any sense. The major ruling premise is that the government should respect the law, which it expects its citizens to obey. This respect for law should find expression in its compliance with the scheme of legislation setting down norms and the consequence of their breach.The Constitution is the charter for the existence of the State and the Union, and any breach of its terms sets apart the government as a law breaker and it breeds contempt for law from the law breakers the government sponsors and encourages.. This occurs when the politics of the party in power takes precedence over the Constitution and the laws.

A Chief Minister bending the institution of justice brazenly only with the object of ensuring her continuance in power and another for legitimizing the theocratic designs of a political party ignoring the Constitutional mandate and driving Rule of Law in search of safe havens to function fearlessly is a tragedy

the like of which was never witnessed even in the worst periods of authoritarian trends in this country. Should we allow Rule of Law to take to flight like a fugitive? Or should the acts of these two chief Ministers be taken, as breakdown of the Constitutional machinery is the question confronting the country today. We were already up against the objection raised by the Karnataka State to the transfer of the case for trial in that State The Chief Minister of Karnataka soon realized the untenability of such an objection and so did not act upon the objection. Nonetheless the Chief Minister of Tamilnadu moved the Supreme Court again for transfer of the case against her, to some other State on the ground that the relationship between the two States is soured due to Kaveri River Water dispute. The inter state river water dispute, which is about water sharing of the common natural resource by the people of riparian regions has been converted into a chauvinistic and senseless fight between people of the two regions leading to riots between two linguistic groups. This speaks volumes of our understanding of politics and the constitutional arrangements of the relationship between the states inter se and with the Union. The concept of enmity between two states, alien to any constitutional scheme, federal or quasi-federal, is promoted and nursed and kept ready for use by the prevailing vulgar adversarial political practice.

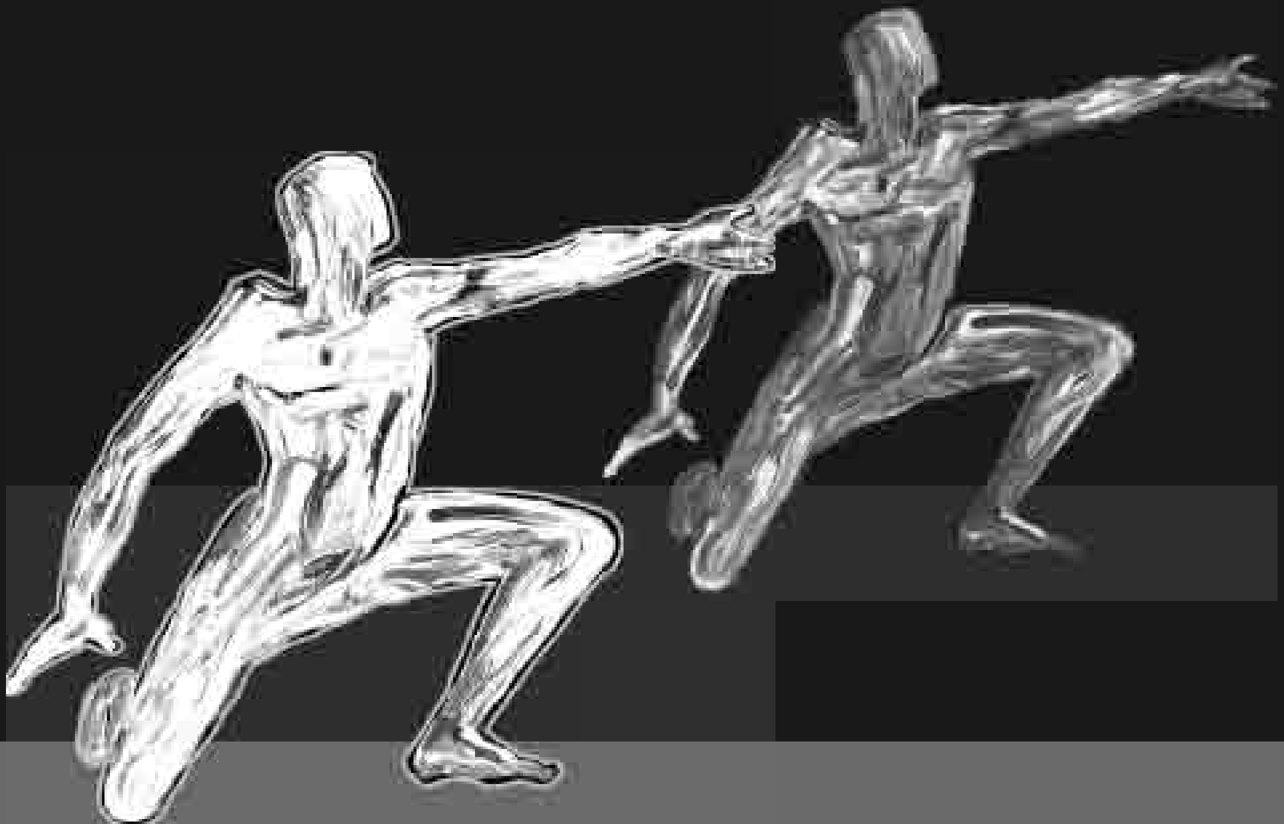
This dimension never invaded the debates and affected the decision making process in courts. A composite judiciary in a quasi federal set up is now called upon to bestow thought on the rise of regional politics and parties and the consequent weakening of the center leading to breakdown of judicial authority. This attitude exposes the ignorance of the history of Constitution making and the absence of a working knowledge of the Constitution. This ignorance even of an awareness of Constitutional politics has produced modern Chief Ministers like Jayalalithaa Narendra Modi and a whole lot of leaders at the state and the center for whom election means occupation of the power structure and governing without reference to the Constitution and its values. Can this fleeing Rule of Law successfully evade the long arm of corruption and abuse of power? Nor can we expect the Chief Ministers facing similar accusations help the fugitive Rule of law to function freely and fearlessly with the constitutional system seeming to be paralyzed.

Fundamental rights of a huge collectivity of citizens in the country who have been told by the courts that their right to vote is a fundamental right, that they have a right to a corruption free government and that a fearless and free administration of justice system is a part of the basic structure of the Constitution and yet courts appear to be helpless in these situations. Surely the Courts, which came up with the principles of prospective over ruling and the basic structure of the Constitution during periods of crisis, can innovate ways to secure a corruption free government by providing them with a stable, fearless and free system of administration of justice.

— April-May 2004

SECTION 3

Most of them treated as untouchables and denied basic dignity of life, fundamental human rights, civil liberties and rightful opportunities to develop, roughly one sixth of India's population lives in precarious existence, shunned by society. After gaining independence, the country embarked on a purported progressive journey towards enacting a plethora of progressive legislations to empower marginalised communities. It has been more than two decades since the SC/ST (PoA) Act was passed aiming at eliminating atrocities against Dalits with provisions for protection, compensation and rehabilitation of the victims of caste bias and punishments for perpetrators of violence. But, like all other empowering legislations, this law has also served more of a decorative purpose on paper than giving desirable effects to the rights envisaged in the Act.



Atrocities Against Dalits: Retrospect and Prospect

In their homelands their life is a daily struggle to be treated with the minimum dignity as normal human beings - a battle in which all odds are stacked against them and which they have been and still are losing. The PoA Act, now two decades old, was enacted to protect the SCs and STs from wanton attacks by those claiming to be superior. But the law has not achieved desirable results to reduce the number of crimes against them, including murders and rapes, and the conviction rates are dismally low.

P S KRISHNAN

Atrocities against scheduled castes (SCs) and scheduled tribes (STs) and untouchability are the natural expressions of the unnatural Indian caste system (ICS). Therefore, a clear understanding of the age-old phenomenon of "untouchability", which is an integral part and essential feature of the ICS and of the recent phenomenon of atrocities, can only be facilitated by a brief overview of the ancient caste bias and how it works in relation to the SCs and STs and also socially and educationally backward classes (also known as backward classes or other backward classes and hereafter briefly referred to as BCs). The usual descriptions and interpretations of the caste system, which are but of course upper caste-centric, do not bring out the essence of its nature and functions. In order to perceive that essence, it is necessary to study it from the standpoint of the large majority of the Indian people, who have been its victims in various forms and degrees, and to understand how the caste system works in relation to the SCs, STs and the BCs.

Dr Babasaheb Ambedkar was the first thinker to bring a fresh approach to the examination of the essence and functioning of the caste system in India. Contrary to earlier and later practice, he focused attention on labourers in relation to the caste system. He identified its important features by characterising it as: "A division of labourers into water tight compartments" and as "an hierarchy" in which the division of labourers is graded one above the other. He further refers to this as "a stratification of occupations".

Justice Chinnappa Reddy felicitously and appropriately called caste a system of "gradation & degradation" in his judgement in the Vasanth Kumar case of 1985 [1985 Supp SCC: 714]

Looking at the Indian society in relation to its socio-economic frame and from the viewpoint of SCs, STs and BCs, I consider it realistic and enlightening to distinguish four layers of castes — very different from the traditional four Varnas model. The traditional Varna model is flawed for various reasons. For one, through this model the privileged minority has appropriated for itself three-fourths or even more of the conceptual space, relegating the majority to the residual space characterising it as Shudra, and leaving no space at all for another substantial part of the population who were characterised as a Varnas. This model and the literature that has drawn on this model focus on concepts like "pollution" and "purity" which are terms coined by the privileged category to justify its privilege and the deprivation of others and they only help to obfuscate the functional reality of the Indian caste system. Its greatest deficiency is that it does not bring out the caste-based exploitation which was its core essence. It also does not bring out its functional role of monopolisation of advantages and privileges by a minority of the population. The diagrammatic representation of India's traditional socio-economic system and structure, still in operation and which was earlier expounded in my book Empowering Dalits for Empowering India[i] and elsewhere, depicts this clearly.

The topmost layer is that of privilege and prestige. It consists of castes, to which all

Disposal of cases in courts [Table 1]

Year	2003	2002	2001	2000	1999
Percentage of cases in which trial completed in courts at beginning of the year including B/F of previous year	14%	21%	11%	8%	10%
Percentage of cases convicted to trial- completed cases	13%	11%	12%	11%	12%
Percentage of cases acquitted or discharged to trial completed cases	88%	89%	88%	89%	88%
Percentage of cases convicted to total cases in courts	2%	2%	1%	1%	1%
Percentage of cases acquitted or discharged to total cases in courts	12%	18%	9%	6%	8%

or the major proportion of persons in prestigious and privileged positions and occupations traditionally belong. Such traditional positions and occupations include religious/spiritual authority, state governance and public administration, control over agricultural land (irrespective of whether and when individual ownership came into existence in a region), military professions, commerce and the like. The second layer consists of land-owning and cultivating peasant castes. In relation to land, their traditional position was between land-controlling castes and agricultural labour castes. But, as a result of post- Independence land reforms, they have recently become land-controlling castes in some parts. Some of the peasant castes are also herders of cattle, sheep, goats etc. The third layer consists of two or three sub-layers — the castes of traditional artisans and the castes providing various personal services and pastoral castes. The lowest layer consists essentially of castes of agricultural labourers. The castes of the three lower layers have traditionally been producing primary and secondary goods and rendering various types of services and labour mainly for the top layer, on unequal terms in varying degrees and forms, and involving exploitation at various levels. This has been facilitated by the economic power of the top layer aided by the ideology of "caste-with-untouchability", the latter part (i.e., untouchability) being directed against the castes in the lowest layer.

The colonial era and the post-Independence decades have no doubt introduced changes, but have not fundamentally altered the four-layer profile of the socio-economic frame of non-tribal India. Broadly speaking, most of the castes in the lowest layer have been classified as SCs for the purpose of measures of special protection and safeguards since 1935 and also after independence under a series of Presidential Orders issued in terms of Article 341 of the Constitution. They have been so classified on the basis of the criterion of "untouchability". While the numerically large castes in this layer are typically agricultural labour castes (ALCs), to this layer should also be assigned a number of numerically small castes which are nomadic (N), semi-nomadic (SN) or "Vimukta Jati" (VJ) or "ex-criminal". Some of them have also been classified as SCs on account of their being found to be victims of untouchability. To this layer also belong a number of scheduled tribes specified in a series of presidential orders issued in terms of Article 342 of the Constitution. While STs as a whole are outside the ambit of the Indian caste system and the bulk of them live in remote tribal areas, some of them have been sucked out of their homelands and have virtually become ALCs like the typical SCs. Some others represent tribes which never had a separate homeland and still others may be representatives of those submerged by the advancing caste-based agricultural civilisation of India. STs outside tribal areas live in style and circumstances which are little different from those of SCs and therefore logically belong to this, the lowest layer along with the SCs. Those N, SN & VJ communities which are neither SC nor ST are entered in BC lists.

The castes in the second layer i.e., the mid-layer are

generally found in BC lists. There are exceptions, which are logical and realistic. The presence of any caste of the top layer in BC lists is exceptional and such exceptions are either deliberately contrived aberrations or unrectified historical hangovers.

STs in tribal areas — accounting for two-thirds to three-fourths of the scheduled tribe population of India — constitute a layer broadly parallel to the lowest layer and partly jutting above vaguely. This layer has nothing to do with the Panchama of/ outside the traditional four Varna model. The STs even in their homeland — though free from untouchability and the daily intrusion of and constant oppression of the caste bias — rank with SCs in the matter of all-round deprivation. In their homelands their life is a daily struggle to retain what they have against relentless external incursions — a battle in which all odds are stacked against them and which they have been and still are losing. Some of the N, SN and VJ categories have been included in the lists of STs on account of their possession of tribal characteristics.

Among the main features and effects of the working of the Indian caste system through the centuries till date have been:

(a) To lock up labourers as labourers, and agricultural labour castes as ALC.
(b) Keep SCs down in their position with no or little scope for escape.
(c) Keep STs grounded in remote areas except only to be drawn out to supplement labour requirements.
(d) To keep SC and ST in conditions of segregation and demoralisation and to deprive/minimise opportunities for their economic, educational and social advancement and upward mobility.
(e) To Keep the backward classes tied down as providers of agricultural products (peasants), non-agricultural primary products (fisher-folk), traditional manufactured and processed products (artisans and skilled workers), service providers (hair-dressers) etc, on terms grossly adverse to them and hampering their economic, educational and social upliftment.
(f) To retain a virtual monopoly over superior opportunities in the hands of a small elite drawn from the top layer of the traditional socio-economic system, by hampering, handicapping and hamstringing SCs, STs and BCs in differen ways and to different degrees.

SCs – as the greatest and most intensive, forced contributors of agricultural labour in India as well as other workforce, including labour of the most sordid and unpleasant type such as sanitation and death and cremation-related services – have been central to this theme of exploitation and deprivation. The agro-climatic characteristics of India, with the monsoon confined to a limited part of the year necessitating a large reserve of labour force based on the requirements for agriculture during short peak periods made it extremely important for the design and purpose of the caste system to ensure that the "untouchable" castes now classified as SCs were kept in a state of socio-economic incarceration without hope of redemption or escape. The coercive mechanism designed to secure this purpose has been:

1. The caste system in its totality;
2. Specifically against the scheduled castes, the instrumentality of untouchability over the centuries, which continues to this day with full virulence;
3. For many centuries the Indian caste system was able to operate as the perfect instrument to keep the "untouchable" castes and plains tribes under total subjugation as providers of labour for agriculture and other purposes;
4. The weapon of atrocities in the modern context when SCs have rejected the caste system ideology and psychology of subservience and thus the efficiency of untouchability as a disciplining instrument has been partly blunted.

EMERGENCE OF "ATROCITIES"

The reformist, nationalist and revolutionary movements of the last one and a half centuries and the Ambedkarite movement have instilled a new sense of awareness in the Dalits. Under its influence they refuse to accept their status as ordained by the Indian caste system. This was given another dimension by the movement for land reforms, for reduction of crippling burdens on share-cropping tenants and for improvements in agricultural wages like the Telengana and Tebhaga agrarian movements and the agricultural labourers' strikes in places like Thanjavur. It became necessary for the dominant classes drawn from upper castes in different parts of the country to forge new instruments of control. This is how atrocities, as we know them, made their debut on a large scale in the 60s. As the resistance of the Dalits

has grown, so the frequency and brutal ferocity of atrocities have grown apace.

EXISTENTIAL PROBLEMS OF SCS

Along with an understanding of the Indian caste system in relation to Dalits, equally necessary for an understanding of untouchability and atrocities in their correct context and perspective is a picture of the existential conditions of SCs and STs, which continue to operate to this day even after nearly six decades of our glorious Constitution. No doubt there has been some amelioration of their conditions compared to the pre-Ambedkar, pre-Indepndence, pre-Constitution stage.

The present existential conditions of SCs are marked and marred by the following features:

(a) Landlessness and State's failure to distribute land among all rural SC families

(b) Lack of irrigation for and poor development of even the little land held by SCs

(c) Condemnation of SCs to agricultural servitude and other hard labour with poor wages/remuneration

(d) Condemnation to safai karamcharis or human scavenging

(e) Subjection to rampant bonded labour

(f) Denial of social security and modern facilities and conditions of work for the agricultural labour sector and the rest of the unorganised labour sector which accounts for 93 percent of the entire labour force of the country and among whom SCs, including those belonging to religious minorities (SCRM) are prominently placed. In addition, including socially and educationally backward classes belonging to religious minorities (SEdBCRM) and STs including those belonging to religious minorities (STRM) are also significantly present

(g) Exclusion of majority of SC children from the main school system, which manifests itself as non-enrolment (including false enrolment), low rates of enrolment, high rates of dropouts (which partly is adjustment of false/formal enrolments) and low rate of survivors at the end of school.

(h) Denial of quality education and denial of "level playing field" at every level of education — particularly at higher educational level. Failure to enact reservation in private educational institutions pursuant to the 93rd amendment of 2005 and following the successful defence and upholding by the Supreme Court of the Central Educational Institutions (Reservation in Admission) Act, 2006

(i) Grabbing away in 2003 of funds provided in 1996 for establishing residential schools for quality education for SCs (also similar schools for STs and BCs)

(j) Denial of access to market opportunities

(k) Trivialisation, routinisation and truncation of special component plan (SCP) for scheduled castes, which was initiated about a quarter century back (in the late 1970s)

(l) Poor outlays in the budgetary heads of welfare/social justice ministry

(m) Unsatisfactory implementation, quantitatively and qualitatively, of existing centrally sponsored schemes (CSS) and other existing developmental instrumentalities

(n) Special problems of Nomadic, semi-Nomadic and Vimukta Jati, (formerly criminal) communities have missed attention. Their problems are different from those of the numerically large SC/ST/BC communities.

(o) Nominations to national commissions for deprived categories are often made inappropriately, thereby crippling their functional efficiency and converting national commissions largely into national omissions. Gross delays in tabling of annual reports in Parliament and in public domain, defeat their purpose

(p) Poor representation of SC, ST and SEdBCs in important bodies relevant to development and empowerment

(q) Half-hearted implementation of reservation in central as well as state governments, PSUs, PSBs, universities and leaving in the limbo bill for reservation for SCs and STs in the services of the State in order to provide statutory base and force for them

(r) Tampering with and diluting pre-existing reservation rules, including relegation of SCs and STs from the first and third positions in the pre-1977 roster to the seventh and thirteenth positions in 1977 by misinterpreting the Supreme Court judgement in the Sabharwal case

(s) Denial of normal service benefits and progress to SCs

(t) Denial of entry for SCs in technical, supervisory and managerial positions in the organised private sector till date
(u) Depriving SCs of reservation in PSUs while privatising them and consequent reduction in number of reserved posts
(v) Continuance of atrocities and practice of untouchability
(w) Failure to establish Dalit-friendly administration at all levels and to adopt Dalit-friendly personnel policy

EXISTENTIAL PROBLEMS OF STS

Scheduled tribes share in common many of the existential problems of the SCs. However, following are some of the difficulties faced by the former exclusively:

(i) Fraudulent and illegal dispossession of STs from their lands, often with implicit or even open collusion by those wielding power
(ii) Consequent reduction of large numbers of STs into landless agricultural wage labourers
(iii) Conversion of tribals into minorities in traditional tribal territories
(iv) Depriving STs from their traditional rights in forests. The Indian Forest Act 1927, of colonial vintage, had been continued after independence till the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act was passed in December, 2006. But, the implementation of this Act is facing rough weather of late
(v) Failure to reverse the process of shrinkage of non-timber forest produce or NTFP (minor forest produce or MFP), on which a large proportion of STs depend wholly or partly for their livelihood
(vi) As part of the exploitation process, poor prices being paid by private merchants as well as governmental and cooperative agencies for NTFP/MFP collected by STs
(vii) Displacement of STs from their lands and territories in the name of industries, mining, hydel plants, irrigation, township and other projects, the benefit of which accrues to non-tribals and non-tribal territories, major proportion of project displaced persons (PDPs) are STs
(viii) Displacement of tribal communities from their traditional common property survival resources through creation of national parks, sanctuaries and biosphere reserves
(ix) Delayed formation of the second commission on the administration of the scheduled areas & welfare of STs under Article 339 (1), and lack of action on its report submitted by the commission to the government in 2004. Further lack of transparency regarding action proposed and failure in tabling the report in Parliament and placing it in public domain

Atrocities against SCs and STs, along with untouchability against SCs, has to be seen as part of this large scheme of deliberate and comprehensive deprivation of SCs and STs against the socio-historical background of the caste system and its functioning; the inadequate efforts made by post-Independence and post-constitutional governance to terminate this evil and anti-national historical legacy, and the consequent present existential plight of the SCs and STs despite some amelioration after the Constitution. This applies in varying forms and varying extents to the backward classes. However, the present discussion is confined to SCs and STs as they constitute the worst victims of the inherited system, which is largely continuing, and the victims of atrocities are mainly the SCs and along with them, to a lesser extent, the STs.

ANTECEDENTS OF PCR ACT

Before Constitution of India, 1950

The following, in brief, were the pre-Constitution immediate antecedents of the Act:

- Exposure of untouchability and its wide ramifications as the Achilles' Heel of the Indian society and the projected Indian polity by Dr Babasaheb Ambedkar at the round table conferences.
- Negotiations between Mahatma Gandhi and other Congress leaders with Dr Babasaheb Ambedkar in the Yeravda prison following Gandhi's fast against the Macdonald Award in September 1924, the Mahatma-Babasaheb dialogue culminating in the Yeravda Pact.
- Consequent sensitisation of the nationalist movement and the Indian National Congress to untouchability and the injustices done to the SCs — its adoption of removal of untouchability as a major plank.

- Enactment of the Madras Removal of Civil Disabilities Act, 1938 by the popular government of the Congress in Madras Presidency led by Rajaji.
- Similar enactments in many other provinces and princely states in the years shortly before or after independence and before the Constitution of India was adopted.

Under Constitution of India, 1950

- The watershed of Article 17 of independent India's Constitution adopted in 1950 reads: "17. Abolition of untouchability – untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law."
- Enactment of the Untouchability (Offences) Act, 1955 w.e.f. from 01-06-1955, followed by immediate realisation of weaknesses of the Act.
- Consequent introduction of the Untouchability (Offences) Act amendment and Miscellaneous Provisions Bill in Lok Sabha in 1972 and its passing in 1976 as the Protection of Civil Rights Act, 1955 with stronger, but still inadequate, provisions with effect from 19.11.1976.

ANTECEDENTS OF POA ACT

In modern times, atrocities can be traced back to the 19th century in parts of India when the discipline of untouchability began to be challenged by the "untouchables". A committee which toured British India in 1920s for review of the working of the Government of India Act, 1919 noted that many atrocities were being committed during those days against the untouchables but were going unnoticed and unpunished because no witness would come forward to give evidence. Dr Ambedkar, then MLC of Bombay, cited some early instances of atrocities against Dalits in Annexure A to the statement submitted by him to the Indian statutory commission (Simon Commission) on behalf of the Bahishkrita Hitakarini Sabha on 29.05.1928, including the rioting and mass assaults on Dalits on 20.03.1927 for asserting their right to drinking water from the public chowdar tank in Mahad, Kolaba district; and the mass assaults on and burning down of the dwellings of Balai people (SC) in Indore district. The early post-independence signal of the Ramanathapuram riots of 1957 starting with the assassination of the young educated Dalit leader Emmanuel for daring to defy untouchability-based interdicts on SCs did not register on the national radar though the state government took strong measures to quell the attacks on SCs. Under pressure of Dalit MPs, the government started monitoring atrocities from 1974, and in the case of STs 1981 onwards with special focus on murder, rape, arson and grievous hurt.

There was a flare up of atrocities in and from 1977 onwards. The then home minister in defence, apparently to show that atrocities were not as serious as claimed, advanced the strange and shocking argument that the number of SC victims of atrocities was less than 15 percent, perhaps without understanding the implication of that argument that the SCs' due share in this is equal to their population percentage (though their entitlement to this share in landownership, national wealth, etc. were not recognised). The outcry that followed persisted resulting in a cabinet reshuffle. At that time the government created the post of a joint secretary in the ministry of home affairs in charge of the subject of scheduled castes and backward classes including atrocities. I volunteered for this post and took up on top priority the task of monitoring of atrocities which I converted from mere receipt and transmission of statistical information, additionally into an active pursuit of individual gruesome incidents like Belchi, Bodh Gaya, Chainpur, Marathwada, Chikkabasavanahalli, Indravalli, etc. to their logical conclusion. The second important task was getting special courts with special judges for specific cases established by state governments, supported by carefully chosen special prosecutors and securing quick trials and execution of verdict without delay. In these efforts, I gratefully recall the total support of Dhaniklal Mandal, the then minister of state for home affairs. I continued this practice after the regime change in 1980 and similarly covered the atrocities at Pipra, Kafalta, Jetalpur, etc. This produced a crop of convictions and punishments including death sentences in Belchi.

Atrocities continued with rising ferocity and frequency as basic contradictions, vulnerabilities and causative factors were evaded by the State at national and state levels for obvious reasons and treatment was mainly symptomatic and palliative instead of the required radical solutions.

Under continued pressure of Dalit MPs and leaders, magnitude and gravity of problem was finally recognised by prime minister Rajiv Gandhi and he announced from the Red Fort in his Independence address on August 15, 1987 that an Act would be passed, if necessary, to check atrocities. I was called back from the state and appointed as special commissioner for SCs. After intensive consultations the PoA Act emerged in September 1989 but not operationalised immediately under section 1 (3). I recall the active interest and support of Dr. B Shankaranand and the then home minister Buta Singh, particularly to my view that a new and stringent Act is necessary and it is not enough if the PCR Act is amended for this purpose as suggested by the ministry of welfare then.

In my capacity as secretary, ministry of welfare, I took the initiative to quickly operationalise the Act w.e.f. January 30, 1990, after urgent consultations with state governments in order to swiftly cut the Gordian knot.

IMPACT OF POA ACT

The Act came as a watershed in the jurisprudence of protection for the SCs and STs and their better coverage by the right to life under Article 21 as creatively interpreted from time to time by India's higher judiciary.

Over time it created a certain measure of confidence in Dalits that they have a protective cover and also produced a sense of wariness in the potential perpetrators of atrocities. However, the full thrust of the Act is not available on account of deficiencies in the Act and in various aspects of the implementation of the Act.

As a result of the traditional Indian socio-economic structure still largely prevalent today, most of the SCs live typically in a situation where they are the major segment/majority of agricultural wage labourers but a minority of the population. Their numerical vulnerability is accentuated by the socio-psychology of the caste system precluding support for them from labourers of other castes whose affinity is unfortunately more towards the large landowners of their respective castes. Juxtaposition of a caste of agricultural labourers (SC) with a caste of land-based DUC or DMC or DMBC to which most of the large landowners belong, provides an explosive situation which can be ignited by any immediate spark. Dalits' resistance to various forms of discrimination and demand for normal civilised inter-personal, inter-community relations is opposed especially by major land-owning and land-controlling DUCs, DMCs and DMBCs. The upward mobility that a small proportion of SCs have achieved through education and reservation and consequent change in lifestyle is an eyesore to those who are accustomed to seeing SCs as only indigent and subservient labourers.

Even legitimate protection of their rights when encroached upon by others (the instance of encroachment on Balmiki Ashram land in Gohana in Haryana by an adjacent lawyer of the dominant upper castes) is perceived as intolerable and insolent rebellion and is resentfully stored in the mind waiting for an opportunity to wreak collective "vengeance".

EVIDENTIAL ANALYSIS OF ATROCITIES

Atrocities out of demand for better wages

- Kilavenmani holocaust in Tamil Nadu, 25.12.1968
- Atrocity in Gurha Slathian, Jammu & Kashmir, 1985,
- Bihar massacres at Belchi, 27.05.1979
- Pipra, 26-27.02.1980
- Nonhi-Nagawa, 16-17.06.1988
- Damuha-Khagri Toli, 11.08.1988

Atrocities connected with bonded labour

- Killing of Bacchdas in Mandsaur district, MP, 1982
- Atrocity on bonded SC quarrying labourers at Chikkabasavanahalli, near Bangalore, Karnataka, 1976
- Atrocities connected with land
- Atrocity in Rakh Amb Tali, Jammu & Kashmir, 10.07.1988
- Killings etc., in Bihar at Bodh Gaya, 08.08.1979
- Chainpur, 10.12.1978
- Khairlanji, Maharashtra, 29.09.2006

Atrocities connected with civic facilities

- Killings & arson in Kachur, MP, 25.06.1985
- Atrocity in Diyalpur, Haryana 26.11.1997
- Hold-up of dead bodies of aged women, one each in Konalam, Tamil Nadu, 1982 and Patchalanadakuda, AP, 1989

Atrocities graduating from untouchability

- Jetalpur, Gujarat, 1980

- Destruction/damaging of hundreds of huts/houses in many villages of south Arcot & adjoining districts, Tamil Nadu, September 1987 & January 1988
- Massacre on account of an SC bridegroom riding on horseback at Kafalta, Uttar Pradesh, 09.05.1980
- Masari, Rajasthan, 09.07.1989
- Panwari, Uttar Pradesh, 02-06-1990
- Kumher, Rajasthan, 06.06.1992
- Drinking water segregation-related untouchability
- School in Divrali, Rajasthan, December 1983
- Kachur, Madhya Pradesh, 25.06.1985
- Udamgal-Khanapur, Karnataka, 06.02.1988
- Killings etc., on temple entry right issue at Hanota, MP, 1984, (rare case of death sentence for two on 11.10.1988)
- Nathdwara, Rajasthan, 1988 and again in 2004

Atrocities connected with Dalit assertion of self-respect & equality

- Eight Dalits were massacred, some of them well educated, in Tsunduru, Guntur District, Andhra Pradesh, 06.08.1991.
- Gohana, Sonepat District, Haryana where on August 31, 2005, 55 houses were destroyed by arson and another 97 houses were looted. All of them were pucca houses. Twenty-five percent Balmikis of this town have, through their hard labour, savings and some education gave up the traditional occupation of scavenging and switched to more dignified occupations with some dignity.
- The atrocities extending over eight to nine days from August 1, 1978 on Dalits in Marathwada following the resolution moved by the chief minister in the assembly for renaming the Marathwada University after Dr Babasaheb Ambedkar's name in response to a long standing Dalit desire and in fulfillment of earlier promises. In the name of opposing the proposed renaming, on the one hand mobs attacked Dalit agricultural labourers with whom land-owning DUC had enmity on account of constant wage-disputes; on the other hand educated Dalits were targeted because of the improvement registered in their standard of life and education.

ANALYSIS OF ATROCITIES ON STs

A large majority of STs live in their own tribal territories or homelands where they are in majority and therefore are safe from physical attacks that SCs are vulnerable to. But when they are drawn out of their territories into the plains as migrant labourers etc., they become equally vulnerable as the SCs. One of the serious cases of atrocities on STs is the mass rape of six ST women labourers in Padaria, Bihar. In their homelands they are sometimes subjected to mass killing not at the hands of mobs but the police when they resist illegal acquisition of their lands or their other age-old traditional rights. On April 19, 1985, in Banjhi area of Sahibganj district in Bihar, 15 STs including an ex-MP were killed in police firing on an agitated mob protesting against deprivation of traditional fishing rights by the government, which settled a tank in favour of a non-local, non-ST.

The second incident was in Indravalli, Adilabad district of Andhra Pradesh in 1978 where 10 STs were killed in police firing in connection with a land dispute. Killing in police action is not covered by the PoA and many more deficiencies in the PoA Act hamper its benefits reaching the Dalits promptly, effectively and fully and right to life under Article 21 has not been made a reality for them. The provision in section 14 (2) requiring the state government to specify for each district a court of session to be a special court to try the offences under this Act is also not fully implemented. This contradicts the very purpose "of providing for speedy trial", because trial will not be speeded up by merely calling an existing court (with all of its load of various cases) a special court. Instead the section ought to have provided and even now ought to provide for the establishment of an exclusive special court in each district exclusively to try the offences under this Act, on day-to-day basis and no other offences with corresponding provisions for an exclusive special public prosecutor and a special investigating officer.

Section 3 in the Act does not list among the crimes of atrocities social boycott, economic boycott, social blackmail and economic blackmail, which are realities faced by Dalits whenever they make just demands or resist injustices or asserts their rights. Section 3 (2) of the Act does not provide death sentence for murder where the court considers death sentence appropriate.

The protection of section 10 of the Act by externment is not available for the SCs who are the main victims of the atrocities (more than 80 percent of atrocities

against SCs and STs are committed on SC) while the share of SCs specifically in cases of arson and grievous hurt is close to 90 percent. The Act also fails to take the SC converts to Christianity (SCX) or Dalit Christians within the protective umbrella of its ambit though SCX have been subjected to atrocities not because of their religion but because of the same reason why SC Hindus have been victimised. This was among the issues, which held up the commencement of the proper trial in the Tsunduru case till November 2004.

DEFICIENCIES IN IMPLEMENTATION

This falls in addition to deficiencies in the Act itself. No matter how sound an Act is, unless the personnel at different levels in charge of its implementation perform totally in accordance with the letter and spirit of the Act, its implementation will fall short of the objective of reaching the protection of the Act to all the people intended. One of the practical problems experienced by the victims and survivors of atrocities and by Dalit and human rights activists at the field level is the indifference of local level personnel and callous attitude of higher authorities (all subject to honourable exceptions).

ANALYSIS OF ATROCITIES

A close study of the annual reports laid in Parliament as required by section 21 (4) of the PoA Act reveals that of the total number of cases with police at beginning of each year including those brought forward from previous year, only 50-60 percent have been chargesheeted in courts. Table (1) shows the percentages of disposal of cases in courts.

From the point of view of the victims of atrocities the figures in the 4th row are the most relevant. While they may not be aware of statistical details, the victims' perception is that the Act and its implementation fall far short of their expectation and need and the SCs in each area are aware of the acquittals in many serious cases of atrocities and consequent miscarriage of justice.

The Dalits perceive this as a failure of the complete system and are not interested in the apportionment of blame among the different limbs of the system and of the State. The low figures in row 1 are also within their perception in the shape of the situation in which substantive trial in Tsunduru (06.08.1981) case could start only in November 2004 and the Kumher (06.06.1992) case is still languishing.

All in all, though the Act has given some sense of security to the Dalits, its effectiveness has not measured up to its potential and purpose on account of deficiencies in the Act and delay and laches in investigations and the slow progress of trial and large scale acquittals.

Further, the annual reports laid before Parliament do not bear the impress of in depth and critical analysis, identification of problems and efforts at resolution. They look like a mere enumerative and uncritical recital of state governments' reports. For e.g., there is nothing to explain the sudden and steep and prima-facie inexplicable and incredible fall of new cases registered in Uttar Pradesh from 9,764 in 2001 to 5,841 in 2002 and 1,778 in 2003!

The greatest defect is that special mobile courts do not exist in every district as a means of handing out swift and deterrent punishment on the spot. Wherever a mobile court exists and has delivered punishment immediately, I have personally seen the impact of fear and curbing of untouchability practice at least for some time (doses need to be repeated periodically for this chronic disease).

Where special mobile courts exist their functioning is often hampered by thoughtless actions like withdrawal of vehicles, rendering mobile courts immobile on certain occasions, keeping vacant posts unfilled etc. This has laid the foundation for non-and-ineffective implementation of the categorical constitutional mandates of Article 17 read with Article 14 and 46.

DEFICIENCIES IN IMPLEMENTATION

The deficiencies in the Act have been compounded by severe deficits of implementation all along the line, presenting a more dismal picture than even the implementation of the POA Act.

Following are the highlights of a statistical analysis of the annual reports tabled in each house of Parliament by the government from 1977 up to 2003:

- Of the total number of cases with police at beginning of each year including those brought forward from previous year, only 1/8th to 1/5th have been chargesheeted in courts.
- A number of states are reporting nil against new cases registered in the year, which is far from reality.
- The number of cases reported by many states is unrealistically low, for example, only two in 2002 and three in 2003 in Tamil Nadu.

- The percentage of conviction in courts and other quantitative data are much more bleak than even for the PoA Act both at the police stage as well as at the court stage.
- The figures do not mesh with the ground level reality of rampant untouchability and the registration and variations is apparently the product of casualness and in some cases perhaps even election-related remote controls.

Even the pan-India picture belongs to a different world away from reality. The annual reports do not contain any indication either of the state governments or the central government making efforts to fulfill the specific mandates of section 15A nor do they show any application of mind to critically identify deficiencies and anomalies in the reported statistics and correct them.

Some neo-modern forms of untouchability have appeared in rural as well as urban areas in many parts of the country, in keeping with new developments. For example, explicit caste bias at village teashops is a recent phenomenon which has paved way for a variety of discriminatory practices such as separate seating, separate and usually old, dirty and cracked or chipped glasses, for SCs. In many metropolitan areas, untouchability has seemingly attenuated, but is practised with sophisticated concealment in variety of ingenious ways, revealing creativity worthy of a better cause. In many modern offices, Dalits have to suffer snide remarks and quiet and neat acts of discrimination.

ACTS NEED MORE TEETH

In the Dalit manifesto of 1996, I listed some important measures required to strengthen the Act so as to make the right to life guaranteed by Article 21 of the Constitution to every person a reality for the SCs and STs and also included therein drafts of related amendment of sections 14 and 15 and inserting a new clause 15(A). These related to the establishment of a court of session in each district to be a special court exclusively to try the offences under this Act, appointment of a public prosecutor for each such court for the purpose exclusively of conducting cases under this Act, and appointment of a police officer as investigating officer exclusively for the purpose of investigation of the cases under the Act. The measures also included certain related matters in order to see that the purpose of the above provisions is not administratively defeated such as the stipulation that the judges, the special public prosecutors and the special investigating officers should be appointed from panels prepared on the basis of their record and reputation for upholding the rights of SCs and STs, especially their right to protection from violence. The Dalit manifesto also contained a draft of the amendment of clause (3) of section 2 of the Act to include social boycott, economic boycott, social blackmail, economic blackmail as atrocities, recognition of any form of disrespect to the statues of Dr Babasaheb Ambedkar as a collective atrocity against SCs and STs, and to provide for death sentence for murder as provided in section 302 of the IPC and for mandatory death sentence for multiple murders, multiple mass rapes and gang rapes. The draft further contained an amendment of section (10) so as to make the provision of externment of a person likely to commit an offence in order to protect SCs and STs who reside outside scheduled areas or tribal areas and other measures like the constitution of a special wing of rapid action force at the Central level as well as state levels, to exclusively deal with atrocities against SCs and STs so that any outbreaks could be quelled promptly. These have been pursued from time to time with different governments personally as well as through letters.

The Dalit manifesto also included amendments required in the PCR Act like mandatory establishment of a special mobile court in each district for trying cases under the PCR Act on the spot, and certain other administrative as well as civil society measures required to realise for the SCs and STs the right to life under Article 21 which includes right to live with self-respect, the practice of untouchability being a fundamental attack on the self-respect of the SCs. These amendments and measures in respect of both the Act have also been recommended by the national commission to review the working of the constitution (NCRWC).

ROLE OF HUMAN RIGHTS BODIES

A number of Dalit and human rights organisations and activists have been engaged in helping and guiding SC and ST victims and survivors of atrocities towards rehabilitation. The groups' grassroots experience has brought out specific problems of implementation. These are partly traceable to the lacunae in the PoA Act and partly to the lackadaisical way in which individuals are positioned in posts of responsibility for actual day-to-day implementation of the Act and indifference, sub-

ject to honourable exceptions, at the top levels of the political and permanent executive at the national, state and sub-state levels.

AFTER TWENTY YEARS

This is the twentieth year since the Act came into existence. The Act was passed by Parliament and received the assent of the president on September 11, 1989 and came into force with effect from January 30, 1990. A number of Dalit and human rights organisations feel that now time should be utilised to critically review the performance of the State and its various limbs in its implementation and the realisation of the objective of the Act and to come out with measures required to further strengthen the PoA Act, 1989 and Rules, 1995 including essential amendments to the Act and other measures required to ensure its more effective implementation. A preliminary draft on the amendments had been prepared by a working group, which included various points already mentioned in the Dalit manifesto of 1996 and others arising from the field experience of the last 20 years. This preliminary draft was sent to a number of Dalit and human rights organisations for their feedback and suggestions. A national coalition for strengthening the PoA Act and its implementation was also set up in September 2009. The coalition has on its agenda the finalisation of the draft and to review, finalise and prioritise the amendments proposed and to work out the strategies and other measures for strengthening the Act and Rules and to secure their effective implementation and for the purpose to undertake mobilisation of Dalits, friends of Dalits and all those who believe that the security and empowerment of Dalits is the sine qua non for the security and empowerment of India.

AMENDMENTS REQUIRED

Amendments required in the Act include:

(a) Amendments required to speed up trials and the pre-trial process.

(b) To bring into the list of atrocities certain crimes which do occur but were not included in section 3 of the Act. Major examples are social boycott, economic boycott, social blackmail and economic blackmail.

(c) Amendment to section 10 to make externment relevant to the scheduled castes situation also.

(d) A new chapter incorporating the rights of victims and witnesses. One specific problem area which needs much consideration pertains to the terms "with intent", "intentionally", "intending", "knowing it to be likely", etc. and the interpretation placed on these terms by courts in trials.

(e) Strengthening and elaborating the presumption clause in section 8 is also an area needing careful thought. These are ideas that have been initiated and require to be developed.

Other than amendments to the Act, some measures have to be adopted to ensure that the State as a whole and every limb of the State function effectively and sincerely, taking the constitutional mandates on the State and the constitutional rights of Dalits with the seriousness that they deserve and need. This is a matter which requires careful thought based on the field experience of Dalit and human rights organisations and activists so that practical and practicable measures can be evolved, to be taken up with the government and political parties. This can include training and orientation of lawyers and activists to utilise the Act and the socio-historical inputs contained in this so as to make their role in court and pre-court stages most effective.

Along with these measures, directly connected with the Act, the Rules and their implementation, are related matters like the impact of the recent amendment to section 41 of the CrPC and the need for a constitutional amendment to provide the entry "development, welfare and protection of scheduled castes and scheduled tribes" in "List III – concurrent list" of the seventh schedule of the Constitution. The amendment to section 41 of CrPC is the outcome of human rights advocacy in view of the feeling that the powers of police to make arrest are used indiscriminately against the poor and the helpless. While this feeling is justified in the general context, the context of atrocities is different. Here, the accused include or are backed by persons of influence and power. In such a case, the problem faced is not the indiscriminate arrest by police, but hesitation or even unwillingness to make arrest. Therefore, this amendment needs a further amendment to exclude from its purview the PoA Act, the PCR Act and other Acts for the protection of the weak against the powerful like the Bonded Labour System Abolition Act, 1976. At the same time, the provision in section 41 empowering victims and survivors to go on appeal on their

own even when the State is hesitant or unwilling is welcome and must be preserved.

The above constitutional amendment proposed earlier in the Dalit manifesto 1996 etc will remove a serious gap in the seventh schedule and will help in strengthening the comprehensive social justice action.

THE CAMPAIGN

This focused campaign has drawn together a number of Dalit and human rights organisations and activists on a united platform. This is a good augury for similar focused campaigns, jointly by all Dalit and human rights and patriotic organisations and activists on many other issues pertaining to the rights of the SCs and STs (the resumption of the thread for a bill of reservation for SC and ST in services under the State and a bill for reservation in private educational institutions, other education-related and land-related issues, etc. and issues listed in the draft common minimum programe, 2009 in respect of scheduled castes, scheduled tribes and backward classes and the Himalaya Proclamation (2004), all of which have been communicated to different political parties and leaders). This campaign can also be utilised to spread awareness among agencies of the State and members of the civil society, including the leaders of the print and visual media, of the need to actively help in and contribute to the control and elimination of atrocities and untouchability. This task should not be left only to the Dalits. Leaders of the executive, both political executive as well as permanent civil executive, can bring about a zero-atrocity and a zero-untouchability situation in the country if they take pro-active interest in extirpating these twin blots on India's face which are sapping national energy and optimal national progress. For example, if the political heads of the State at the national and state levels can spend even five minutes in their tours to different parts of the country and enquire in public view and hearing about the atrocity situation and particularly about major cases and the progress of action taken in respect to them, it will have an electrifying effect on the entire system. A few minutes with victims of atrocities will help lift the morale and self-confidence of the long-suffering Dalits. This is also true of the heads of civil administration at the national, state, district and intermediate levels and the heads of the police forces at all levels. They now have, in the NREGA, an instrument, very effective if instituted promptly in every village where atrocities take place, to counteract social and economic boycott and blackmail which intend to cow down victims, survivors and other possible witnesses. The heads of local bodies, both rural and urban, can make an intense contribution within their areas and thus make Panchayati Raj more meaningful for Dalits.

During the campaign it must be brought home to educated members of civil society that continued neglect in curbing atrocities and untouchability will not only heap continued human injustice on Dalits but also sap India's potential for growth and, therefore, it is in their own enlightened self-interest to actively cooperate with Dalit and human rights organisations and activists in eliminating atrocities and untouchability.

POSSIBLE HELP[II]

The higher judiciary can play a decisive helping hand in certain aspects of atrocities and untouchability. For example, the high courts in their capacity as overall superintendence of lower courts may, it is respectfully suggested, consider measures to speed up disposals with special attention to cases of massive and gruesome atrocities, and creation of possible special arrangements for clearance of arrears, and meanwhile ensure full physical and economic protection for the victims, complainants and witnesses (the importance of this emerges from the findings of the committee of 1920 referred to earlier and has been poignantly brought home again recently by the Kambalapalli case acquittals in Karnataka) — in some cases this protection may need to cover a whole community under attack or threat in a village or tract.

(a) Provision of guidance to vastly minimise acquittals so that there is no significant gap between reality as widely known and trial-outcomes. In this context chief justice (Rtd) A S Anand's observation while delivering Bhimsen Sachar Memorial Lecture on 03.12.2005 as the then chairman of NHRC, that the present situation "resulted in the citizen getting tempted to take the law into his own hands and take recourse to extra-judicial methods to settle scores and seek redress of his grievance", is very relevant. [In this context it may be recalled, not approvingly but as a warning, that the first accused in the Kilavenmani case who was acquitted with all other accused, was murdered on the 10th anniversary of the atrocity and a prominent person-

ality of Karamchedu, who was believed by Dalits to be the main person behind the Karamchedu atrocity but was not even chargesheeted was also later murdered, the Naxalites claiming credit for it and getting popularity at the cost of established democratic institutions].

(b) Utilisation of the inputs of this presentation regarding the miserable plight of the Dalits under the ICS, the vulnerability of the SCs and STs in their present existential situation, to provide a socially realistic perspective to the lower judiciary in dealing with atrocities, and in drawing permissible presumptions in addition to the mandatory presumption prescribed by section 8 of the Act, along lines similar to the way the Supreme Court and high courts have sensitised evidentiary evaluation of the testimonies of rape victims.

(c) Making the record of judicial officers in dealing effectively with cases of atrocities (and similarly also PCR Act cases) a criterion while considering proposals for elevation to the Bench of high courts.

For quick disposal of appeals from judgements and interim orders of the trial court, institution of special arrangements similar to the creation of environment benches.

(d) Arrangements to pass quick orders in PILs, instituted by Dalit rights organisations in a number of high courts and issue of specific directions to the executive so as to help move matters effectively forward

(e) It is also respectfully suggested that the POA Act and the PCR Act and meeting the challenge of reaching fully, promptly and effectively their benefits to the SCs and STs and ensuring their proper and effective implementation at the various police stages upto chargesheeting in courts, and at the trial stage in courts is a most deserving and essential area for activism in the best established traditions of India's higher judiciary.

THE LAST WORD

A recent article on the website of the China Institute for International Strategic Studies (CISS), one of the top ten Chinese thinktanks, shows that those who bear ill-will towards India have identified as a critical weakness of India its caste-based exploitativeness. It is in the interest of our country's security and integrity to see that this weakness, of which an important manifestation is atrocities along with untouchability, is fully and finally removed.

After a long wait a ray of hope emerged when in September 2009, addressing a two-day conference of state ministers in-charge of SCs, STs, BCs and social justice, Prime Minister Dr Manmohan Singh expressed rude shock over the low rate of convictions in the cases of atrocities against SCs and STs. The prime minister further asked the state governments, the chief ministers and the state ministers to give more attention to this issue, ensure conduct of meetings of state and district level vigilance committees on a regular basis and pursue the cases of atrocities on priority. It is to be earnestly hoped that this initiative will be pursued and carried to the logical conclusion of zero tolerance of atrocities against SCs and STs and untouchability. It is also envisaged that the services, energies and experience of the large number of Dalit and human rights activists working for this cause in each state will be utilised and action will be taken on the various detailed measures including proposed amendments to the Act.

— September-December 2009

Endnotes

i. P. S. Krishnan, "Empowering Dalits for Empowering India — A Road Map". Delhi: Dr. B.R. Ambedkar Chair in Social Justice, Indian Institute of Public Administration / Manak Publications.

ii. Based on and expanded from my presentation on 18.12.2005 at the National Judicial Colloquium on Disability and Law held on December 17-18, 2005 at New Delhi, organised by the Human Rights Law Network, New Delhi.

Right not to be Treated as Untouchable

More than sixty years after Independence, untouchability is alive and thriving in India's hinterlands. Pockets of social change are mere drops in an ocean of casteism and prejudice. An analyses of the SC/ST Atrocities Act, in comparision with other international laws, reveals that untouchability is equal to apartheid and there is an urgent need to redraft Article 17 in the form of a right - 'right not to be treated as an untouchable'.

JUSTICE (RETD.) HOSBET SURESH

While the Indian Constitution guarantees certain fundamental freedoms, under Articles 19(1), 14, 21 with constitutional remedies under Articles 32 and 226, can it be deduced that there is a similar guarantee when it comes to Article 17 relating to untouchability? The Article only says, "untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'untouchability' shall be an offence punishable in accordance with law."

While the Constitution states that it is "abolished", the reality and factual situation is that untouchability is prevalent all over the country even after nearly six decades of the Constitution. While it is not necessary to enumerate those practices of untouchability, it must essentially be considered as a caste-biased discrimination. As such it should fall within the ambit of Article 14. However, under Article 14 there is no positive programme to initiate democratic change under rule of law to eliminate the inhuman practices of untouchability. Articles 15 and 16 operate in certain areas, as mentioned therein, prohibiting discrimination on grounds of religion, race, caste, sex or place of birth and providing equality of opportunities in certain areas of public employment and education. These provisions by themselves are not sufficient enough to bring about equality of status in every walk of social life. Justice K Ramaswamy observes: "There can be no dignity of person without equality of status and opportunity. Denial of equal opportunities in any walk of social life is denial of equal status and amounts to prevent equal participation in social intercourse and deprivation of equal access to social means…" (State of Karnataka vs Appa Balu Ingle. AIR 1993 SC 1126)

Untouchability is nothing but severe social discrimination, and has resulted in deprivation of all economic, social and cultural rights of all the victims of untouchability namely the Dalits. Therefore, the objective of Article 17 being to guarantee non-discrimination by eliminating untouchability ought to have provided for measures in relation to economic, social and cultural rights, with a view to attain equality of status and dignity for every Dalit at par with every other citizen. Unfortunately, Article 17 only provides for treating untouchability as an offence, and

leaves the rest with the police. Perhaps the Constitution makers might have felt that treating untouchability as a crime would be a sufficient deterrent to put an end to this social evil.

The government initially enacted the Untouchability (offences) Act, 1955, later amended and renamed in 1976 as the Protection of Civil Rights Act. It provided for punishment to persons enforcing religious disabilities (prevention of entry into temples, sacred rivers and water bodies, etc.) and enforcing social disabilities (denying access to any shop, hotel, public hospital, etc.). The Act authorises the government to impose collective fine on all inhabitants of an area where the offence is committed. Similarly in the case of commercial establishments, every person in-charge of its affairs could be prosecuted even if they have not personally committed the offence.

However, PCRA was found to be not sufficiently effective. Hence, the government enacted the scheduled caste and scheduled tribes (prevention of atrocities) Act, 1989. It enumerated about 15 offences of atrocities and provided for punishment of those offences. Further it provided for punishment for abetment, fabrication of false evidence, etc. It also provided for punishment for neglect of duties and even the police could be prosecuted for not registering a complaint and for not carrying out proper investigation. Under the Rules, the victims are entitled to get compensation for different stages as the case proceeds.

Another piece of legislation is the Employment of Manual Scavengers and Constructions of Dry Latrines (Prohibition) Act, 1993, which provides for the prohibition of employment of manual scavengers as well as construction or continuance of dry latrines and for the regulation of construction and maintenance of water seal latrines and matters connected therewith.

However, with all these laws in place for decades what have we achieved so far? The practice of untouchability continues. We still have manual scavengers and workers being required to enter the manholes and sewers to clean them manually without the safety equipment. These persons are engaged by the State -- the local authorities -- without realising that such acts are violative of the Constitution itself.

One of the main reasons for the ineffective implementation of the SC/ST Act is that there is an inordinate delay in the trial of criminal cases in this country. Moreover, the investigations are generally in the hands of the police, majority of them being from the upper caste. The delay ultimately defeats justice and the evil persists. This is exactly what has happened with regard to the offences under the Atrocities Act.

Untouchability cannot be eliminated by the police alone. It cannot be removed by just making it an offence without taking positive steps to end all social discrimination and promote equality. It is time to redraft Article 17 in the form of a right -- Right not to be treated as an "Untouchable". The State will then have the obligation to prevent violation of this right, and also to fulfil its duty.

In this connection we may refer to the South African constitution. They had the worst form of apartheid and faced all kinds of discriminatory practices that white minority heaped upon the blacks, Asians and other "coloured" people. However, South Africa, after its reconstitution into a republic in 1996, enacted two great pieces of legislation that any country could. The first one is the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000. This was enacted to give effect to section 9 of the constitution of the South African Republic. It provides "for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality". The Act is said to be advancement over the Civil Rights Act, 1964, of the USA and the SC/ST Prevention of Atrocities Act, 1989, of India. The South African Act is significant since it selects three very crucial and socially burning issues namely, discrimination, harassment and hate speech.

The objective of this law states:

"The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people.

Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy."

It takes into account international conventions, particularly Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Elimination of All Forms of Racial

Discrimination. It emphasises the need for the advancement by special legal and other measures of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources, deprived of their human dignity and who continued to endure the consequences.

The Act provides for prevention and general prohibition of unfair discrimination, prohibition of unfair discrimination on grounds of race and gender, prohibition of hate speech and harassment and of dissemination and publication of unfair discriminatory information. The Act provides for equality courts and for promotion of equality it ordered general responsibility to promote equality as a duty of the State.

The second Act in the South African constitution is the Employment Equity Act, 1998. This was enacted to mainly eliminate disparities in employment, occupation and income. The Act was brought in order to promote the constitutional right of equality and the exercise of true democracy and to give effect to the obligations of the republic as a member of the International Labour Organisation (ILO). The Act, apart from prohibiting unfair discrimination, has an affirmative action programme. One of the important provisions is that anybody who employs 50 or more employees, whether in government, public or private sector, or anyone who under a contract with the State employs 50 or more persons, will have to employ certain number of black people (all coloured people), women and persons with disabilities. Like in the US, the Act provides for a committee for employment equity, similar to Equal Employment Opportunity Commission.

Both, USA and South Africa had passed through histories of inequality, discrimination, racism, apartheid and many violent and peaceful protests. In the US, the African-Americans who were taken as slaves in the 16th and 17th centuries, and the Hispanics -- people from Latin American countries -- also taken as slaves, have been able to overcome discrimination and inequality to a great extent. Today these discriminated people are on an equal footing, both, in the private sector and in every sphere of public life. Hence, South Africa is very much on the way to evolve into a vibrant democracy.

The Human Rights Committee (under Article 40 of International Covenant on Civil and Political Rights) in its report on India (August 4, 1997) had, inter-alia, observed:

"The Committee notes with concern that, despite measures taken by the government, members of scheduled castes and scheduled tribes … continue to endure severe social discrimination and to suffer disproportionately from many violations of their rights under the covenant, inter-alia, inter-caste violence, bonded labour and discrimination of all kinds. It regrets that the de facto perpetuation of the caste system entrenches social differences and contributes to these violations. While the committee notes the efforts made by the State to eradicate discrimination, it recommends that further measures be adopted, including education programmes…"

It is now two decades since the report surfaced. The crux of the problem is that while we abolished untouchability we have still retained the caste system. As long as the caste system continues to dominate our social and cultural life, untouchability will not disappear. It is time we say the caste system is abolished.

— September-December 2009

Two Decades of the Act: An Experiential Review

Dignity of life and equal opportunities to Dalits are distant dreams even after 20 years of enactment of SC/ST (PoA) Act. That is why there is an urgent need to review the legislation to ensure a prompt and fair probe into crimes against Dalits and render speedy justice to the victims of caste persecution.

V NANDAGOPAL

The people of India promised, "We the people of India solemnly resolve … to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity", through the preamble of the Constitution. The founding fathers of the Constitution, realising the ground situation, engrafted this promise in Articles 15, 16, 17, 18, 21, 23, 24, 27, 30, 40 to 47, 335, 361 and 362 etc so that the Dalits and Adivasis could enjoy equal opportunity, equal status in the society and equal dignity of their identity. The idea was to bring the marginalised on parity in the mainstream society and to do social, economic and political justice to them.

In the light of ever increasing atrocities against the scheduled castes and scheduled tribes -- less than one percent conviction rate under SC/ST (PoA) Act, growing tendency of disposing the atrocity-related cases as false cases by police and concerned officials, and rising trend of filing counter cases against the victims and witnesses -- reviewing the twenty years-old SC/ST (PoA) Act, 1989 has become a necessity especially in reference to the preamble of this Act which says, "An Act to prevent the commission of offences of atrocities against the members of scheduled castes and tribes, to provide for special courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto".

HARD REALITIES

1. *Increasing atrocities against SC/STs and at the same time the tendency of avoiding registration of cases by police under the Act is equally growing.* ".... Even in respect to heinous crimes the police machinery in many states has been deliberately avoiding the SC/ST (PoA) Act, 1989". ".... Police resort to various machinations to discourage SC/STs from registering cases -- to dilute the seriousness of the violence, to shield the accused persons from arrest and prosecution and, in some cases, the police themselves inflict violence."(NHRC report, 2002)

2. *Victims getting frustrated and forced, either to withdraw the case or to compromise with the perpetrators. Reasons behind this are:*

(i) *Police deliberately not registering the cases under appropriate sections:* Under the SC/ST (PoA) Act, section 3(1)(x) was the only common section that was charged in every atrocity. Number of judgements reveals that the words 'intentionally insult' or 'intimidates with intent to humiliate' and 'in any place within the public view' mentioned under this section gives ample opportunity to the accused to escape punishment. In other words, hardly gives any scope to the victim to prove his/her case.

(ii) *Enormous delay in filing the chargesheet:* Rule 7(2) of the SC/ST (PoA) Rules, 1995 says "the investigating officer so appointed shall complete the investigation on top priority within 30 days and submit the report to the superintendent of police who in turn will immediately forward the report to the director general of police of the state government". This is the rule to be applied in every case under the SC/ST (PoA) Act but the real picture is quite grim. There are hardly any cases where investigation was completed within the stipulated time. None seems to realise the importance of this rule in view of the vulnerable conditions of the scheduled castes and scheduled tribes living under the caste dominated rural village structure. The data shows that delay was extended from days to months and months to years and for the concerned authorities this is nowhere figuring in even in their normal priority forget the question of "top priority".

(iii) *Accused are invariably released either on immediate bail or through a petition in the high court for grant of stay of all further proceedings including arrest and to quash the FIR:* Because of section 18 of the SC/ST (PoA) Act very clearly stating, "Nothing in section 438 of the CrPC shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act", the accused in a number of cases under this Act have found a blessing in disguise by using section 482 of the CrPC through filing a petition in the high court, asking grant of stay of all further proceedings including arrest and to quash the FIR. None of the public prosecutors seem to have opposed this type of a petition, which is against section 18 and to its true spirit.

Despite the clear expression under this section many high courts are giving relief to the accused under section 482 of CrPC. The only fear of getting arrested without any anticipatory bail which made the culprit think twice before committing a crime is slowly taken away with this process.

(iv) *Victims are put to more trouble and embarrassment because of false and counter cases filed against them by the perpetrators:* As per the rule 7 of SC/ST (PoA) Rules, an offence committed under the Act shall be investigated by a police officer not below the rank of deputy superintendent of police whereas a counter case filed by a non scheduled caste person against the victim can be investigated by a station house officer. Taking this as an advantage to demoralise the victims' confidence levels culprits influence police to take quick action against victims while the original case remained ever pending for investigation.

3. *Discouraging trends in criminal justice administration system:*

Section 14 of the Act says "for the purpose of providing for speedy trial, the state government shall … specify for each district a court of session to be a special court to try offences under this Act". There are number of districts where the special courts are yet to be established and those areas where such courts are functioning they have eventually defeated the very purpose of the SC/ST (PoA) Act because the designated courts were not given the power to directly take cognisance of cases of atrocities against SCs and STs. In the present scenario, all cases have to go through a committal process by a magistrate before going to the special court. This has not only overburdened regular court system but also slowed down the efficacy and pace of special courts in disposing off the atrocity cases. Another aspect to be noted is that the special courts are not functioning as ones dealing exclusively with the SC/ST (PoA) Act cases but all other cases too, leading to an enormous delay in delivering justice.

Notably, the Supreme Court's judgement in Gangula Ashoka and Ors vs state of Andhra Pradesh (2000(2) SCC 504) has made it compulsory for all

atrocity cases to go through the committal process to be placed before the special court, thus, placing unnecessary delays in trial of atrocity cases. On the contrary, in S Madava Reddy vs state of Andhra Pradesh (1996(1) ALT (Crl.) 452(AP), the Andhra High Court held that as the special courts are courts of original jurisdiction, they have the power to take cognizance of atrocity offence and try cases without the case first going through a committal process with a magistrate

Under the SC/ST (PoA) Act, there are several offences wherein the words like "intent", "intention" or "on the ground", "public view" and "public place" specified in sections 3(1)(ii), 3(1)(x), 3(1)(xi), 3(2)(i), 3(2)(ii), 3(2)(iii), 3(2)(iv) and 3(2)(v) give ample space to the accused to escape from the law. The enforcement officials also resort to various schemes to support the accused in different ways.

Even the judiciary is not exempted from this kind of appreciation of the above-mentioned words. The analysis of the judgements pronounced by the special courts indicates that 39 percent of the cases were disposed off on the ground that "the accused did not abuse by caste name" while committing the offences including rape. Eleven percent of the cases were cleared on the ground that the offences were "not committed on the ground of SC/ST". It shows in more than 50 percent cases that the accused escape from the law based on the appreciations of the courts on the words "intent", "intention", and "on the ground of". Similar trend can also be observed in the judgements pronounced by the high courts. In Appa Bali Ingley case, the Supreme Court declared that proof of motive to commit atrocities on Dalits is not necessary. The very mindset and caste-based discrimination is the ground for inflicting torture on the downtrodden.

In a public interest litigation filed by Sakshi human right watch, Andhra Pradesh, police admitted that:

- Investigation of 1,873 cases delayed due to delay in obtaining caste certificates;
- Nearly 3,281 cases were not chargesheeted due to delay in getting approval, legal opinion and superior's order;
- 1,464 cases because of 'more witnesses' in the case;
- 2,934 cases due to delay in the collection of documents & evidence;
- 1,212 cases due to delay in receipt of wound certificates, medical certificates & post-mortem report.

FAILED PROSECUTION

The PoA Act under section 15 envisages the appointment of a public prosecutor and in some cases a special public prosecutor as well. But one finds a serious flaw in the implementation of the Act with almost negligible appointment of the SPP to conduct trials. The public prosecutors are usually busy in conducting trials of IPC offences and they seldom give priority to the trial of the case filed under the SC/ST (PoA) Act and PCR Act.

Victims have been facing a lot of delay or denial of getting compensation, relief and rehabilitation measures. The raising awareness among the scheduled castes and scheduled Tribes to question the root causes of the atrocities on one side and the intolerant behaviour of the dominant rural upper caste social structure on the other is increasing the need for the effective implementation of the SC/ST (PoA) Act and its Rules in real spirit and strength. Hence, there is a need to review and reflect on the practical achievements and failures of this Act in last twenty years. And this exercise should take place at every level across the country to strengthen the only Act which provides the reparation and compensation to the victims in addition to punishing the accused and be made more user friendly.

— September-December 2009

Manual Scavenging Nation's Shame

Despite laws abolishing the inhuman practice of manual scavenging, over a million Dalits in 'superpower India' are caught in a vortex of severe social and economic exploitation. Cleaning and carrying headloads of human excreta, these 'night soil' workers are condemned to live a daily life of filth and indignity, even while the Indian State behaves with stunning insensitivity.

SUNIL KUKSAL

The social, cultural and economic realities of modern India unfold a series of paradoxes. While a parliamentary law bans the manual scavenging and the government approves projects to wean the underprivileged section away from this dehumanising occupation, cruel caste apartheid and brutalising poverty perpetuate the practice. Furthermore, neo-liberal economic policies restrict alternative possibilities of having a dignified livelihood.

The term 'manual scavenging' describes the daily work of manually cleaning and removing human faeces from dry (non-flush) latrines across India. Workers, mostly women and young boys, are also referred to as 'night soil workers', a Victorian euphemism that hides the repugnance of the word 'shit'. In India, manual scavenging is a caste-based occupation carried out by dalits. The manual scavengers have different caste names in different parts of the country: *bhangis* in Gujarat, *pakhis* in Andhra Pradesh, and *sikkaliars* in Tamil Nadu. These communities are invariably placed at the bottom of caste hierarchy, as well as of dalit sub-caste hierarchy. Using a broom, a tin plate and a drum, they clear and carry human excreta from public and private latrines, more often on their heads, to dumping grounds and disposal sites.

Though considered illegal, manual scavenging is forced onto dalits by caste pressure. Scavengers earn anywhere between Rs 20 to Rs 160 a month and are exposed to the most virulent forms of viral and bacterial infections that affect their skin, eyes, limbs, respiratory and gastrointestinal systems. Official figures show that there are still 3.43 lakh scavengers in the country. A 2002 report prepared by the International Dalit Solidarity Network, including Human Rights Watch (United States), *Navsarjan*, (Ahmedabad, Gujarat), and the National Campaign on Dalit Human Rights (NCDHR), gave estimates of one million dalit manual scavengers in India.

ActionAid India's random survey in 2002 of six states, Madhya Pradesh, Andhra Pradesh, Orissa, Uttar Pradesh, Rajasthan and Bihar, claimed that manual scavengers were found in at least 30,000 dry toilets. The scavengers belong to the *valmiki* community and its sub-sects—*badhai*, *charmkar*, *barguda* and *bherva*. The survey found that the scavengers face severe discrimination even from other dalits. Teashop owners in some villages still keep separate, often broken, utensils

to serve *valmikis*. The national commission for *safai karamcharis*, a statutory body, pointed in its reports to the use of dry latrines and continued employment of manual scavengers by various departments of the Union of India, particularly the railways, the department of defence and the ministry of industry. While states like Haryana deny employing manual scavengers, other states like Andhra Pradesh employ them through municipalities. The practice is on in almost all states, including Bihar, Maharashtra, Jammu & Kashmir and even Delhi. The Indian railways is one of the largest employers of manual scavengers.

Mahatma Gandhi raised the issue of the horrible working and social conditions of *bhangis* more than 100 years ago in 1901 at the Congress meeting in Bengal. Yet it took about 90 years for the country to enact a uniform law abolishing manual scavenging. The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 punishes the employment of scavengers or the construction of dry (non-flush) latrines with imprisonment for up to one year and/or a fine of Rs 2,000. Offenders are also liable to prosecution under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. This Act to eradicate a pernicious practice that only dalits were subjected to, aims at restoring the dignity of the individual as enshrined in the Preamble to the Constitution. Given the high prevalence of the illegal practice, the government launched a national scheme in 1992 for identifying, training, and rehabilitating *safai karamcharis* and allotted substantial funds for this purpose. However, only a handful of scavengers benefited, and the scheme's failure is evident in that there remain more than one million manual scavengers in India.

The Act, first enforced in Andhra Pradesh, Goa, Karnataka, Maharashtra, Tripura, West Bengal and all the union territories, made it obligatory to convert dry latrines into water-seal latrines (pour-flush latrines). It was expected that the other states would adopt the Act by passing an appropriate resolution in the legislature under Article 252 of the Constitution.

A petition filed in the Supreme Court in 2003 pointed out that the practice persists in many states of the country, and particularly in public sectors like the Indian railways. The petitioners sought the enforcement of fundamental right of persons engaged in this practice guaranteed under Article 17 (right against untouchability) read with Articles 14, 19 and 21, that guarantee equality, freedom, and protection of life and personal liberty, respectively. They urged the Supreme Court to issue time-bound directions to the Union of India and the various states to take effective steps to eliminate the practice of manual scavenging, and to formulate and implement comprehensive plans for rehabilitation of all persons employed as manual scavengers.

As the hearing of a public interest petition filed by the *safai karamchari andolan*, six associated organisations and seven individual manual scavengers, in the Supreme Court has revealed, the number of manual scavengers has increased from 5.88 lakhs in 1992 to 7.87 lakhs. Unofficial surveys estimate that over 12 lakh manual scavengers, of whom 95 percent are dalits, are thrust with the task of this 'traditional occupation'. They are considered untouchables by the higher castes and are caught in a vortex of severe social and economic exploitation.

During the recent hearing of the case the Supreme Court issued an interim order directing every department/ministry of central and state governments to file an affidavit within six months through a senior officer who would take personal responsibility for verifying the facts. If the affidavit proclaims manual scavenging in a particular department, or public sector undertaking or corporation, then it should indicate a time-bound programme with targets for liberating and rehabilitating all manual scavengers. The court warned the governments against making false statements in these affidavits. The interim order was an expression of the court's impatience with dilatory and insensitive responses from various states and the Centre to the petition.

The railways, in its affidavit, admitted that there are approximately 30,000 passenger coaches fitted with open-discharge toilets. The affidavit stated: "A proposal to fit totally sealed toilet systems is also under consideration and various technologies, e.g. biological/vacuum/filtration, etc, shall be tried out. However, no firm dates/time frame can be given for introduction of such system at this stage." The railways claimed that without facilities to make platform tracks concrete and provide washable aprons at all important stations, on track manual scavenging cannot be eradicated. The railways is perhaps the biggest violator of the Act; yet none of the railway ministers has thought it necessary to allocate railway budget funds to implement the Act.

According to the national commission for *safai*

karamcharis, progress "has not been altogether satisfactory" and benefited only "a handful of these workers and their dependents. One of the reasons for unsatisfactory progress of the scheme appears to be inadequate attention paid to it by the state governments and concerned agencies." State governments often deny the claim and cite lack of water supply as preventing the construction of flush latrines. This despite the sum of Rs 4,640 lakh (US$116 million) allocated to the scheme under the government's eighth five-year plan. Activists claim that the resources, including government funds, for construction and rehabilitation exist; what is lacking is political will. Members of the national commission for *safai karamcharis* consider it imperative that the commission be "vested with similar powers and facilities as are available to the national commission for Scheduled Castes and Scheduled Tribes." Currently, the commission has only advisory powers and it has no authority to summon or monitor cases.

The political class has failed to exert any will in acknowledging the gravity of the situation and its own duty to eradicate it. Even the central government pleaded lack of resources in failing to implement the law effectively. The judiciary, however, has taken exception to the fact that money was squandered, but yet at the ground level there are no results.

— November-December 2006

SECTION 4

It is a well know fact that disabled persons live in severely inadequate housing, are denied employment opportunities; basic facilities like access to education and health are denied to them as is access to places of recreation, sporting facilities and even cultural lives of the communities. If they get work, the conditions remain unjust and unfavourable. Accessing civil and political rights too remains a major issue. A 'rights based approach' to enable access to these rights is gaining momentum but there lies a long road ahead.

Disability Rights @ UN

Seldom before has any international treaty been worked out the way disability rights were drafted before being signed to become a convention on rights of persons with disabilities. The process that has shaped it signifies a break from a sordid history of neglect and apathy towards the disabled.

RADHIKA ALKAZI

The UN Convention on the Rights of Persons with Disabilities (UNCRPD) is an international treaty intended to protect and promote the rights and dignity of persons with disabilities all over the world. December 13 2007 will already mark a year since the convention was sealed as member appended their signatures. A first in many spheres, this convention is historic and unique in different ways. For one, it is the first human rights treaty that has been signed in this century. It is the most rapidly negotiated convention in the history of convention writing. It is said to be the most accessible convention since it gives titles to each article making it easy to understand what it has to say. But most significantly, it is the process of making this convention that merits our attention.

Unlike other conventions, this convention has been drafted with the active participation of the people whose rights it upholds. People with disabilities were both literally and figuratively at the centre of the negotiations for this convention and therefore this convention reflects the lived and contemporary life experiences and specific requirements of people with disabilities all over the world. **For this and this reason alone it is important that this convention and what it is saying is understood by all.**

Yet how do we begin the process of understanding this convention? As we begin to read the 50 Articles of the convention it is quite possible that many of us will start reading the text and then put it down with a sigh and think to ourselves … " it is so general. How are we going to understand this convention?" And indeed, international law is often open and multi-textured that it seems sometimes to say everything and nothing! Much depends on how countries, civil society and the immediate stakeholders of the convention interpret it.

One of the most exciting and illuminating ways for us to begin to interpret and understand the convention is for us to go back to look closely at the process of drafting of the convention and to understand the discussions and arguments that were made by people with disabilities and their organisations, the State-Parties and human rights institutions who participated in the making of this convention. This helps us understand why certain Articles are there in the convention and why there is a specific focus on some areas. The UN enable site that documents all the arguments sent electronically under each Article of the convention is a goldmine of information and, thus, worth being a subject matter for many a PhD thesis!

The International Disability Caucus (IDC) was a coming together of many international and national organisations representing people with different disabilities that got together to present a united front. This cutting across of different disability groups is an example for all disability movements across the world. A separate women's IDC constantly brought in the needs and experiences of women with disabilities to the table.

The IDC constantly laid emphasis on all disabled people being equal holders of all rights. It argued constantly against barring some people from getting equal rights. For example, during the discussions on Article-25 on health there was discussion on whether there is a group of people who should be left out of the obligation to refrain from coercive medical practices. To this IDC argued, "such exceptions fail to respect the rights of persons with disabilities and should not be repeated in this convention."

Article-12 (Equal Recognition under the Law) is one of the seminal and crosscutting articles of this convention. It topples all conventional thinking on disability rights and " recog-

nises that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life" (12 (2)). It recognises that persons with disabilities may need support in exercising their legal capacity and enjoins upon the State to provide access to this support. As we read through the rather large volume of discussion that took place on this Article we find that the IDC and the network of users and survivors of psychiatry are constantly arguing for all persons with disabilities having legal capacity. They constantly argue against the notion that there are some people with disabilities who will require personal representatives to take decisions on their behalf.

IDC: "Such an Article is of particular importance to people with disabilities, for in many countries people with disabilities are denied recognition of their full legal capacity and are subsequently forced to relinquish autonomy for substituted decision-making and actions of others. Such action in turn places people with disabilities at greater risk of human rights errors."

In this as in other Articles we see the IDC constantly fighting to keep people with disabilities at the centre of all rights. We see them constantly rephrasing the Articles in a way that they reflect rights based terminology, using the principles of autonomy and independence that are integral to this convention.

On the question of support required by persons in the process of taking their own decisions one of the drafts of the Article was phrased as follows: "the assistance provided is proportionate to the degree of support required and tailored to the person's circumstances."

IDC's formulation put the person with disability at the centre of the right. "Persons with disabilities are entitled to use support to exercise legal capacity and that such support meets the person's requirements… does not undermine the rights or freedoms of the person, respect the will and preference of the person."

Finally, it seems the middle path was followed and the final Article reads: "the safeguards shall be proportional to the degree to which such measures affect the person's rights and interests."

We find another example during the discussions on the Article on health when the IDC supported the suggestion by several States to retain the term 'health services' instead of 'healthcare' in the article "health services are more in line with rights-based language of the 21st century. Care gives the perception that people with disabilities need to be taken care of." **(IDC Statement on Article 25 Health January 25, 2006)**

These and many other instances give us a tremendous insight into the way in which people with disabilities argued for their rights during the formulation of this convention. They also provide us with good guidelines to follow when we actually begin the whole process of redrafting and amending the Persons with Disabilities Act.

Another uniqueness of UNCRPD is in the inclusion of the general principles of the convention as a separate Article (Article 3). Usually, the principles of the convention are to be found in its preamble and are therefore not legally binding. However, the inclusion of the general principles as a separate Article makes them enforceable. They become therefore strong indicators for the monitoring of the implementation of the convention.

As we begin to read, understand and implement UNCRPD the principles of respect for the inherent dignity, individual autonomy including the freedom to make ones own choices and independence of persons (3a), non-discrimination (3b), full and effective participation and inclusion in society (3c), equality of opportunity (3e), accessibility (3f) and the respect for difference and acceptance of disability as a part of human diversity and humanity (3d) become strong indicators for the monitoring and the implementation of the convention. The inclusion of the principles of 'equality between men and women' (3g) and the 'respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities' (3h) are equally significant in our understanding of the convention.

CHILDREN WITH DISABILITIES

Why is the respect for the evolving capacities of children there as a general principle in UNCRPD? Once again, a look at the discussions during the seventh session of the ad-hoc committee of UNCRPD gives us some answers. In its comments UNICEF makes some important points.

"*One of the general principles in the draft text of the new convention relates to recognition of people with disabilities to autonomy and independent decision-making. However, in contrast to adults, children are generally recognised as having neither autonomy nor legal capacity. These rights are granted to their parents who have responsibilities for de-*

cision-making in respect of their children. Only gradually, as children acquire capacity, do these rights transfer to them. In the case of children with disabilities, however, there is little recognition or willingness to allow them to exercise their rights for themselves. Without explicit mention of the right of children with disabilities to respect for their evolving capacities, the general principles will, de facto, exclude them." *(Article-7, 7th session, comments, proposals and amendments submitted electronically, UNICEF) The concern for children runs across the UNCRPD. Apart from the general principles of the convention, the preamble and a separate article (Article-7) focus on the child with disabilities. The need for a separate Article in the convention was debated during the deliberations. It seems that many State-Parties as well as the IDC supported the inclusion of what is now Article-7* (Children with disabilities) in the convention even though there is a separate Convention on the Rights of the Child and within it a separate Article (23) on children with disabilities.

"It is important to affirm the right to the realisation of all human rights by children with disabilities — evidence from monitoring the implementation of the CRC indicates that governments do not give consideration to the rights of children with disabilities except in regard to the issues addressed in Article-23 addressing children with disabilities."

However, the concern does not stop here and children are specifically mentioned in a number of Articles within the convention. The focus remains on the inclusion of children with disabilities in all services and situations affecting children. The most notable are Articles 16, 18 and 23, which articulate concerns we do not usually address. For example, **Article 16 (Freedom from exploitation, violence and abuse)** recognises high levels of violence against children and abuse and urges States to put forth effective policies and legislation that would ensure the identification and investigation of violence and abuse against children.

Article 18 (Liberty of movement and nationality) argues for birth registration and the right to name, nationality and to be cared by ones own parents.

Article 23 (Respect for home and the family) reiterates the right of children with disability to retain their fertility. This refers to the contentious practice of forced sterilisation of children and women with disabilities. It also emphasises the right of the child to live within home and family.

In its comments the IDC clarifies the specific situation regarding children with disabilities and why there is a focus in these particular areas.

"*Despite the disproportionate vulnerability of children with disabilities to both sexual and physical violence, very few governments currently address the need to develop child protection services which are accessible or appropriate for children with disabilities. For example, hotlines, and keep safe programmes are largely irrelevant to many children with disabilities. The media, through which information about their rights and where to go for help are disseminated are largely inaccessible to many children with disabilities. In developing countries, they are usually not in school, so have no access to possible information or help through teachers. With no information about their rights, they lack of knowledge of what they are entitled to challenge, or where to go for help… …. Child protection services are, in most countries, developed in different departments from comparable services for adults. Adult services addressing violence will be addressed in the main criminal justice system and deal inadequately with children with disabilities. Violence against children is usually dealt with in children's departments through specialised child protection legislation and rarely takes any account of the situation and needs of children with disabilities. Unless specific reference is made here to the necessity for these services to include children with disabilities, there is a real danger that they will fall through the gap between these two services and continue to be unprotected.*" (Article 16)

Freedom From Exploitation, Violence And Abuse, Inclusion International And International Disability Caucus (IDC)—Justification). Once again, it is the worldwide experience of children with disabilities that prompts a specific mention of the right of children with disabilities to retain their fertility. (Article-23)

UNICEF argued that this was a matter of considerable importance and should get specific mention.

"International evidence shows that young people with disabilities from around the world continue to face forced sterilisation, with disabled girls having even greater chance of having forced sterilisations without proper consent. Such practice represents a fundamental violation of their physical integrity, exposes them to major medical intervention for no clinical benefit and denies them the right to found a family." (Article 7, 7th session, Comments, proposals and amendments submitted electronically, UNICEF)

Meanwhile, the IDC argued why children with disabilities must have the right to be part of their family and live within their families.

"Many children with disabilities are still denied the right to family life, either because they are placed in institutions or because they live at home and are excluded from most aspects of family activity. Children with disabilities themselves argue that lack of information, education, training and support for families is the greatest barrier to the realisation of their rights. They highlight that parents lack understanding about the nature and causes of disability, lack education and training in how to communicate with them or help them develop, and lack awareness of their right to education and health care. Without this information and support being available to families, children with disabilities are too often rejected, excluded, denied the opportunity to go to school or to play and active role as members of their family." **(IDC response to the facilitator's proposal on children — Jan 22nd 2006, Article 23 Respect for the home and family)** The gender perspective runs through the convention. The focus in Article-25 (health) on services being gender sensitive as well as accessibility and availability of sexual and reproductive healthcare comes from the experience of women with disabilities.

THE WOMEN'S IDC ARGUED

"*Disabled women are not included in the mainstream health care programmes, particularly maternal and gynaecological issues. There is a lack of knowledge of the interactive effects of disability and sex in the medical community. And testing equipments are not meeting the particular needs of women with disabilities. Furthermore, they are often sent to poorly equipped rehabilitation-focused facilities. Additionally they face stereotypes concerning their sexuality and parenting ability.*" **(Article 25, 7th Session, Women's IDC Proposals on inclusion of gender aspects in a specific article--Justification)**

It is these arguments and elaboration of the experiences of children and people with disabilities that indicate the 'what' in UNCRPD and the 'why'. It is these experiences that should guide our policies and programmes. Then and only then can we hope to implement this very important convention in its letter and spirit.

— January-February 2008

Disabling, Crippling, Turning Rights Lame

The six-decade-old battle for ensuring just rights of the disabled persons starting off from the UN declaration of human rights is far from over as the laws framed at home often go unimplemented.

RAJIVE RATURI

As many as 70 million disabled people spread across India continue to be treated as second-class citizens. For them segregation, marginalisation and discrimination are norms rather than exception. Faced with barriers put by stereotyped attitudes, they are generally viewed as objects of charity and welfare as the world merrily goes about trampling their most basic human rights. Sadly, this is so despite the United Nations Declaration of Human Rights in 1948 that makes observance of human rights a precondition for ensuring justice, freedom and peace.

In 1992, India became a signatory to the Proclamation on Full Participation and Equality of People with Disabilities in the Asian and Pacific Region. This was adopted at Beijing at a conference convened by the Economic and Social Commission for Asian and Pacific Region. The proclamation brought an obligation upon the country to enact a law as per its solemn affirmations. And so the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act of 1995 got through Parliament.

Amongst the four domestic legislations related to disability it is this Act that provides entitlements of rights to persons with disabilities and mandates the government to provide facilities for their full participation. The provisions under the Act are all very empowering but unfortunately, even though the Act was passed over a decade ago, its implementation remains woefully inadequate. Those responsible for its implementation and several persons with disabilities often remain unaware of the provisions of the Act.

The Act recognises seven disability conditions but the provisions on the various rights and entitlements are reserved only for the visually, hearing and orthopaedically impaired, including those afflicted by cerebral palsy. Whilst some disability conditions like autism and deaf-blind have not been included in the list of disabilities under the Act, the general benefits are for all disability groups. The issue of certification remains a huge bottleneck for the disabled to claim entitlement to their rights and is subject of much concern. The authorities who are empowered to issue certificates are not equipped with the experts and equipment required to certify all disability conditions, consequently you find the hearing impaired being certified by voluntary testing procedures in the absence of BERA testing facilities, persons with multiple disabilities running from one doctor to another to have each disability certified

and no standard procedures for certifying the mentally retarded and the mentally ill as hospitals do not have psychiatrics and psychologists. There is an urgent need for a single window for issuing disability certificates and simplification of certification procedures.

The Act is gender neutral and moreover, one needs to review rights of the disabled under the PWD Act in the light of their human rights. Whilst social rights like access to health and education have been dealt with to an extent in the Act, cultural rights have not been thought of. Every disabled person is entitled to participate in cultural activities, have access to sporting and recreational opportunities and access to media and communication.

Civil and political rights too have not been covered under the PWD Act. All persons with disabilities have the right to have equal access to the law, freedom from cruel and inhuman treatment, freedom of expression and access to information, freedom of association, right to marry and found a family and participation in political and public life.

Persons with disabilities have their civil and political rights violated often. They are subject to cruel and inhuman treatment in the very institutions which have been formed to protect them, they have no right to freedom of expression as for instance the linguistic rights of the deaf are not recognised and information is not made available to them in a language they can comprehend. Even their right to marry and found a family is denied as most feel that persons with severe disabilities cannot marry and have a family. Often a child is separated from a mother if she is found to be of unsound mind and this is also reason for denying a person to hold political office and vote.

Several salutary provisions of the Act are pre-fixed with the words 'within the limits of their economic capacity'. Can the government use this as an excuse for doing nothing? **Over 12 years have elapsed since PWD Act came into force and in all these years no budgetary provisions have been made to provide barrier free features to disabled in transport, road and the built environment.** It is also absolutely essential that the provisions for grievance redressal are strengthened. It has been seen that orders of the commissioner of persons with disabilities are often not implemented and one has to approach the High Courts for enforcement of their orders. These offices need to be given more powers similar to powers vested with the SC/ST commission and the national commission for women. Penal provisions for non-compliance of the provisions of the Act are an absolute must. The United Nations Convention on the Rights of Persons with Disability (UNCRPD) which was finalised as on March 2007, is an international treaty intended to protect and promote the rights and dignity of persons with disability all over the world. The first human rights convention of the 21st century, the UNCRPD marks a shift in attitudes and approaches to persons with disabilities.

On October 2, 2007 India became the sixth country to ratify this Convention and upon the 20th nation ratifying the Convention, India will have to amend its laws wherever necessary, in order to bring them in consonance with this Convention. Thereafter the true struggle for the implementation of the provisions for protection of human rights of the disabled in India will commence.

It is in this backdrop that this special issue of the Combat Law dedicated to disability has been contemplated in collaboration with Human Rights Law Network. HRLN works across disability and provides a common platform to all disability groups to voice their concerns and this special issue of Combat Law is part of this endeavour. We have attempted to give a fair representation to all groups to raise issues of concern as reflected through the articles that follow.

— January-February 2008

SECTION 5

The Indian State seems to actively create disasters by uprooting and displacing tens of thousands of its own people in the name of development. The government is working as a collaborator with corporations, compromising the food security and livelihood of millions of its own people at the altar international trade and development. A sensitive judiciary examined environmental issues with serious concerns during 80s and 90s. However, if recent judgments are any indication, the courts seem to be heavily tilting in favour of 'development', forgetting its dangerous ecological and human cost.

The Bhopal Catastrophe: Politics, Conspiracy and Betrayal

Despite the Union Carbide Corporation (UCC) being criminally liable for the Bhopal catastrophe, the government, though being the sole representative of the victims, colluded with the UCC and compromised the interests of the affected people. The UCC and its Indian subsidiary, the Union of India and the state of Madhya Pradesh made sure that the victims would not obtain compensation comparable to the damages awarded in similar mass tort actions in the United States. Moreover, even with the re-institution of criminal liability, the UCC accused have been allowed to evade prosecution. The trial court in Bhopal had no option but to hand down a sentence, equivalent to what is given for causing death by negligence in a traffic accident! Bhopal has hastened the decline in the standards of judicial decisions on the environment more than any other case.

COLIN GONSALVES

The paltry payments made to the victims, the escape of the chairman of the Union Carbide Corporation (UCC), Warren Anderson on a government plane, the neglect of the babies born subsequently with terrible deformities and ailments, the inability of the state to clean the contaminated soil, the petty sentences rendered and the 26 long years in the trial court, all seem separate instances which, though regrettable, are treated as issues of governance and not one of politics, conspiracy and betrayal. Let us not look at the past, we are advised, let us look to the future to ensure that such an incident does not take place again. But unless we understand the treachery of the past, it is impossible to change things for the future.

Indira Gandhi's death and the appointment of Rajiv Gandhi as Prime Minister of India marked the end of the era of the Indian version of social democracy started by Jawaharlal Nehru and the beginning of American-style globalisation. Rajiv Gandhi started off well with Ronald Reagan, the then President of United States. It is said that the understanding between these two leaders ultimately led to the pitiable settlement being agreed to by India, the quashing of all criminal liability and the removal of Anderson from Indian soil. The then Madhya Pradesh Chief Minister, Arjun Singh, naturally, will be made the scapegoat as if decisions of this magnitude could be taken without the prime minister's approval.

In the power play of globalised politics, all this is understandable, though it may make us angry. But the inability of the Supreme Court of India to stand firm and side with the people of India against UCC and the government of the United States of America (USA) left many Indians confused and frustrated. The long line of decisions starting from 1989 ultimately left them bitter.

It was in the interests of the victims to have the cases tried in the US where substantial damage would have been awarded. In the Exxon Valdez oil spill case, where no one died, $507 million was awarded. In the Vioxx drug case, where 47,000 consumers suffered heart attacks, strokes or death, $4.85 billion was paid on an average of $103,000 per plaintiff. In asbestos litigation, jury verdicts range anywhere from $1 million to $20 million in compensation per person. In the Lockerbie bombing case, Libya paid $2.7 billion or $10 million per family.

Legal luminaries flocking to represent Dow Chemical was understandable. Nani Palkhivala made a strenuous attempt by filing affidavits in the US courts to have the litigation brought to India. The then Attorney General, Soli Sorabjee, argued against giving the victims a hearing and justified the quashing of criminal proceedings. What was inexplicable was the attitude of the judiciary. In February 1989, in a cryptic three-page order containing no reasons, the Supreme Court accepted the settlement of $470 million as "just, equitable and reasonable" and quashed all criminal proceedings. In May, reasons were given as an afterthought. Chief Justice RS Pathak then resigned on being nominated by India to the World Court at The Hague. After indignant protests in the country, in 1991, the Supreme Court reinstated the criminal proceedings. In 1996, in a decision likely to have far-reaching consequences, the Supreme Court quashed the charges of culpable homicide not amounting to murder and voluntarily causing grievous hurt and introduced the criminal negligence charge carrying a maximum sentence of two years. The hands of the trial court were tied. It is now up to the present Chief Justice of India to right this historic wrong.

BACKGROUND

On the night of December 2, 1984, there was a massive leak of methyl isocyanate (MIC), a highly toxic gas which resulted in the death of 20,000 persons and disablement of more than 2,00,000 persons.[i] The gas affected not only those living but even the generations that came thereafter. As a result of a high-level conspiracy between UCC, the US government, the Union Government of India and government of the state of Madhya Pradesh, Warren Anderson was secretively taken away from Bhopal on a government plane and allowed to leave the country. Thereafter, 3,500 cases were filed by victims claiming damages of a total of $150 billion. These claims were made on the pleading that the UCC Corporate Policy Manual, testimonies available and documents gathered demonstrated "pervasive decision-making presence of UCC in all vital matters relating to the location of the plant, the designing of the plant, the production and storage of ultra hazardous substances, toxic chemicals and gases, the designing of safety systems and the monitoring of accidents review of the operational safety systems".[ii] Later, Morehouse and Subramanian did a sophisticated analysis of compensation and rehabilitation costs and worked these out to about $4 billion.[iii]

LITIGATION IN AMERICA

The Union of India filed a suit on April 8, 1985 in the US District Court (Southern District of New York) against UCC for compensation and punitive damages. Earlier, on February 20, 1985, Parliament enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 purporting to speedily, effectively and equitable securing all claims arising out of the Bhopal gas leak.

UCC then filed a motion to dismiss the Union of India's suit pursuant to the doctrine of forum non conveniens. In this Nani Palkhivala filed an affidavit in the American Court saying that the Indian courts were competent to effectively handle tort litigation of this magnitude. Marc Galanter, a leading US scholar on the Indian legal system, filed an affidavit to the contrary. Palkhivala was wrong then and was proved wrong by subsequent developments in the Indian courts. Marc Galanter's stand was vindicated. Palkhivala said that there was "no doubt that the Indian judicial system can fairly and satisfactorily handle the Bhopal litigation".[iv] "The charge of inordinate delays" he said, "is wholly inapt and inapplicable as regards the Bhopal case".[v] He was confident that "the unprecedented Bhopal case will receive unprecedented treatment in India".[vi] He ended with a demeaning and degrading observation that the "$9.5 billion which I believe represents that total aid given by the US to the Indian Republic over the last 35 years is exceeded by the aggregate claims made on behalf of the Bhopal victims".[vii]

Marc Galanter argued in his affidavit[viii] that India "has only incompletely emerged from the heritage of colonial rule…the Indian system is characterised by massive backlogs of cases and enormous delays…(which) can be considered a permanent feature of the Indian system…tort law in India is undeveloped…(and of the few tort cases) none deal with the problems arising from complex technologies…the Bar in India does not presently possess the pool of skills, the fund of experience or the organisational capacity to effectively and efficiently pursue massive and complex litigation…and the Indian legal system contains a paucity of devices to promote timely resolution of complex cases."

On May 12, 1986 federal Judge John F Keenan allowed the application of UCC but imposed three conditions:

(1) That UCC shall consent to the jurisdiction of the courts of India and shall continue to waive defences based on the statute of limitation;

(2) That UCC shall agree to satisfy any judgement rendered by an Indian Court against it and if applicable, upheld on appeal, provided the judgement and affirmance "comport with minimal requirements of due process"; and

(3) That UCC shall be subject to discovery under the Federal Rules of Civil Procedure of the US after appropriate demand by the plaintiffs.

UCC filed an appeal before the US Court of Appeal for the Second Circuit, and the Appellate Court set aside the second and third condition.

IN THE BHOPAL DISTRICT COURT

In the meanwhile, on September 5, 1986, Union of India filed a suit for damages in the district court of Bhopal being regular suit no 1113 of 1986. In that suit, UCC gave an undertaking to preserve and maintain unencumbered assets to the extent of $3 billion. Pursuant to this undertaking, the district court lifted the injunction against UCC's selling assets. This perhaps was a mistake we will come to regret. On December 17,

1987, the district court ordered interim relief of Rs 350 crore. This was reduced by the high court on April 4, 1988 to 250 crore.

In the meanwhile a charge sheet was filed under Sections 304, 324, 326, 429 read with Section 35 of the Indian Penal Code (IPC) against Warren Anderson and others.

SC AND THE VICTIMS

On February 5, 1989, in a cryptic three-page order containing no reasons at all, a constitutional bench of the Supreme Court of India, headed by the then Chief Justice RS Pathak quashed "all criminal proceedings related to and arising out of the disaster". Without any discussion on the "mass of data" placed before the Supreme Court and the extensive pleadings filed by the parties, the Supreme Court abruptly closed the case with the observation: "we are of the opinion that the case is pre-eminently fit for an overall settlement between the parties covering all litigations, claims, rights and liabilities related to and arising out of the disaster". The Supreme Court found the settlement sum of $470 million "just, equitable and reasonable".[ix]

A couple of months later, the Supreme Court woke up to the need to provide reasons for its rather dismal decision. On May 4, 1989, reasons were set out in a separate decision.[x] It was "the compelling need for urgent relief" which prompted the Court to make the initial order; UCC, through counsel, offered $350 million. "Shri Nariman stated that his client was of the view that the amount was the highest it could be up to". The Attorney General of India "submitted that any sum less than 500 million US dollars could not be reasonable". The victims were excluded from these proceedings. In this casual, perfunctory manner, the final compensation package was decided. It may be remembered that in the Exxon Valdez oil spill case, the jury awarded $2.5 billion which was later reduced by the Supreme Court of the US to $507 million. Moreover, no one died in this case. Perhaps more comparable is the 2008 Merck & Co Inc case which settled claims by 47,000 consumers who suffered heart attacks, strokes, or death from using the pharmaceutical product Vioxx. The company agreed to pay $4.85 billion, representing an average of $1,03,000 per plaintiff.

An even larger public health disaster in the US has been the use of asbestos as an insulation material. Asbestos exposure has been proven to cause mesothelioma, a rare and deadly form of lung cancer. In asbestos litigation, jury verdicts can range anywhere from $1 million to $20 million in compensation per plaintiff. However, where a settlement is reached, these amounts are substantially lower. Legal analysts have estimated that asbestos litigation in the US has cost over $250 billion and has involved more than 7,30,000 plaintiffs.

The 1988 bombing of Pan Am Flight 103, or "the Lockerbie bombing", is another example of a large class action settlement. In a private agreement reached in May 2002, Libya committed to pay approximately $2.7 billion to resolve wrongful death claims by the families of those killed, representing $10 million per family.

Sadly, there is no reference in the Supreme Court order to any international norm or standard or practice regarding damages, paid in similar or comparable circumstances. The calculations done by the Supreme Court show that it compared the Bhopal disaster with motor accident cases. "It is well known", said the Supreme Court, "that in fatal accident actions where children are concerned, the compensation awardable is in conventional sums ranging from Rs 15,000 to Rs 30,000 ($500 in 1989)."

The Court then awarded Rs 2 lakh ($4,000) in each case of death and total permanent disability and Rs 1 lakh ($2,000) in each case of permanent partial disablement. This judgement ends prophetically with the sentence "those who trust this Court will not have cause for despair".[xi]

Apart from the paltry amounts awarded, the hurtful part of the decision was the quashing of all criminal cases.

THE 'CONSTITUTIONAL' ACT

On December 22, 1989 the constitutional bench of the Supreme Court in Charanlal Sahoo vs Union of India[xii] looked into whether the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 and the Bhopal Gas Leak Disaster (Registering and Processing of Claims) Scheme, 1985 were constitutionally valid. The Court decided to look into whether "the act has been worked in any improper way".[xiii] The Supreme Court upheld the right of the union government to be the sole representative of the victims even to the exclusion of the victims themselves. Reference was made to the parens patriae doctrine which obliges the state to protect its citizens. But the Court failed to recognise that the Union of India was, on the contrary, colluding with

UCC and compromising the interests of the victims. After observing that "if the victims had been given an opportunity to be heard, they would, inter alia, have pointed out that the amount agreed to be paid by UCC was hopelessly inadequate and that UCC, its officers and agents ought not to be absolved of criminal liability, and that the central government itself was liable to have been sued as a joint tort-feasor",[xiv] the Supreme Court inexcusably upheld the exclusion of the victims, on the specious argument that "no useful purpose would be served by giving a post decisional hearing…having regard to the fact that there are no further additional data and facts available with the victims which can be profitably and meaningfully presented to controvert the basis of the settlement."[xv] This was entirely incorrect because as revealed subsequently, there was a gross underestimation of the number of deaths and injuries and the lasting nature of the ill effects of the gas leak on individuals, livestock and the environment. Therefore, said the Supreme Court: "though settlement without notice is not quite proper to do a great right after all it is permissible sometimes to do a little wrong".[xvi]

To meet the argument repeatedly made that the Union of India was a joint tortfeasor as, inter alia, its agency and instrumentalities (the Life Insurance Corporation and others were shareholders in Union Carbide of India Ltd – UCIL), and that the plant was permitted to operate by the Indian authorities close to a heavily populated area, the Supreme Court brushed aside these objections holding that "the circumstances that financial institutions held shares in the UCIL would not disqualify the Government of India from acting as parens patriae".[xvii] The Supreme Court recognised that "perhaps, theoretically, it might have been possible to constitute another independent statutory body…entrusted with the task of agitating or establishing the same claims".[xviii] The Court observed that "the question whether there is scope for the Union of India being responsible or liable as a joint tortfeasor is a difficult and different question. But even assuming that it was possible that the central government might be liable in a case of this nature, the learned attorney general was right in contending that it was only proper that the central government should be able and authorised to represent the victims."[xix]

The then Attorney General, Soli Sorabjee, made a series of unfortunate submissions, urging "that the allegation that a large number of victims did not give consent to the settlement entered into, is really of no relevance…"[xx] Hearing the parties after the settlements would also not serve any purpose…[xxi] "Quashing of criminal proceedings was done by the Court in exercise of plenary powers under articles 136 and 142 of the Constitution."[xxii]

On the quantum of damages, though the Supreme Court recognised "that the measure of compensation in these kinds of cases must be correlated to the magnitude and capacity of the enterprise…not on the basis of actual consequences suffered … because such compensation must have a deterrent effect",[xxiii] nevertheless the Court concluded "we are of the opinion that justice has been done to the victims".[xxiv]

The majority decision ended on an ominous note with the Supreme Court referring to "the atmosphere that was created in the country". "Attempts were made", said the Supreme Court, "to shake the confidence of the people in the judicial process and also to undermine the credibility of this Court. This was unfortunate… the credibility of the judiciary is as important as the alleviation of the suffering of the victims… we hope these adjudications will restore that credibility".[xxv]

In a separate concurring decision, justice KN Singh warned that "if the act was declared unconstitutional, the settlement under which the UCC has already deposited a sum of Rs 750 crore…would fall and the amount of money which is already in deposit with the registry of this Court would not be available for relief to the victims."[xxvi] This was a patently wrong conclusion. Even if the settlement was set aside, it was open to the Supreme Court to impound the amount deposited by a way of interim payment for the victims. The whole tenor of this decision suggests an unwarranted helplessness on the part of the Supreme Court, firstly, because "it is difficult to foresee any reasonable possibility of the acceptance of…the observations made by this Court in MC Mehta's case[xxvii] (according to which damages) would be much more than normal damages… (and) must be computed on the basis of the capacity of a delinquent made liable to pay."[xxviii] A second unwarranted observation was made to the effect that if the government did not assume monopoly of the litigation the victims would be helpless to proceed. "Because of the situation" said the Supreme Court, "the victims were under disability in pursuing their claims". Thus, the tenor of all the Supreme Court judgements

is to the effect that the Government of India and the judiciary were doing the victims a favour by acting on their behalf in the manner in which they did.

The notion that the victims were incapable of acting on their own was wrong then, and, with the rich experience of history, has been proved totally wrong even today. Many non-governmental organisations (NGOs) gathered around, collecting extensive data which the state of Madhya Pradesh and Union of India refused to look at. Many lawyers both in India and America offered their services pro bono to support the victims. Suits were meticulously drafted and had they been allowed to proceed evidence would have been elaborately led to establish the claims of the victims against UCC, UCIL, Union of India and state of Madhya Pradesh. All that the Supreme Court had to do was to ensure that the cases proceeded on a fast track and that all technical impediments and objections were brushed aside. Instead of this the State of Madhya Pradesh, the Union of India, Union Carbide and the government of US entered into unholy alliance to undermine and sabotage the efforts of the victims to obtain compensation comparable to the damages awarded in similar mass tort actions in the US and to have the accused prosecuted speedily in India. Instead of seeing through this unholy alliance, the Supreme Court let down the people of Bhopal by clearing a settlement that was patently paltry and by allowing the litigation in the trial court to drag on for 26 years. Returning to the concurring but separate decision of justice KN Singh, a pious sermon on the role of multinational and transnational corporations follows. “Multinational companies in many cases exploited the underdeveloped nations and in some cases they influenced political and economical policies of host countries which subverted the sovereignty of those countries. There have been complaints against the multinationals for adopting unfair and corrupt means to advance their interests in the host countries.”[xxix] Referring to the UN Code of Conduct on Transnational Corporations, justice KN Singh held that “a transnational corporation should be made liable and subservient to laws of our country and the liability should not be restricted to the affiliate company only but the parent corporation should also be made liable for any damage caused to the human beings or ecology. The law must require transnational corporations to agree to pay such damages as may be determined by the statutory agencies and forums constituted under it without exposing the victims to long drawn litigation”.[xxx]

Justices S Ranganathan and AM Ahmadi made a separate decision partly dissenting regretting that the Supreme Court had put an end to all litigation without first considering the issue of validity of the statute. The court found it “unfortunate”[xxxi] that though the writ petitions impugning the act were pending before the Supreme Court these petitions were not decided and the settlement was approved and all the litigation closed in the 1989 decisions of the Supreme Court.

The court then found itself “in somewhat of a predicamentxxxii as it has to pronounce on the validity of the provisions of the Act in the context of the implementation of its provisions in a particular manner and, though we cannot express any views regarding the merits of the settlement, we are asked to consider whether said settlement can be consistent with a correct and proper interpretation of the Act”.[xxxiii]

Then in a startling display of unawareness of the principles of natural justice, particularly in the context of mass tort actions, justices Ranganathan and Ahmadi compared the situation to a Karta of a Hindu undivided family. The Union of India in its parens patriae position qua the victims was similar to that of a Karta qua the junior members of a family who “are not to be consulted before entering into a settlement!”

SCOLDING THE VICTIMS

The two judges then went on to berate the victims and their supporters for being “apparently not alert enough to keep a watching brief in the Supreme Court”.[xxxiv] Despite the vehement protests repeatedly made regarding the paltry amount of the settlement, which were carried in the national media, the two judges assert: “no attempt appears to have been made to put forward a contention that the amount of settlement was inadequate”![xxxv] Then comes the most startling statement that “there was a day’s interval between the enunciation of the terms of the settlement and their approval by the Court.”[xxxvi] By this the Court meant that 24 hours after the disclosure of the terms of the settlement was adequate for persons to protest and the approval given by the Court a day after the disclosure of the settlements was justified.

All in all, a reading of the majority decisions and the two minority decisions show how out of touch the Supreme Court was with the suffering, grievances and

demands of the victims and how the Court proceeded quite regardless of the views expressed on behalf of the victim families.

RESTORING THE CRIMINAL CASES

Once again "a hue and cry was raised against the settlement by victim groups".[xxxvii] "Considerable heat was generated throughout the Court hearing and the press was also none too kind on this to Court".[xxxviii] A series of review petitions were filed in the Supreme Court once again seeking a "Fairness Hearing", inclusion of additional victims in the list of persons to be compensated, higher compensation amounts and the restoration of the criminal cases. The Supreme Court noticed the pleadings to the effect that the "toll of lives has since gone up to around 4,000 and the health of tens of thousands has come to be affected and impaired… though it was initially assumed that MIC caused merely simple and short-term injuries…it has now been found by medical research that injury… is to the entire system including nephrological lymphs, immune and circulatory systems… and has mutagenic effects and that the injury… is progressive… Indeed the effects of exposure of the human system to this toxic chemical have not been fully grasped. Research studies seem to suggest that exposure to these chemical fumes renders the human physiology susceptible to long-term pathology and the toxin is suspected to lodge itself in the tissues and cause long-term damage to the vital systems… The potential risk of long term effects is presently unpredictable."[xxxix] Despite this the Court concluded that "as of now, medical documentation discloses that there is no conclusive evidence to establish a causal link between cancer incidence and MIC exposure".[xl]

The Court then noticed the pleadings in the review petitions to the effect that UCC, holding 50.9 shares in UCIL, "retained and exercised powers of effective control over its Indian subsidiary in terms of its corporate policy".[xli] The plea was that UCC established and maintained the Bhopal chemical plant "with defective and inadequate safety standards which compared with designs of UCC's American plants, manifested an indifference and disregard for human safety".[xlii] Despite this, the Court warned that the settlement ought to be accepted as "we should not proceed on the premise that the liability of UCC has been firmly established".[xliii] Thus the whole approach of the Court was pessimistic and diffident. The Court appeared unsure as to the liability of the UCC and the connected inability of UCIL to pay substantial damages. The positive aspect of this decision was the direction to restore the criminal prosecution in the following terms:

we hold that no specific ground for withdrawal of the prosecutions having been set out the quashing of the prosecutions requires to be set aside…The memorandum of settlement… leaves no manner of doubt that a part of the consideration for the payment of $470 million was the stifling of the prosecution and, therefore, unlawful and opposed to public policy.

Then the Court rejected the "Fairness Hearing" argument as well as the argument that the settlement was vitiated because it did not contain a "re-opener" clause to take into consideration those injuries that were not anticipated earlier. This conclusion came after the Court admitted that:

what was transacted with the Court's assistance between the Union of India on one side and the UCC on the other is now sought to be made binding on the tens of thousands of innocent victims who had a right to be heard before the settlement could be reached or approved…Any paternalistic condescension that what has been done is after all for their own good is out of place.[xliv]

Dealing with the argument that, if the settlement were to be set aside, the money deposited would have to be returned to UCC, the Supreme Court held that while this may be true, UCC would be required to abide by the earlier interim order requiring UCC to maintain unencumbered assets of the value of $3 billion during the pendency of this suit. The Supreme Court also directed the Union of India to stand guarantee to make up the deficit in case the settlement sum deposited proved for any reason to be inadequate.

Justice Ahmadi wrote a dissenting judgement. "I find it difficult to persuade myself to the view that if the settlement fund is found to be insufficient, the shortfall must be made good by the Union of India".[xlv]

In May 1996, a public interest petition was filed in the Supreme Court on behalf of the victims complaining that from 1994 onwards instructions were issued to the deputy commissioners adjudicating claims not to continue with the adjudication and to direct all claimants to go to the Lok Adalats. The grievance was made that since adjudication has come to a grinding halt the victims were compelled to go to the Lok Adalats where "payments were restricted to the bare minimum of Rs 25,000 in a large number of cases."[xlvi]

QUASHING THE CHARGES

In September 1996, a Bench of the Supreme Court quashed the charges against the accused persons[xlvii] overriding the submissions of the Additional Solicitor General appearing for the Union of India who submitted that "there was ample material produced by the prosecution which clearly indicated that all the accused concerned shared common criminal knowledge about the potential danger of escape of the lethal gas".[xlviii] Such was also the finding of the Vardarajan Committee, which was appointed by the Government of India to look into the causes of the accident. The evidence on record showed:

that these accused even though stationed at Bombay shared the criminal knowledge of the other personnel of the company who were actually handling the Bhopal plant… had criminal knowledge regarding the defective working of the plant and…were no longer interested in its safe keeping…(so that) no remedial steps were taken.[xlix]

Without going into the extensive evidence on record pointing in the direction of criminal culpability the Supreme Court quashed charges under 304 Part II (culpable homicide not amounting to murder which is attracted if the act done is with the knowledge that it is likely to cause death but without any intension to cause death), 324 (voluntarily causing hurt) and 326 (voluntarily causing grievous hurt) IPC. These sections were quashed on the questionable reasoning that there was no evidence on record to show that the accused had knowledge "on that fateful night" that "they were likely to cause death".[l] This phrase "on that fateful night" is found repeatedly in the judgement. What the Court is saying therefore is that although the accused generally understood that they were storing a highly toxic chemical in an inappropriate manner and in a dangerously defective plant and knew generally that the leakage of gas could cause death nevertheless they were liable to be exonerated of these charges because there was no evidence to show that they knew that the gas was likely to leak "on that fateful day" causing death. After quashing all the charges thus, the accused would have been discharged. To avoid this, the Supreme Court introduced the charge of criminal negligence under Section 304-A.

ROLE OF CJM, BHOPAL

By order and judgement dated June 7, 2010, the trial court convicted all the accused persons under Sections 304-A, 336, 337 and 338 r/w section 35 of the IPC, 1860 and sentenced them to two years imprisonment and a fine of Rs 1,00,000 each.

The trial court noticed that industrial licensing related to pesticides was granted by the director general of technical development. Licenses were provided by the industrial department of the ministry of chemicals and fertilisers, Government of India for manufacturing 5,000 tonnes of MIC-based pesticides. The government of India also approved a foreign collaboration between UCIL and UCC on the assurance given by UCC "that the company have technical knowledge of several years of manufacturing MIC in USA successfully."[li] UCIL acquired the Bhopal plant from UCC, US, which was 50.9 percent shareholder in the company. A design and transfer agreement and a technical services agreement were entered into between the two companies. The Court records that "both these agreements categorically record that UCC was a global leader in the field of MIC based pesticides having been engaged in this field for many decades prior to these agreements. The accused company made every effort to acquire the best possible technology and design that was then available." The whole technology was imported from UCC, US.[lii] The entire plant was set up by the UCC personnel under control and supervision and start up procedure was done by Warren Woomer, who is a specialist in MIC.[liii] This is how the manufacture of MIC started at the Bhopal plant in 1979. The Court also noted that "in 1980s an American, Warren Woomer came to India and remained here for two years in the capacity of general works manager".[liv]

The Court elaborately set out the "major design defects brought to the notice of the Court".[lv] Also that "the problem was made worse by the plants' location near a densely populated area, non-existent catastrophe plants and shortcomings in healthcare and socio-economic rehabilitation",[lvi] and concluded that the parties responsible for the disaster were UCC, government of India and Government of Madhya Pradesh.[lvii] The Court found that there was a storage failure in that huge quantities were stored with all the safety systems "either out of order or shut down".[lviii] MIC is required to be stored preferably at zero degree centigrade, but the Court found that the refrigeration system had been closed down and that "the directions for shut down was given by the Production Manager, SP Choudhary and by Warren Woomer, overall in-charge of the plant".[lix]

The Court also found that the Vent Gas Scrubber and Flare Tower were not in working order and were "kept shut down".[lx] "No explanation is there on the part of the accused persons why it was kept shut down/inoperational."[lxi] Though the MIC was to be stored under pure nitrogen pressure of 1 kg/cm^2 the pressure was 0.25. That the plant was "running negligently"[lxii] was reported by "a team of experts headed by Poulson from UCC, USA, who came to Bhopal after the death of an employee of UCIL in 1982.[lxiii] Reports were sent from Bhopal to UCC about the rectification of defects.[lxiv] The Bhopal plant was at the time of the incident "running in loss of near about Rs 5 crore."[lxv]

The Court then records the defence of Keshub Mahindra to the effect that "he only used to chair the meeting of the board. He was not concerned with the day-to-day business. He was not concerned with the safety aspect."[lxvi] None of the matters were ever placed before the board of directors.[lxvii] These arguments were rejected. Referring to the role of a non-executive director, the Court observed that "she is usually involved in planning and policymaking…are expected to monitor and challenge the performance of the executive directors and the management and to take a determined stand in the interests of the firm and its stakeholders. They are generally held equally liable as executive directors…"[lxviii] The Court concluded that the present case was "not a case of vicarious, but a personal liability. In the modern times, there is an ever increasing awareness and expectations of the duties and responsibilities of large corporations in matters of health and safety."[lxix] Then the conviction and the sentence followed.

In concluding the Chief Judicial Magistrate observed:

the tragedy was caused by the synergy of the very worst of American and Indian cultures. An American corporation cynically used a third world country to escape from the increasingly strict safety standards imposed at home. Safety procedures were minimal and neither the American owners nor the local management seemed to regard them as necessary. When the disaster struck there was no disaster plan that could be set into action. Prompt action by the local authorities could have saved many, if not most, of the victims. The immediate response was marred by callous indifference.[lxx]

The Court ended by declining payment of compensation under Section 357(3) of the Criminal Procedure Code on the grounds that the compensation settlement had been entered into. This is an interesting point. Damages were awarded in the settlement for injuries caused in civil proceedings. Compensation in criminal law proceedings is awarded "to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system".[lxxi] In that case the Supreme Court regretted courts not exercising "their salutary powers under this section as freely and liberally as could be desired."[lxxii]

LESSONS OF BHOPAL

After 1985, judicial activism went into a tailspin. Bhopal hastened the decline in the standards of judicial decisions on the environment more than any other case. It taught industrialists a memorable lesson. If you can get away with Bhopal, you can get away with anything. If after thousands of people died in Bhopal, Union Carbide and the board of directors could get away with petty compensation and no criminal liability (under the 1989 judgement), then one need not fear the law.

Poor people do not count. This was the second lesson. The tragedy of Bhopal was that the gas leaked into the quarters where the poorer people lived. Had the toxic cloud drifted in the direction of the Secretariat, the Bhopal litigation may have taken a different turn. As things turned out the wind direction changed and Arjun Singh, then Chief Minister of Madhya Pradesh, was able to board his helicopter and decamp.

Poor people died like flies and the litigation dragged on for years. Advocates made fools of themselves in American courts arguing with fawning patriotic zeal that courts in India were up to the mark, and Judge Keenan took advantage of this to disguise his basically pro-business attitude with patronising sweet-nothings. Who are we to tell the Third World what they should be doing? They have their values, their courts, their standards. Who are we to decide what compensation is payable? With words of this kind the litigants were banished from American courts, with their strict liability and high levels of compensation and low levels of judicial corruption, into the labyrinthine mess of the Indian judicial system.

DOUBLE STANDARDS

Thus, with Keenan's judgement, double standards for transnational corporations became the norm. American corporations were required to follow higher standards of safety in America and also abide by the right to information laws and the higher level of compensation. But operating in the backwaters of the developing world, they were free to work in secrecy, bribe officials and lie in court. Were transnational corporations to be prosecuted in American courts according to American law for disasters abroad, the occupational health and safety scene in the developing world would have improved dramatically.

The undue haste with which the full Bench of the Supreme Court pushed through the settlement and quashed the criminal proceedings was later partially corrected when the Court reversed itself and restored criminal liability. This haste to push through the settlement was in sharp contrast to the manner in which the judicial proceedings went on for years. The Court's performance was a fitting answer to Nani Palkhivala's grand arguments that the Indian judicial system was competent to handle the Bhopal litigation.

And when Chief Justice Pathak went to the World Court at The Hague soon after criminal liability was quashed and then tried to hang on for a second term by unusual means, eyebrows were raised. The result of all this was a clear signal to the lower judiciary that the environment was taboo and to industrialists that it was business as usual.

So, many years later, when an inflammable gas leaked and ignited causing an explosion that shook the Indian Petrochemical Corporation Ltd's (IPCL) factory at Nagothane in Maharashtra and killed 50 workers, it was history repeating itself. The management was hopelessly unprepared. The hospital within the complex in which thousands resided had beds for only seven patients. The doctors said that they were not surgeons. They did not know how to give an intravenous drip. They claimed that they had neither the equipment nor the medicines and that they were never informed of how to deal with victims of chemical explosions. The hospital had only two ambulances with two beds each. One was so old it broke down at the gate. The workers' bodies were, therefore, taken to hospital by contractor's trucks. Acting in a panic the doctors evacuated the factory without first treating the injured and dying. They were taken northwards towards Alibag over roads pitted so badly that some of the workers died on the way. After hours they reached Alibag only to find the civil hospital without medical supplies. The trucks then turned around and came south to Mumbai. At Sion Hospital the doctors found all the workers dead. They said that had elementary emergency aid been provided by spraying the workers with cold water immediately after the explosions and then by covering them in light cotton clothing and had intravenous drips been administered it would certainly have been possible to save lives. As in Bhopal, transnational corporations were involved in the fabrication of the IPCL plant and these foreigners were working in the premises when the explosion took place. They immediately left the factory and caught the first flight home. Thus even after Bhopal no industrialist had learnt that a disaster management plan was necessary. Not very different is the story of the recent hazardous chemical leak from Century Rayon, Thane.

Government attitudes in Bhopal sent a similar signal down the line to all the expert bodies. When on behalf of government, the Tata Institute of Social Sciences sent a team to Bhopal to document the number of persons affected and the degree of injury, much work was put in but the records are mysteriously missing. Voluntary groups doing similar work had their offices raided, their activists arrested, their records seized by the police and later destroyed so that documentation of the nature and extent of injuries was deliberately done away with leading ultimately to only about one-third of the victims getting compensation. From the top came the warning to zealous officers that the environment was not to be taken seriously.

The courts and the government repeated this performance when activists of the Narmada Bachao Andolan were routinely beaten up and arrested and treated as anti- nationals and anti-development. Despite the failings of the Narmada project, the high court refused to entertain the petition and the Supreme Court in this matter of national importance passed a one page order directing the construction to proceed apace with perfunctory remarks regarding rehabilitation. As with the Amnesty report on torture in India, it sometimes takes a foreign committee's report to make India sit up and take notice. There could not be a more scathing indictment of the Narmada project than the Morse Committee report. Yet, in a situation where the governments of Gujarat, Madhya Pradesh, and Maharashtra have no in-

tention of rehabilitating anyone according to the Narmada Water Disputes Tribunal. Award and the supplementary agreements, all that BD Sharma, the intrepid ex-Commissioner for scheduled castes and Tribes could get from the Supreme Court in his public interest petition was a direction against him, for the work on the dam to go ahead.

CORRUPTION

The casual attitude of the courts has taught the pollution control boards a thing or two. Steeped in corruption and headed by politicians, these boards fabricate anything for anybody at a price. At the centre of the putrefaction of social life, the pollution control boards – themselves cesspools of corruption – have become a law unto themselves. Reports are fabricated, investigations stage managed, approvals granted fraudulently and accidents covered up. And the position of the Union Minister for the Environment, once a punishment posting, has become the most lucrative ministry. Crores of rupees in bribe money flow through the corridors of Paryavaran Bhavan.

The pollution control boards get away with this because courts do not question their reports. In property matters, affidavits, reports and other documents are scrutinised closely by the writ courts, but in environmental matters, even the most outrageous, casual or contradictory reports would pass muster. When expert bodies act independently and fearlessly then it is understandable that courts not substitute their eclectic knowledge of the subject for the scientific reasoning of the expert body. But when the pollution control boards act mala fide, should the courts keep their eyes shut?

The obsession judges have with the amount of money spent on projects is another misplaced concern. What lawbreakers routinely tell the courts, in effect, is: "perhaps we have broken the law and harmed the environment but we have spent so much money; let us continue with the construction, otherwise we stand to lose more money." And the courts succumb. Because of their property and profit orientation, judges rarely calculate the enormous costs in terms of environmental destruction.

It takes courage to condemn a mega project that will harm the environment. But it must be done and in clear terms. Judicial pronouncements on the environment in India tend to appear to say much more than they do. The Sriram case, for example, used wonderful language and several quotations and relied on many precedents and is said to lay down the principle of strict liability. The casual reader might believe that strict liability now exists in India. But when read carefully the judgement is otherwise. Subsequent decisions of the Supreme Court have not taken the Sriram case as laying down strict liability. We are told that one of the judges who delivered the decision – a prominent public interest litigation proponent – has, after retirement, in opinions given to industrialists, said that the doctrine of strict liability as laid down in Sriram's case was obiter.

Thus, after Bhopal, the separation between what judges pretended to say and what they actually said grew. Grand judgements were not uncommon but they had little effect because the operative part of the orders were like little pipsqueaks as compared to the lion's roar of the quotations and lofty ideals. By these techniques the judiciary caused the public to believe that the judiciary was receptive whereas quite to the contrary judicial decision-making was characterised through this period by timidity and domination by industry.

As the judiciary went into decline, the movement grew and took on the dimensions and characteristics of a mass movement. Now we are truly on the threshold of a second national movement. Public life has become so corrupt, standards are so abysmally low and looting the exchequer has become so much a national pastime that nothing short of a national cleansing of the rot that pervades Indian society will do.

The environment movement once stood on the fringes of the human rights movement together with other issues as just another issue. Today it stands centre stage. The nexus between environment issues and life itself indicates that the struggle for a healthy and sustainable environment is a struggle for changing the whole of society itself. Basic values, attitudes, approaches, priorities and lifestyles are called into question and the environment has transited in the people's minds from just another issue to the subterranean strata of all movements. It is not simply an issue of forests or water or the air but the living together in harmony of all people and their harmony with nature.

— May-August 2010

Endnotes

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lii. Para 34.
liii. Para 34.
liv. Para 34.
lv. Para 37.
lvi. Para 38.
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lx. Para 64.
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lxiv. Para 80.
lxv. Para 115.
lxvi. Para 118.
lxvii. Para 135.
lxviii. Para 137.
lxix. Para 184.
lxx. Para 216.
lxxi. Manish Jalan vs State of Karnataka (2008 9 Scale 814).
lxxii. 818.

Trojan Horse

Tracking the emerging evidence on the adverse environmental and health impacts of GM crops and keeping a watchful eye on the ecological practices in farming reveals that GM crops are no solution and only rigorous, appropriate, transparent and independent scientific testing will establish the safety of the genetically modified vegetable.

KAVITHA KURUGANTI

Around the time when India's minister of state for environment & forests, Jairam Ramesh took charge in the second term of the UPA government (sworn in on May 27, 2009), two days later the GEAC (Genetic Engineering Approval Committee) was busy putting together an "Expert Committee" on Bt brinjal. This EC-II, its terms of reference, members and its functioning, has come under a huge cloud of doubt posing an obvious question in front of many – can we really trust this committee to have kept the best interests of India's health and environment in mind when they cleared Bt brinjal for cultivation in India as the first GM food crop and the first ever such vegetable anywhere in the world? Following the recommendations of this committee in its report dated October 8, 2009, a week later India's apex regulatory body also cleared the transgenic crop and recommended its release in a highly controversial manner. There was a huge public outcry against this decision which threatened to blow up into a major storm without delay. Jairam Ramesh had to step in immediately and announced that after holding public consultations and seeking all stakeholders' views, he would take a final decision on the matter.

On February 9, the minister announced his decision: *"A moratorium on the release of Bt brinjal till such time studies establish the safety of the product, to the satisfaction of both the public and professionals, from the point of view of its long-term impact on human health and environment, including the rich genetic wealth existing in brinjal in our country"*.

Bt brinjal is a genetically modified (GM) food crop created by inserting a bacterial gene from the soil bacterium Bacillus thurengiensis into the brinjal DNA to make the plant produce a toxin against a particular pest (fruit & shoot borer). This is being sought to be introduced in India, Philippines and Bangladesh on the claim that it will bring down pesticide use in brinjal/eggplant/aubergine cultivation, reduce pest-related losses and increase yields and bring in better incomes for farmers. While these are the claims around this novel produce, there are many unaddressed concerns around Bt brinjal even as there are also unanswered

questions on the very rationale extended for wanting to bring in the Bt food crop.

Bt brinjal was sought to be made into the Trojan horse by the biotech promoters and proponents for an easier entry of various GM seeds and such technologies into India's food and farms sector. This was quite apparent to everyone and the ones who were resisting Bt brinjal were also aware of this. The minister however always kept insisting, rightfully so when he stepped in, that his remit is narrow and limited: that of reviewing the regulatory clearance for Bt brinjal and taking a final decision on it given that the regulatory committee itself put the onus of the final decision on him. However, in deciding on Bt brinjal "EE1 event" (the one developed by Mahyco, Monsanto's Indian partner with Monsanto's technology included and later supplied to public sector universities like UAS-Dharwad and TNAU-Coimbatore as part of a USAID-funded project), he thankfully exposed many facets to the GM seeds debate that did not get highlighted enough or ever get incorporated into decision-making processes in the past.

TRANSPARENT DECISION-MAKING

Given the controversy around this technology in farming, public consultations undertaken by Jairam Ramesh assumed great significance. A legitimate platform was created for scientists of different hues to engage with the issue along with "ordinary citizens", civil society groups and others, to look into available data and come up with their analysis and share the same in public. Ramesh had to lock horns with the agriculture minister for taking the issue to the public. He defended the government's right, nay responsibility, to take a final decision on this issue (and not leave it to a bunch of "experts") in response to a reported statement by the agriculture minister Sharad Pawar that the expert committee's views are final as far as he is concerned. Ramesh, in his letter to Pawar, wrote "GEAC may well be a statutory body but when crucial issues of human safety are involved, the government has every right and in fact has a basic responsibility to take the final decision based on the recommendations of the GEAC".

The Cartagena Protocol on Bio-safety (under the Convention on Biological Diversity) Article 23.2 says, "Parties…shall consult the public in decision-making process regarding living modified organisms…" and India is a signatory to this. Interestingly, the GEAC itself, in its October 2009 meeting while concluding that Bt brinjal was safe for environmental release, said "since this decision will have major policy implications, the GEAC decided to forward the recommendations and report of the expert committee…to the government for a final view". Many environmental activists are also arguing that the standard environmental impact assessment processes should require mandatory public hearings for a technology like Bt brinjal too.

This opening up is also about democratisation of science and technology decision-making, where realising that the issue has many facets, ruling does not rely on just "experts", given that expertise is often in a highly specialised but reductionist domain. There is an emerging school of thinking which stresses upon an integrated approach, of including environmental and social goals firmly into S&T policy/decision-making and one that advocates for a better 'knowledge democracy'. In this approach, concepts like sustainability, plurality and justice are deeply embedded and for obvious reasons, the approach does not rely on just a few "experts". It involves people and various knowledge domains. A group of science & society experts and practitioners recently concluded in a manifesto they released, this is about "Knowledge Swaraj".

Having set a precedent like this, the Indian government would be hard put to justify why other products and crops will not go through a similar transparent, democratic decision-making process!

TO ERR ON SIDE OF CAUTION

Genetic engineering is an evolving science and existing evidence shows that it is imprecise and hazardous. The last word on this subject is not out yet and many scientists themselves admit that the jury is still out. Combined with the scientific and technological shortcomings of this technology and the resultant hazards is the socio-political context in which this technology is situated, making it a tool in the hands of powerful corporations for monopolistic control over our food and farming systems. There is also the issue of trade security getting jeopardised with GM options since a majority of countries around the world does not allow GM crops and there are more and more regions actually declaring themselves GM-free like never before.

In the case of Bt brinjal, the minister clearly adopted a "cautious, precautionary principle-based approach" in the matter given that several state governments, the Supreme Court observers in the GEAC, independent scientists and concerned citizens -- all

pointed out the lack of conclusive proof of the safety of the Bt food crop. The minister clearly cited a Supreme Court judgement which invoked the precautionary principle as a guiding instrument (AP pollution control board vs MV Nayudu 1999(2)SCC718) by relying on the following:

"There is nothing to prevent decision-makers from assessing the record and concluding there is inadequate information on which to reach determination. If it is not possible to make a decision with 'some' confidence, then it makes sense to err on the side of caution and prevent activities that may cause serious or irreparable harm. An informed decision can be made at a later stage when additional data is available or resources permit further research".

This precautionary principle is enshrined in the Cartagena Protocol too, which India ratified and agreed to.

BT COTTON: LESSONS LEARNT

Bt cotton is being cultivated in India from 2001 onwards, when it appeared illegally on vast tracts of cotton land in Gujarat. We have about 8-9 years of experience with this first and only genetically modified non-edible crop in the country. Field level experiences shared in a recent Indian People's Tribunal on Bt brinjal in Delhi, shows that several problems with Bt cotton have been brushed aside whereas much hype around Bt cotton as the reason for increased cotton productivity and production in India has been spread around.

Jairam Ramesh, even as he acknowledged that Bt cotton couldn't be equated with an edible crop like Bt brinjal, listened to farmers' experiences with Bt cotton in different locations. Several submissions made to him include adverse human and animal health impacts witnessed in the Bt cotton cultivation belts of the country in addition to impacts on soil health. The issues with regard to changed pest and disease ecology in cotton, the crop becoming resource-intensive after the shift to Bt cotton (including higher use of chemical fertilisers), about declining yields and increasing pesticide usage etc., have all been brought up. The GEAC had agreed to take up a comprehensive review of Bt cotton way back in May 2008 but had not actually done anything so far. It becomes pertinent to take this up immediately as pointed out by the environment minister too: *"Bt cotton is not comparable to Bt brinjal no doubt but it is nevertheless necessary to review our experience with it".*

INDEPENDENT TESTING

The Indian regulatory regime depends on the crop developer's data as well as its interpretations/conclusions for its decision-making and the same had happened with Bt brinjal regulatory approvals so far. This obviously does not inspire any confidence. Further, no chronic impact studies have been taken up, knowing well that brinjal is a staple vegetable in India. The existing safety evaluation guidelines do not prescribe such long term testing and what is worse, the recast guidelines in India make it into a more lax evaluation regime. It has also been observed that even though a key regulator who used to be with the Indian Council of Medical Research (and part of the GEAC for several years as well as part of the EC-II) said in one of the GEAC meetings that chronic impacts evaluation should be taken up as part of safety evaluation, but the EC-II rubbished the need for the same.

In this context, the views of the two Supreme Court observers, asking for chronic impacts testing, the views of the drug controller general of India and director-general of Indian Council of Medical Research recommending chronic toxicity and other associated tests to be carried out independently is a good precedent.

SOLUTION OR PROBLEM?

For a long time now, despite repeated queries, a fundamental issue around Bt brinjal and other such crops has remained unanswered: Where is the need for Bt brinjal when pest management in various crops is possible without the use of chemical pesticides or irreversible hazardous technologies like GM seeds? In a media interview after his decision on moratorium was announced, Jairam Ramesh is reported to have said that the Bt technology is a solution looking for a problem. In Andhra Pradesh, hundreds of thousands of farmers are showing an exemplary will of cultivating their crops without the use of synthetic pesticides, through NPM (non-pesticidal management) methods which bring down the cost of cultivation, the adverse ecological and social impacts of pesticides and leave farmers with better livelihoods.

In the case of brinjal too, many affordable, safer and sustainable alternatives exist like pheromone traps being used for mass-trapping, spraying the extracts of neem seed kernel, intercropping with coriander etc. Further, by conventional breeding methods, Indian scientists had released FSB-resistant cultivars in the past

from different state agriculture universities. Therefore, the argument that the problem of pesticides has only one solution in insect-resistant GM seeds is wrong. In fact, any pest management solution that seeks to kill a pest is bound to put a selection pressure for resistance whereas sustainable pest management options seek to control pests in a natural way.

In this context, the minister acknowledged the role of "alternative" technologies like NPM saying, "NPM scores over Bt technology as it eliminates chemical pesticide use completely whereas Bt technology only reduces the pesticide spray…"

It is worth noting here that the Supreme Court observer in the regulatory body, Dr Pushpa Bhargava, had laid down the following as the very first parameter for assessment for the regulators: *"ascertain after careful analysis of existing information (and, if need be, relevant new information that could be generated within a short period) that there are no alternatives to the GMO and that the GMO will, if it meets the stipulated requirements, bring substantial benefit to the country and to one or more classes of its citizens. And if the GMO is truly required, carry out rigorous risk assessment"*. Dr Bhargava has then gone on to lay down what such a risk assessment should consist of. Experiences like NPM are not just "alternatives" anymore in states like Andhra Pradesh where entire villages are going pesticides-free rapidly in some of the intensive-cultivation areas too.

If this parameter is applied to various agencies getting into GMO research and development in India, a majority of applications would have to be thrown out right at the beginning and that is exactly how it should be.

SEED SOVEREIGNTY

The minister highlighted in his decision note the strategic importance of retaining public and farmers' control over the seed industry. The issue of corporate control over Indian farming, especially the seed sector, was a recurring theme that Jairam Ramesh heard in all the public consultations, with farmers and their organisations expressing their concerns over the monopolistic tendencies of corporations like Monsanto. Further, undue interference by American agencies and the political economy of this technology were highlighted by many time and again.

When a technology is unsafe and hazardous, it does not make it anyhow welcome whether it comes from the public sector or is free of cost. In the case of Bt brinjal varieties developed with the support of USAID funds, the fact that these "varieties" are just a façade to gain more acceptability for Bt brinjal per se and this is also the manner in which farmers' seed varieties are being appropriated by private corporations should be clearly and firmly underlined.

TRANSGENIC TECHNOLOGY

While the minister acknowledges that the safety evaluation has many lacunae, including the fact that no long term or independent testing has been taken up to conclusively prove the safety of Bt brinjal; he does not touch upon fundamental aspects related to transgenic technology – on the very scientific and technological shortcomings of genetic engineering. He states upfront that his current exercise has got only to do with Bt brinjal and not with the larger issue of genetic engineering in Indian agriculture.

While this may be so as far as Jairam Ramesh's processes of decision-making around Bt brinjal are concerned, it is imperative that India resolves this issue firmly and clearly.

The current diversion of agri-research investments in transgenic technologies takes away from the urgent need to deploy appropriate resources and technologies for farmers' real needs for lasting and sustainable solutions. The myth around GM crops representing a safer and more precise breeding technology, of the belief that GM seeds are the only way to increase productivity and of leaving farmers to the mercy of market forces in the name of "farmers' choices" even as extension support is being cut back etc., are all issues that need to be addressed squarely.

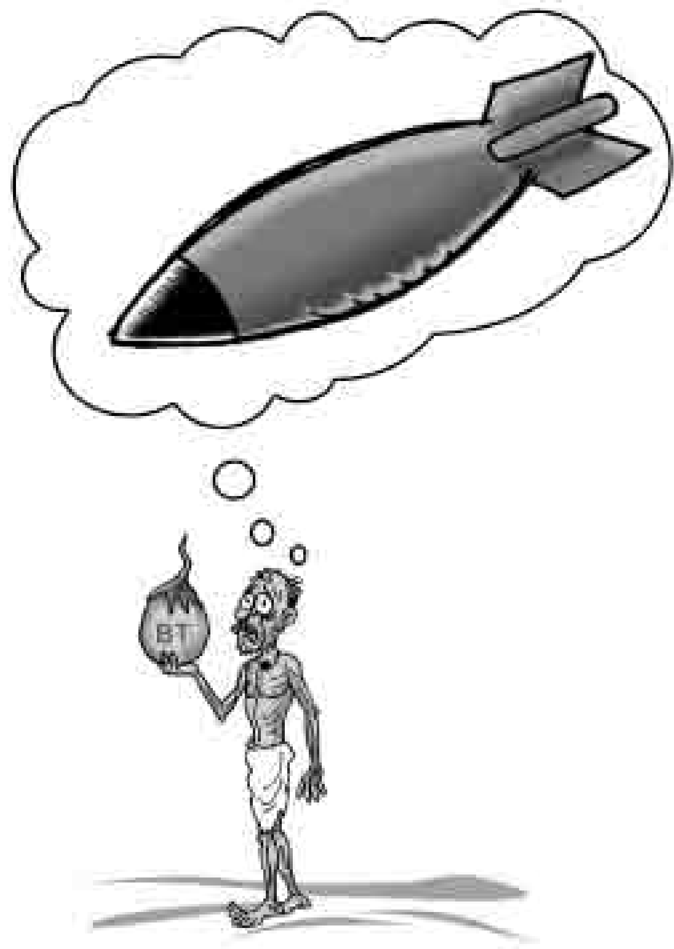
For all those who have been tracking constantly emerging evidence on the adverse environmental and health impacts of GM crops – both from laboratories and real life experiences from around the world, and for those of us who have watched ecological practices in farming lend a fresh lease of hope to distressed farmers, GM crops are no solution and have to be resisted on various fundamental grounds.

Nevertheless, we also recognise that Mr Jairam Ramesh had set an excellent precedent in undertaking a transparent and democratic decision-making process and in raising the bar for safety assessment and evaluation of such GMOs, by asking for independent scientific studies to the satisfaction of both the public and the experts to establish safety of the product including

long term impact on human health and environment. It is believed that rigorous, appropriate, transparent and independent scientific testing will certainly bring out the dangers of this technology and this is what the current regulatory regime unfortunately tries to bypass.

The sustained attempts by some section of scientists, media and industry to attack the minister on his decision continue even as newer strategies of bypassing his decision are being explored as in the case of a new statute being sought to be enacted for a biotechnology regulatory authority to be set up in India. For those who seek to democratise S&T decision-making and to make the scientific establishment accountable to sustainable development goals, the fight continues.

— March-April 2010



GM Crops and Trade Security Issues

Aggressive lobbying by biotech corporations like Monsanto, Bayer, Syngenta and Aventis today play a defining role in international policies and decisions governing trade in GM crops and foods. Trade laws are tailored to suit agribusiness and megacorps while citizens are losing their right to decide what they consume. Farmers, on the other hand, are confronted with seed monopolies and increased volatility in trade prospects.

BHASKAR GOSWAMI

In September 2009, Canadian farmers woke up to a grim prospect. European companies had detected genetically modified (GM) flax in their consignment. Within two months, GM contaminated flax was reported across 35 countries. There is no way to reverse the process and Europe with its zero tolerance policy towards GM foods has suspended flax imports from Canada.

Europe is the destination of two-thirds of the flax produced by Canada. Curiously, the GM contaminant – known as Triffid – was deregistered in 2001 in Canada, is illegal to sell, and was confiscated and destroyed to protect Canadian flax exporters. Yet rogue seeds multiplied and contaminated the supply chain.

While scientists and bureaucrats rant about the business of figuring out the cause of this contamination, farmers in the Canadian Prairie provinces are the ones left high and dry. The Canadian Flax Council's "2015 Initiative" to increase the value of flax crops five-fold to $1.5 billion is unlikely to be of much help. Without access to European markets, Canadian farmers might as well stop growing flax.

Similar rejection of contaminated shipments has also been reported in the case of rice from the US and China in the past. Apart from economic losses, the cost of the product goes up manifold to meet stringent testing and clean-up norms. For commodity traders, it is perhaps a one-time loss that can be made up by switching over to trading another commodity. For crop cultivators, rapid supply management responses are tough to put in place and consequently they are the eventual losers.

When it comes to environmental and public health concerns, the international guideline prescribes exercising caution. Termed as the "precautionary principle" under the Cartagena Protocol on Biosafety (CPB), it empowers policy makers with the discretion to reject cultivation of GM crops. Nothing prevents policy makers to extend this to address trade security issues as well.

Instead, the harm is undone by legitimising trade in hazardous GM foods, often through

coercion. There have been several attempts to harmonise cross-border trade regulations to accommodate GM crops and foods. The most notable one was the case at the Dispute Settlement Board (DSB) of the World Trade Organisation (WTO) against the zero-tolerance policy for GM contamination followed by the EU. In 2006, the DSB ruled against the EU and sent across a message that trade and commercial interests weigh higher than scientific evidence tendered on adverse environmental and health impacts of GMOs. It has virtually stripped nations to apply the "precautionary principle" and is therefore inconsistent with the CPB, an existing international treaty.

The WTO ruling, among others, is a case in point of nations losing their sovereign rights to enact laws governing food trade. Aggressive lobbying by biotech corporations like Monsanto, Bayer, Syngenta and Aventis, and groups representing commodity producers like the National Corn Growers Association of the USA, today play a defining role in international policies and decisions governing trade in GM crops and foods. Trade laws are tailored to suit agri-business and biotech corporations and citizens are losing their right to decide what they consume. Farmers, on the other hand, are confronted with seed monopolies and increased volatility in trade prospects.

Using multilateral bodies to prise open trade borders is becoming increasingly common. In 2006, the USA filed two notifications at the WTO challenging India's decision to label commodities with GM ingredients and to seek clearance of the apex regulator for imports of any GM crops and foods. Sri Lanka introduced a ban on import of any GM product in 2001 but was browbeaten into amending its laws by the US. Similar cases of arm-twisting developing countries to facilitate trade in GM foods are becoming a norm.

Forcing developing countries to relax their laws is not limited to trade alone. Food insecure countries, particularly the ones that depend on food aid, are increasingly feeling the pressure to accept GM foods. The US is notorious in this respect and it uses all possible means to force aid-dependent countries to accept GM feed developed for animals as food aid. Countries like Malawi, Zambia, Ethiopia, to name a few, have experienced such beggars-can't-be-choosers tactics of the US.

The current negotiation on "Aid for Trade" at the WTO is another arena that will be worth following in the days to come; GM food that does not get traded would be sought to be dumped as food aid. This is already a common practice and all that remains is legitimising it through the WTO.

With the current negotiations at the WTO at a standstill, countries are busy stitching together Free Trade Agreements (FTAs) where trade liberalisation in agriculture goes much beyond what is required under the WTO. FTAs between two parties allow limited processing of agri-products imported from third parties to be eligible for trading. Termed as Rules of Origin, these diluted norms are opening the floodgates for reprocessed GM foods. Instead of clear rules, most FTAs have general guidelines for trade in GM products which makes import filters redundant. Worldwide, countries either have stringent safety approval and mandatory labelling requirements - EU and Japan, for instance - or have open borders for GM foods and crops, as is the case with US. There is a third category of countries that do not have any regulations for GM products or have declared themselves to be GM free; many developing countries fall in this category.

Technically, India falls under the first category where safety standards and import filters are quite rigorous. In India, all research, development, commercial release and imports of GM products must be cleared by the apex regulator. Besides, labelling of permitted GM products is mandatory.

However, the ground reality is that India has woefully fallen short of implementing its regulations. Bootlegged varieties of Bt cotton appeared before the regulator approved commercial cultivation. Inadequate biosafety tests are rampant – public laboratories lack facilities for comprehensive tests and rely on data provided by the GM crop developers. Responses by the Indian government to the 2006 WTO notifications by the US make the right noises but labelling laws that have been enacted are deliberately not made operational and import of GM soybean oil without permission or labelling has been legalised by amending the law not only to allow its unhindered import but also to exempt it from labelling. The list of such omissions is long and has predictably turned India into a favoured dumping ground for hazardous GM products.

Recently the EU detected presence of GM Bt cotton in non-GM soy meal exports from India meant for animal feed. The contamination occurred on account of oil mills involved in processing both cottonseeds and soybean. As a result, India is on the brink of losing the

status of a major exporter of non-GM soy meal in the world. Future consignments will be subjected to stringent tests and, apart for rejection of contaminated shipments, the cost of testing will have to be borne by the exporter. The fallout of such contamination on farmers who are at the end of the supply chain is therefore quite serious.

Going by the array of GM food crops that are at various stages of development, India will be seriously impacted on several fronts. Non-GM rice is a major export commodity and any report of contamination will squeeze Indian produce out of competition. Similarly, exports of maize feed for animals and certain fresh vegetables will be hit once their GM varieties are cleared for commercial cultivation in India. Before embarking on such research and development, careful evaluation of the impacts of loss of markets on farmers ought to have been carried out. This has never been done and so long as profiteering at the cost of farmers lasts, it never will. Where trade legislations allowing unhindered flow of GM foods are not possible or when high-handedness fails to get the desired result, the approach is altered to that of deliberate contamination of the supply chain. In both cases of Canadian flax and the GM rice developed by Bayer in US (which was at a trial stage and yet escaped into the environment), farmers were not aware that their produce is contaminated, yet ended up at the wrong end of the stick. Penalties imposed on the GM crop developers for contamination and cleanup is a small fraction of the overall losses in trade suffered by farmers.

Research and development of GM crops need to be effectively regulated. Every possible alternative must be explored before considering any proposal on genetic modification. Instead, such R&D activities are being treated as routine and a necessity. Large-scale contamination is therefore becoming common. When containing or reversing such contamination is not possible, it is generally followed by legislations to legitimise it. The fact is that scientists, bureaucrats, politicians and seed corporations enjoy legal immunity from being held accountable.

Trade security of nations is closely linked to livelihood security of its farmers. When governments permit introduction of GM crops, biosafety parameters alone must not be the governing criteria. If GM crops impact the livelihood security of farmers, they must not be permitted. This assumes high importance given the fact that there are hardly any safety nets for farmers in developing countries whose exports are rejected. Can one imagine the plight of farmers of single commodity exporting nations like Madagascar if the sugar they produce is contaminated with GM ingredients?

Right now the economic liability for trade losses due to GM crops is borne by farmers. This must change. After all, neither have these crops been developed with their consent, nor is it protecting their commercial interests. If agri-biotech corporations are allowed to patent their seeds and profit from it, and scientists, regulators and politicians never lose and opportunity to defend the former's interest in the name of "sound science", they must be made liable not only for undesirable environmental and human impacts but also for adverse trade fallouts.

— March-April 2010

Drowning Million Dollars

Big irrigation projects are bringing small results.
Yet billions of rupees are being drained out in the name of expanding irrigated area

HIMANSHU THAKKAR

In twelve years from 1991-92 to 2003-04 (the latest year for which figures are available), there has been absolutely no addition to net irrigated areas by canals as reported by union ministry of agriculture, based on actual field data from states. In the period from April 1991 to March 2004, the country has spent Rs 99,610 crores on major and medium irrigation projects with the objective of increasing canal irrigated areas. What the official data show is that this whole expenditure has not led to addition of a single ha in the net irrigated area by canals in the country for the whole of this 12-year period. In fact, the areas irrigated by canals have reduced by a massive 3.18 m ha during this period. This should be cause of some very serious concerns and the ministry of water resources (MWR), the states and the planning commission will have to answer some difficult questions.

The then Prime Minister Rajiv Gandhi speaking on big irrigation projects to state irrigation ministers in August 1986 had said, "Perhaps, we can safely say that almost no benefit has come to the people from these projects. For 16 years, we have poured out money. The people have got nothing back, no irrigation, no water, no increase in production, no help in their daily life." Only change that quote would require today is removal of the word Perhaps.

In this period, the MWR has been claiming (e.g. in the working group report on water resources for the eleventh Plan) that they have created additional irrigation potential of 8.454 million ha and utilisation of irrigation potential of additional 6.297 million ha, but the data from the ground raise questions about these claims. The MWR has been using such claims to push more allocations for investment in major and medium irrigation projects. The MWR has proposed, for example, that in the eleventh Plan, an allocation of Rs 1,65,900 crores should be done for the major and medium irrigation projects. The facts show that this will be a total waste of public money.

The net irrigated area by canals all over the country was 17.79 million ha in 1991-92. In all the years thereafter, till 2003-04, the latest year for which the data is available, the net irrigated area by canals has not only been lower than 17.79 m ha, but has been consistently falling.

So even though it is claimed that during the period 1991-2004 total of 210 major and medium irrigation projects have been completed, there has been no addition to the net irrigated area. This is another revealing statistic that should worry all concerned. Incidentally, it

should be noted that the projects add irrigated areas even in years before they are completed. What this means is that some projects that were completed after March 2004 could also have added irrigated areas in the period we are discussing and some of the projects completed may have added some of their irrigated areas before the reporting period.

Rs. 99,610 crores spent, no benefit during the period from April 1991 to March 2004, the government has spent the following amounts on major and medium irrigation projects. This is the total expenditure on these projects including that by the centre and the states.

It is remarkable that the figures of net irrigation areas were available to the working group and to the ministry of water resources and they knew that the net irrigated areas by canals have been dropping for some years. And yet they took no note of that in the working group report and in fact made claims as stated above to push for the case for additional funding of Rs 1,65,900 crores for major and medium irrigation projects for eleventh Plan.

It is true that this analysis would have benefited from similar figures of gross irrigated areas by canals at all India level during the same period. Unfortunately these figures are not available, though we are trying to get them. In the meantime we note that with so much investment, completion of so many projects (which are necessarily in new areas not benefiting from old irrigation projects) and the claims of achievement by the MWR, net irrigated areas by canals should be increasing, not decreasing. What we have achieved, instead is a reduction in net irrigated area by canals from 17.79 m ha in 1991-92 to 14.61 m ha in 2003-04 (the latest year for which data is available). This is a reduction of massive 3.18 m ha, almost double the planned irrigation from the controversial Sardar Sarovar Project.In majority of the years during 1991-2004, the rainfall has been normal or above normal. So it cannot be claimed that this trend is due to low rainfall.

Attempt to underestimate groundwater irrigation figures, the working group report for water resources for the eleventh Plan has attempted to underestimate the contribution of groundwater irrigation. As against the figures of potential creation of 7.169 m ha and potential utilisation achievement of 4.754 by groundwater during the 1991-2004 period, the actual addition of net irrigated area during the period has been 9.15 m ha. If we estimate addition to the gross irrigated area during the period from groundwater, the figure comes to 12.54 m ha, almost three times the estimate of potential utilisation by the working group headed by secretary, union ministry of water resources.

The union water resources ministry also seems to be indulging in exaggeration in potential utilisation of canal irrigated areas. For example, according to the working group report for the eleventh Plan, Maharashtra had irrigated potential utilised from major and medium projects to the extent of 2.147 m ha in 2001-02 and 2.313 m ha in 2005-06. When we look at the benchmarking report for irrigation projects, Government of Maharashtra for 2005-06, we see that according to the state government, Maharashtra had achieved utilisation of irrigation potential from major and medium project to the extent of 1.25 m ha in 2001-02 and 1.617 m ha in 2005-06, both figures are way below the figures claimed by the eleventh Plan working group report. The question arises, why should the working group, chaired by secretary, union ministry of water resources, exaggerate the figures of potential utilised by M&M projects?

Some of the reasons for this situation include: siltation of reservoirs and canals, lack of maintenance of the irrigation infrastructure, water intensive crops in the head reaches and non-building of the canals and over development (beyond the carrying capacity) of projects in a basin, water logging and salinisation, diversion of water for non-irrigation uses. Some other possible reasons could include: increased rainwater harvesting and groundwater use in the catchments of the major irrigation projects, increased groundwater use in the canal command areas. In some cases, the additional area added by new projects is not reflected in the figures as the area irrigated by older projects (due to above reasons) is reducing. Indeed the World Bank's 2005 report India's Water Economy: Bracing for a Turbulent Future showed that annual financial requirement for maintenance of India's irrigation infrastructure (which is largest in the world) is Rs 17,000 crores, but less than 10 percent of that amount is available and most of it does not result in physical maintenance of the infrastructure. In some over developed basins, the new projects are like zero sum games, since they would be taking away water for some of the downstream areas. Optimistic hydrological projections, which is almost universal in big irrigation projects, would mean that projects in any case would not provide the projected benefits.

A number of eminent experts in this area whom we consulted to check if this trend is indeed happening, said that yes, this is indeed true. Some such eminent experts include planning commission member BN Yugandher, Prof VS Vyas, former planning commission member L C Jain, former secretary union ministry of water resources, Ramaswamy Iyer, well known irrigation expert Dr Tushar Shah, former World Bank consultant Prof RPS Malik, among others. Some officials of the ministry of water resources justify big irrigation projects, arguing that increase in groundwater irrigation becomes possible because of recharge of groundwater by canal irrigation. This is strange proposition. If groundwater recharge is an objective then canal irrigation is not the best option to achieve that objective.

Secondly, Dr Tushar Shah of International Water Management Institute says that hardly 12 percent of wells are in canal command areas. In a paper presented at a national workshop on interlinking of rivers in Delhi in October 2007, Dr Shah et al say, "a substantial part of the groundwater irrigated area growth in the last decade is in districts outside the command areas and show no significant spatial dependence with surface irrigated area growth." It is clear that big irrigation projects cannot be justified in the name of increasing groundwater recharge by canals.

These findings have grave implications. Firstly, they very clearly imply that the thousands of crores the country is spending each year on big irrigation projects is not leading to any additional net irrigated area. Secondly, the real increase in irrigated area is all coming from groundwater irrigation and groundwater is the lifeline of irrigated agriculture. Thirdly, in fact these futile investments of Rs 99,610 crores not adding any irrigation may be the reason behind the slackening of the agriculture growth rate India has experienced over the last decade. Forthly, Rs 14,669 crores spent on the Accelerated Irrigation Benefits Programme (AIBP) between April 1996 (when the programme started) to March 2004 (the period we are discussing) has not helped add any additional irrigation area, the claims of MWR that AIBP has added 2.66 m ha of additional irrigation potential not withstanding. AIBP clearly needs to be scrapped. Lastly, this raises many accountability issues and those responsible in MWR, planning commission and states will have to answer for a lot. The Bharat Nirman Yojana, that plans to add one crore ha irrigated area during 2005-09 also needs to be urgently reviewed, else, a lot of money and precious other resources will be wasted.

This trend indicates that instead of spending money on new M&M irrigation projects, the country would benefit more (at lesser costs and impacts) if we spend money on proper repair and maintenance of the existing infrastructure, taking measures to reduce siltation of reservoirs and at the same time concentrating on rainfed areas.

On groundwater front, we need to make preservation of existing groundwater recharge systems and augmentation of the same should be our top priority. Weeding out the unviable investments from the ongoing M&M irrigation systems needs to be done so that good money (not yet spent) is not thrown after bad money (spent on unviable projects). In case of some of the ongoing projects, it may be more profitable to review the projects to reduce further investments and impacts.

Even as the planning commission finalises the eleventh Plan, this is a golden opportunity to make radical changes in our water resources development plans. If we miss this opportunity, the combined impacts of the wrong priorities we have pursued so far and the global warming will result in we having neither the water required for the people or the economy, nor the cash to maintain and sustain the existing benefits, as the 2005 World Bank report also concludes.

— November-December 2007

There was Once an Old Tehri Town...

Despite three decades of criticism and concerns, as the Tehri dam finally starts producing electricity and drinking water reaches distant Delhi, most questions have gone unanswered.

HARSH DOBHAL

With the Tehri water gushing into the Sonia Vihar water treatment plant, a long wait by a parched Delhi has ended with the completion of the first phase of the controversial Tehri dam project. As of mid-July, the project has begun producing 150 to 400 megawatts of electricity, depending upon water availability. Meanwhile, with the closure of the project's Tunnel 2 in October 2005, Tehri town and nearby villages have been completely submerged under the dam's artificial lake. This project has been mired in controversy ever since its approval in 1972, particularly with regard to rehabilitation and environmental issues, but also as pertains to alleged structural flaws in the dam, its size, design and location.

Lawsuits have repeatedly challenged the project, and national and international criticism has forced construction to drag on for nearly three decades. Officials with the Tehri Hydro Development Corporation (THDC) spout statistics: the project will generate 2400 megawatts of electricity, supply about 100 cubic feet of water per second (about 25 crore litres per day) to Delhi, and irrigate about 2,70,000 hectares (6,90,000 acres) of land in Uttar Pradesh, which has a 25 percent share in the project. But such figures do not drown out the project's negative impact, nor do they address the potentially drastic problems that have come up and would further arise from its construction. Apart from the old town of Tehri, the dam directly affects about 125 villages, 33 of which will be completely submerged. Nearly 5200 hectares of land is being inundated, and almost 5300 urban, and over 9000 rural families, 5429 of them fully, are being displaced from their homes and land. In 1972, the Tehri project's cost was assessed at Rs 197 crore, and aimed to produce 600 MW of electricity. Over the years, the size and the cost of the project have multiplied. With the completion of the first phase of the project, which is estimated to produce 1000 megawatts of electricity, Rs 8000 crore has already been spent - a 24-fold increase in cost. The second phase will both pump up the water to produce another 1000 MW and the third phase, adjacent to Koteshwar dam, will produce 400 MW. But completion of these two phases will further require massive amounts of funding. Constructed over the confluence of the Bhagirathi and Bhilangana rivers in the Garhwal Himalayas, the reservoir that is being formed by the dam extends 45 km into

the Bhagirathi valley, and 25 km into the Bhilangana valley. The lake's total surface area is nearly 43 square km. Perhaps most critically, the dam has been built on an active seismic area known as the 'central Himalayan gap,' just 45 km from the epicentre of the 1991 Uttarkashi earthquake.

Seismologist and dam experts point out that in the event of a major earthquake, the dam can fail and the massive amount of water in the reservoir could suddenly come crashing out, inundating an unknown amount of the surrounding and downstream land and communities.

CATASTROPHE IN WAITING

Construction began in 1978, six years after the Planning Commission formally sanctioned the Tehri project in 1972. The dam was vehemently opposed by the Tehri Bandh Virodhi Sangharsh Samiti (TBVSS), which went to the Supreme Court against the construction in 1978. Although the apex court rejected the appeal, the movement against the dam continued. The government's Environmental Appraisal Committee twice refused to give clearance to the project before finally granting it in 1993.

The issue again hit the headlines following the 6.6 strength earthquake of October 20, 1991 in the area. Then Prime Minister, PV Narsimha Rao, remarked that the earthquake had raised a question about the project. During that year, opposition to the project further gained momentum when environmentalist Sunderlal Bahuguna undertook a long fast and succeeded in bringing construction to a standstill for 75 days. Bahuguna and other activists were subsequently arrested, and the work resumed under heavy police protection. Two fasts undertaken by Bahuguna in 1992 and 1995 marked the high point of the anti-dam movement to press for an independent and transparent review. Following both of these fasts, which lasted 45 and 49 days

respectively, the government promised a review but later reneged, allowing the work to continue.

After Bahuguna undertook a third fast in April 1996, New Delhi appointed an official committee to look into the matter. The Hanumantha Rao Committee subsequently pointed out that the dam was being built in violation of the conditions that accompanied its environmental clearance. This committee was in fact the last in a series to look into the dam's construction. Both the SK Roy Committee, set up by Indira Gandhi, and the 1990 Environmental Appraisal (Bhumbla) Committee had recommended that the construction of the project be halted. In addition, engineers from the Soviet Union, which had agreed to bankroll the project on concessional loans, had noted in reviews that the dam site's location in a seismic area had not been taken into adequate consideration by the Indian planners. The project was unsuccessfully challenged in the Supreme Court. Another petition, raising rehabilitation and environmental issues, is still pending with the apex court.

In April 1987, the Indian National Trust for Art and Cultural Heritage (INTACH) sponsored an independent assessment of the dam's economic feasibility. After calculating social and environmental costs and benefits, the multi-disciplinary team concluded that the project's benefit-to-cost ratio worked out to around 0.56:1 - not simply short of the 1.5:1 ratio adopted by the Planning Commission to sanction such projects, but also that the project will cost more than the benefits it is expected to deliver. The INTACH team also noted that the projected useful lifespan of 100 years was questionable, as the high siltation rate in the Bhagirathi River would reduce the life of the dam to just 62 years at most. Even the International Commission on Large Dams (ICOLD) has declared the Tehri dam to be one of the most hazardous sites in the world, a contention supported by independent seismologists from within and outside India. An earthquake of large magnitude could result in bursting of the dam, which would almost immediately flood nearby towns such as Deoprayag, Rishikesh and Haridwar, as well as those farther away. If the dam broke, the city of Meerut would be under water within 12 hours.

THE MYTH OF REHABILITATION

The story of rehabilitation for those affected by the dam's construction has been one of broken promises. The creation of the town of New Tehri has significantly altered the social, economic, cultural and administrative dynamics of the entire area. Oustees have cited hundreds of examples of discrepancy, as well as a general absence of political will to rehabilitate people. While affected families were promised employment for one adult at the time of acquiring their land, authorities appeared to quickly forget the promise, leading to discontent. Community members could have taken a cue from those families that were resettled to areas around Haridwar and Rishikesh a quarter century ago, back at the beginning of the Tehri project. Promised hospitals, roads, irrigation canals and the like are still nowhere to be seen. Resettled individuals have experienced a disorienting process of being cut off from their traditional social fabric, thereby risking social disintegration.

While compensation has been reserved for those who had land in their name before 1985, many families who came after that year have also been left out - particularly those who do not have 'good contacts.' Furthermore, even while 1985 was set as the cut-off date for the people living in the town, people living in villages are eligible for rehabilitation only if they were there before 1976. Partially affected villages face another problem. Only those who have had more than half of their lands acquired qualify for complete rehabilitation; those with less than half of their lands affected are compensated, but not moved to new lands. Nonetheless, in most cases, the land being submerged, even if less that 50 per cent of their landholding, is the only fertile land around the river valley - the rest is barren land on steep hills, not suitable for agriculture.

The number of affected families is more than just those whose lands have been submerged, and includes those who have lost link roads, schools and hospitals. With crucial infrastructural links disrupted, local communities are demanding new link roads, bridges and ropeways. But the government's rehabilitation policy does not clearly state anything about partially submerged villages, or the fate of the people living in such altered situations.

The Tehri project is nearing completion, but there are crucial questions and concerns related to the environment, development and rehabilitation-some of which are still unanticipated, and many of which are as unanswerable as Old Tehri town is forever unreachable.

— January-February 2007

Iron Curtain's Mendacity

This is a report to the nation of the relentless suffering of the people of the Andaman and Nicobar islands. Their decline from a proud race of independent tribals who cared two hoots for the government, to a people crippled by a corrupt, inefficient administration in sub-human conditions of survival is not accidental but a symptom of our colonial hangover.

COLIN GONSALVES

What sense of importance did it give the government of India to reject offhand the offer by the European states to provide grants, materials and equipments for the victims of tsunami in India, only to thereafter approach the World Bank for a loan albeit with low interest? What drove the government to provide relief by sea and air to the tsunami victims in Sri Lanka, when the victims in the Andaman and Nicobar Islands are without housing and clean drinking water till today? For how long will the central government hide the suffering of the tsunami survivors in India from the rest of the world?

There is something fundamentally wrong with the way we deal with relief to the victims of disasters and their subsequent rehabilitation. In the aftermath of the Latur earthquake in Maharashtra, money poured in from all over the world. The state government forced its employees to make a contribution. Notwithstanding all this, the situation on the ground remained pathetic.

A closer enquiry and a public interest petition in the Bombay High Court (at the Aurangabad bench), indicated that part of the funds flowing in, including the Rs 801 crore of the World Bank meant for rehabilitation of the quake survivors, was diverted elsewhere, perhaps for election expenses. It was only Justice BN Deshmukh's no-nonsense approach that forced the government to bring money back for the building of houses. Ten years after the Latur earthquake, and after elaborate monitoring, first by the high court and later by the Supreme Court, the houses were ultimately built for everyone. The Gujarat earthquake saw a similar situation. Here Muslims and dalits were discriminated against in the re-building effort. The heroic efforts of NGOs and an ombudsman appointed by the high court did bring some relief.

A disquieting feature of all disasters is the reluctance of the administration to publicly acknowledge the specific details of the funds coming in, and the identity of donors. Leading newspapers invariably list their donors when they raise money for public causes, as after an earthquake. But the government is loath to do this. The reasons for this are to be found in the greed entrenched within the system, and the cruel attitude towards the poor. A careful

social audit of how the donations of millions of dollars were actually used may yield interesting results. Indeed, nothing angers the administration of the government more than a request from the public to publish the list of donors. I suspect that money meant for the victims of disaster are routinely diverted for the payment of the salaries of government servants and other sundry expenses. In the case of the tsunami to this day, despite requests, the government has refused to put the list of donors on its website.

General figures, of course, are routinely reported in the newspapers. Besides being unreliable they do not permit an individual donor to verify whether her contribution has been acknowledged. It's a classic government strategy to always hide, obfuscate and confuse financial details by leaking banal details of the total quantum received.

When the tsunami broke in the Andaman and Nicobar Islands on December 26, 2004, very few people from the mainland reached these remote areas. There was total confusion. Some policemen and government officials abandoned their posts and the people. Others made heroic efforts. A member of the Human Rights Law Network managed to land up on Kamota in the Nancowry islands. The people had been deserted by the administration. Were it not for the air force, many more lives would have been lost.

When Combat Law covered the betrayal of the tsunami survivors in its September 2005 issue, the joint editor, Mihir Desai, characterised the government of India's response as "a disastrous response to disasters". Instead of relying upon the skills and contributions of the local population, the administration in the islands went about their business in a typically colonial fashion. The people asked for tools such as knives, axes and saws so that they could use the wood of the fallen trees to reconstruct their homes; but they were denied this. Instead, someone highly placed at Delhi took the decision to send hundreds of thousands of tin sheets long distance across the sea so that the people of the Andamans, who usually reside in wood houses or *machans*, were forced to live in cattleshed type structures which turned into ovens during the day and were uninhabitable during the monsoons because of the mud flooring. They live in these sub-human structures to this day.

The government of India repeatedly promised the people that they would be given permanent housing, but as we publish this report, apart from the model houses constructed for display, not a single house has been built for the 10,000 tsunami survivors! Instead of allowing the people to construct traditional houses made of wood, a prefabricated model of tubular steel is being imported from the mainland, obviously for the benefit of contractors and bureaucrats. The people have no understanding of how this structure is to be maintained. It is frightening to think of what these beautiful islands will look like ten years from now with 10,000 prefabricated steel structures rusting and in disrepair.

Then the people asked for boats and nets so that they could resume fishing and get back to living as normal a life as possible. Their jetties had to be repaired so that the boats could dock. Cold storages had to be made so that fishing could become a commercially viable proposition. Two years after, in many of the islands, the boats have yet to come, nets are yet to be distributed, jetties remain destroyed, and cold storages do not exist. There is fish in the sea but not for the tribals of the islands.

The other source of traditional livelihood is coconut plantations, but these have been destroyed. The seedlings planted will take seven years to yield fruits. There is no work or meaningful employment. This is why the administration provides free rations to the tsunami-affected.

When we met with the people we found that kerosene had been discontinued. The supply of free rations was irregular in many areas. And then came the announcement that free rations were to be discontinued. The intervention of the high court saw better sense prevail. The stand of the administration now is that free rations will continue for some time. Unless alternative livelihood options emerge, free rations cannot and should not be discontinued.

For a country which considers itself a super power, safe drinking water is not available in most places. People are still drinking from stagnant water pools and streams. They suffer all kinds of diseases.

This is a report to the nation of the suffering of the people of the Andaman and Nicobar islands two years after the tsunami struck, and of their decline from a proud race of independent tribals and indigenous people who cared two hoots for the government, to a people dependent on the administration for their survival. This has been achieved by following policies and practices that ignore the desires and suggestions of the people, reducing them, in the process, to passive onlookers.

This was not accidental. If corruption is to exist and grow, activities of the government must operate above the people — with very little participation, understanding and information.

Perhaps it is the remoteness of the islands that allows for such a colonial administration to flourish. The newspapers from Port Blair give details almost on a daily basis of cases of corruption. Nothing happens. Justices come on a rotation basis from Kolkata to man the high court functioning at Port Blair. They get to hear the administration's point of view, but there are few NGOs or civil society groups who interact with the judges to give them the other side of the story. As a result, judicial intervention through PILs is hardly known. The *Lok Adalats* operating at Port Blair are ineffective principally because they require individuals to travel long distances at considerable cost and come to Port Blair — instead of holding the *Lok Adalat* in inaccessible and far-flung islands.

All in all, there is an iron curtain between the islands and the mainland. Unless this autonomy of a dominant section of the administration to loot at will and to treat tribal people as basically inferior is fought tooth and nail, a similar report will be documented by Combat Law next year as well!

In the middle of all this confusion, it appears that the minister for tourism is pushing for these pristine islands to be opened up for "high value" tourism. Deals are being struck with a string of five star hotels. Bureaucrats support this initiative with talk of the tribals being backward. They, like our colonial masters, see their role as bringing primitive people into the "mainstream". Globalisation has now reached the southern most tip of India.

— January-February 2007

Environment, Terribly Misjudged

In the 1990s, a sensitive judiciary examined environmental issues with serious concern, but if recent judgments are any indication, the courts seem to be heavily tilting in favour of 'development', forgetting its dangerous ecological cost.

BIBHU PRASAD TRIPATHI

The Supreme Court as well as many high courts were examining the environmental matters in a more pro active manner in the 1990s but after the year 2000 the courts have apparently tilted more in favour of development while turning a blind eye to long term environmental implications. Many of the international environmental principles such as precautionary principle, polluter pays principle, principle of sustainable development, principle of intergenerational equity and public trust doctrine were incorporated into the domestic law of the land and a part of the environmental jurisprudence of the country.

Environmental law in India has undergone a sea-change over the last few years. Of late, the courts are becoming increasingly insensitive to environmental concerns and have failed to examine a number of cases with a sustainable development perspective. Following are some of the landmark judgments relating to environmental issues in the period 2004–2005.

POLLUTION

KA Wadhawani vs. State of U P and Others (Ors): A public park developed by an NGO was misused by an individual, who carried on the wedding of his daughter in the park disregarding all protests by the NGO as well as a direction of the Allahabad High Court. The court said that that right to life is granted under Article 21 of the Constitution of India and implicit in the said right is the right to lead a healthy life, and since public parks contribute much to the quality of life, the sanctity of parks must be maintained. As such, the court said that it would not be adequate for the offender to pay only for the actual damage to the park, but that they must also pay exemplary damages such that it would act as a deterrent for others.

Justice RS Verma vs. State of Rajasthan: Public interest litigation concerned with maintenance and restoration of green belts in certain housing colonies of Jaipur. The High Court of Rajasthan reiterated the statement that Article 21 not only protects the life and liberty of the individual, but also ensures a life that is worth living. The court stated that without good health, life is not worth living, and a healthy environment was needed for good health. Holding that parks and green belts create a healthy environment and promote well being of the citizens, the court directed the state to take effective measures to ensure that the parks and green areas in the cities and towns of Rajasthan are neither encroached upon nor allowed to be converted for purposes other than park and green areas.

Belmaks Metal Works vs. Member Secretary, Pondicherry Pollution Control Committee: Petitioner asked the High Court of Madras to quash the orders of the Pondicherry pollution control committee and allow the petitioner to operate the electroplating plant based on a previous no objection certificate. The court ruled for the petitioner, commenting that the state pollution control board (PCB) must have a positive approach towards business and industry, and urged the PCBs "not to discourage the setting up or expansion of industries on hyper-technical or minor grounds."

Piedade Filomena Gonsalves vs. State of Goa and Ors: Petitioner appealed a judgment of the Goa High Court, which while deciding two writ petitions, one praying for demolition and the other for the protection of a structure belonging to the petitioner on the sea beach of Goa, ordered the demolition of the construction. The Supreme Court of India ruled

against the petitioner, holding that the petitioner was at fault for constructing the structure without securing permission from the competent authorities. The Court reiterated the fact that coastal regulation zone notifications have been issued in the interest of protecting environment and ecology in the coastal area. Construction done in violation of such regulations is liable to cause environmental damage and cannot be lightly condoned.

Fertilisers and Chemicals Travancore Ltd Employees Assoc. & Ors. vs. Law Society of India & Ors: The Supreme Court set aside a judgment of the Kerala High Court ordering the relocation of an ammonia reservoir. The court ruled that it has to strike a balance between human safety conditions and utilities that exist in the public interest, such as the fertiliser plant and nuclear power generators. The court commented that such facilities are needed for the welfare of society, even if their structural integrity and operations are vulnerable to certain risks.

The Perundurai Citizens Welfare vs. The Tamil Nadu Pollution Control Board and Ors: The Madras High Court dismissed two public interest litigations regarding the pollutions caused by tanneries, commenting that the litigants did not appear to be moved by public interest, but rather by private business interests. The court said that it was reluctant to sit as a court of appeal over the decisions of PCBs that have expertise in the matter. The court also noted that the petitioner had not pursued administrative remedies in a timely manner, but had instead waited an inordinate length of time and then filed the PIL.

Bihar State Pollution Control Board and Anr. vs. Hiranand Stone Works and Ors: Disposing of an appeal from a decision of the Patna High Court set aside the order of the lower court and ruled that the power of the state pollution control board included the ability to order the closure or moving of an industry and to cut-off utility services to enforce the order.

Kala Singh and Ors. vs. Union of India and Ors: Petitioners asked the court to restrain the government from issuing an environment clearance certificate for setting up of a distillery unit, and for quashing of the no objection certificate (NOC) issued by the Punjab pollution control board. Petitioners claimed that the area was a residential area and given that the gluten and glucose manufacturing unit of the same company was already causing water and air pollution, the planned distillery unit would further increase pollution levels. The PCB responded that they had not yet issued the NOC, and that they would do so only after verification of the pollution control measures proposed by the industry, which guaranteed zero discharge of wastewater. The court ruled against the petitioners. The court noted that the PCB had, in principle, granted a NOC to the industry, which meant it had the requisite consent to use the plot allotted for the purpose of distillery. The court also did not find any irregularity in the conduct of public hearing which was attended by more than 250 persons, and was conducted as a public hearing should be. The distillery unit was not going to be established in an approved residential area but in an industrial growth centre. The residential colony came up after the industrial growth centre was identified.

Sudarsanam Spinning Mills and Anr. vs. Tamil Nadu Pollution Control Board and Another (Anr): Petitioner appealed a show cause notice issued by the state PCB. The High Court of Madras, while elaborating the scope of powers of officers of state pollution control board, held that petitioners could not rely on permission obtained in the various consent orders for installation of diesel generator sets for future replacement or alteration of the generator sets or associated equipment. The court ruled that petitioners must obtain fresh permission from the PCB for any kind of alteration since only the PCB can determine whether the generators are causing air pollution. The court also dismissed the petitioner’s contention that the issuance of the show cause notice would hamper the working of their textile mill and that the PCB’s stance would hamper industrial growth in general. The court said that saving the environment couldn’t be sacrificed at the cost of promoting the industrial growth.

Vedire Venkata Reddy and Ors. vs. Union of India and Ors: In a case arising from the commencement of the pulichintala project without environmental clearance, the Supreme Court held that the clearance obtained from the water commission is about technical and economic aspects of the project, and is different from a clearance from environmental and forest angle. The court also admonished the state against flouting the directions of the Supreme Court and the central government in its hurry for immediate implementation of a project. While acknowledging that no development is possible without some adverse effect on ecology and environment, and that projects of public utility can-

not be abandoned, the court said that a balance has to be struck between economic interests and maintenance of the environment maintenance.

In Re: Government of State of Rajasthan: In a *suo moto* case initiated by the Jaipur Bench of the High Court of Rajasthan, the court said that it was concerned by the "growing slew of maladies adversely affecting the glory, magnificence, splendour and quality of life of the ancient city of Jaipur." The court, explaining the scope of Article 21 of the Indian Constitution, which includes the right to a decent environment and the right to live in a clean city, held that the plea of "lack of finances" was a "fragile excuse by civic bodies for not carrying out their statutory duties." The court issued several directives to improve the hygiene and ecology of Jaipur. The civic authorities were directed to take appropriate actions to battle the menace of polythene bags lying on the streets. The court also ordered provision of food, clothing and shelter for migrants from villages in their respective villages to counter the problem of urban-targeted migration.

MC Mehta vs. Union of India and Ors: Public interest litigation regarding the existence of unauthorised industrial activity in residential areas of Delhi. The Supreme Court issued various directions to the central government to finalise a list of permissible household industries falling in category 'A' within a period of three months and allot industrial plots to the 6,000 industrial units on the waiting list within one year, to close all industrial units except household industry in residential/non conforming areas in Delhi, to disconnect water and electricity connections of the industrial units found operating after the due date of closure, and in case of continuance of industrial activity, to seal premises within a period of one month. The court also ordered the government to appoint a monitoring committee to oversee the implementation of the aforesaid directions.

Research Foundation for Science vs. Union of India and Anr: The Supreme Court of India, on prima facie finding that 15 importers had illegally imported waste oil in 133 containers in the garb of lubricating oil, registered a suo moto case holding that it was not necessary to await the final report of the adjudication proceeding pending before the commissioner of custom with respect to the consignments and directed the commissioner of custom to send a report within three months whether the consignment contained waste oil within the meaning of the Basel convention on hazardous waste rules, 1989 as amended in 2000 and 2003. The Court allowed the importers to re-export or destroy the waste oil, and ordered them to pay compensation for the amounts spent on laboratory testing.

WATER POLLUTION

According to the United Nations world water development report, 'Water for people, Water for Life,' India ranks 120th among 122 selected nations in the world in terms of quality of water. The rapid pace of infrastructure and industrial development has caused massive amounts of pollution. The government's data reveals a bleak picture of the water situation in India: Over 200 million people do not have access to safe drinking water; about 15,000 habitations are reported to be without any source of potable water; and about 200,000 villages are only partially covered by drinking water schemes.

Relevant legal provisions and regulatory bodies:

Section 7 of the Environment (Protection) Act: overarching law that can be used to proceed against any type of environmental pollution, as it forbids the emission or discharge of any kind of environmental pollutants in excess of what has been permitted.

Water (Prevention and Control of Pollution) Act, 1974: Provided the first statutory foundation for environmental protection in India. Before this Act, environmental law in India mainly consisted of claims made in tort under the common law doctrines of nuisance or negligence. The stated purpose of the act is the "prevention and control of water pollution and the maintaining or restoring of the wholesomeness of water." It attempts to do this by setting up the pollution control boards and empowering them to regulate water pollution. Along with the central pollution control board (CPCB), the Water Act establishes state pollution control boards (SPCB). Union territories do not have their own SPCBs; instead, the CPCB performs state board functions directly for the union territories. The boards are independent and cannot be compelled by any court in the country to allow such activity or industry that might be polluting in nature.

WATER POLLUTION CASE SUMMARIES:

Following are the landmark judgments relating to water pollution in the period 2004–05:

Neelanchal Griha Nirman Swabalambi Sahakari

Samity Ltd, Jamshedpur vs. State of Jharkhand and Ors: In a pair of companion cases, petitioners asked the High Court of Jharkhand to issue writs of mandamus to enable the completion of the dumping of slag on the banks of local rivers by TISCO. One petition asked the court to directly order TISCO to complete the dumping, and the other asked the court to order the SPCB, which had halted the dumping, to give permission to TISCO to complete the work. The court ruled against the petitioners on the grounds that since the issue was pending before the central and state PCBs, the court had no power to allow potentially environmentally harmful activity to be carried out by deciding that case. Whether TISCO completed its slag dumping or not would have to be a decision of the PCBs, the court had no say in the matter.

Smt. Bimla Varta vs. State of Jharkhand and Ors: Petitioner objected to the construction of a sulabh shauchalaya within the Dhanbad municipality, alleging that public nuisance will be caused and that there will be pollution. The High Court of Jharkhand issued a conditional ruling in favour of the municipality. The court said that the municipality could complete the construction of the sulabh shauchalaya, but the facility could be commissioned only after permission was obtained from the state pollution control board, and that the facility must be properly maintained so that it would not cause nuisance to the people of the locality and those who would pass along the adjacent road.

In both of the above cases we see a clear enunciation of the rule that the courts cannot override the ability of the central or state PCBs to independently monitor and prevent water pollution in the country as "[i]ssuance of any such direction would tend to defeat the very object of the Environment (Protection) Act and the Water (Prevention and Control of Pollution) Act."

V Elangovan vs. The Home Secretary, State of Tamil Nadu and Ors: Petitioner prayed for a writ of mandamus stopping the state from issuing permits to take out processions carrying large-sized idols made of plaster of paris and/or other chemicals, and immersing such idols in sea, rivers and other water resources anywhere in Tamil Nadu. Petitioners pointed out that the immersion of idols causes large-scale destruction of sea organisms and irreparable damage to the environment leading to ecological disaster. The High Court of Madras denied the petition on the grounds that immersing of all idols was already banned except for those made of pure clay, and that such idols were immersed in places notified by the government well in advance of the festival at a distance of 500m from the shore line as suggested by the pollution control board.

M. Joseph Rathnasamy vs. The Government of Tamil Nadu and Ors: Petitioners sought the quashing of the consent order for running a pharmaceutical manufacturing unit on the ground that the unit would require a huge amount of water for its operations, resulting in a lowering of the water table, thus negatively affecting agriculture in the area. The High Court of Madras ruled in favour of the petitioners, and since the subject factory was not yet in operation, ordered the state to not allow the factory to operate in the future.

Centre for DNA Fingerprinting and Diagnostic vs. A.P. Pollution Control Board and Anr: Petitioner, based in Hyderabad, questioned the legality and validity of the orders passed by the board as well as by the lower appeals court in having rejected its application for setting up of the laboratory for dry and wet operations. The petitioner claimed that the board had not considered all the evidence, especially a current Environmental Impact Assessment (EIA) report submitted by the NEERI, supporting petitioner's claim that none of its effluents would in any manner cause pollution. The petitioners also argued that they were not an industry and therefore unaffected by the water act. The board, basing its argument on an earlier EIA report, said that petitioner's activities would cause pollution. The Andhra Pradesh High Court ruled in favour of the petitioner and asked the board to reconsider its decision in light of the report submitted by the NEERI. But the court also rejected the petitioner's argument that the Water Act was limited to industrial operations. The court said that the Water Act applied to any activity, which was likely to have the effect of discharging effluent into a stream or well, or sewer or on land.

People Health and Development Corporation vs. State of Tamil Nadu and Ors: Petitioners asked for a writ directing the responsible authorities to close down all polluting tanneries in the area as these were functioning without proper authorisation, were causing severe air, water and soil pollution, and posed a danger to nearby agricultural and residential zones, as well as to local and regional water sources. Thereby, several

tanneries filed affidavits stating that they had developed effluent treatment plants in an effort to internalise the pollution, and that they were operating with the approval of the Tamil Nadu pollution control board.

The board said that although the tanneries had their own effluent treatment plants, they still discharged effluents directly into the Kalingarayan canal and the Cauvery river, polluting both the surface water and the ground water to such an extent that the water had now become unfit for both irrigation and drinking purposes. The court held that since required reverse osmosis systems had not been implemented, the effluent discharge system could not be said to be under control.

The court pointed out that despite their claims of adherence to the norms set by the board, the tanneries had not fulfilled the standard prescribed as per the provisions of the Water Act, rules and the guidelines issued by the Supreme Court. The court accordingly directed the units to adopt and implement suitable technologies which were required for curbing the environmental hazard, and granted them a reasonable amount of time to do so.

AIR POLLUTION

"Air pollution" is a broad term used to define the modification of the natural characteristics of the atmosphere by any chemical, physical, or biological agent. According to a Centre for Science and Environment study, in spite of a 26% reduction in air pollution levels in Delhi over the past 10 years with the introduction of better fuels, there has been a reported 21.3% increase in lung disease cases, a more than 20% increase in asthma attacks and a 25% rise in the number of heart patients. Over 7 percent of males in the city suffer some form of respiratory disease due to air pollution.

Moreover, though big cities in India do not figure among the list of top ten most polluted cities in the world, small cities like Lucknow, Faridabad, Raipur, etc do. This is a cause of concern, since this distinctly indicates that development in India has the least consideration towards sustainability and is still following a pattern where the pollution is first created and then there is a scramble to make amends for it.

Relevant legal provisions and regulatory bodies:

Section 7 of the Environment (Protection) Act: Overarching law that can be used to proceed against any type of environmental pollution, as it forbids the emission or discharge of any kind of environmental pollutants in excess of what has been permitted.

Section 278 of the Indian Penal Code makes it a punishable offence for any person to voluntarily violate the atmosphere, so as to make it noxious. The pollution need not be actually dangerous for this section to apply; it need only be a source of mere irritation and annoyance.

Air (Prevention and Control of Pollution) Act, 1981: This Act is aimed at controlling air pollution due to industrial activity. The Act confers additional powers on the central and state PCBs—established by the Water Act—to enable them to regulate air pollution as well.

The main limitation of this Act is that its provisions only apply in specified air pollution control areas (APCAs), as defined by the state government and the state pollution control board. Since most backward or rural areas are not identified as APCAs, polluting industries cannot be regulated by the use of the Air Act in such areas. The Air Act is further limited because only those industries can be regulated that are listed as polluting industries in the schedule of the Act. This is wholly inadequate since even industries that do not normally generate pollutants, can become polluting when operated in an inefficient and incompetent manner (some of these limitations can be overcome by bringing charges under either section 7 of the Environment Act or section 278 of the IPC).

AIR POLLUTION CASE SUMMARIES

The following are the landmark judgments relating to air pollution in the period 2004–2005:

Rajesh Kumar Ramesh Chandra Rao vs. Gujarat Pollution Control Board: Petitioner sought a direction against the Gujarat pollution control board to initiate appropriate proceedings against the responsible officers of the board for not performing their statutory duties under the provisions of the Air Act and the Environment (Protection) Amendment Rules, 2001.

The petitioner asked that the board be ordered to prohibit all brick manufacturers from manufacturing bricks by using moving chimney bull's trench kilns, as contemplated under the provisions of the Environment (Protection) Amendment Rules. The Gujarat High Court ruled for the petitioner and criticised the board for its lapses, issuing a warning that intentionally omitting to prosecute polluting units could be interpreted by the court as participating in the crime of pollution. The court directed the board to take a decision as re-

gards the prosecution of the units in cases where offences under the Air Act were being committed.

Kalinga Carbonates Ltd and Another vs. Orissa State Prevention and Control of Pollution Board: The managing director of the petitioner company had been prosecuted by the board under Section 37(1) of the Air Act for operating an industrial unit without obtaining prior consent and clearance of the board. Petitioner argued that unless the board sanction was made clear, the complaint lodged by the assistant law officer was not maintainable. The High Court of Orissa however made it clear that, when the board itself is the complainant, the secretary or assistant secretary may nominate any officer of the board and such nomination would not amount to sub-delegation of power. Section 49(1) of the Air Act was interpreted as meaning that when the board itself is the complainant, no specific authorisation or resolution of the board authorising a particular person to file the complaint is necessary.

Deepak Nitrite Ltd Vs. State of Gujarat and Ors: The case arose on appeal out of a decision of the Gujarat High Court which had directed industries not in compliance with the mandates and guidelines issued by the Gujarat PCB to pay one percent of their maximum annual turnover of the preceding three years towards compensation and betterment of environment within a stipulated time.

The Supreme Court ruled that although it was indisputable that the industrial units in question had not conformed to the standards prescribed by the Gujarat PCB, mere violation of the letter of the law did not necessarily mean that there had been environmental degradation. Basing its ruling on the "polluter pays" principle, the Court said that the quantum of damages had to be proportional to the environmental damage caused, and thus, the pollution caused by a unit would need to be measured before a penalty could be imposed. The Supreme Court directed the High Court to investigate further into the damage caused by each unit, before levying a fine.

Residents of Sanjay Nagar and Ors vs. State of Rajasthan and Ors: Petitioners asked the court to order closure of various slaughter houses located in Sanjay Nagar area, and to direct the Rajasthan PCB to take preventive steps because slaughterhouses create pollution.

The High Court of Rajasthan allowed the writ and directed that all illegal slaughterhouses and five godowns, stocking skins illegally, be closed immediately and directed the state to file a report after implementation of the closure order.

Pollution Control Board vs. Jadav Shop Works and Ors: On an appeal from a judgment of a single judge quashing a closure notice issued by the board. The Guwahati High Court dismissed the appeal, holding that for an industry to come under the purview of section 21 of the Air Act, and before exercising of powers under section 31A, the board has to reach a conclusion that the industry is emitting air pollutants. But as in the case no such finding had been arrived at before issuance of closure notice, the closure notice issued by the board was invalid as a matter of law.

PUBLIC NUISANCE

The term "nuisance" as used in law is not capable of exact definition. However, we can use the working definition that public nuisances adversely affect the general public or a considerable portion of it. Since the environment consists of several shared resources, any damage caused to it by pollution is likely to affect a large number of people, and as such, environmental pollution may be considered a public nuisance.

Relevant legal provisions and regulatory bodies:

Section 268 of the Indian Penal Code defines public nuisance as any act or omission which "causes a common injury, danger or annoyance to the public – or to the people in general who dwell or occupy property in the vicinity, thus causing injury, obstruction or annoyance to persons who may have occasion to use a public right."

Chapter X-B of the Criminal Procedure Code provides for fast resolution of cases in which there is imminent danger to public interest, including cases of environmental pollution.

Section 133 of the CrPC empowers a magistrate to issue an injunction requiring the person causing the nuisance to cease and desist from carrying on the activity causing pollution.

Where jurisdictions may overlap, the powers of the magistrate complement, rather than interfere, with the powers of the central and state PCBs established under the Air and Water Acts (see M/s Nagarjuna Paper Mills Ltd vs. SDM & R.D. Officer Sangareddy, 1987 Cr. L.J. 2071). This allows the magistrate to operate at a local level, dealing with minor cases of pollution that may escape the notice of the pollution control boards.

Special or Local Laws: injured parties can also seek remedies under special or local laws, as per the Supreme Court's judgment in Kachrulal Bhagirath Agrawal and others vs. State of Maharastra and others.

PUBLIC NUISANCE CASE SUMMARIES:

The following are the landmark judgments relating to public nuisance in the period 2004–2005:

Ram Pal vs. State of Punjab and Ors: An appeal from an order of the trial court directing the petitioners to stop the operation of a Hadda Rori (a spoil heap, traditionally found on the outskirts of most villages and towns in Punjab & Haryana, where animal carcasses are dumped, and where the skinning and collection of bones from the carcasses provided the primary means of livelihood for the lowest castes) and remove all the carcasses/animal skins/bones and any other material causing foul smell in the vicinity of G T road/national highway. The plaintiffs pleaded that another unit, situated opposite the applicant's unit, ran the same business but no action had been taken against it. The High Court of Punjab and Haryana dismissed the appeal stating that if one person has committed a wrong, another person does not acquire the right to commit a similar wrong.

Bhopal Prasad Deo vs. State of Jharkhand and Anr: The question before the court was whether a poultry farm run from private premises was a public nuisance, as defined under section 133 (1) (b) of the criminal procedure code. The court said that the question could be decided only on factual evidence and after taking the view of the community, which had not been done in the present case, and directed the responsible officials to do so.

Kachrulal Bhagirath Agrawal and others vs. State of Maharastra and others: Appeal from an order of the Bombay High Court upholding an order restricting the appellants from keeping, storing and transporting chillies in a warehouse because such actions were injurious to the health and physical comfort of the local community. The Supreme Court dismissed the appeal, but also cautioned that the right to free and full enjoyment of one's property cannot be interfered with, except on clear and absolute proof that such use is producing legal damage or harm. As such, a lawful and necessary trade ought not to be interfered with unless it is proved to be injurious to the health or physical comfort of the community.

NOISE POLLUTION

Noise pollution can be defined as the disturbance produced in our environment by various kinds of undesirable sounds. Excessive exposure to noise can adversely affect human health.

Relevant legal provisions and regulatory bodies

Air (Prevention and Control of Pollution) Act, 1981, – Section 2(a), as amended in 1987, added noise to the definition of "air pollutant," thus enabling the pollution control boards to regulate noise under the Act.

Environment (Protection) Act – Section 6(2)(b) empowers the central government to make rules regulating the maximum allowable limits of noise in different areas.

Central Motor Vehicle Rules, 1989 contain provisions for reducing vehicular noise pollution.

Rule 119 bans the use of multi-toned horns or those that make a shrill, loud or alarming noise.

Rule 120 requires all motor vehicles to be fitted with silencers and the rules also specify the maximum permissible noise levels for different categories of motor vehicles.

Noise Pollution (Regulation and Control) Rules, 2000 were framed to maintain ambient air quality standards by regulating noise pollution. Section 2 (c) of the rules provides for an officer authorised by the central or state government who will be responsible for enforcing the law relating to noise pollution.

NOISE POLLUTION CASE SUMMARIES

The following are the landmark judgments relating to noise pollution in the period 2004–2005:

K N Neelamandan Namboodiri and Ors, etc vs. State of Kerala and Ors: A consolidated case where the Supreme Court ruled against three separate petitioners who had questioned the justification of police officials initiating prosecution against state carriage operators for using air horns. The Court ruled that section 3 of the Environmental (Protection) Act, 1986, empowers the central and state governments, through the appropriate officials, to take necessary measures to protect and improve the quality of the environment by prevention, control and abatement of noise pollution. The Court added that a particular type of horn, such as the air horns at issues in these cases, need not be explicitly forbidden under the Motor Vehicles Act, 1988, for it

to come within the ambit of the same.

Jackson and Company vs. Union of India and Manoj Gupta vs. Central Pollution Control Board: Petitioners, who were manufacturers of diesel generator sets, asked the Delhi High Court to quash rule 2(c) of the Environmental Protection Second Amendment Rules, 2000, which made it mandatory for manufacturers to provide the sets with integral acoustic enclosure at the manufacturing stage. Petitioners argued that such enclosures were the obligation of the consumer. The Court rejected the petition.

Noise Pollution-- Implementation of the Laws for Restricting Use of Loudspeakers and High Volume Producing Sound Systems: Petitioner sought better implementation of noise pollution laws. The Supreme Court seized the opportunity to review noise pollution laws in India along with the harmful effects of noise pollution, laying special emphasis on the pollution, noise or otherwise, caused by the use of firecrackers. The Court stated that fireworks were a special case as their use led to air pollution both in the form of noise and smoke. The excessive use of fireworks in India, on religious festivals especially, had now become a public hazard. No one can justify noise pollution by claiming that they have a fundamental right to speech and expression. This exercise of this right can be reasonably restricted when it infringes upon other fundamental rights, as is the case in the use of fireworks. The Court also decided that there would be no relaxation of the rules laid down relating to firecracker use for religious reasons. Permitting such relaxations would make the law difficult to implement.

The Court banned the use of sound emitting firecrackers from 10:00 pm to 6:00 am. Moving beyond the specifics of the case, the Court also issued direction regarding the use of horns, instruments, privately owned sound systems and the noise level limit at public places. The states were directed to make provision for seizure and confiscation of loudspeakers, amplifiers and such other equipments as were found to be creating noise beyond the permissible limits. The court recommended noise pollution awareness programmes in educational institutions so as to reduce the menace of noise pollution in the future.

Forum, Prevention of Environmental and Sound Pollution vs. Union of India (UOI) and another (2005): Appeal from the High Court of Kerala which had ruled in favour of the petitioners. Persons who wished to use loudspeakers for, among other things, broadcasting of religious sermons, bhajans, etc., challenged the constitutional validity of rule 5(3) of the Noise Pollution (Regulation and Control) Rules, claiming that it was violative of Article 21 of the Constitution and went against the judgment of the apex court in In Re: Noise Pollution.

The high court cited several religious texts to make the point that forced audiences by the use of loudspeakers are not encouraged by the major religions in India. The Supreme Court upheld the high court's decision and also instructed the state to specify in advance the number and particulars of the days on which exemptions would be operative, and not to grant exemptions in silent zone areas.

HAZARDOUS INDUSTRIES

For India's development model to be sustainable, industries using hazardous substances, or releasing hazardous wastes must have proper facilities for storage, transport, disposal or recycling of these chemical hazards. Apart from hazardous wastes generated by our domestic industries, a regulatory structure for imported wastes is urgently needed. Developing countries such as India, with generally low environmental awareness and with weak laws and/or inefficient enforcement mechanisms, are increasingly becoming 'safe havens' where hazardous waste is dumped or where hazardous industries relocate themselves from countries with strict regulations.

A recent controversy involved the extremely dangerous ship breaking industry. Alang, in Gujarat, is the world's largest ship-breaking facility where half of the world's ships are sent after retirement for dismantling. While the industry is extremely profitable for the owners, it causes severe environmental pollution and is responsible for grave human rights violations. Ships laden with asbestos and other toxic chemicals are dumped on India's shores, often in clear violation of international laws and norms, and the workers at Alang suffer from innumerable diseases while dismantling them. An associated human rights issue is the use of children as workers in highly dangerous industries.

Relevant legal provisions and regulatory bodies:

Hazardous Waste (Management and Handling) Rules, 1989 aim at regulating the use of, trade in, disposal and import of hazardous substances and making the state PCBs the main regulatory bodies where hazardous wastes are concerned.

ENVIRONMENT PROTECTION ACT:
Section 2 (e) defines hazardous substances.
Section 8 requires everyone handling hazardous substances to comply with whatever procedure or safeguards that have been prescribed by the responsible authorities.

HAZARDOUS INDUSTRIES CASE SUMMARIES

Following are the landmark judgments relating to hazardous industries in the period 2004–2005:

Manbodh Mahto vs. Union of India and Ors: Petitioner asked the High Court of Jharkhand to restrain a contractor from operating a hot-mix plant because such plants were classified as being a hazardous industry as per the expert committee of the central PCB. The court denied the petition, ruling that it was not for the court or the expert committee to decide if a particular plant is polluting, and since the state PCB had no objection to the plant, its operation was allowed.

MC Mehta vs. Union of India: Public interest litigation regarding the existence of unauthorised industrial activity in residential areas of Delhi. The Supreme Court issued various directions to the central government to finalise a list of permissible household industries falling in category 'A' within a period of three months and allot industrial plots to the 6,000 industrial units on the waiting list within one year, to close all industrial units except household industry in residential/non conforming areas in Delhi, to disconnect water and electricity connections of the industrial units found operating after the due date of closure, and in case of continuance of industrial activity, to seal premises within a period of one month. The court also ordered the government to appoint a monitoring committee to oversee the implementation of the aforesaid directions.

Soma vs. Geologist: Petitioners challenged conditions imposed by the state geologist while granting quarrying permit. The High Court of Kerala denied the petitioners' prayer, holding that the conditions imposed by the geologist are valid, as industries driven by the profit motive do not fit within the framework of sustainable development. The court noted that the concept of sustainable development is now ingrained in environmental jurisprudence, in India and internationally.

Dindigul Spinners vs. Tamil Nadu: Petitioners prayed for the quashing of the GOs that categorised polluting industries into categories, and asked the court to direct the state PCB to institute a transparent system as the current system was arbitrary. The court ruled against the petitioners, holding that Tamil Nadu's categorisation scheme was based on polluting potential, and that the policy was in no way arbitrary.

RADIATION

Radiation of the type that needs to be regulated causes ionizations in the molecules of living cells. This results in certain abnormal reactions within the cells, which may cause damage at the genetic level. Damage caused by high doses of radiation is not easily repairable by the body, and the cells either die or change permanently. These changed cells are responsible for the creation of abnormal, cancerous cells. High doses of radiation may also cause tissue failure, immune system failure, nausea, diarrhoea, vascular failure, and death.

Relevant legal provisions and regulatory bodies

Atomic Energy Act, 1962: The primary legislation covering all aspects of radiation.

Section 17 enables the central government to make rules as required in order to protect the health of the people whose work involves exposure to radiation and radioactive substances, as well as to protect the environment by ensuring safe disposal of all radioactive substances.

Sections 3(c) and 3(d) are controversial sections, allowing the central government to keep the work done relating to atomic energy, research and production, as classified information. This discretionary power of the government makes it difficult for interested people to access information, even though the work could be affecting their lives and health directly.

Radiation Protection Rules, 1971 make several safety provisions. Section 12 instructs employers to have a radiological safety officer with the power to investigate and report on any activity resulting in harmful or unsafe radiation.

Atomic energy regulatory board (AERB) was established in 1983 with the objective of ensuring that the presence of ionizing radiation and the use of nuclear energy in India do not cause unacceptable impact on the health of workers, members of the public and the environment. The board derives its regulatory powers from the provisions of the Atomic Energy Act.

RADIATION CASE SUMMARIES

Following are the landmark judgments relating to Radiation in the period 2004–2005:

Citizens for a Just Society vs. Union of India and Ors: In the wake of the Indian Ocean tsunami, petitioners claimed that the Trombay nuclear facilities were located in an earthquake and tsunami prone zone in violation of safety norms, and that the respondents had been negligent in implementing safety provisions, resulting in large-scale pollution of the water and soil in the area. Petitioners demanded the shifting of the strategic application activity out of Trombay, stopping of fuel reprocessing activity, and establishment of an independent agency to monitor Thane creek. The government responded that the tsunami had no effect on the nuclear facilities at Kalpakkam and the built-in safety features and procedures had worked as per expectations, and so the same could be expected of the Trombay facility. The government denied the allegations that radioactive contamination was spreading in the food chain, and that Thane creek had become highly radioactive because of nuclear effluents.

The government also submitted that the earthquake potential of the area had been taken into consideration during construction, and that appropriate safety measures had been taken. The court held that the explanations contained in the government's reply affidavit were sufficient and that it did not feel it would be appropriate to probe the matter any further. The petition was dismissed.

People's Union for Civil Liberties and Another. vs. Union of India (UOI) and Ors: Appeal to the Supreme Court from an order of the Bombay High Court dismissing appellants' writ application claiming right of access to copies of AERB reports to get information on safety defects and weaknesses. The petitioners challenged section 18 of the Atomic Energy Act as ultra vires Constitution of India because section 18 conferred "unguided, uncanalised or wide power in exercise of discretion in notifying a document as secret document." The Supreme Court dismissed the appeal holding that the situation did not warrant any restriction on the right of the government to classify information as secret in the interest of the security of the State.

WILDLIFE AND FORESTS

Forest conservation and wildlife protection are closely correlated, as any human activity affecting forestland must necessarily have an impact on any form of life residing in those forests. Similarly, any plan or agenda to conserve wildlife must necessarily involve the conservation of their most common natural habitat, forests. The Constitution of India asks citizens to "protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures" as a fundamental duty.

Relevant legal provisions and regulatory bodies

Indian Forest Act, 1927

Constitution of India, Article 48-A mandates that the state shall endeavour to protect and improve the environment and safeguard the forest and wildlife of the country.

Forest (Conservation) Act, 1980 restrains state governments from breaking up or clearing up of any forestland or portion thereof for non-forest purposes, such as cultivation, or any purpose other than reforestation, without permission from the centre.

Wildlife (Protection) Act of 1972 provides for the protection of wild animals, birds and plants. Barring a few well-defined special cases (e.g., the killing of vermin, as defined under schedule V of the Act) it bans the hunting of and trade in all wild animals and birds. Citizens are encouraged to protect wildlife by making offences under this Act cognizable and non-bailable, thus allowing a witness to an offence to arrest the offender.

The Wildlife Protection Act directs states to constitute a wildlife advisory board, director of wildlife preservation, and a chief wildlife warden. The duties of the wildlife advisory board include establishment and operation of sanctuaries, national parks and closed areas and formulation of the State's preservation policy.

WILDLIFE AND FORESTS CASE SUMMARIES:

Following are the landmark judgments relating to wildlife and forest conservation in the period 2004–2005:

Nilamber Sahu & Anr. vs. State of Jharkhand & Ors: Jharkhand terminated mining leases in an area that had been notified as a sanctuary. Petitioners asked the High Court of Jharkhand to set aside the state's order on the grounds that the leases had been granted before the area was declared a sanctuary. The court said that on balance, environmental protection carried more weight in this instance and ruled against the petitioners.

Pu. C. Thangmma vs. The State of Mizoram & Ors:

Petitioner alleged that high-profile individuals were killing rare wild animals, and the chief secretary, forest department, had been directed by the chief minister not to pursue the matter. The Guwahati High Court ruled that the chief secretary was duty bound to follow the law and could not refuse to perform his duties.

Surendra Purty & 2 Ors. vs. State of Orissa & 5 Ors: Petitioners asked the High Court of Orissa to order the state to sanction them land that they had farmed on for a long time and from which they were now being evicted due to the land being declared part of a protected forest. The court refused to take a stand on the matter and did not admit the petition.

Essar Oil Ltd vs. Halar Utkarsh Samiti and Ors.: Appeal via special leave petition filed by Essar against the Gujarat High Court division bench order of July 2000, cancelling the clearances granted for laying pipelines under sections 29 and 33 of the Wildlife Protection Act, 1972, through the Marine national park and sanctuary. The Supreme Court ruled in favour of Essar, holding that there being no prior presumption of destruction of wild life in the laying of pipelines, it could not be said that invariable consequence of laying pipelines through ecologically sensitive areas would be destruction or removal of wild life. The court noted that if the damage is irreversible, it amounts to destruction and no permission may be granted, but here, according to the Court, the evidence on record indicated that the state government and Essar had taken precautions so that the pipeline route caused minimal and reversible damage to the wild life.

State of Kerala and Anr. vs. M/S Popular Estates and Anr: Appeal by the state of Kerala against a judgment of Kerala High Court setting aside the judgment of the forest tribunal and requiring the state to hand over possession of a large area of land to respondent developer. The Supreme Court restored the original applications before the forest tribunal, holding that the finding of the forest tribunal on the issue of the jurisdiction is correct and needs to be upheld, and directed the state to decide the claims of the respondents in accordance with the law in the light of the evidence already before the forest tribunal.

Kamla Kant Pandey Vs. Prabhagiya Van Adhikari and Ors: Petitioner challenged the cancellation of a mining lease granted to them. The High Court of Allahabad, considering whether the state is justified in cancelling the mining lease granted to the petitioner, elaborated on the power of the state in granting mining operations in wild life sanctuary areas. The court held that unless and until the boundaries of the wildlife sanctuary are defined, the mining cannot continue, and directed the state to ascertain the boundaries within six weeks. The court further ruled that if the mining area falls within the boundaries, the petitioner would need to get permission from the state's chief wildlife warden before commencing operations.

T.N. Godavarman Thirumalpad vs. Union of India and Ors: Appellants challenged the validity of the recommendations made by central empowered committee (CEC) in its report dated March 20, 2006. They objected to the directions given by the CEC to destroy all the fish tanks and to prohibit pisciculture in the Kolleru lake sanctuary. The appellants argued that they had made huge investments in the area and that the mud bunds set up with the collector's permission were a part of the traditional methods of fishing. They urged that a balance must be struck between preservation of the lake and livelihood of the people depending on aquaculture and pisciculture. The court upheld the recommendations of the CEC report and directed the state government and its officers to implement the directions of CEC, to stop the use or transportation of inputs for pisciculture and to destroy all fish tanks in the area starting from April 20.

State of Tamil Nadu Vs. Kaypee Industrial Chemicals (P) Ltd. – The petitioner, the state of Tamil Nadu, appealed from the ruling by a single judge that allowed respondent industrial concern to continue manufacturing lime using chunks of dead coral collected by local fisher folk. The petitioner contended that all corals were included in the Schedule I, part IV A of the Wildlife (Protection) Act, and should be considered wild life.

The court held that the chunks being collected were the outer skeletons of the dead marine animal that built coral reefs, and as such, cannot be considered as "wildlife" or "wild animal" as defined in the Act. The court further ruled that since Kaypee did not mine the corals, nor did it seem from the evidence that they caused destruction of any habitat, their activities could not be said to be violative of the provisions of the Wild Life (Protection) Act. Thus, as long as Kaypee continued to buy the lifeless corals, and did not damage the living corals, they were carrying on a legitimate business.

URBAN PLANNING

The various judgments expanding the scope of the right to life by reading in it the right to live in a clean city,1 the right to enjoy a decent environment and a reasonable residence,2 as well as the right to live in a well planned hygienic environment3 have called attention to the importance of urban planning. Since urban planning has a direct long-term effect on people, they are encouraged to participate in the planning process by allowing them to make objections to the first draft of the development plan released by the planning authority. Affected residents also have the right of approaching the court in order to enforce the implementation of a plan, as the declarations in the plan become mandatory obligations once it has been sanctioned and finalised by the state government.

Relevant legal provisions and regulatory bodies

Much of the law relating to urban planning is state legislation, as the states are considered competent to make laws on such subjects. Central legislation on town planning, for Delhi and for the union territories, is also advisory and recommendatory in nature. State governments formulate town-planning laws with the help of local bodies. The planning authorities of each town are responsible for creating the town planning acts, for preparing development plans, releasing them for review by the general public and then implementing them. They are given broad discretionary powers with respect to town planning and decide the allocation of land for industrial, residential, or public purposes such as hospitals, parks and schools. Once a developmental plan has been prepared and published in accordance with the law, property owners of an area can only use their property in accordance with and in conformity with the provisions of the applicable developmental plan.

URBAN PLANNING CASE SUMMARIES

Judgments relating to Urban Planning in the period 2004–2005:

"Brajesh Sharan Sharma vs. The Patna Regional Development Authority and Ors: Petitioner complained about the pollution and other problems due to unauthorised construction. The High Court of Patna ruled in favour of the petitioner and expressed concern about the irregularities & illegalities in the urban planning. The court appointed a commission for proper inquiry into the matter with professional help.

CS Kuppuraj and Ors. vs. The State of Tamil Nadu, Ramaniyam Real Estates Ltd. vs. The Union of India and Foundation for Fair Practices in Property Development vs. The Union of India: Ruling in these consolidated cases, the High Court of Madras held that planning the location of new government office buildings is a policy decision that must be left entirely to the appropriate government entity. But the court also said that the government couldn't create and enforce restrictions with retrospective effect.

Gajanand Sharma vs. State of Jharkhand and Ors: Petitioner filed a PIL seeking direction to opposite parties to ensure that no sewerage or effluent is drained to the public pathway in a residential area. A small-scale industrial unit that manufactured soap filed a parallel writ challenging the notice issued by the pollution control board, on the ground that the industrial unit was instituted first and the residential area came up later. The High Court of Jharkhand dismissed the writ filed by the soap-manufacturer, allowed the PIL and ordered the manufacturer to restrain from operation till the requisite pollution control devices are adopted and necessary consent is obtained.

— November-December 2006

Judicial Assault Against Poor

If recent judgments on Narmada, slum demolitions, evictions of hawkers and rickshaw-pullers are any indication, the judiciary, instead of upholding the rights of the poor, is spearheading the assault against them. Violated and unable to take it anymore, some are taking to violence.

PRASHANT BHUSHAN

The Supreme Court of India, till not so long ago, used to wax eloquent about the Fundamental right to life and liberty guaranteed by Article 21 of the Constitution to include all that it takes to lead a decent and dignified life. They thus held that the right to life includes the right to food, the right to employment and the right to shelter: in other words, the right to all the basic necessities of life. That was in the roaring 80's when the court gave a series of path breaking judgments; Olga Tellis (where it held that even pavement dwellers have the right to resettlement and a right of hearing before they are evicted); the Asiad workers case, where it held that non payment of minimum wages to the workers violated their right to life; the Bandhua Mukti Morcha case, where it was held that workers cannot be kept in bondage because of loans they had taken from their employers; in Vishaka where while giving a liberal interpretation to sexual harassment of women in the workplace, they held that international covenants signed by India can be read into domestic law. A new tool of Public Interest Litigation was fashioned where anyone could invoke the jurisdiction of the courts even by writing a post card on behalf of the poor and disadvantaged who were too weak to approach the courts themselves. It seemed that a new era was dawn ing and that the courts were emerging as a new liberal instrument within the State to provide the poor some respite from the various excesses and assaults of the executive.

Alas, all that seems a distant dream now, given the recent role of the courts in not just failing to protect the rights of the poor that they had themselves declared not long ago, but in fact spearheading the massive assault on the poor, particularly since the era of economic liberalisation. This is happening in case after case, whether they are of the tribal oustees of the Narmada Dam, or the urban slum dwellers whose homes are being ruthlessly bulldozed without notice and without rehabilitation, on the orders of the court, or the urban hawkers and rickshaw pullers of Delhi and Mumbai who have been ordered to be removed from the streets again on the orders of the court. Roadside hawkers are being evicted on the orders of the courts (which will ensure that people will shop only in these shopping malls). All this is

being done, not only in violation of the rights of the poor declared by the courts, but also in violation of the policies for slum dwellers and hawkers which have been formulated by the governments. Sometimes these actions of the court seem to have the tacit and covert approval of the government (and the court is being used to do what a democratically accountable government cannot or dare not do), but occasionally they are against the will of the government. Let us examine a few of these cases.

In the main judgement of the Narmada Bachao Andolan case on the Sardar Sarovar Dam, the majority judges in the Supreme Court ruled in October 2000, that the project need not be reviewed, despite Justice Bharucha holding that a cost benefit analysis of the project had never been done, since even the environmental impact studies had not been done. While giving the go ahead for the project, the majority judges justified it by saying that the Narmada water disputes tribunal's award had given a very humane and land based rehabilitation package for the oustees of the project which must be implemented, and which will ensure that the oustees will be better off after their displacement and rehabilitation. They also ruled that the award that mandated that rehabilitation must precede submergence and displacement must be adhered to at all costs.

In 2002 however, the NBA went to court again against the permission to raise the height of the dam, when it was clear from the government's own records and reports that the oustees to be submerged at that level had not been rehabilitated. The court first adjoured the matter because of a difference of opinion between the judges hearing the case, and finally, Justice Kirpal, who had written the majority judgement in 2000, dismissed it by saying that NBA could not approach the court on behalf of the oustees, who had to come on their own after ventilating their grievance before the Grievance Redressal Authorities (GRA). The whole basis of PIL developed over the last 25 years, which allowed any public spirited person to approach the court on behalf of persons too weak to approach the courts themselves, was casually set at naught for these Narmada oustees. And, of course, the construction and submergence went on without rehabilitation.

In 2004, when permission was given to construct the dam to 110 metres, some of the affected oustees from two villages approached the apex court again after having gone through the motions of having first approached the geriatric and moribund GRA of Madhya Pradesh, which would either keep their grievances pending or dispose them off on the basis of the claims of the authorities, without bothering to get a field verification done. Two of the grievances of these oustees were, that the authorities and the GRA were not offering rehabilitation to the major sons of oustees and to those whose lands and houses would be temporarily submerged during the monsoon. The court finally ruled in 2005 that the temporarily affected oustees as well as the major sons were entitled for rehabilitation. However, again the construction was allowed to go on, resulting in the lands and homes of thousands of families getting submerged without rehabilitation.

In March 2006, the Narmada Control Authority gave permission for raising the height of the Dam to 122 metres, which would result in the submergence of another 15 thousand additional families. This, when Madhya Pradesh had not offered cultivable agricultural land to virtually anyone, and none of their rehabilitation sites were ready with the infrastructure of roads, water supply, electricity, and sanitation. It took more than a month long agitation and an indefinite fast by Medha Patkar for the prime minister to send a team of three ministers to the valley to verify the facts. The team made a hurried visit to 7-8 rehabilitation and submergence sites and gave a scathing report pointing out that virtually none of the oustees had been resettled and none of the rehabilitation sites were even ready to house the oustees. In the Narmada review committee, consisting of the chief ministers of the four states and union ministers of water resources and environment, there was a split on party lines, with the BJP chief ministers voting to continue construction and the three UPA members voting to stop it. The matter was referred to the prime minister who had been designated by the Supreme Court as the final authority in such a situation. Manmohan Singh however preferred to duck his responsibility and passed the buck to the Supreme Court which was due to hear a petition by the affected oustees a few days later.

The Supreme Court, which was originally due to hear the matter on the April thee, had earlier postponed it to April 17, citing the non availability of the bench to hear the matter. This was done despite being told that the ongoing construction would submerge an additional 150 families by every day of construction. On April 17, the report of the group of ministers which

had reported the gross and total failure of rehabilitation, was placed before the court which again adjourned the case by two weeks, giving the states more time to reply. Meanwhile, the construction was allowed to go on.

On May one, the court heard detailed arguments after the counter affidavits of the states had been filed. On behalf of the oustees, it was pointed out that it was the admitted position that virtually no oustee had been provided land for land. More than 90 per cent of those entitled for land had been given only cash compensation. And more than 90 per cent of these had been so far given only half of their cash entitlement with which they could not even buy half hectare of land despite being entitled for two hectares. The Award mandated that rehabilitation had to be completed a year before submergence. It was also admitted by Madhya Pradesh government in its affidavit that many rehabilitation sites meant for these oustees were incomplete and lacked basic infrastructure. It was also pointed out to the court, that Gujarat's claim that the additional height of the dam was necessary for providing additional water to the drought prone regions of Gujarat was bogus, since Gujarat was being able to use only 10 per cent of the water already available from the existing height of Sardar Sarovar on account of the hopelessly incomplete canals and water pipelines.

The court first adjourned the case further to May eight, and then observed that since facts were disputed, they would like to have the report of the three member committee, formed by the prime minister and headed by former CAG, V N Shunglu. This committee is supposed to give a report on the state of resettlement of the oustees to the prime minister by the end of June. The court therefore adjourned the matter to July 10, after which they would decide whether the construction of the dam was legal or not. Meanwhile, the construction would continue and be completed by the end of June. In other words, after the dam was completed and the oustees submerged, the court would decide whether the construction was legal or not! This, after the admission Madhya Pradesh government that many of the rehabilitation sites were not ready, and after the scathing report of the group of ministers. The court's behaviour in first refusing to hear the matter, then repeatedly adjourning it, then allowing the construction to be completed on the specious ground that they needed the report of the Shunglu Committee, clearly demonstrated a total lack of sensitivity to the oustees and the complete subordination of their rights to the commercial interests of those industrialists led by Narendra Modi who are eyeing the Narmada waters for their industries, water parks and golf courses. The gap between the rhetoric and the actions of the court could not be more yawning.

Meanwhile, as the Narmada oustees were being submerged without rehabilitation, a massive programme of urban displacement of slum dwellers without rehabilitation was being carried out in Delhi and Bombay, also on the orders of the high courts. Sometimes on the applications of upper middle class colonies, sometimes on their own, the courts have been issuing a spate of orders for clearing slums by bulldozing the jhuggis on the ground that they are on public land. Some of this is being done with the tacit approval of the government, such as the slums on the banks of the Yamuna in Delhi which are being cleared for making way for the constructions for the commonwealth games. But elsewhere the demolitions are being ordered despite the government saying that the slum dwellers are entitled for rehabilitation on the government's own policy and that right now they do not have the land to rehabilitate them. Instead of stopping the demolitions in such circumstances, the Delhi High Court has ordered the demolitions to continue. And all this, without even issuing notices to the slum dwellers, in violation of the principles of natural justice.

The matter was taken to the Supreme Court, where it was pointed out that the High Court's orders were in violation of at least two rights of the slum dwellers, which had been reiterated by the courts in a series of judgements of the '80s and '90s, starting with the pavement dwellers case of Bombay in 1984, where the apex court had held that poor persons occupying public pavements had a right to be heard before eviction and if they had been there for a considerable time, they had a right to be given alternative places, prior to their eviction. However, ignoring the jurisprudence developed over two decades by it, the court dismissed the petitions and orally observed that nobody asked these persons to come to Delhi, if they could not afford housing here, and that they have no right to occupy public land. This was not all. The Court's relentless assaults on the poor continued with the Supreme Court ordering the eviction of Hawkers from the streets of Bombay and Delhi. Again, turning their backs on Constitution bench judgements of the court that hawkers have a fundamen-

tal right to hawk on the streets, which could however be regulated, the court now observed that streets exist primarily for traffic. They thus ordered the municipality and the police to remove the "unlicenced hawkers" from the streets of Delhi, all this again without any notice or hearing to the hawkers. This effectively meant that almost all the more than 1.5 lakh hawkers would be placed at the mercy of the authorities, since less than three per cent had been given licences.

More recently, the Delhi High Court has ordered the removal of rickshaws from the Chandni Chowk area, ostensively to pave the way for CNG buses. This order will not only deprive tens of thousands of rickshaw pullers of a harmless and environmentally friendly source of livelihood, it will also cause enormous inconvenience to tens of thousands of commuters who use that mode of transport.

The country today is living through a phase where the country's billionaires are growing as rapidly as farmers suicides in the countryside; where opulent shopping malls, commercial complexes and futuristic IT cities are coming up on land which the poor are being forced to vacate. Thus, the poor are being deprived of the only real resources that they have, land, and are being made homeless and destitute in order to feed the greed of the wealthy. All this is being accomplished with the help of the courts, with the courts often leading the assault. This has bred and is continuing to breed enormous resentment among the poor and the destitute. Feeling helpless and abandoned, nay violated, by every organ of the State, particularly the judiciary, many are committing suicides, but some are taking to violence. That explains the growing cadres of the maoists who now control many districts and even states like Chhattisgarh. The government and the ruling establishment thinks that they can deal with this menace by strong-arm military methods. That explains why the government relies more and more on the advice of former policemen and why there is a talk of using the army and air force against the maoists. Tribals in Chhattisgarh are being forced to join a mercenary army funded by the State by the name of Salva Judum to fight the maoists. But all this will breed more maoists. No insurrection bred out of desperation can be quelled by strongarm tactics. The very tactics breed more misery and desperation and will push more people to the maoists.

Unless urgent steps are taken to correct the course that the elite establishment of this country is embarked upon, we will soon have an insurgency on our hands that will be impossible to control. Then, when the history of the country's descent towards violence and chaos is written, the judiciary of the country can claim pride of place among those who speeded up this process.

— June-July 2006

Magic Seeds

While the government is trying its best to make us believe that the patent regime will begin another boom in agriculture, a solid mass of protests by NGOs and civil society groups is highlighting the cruelty and negative impacts on farm sector and bio-diversity.

HARSH DOBHAL

Chipko movement hit the headlines in the 1970s and now it is written in golden letters of ecological movements across the globe. For the world it is part of memory and nostalgia, but not for the people of Garhwal. They still derive lessons from it and continue to better their lives by adding to the prevailing ecological wisdom by the day.

Chipko lives on - thriving and pulsating, challenging and sustaining. The men and women who once hugged trees to save them from commercial felling, continue their struggle to save nature and its children, local diversity and culture. The slogan,

"Kya hain jangal ke upkar:
pani, mitti aur bayar,
ye hain jeene ke aadhar

What do forests bear:
water, soil and air;
these are the basis for life

that reverberated in the villeys of Garhwal Himalayas for the world to take notice in the 1970s, is still echoing 30 years on, in the Hewalghati valley of Tehri Garhwal. This time in the form of the ***Beej Bachao Andolan*** (Save the Seeds Movement). After the so-called success of the green revolution, High Yielding Variety (HYV) seeds were being introduced all over the country and cash-crop driven agriculture was destroying traditional farming.

Crop yields of the HYV started becoming less in Garhwal, while soil fertility was declining and dependence on toxic chemicals was increasing. The ecosystem was also severely damaged. As a result, Chipko activist and a local farmer, Vijay Jardhari, and other activists from Jardhargaon and nearby areas of Tehri Garhwal, formed the Beej Bachao Abhiyan, later re-named as Beej Bachao Andolan (BBA), to revive traditional farming methods and rejuvenate agricultural diversity. The aim was to create awareness about 'modern but destructive' agriculture practices, search and conserve indigenous seeds and promote traditional and sustainable farming. In the beginning, like others, former Chipko activists from Henwalghati also used high yielding seeds in the eighties. Having reaped bumper crops in the beginning,

they soon realised that productivity was declining and more and more chemicals and fertilizers were needed to sustain the yield. "As we understood the problem with the HYV crops, we wondered where the traditional seeds had vanished? We realised that what we had achieved through Chipko, was going down the drain through new technologies in agriculture. This realisation led to the birth of BBA," says Jardhari.

"It was an easy choice to discontinue the cultivation of chemical-dependent seeds, but the challenge was to convince other farmers. We had several meetings to explain to the people that these new agricultural techniques were harmful," Jardari says. "As we learnt more, we were shocked. I could find only two varieties of local paddy available in my village."

This shocking realisation was followed by long arduous treks or food marches to distant villages to look for local, traditional, and diverse seeds. To the far-flung areas where HYV seeds were yet to reach. The activists collected different kinds of seeds. They also asked people to conserve rare seeds. These yatras also became occasions for cultural re-assertion, reciting folk stories, re-thinking oral traditions, poems, songs and reviving collective wisdom.

Now BBA, a non-formal collective of farmers and activists, is spread all over Uttaranchal. From the villages of Jardhargaon, Nagni, Paturi and Rampur in Henwalghati, it has spread to other areas of Uttaranchal among non-ngo organisations like Adhar in Almora, Samudayik Chetna Kendra in Nainital and Vividhara in Nahikalan in Dehradun. The andolan is responsible for producing over 200 varieties of rajma, over 350 varieties of rice -- thapchini, jhumkiya, rikhwa, ramjawan, bangoi, hansraj and lal basmati -- about 30-35 varieties of wheat, 12 varieties of *mandua* (finger millet), eight varieties of *jhangora* (bharmyard millet), eight varieties of *bhatt* (local soyabeen), 12 varieties of *makka* (corn), five varieties of *gahat* (horsegram), eight varieties of *lobia*, apart from *cheena* (hong millet), *kauni* (foxtail millet), *junyali* (pearl millet), *rayaance* (adjuki bean), *til* (seasame), *bhangir* (perilla), among other local produce. Most of these seed varieties were going extinct very fast. The movement has also promoted the use of traditional farming method called '*baranaja*' whereby 12 crops are grown simultaneously in the same field. This unique method provides a security against drought and crop failure. The practice ensures supply of food round the year as different crops are harvested at different times. A humble initiative like BBA, which is not a part of the multi-billion dollar NGO industry, has proved that even without funds and resources, those on the fringes of society can take on the onslaught of globalisation.

— June-July 2005

Making Water a Human Right

The human right to water is indispensable for leading a life in human dignity and it is a prerequisite for the realisation of other human rights. The states have to ensure this right in order to avoid becoming violators of their legal, moral and ethical obligations

MILOON KOTHARI

World Over an estimated 600 million urban dwellers and over a billion rural persons today live in overcrowded and poor quality housing without adequate water, sanitation drainage or garbage collection. More than 1.2 billion people still have no access to safe drinking water, and 2.4 billion do not have adequate sanitation services. This despite that water is essential to human life and to all life on earth, and that the fresh-water resources are part of the global commons and a collective resource, not a private commodity to be bought, sold or traded for profit.

To address the large-scale problem, in a manner consistent with the human rights obligations of States, the Committee on Economic, Social and Cultural Rights in November 2002 adopted its General Comment No. 15 on the right to water. The Committee underlines in the General Comment that while "the human right to water is indispensable for leading a life in human dignity" and that it is "a prerequisite for the realisation of other human rights", it had nevertheless "been confronted continually with the widespread denial of the right to water in developing as well as developed countries." The General Comment on the Right to Water (hereafter G.C.) is a remarkable achievement and a path-breaking legal development. The main features of G.C.15 are summarised below:

- Declares, " Water should be treated as a social and cultural good, and not primarily as an economic good". (Para. 11)
- Establishes a delineation of the components of Adequacy based on the requirements of human dignity, life and health. The G.C. details the following factors that "apply in all circumstances": Availability - The water supply for each person must be sufficient and continuous for personal and domestic uses; Quality - The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health; Accessibility - Water and water facilities and services have to be accessible to everyone without discrimination. (Para 12)
- Enhances and clarifies the content of the internationally recognised human rights to food, health and housing by elaborating on the human right to water to include freedoms and entitlements to drinking water, water for household purposes, water for agriculture purposes and sanitation. (Para 7)
- Establishes the relationship of the right to water with the human rights to life and human dignity. (Para 3)
- Utilises the foundational human rights principles of 'non-discrimination and equality' and 'non-retrogression'.
- The G.C. also reinforces and develops principles of State conduct and obligations stemming from their commitments to international human rights instruments, such as 'immediate obligations'; 'utilisation of maximum available resources' and the obligations of the State to 'undertake steps' to 'progressively realise' the human rights in the Covenant on Economic, Social and Cultural Rights related to the right to water.
- Considerably assists in forging the link between human rights and environment by recognising the role of protection of biodiversity and the respect for Multilateral Environmental Agreements (MEA's).

- The G.C., for example, calls for States to 'adopt comprehensive and integrated strategies and programmes to ensure that there is sufficient and safe water for present and future generations'.... 'And that such programmes may include... assessing the impacts of actions that may impinge upon water availability and natural-eco systems, such as collate changes, desertification and increased soil salinity, deforestation and loss of biodiversity' (Para 28).
- In keeping with the inherent human rights basis of the Covenant, imbibed with respect for the protection of the right to human dignity, the G.C. places emphasis on the freedoms and entitlements accrued on people as a result of the recognition of the right to water.
- The G.C. explains freedoms to include 'the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies'. For the G.C entitlements include 'the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water" (Para 10).
- Recognises the relevance of and builds upon the work of UN treaty bodies (especially the Committee on the Elimination of All Forms of Discrimination against Women and the Committee on the Rights of the Child) and work of Commission on Human Rights mechanisms (the Special Rapporteurs on the right to food, and on adequate housing) and the Sub-Commission on the Promotion and Protection of Human Rights whole title (the Special Rapporteur on Water) .

STATE OBLIGATIONS

The primary obligation that forms the basis of international human rights principles and obligations is the responsibility of States to ensure that freedoms and entitlements accrue first, and with a sense of urgency, to individuals and groups that have traditionally faced difficulties in exercising human rights. The G.C. calls for special attention to be accorded by States parties to the rights of "Women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees". (Para 16) '

- The G.C. places a challenge before States in regard to 'immediate obligations' that they have in relation to the right to water, "such as the guarantee that the right will be exercised without discrimination of any kind (Article 2(2)) and the obligation to take steps (Article 2(1)) towards the full realization of Articles 11(1) and 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to water ". (Para 17)
- The Committee also draws upon various articles of the Covenant to enrich and further articulate the complex web of obligations evident in a comprehensive treatment of the human right to water. The G.C. refers, for example to the Article 1(2) on the right to self-determination by taking note of the State obligation "to ensure that people may not be deprived of its means of subsistence "; Article 11(1) on the right to housing by specifying that the State obligation to ensure that "no household should be denied the right to water on the grounds of their housing or land status " and that "deprived urban areas, including informal human settlements, and homeless persons, should have access to properly maintained water facilities "; Article 11 (1) on the right to food placing an obligation upon States to give attention towards ensuring that "disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology". Article 12 on the right to health and the obligation on States in pursuance of one aspect of this right, namely environmental hygiene "to take steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions ".
- The Committee urges States to pay particular attention to the relevance of water resources and entitlements for Women. The G.C. urges States to take steps to ensure that "Women are not excluded from decision-making processes concerning water resources and entitlements. The disproportionate burden women bear in the collection of water should be alleviated". (Para 16). The G.C. calls for particular attention to be paid to the needs of women farmers (Para. 7) and women living in rural and deprived urban areas. (Para 29).

INTERNATIONAL OBLIGATIONS

The essential message of this section of the G.C. is that States, in complying with their obligations under the international cooperation provisions of the Covenant have to (i) refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries and (ii) that States, in particular those with the means at their disposal have a special responsibility to assist the developing States realise the right to water for all who are living under their jurisdiction.

In relation to point (i) the G.C. categorically urges that "States should refrain at all times from imposing embargoes or similar measures, that prevent the supply of water, as well as goods and services essential for securing the right to water" and that "Water should never be used as an instrument of political and economic pressure ". The G.C. also importantly, in the current context of economic globalisation, urges that "Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries " and that "With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water. " (Para 35)

CORE OBLIGATIONS

The G.C. breaks new legal ground by detailing core obligations in relation to the right to water. These are obligations that take 'immediate affect'; are 'non-derogable' and must be complied with by States using the 'maximum available resources'.

The G.C. identifies these core obligations to include the obligation of States to "ensure access to the minimum essential amount of water; the right of access to water on, and water facilities on a non-discriminatory basis' ...'to ensure physical access to water and water facilities... '; ' to ensure that personal security is not threatened when having to physically access water'; 'to ensure equitable distribution.....'; 'to adopt and implement a national water strategy and plan of action... including methods such as the right to water indicators and benchmarks....'; 'to adopt relatively low-cost targeted water progammes; to take measures to prevent, treat and control diseases linked to water, in particular ensuring adequate sanitation'. (Para 37)

Significantly, and to remove any doubts as to the position of the Committee on this issue, the G.C. emphasises that it is particularly incumbent on countries that have the financial and technical capacities to provide international assistance to developing countries to fulfill their core obligations as stated in paragraph 37 of the G.C.

VIOLATIONS OF THE RIGHT TO WATER

The G.C. again breaks ground in identifying the range of violations of the right to water that States are prone to. These examples in the G.C. clarify further State responsibility as it applies to actions or omissions that lead to denial of the right to water. The G.C. distinguishes between the inabilities from the unwillingness of a State party to comply with its obligations in this regard.

In an unambiguous manner the G.C. states - "A State which is unwilling to use the maximum of its available resources for the realization of the right to water is in violation of its obligations under the Covenant". The G.C identifies violations of the right to water that can occur through "acts of commission, the direct actions of States parties or other entities insufficiently regulated by States. Violations include, for example, the adoption of retrogressive measures incompatible with the core obligationsii. . These types of violations can also occur through "the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to water, or the adoption of legislation or policies which are manifestly incompatible with pre-existing domestic or international legal obligations in relation to the right to water" (Para 42).

Violations can also occur though "acts of omission" including through "the failure to have a national policy on water, and the failure to enforce relevant laws. "

The G.C. identifies a range of possible state violations of the right to water. A representative example of these would:

- result from State interference with the right to water, including "(i) arbitrary or unjustified disconnection or exclusion from water services or facilities; (ii) discriminatory or unaffordable increases in the price of water; (Hi) pollution and diminution of water resources affecting human health. "
- follow from the failure of a State to take all nec-

essary measures to safeguard persons within their jurisdiction from infringements of the right to water by third parties (defined by the G.C. as individuals, groups, corporations and other entities as well as agents under their authority) including "(i) failure to enact or enforce laws to prevent the contamination and inequitable extraction of water; (ii) failure to effectively regulate and control water services providers; (iv) failure to protect water distribution systems (e.g.,piped networks and wells) from interference, damage and destruction. "

- be result of the failure of States to take all the necessary steps to ensure the realisation of the right to water including "(i) failure to adopt or implement a national water policy designed to ensure the right to water for everyone; (ii) insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to water by individuals or groups, particularly the vulnerable or marginalized; (iii) the failure to monitor the realization of the right to water at the national level, for example by identifying right to water indicators and benchmarks; (iv) the failure to take measures to reduce the inequitable distribution of water facilities and services; (v) failure to adopt mechanisms for emergency relief; (vi) failure to ensure that the minimum essential level of the right is enjoyed by everyone (vii) failure of a State to take into account its international legal obligations regarding the right to water when entering into agreements with other States or with international organisations " (para. 44).

IMPLEMENTATION ON THE NATIONAL LEVEL

The G.C. also underlines that Article 2, paragraph 1, of the Covenant imposes an obligation on States parties "to adopt a national strategy or plan of action to realize the right to water." Such strategies should: "(a) be based upon human rights law and principles; (b) cover all aspects of the right to water and the corresponding obligations of States parties; (c) define clear objectives; (d) set targets or goals to be achieved and the time frame for their achievement; (e) formulate adequate policies and corresponding benchmarks and indicators. The strategy should also establish institutional responsibility for the process; identify resources available to attain the objectives, targets and goals; allocate resources appropriately according to institutional responsibility; and establish accountability mechanisms to ensure the implementation of the strategy " (para. 47). In addition, this section calls for the adoption of national framework legislation and the development of indicators and benchmarks and that right to water indicators should be identified in the national water strategies or plans of action (para.53). According to the G.C. "indicators should address the different components of adequate water (such as sufficiency, safety and acceptability, qffordability and physical accessibility), be disaggregated by the prohibited grounds of discrimination, and cover all persons residing in the State party's territorial jurisdiction or under their control.

Both on the national and international level, "any persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies". It is further stated that "all victims of violations of the right to water should be - “entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, and similar institutions should be permitted to address violations of the right" (para. 55).

The G.C. also addresses the issue of decentralisation at the national level, underlining that "steps should be taken to ensure there is sufficient coordination between the national ministries, regional and local authorities in order to reconcile water-related policies. Where implementation of the right to water has been delegated to regional or local authorities, the State party still retains the responsibility to comply with its Covenant obligations, and therefore should ensure that these authorities have at their disposal sufficient resources to maintain and extend the necessary -water services and facilities". (para. 51)

SANITATION

Sanitation has been historically accorded less attention, despite even lower rates of access and the great need for more support to this area. Some 2.4 billion people worldwide are estimated to lack adequate access to sanitation, more than twice the nuber of persons who lack access to safe drinking water.

The G.C. emphasizes that."'ensuring that everyone has access to adequate sanitation is not only fundamen-

tal for human dignity and privacy, but is one of the principal mechanisms for protecting the quality of drinking water supplies and resources" (para. 29). It is therefore not surprising that one of the core obligations found in the G.C. is for States "to take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation'" (para. 37(i).

RIGHT TO WATER AND PRIVATISATION

Water is essential to human life. The G.C. specifically underlines that "the human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights... Water should be treated as a social and cultural good". Paragraph 44 (b) (ii) states that "violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to water by third parties", which includes the "failure to effectively regulate and control water services providers".

The G.C. does not mention the words privatisation and globalisation. Yet, read as a whole, the G.C. offers a carefully modulated and persistent critique of the advocates of privatisation of water and sanitationiv.. The G.C. places a challenge before States and international organizations such as the World Bank, IMF and the WTO to design policies that do not in any manner deviate from the primarily obligation to ensure the promotion of the human right to water. The G.C. particularly calls attention to policies of trade, lending and credit and structural adjustment programmes. ...(Para 60)

Read along with the obligation to ensure "Economic Accessibility - Water, and water facilities and services, must be affordable for all. The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other Covenant rights" (Para 12 (c)) and Para 14 on "removal of de facto discrimination" including the fact that "Inappropriate resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive water supply services and facilities that are often accessible only to a small, privileged fraction of the population, rather than investing in services and facilities that benefit afar larger part of the population."

Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the United Nations Charter and applicable international law. (Para 33)

Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means,' such steps should be taken in accordance with the United Nations Charter and applicable international law. (Para 35)

THE GATS AND WATER

The rendering of State and international organisations obligations in the G.C. (see in particular paras. 35, 44 and 60) places a warning to the negotiators of WTO General Agreement on Trade in Services (GATS) to step back from any expansion of the agreement that leads to water privatisation and the entry into the 'social sphere' of multinational corporations. According to the G.C. "States parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water." (para. 35)

Among typical examples of violations of the right to water, the G.C. explicitly mentions the "failure of a State to take into account its international legal obligations regarding the right to water when entering into agreements with other States or with international organisations" (para. 44). The G.C. also points to the necessity of cooperation by United Nations agencies and other international organizations concerned with water, as well as international organizations concerned with trade such as the World Trade Organization (WTO), in relation to the implementation of the right to water at the national level (para. 60).

CIVIL SOCIETY AND THE RIGHT TO WATER

For civil society groups that have long called for water to be treated, by governments and third party individuals and corporations at all levels, as a social and public good the G.C. offers convincing arguments, based on legal obligations of States, to buttress their arguments.

Para. 48 explicitly states that "the right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning -water. Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties".

The G.C recognises role of civil society in proposing solutions. With regard to the necessary elaboration of a national water strategy and plan of action it states that "(i)n order to create a favourable climate for the realization of the right, States parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to water in pursuing their activities." (Para. 49).

The G.C. also encourages States parties to adopt framework legislation to operationalize their right to water strategy, which should include the framework for intended collaboration with civil society (Para. 50).

Finally, the G.C. explicitly urges that "States parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society with a view to assisting vulnerable or marginalized groups in the realization of their right to water "(Para. 59).

MDG'S AND THE RIGHT TO WATER

The G.C. gives a clear direction on how Millennium Development Goals (MDGs) relevant to water and sanitation are to be realised - especially the sections on state responsibility and national obligationsv.. Under MDG no. 7, target 10, States have committed to halve by 2015 the proportion of people without sustainable access to safe drinking water. This target is closely linked to other MDG targets relating to poverty, food, health and housing. The G.C. in its treatment of water and sanitation, offers to States, consistent with their human rights obligations, a detailed prescription of how to reach these relevant MDGs.

CONCLUSION

The G.C. comes at an opportune time when governments, influenced by the World Bank, regional development banks and the multinational water companies, are promoting privatisation of water and sanitation as the principle means for improving the adverse conditions of millions of people across the world. This, unconditional support for privatisation of water is, as the G.C. convincingly demonstrates at odds with the existing human rights obligations of States. Most significantly, the G.C. reduces the margin of flexibility that States and third parties have used to deny water to people, particularly the marginalised and disadvantaged. The G.C. provides a menu of actions that States have to take immediately and progressively if they are to avoid becoming violators of their legal, moral and ethical obligations to respect, protect and fulfil the human right to water.

— June-July 2004

A Ruinous Mirage

It does not take much technical knowledge to understand why the interlinking of rivers is an absurd idea and a ruinous project which would involve enormous social and environmental upheaval and conflict between states. If the Cauvery dispute which is only between three states on the sharing of water of one river is any indication, imagine what will happen when water from several rivers is taken to other rivers across several states. Apart from being an administrative nightmare, the proposal is impractical, expensive and downright foolish.

PRASHANT BHUSHAN

The clandestine and insidious manner in which a gargantuan project of interlinking of rivers has suddenly become the most important project on the national agenda is a great tribute to the ability of this government to use the President, the judiciary and the media to legitimise a project which was unthinkable a year earlier and will unquestionably be ruinous for the nation.

The precursors to the project for interlinking the rivers were the Ganga Cauvery link proposal mooted by K.L. Rao and the Garland Canal idea put forward by Captain Dinshaw Dastur in the Sixties. They were both examined and found impractical, the former on the grounds of the very large financial and energy costs involved, and the latter because it was technically unsound. Moreover, since then, with the growth of the understanding of environmental and ecological connections, it has been realized that large dams and irrigation projects cause enormous disturbances to the environment and ecology.

There has also been a realisation that rainwater harvesting or Micro watershed development are far quicker and more economical ways of harnessing water.

Recently, the World Bank along with several other international agencies formed a World commission on dams to do a retrospective study of the overall impact of large dams and irrigation projects around the world. .

The commission gave a unanimous report, mainly pointing out that the costs of large dams had been largely underestimated and the benefits exaggerated. The environmental and social impacts of such projects had largely been left out in the cost benefit calculations. The India country study which had been conducted by some of the most eminent experts in the country concluded that, "It is evident that past (large dam) projects, in general, have not been comprehensively assessed in terms of their environmental, social and economic viability and optimality... Also, the distribution of most of the costs and benefits of large dams seems to accentuate socio-economic inequities."

CONSPIRACY AT THE TOP

Despite all this, a conspiracy appears to have been hatched at the top echelons of the government to somehow bring this massive river linking project on the national agenda. On Independence Day last year, a paragraph was added in the President's speech to the effect that the problems of floods and drought can perhaps be solved by interlinking the rivers. This paragraph was enough for a lawyer appointed by the Supreme Court as amicus curiae (to assist the court) in the Yamuna pollution case to file a short application praying that the court should direct the government to take up this project. As if on cue, the bench headed by the then Chief Justice B.N. Kripal issued notices to all the States and the Centre.

On the next day of hearing, which was the day before the retirement of the then Chief Justice, an order was passed which is now effectively being treated by the government as a direction by the court to undertake this project and complete it within the shortest possible time. The order noted that only the Union of India and the State of Tamil Nadu had filed responses to the notice issued by the court. It stated that the Union of India pointed out that the project would cost Rs 5,60,000 crores, would take 43 years, and would need the consent of the States. The State of Tamil Nadu had filed an innocuous affidavit, virtually saying nothing. The court noted that no other State had filed any affidavit and therefore it could be assumed that none had any objection to the implementation of this project! After orally noting, that funds cannot be any constraint for the government for a project in national interest, the court observed in its order that the project should be completed within 10 years! It also went on to advise the government that in case consent was not forthcoming from the States, the government should consider passing a legislation to obviate consent of the States for this project.

All this for a project which would require funds equal to the total irrigation budget of the country for the next 44 years, if the Ninth Plan expenditure is any guide. And all this without hearing any interested party, not even the States, without any discussion or debate whatsoever, without completing even feasibility studies, leave aside the question of social, environmental, economic or optimality assessments! Such is the casual nonchalance with which this country is being pushed to a course which would have unparalleled and unprecedented, financial, social and environmental consequences.

Such an order from the court was all that the government needed to immediately go on a public relations offensive to bring this project on the national agenda, characterising it as a court approved or court directed project. It immediately formed a task force, consisting of mainly civil engineers who had been involved in dam construction or officials who had been connected with the water resources Ministry, to draw up detailed plans for the implementation of this project. Such is the speed with which the task force has been proceeding with this proj¬ect, that it has submitted a report to the court recently, saying that it will during this year itself begin work on one or two links at least.

All this, without even a feasibility study.lt is being assumed that all the planning process necessary for such projects including environmental clearance etc will be short-circuited, as all in authority will be told that this is a court directed project and is topmost on the national agenda. It is being projected as the lifeline of India in much the same manner as the Sardar Sarovar project has been projected as the lifeline of Gujarat. It is this ability of the governments of the day to sell illusions and outright lies by using the media, which has now emerged as one of the most serious threats to democracy in our times.

It does not take much technical knowledge to understand why the interlinking of rivers is an absurd idea and a ruinous project. Before one can think of bringing water from long distances, one must first store at least the water which is falling over one's head. It has been found that the cost of rainwater harvesting is on an average 1/5 of the cost of harnessing the same water by bringing it over large distances after storing it in large dams. Moreover, such a project would involve enormous social and environmental upheaval and enormous conflict between States. If the Cauvery dispute which is only between 3 states on the sharing of water of one river is any indication, imagine what will happen when water from several rivers is taken to other rivers across several states. It will also be an administrative nightmare.

MISGUIDED PRIORITIES

Yet, despite such fundamental considerations, the central government wants to push this project, which would require the total irrigation budget of the country

for more than 44 years, without any public debate and without any planning. And this at a time when we are not able to get Rs 1,00,000 Crores to complete our incomplete and long overdue irrigation projects. Nor are we able to maintain and optimally use existing irrigation infrastructure or use rainwater where it falls.

If 5,60,000 crores is to be spent through a centralized pipeline as will be the case in this project, the potential for huge kickbacks are enormous. 10% of this is 56,000 Crores. Even if you spread it over 20 years it means 2,800 crores a year! Not small pickings even from today's standards. Why else should there be such an unseemly hurry to undertake such a massive project? Why else would the normal planning process be short circuited? Why else would the task force say that it will begin work on one or two links this year without knowing which link and without doing even a feasibility study of the links that it wants to take up. If only Rs.10 lakhs on an average were given to each of the less than 1 million villages in the country for rainwater harvesting on the lines pioneered by the Tarun Bharat Sangh in Rajasthan, much of the agricultural land in the country could be irrigated. This would mean a total outlay of less than 1,00,000 Crores for the country (less than 20% of the cost of this project). Such a project could be implemented in 2 years if the funds and technical knowledge were made available to each village. But people who rule this country know that they could hardly take 10% from the funds allocated to each village without being caught. It is only when the funds go through a central pipeline through a few large contractors that such large kickbacks can reasonably be taken. That is why this preference for such large centralized projects. If the Rs 14,000 Crores that have already been spent on the Sardar Sarovar Project had been spent on rainwater harvesting in Gujarat, every single village of Gujarat would have been drought proofed long ago. But even after 24 years since the project started, we are nowhere near the completion of the project, which is likely to take at least another 25 years and will cost another at least Rs 30,000 Crores. During all this time, there has been and will be no funds left for any other minor or micro irrigation projects or for maintenance and repair of existing infrastructure in the State since the Sardar Sarovar has and will continue to swallow the entire irrigation budget of the State and more.

Jawaharlal Nehru is credited with having called large dams, "temples of modern India". But no textbook recalls what he said soon thereafter. He said, "For some time past, however, I have been beginning to think that we are suffering from what we may call, "disease of gigantism".

— August-September 2003

SECTION 6

Traditionally, in a welfare state, the responsibility for providing affordable and at times free health care lies with the State. However, the welfare State is under a great attack from the free market proponents world over and India is no exception. In a globalised world driven by insatiable hunger for profit making and monopoly, exorbitant medical care and high drug prices are pushing millions to the brink of a manufactured disaster. Though the judiciary has been receptive and has recognized the right to health and healthcare as a fundamental right, globalization and free markets pose a challenge which needs to be addressed by the courts.

Positively Insensitive?

Media reports concerning the HIV infected persons only add to the stigma and discrimination that one would associate with AIDS in India. There is an urgent need to sensitise the media to act as a catalyst for changing decadent and ill-informed beliefs prevalent in society.

USHA RAI

The stigma and discrimination associated with HIV/AIDS has not been eliminated even though 19 years have lapsed since the first case was discovered in Chennai in 1986. Could reporting in newspapers and television have been more sensitive to the problems of those infected by the virus so that they are not driven to suicide or forced to hide their infection for fear of reprisal and isolation? Could media reports dispel the myths surrounding the infection and the way it is transmitted? These are some of the important issues that the manual 'HIV/AIDS in News - Journalists as Catalysts,' seeks to answer.

The 162-page manual prepared by Population Foundation of India (PFI) is based on a survey of newspapers in the states of Karnataka, Punjab and Uttar Pradesh, including seven national news channels. The study carried over for six months shows the wide gap in what the media has been writing on HIV/AIDS and the expectations of HIV positive people on what they perceive should be the media's role in reporting on the issue. Though there is considerable coverage of HIV/AIDS, most of it is factual -reporting of events or statements by celebrities. There has been a sea change in the HIV/AIDS scenario in the country. Thanks to greater awareness about the infection, positive people are living longer and there is a range of drugs now available. However, what has not changed is the stigma and discrimination associated with the infection. In Goa, in 1989, ignorance compounded by wrong laws stigmatized Dominic D' Souza. The police picked up Dominic because the blood he had donated some months earlier had tested positive. Instead of informing him, the hospital tipped off the police. In those days under the Public Health Act of Goa, detention of all positive people was indefinite. He was kept in custody at a tuberculosis sanatorium for 64 days and was released only after a legal battle. He even lost his job.

In the Burdwan District in 1999, Dhiren Sarkar's wife and family walked out when they found that he was HIV positive. His village ostracized him and there were attempts to burn down his hut. No driver was willing to take him to the district hospital for treatment and when he reached there, doctors and other patients kept away from him. Sarkar died a couple of days later in a dark corner of the hospital-unwanted and deprived of his basic rights as a human being.

In October, 2005 at Gorakhpur, two cases of gross discrimination were reported. A man admitted to a private hospital after an accident was given first aid, then a blood test before surgery revealed he was positive. He was thrown out of the hospital and went to another one. Just because a minister was to visit the hospital, his bed was kept outside a toilet. In sheer despair the man left for Kathmandu hoping for better treatment. In another case, the public stopped the cremation of a man who died of AIDS-related causes. His family then buried him. But some others exhumed the body and it was finally dumped in a river.

There has been little change in the mindset of people towards those infected with HIV/AIDS, particularly women. Just how this attitude can disintegrate families came to light when a HIV positive woman who, after a great deal of persuasion, came forward to become the president of the Union Territory Network of Positive People, Chandigarh, but had to quit within a month. Even though her family knew of her status, they disowned her when she went public on her infection by heading the positive network. This is the extent of stigma and discrimination of those infected. After several months the woman was taken back by the family but on the strict condition that she disassociated from the network.

Stigma and discrimination seems to multiply in an alarming manner when the infected person is a woman. Nearly half of all adults living with HIV today are women. They suffer the traditional taboos of widowhood as well as the indignity heaped on them because of the infection. Most of the infected women in rural India have a single partner - their husband-yet they are thrown out of their marital homes after their husband's death. The stigma of HIV positive daughters-in-law and the greed to grab their husband's property/ savings propels in-laws to drive them out.

Journalists, the study revealed, don't go beyond reporting an incident. For example there have been quite a few stories on HIV positive people being denied their last rites. When an Orissa newspaper reported that a couple that had died from AIDS related illness were not allowed to be cremated for fear that smoke from the pyre would pollute the entire village, it did an incomplete job. It allowed a myth to go unchallenged. It has to counter the fears of the village by giving information that HIV infection can only be transmitted through sexual contact, blood transfusion, infected needle etc.

An HIV positive child in an orphanage being denied admission to a school is undoubtedly a good story. On the front page of a national daily, the story brought out the fears of the principal that the infected children could spread infection when they bumped into others in the bus or bled from an injury. He also feared that parents would withdraw their children from the school if they found the infected ones travelling on the same bus. The principal further reinforced the stigma and discrimination by denying admission to these children.

It is the journalist's job to not just report the expulsion of infected children but to campaign for their right to study in the school by giving correct information. The human rights angle, the manner in which the infection is transmitted has to be constantly reinforced by journalists for eliminating stigma and discrimination. While journalists need to highlight the urgency of the HIV/AIDS situation and the methods to tackle it, the manner in which it is done should not heighten the fear and stigma associated with the virus.

All HIV/AIDS stories are about people. Sometimes the journalist in his effort to sell a story tends to sensationalise it. This tremendously damages the affected people. A section of the Hindi newspapers repeatedly refer to women with the virus as vish-kanyas or poison women. The media adds to the stigmatisation by alleging that these women were infecting 'innocent victims.' Another newspaper writes that terrorists are sending in vish kanyas to infect the Indian armed forces.

These salacious stories made it to the front pages of the newspaper. Another article attributed an increase in sexually transmitted infections and HIV/AIDS in Bundelkhand to the growing practice of buying brides from other regions. These women were blamed for spreading the infection. Such reports can result in a backlash on the accused, the study points out.

Many good stories are marred by terminology commonly used by the media to describe HIV and AIDS-scourge, dreaded/draconian/deadliest disease/single biggest killer/viral tsunami/even deadlier than the enemy/pestilence/ugly truth. Infected persons are called victims, patients, and cases. In Punjabi the word kauda, used for those affected by leprosy, is applied in a derogatory manner for the HIV infected. In Kannada, the word naraka yatane (deadly disease) is used for describing HIV and AIDS.

Six per cent of the stories analysed in the PFI study were factually incorrect. Some stories were exaggerated

or totally false. A story in an Urdu newspaper in Punjab alleged that a new type of condom with a microchip had been developed to prevent HIV/AIDS! Another misleading headline in a UP newspaper said "tamatar khao, AIDS bhagao" or 'eat tomatoes-drive away AIDS.'

Newspapers shouldn't be carrying stories that promise cures for HIV and AIDS unless they have been scientifically authenticated. Articles like the use of cow urine, as therapy and healing by a 'swami,' frequently appearing in Kannada papers, need to be verified and crosschecked. Desperate for a cure, those infected run around looking for 'miracle cures' and spend a fortune in the process. R. Elango of the Karnataka Network of Positive People recalls how he joined a horde of people running to Kerala for an ayurvedic cure for his infection soon after a story and several advertisements on the 'cure' appeared in leading Indian newspapers. Elango says the medicine damaged his kidneys and he ended up with diabetes. A subsequent issue of one of the magazines that carried the story was compelled, through public pressure, to retract its story.

A story that raised dubious concerns was a full page feature in Hindustan Times on the theory that the HIV virus does not in fact lead to AIDS. It quoted international scientific authorities to buttress its claim that "AIDS is a non-contagious lifestyle epidemic caused by anti-HIV drugs." Several Indian experts are livid that such a story was carried so prominently even though the page did have a section on dissenting opinions. Such an article, at this juncture of the epidemic, could do extensive harm. This debate has, for instance, set back the response to the epidemic in South Africa.

Even photographs used by newspapers have to be careful not to send out wrong messages. A photograph used by many newspapers of a sand sculpture of skeletons by a well-known artist from Orissa reinforced the misconception that the HIV infection spells death.

To be fair to the media, there have been several excellent stories that send out positive signals. The fear created by reporting that was not well informed is being replaced not only by more extensive coverage, but also by more sensitive reporting. The fact that positive people are speaking up and many of them don't mind being photographed has added to the committed journalist's understanding of HIV and AIDS. It was heartening to see the well-displayed story in the Indian Express on a HIV positive woman seeking a ticket to contest the assembly elections in Assam. Such stories should be put on the front pages of newspapers so that others can take heart and aspire to live fulfilling lives.

— April-May 2006

Ethical Challenges of AIDS

The introduction of free antiretroviral treatment should go hand-in-hand with the strict enforcement of the fundamental obligation to non-discriminatory care for positive persons.

AMAR JESANI

Following the June 2001 "Call to Action" at the UN General Assembly Special Session on HIV/AIDS, in September 2003 the WHO, UNAIDS and the Global Fund to Fight AIDS, Tuberculosis and Malaria launched the "3-by-5" initiative to treat three million people living with HIV/AIDS by 2005. Lee Jong-Wook, the Director General of the WHO declared that, "Lack of access to antiretroviral treatment is global health emergency. …. To deliver antiretroviral treatment to the millions who need it, we must change the way we think and change the way we act". According to WHO estimates, of 40 million People Living with HIV/AIDS (PLHA) in the world, 95% are in developing countries and of the six million people currently in urgent need of antiretroviral therapy (ART), less than eight per cent receive it (as compared to that in the WHO region of Americas, 84 per cent have been brought under treatment) . The 3-by-5 initiative found its echo soon in India where 4.58 million PLHA were detected by 2002.

The government announced that from April 1, 2004, in six high prevalence states - Andhra Pradesh, Karnataka, Maharashtra, Tamil Nadu, Manipur and Nagaland - it would begin its programme of providing free ART. Later, the government also added the low prevalence state of Delhi due to its "high vulnerability"!! According to NACO, in the first phase of its implementation the programme would cover sero-positive mothers, sero-positive children below the age of 15 years and people with AIDS who seek treatment in government hospitals; and the estimated coverage of the PLHA would be slightly over one lakh. Perhaps it would be proper to call it "1-by-5" strategy - covering one lakh PLHA by 2005. The WHO and now NACO have come out with detailed technical guidelines for selection of the positive persons, treatment and monitoring.

This change in the "way we think" is brought about by many factors, but two of them stand out the most. The first is the unprecedented HIV/AIDS activism, with direct participation of the PLHA all over the world, including India. They used all kinds of methods to pressure governments and international organisations to recognise their right to treatment and care. The second factor was the growing realisation that the HIV/AIDS epidemic was causing massive havoc on the economy and society in several parts of the world. The public health issues of this kind have now been well recognised as human rights issues. In fact,

HIV/AIDS provided massive impetus to the orientation of the public health to the human rights, particularly the right to health and the vice versa. As compared to that, the understanding of the connections between the ethics and human rights, and so the public health, was late in development, but is soon catching up with the larger movement. Therefore it is important to put the Indian government's change in "the way we think" and "the way we act" under the scrutiny of ethics.

OBLIGATION OF THE HEALTH SYSTEM

The record of the health system in India is dismal on this count. The medical profession has extensively practiced discrimination against the PLHA. Hospitals are testing positive persons for HIV infection without their knowledge or consent, without pre-test counselling contrary to national and international guidelines. In the private sector, persons found HIV positive are shunted to government hospitals, discharged on some pretext or charged extra for treatment with 'special protection'. In government hospitals, persons with HIV are referred to the STD wards regardless of the source of their infection. Some have been refused emergency treatment and others have been isolated, their HIV status thus being made public. Some have even been physically assaulted for concealing their infection , . A few professional organisations have even argued in favour of the right to refuse treatment to people with HIV .

Interestingly, the private health sector has been delivering the ART since long to those who could afford it, but such delivery has gone hand-in-hand with the increase in discriminatory practices. Such situations make us sceptical of the claim that the stigma and discrimination would reduce as treatment options become available. More importantly, the government's programme makes commitment to cover only around two per cent of the suffering PLHA, and thus deliberately leaving out a vast number simply because the system cannot afford it. The plethora of guidelines developed by the WHO and others, including NACO are for selecting these two per cent. It is assumed that using technical guidelines giving medical criteria to select the recipient of benefits would make the selection objective and impartial. How could the selection process be impartial and objective if the profession that is supposed to implement it has shown deep partiality and discriminatory behaviour itself? This is an issue of credibility and legitimacy of the agency selecting positive persons. Therefore the introduction of the free ART to a selected few should go hand-in-hand with the strict enforcement of the fundamental obligation to non-discriminatory care for patient by the profession and the services.

BEING JUST AND SEEN TO BE JUST

In the principle-based approach to ethics, justice occupies a prime place. It is this principle that looks the most at peril. Clearly, the trade and industrial policies that grant intellectual property rights and liberate the price of drugs in the manners that disregard human rights of positive persons are responsible for such public health and ethical crisis in the HIV/AIDS. When, between the corporate profit and the lives of the positive persons, the political choice is made overwhelmingly in favour of the former, the principle of justice is the casualty. But this is a part of the grand scenario. The problem is at the micro-level of the new policy too.

Admittedly, the 3-by-5 strategy of the WHO and for that matter the government of India's new strategy on ART do not intend to cover all who will be eligible for the treatment. This means some are to be deliberately left out; as will be all those PLHA who live in states other than the seven named above. Even within those states, only certain categories are made eligible. Essentially these are political decisions made under the cover of the technical-medical arguments. The ethical crisis would loom large if credibility and legitimacy for such a policy is not established. For instance, the argument that Delhi was belatedly included because of its higher "vulnerability" hides the fact that it is not medical vulnerability that has brought it in, but the political vulnerability, and the political vulnerability flows from the fact that the policy is based on "selection" that still does not have the legitimacy. It would not be a surprise if another place by creating political vulnerability for the government forces itself in as Delhi has done.

This means the policy needs to be seen as just or what Norman Daniel describes as having "perfect procedural justice" . Such a process has many facets and all need to be carefully implemented. If the states are selected on the basis of the sound public health logic, it must be strictly adhered to and should not give in to the political exigencies. The location of treatment facilities ought to be such that physical access to it is easy. As of now, the 15 institutions identified in the NACO guidelines are grossly mal-distributed, as 10 of them are

in Maharashtra and Tamil Nadu alone. This physical location carries forward the past unjust distribution and so needs to be corrected immediately if there is commitment to be just to the PLHA in other states selected and also those, which are not. The issue is also of ensuring prevention of drug resistance due to poor adherence to protocol and compliance to treatment. The NACO needs to clarify whether the technical criteria of selection also includes the value judgement of the positive persons who are best placed to follow compliance. Besides, the past experiences in the treatment of other communicable diseases show great irresponsibility of the private health sector's irrational prescription practices, discarding positive people running out of money mid-way through the therapy etc. for development of drug resistance. Since the ARTs are being used by the private health sector since long and it will continue to use it, the needs for stringent regulation of the private sector's prescription practices must be brought on the policy agenda. In the absence of that the policy would suffer reversals thus again jeopardising the PLHA's right to treatment. Other issues of corruption in the system leading to discriminatory rejection of deserving positive persons and the "free" treatment becoming costly "bribe" need to be addressed to. Above all, the need for transparency in the policy and its implementation are absolutely essential to prevent corruption as well as to find legitimacy for the package developed by the government.

Just process also demands fair explanation on why the people suffering from other diseases - many of them life threatening - should be made to pay in the government centres for drugs and user charges when the ARTs will be freely available. The new health policy and even the Common Minimum Programme of the new government has promised that the government expenditure on health care will be increased from 0.8% of GDP to over two per cent of GDP. Just process demands that there is transparency about when it will be achieved and whether the increased funding will go primarily for the HIV/AIDS programmes or will be fairly distributed across the suffering positive persons of all types.

In all, the medical ethics movement in India need to keep a sharp eye on this programme. Such work not only would prevent unethical unfolding of the programme but also make the ethics movement to learn immensely from the public health and human rights concerns.

— April-May 2006

Occupational Health, Safety and Laws

Seventy five per cent of the global workforce lives in the third world countries. More than 125 million workers are victims of occupational accidents and diseases every year. Safety and health are the cornerstones of any hazardous work and should occupy a significant position in a country's national policy.

VIJAY KANHERE

On September 6 2005, the widows of Khambat in Gujarat got together to form an "organisation of Agate Pidit (affected) persons". "We have formed self-help groups for widows. Our men died while working with akik (agate). All of them were suffering from severe breathing problems," said Kamalaben, a member of the organisation. These workers produce polished agate stones for export and all of them suffer from silicosis and later silico-tuberculosis. In Shakarpur hamlet alone hundreds have died due to agate work.

The lot of poor workers in Khambat in Gujarat and in Mandsor in Madhya Pradesh is indeed tragic. There is no law in India that covers them. Facilities in Tuberculosis clinics and primary health centres are not accessible to these workers. Although the government has facilities for sputum test at Khambat, x-ray facilities are not there. The National Institute of Occupational Health has kept two x-ray machines in Khambat but there are no technicians. This is just an example of lack of concern shown to the workers in the informal sector.

The informal sector workers in India constitute around 90 percent or more of total workers. Women are the dominant component in the informal economy. Although this economy contributes 66 percent of the Gross National Product (GNP), the workers have no protection. The loss to GNP due to occupational diseases and accidents in India is in the magnitude of US $ 12 billion, as estimated by Sterling Smith in his article `Occupational Health and Safety in India'.

In India, traditional public health concerns like communicable diseases, malnutrition, reproductive health, and so on get greater emphasis. There is a general lack of awareness about occupational health and safety issues. The low resources settings in which they work make it highly likely for the workers to be affected by the dangers surrounding their work environment. A lack of education, ignorance regarding their occupational hazards, a general backwardness in living conditions like sanitation, nutrition and proneness to epidemics aggravates their health hazards.

PREVENTIVE LAWS

In India and even in developed economies, a large number of unprotected workers with insecure contracts work side by side with workers with more permanent contracts or comparatively more secure employment. These workers have no standing in the eyes of the law. They are working in an environment covered by the law but are themselves outside its jurisdiction. The Factories' Act and the Mines' Act are two major laws in India covering the formal economy workers.

DEFINITION OF A WORKER UNDER THESE TWO LAWS

The Factories' Act, Section 2 (l) defines a worker as

"Any person [employed directly or by or through any agency (including a contractor)] with or without the knowledge of the principal employer, whether for remuneration or not, in any manufacturing process or any work incidental to or connected with the manufacturing process or the subject of the manufacturing process."

Section 2 (h) of the Mines Act similarly has the words "for wages or not". The definition is a bit more restrictive: " A person is said to be employed in a mine who works as the manager or who works under appointment by the owner, agent or manager of the mine or with the knowledge of the manager, whether for wages or not." Here with the knowledge or appointment is made a necessary part of the definition.

The definition is very clear in the Factories Act. Workers need not have any proof of remuneration. Many contract workers do not have written contracts nor do they get pay-slips. Usually the management finds it convenient to decipher the Act as one under which contract workers do not have any rights. Most of the permanent workers and their unions too have a similar attitude.

HEALTH

Chapter III of the Factories Act includes cleanliness, disposal of wastes and effluents, ventilation and temperature, dusts and fumes, over crowding, lighting and sections for latrines. The Mines Act has similar sections for ventilation and provision for latrines and health check needed.

FACTORIES ACT

After the manmade disaster in Bhopal there was an amendment in the Factories' Act. With this amendment, special sections for hazardous processes were added - namely sections 41 A to 41 H. These are important sections but are only applicable to hazardous processes as given in schedule I of the Act. This schedule covers all chemical, pharmaceutical, metallurgical industries and industries involving asbestos rubber, and so on. In hazardous industries it is the duty of the occupier to arrange for medical check up of workers at least once a year. An important section was added to the Factories Act: section 7 A. 7 A (1) states that every occupier shall ensure so far as reasonably practicable, the health, safety and welfare of all workers while they are at work. The Act of course does not tell us who decides on reasonability and practicability?

MEDICAL EXAMINATION

Section 41-C (c) of the Factories Act provides for medical examination of every worker; (i) before such a worker is assigned to a job involving the handling of or working with, a hazardous substance, and (ii) while continuing in such a job, and after he has ceased to work in such a job, an interval not exceeding twelve months, in such a manner as may be prescribed. This section clearly states that not only does every worker involved with a hazardous process have to be checked medically, but also even after being out of such a job there should be annual check up. We interpret this, as a medical check up that has to be provided even after retirement. This interpretation needs to be tested by a legal case or a demand to the factory inspector for such a medical check up. Medical check is essential even after retirement because occupational diseases such as lung cancer may become apparent after years. Diseases such as silicosis take five years to surface. Occupational health problems relate mostly to chronic diseases or slowly developing diseases due to exposure to small amounts over a long period of time.

There is a dearth of case law as far as diseases are concerned. Most of it is related to safety and about guarding of machines or fatal cases. Jagadish Patel in an article in Economic and Political Weekly, January 16-23, 1999 analysed prosecutions by the factory inspector in Vadodara district. Most of the prosecutions are regarding machine guarding, checking of hoists and enclosure of source of ignition.

PERMISSIBLE LEVELS

In 1987, Section 41-F was added which laid down permissible levels for toxic chemicals under Schedule II of the above Act. There are 116 items in the second schedule. The lacuna lies in the mechanism of implementation. In 1990, a training programme was organised for a safety committee of a multinational company. After the training, the workers started asking about calibration of the meter used for measuring the amount of carbon monoxide in the air. The meter had not been calibrated in years making its measurements unreliable.

WORKERS' PARTICIPATION

Section 41-G provides for safety committees in hazardous processes. All state governments have legislation relevant to this aspect. For example, Maharashtra Factories' Rules rule 73 J states that in a factory with 250 workers, if hazardous process or a dangerous operation (as defined by rules) is used, then if 50 or more workers are employed, there has to be a safety committee formed. Rule 73 J (c) (3) states " workers' representatives on this committee shall be elected by the workers." We do not know a single factory where there are workers' representatives on safety committee elected by workers.

COGNIZANCE OF OFFENCES

The biggest lacuna in the two laws given above is the law regarding cognizance. Section 105 (1) states that no court shall take cognizance of any offence under this Act except on complaint by or with the previous sanction in writing of an inspector. This is a classic case of inspector raj. Since workers cannot approach the courts directly, the unions need to challenge this section. Either the inspector can prosecute or there has to be written permission from him. Why are the affected workers denied the right to approach courts? During the British period, the argument may have been that Indians were incapable of acting irresponsibly and only Government appointed inspectors could be responsible 'citizens' (sic). The sad part is we have continued with this section unchallenged. The Mines' Act also has a similar section: Section 75. Recently there was a laudable change in the law passed in 1996 for building and construction workers. It allows cognizance by courts on complaints by unions or by an NGO representative.

COMPENSATORY LAWS

It is often said that one should emphasise prevention and not compensation. One needs to keep in mind that the liability to pay compensation, if it materializes, acts as a factor in increasing interest of employers in strengthening preventive measures to safeguard health and safety. It is a necessary basic human right of an injured person to receive compensation, though no monitory compensation can actually compensate the loss due to employment injuries-accidental and due to occupational diseases.

There are two main laws - the 'Workmen's Compensation Act" and the "Employees' State Insurance Act (ESI Act)'. Both these laws have sections about presumption of connection between work/occupation and disease. Both also have the same schedule III. This schedule has three Parts - A, B and C - according to qualifying periods of employment for the presumption to become operative. A single day's employment for Part A, six months for Part B and for Part C employment, there is notification defining qualifying periods.

Presumption is an important aspect of laws across the world regarding compensation for occupational diseases. All countries have such schedules. If a worker suffers from a peculiar disease listed in the law and has worked for the qualifying period then unless proved to the contrary, the law presumes that the disease has arisen out of and in course of employment or is an occupational disease. Usually lawyers trained in criminal law feel that if the employer just shows probability of any other cause then the connection between work and disease is not proved. This conception is wrong as far as scheduled diseases are concerned. The employer will have to prove the cause is other than employment. If he fails to do so beyond doubt then the law will presume that the disease is an occupational one. There haven't been many cases using this aspect of law. Actually in one case of sulfuric acid poisoning, the court had to be shown that there was something called schedule III.

TWO LAWS FOR COMPENSATION

Some people believe that the ESI Act allows the employers to escape by taking responsibility of compensating for accidents and diseases. The Workmen's Compensation Act also has provision for insurance companies taking over the employer's liability. In most cases, the insurance companies contest cases/claims to

the level of the highest court. Secondly the Workmen's Compensation Act applies only to non-clerical workers in scheduled employment only (schedule II of the Act). Thirdly the amount in calculation of compensation is considered to be maximum Rs. 4000. Before the year 2000 it was only Rs. 2000 that went into calculation. Under the ESI Act the amount of pay on which contribution is paid is considered in calculation of compensation to be paid. At present the limit on pay under this Act is Rs. 7500 per month.

The ESI Act provides for treatment of insured workers and their families. This law has Schedule III of occupational diseases. It also directs the ESI Corporation along with state governments to create and maintain facilities for proper treatment, a direction, which has not been implemented properly. The Corporation has only four occupational disease centres for workers. None have proper diagnostic facilities. ESI has savings in the tune of Rs. 7 lakhs, more than 40 percent of which is kept as a special low interest deposit with the central government. This fund needs to be used properly for providing treatment to workers in case of occupational diseases and in case of general diseases, workers and their families.

In case of occupational diseases it is extremely difficult to get proper treatment and diagnosis. Byssinosis, a disease caused due to cotton dust and noise induced hearing loss were both added in Schedule III in 1984. ESI had not diagnosed even a single instance till 1995/96 and that also after pressure by workers. The only organisation to diagnose occupational deafness or hearing loss in more than 500 workers is Mumbai Occupational Health and Safety Centre (OHSC). Although ESI authorities have cooperated, they have also created hurdles in workers getting justice. More than 300 workers are currently receiving life long compensation from the ESI Corporation for hearing loss mainly due to the efforts of unions, workers and the OHSC.

The central government had proposed a Bill to enact a comprehensive law for health and safety at work. Needless to say, the Bill has many shortcomings. The most glaring among them is that it specifically states that the proposed law will not cover domestic workers. All the domestic workers, mostly women were left out even at the stage of proposing a law for health and safety.

What is needed is an increased role for workers in the implementation of laws regarding health and safety at work. At present, this role is minimal. There are safety committees envisaged but these committees do not have any powers. Even when laws are clearly violated, the inspectors under each law have the major role. We need laws that allow workers as citizens of this country to participate in the implementation of laws to protect their health and safety and for compensating employment injuries.

The workers and their organisations do not use even the limited laws that exist as health and safety remains low priority, a situation that can be remedied only through legal literacy. This will bring some pressure on the government to have better laws and will give impetus to the localised efforts of affected workers at their workplaces.

— November-December 2005

Judicial Responses to Healthcare

Though the judiciary has been receptive and has recognised the right to health and health care as a fundamental right, globalisation and free markets pose a challenge which needs to be addressed by the courts.

MIHIR DESAI

Until the early 1980s judicial response to health related issues in India was essentially centred around cases of medical negligence. Even these cases were few and far between. There were two developments in the 1980s, which led to a marked increase in health related litigation. First was the establishment of consumer courts that made it cheaper and speedier to sue doctors for medical negligence. Second, the growth of public interest litigation and one of its off shoots being recognition of health and health care as a fundamental right.

This article deals mainly with two topics: (1) fundamental right to health and (2) emergency health care. Due to constraints of space I am forced to omit various other issues which are of great importance such as medical negligence, occupational health, laws relating to drugs, medical practice, rights of HIV/ AIDS patients, women's health, etc.

RIGHT TO HEALTH AS A FUNDAMENTAL RIGHT

Article 21 of the Constitution: "No person shall be deprived of his life or personal liberty except through procedure established by law."

Till the 1970s by and large the courts had interpreted 'life' literally i.e. right to exist. It was in late 1970s onwards that an expanded meaning started to be given to the word 'life'. Over the years it has come to be accepted that life does not only mean animal existence but the life of a dignified human being with all its concomitant attributes. This would include a healthy environment and effective health care facilities. To begin with, the right to health as a fundamental right grew as an offshoot of the environmental litigation. Pollution free environment as a fundamental right presupposes right to health as a fundamental right. Logically, the explicit recognition of the fundamental right to health should have preceded the fundamental right to good environment. However, the development of jurisprudence in this branch has been reverse. To begin with, right to decent environment was recognized and from that followed the right to public health, health and health care. Even while dealing directly with right to health, the first issues concerned employees' health.

EMPLOYEES RIGHT TO HEALTH

In 1991, in C.E.S.C. Ltd. v. Subhash Chandra the Supreme Court placed reliance on international instruments and declared that right to health is a fundamental right. It went further and observed that health is not merely absence of sickness and observed:

"33. …In the light of Arts. 22 to 25 of the Universal Declaration of Human Rights, International Convention on Economic, Social and Cultural Rights, and in the light of socio-economic justice assured in our Constitution, right to health is a fundamental human right to workmen. The maintenance of health is a most imperative constitutional goal whose realisation requires interaction by many social and economic factors."

In CERC v. Union of India the Supreme Court was dealing with the rights of workers in Asbestos manufacturing and health hazards related to it. It observed:

"27. Therefore, we hold that right to health, medical aid to protect the health and vigour of a worker while in service or post retirement is a fundamental right under Article 21, read with Articles 39(e), 41, 43, 48A and all related to Articles and fundamental human rights to make the life of the workman meaningful and purposeful with dignity of person."

Similarly, in State of Punjab v. Mohinder Singh Chawla , dealing with rights of Government employees to health care, the Supreme Court observed:

"It is now settled law that right to health is an integral to right to life. Government has constitutional obligation to provide the health facilities. If the Government servant has suffered an ailment, which requires treatment at a specialised, approved hospital and on reference whereat the Government servant had undergone such treatment therein, it is but the duty of the State to bear the expenditure incurred by the Government servant. Expenditure, thus, incurred requires to be reimbursed by the State to the employee."

IS IT ONLY STATE RESPONSIBILITY?

In Virender Gaur v. State of Haryana, 1995 (2) SCC 577, the Supreme Court held that environmental, ecological, air and water pollution, etc., should be regarded as amounting to violation of right to health guaranteed by Article 21 of the Constitution. In Kirloskar Brothers Ltd. v. Employees' State Insurance Corporation , the Supreme Court held that right to health and medical care is a fundamental right under Article 21 read with Article 39(e), 41 and 43. It is also relevant to notice as per the judgment of the Supreme Court in Vincent Panikurlangara v. Union of India, AIR 1987 SC 990 - (1987) 2 SCC 165, "In a welfare State, therefore, it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health."

But having recognized that right to health and health care is a fundamental right what follows? Fundamental rights are generally available only against the state. They prescribe the obligations of the State. In a poverty-ridden country like India, does it mean that the State must provide free medical health care facilities to all? In a situation where there is increasing privatisation of health care systems, where the annual budget for health is reducing, where the cost of health education

DRUG COMPANIES RUNNING AMOK?

D V Gupta of Agra had no idea that the drug that he had been injecting in his body for his diabetic treatment was substandard. Soon after injecting this drug, popularly known as Huminsulin, (100iu) he suffered from paralysis. The company that manufactured and sold this drug was a wholly owned Indian subsidiary of the American company Eli Lilly & Co.

Soon after, a First Information Report (FIR) was registered by the local police on June 2005, the company in view of the criminal nature of the offence that could lead to arrest of the executives, petitioned the Allahabad High Court to (a) quash the proceedings and (b) obtain a stay on arrest. While defending itself, the company argued that neither the Indian subsidiary nor its executives were legally liable since "the product was being imported from France" and hence only the manufacturer (in France) was liable.

The company conveniently did not inform the Court that the manufacturer in France was none other than the company itself! No wonder, the Court did not buy the argument and refused to quash the legal proceedings and directed that the entire case be transferred to the Central Bureau of Investigation (CBI) for further enquiry and legal action.

Despite the adverse decision of the High Court, the 14-billion Company (annual profits Rs. 7,000 crores) continued its battle by hiring a battery of three high profile lawyers led by Kapil Sibal (now a Union cabinet minister). However, a two-member bench of the apex court dismissed the Company's special leave petition (number 475/2002) stating, "we see no reason to interfere with (Allahabad High Court's) impugned order."

The Central Drugs Laboratory in Kolkata found both the samples of Huminsulin to be substandard. Curiously, ignoring the documented evidence of the Company's responsibility in selling a substandard drug, the CBI for unknown reasons took the surprising step of filing a "Closure Report" which absolved the US Company of any legal liability. The CBI court, unhappy with the "closure" recommendation, set aside the investigating agency's report and instead proceeded to frame criminal charges.

On August 2 2005, the Court of the Special Judicial Magistrate (CBI) framed criminal charges against Eli Lilly & Co and ordered its prosecution on three counts:

- Section 27 of the Drugs and Cosmetics Act which deals with penalty for manufacture, sale etc. of "any drug deemed to be adulterated or spurious or not of standard quality...which when used is likely to cause death or ...grievous hurt." The mandatory punishment for such a cognizable crime is imprisonment for a period that can extend to whole life.

is growing exponentially this seems very unlikely. No Court has yet said that the State is bound to provide free medical care to all the citizens.

QUALITY OF HEALTH CARE

The other aspect would of course be the quality of health care provided by the State. Infrastructure in not just primary health care centres but even in government run hospitals in metropolitan cities is crumbling. These institutions are plagued by lack of enough beds, sufficient medicines and other similar problems. The Courts including the Supreme Court have not adequately dealt with this aspect. They have mainly been concerned with pious declarations of health being a fundamental right and peripheral and not so peripheral issues such as rights of government employees to be treated in government hospitals, emergency medical care and the like. But in a case dealing with bad infrastructure in public hospitals the Allahabad High Court held :

" It is indeed true that most of the Government Hospitals in Allahabad are in a very bad shape and need drastic improvement so that the Public is given proper medical treatment. Anyone who goes to the Government Hospitals in Allahabad will find distressing sanitary and hygienic conditions. The poor people, particularly, are not properly looked after and not given proper medical treatment. Consequently, most people who can afford it go to private nursing homes or private clinics. …All this needs to be thoroughly investigated. This is a welfare State, and the people have a right to get proper medical treatment. In this connection, it may be mentioned that in U.S.A. and Canada there is a law that no hospital can refuse medical treatment of a person on the ground of his poverty or inability to pay. In our opinion Article 21 of the Constitution, as interpreted in a series of judgments of the Supreme Court, has the same legal effect."

- Section 420 of the Indian Penal Code (IPC) that deals with cognizable non-bailable cases of cheating and dishonesty carrying an imprisonment of up to seven years and fine.
- Section 275 of the IPC that covers cognizable, non-bailable cases, where anyone found selling adulterated drugs is punished with life imprisonment with or without fine.
  While the law will take its own course in due time, investigations by the Monthly Index of Medical Specialties (MIMS) have brought to light some very disturbing issues.
- In India, Eli Lilly is a trader, not a pharma manufacturer. It either imports or merely markets medicines produced by Indian manufacturers. Should the nation allow such domestic trading operations by foreign companies in the pharma sector?
- Patients, even prescribers, are not aware that Eli Lilly's brands are not manufactured by the company but outsourced from local producers in India. Thus its brands are being patronised under a false notion.
- Huminsulin (40iu) though sold under Eli Lilly banner is actually produced by a local manufacturer by the name of M. J. Pharma in Halol, Gujarat. The manufacturing plant is not approved by the United States Food and Drug Administration (USFDA). Hence Huminsulin 40iu being sold in India, is not allowed to be sold to Americans because of lack of quality certification.
- In recent months, USFDA has been aggressively exhorting American citizens not to buy unapproved medicines either at home (via mail order suppliers) or abroad. Huminsulin produced in Halol falls in this category. Who will be liable if a visitor from United States, who has been using the US-made Eli Lilly's insulin, buys the India-made product and suffers?
- For poor quality goods and deficient services, foreign companies operating in India can be sued in their home countries as happened in the case of Bhopal gas disaster. However filing and fighting lawsuits in western countries, particularly in the United States, is without exception beyond the means of even the most resourceful and richest of Indians. With the product patent coming into force from.

January 1, 2005, monopoly manufacturers at monopoly foreign prices are selling new medicines. However, no mechanism has been put in place to support ill-informed patients in India with limited means to claim and secure damages that are legally permitted in the home countries of foreign companies in case of serious adverse effects. For example an American court has awarded US$ 252 million (Rs. 1,100 crore) to the family of just one American patient who died after taking rofecoxib. Why should an Indian sufferer be denied similar compensation when he pays the same price for the same drug of the same company?

Source: Editorial, MIMS INDIA, August 31, 2005

STATUTORY DUTIES

In the case of B. Poonam Sharma v. Union of India , the Police took the Petitioner's husband who had met with an accident into custody as they suspected him of drunken driving. The deceased had suffered one inch cut on his head and he was taken to a government hospital for first aid. The Government doctor stitched up the wound and prescribed brufen tablets. Thereafter, Police charged him under the Motor Vehicles Act and put him behind bars. At night, the deceased complained of severe headache and he was taken back to the same doctor who gave the deceased some more brufen tablets and sent him back without examining him. Next day he was released on bail. When the condition of deceased deteriorated, his relatives took him back to the same hospital. The hospital took X-Rays and CAT scan that showed brain haemorrhage, and he was immediately referred to a specialist hospital but succumbed to his injuries at the time of admission. Petitioner invoked writ jurisdiction of High Court under Article 226 and sought relief against the alleged negligence on part of the Government Doctor and police that caused the death of Petitioner's husband.

The High Court held that the instant case was not of an error of judgment as within a few hours patient was brought back complaining of severe headache yet no further treatment was given. The Court held that every doctor at the government hospital having regard to the paramount importance of preservation of human life is under statutory obligation to extend his services with due expertise. Hence, Respondent was directed to pay Rs.2 lakh as compensation under Public Law for violation of fundamental rights of Petitioner's husband.

In Marri Yadamma v. State of Andhra Pradesh , the deceased was an under trial who died of 'congestive cardiac failure'. The petition was filed by his spouse alleging negligence on part of the jail authorities and jail doctor in not providing appropriate treatment on time or referring to a specialist to determine the root cause of the ailment. The High Court in this case observed that the condition of the deceased at the time of his death was such that could have developed over a period of time and not immediately. Thus, it was abundantly clear that no care or caution was taken by the Respondents to get the deceased examined by a Surgeon or a specialist, even though he was complaining of ailments very often. The Court stated that on arrest a prisoner merely loses his right to free movement. His all other rights including right to medical treatment remains intact and it cannot be violated. The jail authorities had infringed fundamental right of the deceased therefore the State was liable to compensate his widow as a public law remedy for an amount of Rs.2 lakh.

MENTAL HEALTH AND COURTS

In the case of Death of 25 chained inmates in Asylum fire in TN., in Re. v. Union of India , the petitioners sought directions for implementation of provisions of Mental Health Act, 1987 to prevent another mishap of the kind in mental asylum in Tamil Nadu. In light of the provisions of Mental Health Act, Supreme Court issued following directions for its implementation:

(i) Every State and Union Territory must undertake a district-wise survey of all registered/unregistered bodies, by whatever name called, purporting to offer psychiatric/mental health care. All such bodies should be granted or refused licence depending upon whether minimum prescribed standards are fulfilled or not. In case licence is rejected, it shall be the responsibility of SHO of the concerned police station to ensure that the body stops functioning and patients are shifted to government mental hospitals.

(ii) Chief Secretary or Additional Chief Secretary designated by him shall be the nodal agency to coordinate all activities involved in implementation of the Mental Health Act, 1987, the Persons with Disabilities (Equal Opportunities, protection of rights and full participation) Act, 1995 and National Trust for Welfare of Persons with Autism, Cerebral Palsy, mental Retardation and Multiple Disability Act, 1999. He shall ensure that there are no jurisdictional problems or impediments to the effective implementation of the three Acts between different Ministries or Departments. At the Central level, Cabinet Secretary, Government of India or any Secretary designated by him shall be the nodal agency for the same purpose.

EMERGENCY HEALTHCARE

One of the major issues concerning health care has been the obligation of doctors to provide emergency health care. In the case of Paschim Banga Khet Mazdoor Samity v. State of W.B. the Supreme Court observed that providing adequate medical facilities is an essential

part of the obligation undertaken by the State in a welfare state. And the failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21.

The issue before Supreme Court was the legal obligation of Government to provide facilities in government hospitals for treatment of persons who had sustained serious injuries and required immediate medical attention. In the case before the Court, Petitioner who had suffered brain haemorrhage in a fall from the train was denied treatment at various Government hospitals because of non-availability of beds. Government justified its action on the ground that the petitioner could not have been kept on floor of a hospital or trolley because such arrangement of treatment was fraught with grave risks of cross-infection and lack of facility for proper post-operative care. It further argued that State hospitals cater to the need of poor and indigent patients as of the total number of beds maintained by the state government all over the State, 90% are free beds for treatment of such patients.

During the pendency of the case, the State Government appointed an enquiry committee to investigate the matter. The State Government adopted various recommendations made by the Enquiry Committee. Apart from the recommendation of Enquiry Committee, Supreme Court made certain additional directions in respect of serious medical cases:

1. Adequate facilities be provided at the Primary Health Centres where the patient can be given basic treatment and his condition stabilized.
2. Hospitals at the district and Sub-divisional level should be upgraded so that serious cases can be treated there.
3. Facilities for giving specialist treatment should be increased and having regard to the growing need, it must be made available at the district and sub-divisional level hospitals.
4. In order to ensure availability of bed in an emergency at State level hospitals, there should be a centralized communication system so that the patient can be sent immediately to the hospital where bed is available in respect of the treatment, which is required.
5. Proper arrangement of ambulance should be made for transport of a patient from the primary health centre to the district hospital or sub-divisional hospital to the State hospital.
6. Ambulance should be adequately provided with necessary equipment and medical personnel.

Supreme Court observed that though for implementation of the above directions financial resources would be required but at the same time it cannot be ignored that it is the constitutional obligation of State to provide adequate medical services to the people. The Court also observed: "In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints. (Khatri II v. State Of Bihar). These observations will apply with equal, if not greater, force in the matter of discharge of constitutional obligation of the State to provide medical aid to preserve human life. In the matter of allocation of funds for medical services the said constitutional obligation of the State has to be kept in view." The Court held that it was necessary that a time-bound plan for providing these services should be chalked out keeping the above in mind.

This case arose out of an incident in West Bengal. Other States were not parties to the case. Also, the Committee was concerned with West Bengal and the directions were also given by the West Bengal Government. The Supreme Court, however, observed that other States, though not parties, should also take necessary steps as set out in the judgment. Thus all the directions referred to above, would be equally applicable to other States in the country.

It is to be noted that though the responsibility of the State and government hospitals is well provided by a radical interpretation of the Constitution, there is no definite corresponding legal duty imposed on private hospitals and practitioners to treat emergency cases. The above judgments focus on the duty of State and government hospitals.

MEDICO-LEGAL CASES

Parmanand Katara v. Union of India was filed by a human right activist seeking directions against Union of India that every injured citizen brought for treatment should be instantaneously given medical aid to preserve life and thereafter the procedural criminal law should be allowed. It was widely observed that when accident victims or victims of crimes are brought to hospitals; doctors refuse to touch them till the police formalities

are completed. Some doctors do not treat them even after this for fear of having to attend courts. The Supreme Court, held that -

'There is no legal impediment for a medical professional when he is called upon or requested to attend to an injured person needing his medical assistance immediately. The effort to save the person should be the top priority not only of the medical professional but even of the police or any other citizen who happens to be connected with the matter or who happens to notice an incident or a situation. Every doctor whether at a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid delay the discharge of the paramount obligation case upon the members of the medical profession. The obligation being total, absolute and paramount, laws of procedure whether in statutes or otherwise which would interfere with discharge of this obligation cannot be sustained and must, therefore, give way………"

The Supreme Court and the High Courts have been intervening in a much more active manner in the last few years on the issue of health and health care. But again, unless they start looking into the impact of patents and drug price control as also the obligations of private hospitals, the effect is bound to be limited.

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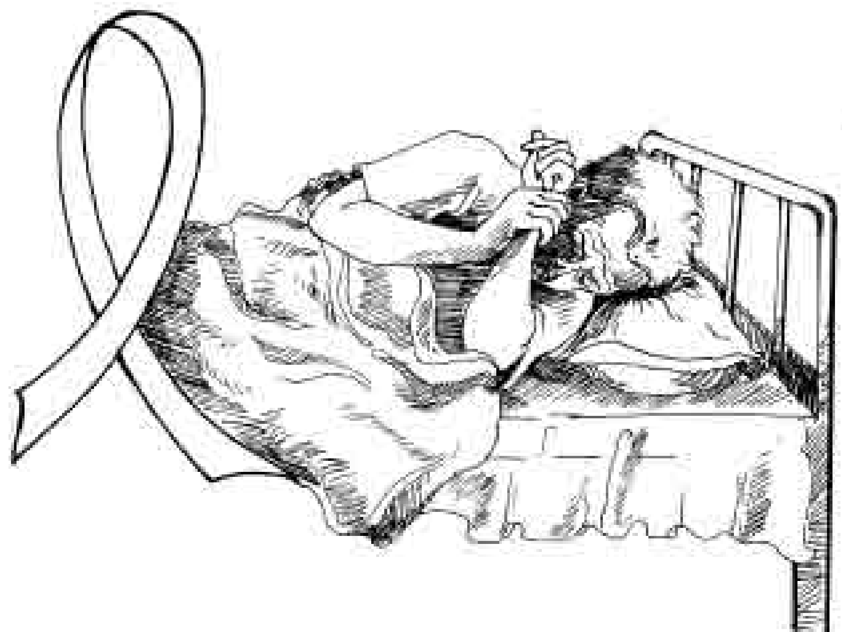

An Agenda Lost in a Unipolar World

The taking over of global governance and national agendas by ultilateral alphabetical combos governed by business interests needs a synergy between the international civil society initiatives and people's movements to ensure that the world enjoys the right to health and healthcare.

RAVI DUGGAL

The battle lines are drawn. No. This is not a fight between two wrestling giants that we see on television. This is the fight to reclaim human rights in a new globalised world where the World Trade Organisation (WTO) and allied agencies are increasingly determining the shape of the global political economy and civil society initiatives like the World Social Forum (WSF) and its allied partner that are globally struggling to counter the new economics unleashed on the people of the world.

The global transformation which the new economic policies have engineered has not shaped a world where the misery suffered by masses has reduced in any significant way or violation of their fundamental human rights has lessened. In fact, the gulf between the developed and underdeveloped world has widened with a shift in control over the political economy from politics to economics. The new engines of change are not political ideologies but globalised economics which use the multilateral institutional route to shape international policies wherein the driving forces are not nations but a new breed of international bureaucrats who are increasingly coming from global business establishments or are economists and social scientists who are supporters of global business tenets. Hence it is not surprising that the new Prime Minister of the largest democracy in the world is an international economist who is also supported by another international economist as head of the Planning Commission of the same nation and in tandem they are changing the direction of that nation's political economy to fit the curves of the new global political economy. Thus World Trade Organisation (WTO), General Agreement on Trade and Tariffs (GATT), Intellectual Property Rights (IPR) and Trade related Aspects of Property Rights (TRIPS), International Monetary Fund (IMF) and World Bank (WB), Multilateral Investment Guarantee Agency (MIGA), Asian Development Bank (ADB) and other affiliate alphabetical combos have taken over global governance. All these multilateral bodies are controlled by business interests based in finance capitals of the developed world and foist their agenda of promoting capitalist globalisation of an increasingly unipolar world.

So if this is the way the world is changing, then the human rights agenda, which is often in conflict with capitalist globalisation because the latter often violates various human rights, including health rights, also needs to follow a similar trajectory of multilateral or multinational initiatives.

Thus alternate alphabetical combos which seek to reclaim human rights have emerged to challenge the capitalist globalisation - World Social Forum (WSF), Peoples Global Action (PGA), Peoples Health Movement (PHM), Earth Charter Initiative (EHI), NGO Coalition for the International Criminal Court (CICC), Jubilee 2000, the International Campaign to Ban Landmines (ICBL), Global Health Watch (GHW), Trans National Institute (TNI), Transparency International (TI) etc. All these are civil society initiatives and believe that not only is Another World Possible but also that Another World is Necessary and these initiatives also actively use multilateral treaties and declarations such as International Covenant for Civil and Political Rights (ICCPR), International Covenant for Economic Social and Cultural Rights (ICESCR), Convention for Elimination of Discrimination of all forms Against Women (CEDAW), Child Rights Convention (CRC), Health For All (HFA), ICPD Program of Action, Beijing Platform, Agenda 21 to demand respect, protection and fulfilment of various human rights from governments across the world. This is then the scenario that the global human rights movements and initiatives have to operate in. And this is true for the interface of health and human rights. Experience the world over shows that if citizens of a country have to enjoy basic quality health care as a human right then:

- The State must be an active player.
- The financing of health care has to be under some form of public monopoly or single-payer mechanism.
- Lack of purchasing power is not an impediment to realize the highest attainable standard of health.
- The private provision of health care is well regulated and
- A Law mandating all the above has to be enacted.

This is the experience in most of Western Europe (UK, Germany, Netherlands, Sweden), Canada and a few countries from Latin America (Costa Rica, Brazil, Chile, Cuba) and Asia-Pacific (Japan, Australia, South Korea, Thailand, Sri Lanka). By contrast the United States of America, India and a number of underdeveloped countries which have weak state intervention and participation are unable to respect, protect and fulfil the right to the highest attainable standard of health as mandated by Article 12 of ICESCR and explained in General Comment 14 pertaining to this Article.

THE SHIFTING PARADIGMS

Political and civil rights emerged in the context of colonial and imperialist struggles and in many countries constitutions adopted them as fundamental rights. Post the Second World War, when political independence was gained the world over, social and economic rights became thrust areas in the development paradigm. In the cold war era it was civil and political rights (in the "democratic" capitalist world) versus social and economic rights (in the socialist world). Both the worlds have faced a crisis and the 1993 Vienna Declaration proclaimed the right to development as a universal and inalienable right being integral to human rights. Since then a number of international declarations - Rio, Cairo, Beijing, Copenhagen, Johannesburg, etc. have reaffirmed faith in this. While we may not have as yet the right to development as understood in terms of the Vienna Declaration, the potential and framework does exist to move towards that direction. At the global level there is realisation that health care lies in the rights domain and hence it is an integral part of the Covenant on Economic, Social and Cultural Rights. This group of rights is a new challenge. Hitherto civil and political rights like freedoms of speech, movement, political actions were the main concern for rights debate because the context globally in the last few decades were independence struggles and struggles for establishing democratic governance. Today, the global environment has changed and poverty and deprivation is the new context. Thus the rights debate has shifted to social and economic rights in which health is one of the emerging rights issue.

HEALTH AND HUMAN RIGHTS

Having a Constitutional right (whether as directive principle or as a fundamental right) has little meaning if health care infrastructure is not made available in adequate quantity as per the need and location of the population. At least the basic requirements to maintain a reasonable standard of health must be provided for. Furthermore, if infrastructure is in place it may not necessarily mean that it is accessible to the people, especially the poor. Thus differences based on location (rural-urban and distance), purchasing power (pricing), ethnicity, race and caste, gender etc. must also be eliminated so that access is not hampered due to any form of discrimination or conditionality.

Access to health care must exist irrespective of the capacity to pay. Often it is seen that infrastructure is in

place and access too is reasonable but user charges/fees prevents use of such services by the poor. The success of health care as a right is critical to the condition of affordability and hence any direct payments at the point of receiving care will necessarily be discriminatory. Any charges for health care must be collected indirectly on the principle of payment according to capacity that is through direct progressive taxation and charges, and/or insurance premiums.

Further, availability, accessibility and affordability have little meaning if the quality of care provided is compromised in any way. Quality of care not only means in terms of well-defined standards and good practices but also satisfaction of the client. Hence health care services must be sensitive to this, including being culturally appropriate or acceptable.

In India, the interface of health and human rights is not of recent origin. There is a rich history to it. On the eve of Independence, India had a well defined health policy and a comprehensive health plan in the Bhore Committee Report that was on par with the Beveridge proposal of NHS in Britain, but its recommendations have been sidelined over the years and the health care policy diluted considerably by subsequent committee reports and policy statements. Post Alma Ata (HFA) the government at least announced a health policy statement, which emphasized the need for a universally accessible and comprehensive health care, but this largely remained on paper as the health policy announced turned out to be only rhetoric as nothing changed at the ground level. The implementation, practices, allocations etc. continued to follow the same pattern and hence no significant impact has been visible.

What we have today in health care is a diluted participation of the state in providing selective services mostly of preventive and promotive nature in the rural areas and some curative care in urban areas. On the other hand the private health sector has grown from strength to strength without any regulation or control. Such a pattern of growth in the larger context of poverty is unacceptable. Further with Structural Adjustment Programmes and integration into the world economy the situation of public health has got even worse with both public health investments and expenditures declining as a proportion of Gross Domestic Product as well as a share of the government budget, and here agencies like World Bank and USAID, and unfortunately even WHO and UNICEF, all recommend curtailment of State's role in health and health care and push aggressively for selective care for selected or targeted populations. It is unfortunate that the Indian State has succumbed to such thinking.

This trajectory must be changed. To ensure that the role of the State is not curtailed a paradigm shift mandating health as a human right becomes critical. This means that right to healthcare must become political agenda. To ensure this, apart from honouring the Covenants and Declarations, there is also a need to create pressure from below. This is important because rights are never given they have to be seized. We are presently witness to an opportune moment of both having such an initiative in the form of the Jan Swasthya Abhiyan (Peoples Health Movement) as well as active engagement with the State to negotiate a rights based health policy and healthcare system.

An organized and universal access healthcare system is possible only under a rights perspective. The policy route to comprehensive and universal healthcare has failed miserably. It is now time to change gears towards a rights-based approach. Right to health and healthcare is a fundamental social and economic right mandated by ICESCR that India had ratified way back in 1978. But such a demand is not yet on the political agenda in India. The Peoples' Health Movement has voiced such a demand but this requires a widespread awareness campaign and participation of many more civil society groups. Synergies have to be created for these efforts to multiply so that people of India and other countries of the world can enjoy right to health and healthcare. Only such an approach can lead us closer towards a system that guarantees universal access to healthcare as a human right. To conclude, the battle between global capital and global civil society (read human rights) has to be intensified if the common citizens of this world have to reclaim their human rights, including health rights, which are rapidly being purged by WTO and its allies. Its time for WSF, PHM and other allied forces to expand their sphere of influence and action and one possible way of doing this is to counter the global capital alliance with a global labour alliance.

Thus the global civil society movements have to dovetail with global labour movements to build a strong and sustainable counter force for securing the health and human rights of all.

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Drug Price Control: Reasons and Rationale

India's public health is in crisis and has deepened with the widespread occurrence of HIV. People do not have access to affordable health services while the affluent sing hosannas for India's drug companies as their share prices ride the boom in the market. The reasons advanced for relaxing controls on prices are deeply flawed.

S SRINIVASAN & ANURAG BHARGAVA

Administrative pricing systems for drugs were initiated in 1962, in the wake of the Chinese aggression and the declaration of emergency in 1962. The Defence of India Act was invoked to curb the spiraling prices of medicines. The Drugs (Display of Prices) Order 1962 and the Drugs (Control of Prices) Order 1963 were promulgated. These orders, at least, had the effect of freezing prices of drugs as of April 1st 1963. Drug prices have been unaffordable even before the onset of TRIPs from 2005, thanks to the climate of deregulation and loosening of controls. And drug costs form more than half the treatment costs. India's drug situation is one of poverty amidst adequacy and plenty: people do not have access to affordable health services and medicines even as the share prices of drug companies is booming and Indian drug companies are praised abroad. This makes a thorough overhaul of the drug control and pricing system in India imperative.

A DISASTER FORETOLD

India's public health crisis is a disaster waiting to explode. The crisis has deepened since the last revision of the Drug Price Control Order (DPCO) with widespread occurrence of the HIV epidemic, increasing prevalence of hypertension, diabetes mellitus, ischemic heart disease, cancer and increasing drug resistance in infections such as tuberculosis, malaria, typhoid, and other bacterial infections1. Moreover, post-2005, the possibility of India's pharmaceutical industry reverse engineering newer drugs, has diminished unless the government issues a Compulsory License and new drugs patented by foreign companies will be subject to price control. This is easier said than done because it needs an exercise of political and moral will, against the financial clout of the big pharma.

The Doha Agreement has clarified TRIPS flexibilities, including a country's public health needs for primacy. Unfortunately, this interpretation has not been used either in the provisions of the recent April 2005 Amendments of India's Patents Act regarding more liberal grounds for compulsory license ("…each member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted…") or for defining what drugs can and cannot be patented. Clearly the amendments to the1970 Act could have said that drugs of a certain therapeutic class important for certain crucial disease situations prevalent in India are outside the purview of the patent regime. There is also no statement in the amendments whether newly patented drugs will be subject to price control.

FAILURE OF THE MARKET

Free market and deregulation views are now prevalent in India's policy circles: the message being that the market and competition will take care of high prices and any other distortions.

The reality, however, is that competition does not work[2] in the Indian pharma industry. More players in an uncontrolled market have meant only a wider range of prices for the same drugs.[3] You have the same drug being sold by different companies (and sometimes by the same company) at vastly different prices.

Roy and Rewari[4] surveyed the variation in prices of 84 formulations used in the management of cardiovascular diseases in the Indian market and concluded that variation in prices ranged from 2.8 percent to 3406 percent. Most importantly, the most-selling brand is seldom

Drugs need price control because:

- Drugs are overpriced and unaffordable.
- Drugs constitute 50 to 80 percent of health care costs in India.
- Health care is the second-most leading cause of rural indebtedness, after dowry.
- There is no consumer choice of product, price and quality in medicines; only in whether you take the prescribed drug or not, a decision always made in distress, mostly at the threat of death.
- There is no universal health insurance in India; even if there were, regulation of prices can result in considerable savings.

the lowest priced. The product leader is often the price leader too. Insisting on marginal revenue being equal to marginal cost, the criteria for perfect competition, is laughable.

Most readers would not believe this of India's drug market: retail market prices are often one to three percent of government tender prices![5] This shows if anything the tremendous overpricing without precedent in any other industry in the world. Also this percentage differential in pricing for the public sector and private retail sector is probably true of no other industry in India. Would the booming computer industry sell in the market a laptop at Rs 100,000 and to the government tender for Rs 2000/- to Rs 3000/-? Would a truck manufacturer sell trucks for Rs 5 lakhs in the market and to the government tender for Rs 20,000 even if he had an order of 100,000 trucks at a time?

PRICING POLICIES

The price control policy as we know today started with the DPCO of 1979, based on the Drug Policy (1978), itself an outcome of the path-breaking Hathi Committee Report (1975) on pharmaceuticals. The objectives over the years have been to make drugs abundant and affordable, but the ground situation is one of poverty and unaffordability amidst this adequacy.

Partly because of drug industry pressure and partly because of changing nature of dominant economic paradigms in India, the number of drugs under price control has come down over the years: 347 in 1979 and 74 at present. If the Pharmaceutical Policy (PP) 2002 were implemented it would have come down to around 30. The PP 2002, itself is a subject of litigation.[6]

Briefly, PP 2002 and all previous policies (except possibly the first one in 1978) have some common problems: the criteria chosen to keep drugs in and out of price control are themselves faulty and leads to anomalies:

- Most essential and useful drugs are kept out of price control.
- Non-essential and harmful drugs like analgin, phenylbutazone, Vitamin E, sulphadimidine, mebhydrolin, diosmine panthonate and panthenols, bacampicilin, etc is under price control.
- Drugs for HIV /AIDS, cancer, hypertension, coronary artery disease, multidrug resistant tuberculosis, diabetes, iron deficiency anemia, ORS, tetanus, filariasis, vaccines (new) for rabies, hepatitis B, sera for use in tetanus, diphtheria, Rh isoimmunisation, anticonvulsants and ant epileptics, diphtheria, snake bite, suspected rabid dog bite/rabies, etc. fall outside price control (See boxes below).
- Price control, since it is based on market share criteria, produces only partial regulation. Chloroquine for malaria would be under price control but not equally important other anti-malarials.[7] True also leprosy drugs and analgesics.
- Of the 300 top selling brands, only 36 (that is only 12 percent) were price controlled
- The rest that is 88 percent were not.[8]

Due to limitations of space we have not mentioned other contributory factors that make the drug market of India 'unique': namely, the prevalence of irrational, unscientific and harmful drugs leading to "therapeutic chaos and nihilism" in the Indian market and among medical professionals; the easy availability of medicines across the counter; the poor infrastructure for quality control; weak and poorly staffed regulatory administration; poor regulation of the medical profession, of the retail pharmacists, of the pharmacy profession, and poor drug control; lack of serious prosecution of those selling substandard, sub therapeutic and spurious drugs; prescriptions influenced by aggressive promotion of drug companies leading to over/under prescribing[9]; inaccurate diagnosis, lack of up-to-date knowledge, unethical practices like receiving commissions for prescribing certain drugs and sponsorship by drug companies of individual doctor's expenses as well as of medical conferences, etc.

One upshot is that demand is supplier induced.

The health market creates and promotes wants. Doctors also set themselves as gatekeepers, with societal sanction, to certify various physical states of being including starvation, birth and death.

These trends have to be viewed in conjunction with the burgeoning crisis in non-communicable diseases in India. We also briefly discuss in the accompanying box why drugs for non-communicable diseases have to be placed under price control.

MARKET OR THE STATE

The solution is obvious: the State clearly has a welfarist and interventionist role, especially in the areas of health, education and removal of hunger. In the current environment, one cannot wish away the market. We can curb market fundamentalisms, however, especially in health and education and removal of hunger. The legitimacy of the State as an instrument of ensuring the right to health care and distributional justice needs to be asserted.

Price regulation of medicines is the norm all over the world, except the USA, which unfortunately India is trying to emulate. Even in USA, drug companies and health insurance companies always negotiate prices. But the system excludes large numbers of the poor and especially makes medicines costly for the elderly[10]. One in three non-elderly Americans -- 74.7 million -- was without health coverage for all or part of 2001-2002.[11]

UK has its Pharmaceutical Price Regulation Scheme.[12] All European Union (EU) countries have a form of price regulation. In setting prices, these countries use therapeutic comparators and the price of products in other EU markets. Denmark, Greece, Finland, Ireland, Italy, the Netherlands, Portugal, and Sweden set a maximum price in relation to prices in neighbouring countries. Belgium, France, and Italy set prices in relation to relative cost, prices elsewhere in the EU, and the contribution made to the national economy. In Austria, France, and Spain, there are volume-cost and other

Task Force Report

Even as we go to the press (Sep 25, 2005), the Report of the Task Force, chaired by Pronab Sen, Principal Adviser at the Planning Commission, "to explore Options other than Price Control for Achieving the Objective of Making Available Life-saving Drugs at Reasonable Prices" is available and if implemented they should alleviate many of the gross distortions in drug pricing. Some extracts from the Executive Summary of the Task Force Report:

The Strategic Approach

The Task Force recommends that price regulation should be on the basis of 'essentiality' of the drug and it should be applied only to formulations and not to upstream products, such as bulk drugs. No effort should be made to impose a uniform price, and only a ceiling price should be indicated. The ceiling price of essential drugs should normally not be based on cost of production but on readily monitorable market based benchmarks. Other drugs falling into selected therapeutic categories should be brought under a comprehensive price monitoring system with mandatory price negotiations system, if necessary. The regulatory mechanism should be significantly strengthened both at the Centre and in states. A process of active promotion of generic drugs should be put in place including mandatory debranding for selected drugs. Public Sector Enterprises (PSEs) involved in the manufacture of drugs should be revived where possible and used as key strategic interventions for addressing both price and availability issues. The drug regulator must maintain a database of brands and their compositions and no change should be permitted in the composition of a given brand...

Principles of Price Regulation

The Task Force recommends that the National List of Essential Medicines (NLEM) 2003 should form the basis of drugs for price control/monitoring. To support the process, the government should announce the ceiling price of all drugs contained in the NLEM on the basis of the weighted average price of the top three brands by value of single ingredient formulations prevailing in the market as on 1.4.2005....

Patented Products

All patented drugs and formulations should compulsarily be brought under price negotiation prior to the grant of marketing approval. The reference price to be used for such negotiations will be the prevailing price of the closest therapeutic equivalent in the domestic market/lowest price at which the drug is marketed internationally.

Crisis of Non-Communicable Diseases in India

A major public health crisis, which has arisen in the last few decades with the demographic transition, increasing urbanisation, and lifestyle related factors, is the increasing prevalence of a host of non-communicable diseases. Some problems related to low nutrition, poor sanitation like iron deficiency anaemia has remained. Consider the following:

Anaemia: Anaemia is a major public health problem in women and children with prevalence of 74.3 in children of 6-35 months and a prevalence of 49-56% in women. (NFHS 1998/99) Anaemia contributes to 1/3 of maternal mortality.
Diabetes: India has the highest number of patients with diabetes in the world. (Source: The burden of non-communicable diseases in South Asia. British Medical Journal, April 2004), with estimates ranging from 19.4 million in 1995 to around 32.7 million affected. An increasing prevalence of diabetes in urban areas has been documented.

Hypertension: The number of patients with hypertension is also high with an estimated prevalence in adults of 20-40% in urban areas and 12-17% in rural areas. (Source: The burden of non-communicable diseases in South Asia. British Medical Journal, April 2004)

Coronary artery disease: The prevalence of coronary artery disease in urban areas is estimated to be 10% in people over 35 years of age. (Ibid)

Chronic respiratory diseases: These include bronchial asthma, and chronic obstructive airways disease. Morbidity from respiratory diseases accounts for 65 million cases and 580,000 deaths. (Ibid)

Cancer: Estimates of age standardised rates of cancer range from 99.0 to 129.6 per 100,000 in males and 104.4 to 154.3 per 100,000 in females (BMJ, op.cit). About 700,000 new cases with cancer occur each year.

rebate schemes. Spain and the United Kingdom, set their prices to ensure a rate of return within a particular profit range.[13]

Canada has a Patented Medicines Prices Review Board; France has a Transparency Commission and Economic Committee on Medicines; Egypt has all drugs under price control; Italy has restricted wholesale margins; and Germany has its reference pricing system. Some system of price monitoring and price regulation prevails in Japan, Netherlands, China, Indonesia, Colombia, etc. In some of these countries, drug pricing is tied with national health system reimbursements and or insurance schemes. In the absence of either in India, the havoc on the majority of the population can well be imagined.

How come all the developed free market economies do not have a free market with respect to pricing of medicines? Moreover, pharma has to match its production to disease priorities and patterns prevalent, unlike in India at present; and the kind of drugs made needs to be regulated.

WHAT ABOUT R & D?

One of the reasons given for high price of drugs is the high R&D and innovation cost in pharma. But this is wrong. Does any other sector say that we have to price a product high because we are doing/have done R&D for future/present products? Do manufacturers of computers or microprocessors or cars do so?

Secondly, the cost of doing clinical trials is about $300 million per drug. About 80 percent (Rs 1000 crores) of this has to be done in the West if it has to be accepted there. This is apart from the western pharma industry's figures where the cost of discovering a new molecule is stated as $ 800 million per drug, which includes $400 million as opportunity costs of not doing R&D! Using purchase-parity, this is Rs 700 crores for a single drug. It is not possible at present sales and projected sales of Indian companies. Indian companies together spent Rs 660 crores on R& D in 2003-04. No drug has been discovered, tested and marketed by Indian companies in last 20 years, despite promise of exemption from price control for 15 years. Prices of drugs never increase in the West. If R&D costs are recovered in the first year or so (first few weeks in many cases), only legitimate profits need recovery thereafter. Following some such logic, in Japan it is mandatory that all prices of all new drugs come down by five percent every year! In our case, royalty percent needs to be fixed which is not done in the Patents Amendments (usually, not more than five percent). So is pharma R&D risky? No, it does not appear to be any more than any other technology based industry.[14]

... Despite all the rhetoric to the contrary, this is

Why should drugs for non-communicable diseases be placed under price control?

The degree of morbidity and mortality associated with these non-communicable diseases mean that patients with hypertension and diabetes mellitus would be more than the entire population of many developed countries.

These diseases often carry the burden of lifelong therapy. Drugs for diabetes, hypertension, asthma, have to be taken lifelong, for epilepsy for a minimum of 3 years. Costs of treatment impose a tremendous economic burden on patients, which many cannot afford and suffer premature death or other complications like stroke, heart failure and kidney failure.

Patients with non-communicable diseases most often have to take multiple medications, which further adds to cost. For instance, patients with diabetes may have to take two different anti-diabetic pills, in addition to drugs for hypertension (which often coexists), for cholesterol reduction, etc. The average cost of care for a patient with diabetes is estimated to be Rs. 4500 per year ; a lower socio-economic group person may have to spend 59 percent of his income on this.

We calculate that the cost of the multiple medications for coronary artery disease according to the market leader rates is Rs. 12,500 per year which is clearly unaffordable. This figure can be brought down to less than 20 percent if more rational pricing regimes were in place.

Most of these drugs are at present outside price control and, there is evidence of wide inexplicable differences between brands made by reputed companies that vary by 400-900 percent in their retail prices, which indicates profiteering by the companies at the cost of the patient.

not a high-risk industry. As one indication, the law provides tax credits equal to 50 percent of the cost of testing orphan drugs and extends the credits to other drugs if "there is no reasonable expectation that the cost of developing and making available in the United States a drug will be recovered from sales in the United States". In other words, if you can't make a profit, the government will help you out.

Risky businesses have variable returns, but the pharmaceutical industry has been, year after year, the most profitable in the United States. What these companies are, in fact, claiming is an entitlement not only to recoup anything they wish to spend on R&D but to make an exorbitant profit margin as well. The R&D costs, no matter what they are, have little to do with drug pricing. Mr. Gilmartin, President and CEO of Merck, referring to the $802 million per drug estimate, remarked, "The price of medicines is not determined by their research costs. Instead, it is determined by their value in preventing and treating disease, … it is the doctor, the patient, and those paying for our medicines that will determine its true value."

More relevantly, most R&D even in the West is public funded, even when the pharma companies reap the profits. For example, Taxol (anti-cancer drug) was supported by the National Institutes of Health (NIH). Drugs like Gleevec, Epoeitin, Zidovudine (AZT) were discovered in public funded university departments. And during 1998-2002, of 415 US FDA applications, only 14 percent were innovations, the rest were me-too drugs. And as far as R&D relevant to tropical countries, only 13 out of 1223 new chemical entities discovered between 1975-1997 related to tropical diseases. Therefore, we need different strategies for supporting R&D for diseases of national importance.

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ENDNOTES

1. Details are in Impoverishing the Poor: Pharmaceuticals and Drug Pricing in India, LOCOST/JSS, Baroda/Bilaspur, December 2004. Hereafter LOCOST/JSS, 2004.
2. Chapter 4, LOCOST/JSS 2004, " Pharma Pricing in India: a failure of the market(s) ?"
3. 'Drug Price Control: Principles, Problems and Prospects' by Chandra Gulhati, Editor of MIMS in MFC Bulletin, June 2004). Chapter 3, LOCOST/JSS 2004.
4. V.Roy, S. Rewari (1998). "Ambiguous Drug Pricing: A Physician's Dilemma". Indian Journal of Pharmacology, 30: 404-407.
5. Tender prices of the Tamil Nadu Medical Services Corporation (TNMSC) at www.tnmsc.com. Srinivasan, S. "How Many Aspirins to the Rupee? Runaway Drug Prices", Economic and Political Weekly, February 27-March 5, 1999.
6. The authors' affiliated organizations [LOCOST, Jana Swasthya Sahyog (JSS), All India Drug Action Network (AIDAN) and the Medico Friend Circle (mfc)] are the co-petitioners in the case pending in the Supreme Court. The petitioners have filed a series of affidavits in the matter questioning the wisdom of the criteria for drug price control in Pharmaceutical Policy 2002 (PP 02).
7. The price control on drugs of any category is partial at best, with only one or two drugs of a category of drugs being represented in the price controlled list. For example, in the case of NSAIDS only ibuprofen, aspirin, and phenylbutazone are represented in the previous DPCO list while in the market under the category of NSAIDS 21 drugs are available. This partial representation of drug categories seriously dilute the efficacy of the DPCO in making essential drugs available to people, especially by shifting demand away from a price-controlled drug to those alternative drugs not under price control.
8. Out of the top 300 top selling brands only 115 brands were of drugs, which are included in the National List of Essential Medicines 2003; i.e. 62% of brands were of drugs, which were not considered relevant by experts to be included in the National List of Essential Medicines (2003). These include more expensive alternatives of essential drugs, irrational combinations, and irrational drugs.
9. Surviving the Pharmaceutical Jungle by Nobhojit Roy and Neha Madhiwalla is a new WHO funded study on the unethical promotional practices of pharma companies in India. Jan-Mar 2004 of Issues in Medical Ethics. For the study see www.issuesinmedicalethics.org/docs/Pharmrpt.pdf
10. "Prices Of Most Popular Drugs For Seniors Rose Nearly Three-And-One-Half Times The Rate Of Inflation Last Year -- Prices Of 27 Of The Top 50 Drugs Sold To Seniors Rose More Than Three Times The Rate Of Inflation" at /www.familiesusa.org/site/PageServer?pagename=Media_Out_of_Bounds, July 9, 2003.
11. See <http://www.familiesusa.org/site/DocServer/Going_without_report.pdf?docID=273>
12. See http://www.doh.gov.uk/pprs/index.htm
13. For weblinks, see Impoverishing the Poor, LOCOST, Dec 2004, op.cit, Chapter 1.
14. See The Truth About the Drug Companies: How they deceive us and what to do about it. Marcia Angell.305 pp. Random House, 2004.

To Market! To Market! To Buy Healthcare!

Public healthcare in India has become a casualty to the insatiable hunger of the market for profit making and monopoly, catering only to the rich while excluding millions. There has been little debate about how the privatisation of public health services in India is linked to the global trade-expansion policies of international institutions such as WTO, IMF and the World Bank.

D VARATHARAJAN

Globalisation signifies economic growth and stability through free markets and minimum government interventions. It is nothing but a revisit of classical laissez-faire paradigm. However, the word 'Globalisation' carries varied connotations meaning different things in different contexts and countries that went for it in the past have adopted different variants of it.

India is one of the reluctant nations to adopt globalisation as a strategy for economic prosperity. In a sense, India's globalisation exercise marked the third phase of the country's post-independence economic history. The first phase was the period up to late 1960s when Indian development was predominantly governed by imports. The second phase corresponded to the two decades that followed nationalisation of banks when import substitution was the key. The third phase is the globalisation era wherein export promotion is being employed as a strategy for aggressive growth. In addition to India's own economic history, global economic context too played a major role in the third phase of India's post-independence development. India was under tremendous international pressure to follow the path of quite a few nations within and outside Asia. India also had its own internal compulsions to respond favourably to the international pressure.

Like many other countries facing similar situation, Indian variant of globalisation or Structural Adjustment Programme (SAP) too stressed greater role for market forces, international competition and withdrawal of the interference of government from economic activity. It had many faces such as liberalization, autonomy, decentralization, privatisation and fiscal discipline. However, the country quickly realised, based on our own experience and from the experience of East Asian miracle (and subsequent collapse), that the trade-based growth-oriented strategy is not sustainable in the long run unless we strengthen our asset base because globalisation, by design, brought with it extraordinary risks in the form of growing inequality, marginalisation and social explosions.

This realisation brought the two-legged (growth with development) approach into focus and forced the inclusion of the annexure - human face - into the reform agenda. In other

Declining Health Resources

Health, a major component of human development, suffered on account of India's failure to recognise human development as an investment. Resource flow to health steadily declined from 6.1% of GDP in 1991 to 5.2% in 2001 (Government of India, 2002a). Although the decline has been steady since 1970, it was more pronounced during the 1990s (Duggal et al, 1995). Government's share in total health expenditure in the country has come down from about 25% in the early 1990s to 17% in 2001 and to further less proportion in 2002; Government health expenditure now hovers around 0.9% (estimates differ between 0.6% & 1.2%) of GDP. Health's share in Plan allocation slipped down from 1.8% in early 1990s to 1.3% in 2002, its share in Central budget remained static at 1.3% and the State budgetary share is brought down from 7% to 5.5%. Trend in Plan allocation to health indicates that the increase is much less than even the population growth rate (Panchamukhi, 2000). As a result of compelling demands of the non-social sector and relatively slow growing fiscal capacity of the States, the capital expenditures of individual States on health didn't show any significant increase. It is also generally noticed that the government's allocation to education is larger than the private sector's allocation. In the case of health, it is just opposite. If the current signals emerging from the government (both Centre and States) are any indication, then the government would gradually withdraw from this sector leaving the field open to the for-profit non-government sector.

Governments of all the other countries, rich or poor, invest proportionately more GDP in health than India does; only Czechoslovakia (0.4%) and Sweden (0.8%) lag behind India in this respect. Moreover, existing multi-tier management and staff-intensive delivery systems are costly undertakings in which service quality quickly deteriorates (resulting in under-utilisation) especially when resources

words, 'human face' is a 'residual' not the 'substance' in our globalisation 'design'.

All said and done, the success of this two-legged approach is yet to be ascertained. But, the initial trend is not encouraging because it seems to have only partially succeeded in accelerating the human development prospect (Government of India, 2002). This is because India continues to view human development as consumption not investment even after 40 years of human development debate.

GLOBALISATION AND HEALTH

Indian approach towards health from the beginning has been residual in nature. The health sector has been a mere absorber of reform process elsewhere rather than effecting its own. Globalisation exercise is no exception and the reform was thrust on the health sector from outside the sector and to a considerable extent, from outside the country.

The World Bank (1993), for instance, provided countries such as India with a three-pronged strategy to 'reform' the health sector. First, governments should foster an enabling environment for households to improve health. Advances in income and education are expected to allow households to improve their health. The logic is that the poor, who have the greatest residual health needs, are most likely to spend additional income in ways that enhance their health. Second, governments should spend less on cost-ineffective services such as tertiary care, specialist training and discretionary services and more on public health programmes such as immunizations, AIDS prevention programmes and essential clinical services. Third, governments should facilitate the involvement of the private sector by promoting diversity and competition.

Indian health sector accepted SAP without resistance basically due to the impatient middle class and the private sector (Qadeer, 2000). Globalisation was engineered through policy initiatives such as new public management, contracting out of services, compulsory competitive tendering (best value) and public infrastructure privatisation through public-private partnerships known as private finance initiative (PFI), build-own transfer (BOT), or build, own, operate and transfer (BOOT).

There has been little debate about the way in which the privatisation of public services at national level is linked to the global trade-expansion policies of international institutions such as WTO, IMF and the World Bank.

COMMERCIALISATION OF HEALTH CARE

Globalisation meant that the national priorities became dominated by the interest of international capital and

needed are not adequately available. As a result, the programmes designed to improve health conditions of poor have encountered funding constraints, resulting in shortages in infrastructure and trained staff and quantitative and qualitative deficiencies in services (Chirmulay, 1997).

About 70% of government hospitals function in urban areas where only 27.8% of India's population lives. Similarly, only 25% of public and 35% of private hospitals and 10% of public and 30% of private hospitals beds are located in rural areas. Urban areas also have 20 times higher bed density and 10 times higher doctor density than the rural areas (UNFPA, 1997 and Shariff, 1999). Inter-State variation in doctor and bed availability is respectively 6 and 100 times. Kerala is the only State where about 60% of the hospital beds are located in rural areas. States with higher density of medical institutions are found to have an urban bias and a larger proportion of hospitals in the total (Narayana, 2000). Also, States reporting higher density of hospital beds have high proportion of beds in the private sector.

As a result of urban-rural differences in the availability of health care services, rural people end up spending much larger proportion (estimates vary between 5% & 15%) of their income on health than their urban counterparts (2.3%). This results in considerable increase in rural poverty. Rural areas are found to have 9.6% more people below poverty line. Not only that, percentage of deaths that received medical attention has come down to 16.5% during this period from 16.8%. Rural deliveries receiving medical attention has also declined from 18% in 1992 to 17.4% in 1995. Percentage share of merit bad like tobacco in final consumption expenditure increased from 1.5% in 1990 to 1.8% in 1996. On the other hand, share of food and medical care has come down from 48.8% and 2.4% to 45.9% and 2.1% respectively.

health sector in India has grown in terms of commercial importance since 1991 when the reform process was originally initiated. The background behind the commercialisation seems to be the failure of the traditional commercial sectors to yield the requisite profit. Since the profitability in other commercial sectors has come down over a period of time, the developed nations started focusing on service sector such as health that is being seen as a sector with great profit potential. Advanced countries like the US see huge commercial opportunities in the entire spectrum of health and social care facilities including hospitals, outpatient facilities, clinics and nursing homes (Price at al, 1999). Moreover, profits of the health care industry in the advanced economies started falling due to market saturation. As a result, health care firms withdraw from selected markets and try to capture new markets elsewhere abroad. The strategy also suited the reform process initiated by international institutions such as the World Bank. Expansion of the non-government sector depends on the opening of markets in the traditional areas of public provision and the public sector is left to bear the risk for more vulnerable populations but with diminished risk pooling to finance care.

Medical care in India was handed over to the private sector without any mechanism to ensure the quality and standards of treatment as well as access to services. Not only were the secondary and tertiary health care sectors deprived of resources, but inevitably primary health care sector also suffered. As the cutbacks involved the entire social sector, there was an additional loss of inter-sectoral support. The cutbacks also affected the functioning of the monitoring units. External funding of health sector influenced the functioning and autonomy of the national institutions. At the same time, private investment in public sector and user fee failed to make an impact either on efficiency or on the range of services offered to the poor. In fact, by increasing the cost of medical care, they have made it more difficult for those who most need help to access public sector services. The reduction in the list of drugs under price control from 378 to 73 only compounded the problems as the drug prices have rocketed. Consequently, the monetary value of the pharmaceutical production has gone up by Rs. 130 billion during the last decade whereas the increase was a mere Rs. 38 million during the preceding four decades (Duggal, 2002). Of course, increase in the value of pharmaceutical production need not indicate an increase in the availability of drugs and medicines in the country. It could simply be a value transfer from the consumers to the producers.

URBAN-RURAL DISPARITY

In line with increased emphasis on market processes

and competition, sluggish performance of public health care provision has come under scrutiny now. There appears to be disguised unemployment of health care resources in the health sector (Varatharajan et al, 2002). The main question now is how to organize the health-care delivery system and how to structure incentives to obtain maximum efficiency and quality of care.

Poor efficiency or inefficiency of the public health care sector actually affects the rural people and the poor who are found to utilise the public sector health care more (Krishnan, 1994). In other words, rural poor continues to suffer from lack of essential medicines and supplies even while the urban rich has unprecedented opportunities to treat even cosmetic illnesses.

When all the justification (low human development and higher health care needs) for location of public facilities in rural areas, hospitals, dispensaries and health centres are actually located in urban areas.

MARKET FAILURE AND NEED FOR RETHINKING

The health sector consists of close to a dozen markets, including the market for health financing (insurance, medical savings account), physician services, hospital services, medical labor, medical education, pharmaceutical, medical equipment and supply, etc. These markets are linked and interact closely with each other. During the past three decades, empirical studies found that there were serious market failures (or absence of prerequisite condition for a workable competitive market) in the health sector. Most of these failures are caused by the presence of externalities, asymmetry of information and moral hazards, which exist in a high degree in the various markets in the health sector. In the health service provision markets, we would not expect competition to work when patients suffer from life threatening or urgent medical problems. Moreover, asymmetry of information gives medical professionals strong monopolistic power to set prices and induce demand. In the supply of medical professionals, high barriers of entry have been erected by the government and by the medical profession to assure patients' safety by restricting the provision of services to those who met certain standards. This is in large part because, again, of the asymmetry of information between the patient and the health professionals. In the pharmaceutical and medical devise markets, patent laws give monopoly to new drugs and new medical technologies in order to encourage research and development. While these barriers of entry and monopolies were established for good social and economic reasons, nonetheless, they impair the competitiveness and efficient operations of their markets.

India needs to rethink its reform strategy vis-a-vis health sector. It is no strategy to reduce the government health care resources further down when the present level itself is inadequate and is below the socially desirable level. National Health Policy 2002 does talk about increasing government resources.

This question still remains unanswered especially when State after State is complaining of inadequate resources and the State budgetary allocations to various sectors are inelastic. Panchayats' role with respect to health sector in general and to private health care sector in particular is unclear. Their role is not clear even with respect to the government sector. Role of private sector in health sector is another area still left as a conjecture.

In the absence of government defining it role, private sector assumes that its role lies in the provision of high-tech curative services. The talks of private-public partnership are also centred on the hospital sector once again highlighting and extending the already existing urban bias in planning and resource allocation within health sector. At the same time, urban poor continues to suffer due to lack of primary care and purchasing power.

— December-January 2003

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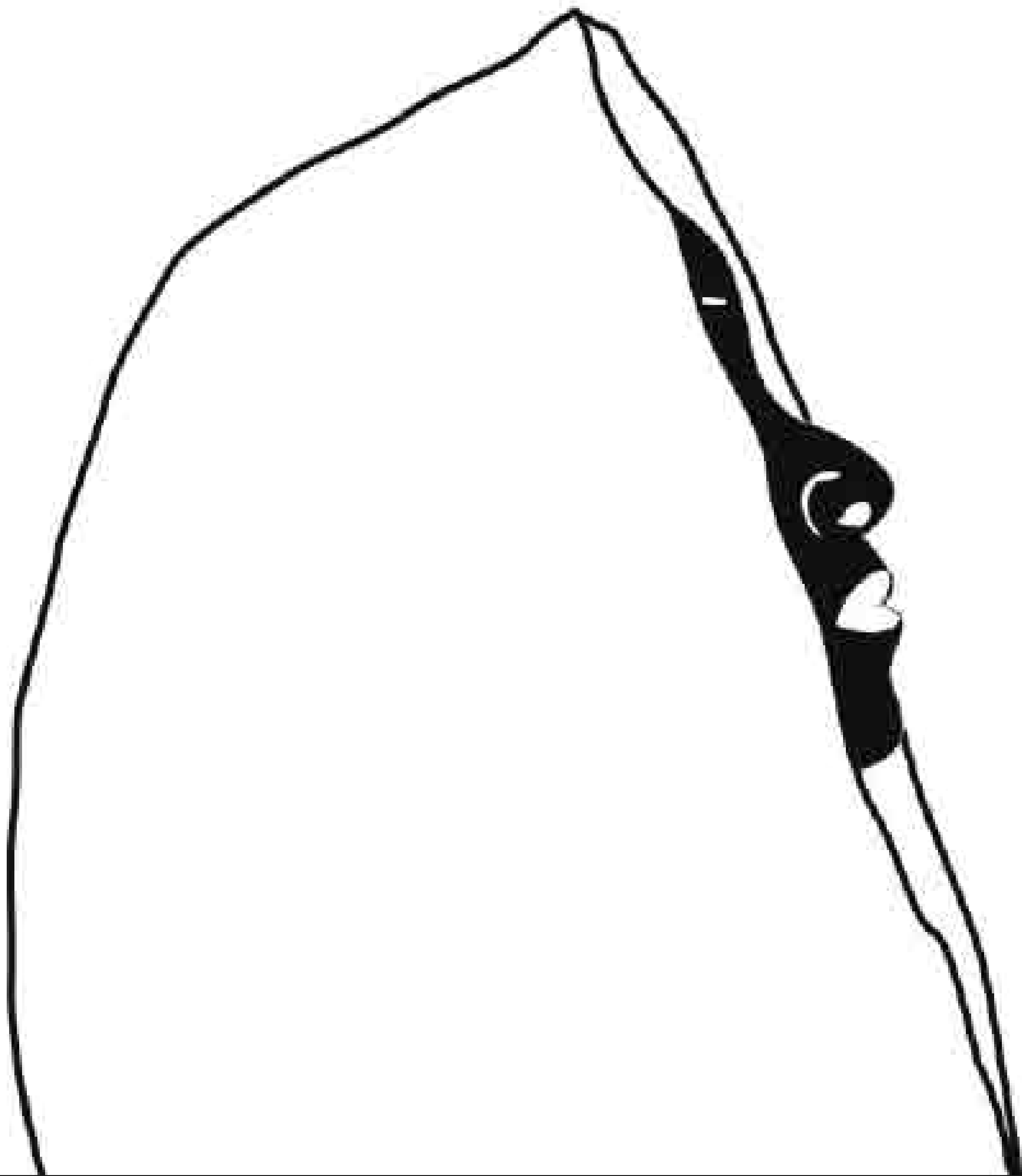


SECTION 7

Over two decades have elapsed since the Valley has been stalked by fear and violence and the unending imbroglio has not only ruined the economy but also turned the 'paradise on earth' into a dreaded zone where widows and orphans abound. Over 60,000 dead, thousands gone missing and hundreds brutally tortured. A staggering 50,000 or more have been orphaned. Thousands of women have been forced to widowhood, many do not know the fate of their husbands or young sons who were whisked away by armed military or militiamen. A heavy blow has been suffered by the people of Kashmir in the name of rule of law.

Amarnath Row: Communalists are Back to Business

A row set off by the move to hand over a piece of land to a pilgrimage centre in Jammu & Kashmir has revved up hate mills that spin sectarian politics. Not just chief minister but sanity too bolted out before another governor could retrace his predecessor's disastrous steps in what looks like a belated damage control exercise.

PRAFUL BIDWAI

As has been famously said, a week is a long time in politics. Jammu & Kashmir has once again proved the validity of this aphorism with the crisis over the transfer of land to Shri Amarnath Shrine Board (SASB). The week-long protests this triggered not only led to the dramatic collapse of the Congress-People's Democratic Party alliance government, but may have generated major negative changes in the political mood in the Valley. This could help revive the separatist militancy which has been on the wane for more than two years. It may also have strengthened forces in the other regions of the state, which would like to divide it along religious lines. All these are worrisome developments.

To start with, the protests impelled the PDP to withdraw from the ruling coalition on June 28. Jammu & Kashmir Chief Minister Ghulam Nabi Azad first put a brave face on the crisis this precipitated but he soon threw in the towel. Rather than go through the vote of confidence he had himself tabled, Mr Azad submitted his resignation to Governor N N Vohra.

Evidently, despite his confidence that he would win the vote, Mr Azad failed to engineer enough abstentions in the legislative Assembly by PDP dissidents and other potential defectors, which alone could have enabled the Congress and its allies (with 42 seats in the 89-member House) to fight off the 47 seat-strong opposition and survive in power till the Assembly elections are held in October.

Meanwhile, the revocation by Governor Vohra of the order transferring land to the SASB set off a conflagration in the Jammu region, which soon spread to other parts of India thanks to the Bharatiya Janata Party's eagerness to exploit the situation to its own narrow ends.

The fall of the Congress-PDP coalition government, the first of its kind in J&K, is a set-back to the cause of moderation and political reconciliation in the long-troubled and restive state. This is only one of the many casualties extracted by the crisis over the transfer of forest-land, and the violent protests this generated.

The crisis has taken an even greater toll in the form of a collapse of the political normalisation process and an eclipse of the internal peace process in Kashmir. The danger, as we see below, is that this may lead to a revival of militant separatism in the Valley and a general shift towards intolerance and assertion of religion-based or communal identities in all the regions of J&K.

The gains of the past six years -- a substantial decline in violence by jehadi separatists and by the security forces, a revival of the economy, a boom in the tourist industry, increasing isolation of strident extremism, and a general acceptance of mainstream political activity and electoral politics -- could now be in jeopardy.

In Kashmir, the biggest winners from the crisis are the Hurriyat hardliners led by Syed Ali Shah Geelani, who until recently got completely isolated thanks to his extremist positions. No less important gainers are the leaders of the moderate Hurriyat, led by Mirwaiz Umar Farooq, who have moved from near-isolation and irrelevance to prominence through their staunch opposition to the land transfer on the ground that it would bring about a demographic transformation of the Valley. The two Hurriyat factions are now discussing unification.

Nationally, the greatest gainer is the Bharatiya Janata Party, which has cynically exploited the return of the land to the forest department to foment violent Hindu-communal protests in different parts of the country. The death toll from the protests has already crossed the double-digit mark.

There are no heroes, only villains, in the entire SASB land transfer drama. The greatest villain is unquestionably former Governor Lt-General SK Sinha, a BJP appointee, who just days before his retirement on June 4 ordered the state government to transfer 100 acres of forest land to the board of which he is the president. The land was to be used to provide temporary accommodation to pilgrims to the Amarnath shrine, where a stalactite of ice forms in a cave. The land transfer was manifestly illegal and violated the Forest Conservation Act. General Sinha has over the years systematically encouraged pilgrimage to this ecologically fragile area at an altitude of 10,000 feet, carved out a new route through the mountains, promoted all kinds of tourist facilities including a helicopter service, and extended the duration of the yatra from four weeks to eight weeks every year -- although the ice lingam lasts for only one month. The result has been a several fold increase in the number of pilgrims to 4 lakhs, with huge environmental destruction and mounds of polluting waste.

The state forest minister, who belongs to the PDP, went along with all this, including the land transfer. Also complicit was Deputy Chief Minister Muzaffar Ali Baig, of the PDP. The PDP falsely claimed that it had been blackmailed into agreeing to the transfer by the Congress which threatened to block the rebuilding of the old Mughal Road, to connect the Valley to the Muslim areas of Rajauri and Poonch. When the news of the transfer leaked out, and protests erupted, the PDP took a U-turn and presented itself as a helpless victim.

The Congress should have removed General Sinha long ago, but failed to do so. It succumbed to his unreasonable pressure while ignoring the Forest Act, and was guilty of venality and blatant manipulation of the state machinery. Such venality contributed in the past to the alienation of the Kashmiri people from the Indian state, and created a cesspool of grievances and injustices, which the separatists used to their own advantage with help from Pakistan's secret agencies.

No less culpable was the National Conference, whose leader, Dr Farooq Abdullah, established the SASB in 2000, thus taking the pilgrimage's charge away from the Muslim family which had discovered the cave in the 1850s and looked after it ever since. This was a case of the government wantonly interfering with what had been a worthy instance of spontaneous Hindu-Muslim harmony and cooperation -- and then messing things up.

When protests erupted in the Valley over the land transfer, Hurriyat leaders jumped into the fray. They had been marginalised ever since General Pervez Musharraf moved away from the azadi agenda and proposed autonomy for the different regions of J&K without redrawing borders. In recent weeks, they had even come around to a position of not opposing and boycotting the coming Assembly elections, unlike in the past.

Rather than make a gesture of generosity to religious Hindus, in keeping with Kashmir's syncretic culture, the Hurriyat leadrers and JKLF chief Yasin Malik falsely depicted the land transfer as a means of forcibly settling Hindus in the Valley and an assault on the Kashmiri identity. This was patently absurd given the tiny size of the plot and the makeshift prefabricated structures being erected on it. They gave a religious-communal colour to the issue by deliberately organising processions to and from the Jama Masjid and the Hazratbal shrine. This falsified their claim to the "nationalist" mantle. They

also tried to present the protests as spontaneous eruptions of popular anger against India's Kashmir policy and the heavy presence of security forces. They maligned the peace process itself as a way of perpetuating the Kashmir status quo. This was the Hurriyat's way of regaining its lost relevance, but this could only happen at the cost of yielding to the hardline Geelani faction.

In reality, the protests were driven by the same narrow-minded and parochial motives as were evident in the earlier mob violence over the "sex scandal" issue, in which vigilante squads went on the rampage and burnt down the house of a woman suspected to be responsible for it. The protests caused great hardship to the public by disrupting the movement of essential supplies, including food and fuel.

The Valley protests polarised opinion in J&K and were replicated like a mirror-image in the Jammu region under the leadership of the BJP. The BJP, true to type, has instigated violent protests in other parts of India by drumming up its favourite but utterly fraudulent slogan of "Muslim appeasement" and "anti-Hindu prejudice" on the part the United Progressive Alliance. This is infusing sectarian divisiveness and communal poison into religious beliefs and rituals.

All this can only help the Valley's hardline separatists revive the jehadi militancy which has been on the wane and lost its popular appeal. Separatists are no longer able to recruit cadres. But if the present polarisation continues, the danger is that this might change and Kashmir could return to the rule of the gun -- with disastrous consequences for all of South Asia.

The two Hurriyat factions' leaders are now holding talks to work out the "modalities for Hurriyat unity" and have set up a six-member committee. The talks are being held within a framework which concedes a great deal to Geelani and seeks to dilute the basis on which the moderates under Farooq split away from Geelani after Musharraf changed his Kashmir stance and proposed his famous four-point formula, effectively turning his back on the separatist demand. The hardliners insist that the Hurriyat holds no more talks with New Delhi, but demands tripartite negotiations between India, Pakistan and the Kashmiris.

The Geelani faction also wants the Hurriyat to launch an active campaign for the boycott of the coming assembly elections, which the moderates had decided not to do. Geelani wants the old United Nations Security Council resolutions on Kashmir to be the starting point for any solution to the Kashmir issue.

If the Farooq faction concedes these demands, it stands to erode its role as a force restraining extremism, with an ability to play a positive role in Kashmir and take the peace process forward.

A special responsibility now devolves on Governor Vohra to use all the contacts he has cultivated as the Centre's special envoy for the Kashmir dialogue to help overcome the sense of alienation from the Indian State that significant sections of the Valley people feel. This sense has been heightened by the protests on the Amarnath land issue.

Vohra must employ his considerable experience as a former Home Secretary and all his skills of persuasion to pacify and stabilise the situation in Kashmir by acting transparently in good faith. He must also strongly resist the demand for Jammu & Kashmir's trifurcation along religious lines -- a demand that spells a major departure from the cause of pluralism and secularism. In particular, he must activate and accelerate the deliberations of the five Working Groups set up at Prime Minister Manmohan Singh's initiative in 2006.

These Groups are meant to deal with improving the Centre's relations with the state, furthering relations across the Line of Control (LoC), giving a boost to J&K's economic development, rehabilitating the destitute families of militants and reviewing the cases of detainees, and ensuring good governance.

The Centre, for its part, must pursue the peace process in Kashmir with vigour and sincerity. However, it won't be enough to resume the domestic peace process alone. India must pursue the new round of dialogue with Pakistan, launched late last month with the visit of Foreign Minister Shah Mahmood Qureshi to New Delhi.

In particular, the two governments must quickly resolve the Siachen and Sir Creek disputes, liberalise visa regimes and expand economic cooperation. That's the best way of bringing Pakistan on board and neutralising militant separatism in Kashmir while overcoming popular alienation.

— July-August 2008

Centuries' Subjugation Kicks Off a Bitter Struggle

Kashmir's past is marked by worst kind of alien rules starting from sixteenth century when Mughals took over the region, followed by Sikhs and Dogras. Ruled by outsiders time and again, a feeling of subjugation crept in the hearts of Kashmiris. These processes have played a role in forming modern-day Kashmiri consciousness where old perceptions linger through, forcing leaders from Sheikh Abdullah to Yasin Malik to cling to the Kashmiris' right to self-determination.

FARRUKH FAHIM

The formation of collective consciousness of a common Kashmiri has been determined by number of factors, the most important being the public perception of history. Kashmir's occupation by Mughals and their successive subjugation by Pathans, Sikhs and Dogras, have left in the minds of a common Kashmiri a memory of continued suppression and attendant economic and political oppression. It was this sentiment that played a role in mobilisation during the nationalist movement of 1930s pioneered by Sheikh Mohammad Abdullah.

MUGHAL AND AFGHAN RULE

The incorporation of Kashmir valley into Mughal India in the year 1586, after the Chak rule is considered to be the beginning of the end of Kashmir's independence. Kashmir remained the northern most point of Mughal empire for nearly two centuries. Mughal rule in Kashmir transformed it in the context of its political and economic condition. This rule introduced Kashmiris to a pattern of government, where a governor was sent to administer the province and demand taxes.

The rapacity of the Afghans after the Mughal rule marks the end of Kashmir's independence. In Kashmiri folklore, Afghans, owing to their oppressive rule, came to represent the greatest 'other'. Afghan domination lasted for little over 50 years. The period is generally regarded as one of the darkest in Kashmiri history.

SIKHS AND DOGRAS

Sikh army entered Kashmir on 4th July, 1819, starting a new phase of tyranny and oppression. In the words of Prem Nath Bazaz, a Kashmiri historian, this change of masters 'proved but a change of king log for a king stork'. Describing the Sikh rule, Moorcraft, an English traveler reflected, 'Sikhs looked at Kashmiris 'a little better than the cattle. The murder of a native Sikh was punished with a fine to the government ranging from 16 to 20 rupees, of which four were paid to the family of the deceased if a Hindu, and two if he was a Mohammedan'. During this dark phase in Kashmir's history, people were in a most abject condition 'subjected to every kind of extortion and oppression'. Under Sikh rule Kashmir was ruled by 10 governors. Out of these, five were Hindus, three Sikhs, and two Muslims. Sikhs consistently followed anti-Muslim policies in Kashmir, subjecting the majority population of the Kashmir valley to severe hardship in relation to the practice of religion. It was also during this phase that the central mosque of Srinagar, the Jama Masjid was ordered to be closed and Muslims of Kashmir were not allowed to say azan (call to prayer). Sikhs tried to establish a 'Hindu' state where cow slaughter was declared a crime and a complete ban was passed against cow slaughter, lands attached to several shrines were also resumed on state orders. Their emphasis on 'setting Hindu and Sikh beliefs was a part of an attempt to articulate a Sikh identity separate from that of the Mughals. The effect of Sikh rule, according to Prem Nath Bazaz, dealt a severe blow to the pride of the local people. 'The people of the valley came to be known as zulum parast (the worshipers of tyranny) as they gradually forgot their glorious martial traditions and became timid and cowardly'. With the battle of Subraon, the Sikhs lost their independence. The treaty of Amritsar between British and Dogras signed on 16th of March 1846, gave way to Dogra rule in Kashmir.

British while recognising the neutrality of Gulab Singh in the first Ango-Sikh war rewarded Gulab Singh, a vassal of defeated Sikh king Maharaja Ranjit singh. The Treaty of Amritsar referred to as 'sales deed', was frequently condemned from 'different quarters of Kashmiri society'. Muhammad Iqbal, while expressing his anguish wrote:

Each hill, each garden, field, Each farmer too they sold.
A nation for a price, That makes my blood ice-cold.

With this treaty Gulab Singh's estate included besides his native Jammu, the Himalayan kingdom of Kashmir, Ladakh and Baltistan. Thus the newly created entity of Jammu & Kashmir joined the ranks of princely states as sovereign entity with British crown being the sovereign overlord. Both British and Dogra government's respective pursuits for legitimacy, allowed the latter to pursue a policy where the state of Jammu & Kashmir was transformed from a state ruled over by a Hindu into a Hindu state. Over the subsequent years, the overtly Hindu tone of the political authority and the complete denial of all rights to the Kashmiri Muslim community (as Kashmiri Muslims were largely left out of the power sharing arrangements of the Dogra state) resulted in articulation of political allegiances along communal lines.

A nucleus of new generation of political leaders, trained at Aligarh Muslim University, and headed by a schoolteacher Sheikh Muhamad Abdullah, soon established a reading room association in Srinagar to discuss questions of social and political change. A similar group called Young Men's Muslim Association was formed in the southern city of Jammu. These young political activists attempted to organise a deputation to present a list of grievances to the Dogra Maharaja. These initiatives by new generation of Kashmiri Muslim political activists announced the arrival of organised political mobilisation in Kashmir. This initiative however ended in a riot on the streets of Srinagar, killing 21 persons when the Maharaja's police opened fire on protesters on July 13, 1931. This became a turning point in the history of political mobilisation in Kashmir. In the words of Mohamad Ishaq Khan, a Kashmiri historian, it was for the first time that 'dumb-driven cattle' raised the standard of revolt.

Soon after this incident, and formally, immediately after, Kashmir's first regional party -- the All Jammu & Kashmir Muslim Conference was formed under the leadership of Sheikh Muhammad Abdullah. This was also an important event in the history of organised protest in Kashmir, as it was for the first time that Kashmiri Muslims sought to build a wider base of support among the agricultural and artisan classes of the valley. Initially starting with the demand for bigger share in the civil services for educated Muslim youth, the proprietorship, and reduction of land revenue, the Muslim Conference soon demanded the right to freedom of speech and expression and more significantly right to establishment of a democratic government with a responsible executive. In the year 1938, the party decided to redefine the basis of its politics on secular lines. Finally in the year 1939, at its annual convention Muslim Conference was accordingly renamed All Jammu & Kashmir National Conference.

The new party sought to expand its base through its political programme called *Naya Kashmir* (New Kashmir). The Bill of Rights stipulating 'equality of the rights of all citizens irrespective of nationality, religion, race or birth in all spheres of life' reached out to all classes of people in the state. By incorporating a peasants charter advocating transfer of all agricultural land to actual tillers of the soil, a Workers Charter ensuring basic rights and better working conditions, and a Charter of Women's Rights in the political, economic, social, legal, educational and cultural spheres, a concerted effort was made to enlist the support of large sections of the society.

Naya Kashmir was the blueprint of the political philosophy of the National Conference, and presented the agenda of how it would exercise state power. A scheme of constitutional reforms based on the democratic elective principle from local pachayats to the national assembly along with a responsible and responsive executive was envisaged. It advocated universal adult franchise with weightage for the minorities, including Kashmiri Pandits, Sikhs and Harijans during the transitional period. The national economic plan envisaged planned development with safeguards against exploitation, ensuring that economic power would not be centralised in any section of society. Recognising the multilingual character of Jammu & Kashmir (Kashmiri being the dominant language only in the valley and some parts of Jammu), the *Naya Kashmir* manifesto designated Urdu as the official lingua franca.

With Muslim league movement for Pakistan gaining momentum, National conference was aspiring to steer a different course of action away from the concept

of two-nation theory. The very proposition of accession meant losing the hitherto autonomous status enjoyed by the state since its creation on the one hand, and facing the prospects of division of the state and its people on religious ground on the other. This meant a certain death of the secular dream cultivated by the National Conference since its birth in 1939. In order to have its secular pluralist democratic programme materialsed, it became imperative for National Conference to ensure that the ethno-religious composition of the state remains intact and its autonomy and geographical unity is safeguarded. For National Conference this was possible only if the state was transformed from an autocratic state into a representative liberal democracy. The ultimate goal for National Conference, therefore, was not to submerge with the secular nationalism in the mainland India, but to maintain its own identity and autonomy albeit supported by its close ally, the Indian National Congress.

With the introduction of historical land reforms and complete transformation of rural Kashmir, hundreds and thousands of newly empowered peasant families started viewing Shiekh Abdullah as the chief architect of this transformation. Commenting on what became the most drastic piece of land reforms in the subcontinent, Nehru said,

'I confess that I look with some envy on the speed and clarity with which they (Kashmir government) have performed this task there, considering the enormous trouble we had have in various states of India, the difficulties, the obstruction and the delays that we had to face, and so, I became a little envious when I saw this was done in Kashmir.'

POST 1947 POLITICS

Shiekh Abdullah had heralded his transformation from vehement political activist against Dogra rule in the Princely State of Jammu & Kashmir to prime minister, since 1947. He dominated the Kashmiri political scene for over 30 years (whether in jail or in office) until his death in 1982.

The *Naya Kashmir* manifesto put forward by National Conference was clearly based on a Jacobin conception of popular sovereignty, augmented by a generous dollop of Bolshevism• in the socio-economic sense of the programme. In *Naya Kashmir* proposals Shiekh Abdullah made a powerful case for the conversion of Jammu & Kashmir into an independent state, which he described as a 'South Asian Switzerland', perhaps in alliance with an India free from British rule but not an integral part of it. He dreamt of an independent Jammu & Kashmir, a secular polity, rooted in Kashmiri Islam. Sheikh Abdullah argued on number of occasions that the Hindu minority in the state had more in common with the Muslim majority than it had with the Hindus elsewhere in the Indian sub-continent. Loy Hendrson, the United States ambassador to India, who visited Sheikh Abdullah in September 1950, reported:

In discussing future of Kashmir, Abdullah was vigorous in restating his opinion that it should be independent; that overwhelming majority population desired this independence; and that he had reason to believe that some Azad Kashmir leaders (read Pakistan Occupied Kashmir) desired independence and would be willing to cooperate with leaders of National Conference if there were reasonable chance such cooperation would result in independence.

Shiekh Abdullah became the undisputed head, with the title of prime minister of the popular interim government in March 1948. His covert dealings with Azad Kashmir (read Pakistan Occupied Kashmir) leaders, and his disclosure to the United States ambassador to India (that was repeated in the talks between American Democrat Adlai Stevenson and Sheikh Abdullah), challenged the finality of the accession of the state of Jammu & Kashmir to India, something that was the most disturbing feature for the Government of India2. Sheikh's disclosures to the foreign visitors made India apprehensive about his intentions, and he came to be regarded as a 'loose canon' in Indian political annals. With Sheikh Abdullah becoming the prime minister an absolute ruler, Indian government seemed to be in a hurry to devise some fresh constitutional checks that would involve not only the structure of the internal government of the State but also the state's formal relationship with the Indian Union.

The Indian Constitution (creation of Constituent Assembly) perforce gave to the state of Jammu & Kashmir special status enshrined in Article 370 of the Indian Constitution, which effectively limited the powers of the Indian Union Parliament to the three matters; Defence, External Affairs and Communications. Apart from the three powers reserved to the Indian Union, everything else was supposed to be the proper concern of government of Jammu & Kashmir. Some interpreters like Alastair Lamb, view the inclusion of this provision in the context of Jammu & Kashmir as an autonomous polity under Indian protection, with implications that it might evolve in time to full independence.

The Praja Parishad agitation in Jammu, Jana Sangh agitation in Delhi for the complete integration of Jammu & Kashmir with India, Dr Shyama Prasad Mukherji's death in Srinagar, brought criticism against Sheikh and his government in Srinagar, across India. Sheikh Abdullah in the meantime found ample support for his own allegations that India was 'secular only in name but basically communal and so Kashmir can have no honorable place' in India. Government of India soon realised that 'sheikh was looking for a semi-independent status where the Indians would protect him while he would benefit economically from the tourist industry and other sources of Kashmiri wealth, free from interference from what he regarded as the Hindu dominated government in New Delhi.' By 1953 New Delhi and Abdullah had fallen apart. So in August 1953 Abdullah was arrested, and one of his top lieutenants, Bakshi Ghulam Mohamad was installed as new Prime Minister.

PLEBISCITE FRONT

In the aftermath of the dismissal and arrest of Sheikh Abduallah, Mirza Afzal Beg took over the reins of politics in Kashmir. Patronised by Sheikh Abdullah, he founded Plebiscite Front in 1955. With the arrest of Shiekh Abdullah, introduction of Jammu & Kashmir Constitution and growing resentment of common masses against New Delhi, Plebiscite Front immediately gained popularity.

During January 1958, Shiekh Abdullah was released, with a rousing welcome by his followers at Srinagar, Abdullah said:

Pandit Nehru is a great man, a close associate of mine and I still respect him. It is in the nature of man that during adversity the flower thrown by a friend appears heavier and more injurious than the stone thrown by an enemy.

Criticising National Conference (read official) led by Bakshi for its undemocratic actions, Sheikh Abdullah challenged the claim of irrevocability of accession saying:

The present government's claim of Kashmir being integral part of India is a worthless claim, adding that the government which is not true representative of the people cannot take the finality of accession to the hearts of the people.

THE KASHMIR ACCORD

The Indian government associated Plebiscite Front with the activities of the militant group Al-Fatah. Imposing a blanket ban on Plebiscite Front, around 'lakhs of politically conscious members of the outlawed Plebiscite Front' were arrested or debarred from participating in any political activity, 'clearing the path for a walk-over for the Congress'. In March 1972, Syed Mir Qasim came to power by winning with a comfortable majority. There were protests against the alleged rigged elections by opposition leaders, which although refuted by Mir Qasim initially, were later confirmed by him in his memoirs in these words:

'If the elections were free and fair, the victory of the Plebiscite Front was a forgone conclusion. And, as a victorious party, the Front would certainly talk form a position of strength that would irritate Mrs Ghandhi who might give up her wish to negotiate with Shiekh Abdullah. That in turn would lead to confrontation between the centre and the Jammu & Kashmir'.

After Mir Qasim's election, he began to relax a number of restrictions on his opponents. In April 1972, Begum Abdullah was allowed to return to the state, political prisoners were released and in June the internment order on Abdullah and Mirza Afzal was lifted. The ban on Plebiscite Front was also lifted, providing a political platform to Sheikh Abdullah. With the creation of Bangladesh, and in the light of changing circumstances Sheikh Abdullah started shifting emphasis from the demand of plebiscite to greater autonomy within the Indian Union. In his memoirs Abdullah justifies this shift and his agreement to what came to be known as Kashmir accord in following words:

We only wanted Article 370 to be maintained in its original form… Our readiness to come to the negotiating table did not imply a change in our strategy.

Thus it seems that Abdullah wanted a pre-1953 status for Jammu & Kashmir, something that was never conceded by New Delhi. Syed Mir Qasim stepped aside as the chief minister of Jammu & Kashmir to make way for Abdullah. The Delhi-determined circumstances of an emasculated Abdullah's return to office amounted to a clever evasion of the Kashmir conflict rather than a substantive solution to it. The 1975 elections saw Abdullah sweeping polls in the valley and winning by a clear majority. It seemed for time being that Kashmir issue was about to reach its logical end, but as soon as Abdullah realised that his decision to sign an agreement with government of India (Kashmir accord) was seen as a compromise by a common Kashmiri, Abdullah abandoned it in a matter of weeks. There was bitterness

among Kashmiris regarding what they considered as 'sell out'.

'A lady (Indira Gandhi) had tamed the toothless Lion of Kashmir' was the lead story in the in Kashmiri press. In April 1975, Abdullah again talked about possible merger of his state with Azad Kashmir. In May 1975 he invited Congress members in the state assembly to join his Plebiscite Front, Congress resentment against this act resulted in widening rift between the two parties. The authoritarian streak in Sheikh Abdullah's National Conference became quite evident from 1976 onwards. National Conference thus made its own contribution to the subversion and retardation of democratic development in Jammu & Kashmir.

The valley of Kashmir witnessed an unprecedented increase in the frequency of demonstrations, many of which were countered by police violence. The organisations like *Jamiat-e-Islami*, the *Jamiat-e-Tuluaba*, *Mahaz-e-Azadi* and People's League were active in these protests. This was also the period when a shadow underground organisation carrying systematic acts of violence and 'sabotage' with a name '*Al-Fatah'* came into existence. Whatever be the background of the underground 'Al-Fatah' the fact is that it was used by Indian State to justify a direct attack on Shiekh Abdullah and the Plebiscite Front, to prevent the Front's participation in the upcoming elections. Some 350 supporters of the Plebiscite Front, including Sheikh Abdullah and Mirza Afzal Beg were arrested. The arrests were justified on the grounds that the Plebiscite Front was involved in subversive activities in the state, presumably associated with 'Al-Fatah'. In another major development on January 1971, some young Kashmiris, who were apparently armed with a hand grenade and a pistol, hijacked an Indian airliner named 'Ganga' en route from Srinagar to Jammu. Seeking asylum in Pakistan, the airliner was taken to Lahore. The hijackers demanded from the Government of India, to release 36 political prisoners said to be the members of an organisation called the Kashmir National Liberation Front. The hijacking drama ended with hijackers setting the aircraft ablaze after taking out the passengers. Amidst all drama and confusion, the world came to know about Kashmir Liberation Front. Its existence was a surprise for many. It was supposed to be the same group calling itself the 'Plebiscite Front' (not to be confused with the Plebiscite Front party founded by Mirza Afzal Beg of which, however it was in some ways an informal offshoot). Al Fatah was among one of the biggest 'subversive' groups in Kashmir during this period. A guerilla outfit that had over 200 people. The group recruited youngsters, set up 'safe houses' and embarked on gunrunning on a large scale. Ghulam Rasool Zahegeer and Abdul Rashid Dar a lawyer from south Kashmir, Fazle Haq Qureshi resident of North Kashmir, Muhmad Yousuf Mir, from downtown Srinagar, Hamidullah Bhat, Muhammad Husseien and Muhammad Salim Gilkar were among the earliest members of Al Fatah, who were 'rehabilitated' by National Conference government after it came to power.

A charismatic, but somehow mysterious figure Maqbool Bhat from the border district of Handwara was among the earliest members of the Front. One time journalist in Peshawar, he had been regularly crossing the Kashmir ceasefire line since 1958. He was arrested in 1966, and sentenced to death later after his re-arrest for the alleged murder of an Indian official during the course of an armed robbery in the valley of Kashmir. He was finally hanged in Delhi's Tihar Jail exactly a week before his 46th birthday. The radicalised generation in Kashmir valley, flying the Jammu & Kashmir Liberation Front's banner of independence, emerged as a force of mass uprising. In 1990 it was essentially the old National Conference-Plebiscite Front brand of politics that got radicalised under the new leadership of a militant younger generation, rebelling against India.

The front articulated the vision of an independent state based on a federal, parliamentary political system. Each of the five federating units, namely, Kashmir valley, Jammu province, Ladakh, Azad (or occupied Kashmir), and Gilgit and Baltistan would enjoy autonomy with elected provincial governments. Each province can be subdivided into districts and these districts will have their own internal arrangements.

The idea of a secular Independent republic of Jammu & Kashmir put forward by Jammu & Kashmir Liberation Front bear a striking resemblance to the contents of a working paper submitted by Balraj Puri to the Jammu & Kashmir State People's Convention in 1968, led by Shiekh Abdullah, which was attended by practically all popularly-based political forces in the valley. These recommendations, according to Bose are reminiscent of the principle of 'subsidiarity', a key part of the political architecture of the new European Community (EC). Under this principle, each level of government (Brussels, the national capitals, and sub-state

entities like the German Lander) stays clear of all decisions that can be taken at a lower level.

In the backdrop of the alleged rigged elections of 1987 Jammu & Kashmir Liberation Front resurfaced after remaining dormant for over 20 years. Jammu & Kashmir Liberation Front led within the valley by the core HAJY (Hamid, Ashfaq, Javed and Yasin) group emerged as one of the most prominent radical organisation in the 1980s campaign of azadi against the Indian state. Jammu & Kashmir Liberation Front found spiritual inspiration in the specific Islamic traditions rooted in the mystical piety of Kashmiri Sufi saints. The Jammu & Kashmir Liberation Front's strategy may be divided into four components: establishing an organisational base and devising military strategy; pursuit of international support; mobilising popular support.

In 1990 the simmering rebellion of 1988-89 (aftermath of rigged elections) came to boil in the form of a mass resistance to the Indian rule in Kashmir valley. Starting with a total boycott of 1989 late-November parliamentary elections, this phase is characterised by massive protests and extensive mass mobilisation, which was on account of a very strong wave of alienation doing rounds in the lives of ordinary Kashmiris. More or less similar alienation in a different context was put to use by Sheikh Abdullah against a different set of actors and now it was the turn of Jammu & Kashmir Liberation Front.

Huge azadi rallies were organised during this phase and one of them took place 1 March 1990, where around 3,000 people gathered in the town of Charar-e-Sharief, 30 kilometers from Srinagar, at the shrine and mausoleum of the valley's patron saint, the fourteenth century Sufi mystic Sheikh Noorudin Noorani, and took a collective oath, in the presence of Jammu & Kashmir Liberation Front leaders to struggle for 'Kashmir's right to self-determination'. Indian state was finding it difficult to tackle the uprising owing to its mass character as workers, lawyers, engineers, schoolteachers, and store-owners, doctors former MLA's and Jammu & Kashmir Police joined and supported the movement. In the absence of any alternative channels of collective action and protest the shrines and mosques emerged as the focal point of popular mobilisation and resistance.

The collective yearning of people of Kashmir for independent existence took a more militant form in the years that followed the early uprising of 1990s. Frequently government installations and offices considered as symbols of Indian states authority and 'occupation' became the targets of violence. The guidelines issued to its members by JKLF titled 'Freedom or Martydom' gave comprehensive instructions to the 'freedom fighters' and exhorted them to follow such guidelines strictly. These guidelines/instructions pertaining to guerilla or underground activities were by and large the Urdu translations of Mao's and Che Guevara's formulations or at least were influenced by them. In these instructions it was strictly urged that 'each guerilla or 'freedom fighter' must show impeccable moral conduct and strict self-control and teach the local population the guerilla band so that they see the advantage of aiding the insurgency. By 1993, with complete take-over of the movement by Pakistan's intelligence agencies, JKLF almost lost its military ascendancy to the radical Jihadist outfits. In the year 1994, Yasin Malik the leader of JKLF renounced the armed struggle and called for unilateral ceasefire.

In the year 2005, when a Bus service was started between 'Azad Kashmir' and 'Occupied Kashmir', Jammu & Kashmir Liberation Front, under Yasin Malik while supporting the peace initiative taken by India and Pakistan, tried to enlist the support for the cause of independence by collecting around 15 lakh signatures across Jammu & Kashmir and regarded the campaign as a 'mandate of trust' and 'Kashmiri people's verdict for peace and inclusion in ongoing peace talks between India and Pakistan'.

Jammu & Kashmir Liberation Front during the moderate political phase tried to address its constituency inside Jammu & Kashmir and was vigorously involved in improving diplomatic relations in India, Pakistan and other countries. JKLF and its chairman Yasin Malik also tried to clarify in various forums the reason for a 'limited militant struggle' in his speeches:

'From 1953 to 1975, Shiekh Abdullah fought through a non-violent movement for right to self-determination. He was a secular and a pure non-violent but Indian state did not like him…..'

The three excruciating incidents, the imprisonment of Yousuf Shah, by Mughals, and his subsequent death in exile, the frequent internment of Sheikh Abdullah by government of India, and to a large extent the death sentence of Maqbool Bhat (Founder member of JKLF) and his burial in Delhi's Tihar Jail, serves as a ready reference to collective memory of Kashmiris.

— July-August 2008

Enforced Disappearances

The more people go out of sight in the wake of enforced disappearances in Jammu & Kashmir the more they agitate the minds of their family members. So much so that the families of those who disappeared have formed an association in the hope to bring back or at least know the truth behind the loss of their near and dear ones.

MIR HAFIZULLAH

In past the Indian army faced armed insurgency on two occasions one in 1947 and another in 1965. In the last case too, a sizable number of armed insurgents infiltrated in Kashmir and were given shelter by unsuspecting innocent villagers. The Indian army was given charge to flush out the militants from the areas they have made their hideouts. While facing the armed insurgents, some encounters occurred at different places but no civilian was harmed nor the people were tortured or made to disappear or killed in fake encounters. The simple reason for this is that the army or paramilitary forces were not given impunity as has been happening since 1990.

The armed conflict which has its routes in the unresolved political dispute that flared up in 1989 in the form of mass uprising which forced the Government of India to bring huge concentration of troops in Jammu & Kashmir (the number is stated to be over half-a-million). The army and the paramilitary forces equipped with impunity under draconian laws like Armed Forces Special Powers Act (AFSPA), Disturbed Areas Act, POTA and Public Safety Act have been committing all kinds of human rights violations. AFSPA is responsible for most of the disappearances committed by the state security agencies. A large number of civilians, students, businessmen, professionals were made to disappear. All these enforced disappearances were made under the central rule and by the so-called elected governments of the state. The purpose to use this method of involuntary disappearances was to terrorise people from joining the insurgency or having any sympathy with the movement.

Formation of Association of Parents of Disappeared Persons -- APDP for short – took place in the early 1990s. This brought the relatives of disappeared persons to the high court for filing the *hebeas corpus* petitions seeking the whereabouts of their near and dear ones since high court was the only institution functional which could give some kind of direction to the state functionaries. Yet most of the court orders were observed in breach and police stations were reluctant to register the missing reports especially where the army and the paramilitary forces were involved in the disappearances. Therefore, the first information reports or FIRs were registered only in some cases with the direction of the court.The number of enforced disappearances was swelling with every passing day and crossed three figures. Few

lawyers, human rights activists and relatives of disappeared persons like Parveena Ahangar whose son too disappeared formed a group of relatives of disappeared persons to fight collectively under the banner of APDP. She is chairperson of the organisation.

NUMBER OF DISAPPEARANCES

The number of enforced disappearances remained always a major controversy with the government who were earlier denying the enforced disappearances but later on acknowledged the number of disappearances as few thousands. This has sometimes increased or decreased. The government wanted to create a confusion and wanted to take the advantage of the fact that the disappearances were not reported to the police stations or to other concerned agencies. The denial of registering the missing reports was done under a policy of the Government of India, though it was a primary duty of the state to register the case of disappearances, including those that were not even reported by any person as the state is responsible for the protection of citizens under the provisions of the Constitution.

'Thousands are missing'

- On July 18, 2002 the then home minister of J&K, Khalid Najeeb Sahorwardi of National Conference, which was in power, admitted on the floor of the legislative assembly that 3,084 persons were missing in J&K since the start of the insurgency.
- Chief Minister Mufti Mohammad Sayeed on February 23 made the disclosure what the security agencies were doing in 2001 and 2002. He informed the assembly that 3,744 persons went missing between 2000 and 2002. One-thousand-five-hundred-fifty-three persons got disappeared in 2000; 1,586 went missing in 2001; and 605 in 2002.
- Law minister Muzaffar Hussain Beig of the PDP government stated on March 25, 2003 that since December 1992, 3,744 were reported missing of whom 135 have been declared dead by June 2002 and the number of disappearances could be even more.
- Abdul Rehman Veeri, minister of state and parliamentary affairs, said in the assembly on June 21, 2003 that 393 people have disappeared.

ACTIVITIES

Members of the APDP are protesting on streets on every 10th of the month and also made several protests at New Delhi with the purpose of garnering support from country's civil society and seek attention of wider media at the national level. The demands of the APDP are:

- Appointment of an independent/ credible commission to enquire into the case of the disappearances as has been done in other countries like Sri Lanka, Philippines, Algeria and Morocco. Even countries that are not democratic have initiated such a process in the wake of large-scale disappearances of their citizens in strife-ridden regions.
- Punishment for perpetrators responsible for enforced disappearances, which cannot be justified even during a war situation.
- Provide justice to the relatives of disappeared persons as per international standards. State is bound to intervene in such cases since disappearances are crime against whole humanity.

On the social and the legal side, the APDP is confronted with a situation arising out of problems of the half-widows who are deprived of the property of their husbands in the wake of their disappearance. Nor they can remarry for a period of seven years as per Muslim law. The children of the half-widows are facing problem in school admission as death certificate of father required at the time of admission is not given. Thus, half-widows are struggling for survival as they are not entitled to get the property of their husbands in the wake of their disappearance. Nor are they entitled to sell the property of their husbands. A number of petitions seeking the right of succession of property of their husbands are pending in the courts for want of death certificates.

On the legal side, the justice delivery system has almost failed to deliver the justice in case of victims of enforced disappearances and their dependents. In some cases inquiries were conducted under the directions of the high court and accused were identified but challans could not be filed in courts as the Government of India has been reluctant to grant sanction for prosecuting the persons responsible for the crime. The sanction for prosecution is barred under section-6 of the AFSPA with the result not a single perpetrator of a crime of enforced disappearances been brought to justice. Members of the APDP have no hope of getting justice in

near future but are determined to continue their struggle till the end.

The enforced disappearances are one of the worst crimes on the globe. It is characterised by gross violation of the fundamental rights of the direct victim as also entails severe consequences for his or her family and even for the entire communities. Because of this reason the enforced disappearances are internationally defined as a crime against humanity. This definition is not coincidental since such cases not only violate the essence of the individual and affect his condition as a human being in different dimensions of his life but also this aspect of the disappearance lands up a person into a very complicated phenomenon. One should not approach this problem in an emotional way because the risk will exist for creating false expectations in the family of the victims for want of justice and, thus, ultimately end up in causing more frustration. No doubt enforced disappearances are rooted in social and political disputes. Despite the fact that each of them may have their own history, enforced disappearances speak a common language of pain and suffering which keep their families hope alive to continue their search for justice. As earlier stated, the disappearances are the product of unresolved political disputes or unjust structures of the societies which in the name of national security are causing the involuntary disappearances. The enforced disappearance of a family member whether by State actors or non-State actors immediately touches one's heart and mind and raises a question like "where is his loved one?" After this the most painful and difficult journey starts for the search for a relative of a victim initially in the police stations, army camps, paramilitary camps, interrogation centres, jails that leads him nowhere. This search goes for months and years but to no consequence. The APDP has one hope that no country has won the war against the people. The country may defeat any other country through war but not the people as history stands witness to this.

— July-August 2008

Incarcerated Land and People

Over half-a-million troops hold Kashmir captive. This has not only robbed people of their normal civilian space but also led to one of the worst traps that any land or its people have ever come under.

SANJAY KAK

Kashmir remains one of the most underreported stories in the world. This is not because of just neglect, or a natural silence. It's very carefully constructed. And the silence is paradoxically constructed out of a lot of noise. Kashmir is an issue that is perpetually in the news in India -- in print, in public life, on television. Yet, when one looks at the output of the huge machinery, there is very little in-depth analysis, showing very little understanding. So this will remain one of the paradoxes of our time; that while Kashmir is always in the news in India, it has never been understood.

Of course, with the international media and India's growing stature – whether real or imaginary -- as a world power, or a world power in the making, India is suddenly a very attractive commodity. Many countries that would have traditionally been very quick to pay attention to what is happening in Kashmir and comment on it, or take a position, are a bit reluctant, because they have vested interests here in India. They see it as a market.

The way the Indian State has successfully projected Kashmir, first to the Indian people, and then to the world at large, is as follows. That 1947 marks the partition of British India into India and Pakistan; Kashmir was a disputed zone, and that Pakistan has illegally grabbed a part of it, and the rest of it has rightfully fallen within India. Hence, the current situation is really a dispute between India and Pakistan.

Such a characterisation completely ignores the fact that for long there has been—as it continues to be – an issue of self-determination of the people of Kashmir. This is a demand that predates Partition by at least a decade and it has been a part of public discourse in Kashmir ever since or even before. However, somehow that political demand for freedom, or azadi, or some form of self-determination, has completely been buried by its over simplification as an India-Pakistan dispute.

The Indian State has managed to curtain off Kashmir from intelligent scrutiny by three rather deft curtains. The first, obviously, is Pakistan. Whenever you speak of Kashmir in India or anywhere else, the Indian position always is that this is a movement that is supported by Pakistan. Since Pakistan as a State is presented as inimical to India, how can one possibly have any kind of sympathy or space or understanding for such a movement? If one makes it past this first layer of obfuscation, then, of course, we are presented with the idea that what we are seeing in Kashmir is part of an *Islamic* movement, a jihad; and this is something that

none of us are in a position to be able to sympathise with. Therefore, once again a curtain is drawn over Kashmir. And thirdly, the issue of the treatment of religious minorities in Kashmir by the pro-independence movement, by the separatists, which specifically refers to the fact that the Kashmiri Pandits had to leave Kashmir in the early 1990s in very large numbers. Conservative estimates of the number of Pandits who had to flee are approximately 200,000, and there are perhaps less than 10,000 who continue to live in the Valley. This was seen as a sign of a movement which was exceedingly intolerant, was communal, and therefore, once again, undeserving of our sympathy and understanding. Collectively then, these three curtains are employed to obscure the issue at hand, this kind of rhetoric completely puts a blanket over the issue, in a way which encourages most Indians to look away from Kashmir.

What do people want? What is the demand for *azadi*, freedom? This idea crops up in Kashmir with such frequency, that we must question what this word encompasses. This is not easy, so let us start by defining what everybody is likely to agree on. It would be fair to say that in principle, whatever the ideology one swears by -- pro-Independence, pro-Pakistan, even pro-India – people are collectively asking for the withdrawal of the Indian army. On that there will be consensus. Beyond that, in order to get a real answer to that question of what people want when they ask for *azadi*, there must be a democratic space in which to hear what people are saying. Kashmir is under far too much stress. Is it not unreasonable to have 600,000 soldiers sitting on a tiny population and then expect to hear genuine democratic voices talking about what people really want? The complexities of the mixed answers that we hear, which sound like confusion to the outside world, are in fact a byproduct of the extreme militarisation of the Valley. Along with militarisation comes the occupation of valuable land, water and even human labour. For instance, in every village in India there is always a scarcity of water, and of course it is accompanied by disputes. But traditionally a kind of mechanism is worked out. But Kashmiri villagers can't argue with security forces, especially since they have all the weapons and the civilians don't. The appropriation of resources and land begins with public facilities: school buildings being taken over to house troops, water towers made into watch towers, and indiscriminate use of water drawn out in huge quantities by the army for their own needs.

More importantly, when the soldiers are kept in one place for too long in the midst of a civilian population, they will begin to exploit that area in new ways. They will begin to call upon the civilian population to do unpaid labour, because these are very remote areas and these are areas that have traditionally been neglected by the civilian governments too. These are people with no access to an arena in which they can voice their concerns. They don't have access to the media; there are no human rights groups that are able to get to them. So if you travel into the interior of Kashmir, that's what you begin to hear: A more brutal, in-your-face kind of oppression. It is not simply the continuous checking and crosschecking at a check post every half-a-kilometre. This is the kind of tribulation that urban Kashmiris feel. In the countryside, it is a much more medieval kind of oppression that people face. It accumulates into a feeling of grave resentment and hostility.

It is not a question whether the army was better behaved or had more discipline. Armies are machineries of war. That's what they're trained for. Armies are meant to fight wars, and when you place them in the middle of civil positions, they behave like armies, which is what they are. At the end of it, you have deep resentment, you have gross violations of human rights, and you create a situation that far surpasses any predictions of the effect of militarisation on Kashmiris.

The issue of the use of rape (and even more routinised sexual exploitation) in Kashmir is also a pressing human rights concern. It is also principally a traditional Muslim society, and that also makes it that much more difficult for people to speak about it. The civilian administration, especially in the countryside of Kashmir, is completely emasculated. They do not have any powers to restrain the security forces from doing anything. It is an archetypal conflict zone situation: There is one side with incredible powers right in the middle of a dispersed civilian population. There is a long history to this form of exploitation. There was the infamous incident of Kunan Poshpora, where an army unit had gone into a village and raped many women. In this case, the women actually came out and wanted to testify. However, the whole thing was just brushed aside. This remains a sore point. What are the women going to get if they are brave enough to come out and take on the shame and ignominy in a conservative society after admitting to having been raped? And then if no action is

taken, the next time around they are not going to come out, because it is not going to bring them anything. It is the failure to provide justice that puts a kind of silence on women who suffer such huge abominations.

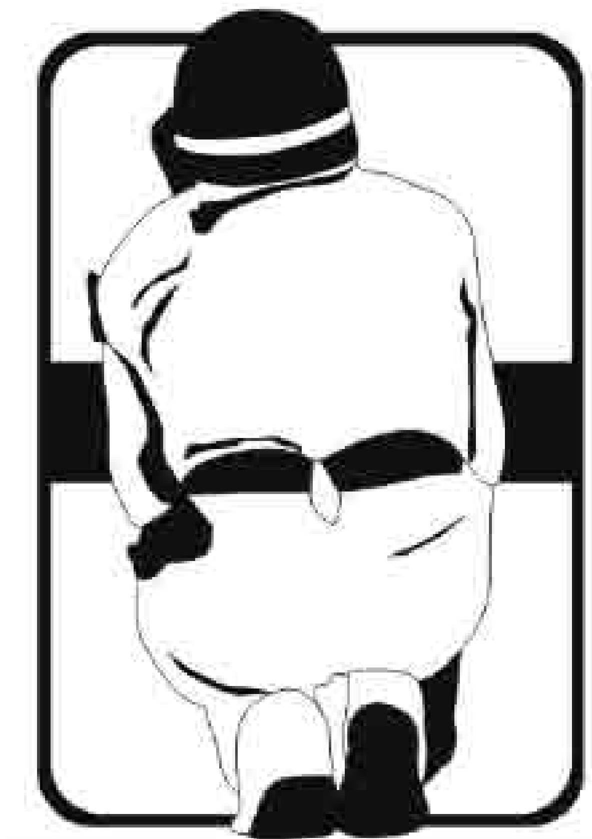
There are also other forms of cultural humiliation that are occurring in Kashmir. There are two ways of looking at this cultural imperialism: one is that it is inadvertent and the other that it is intentional. Either way, it is reprehensible. But the presumption is that Kashmir is an integral part of India. So it is kind of presumed that it is perfectly alright to have milestones that tell you distances in English and Hindi in a population where most people understand only Urdu. So as far as the local people are concerned, the road itself, traffic on the roads. as well as the milestones are clearly meant only for the army soldiers, because they are the ones who read them in Hindi.

There are, however, interesting ways in which civilians deal with the aftermath of oppression. For instance, how come when there is a funeral for a militant commander that 5,000 people turn out? It is not only that they are turning out to honour the memory of the militant commander; they are also turning out to express their rage at the hundred everyday humiliations that they suffer.

Essentially, before we get stuck in looking at the conflict as some kind of human rights problem in Kashmir alone, what we have to acknowledge is that there is an equally massive failure of democracy in India that is going on. It is very important to locate it firmly in this context. It is not simply a question of whether or not we could discipline the army a bit or if we could improve our human rights record. As long as there is a set of legislations in place that are anti-democratic and only serve to silence people, these kinds of excesses will continue to go on.

This article is based on Sanjay Kak's conversation on Kashmir with David Barsamian for Alternative Radio, Colorado, US.

— July-August 2008



International Law and Kashmir

Looking through the prism of international law and tracing the development of the right to self-determination to human rights issue, it can be argued that it is for the UN to make India and Pakistan act.

SHEIKH SHOWKAT HUSAIN

Relevance of UN Resolutions on Kashmir has been subject of debate for a long time. Previously it was Indian State that disputed their applicability. Recent postures of Pakistani president have created doubts about commitment of Pakistan to these. Some Kashmiri leaders by endorsing General Musharaff policies have also depicted their non-seriousness with regard to United Nations role regarding Kashmir. This has been done despite the fact that the UN resolutions are the only internationally valid instruments, which provide basis for recognition of J&K as a disputed territory under International law.

ROLE OF UNITED NATIONS

India after securing a deed of accession from Maharaja Hari Singh of Kashmir proceeded to United Nations Security Council alleging Pakistan of intervention. United Nations Security Council while admitting Indian complaint refused to acknowledge Kashmir as its legitimate part. It recognised people of Kashmir as the principal party to this dispute who should be given a chance to decide their future through exercise of the Right of self-determination. This right was proposed to be exercised under United Nations supervision thus making it a legitimate guarantor of self-determination. This transformed Kashmir dispute into a multilateral problem involving people of Kashmir, United Nations, Pakistan and India. United Nations Resolutions also provided for ceasefire and withdrawal of troops. For this purpose a military observers group was deputed to supervise adherence to the ceasefire.

Although United Nations was approached under chapter VI of the UN Charter yet the decision taken by it reflected that its resolutions were not exclusively based on this chapter. While adopting the resolutions it relied upon chapter I that states the purpose of the United Nations "To develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples (Article 1(2))". United Nations Security Council also kept in view Article 55 of chapter IX that imposes an obligation upon member states to pursue for peaceful and friendly relations among nations based on respect for principle of equal rights and self-determination of peoples. The interim measures which included ceasefire and deputation of United Nations Military Observers Group is based upon Article 40 of chapter VII of United Nations, a view which International authorities on UN Peacekeeping

Higgins & Roselyn confirm. The fact that there does not exist any provision for deputing of United Nations peacekeeping mission under chapter VI makes it obvious that the dispute over J&K although referred to United Nations under this chapter didn't get deliberated exclusively under chapter VI. The resolutions apart from Chapter VI are based upon other portions of the UN Charter including chapter VII.

ELECTIONS

After a short span of cooperating with the UN, India conducted elections, facilitating entry of 72 out of 75 members to the Constituent Assembly of the state unopposed. These 'elections' were portrayed substitutes for the exercise of right of self-determination. United Nations through several resolutions rejected this contention and made it clear that creation of Constituent Assembly in Indian administered part of Kashmir or conducting of elections will not be deemed to be exercise of right of self-determination in accordance with United Nations Resolutions. UN Security Council declared that *"the convening of a Constituent Assembly as recommended by the General Council of the "All Jammu & Kashmir National Conference" and any action that Assembly may have taken or might attempt to take to determine the future shape and affiliation of the entire state or any part thereof, or action by the parties concerned in support of any such action by the Assembly, would not constitute a disposition of the state in accordance with the above principle"* (UN Security Council Resolution 24 January 1957)."

Another significant development was Shimla Agreement (1972) signed by India and Pakistan wherein the parties agreed to resolve all the disputes between them including that of Kashmir mutually. After this agreement India proceeded to United Nations and asked it to withdraw its observer's mission from the state. United Nations refused to accept the Indian plea. Although United Nations Charter (Article 52, para 1) allowed regional arrangements for dealing with matters relating to maintenance of international peace and security these measures however, have to be consistent with the purposes and principles of United Nations Charter. In case there is a conflict between regional arrangements and obligations of States under United Nations Charter, their duties under United Nations Charter will prevail. *In this case Indian interpretation of the Shimla Agreement amounted to denial of the objectives of United Nations* as laid down in Article 1(2) i.e. fostering friendly relations between nations based on respect for right of self-determination.

THE RIGHT OF SELF-DETERMINATION

The development on the normative front were more significant and in favour of right of self-determination. The right found place within The Covenant on Civil and Political Rights (1966) and The Covenant on Economic, Social and Cultural Rights (1966). It was enumerated as a human right in their very first Articles. Besides these instruments importance of this right was asserted in various resolutions of the UN General Assembly. Among these the most important ones are 1514 of 14 December 1960, titled as "Declaration on Granting of Independence to Colonial Countries and Peoples" Resolution 2625 of 24th October 1970 relating to "PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION AMONG STATES". In both these resolutions the right of self-determination was identified with people of colonised territories, whereas there was no such mention within The Covenant on Civil and Political Rights and The Covenant on Economic Social and Cultural Rights.

For a long time there was a debate throughout the world relating to applicability of this right. The third world countries were vocal for this right for the colonies and non-self governing territories in traditional sense of the term. They were not ready to concede it to groups that wanted to secede from the existing states. The third world countries were not ready for fragmentation of any state on the basis of use of right of self-determination because people to them only meant the people of colonies and non self governing territories. This reservation has become obsolete after recognition of this right for all peoples within the Covenants. After the end of cold war applicability of right of self-determination has been practically extended to so many areas and territories of the world, which were not colonies in traditional sense of the term. Examples of such territories are Central Asian Republics, Ukraine, Baltic States, Czech and Slovakian Republics, Croatia, Macedonia, Bosnia, East Timor, Eritrea, Quebec province of Canada and Montenegro. People of these areas were allowed to exercise right of self-determination and given choice of separation from existing sovereign states.

India while ratifying The Covenant on Civil and Political Rights and Covenant on Economic Social and

Cultural Rights made a reservation with respect to right of self-determination. Such a reservation is of little importance now in view of the fact that several authorities including Prof. Gros Espiell special rapporteur of the United Nations Sub-commission on Minorities have made it clear that the right of self-determination has achieved the status of *jus-cogens* i.e. pre-emptory norm of general international law. It must be remembered that treaties and reservation to norms of *jus-cogens* are not allowed under international law.

SELF-DETERMINATION

It is obvious from the preceding discussion that right of self-determination is strongly rooted in international law. Its recognition as human right does not allow any one to deviate from this right or use it on behalf of the people who are entitled to it. Human rights are inalienable. The statements to the contrary on the part of remote controlled politicians do not carry any weight. These statements reflect their interests. Any solution reached after compromising right of self-determination is destined to face the same fate, as was that of Shimla Agreement. *Failure of Kashmiris to secure the right of self-determination is the result of incapability of those who plead it for them.* From New York to Srinagar role of representation of Kashmiris has been assumed by those who are bereft of any understanding of International Law and commitment to Kashmir cause. They are unfamiliar with any appreciation of legal and political dimensions of the Kashmir problem and unfit for any serious discourse and deliberation. Pakistan too has kept the issue hostage to American strategic interests.

Problem of minorities has not been an impediment to exercise of this right anywhere in the world. Twenty-two percent dissenters to independence of East Timor were made to go along with the majority. In case of Montenegro, the decision was taken in favor of secession with 55 percent votes in favor and 44 percent against. In case of Quebec, province of Canada, decision for status quo was taken with a margin of just one percent votes. Forty-nine percent voters favored secession whereas 51 percent supported continuation of status quo. In Kashmir the problem can be addressed by granting minority dominated areas right of secession from the entity to which majority decides to join through a UN sponsored plebiscite. Absence of third option is an issue which relates to *modus-operandi* rather than the principle. Once there is an agreement on the principle even third option can be accommodated.

Kashmir can be addressed as a problem concerning real estate between India and Pakistan or an issue relating to human rights of a people. The real estate approach does admit the propositions of joint management and self-governance. Human rights approach to the problem doesn't provide an avenue for such a dispensation. Kashmir is a human rights issue. Self-determination is an inalienable human right. It can't be made hostage to anything like strategic interests of regional powers, integration of Central Asia with South Asia or American apprehensions relating to nature of an emerging entity after exercise of right of self-determination. The Kashmir problem has to be addressed for the sake of Kashmiris and nothing else. The most important reason for failure of peace process is that it is for resolution of Kashmir for the sake of everything other than restoration of inalienable right to self-determination for the people of Kashmir.

— July-August 2008

Press Trussed by Draconian Laws

The Press in J&K has seen many instances of suppression, both by the state government and those opposed to the State. But 'The Fourth Estate' has valiantly fought back for the sake of people's rights.

S M AFZAL QADRI

Press all over the world is considered as the mirror of the society. History acknowledges the contribution of the press in the success of almost all the major struggles and movements of the world. It is the primary responsibility of each member of the press to be unbiased, impartial, and report every event objectively. Any lapse on the part of the press may lead to chaos and confusion in the society. That is why a common man trusts and expects that whatever media projects will be correct and true. Once they sensationalise the issue and are biased in their reporting, their integrity becomes doubtful. That is why the need arises to control the press by enacting laws.

But these laws were never meant to undermine the use of the press in any manner and the objective of the laws was never to use the press for political gains. Its utmost aim was to apprise the people of the society about the ongoing events in a particular society. Which would otherwise mean that one of its objectives definitely was to apprise the people about the ongoing peoples movements as well. Unfortunately the press is not allowed to highlight the events relating to such movements, because of pressures from government. As a legitimate way to curb any such reporting the legislature has passed many Acts in order to not allow the press to report the truth more particularly in the conflict regions like J&K.

The constitution of India has given due importance to freedom of the press. It is one of the fundamental rights, but this right is not unbridled and is subject to certain controls. An honest journalist has to face a number of odds in performing his daily duties, which can go to the extent of losing lives. Role of the press becomes more difficult when the journalists have to work in a conflict situation. The Kashmir valley is facing a conflict since last many years and the last 20 years have seen the worst kinds of human rights violations. There have been civilian killings at the hands of security forces, local police and government-sponsored gunmen. Rapes, murders, custodial violence, disappearance has become the norm of the day and all these things need to be reported in the press in order to highlight the plight of a Kashimiri who has been fighting for their rights for decades.

In such a situation it becomes an imperative for the local and national media to report all such cases of human rights violations. In such situations if a person is honest in his reporting and news analysis it is a big achievement. Some times while in the process of appeasing both warring factions, truth is undermined. In order to curb the voice of a suffering Kashmiri and

to restrict news, the State of J&K has enacted a number of laws to regulate the working of press. The anti-Press Laws in the being many, some of them are referred to as under

- **Rule 34 of the J&K Public Security Rules**, 1946 binds the newsmen to disclose the sources of their information and prescribes three years imprisonment with fine as a punishment for not doing so. Rule 35 provides five years imprisonment for contravention of order to public newspapers after pre-censorship. Rule 36 prescribes three years imprisonment for contravening an order "prohibiting performance of any drama containing any prejudicial report". Rule 65 (b) prescribes three years imprisonment for contravention of an order requiring shopkeepers to keep open the shops for conduct of essential business and not to observe hartal.
- **Section 10 of the Press & Publication Act, 1932** empowers the government to seize printing presses used for printing newspapers containing "any words, signs or visible representation" which (a) incite commission of any cognizable offence, (b) directly or indirectly expresses, approves, or admires any such offence and (c) to bring into hatred or contempt the government established by law to excite disaffection towards the government or make malicious attacks on the government or any of its ministers or misinterprets the policies and activities of the government."
- **Section 153 (a) of the Ranbir Penal Code** prescribes seven years imprisonment for promoting hatred between different sections of the people on ground of religion, region, place of birth, etc besides doing acts prejudicial to maintenance of harmony. Sections 190 (a), 296 (a) and 505 of the code dealing with "statements conducive to cause fear or public alarm" and carrying imprisonment up to three years also take care of writings aimed at fomenting communalism.
- **Section 8 of the Public Safety Act, 1978** provides detention without trial of persons including journalists for "acting in any manner prejudicial to security of state or maintenance of public order and maintenance of services and supplies essential to the community". The security of the state embodies most of the genuine fields of a reporter.
- **Section 25 & 25 A of the J&K Customs Act, 1958** empowers the government to detain any packet, newspaper, books if it contains any material which is punishable under section 121-130, 153 A, 295 of Ranbir Penal Code".

Although the purpose of these laws ought to have been to control and regulate the working of the press but often these laws are misused to gauge the press in order to stop the objective reporting of events. The state's power to forfeit any printing press where any paper is published if that paper contains any material which incites any act of murder under or any act of violence Act 1908 can be easily used against journalists. Similarly the power of a district magistrate to forfeit the press/newspaper is the easiest way to deal with the people who are reporting any kind of human rights activity, which directly or indirectly involves the state government or its functionary. The various sections of J&K Public Safety Act 1978 can be used to restrict the freedom of press.

The press in the state especially in the valley witnessed worse situation but they performed their duties boldly; they had to face and convince both parties without surrendering there basic norm of objectivety. There have been times when certain sections of the press were biased in favour of militants but the instances are negligible. There are cases when newspaper offices were raided, ransacked, equipments damage, and pressmen being humiliated and assaulted while performing their professional duties. In a recent incident on 29th of June 2008, security forces in Srinagar dealing with an incident of lathicharge beat up two photojournalists. Gunmen killed a prominent journalist in his office in early nineties and culprits are still at large. The killing of veteran photojournalist Mushtaq Ali in a parcel bomb blast is a mystery till date. Nobody could do any thing except naming residential colonies of pressmen after his name. Veteran valley based journalists like Yousuf Jameel, Zaffer Mehraj, NDTV cameraman Zafer Iqbal had a close shave with death. Parwaiz Sultan became the victim of bullets of unknown gunmen.

Another threat faced by press fraternity is their abduction by unknown persons. The recent abduction of a veteran journalist Shujat Bukhari is an example. His abduction was followed by another abduction of a correspondent of a local daily. Those who resort to these tactics want that press should not report objectively but

they should toe the line, which suits the parties, whose news they are supposed to carry.

If we analyse the role of press in the state especially, the valley we will find that they have to walk on razor's edge. Journalists were killed during periods of turmoil but no one was punished by the state for any such killing. The recent decision of the state to stop telecasting some Pakistani channels in the valley is another example of restricting freedom of expression in the state of J&K.

Whether amid such stringent press laws in J&K the scribes are in a position to write boldly and objectively or not can well be imagined. Yet, the members of this press community have contributed a lot to the ongoing movement and have shown the ultimate professionalism often at the cost of their lives.

— July-August 2008

Labour

SECTION 8

The humane and compassionate approach vis-à-vis the working class since Independence has become a relic of the past. Courts have for sure been swayed by the new economic policies guided by demands of globalisation and privatisation resulting in gradual decline of labour law. But if one takes the long view and the interests of the preservation and consolidation of a democratic system, one would not take long to realise that the short-term victory over the working people will inevitably result in a long-term undermining of democracy itself. The working class will find other ways and methods of getting even with capitalists. This is precisely what a well-designed legal system is structured to avoid.

Backtrack on Backwage

The very survival of workers after dismissal becomes a daunting task. In case courts strike down the action taken by the employer, the question of workers' wages from the date of sacking comes to the fore. The past precedents favouring workers are getting mauled by recent court decisions.

BHARAT SANGAL

One of the most important issues which arises in industrial adjudication involves the question of survival of the employee/workmen during the period in which he is contesting his termination/dismissal/retrenchment from service. An associated question is of compensation for the period for which the employer has kept him out of employment without any means of livelihood.

In any situation where the employer unjustifiably and illegally terminates the services of the workmen, on the said termination order being held to be illegal by any court, besides the reinstatement in service, the workmen is also entitled to receive the wages for the period for which he was prevented illegally by the employer from working and more important from earning his livelihood.

The Supreme Court (SC) has consistently held in its various judgements that in case order of termination of service issued by an employer is struck down by the court the reinstatement with full backwages and continuity of service is an automatic result, however in case there are any special circumstances specifically pleaded by the employer and accepted by the court, then only such relief can be interfered with. It is noteworthy that this view of the court has been on the law books since the judgement of the Federal Court reported as 1949 LLJ 245 Western India Automobile Association Vs Industrial Tribunal and Ors, wherein it was held by five judges bench of the Federal Court that in case of quashing of order of termination of service of an employee, the said employee would be automatically granted of an order of reinstatement with full backwages and continuity of service.

The question as to what benefit the workman, whose order of termination has been quashed, is entitled to was discussed by this court at great length in its judgement reported as 1979 (1) SCR 563, Hindustan Tin Works Pvt Ltd Vs Employees of Hindustan Tin Works Pvt Ltd. A three judges' bench of this court was pleased to observed in Para - 9 at Page 568 G of the report as follows: "It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus, the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is question as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a work-

man whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case, viz to resist the workmen's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages. Articles 41 and 43 of the Constitution would assist us in reaching a just conclusion in this respect. By a suitable legislation, to wit, the UP Industrial Disputes Act, 1947, the State has endeavoured to secure work to the workmen. In breach of the statutory obligation the services were terminated and the termination is found to be invalid, the workmen though willing to do the assigned work and earn their livelihood, were kept away therefrom. On top of it they were forced to litigation up to the apex court now they are being told that something less than full back wages should be awarded to them. If the services were not terminated the workmen ordinarily would have continued to work and would have earned their wages. When it was held that the termination of services was neither proper nor justified, it would not only show that the workmen were always willing to serve but if they rendered service they would legitimately be entitled to the wages for the same. If the workmen were always ready to work but they were kept away therefrom on account of an invalid act of the employer, there is no justification for not awarding them full back wages which were very legitimately due to them. A Division Bench of the Gujarat HC in Dhari Gram Panchayat Vs Safai Kamdar Mandal and a Division Bench of the Allahabad HC in Postal Seals Industrial Co-operative Society Ltd. Vs Labour Court II, Lucknow, have taken this view and we are of the opinion that the view taken therein is correct."

The court also held in Para - 11 at page 570 E of the report that full back wages would be the normal rule and party objecting to it must establish the circumstances necessitating departure. It is at this stage that the Tribunal is to exercise its discretion keeping in view the relevant circumstances. It is thus clear that if the normal rule in the case like this is to award full back wages the onus will be on the employer to establish the circumstances which would permit a departure from the normal rule.

The court in Para - 13 at Page 571 D and also as under: "Now, if a sacrifice is necessary in the overall interest of the industry or a particular undertaking, it would be both unfair and iniquitous to expect only one partner of the industry to make the sacrifice. Pragmatism compels common sacrifice on the part of both. The sacrifice must come from both the partners and we need not state the obvious that the labour is a weaker partner who is more often called upon to make the sacrifice. Sacrifice for the survival of an industrial undertaking cannot be a unilateral action. It must be a two way traffic. The management need not have merry time to itself making the workmen the sacrificial goat. If sacrifice is necessary, those who can afford and have the cushion and the capacity must bear the greater brunt making the shock of sacrifice as less poignant as possible for those who keep body and soul together with utmost difficulty."

In fact the court in Para 14 at page 571 F went on to observe that if the employer wants to avoid giving full back wages which has been awarded by the labour court, it must show that the management has also made sacrifice due to its alleged inability to make payment. In absence of any such material on record the worker cannot be expected to make sacrifices from his means of livelihood.

The question came up again in SC's judgement reported in 1981 (1) SCR 789, Surendra Kumar Verma etc Vs The Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and Anr. In the said judgement a three judges Bench of this court again observed as under at page 795B: "Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been and so it must ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-à-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the court to make appropriate consequential orders. The court may deny the relief of reinstatement where rein-

statement is impossible because the industry has closed down. The court may deny the relief of award of full back wages where that would place an impossible burden on the employer. In such and other exceptional cases the court may mould the relief, but ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted."

The above judgement was pronounced by Justice Chinnappa Reddy for himself and Justice Krishna Iyer. It is interesting to note that Justice Pathak in concurring judgement further reconfirmed the issue in the following words at page 799 : "Ordinarily, a workman who has been retrenched in contravention of the law is entitled to reinstatement with full back wages and that principle yields only where the justice of the case in the light of the particular facts indicates the desirability of a different relief. It has not been shown to us on behalf of the respondent why the ordinary rule should not be applied."

The above view of this court that the quashing of an order of termination of service of an employee on being illegal and void results automatically into the grant of reinstatement with full back wages and continuity of service, has been further reiterated by two judges bench in the case of JN Srivastava Vs Union of India 1998 (9) SCC 559 wherein this court was pleased to reject the contentions of the employer "that no back salary should be allowed to the workmen as the workmen did not work and therefore on the principle of no work no pay this amount should not be given to the workmen." This submission did not find any support by the court as the workmen was always to ready and willing to work but the employer did not allow me to work. Thus the scrutiny of the termination of order was held automatically to grant to the workman arrears of salary and other emoluments.

Thereafter, in this Court's judgement reported as 2001 (2) SCC 59 Post Graduate Institution and Research, Chandigarh, Vs Vinod Kumar Sharma and Anr. another two judges bench has held that in case of termination order being quashed the workman was entitled to reinstatement with continuity of service and full back wages. In the said judgement this court also approved its earlier decision in the case reported as 1984 (3) SCR 223 Jitendra Singh Rathur Vs Baidyanath Ayurved Bhawan Ltd wherein also this court was pleased to overturn the order of the HC and direct payment of full back wages with continuity of service on the workman of quashing of the termination order.

However, in recent times the SC in some judgements has been adopting the stand that even if the termination order is struck down, a workman does not automatically become entitled to full back wages alongwith reinstatement and further that even in such cases the workmen should not only plead but prove that he was without any work/job/ sources of livelihood during the period between the date of termination and the date on which the termination order is struck down. The SC has not only reduced the amount of back wages payable to the workmen but have even denied the same on the ground that the workmen did not plead and proved his lack of employment in the intervening period.

What is important to note is that this has been done by the SC without reference to or without overturning or even distinguishing the earlier judgements including that of Hindustan Tin Works. Unfortunately, the SC has behaved as if there were no earlier decisions of the Court and no principal of law have been laid down in regard to payment of back wages.

What is worse is that some of the judgements of the Hon'ble SC have sought to support the contrary view on the ground that the earlier view of automatic payment of back wages also laid down the caveat that in certain circumstances the full back wages may not be paid. The SC has therefore based its latter judgements on the said caveat without realising that the caveat was mentioned by the earlier judgements only to provide that the employers would have the right to plead and prove special circumstances as to why the full back wages should not be paid. The caveat was not for the purpose to hold that the automatic result of quashing of termination order would be non payment of back wages with only exceptional cases deserving such payments. The first judgement worthy of notice in this context is the judgement of the SC reported as 2002 (6) SCC 41 Hindustan Motors Ltd Vs Tapan Kumar Bhattacharya wherein, in Para 12 at Page 44 it was held as follows:

"From the award passed by the Industrial Tribunal which has been confirmed by the division bench of the

HC, it is clear that the order for payment of full back wages to the workman was passed without any discussion and without stating any reason. It appears that the Tribunal and the division bench had proceeded on the footing that since the order of dismissal passed by the management was set aside, the order of reinstatement with full back wages was to follow as a matter of course." It is further noted by the court that the order of grant of back wages by the labour court was passed without any application of mind and no pleadings were filed on these aspects. The above observations of the court is per incurium and passed without noting the earlier judgment of this court passed by similar benches.

I must reiterate that the normal course of law is that once the order of termination of service has been held to be void and illegal, the natural consequence of quashing the order would be the grant of benefit of reinstatement and continuity of service with full back wages. Further, to avoid the above normal consequence of quashing of order of termination, there has to be specific pleadings and evidence placed on record by the employer to deviate from the said relief. In the said event the onus is on the employer and not on the employee. Thus the judgement of the court in Hindustan Motors Ltd is contrary to the settled law and does not take note of the earlier judgements.

It may also be pointed out that the contentions of the employer that the benefit of back wages can only be given by the labour court and is not automatic consequence of the quashing of the order of termination was rejected by this court in its judgement reported as 1981 (3) SCC 225 Mohan Lal Vs Management of M/s Bharat Electronics Ltd The court at page 230 of the report has held that as the concerned order of retrenchment was passed without satisfying the preconditions of a valid retrenchment, the termination of service is void ab initio, invalid and inoperative. The workman should deemed in continuous service.

In fact this Hon'ble court went on to say that even the order of reinstatement is not necessary and the court declaration that the order of termination of service was void ab initio implies that the workman continued to be in service with all consequential benefits.

This court further considered the earlier judgement of Hon'ble SC reported as 1969 (3) SCC 653, Ruby General Insurance Ltd Vs PP Chopra & 1969 (3) SCC 513 Hindustan Steel Ltd Vs AK Roy, wherein it was held that the court granting reinstatement must weigh all the facts and exercise its discretion properly. The court thereafter went on to hold in Mohan Lal's case that where the termination is illegal there is neither the termination nor cessation of service and a declaration follows that the workman concerned continues in service with all consequential benefits. This court's observation in Para 17 at page 238 is as follows:

"The last submission was that looking to the record of the appellant this court should not grant reinstatement but award compensation. If the termination of service is ab initio and inoperative, there is no question of granting reinstatement because there is no cessation of service and a mere declaration follows that he continues to be in service with all consequential benefits. Undoubtedly, in some decisions of this court such as Ruby General Insurance Co Ltd Vs Chopra (PP) and Hindustan Steels Ltd VAK Roy it was held that the court before granting reinstatement must weigh all the facts and exercise discretion properly whether to grant reinstatement or to award compensation. But there is a catena of decisions which rule that where the termination is illegal especially where there is an ineffective order of retrenchment, there is neither termination nor cessation of service and a declaration follows that the workman concerned continues to be in service with all consequential benefits. No case is made out for departure from this normally accepted approach of the courts in the field of social justice and we do not propose to depart in this case."

It is therefore, clear that the court in its judgement reported as Hindustan Motors (Supra) has failed to take note of the earlier judgement mentioned herein above and is thus per incurium and does not lay down the law correctly. Thereafter in a series of cases the judges of the SC have taken to hear the view that it is for the workmen to show that he is not gainfully employed and then only the employer would be required to rebut the same. The court though it noted that the natural consequences of striking down of the termination order was payment of full back wages, however, without any reasoning or discussion the court went on to hold that for entitlement to back wages the initial burden is on the employee to show that he is not gainfully employed. It is of course of importance to note that the court did not indicate as to how a negative could be proved by the employee. It is more logical that the employer should be asked to prove by evidence that the workmen was employed. The above judgement

clearly shows that the SC did not fully consider the implication of its own observations.

Thereafter in 2005 (5) SCC 591 General Manager, Haryana Roadways Vs Rudhan Singh the Hon'ble Court went on to hold that it is not a rule of thumb that in every case of termination of service being illegal, entire back wages should be awarded. The court held that one of the important factors could be considered in the length of service.

It is strange that the entitlement of a workman who is illegally prevented by the employer from working should be paid back wages on the basis of his earlier length of service as held by the court. The length of service or terms of appointment have absolutely no relevance to the payment of back wages because the quashing of the termination order implies that till the date of such quashing the concerned workman is deemed to be in service. Whether he would get employment on an actual termination of service is also of no relevance because the termination has been struck down prior to his getting the back wages.

The court had also observed that if the period of service already rendered by the workmen is very small and the complete period for which back wages are to be awarded is very large then it would be inappropriate to so direct payment. It is noteworthy that pendency of a dispute, especially by filing of repeated proceedings by the employer and thus preventing the workmen from working and earning his livelihood cannot be a ground for denying the workman his back wages. In fact such a proportion of law would encourage the employer not to comply with an adverse award of the labour court and to prolong the proceedings. This would give benefit to the employer of his own wrong doing which is totally illegal and impermissible.

It is also strange that the court in the said judgement held that the nature of employment ie whether permanent, daily wager or casual would also need to be considered. The nature of employment cannot have any relevance to payment of back wages as the back wages to be paid would of course for the employment prior to termination and would not involve any change.

The principle for no work no pay is not applicable in this case since the said principle involves the non-working by the employee of his own will and therefore no payment for such non-work. It cannot be used in a case where the employee is prevented from working by the employer. The employer cannot by his own action prevent the employee from working and then say he should not be paid for such inability to work. It is again strange that the SC did not refer to any of the earlier judgement regarding payment of back wages.

Thereafter two judges of the SC in the judgement reported as 2005 (5) SCC 124 Allahabad Jal Sansthan Vs Daya Shankar Rai and Anr have held that a pragmatic approach is necessary to arrive at a golden mean to balance the interest of the workman and industry and proceeded to deny the workman back wages on the ground that he did not contribute anything to the production and therefore the workman is not entitled to back wages. It is interesting to note that the entire burden of achieving the golden mean has been laid on the rights and interest of the workmen by denying him the back wages, partially or fully and thereby awarding the employer for his prolonged continuous of legal procedure.

It is noteworthy that the court has not appreciated that in a prolonged legal procedure the ability of workman to survive and fight the employer is itself in grate doubt and extremely difficult. Therefore to deny him the price of succeeding in his fight against the employer over a long period of time is totally illegal, unfair, inhuman and contrary to the provisions of the Constitution. It is also strange that the golden mean is to be achieved without putting any burden for the same on the employer.

The fact that the SC has done an absolute about turn on the question of payment of back wages was also admitted by the SC in its judgment reported as 2005 (6) SCC 224 M. L. Binjolkar Vs State of MP wherein it has been noted that the earlier view was that full back wages were the natural result of quashing of order of termination. The SC once again did not refer to the earlier judgements and also did not give any reasons or causes for this reversal of the view.

The question of payment of back wages was considered in some detail in its judgement by the SC in 2006 (1) SCC 479 UP State Brassware Corporation Ltd and Anr Vs Udai Narayan Pandey. It must be pointed out that though the judges have sought to give an explanation as to why the earlier view is not correct for payment of full back wages, the court in fact held that payment of full back wages is not a natural consequence and the workmen must plead and prove that he was not gainfully employed for the period of non employment by the employer. Strangely in Para 42 at page

492 the SC made the surprising observation that "a person is not entitled to get something only because it would be lawful to do so." In fact this would be the best reason why the person should be entitled to get the said benefit. The court though it referred to the judgements in Hindustan Tin Works etc., it brushed them aside with the observation that the said judgements do not deny a discretionary roll to the courts in molding the relief.

Unfortunately, the court seems to have failed to appreciate that even the courts have to exercise their discretionary powers in a fair, just and legal manner. Excepting for a preceived burden of payment on the employer, the SC in its various judgements in the last few years have not laid down any principle of law on the basis of which they would be entitled to deny the back wages to the reinstated workmen. The courts have had to therefore fall back on the strange stand that the workmen has to plead and prove his not being in employment during the intervening period. Of course the court has also failed to provide as to how such a negative fact can be proved by the workmen.

It is further unfortunate that the SC in its judgement reported as 2006 (6) SCC 221 has resurrected the ghost of no work no pay to deny back wages to the workmen. Besides the fact that it would be well near impossible for the workmen to prove that they were not employed during the relevant period, the court has also failed to appreciate that mere surviving by doing job or work in the household or even being partially employed would be necessary and such survival should not be a consideration for grant or denial of back wages. If the present view of the SC is accepted that it would be imperative for the workmen to survive on air and collect proof of such survival to produce before the court for getting full back wages.

Another factor which the courts have ignored and which has resulted in gross injustice to the workman is the fact that normally it is the labour court/industrial tribunal which grants back wages on quashing of the termination order and the question whether back wages are to be given or not should be only for the period between the date of termination and the date of award. In fact thereafter the employer challenges the award by further proceedings before the HC or the SC the said period should be counted as period of full employment and the question of back wages would not be in relation to the period subsequent to labour court award. Today, what actually happens is that the order of the superior court limited to the payment of back wages is treated as if it relates to the wages even for the period after the labour court award. It is therefore imperative that the courts divide the period of absence from work of the workmen due to the termination of his service by the employer and due to non reinstatement by the employer even after the award into two parts one the period between the date of termination order and the date of labour court award, which would be the period subject to the two conflicting stands of decisions of the SC. The second part being the period from the date of the labour court award till the date of actual reinstatement by the employer which may include the period of the pendency of the dispute before the superior courts, is a period distinct from the earlier category to which the conflicting views regarding back wages will not apply and the workman would be entitled to this period payment in full.

Thus not only the recent view of the SC in regard to full back wages is erroneous and contrary to law but its application to the period after the pronouncement of the labour court award granting full back wages is also illegal and void. It must be reiterated that the earlier view of the SC in regard to payment of back wages as held in Hindustan Tin Works is correct and legal.

— November-December 2008

Supreme Court: Friend no More

The courts were for long considered to be the last bastion of hope for people and the Supreme Court as the last friend of the poor worker, particularly from the unorganised sector. Not any more.

SANJAY SINGHVI

In the unorganised sector no laws apply to protect the rights of the workers. More than 92 percent of the workers in India work in the unorganised sector and few of their matters reach the Supreme Court (SC). Despite this several contract, casual and construction workers among others in the unorganised sector have fought valiant battles in the hallowed halls of the SC. However, in wake of globalisation, the playing field is increasingly tilting in favour of the employers and management.

Casual and contract workers form a large part of the unorganised workforce. The famous cases of Steel Authority of India Ltd, Umadevi and Cipla have been spoken about a lot, but there are many other lesser known judgements which expose how the SC, in recent years has abandoned our Constitution to the needs of globalisation and the MNC's. When analysing these judgements, we must keep in mind that globalisation and its neo-liberal philosophy demands that the rights of workers, guaranteed by law, must be curtailed. These rights must be restricted to the contract between the employer and the employee and must, further, be amenable to be changed, as the employer sees fit. This is behind what, in management parlance, is called 'labour flexibility'. The whole aim of globalisation has been to negate all protective labour legislation (called "protectionism" nowadays) and to leave labour to the tender mercies of the most rapacious of capitalists—the MNCs. This means that the very aim of globalisation is to render all the workers 'unorganised'.

The 'socialist' principles enshrined in our Constitution, called for providing protection to those who have little or no capacity to contract. It called for "minimum wages", (Article 21); "equal pay for equal work" (Article 14), "right to form unions and to demonstrate" (Article 19) etc. being placed above any and all contractual obligations. The Constitution has not changed, for the rulers dare not expose their real intentions to the people at large. However, the SC rushes in where the angels of Parliament fear to tread.

REGULARISATION

The first concern of the workers in the unorganised sector is regularisation. Earlier judgements of the SC, Daily Rated Casual Labour Employed under P&T Deptt., through Bharatiya Dak Tar Mazdoor Manch Vs Union of India ((1988) 1 SCC 122) and State of Harayana vs. Piara Singh (AIR 1992 SC 2130) had all laid down that once the workers had

completed 240 days of service, or, in any event, a long period in service, they must be regularised. However, the recent trend has been to undo this whole trend of the law. In RK Panda's case itself, while granting regularisation, the court had deprecated that workers come to court for regularisation as soon as they pass a few years in casual service (though regularisation had been granted in that matter). In the case of MP Housing Board Vs Manoj Srivastava ((2006) 2 SCC 702), the SC held that a person appointed ad hoc is not eligible for permanency even after 240 days. The Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961 and the Standard Standing Orders was framed under it. It read, "If....the appointment is invalid, the same cannot be validated by taking recourse to regularisation", they exposed an ignorance of the fact that it is only an invalid appointment that can be regularised. The essence of that judgement is that no worker appointed to a post that is not sanctioned can be made permanent. This, of course, reflects the judgement of the Constitution bench in Umadevi's case, which says that the unfair labour practise of keeping workers as badlis, casuals and temporaries, for years on end with the object of depriving them of the benefits of regular workers. In this context the Constitution has conveniently overlooked the fact that <badlis> can never be occupying a sanctioned post! The law as it stands today is that one can be employed as a <badli> for decades but if the post against which such appointment is made is not a sanctioned post (which it can never be), then keeping her or him as such is not an unfair labour practice nor does she or he have any right to be regularised under the standing orders. The upshot of this is that the public sector is free to commit unfair labour practices with impunity.

We must also pay equal emphasis to the question of the onus of proving that 240 days have elapsed in employment. In the case of Range Forest Officer Vs ST Hadimani ((2002) 3 SCC 25) given by Justice BN Kirpal and Arijit Passayat and in the case of Rajasthan State Ganganagar S Mills Ltd. Vs State of Rajasthan and Anr. ((2004) 8 SCC 161) given by Justice Arijit Passayat and CK Thakker, the same words were repeated. The court says, "It was for the claimant to lead evidence to show that he had in fact worked up to 240 days in the year preceding his termination. He has filed an affidavit. It is only his own statement which is in his favour and that cannot be regarded as sufficient evidence for any court or tribunal to come to the conclusion that in fact the claimant had worked for 240 day in a year. ... No proof of receipt of salary or wages for 240 days or order or record in that regard was produced." The SC seems to be oblivious of the reality that a vast number of workers in our country are not given such 'receipts' or 'orders' or 'records'.

This has to be seen in the background of the decision of the SC given just one year before the Hadimani's judgement. In the case of Tannery and Footwear Corporation of India Vs Raj Kumar & Anr ((2001) 2 LLJ 256) where Justice Phukan and Rajendra Babu had clearly held that if either side provides no evidence then the statement of the worker that he had completed 240 days would have to be believed. The recent SC judgements have also not noticed the earlier judgement in the matter of HD Singh Vs Reserve Bank of India ((1985) 4 SCC 201) which said, "In the absence of any evidence to the contrary, we have necessarily to draw the inference that the appellants case that he had worked for more than 240 days from July 1975 to July 1976, is true." These judgements took into account the social reality that workers in the unorganised sector were exploited and that the law was made for their protection. They accepted the social reality that workers are often given not an iota of evidence to show how and why they were employed. The recent judgements of the SC accept a different kind of social reality—that globalisation has to be built at any cost—if necessary upon the dead bodies of the workers in the unorganised sector.

A recent SC judgement in Bank of India & Anr vs. Tarun Kr Biswas & Ors (dated 30-07-2007) given by Justice Arijit Passayat and Lokeshwar Nath Penta, must be noted. In this judgement their lordships have held that the case of badli workers is different from the 'temporary' workers in considering the completion of 240 days for the purposes of sections 25B and 25F of the ID Act, 1947. They have refused to count Sundays and other holidays as days 'actually worked' for badli workers breaking from the long tradition of judgements following upon the judgement in the matter of Workmen of American Express International Banking Corporation vs. Mgt. of American Express International Banking Corporation (AIR 1986 SC 458) in which Justice Chinnappa Reddy had famously stated that it is not only when he works with the 'hammer or sickle or pen' that the worker must be said to have 'actually worked'…

EQUAL PAY FOR EQUAL WORK

It is common in the trade union movement to fight for 'equal pay for equal work' where regularisation is not immediately possible. In the judgement of Dhirendra Chamoli & Anr Vs State of UP ((1986) 1 SCC 637), the SC has always interpreted the question of 'equal pay for equal work' in the light of Article 39(d) of the Constitution of India. Though this may seem like over dilating, it would be important to have a look at what the SC said in that matter, especially in view of the recent decision in Umadevi's case: "The argument envisaged in the counter affidavit is that since there are no sanctioned posts to which regular appointments can be made the casual employees employed by different Nehru Yuvak Kendras cannot claim to receive the same salary and perquisites as class IV employees appointed regularly to sanctioned posts. But while raising this argument, it is conceded in the counter affidavit that the persons engaged by the Nehru Yuvak Kendras perform the same duties as is performed by Class IV employees appointed on regular basis against sanctioned posts. If that be so, it is difficult to understand how the Central government can deny to these employees the same salary and conditions of service as Class IV employees regularly appointed against sanctioned posts. It is peculiar on the part of the Central government to urge that these persons took up employment with the Nehru Yuvak Kendras knowing fully well that they will be paid only daily wages and therefore they cannot claim more. This argument lies ill in the mouth of the Central government for it is an all too familiar argument with the exploiting class and a Welfare State committed to a socialist pattern of society cannot be permitted to advance such an argument. It must be remembered that in this country where there is so much unemployment, the choice for the majority of people is to starve or to take employment on whatever exploitative terms are offered by the employer. The fact that these employees accepted employment with full knowledge that they will be paid only daily wages and they will not get the same salary and conditions of service as other Class IV employees, cannot provide an escape to the Central Government to avoid the mandate of equality enshrined in Art. 14 of the Constitution. This Article declares that there shall be equality before law and equal protection of the law and implicit in it is the further principle that there must be equal pay for work of equal value."

However, in the recent judgement of three judges in the matter of State of Haryana Vs Charanjit Singh ((2006) 9 SCC 321) it was held that some people would be more equal than others. The SC has held that equal pay would only be available for 'equal work' and not for similar work. Merely because two people designated as 'carpenters' did not mean that they would get the same wage, even in the same establishment, since the 'quality' of work that they produced may be different. Further, it was held that discrimination in wages on the basis of educational qualifications, mode of entry, etc. were all valid, and reversed the earlier judgement in the matter of Bhagwan Das & Ors. Vs State of Haryana & Ors ((1987) 4 SCC 634) that had specifically held that there can be no discrimination in wages on the basis of entry into the cadre. They even held that the law laid down in the matter of State of Punjab &) Ors Vs Devinder Singh & Ors ((1998) 9 SCC 595) where casual workers doing similar work to regular employees were held to be entitled only to the minimum of the pay-scale of the regular employees and not to the time-scale, was no more a good law. In effect, the three-judge bench in Charanjit Singh's case, (supra) has rendered important the concept of 'equal pay for equal work' and held that educational qualifications, mode of entry, quality of work etc. could all be basis for discrimination. One of the last defences of the unorganised worker against rampant exploitation has also been torn down.

CONTRACT BASIS

Besides workers working under a contractor, popularly referred to as 'contract workers', the SC has, of late being referring to a different type of 'contract worker'. Any worker who is employed under a specific contract delimited either by time or by the venture, is now referred to as a contract worker. Removal of such a worker has been removed from the definition of retrenchment by clause (bb) of sub-section (oo) of section 2 of the Industrial Disputes Act, 1947. Recent judgements like Municipal Council, Samrala Vs Sukhwinder Kaur ((2006) III LLJ 502), Municipal Council, Samrala Vs Raj Kumar ((2006) 3 SCC 81) and Harayana State Agricultural Marketing Board & Anr. Vs. Subhash Chand & Ors ((2006) 2 SCALE 614) have clearly held that such 'contract' workers cannot complain of illegal retrenchment if they are removed from service even though they may have completed 240 days of 'continuous service' or even if

the establishment employs over 100 workers and therefore comes within the purview of Chapter VB of the Industrial Disputes Act, 1947. Sections 25F, 25G, 25H, 25M, 25N have only been enacted to protect workers from being 'hired and fired'. The SC now holds that if the initial order of appointment mentions that the appointment is on a 'contract basis' and if the appointee is warned that he may be 'hired and fired' then summary 'firing' will be permitted. Gone is the protection to the weaker sections of society that it used to be the charter of the SC to ensure. As noted before, the SC seems to be keener than the government to bring in 'hire and fire'. One important point here is that every employment is on the basis of a contract, whether expressed or implied. Hence the mere mention of 'contract' in the letter of appointment cannot create any special situation. The SC seems to be merely using the fact of such mention as a convenient peg upon which to hang its desire to introduce the neo-liberal idea of employment.

MINIMUM WAGES

One of the first encroachments on the iniquitous contract between the employer and the employee was the protection offered by the statutory minimum wage. This protection is also being eroded away. In the matter of Lingegowda Detective & Security Chamber Vs Mysore Kirloskar Ltd & Ors ((2006) 2 CLR 392) Justices Arijit Passayat and Tarun Chatterjee have held that security guards working upon the premises of Mysore Kirloskar Ltd were not entitled even to the statutory minimum wage prescribed for the engineering industry in which Mysore Kirloskar admittedly falls. The fact that the security guards were sent there by the petitioner 'detective' agency, coupled with the fact that 'detective services' were not an industry covered under the minimum wages Act gave the excuse for this decision. This court went so far as to criticise the division Bench for having relied upon the older decision of the SC rendered in the matter of Peoples Union of Democratic Rights vs. Union of India (AIR 1982 SC 1473) (popularly referred to as the Asiad case), where a Constitution Bench of the SC had held that giving a wage lower than the minimum wage amounts to 'forced labour' and falls foul of the constitutional mandate of Article 23. The SC, in the "detective service" case, said that the earlier decision in the Asiad case has no application. This means that any industry can legally practice slavery by employing people through the device of an agency named such as to avoid liability under the Minimum Wages Act. The SC seems to have noticed that the definition of 'employer' in the Minimum Wages Act includes the principal employer in respect of workers employed through some other agency. Inspite of this they have denied minimum wages to the said workers. Most importantly, the division bench had relied upon the Contract Labour Act but the SC has brushed aside this Act in a single sentence as having no application. It is commonly known that the Minimum Wages Act prescribes that contract workers must, in no circumstances, be paid less than the minimum wage prescribed for the industry in which they are sent to work. This abominable judgement has resulted in the perpetuation of 'forced labour' in our country with the connivance and collusion of the SC.

WHO IS THE EMPLOYER?

It has to be noted that in many recent judgements like in the matter of Canteen Mazdoor Sabha Vs Metallurgical Engineering Consultants (I) Ltd. & Ors (August 21, 2007), the workers are being found to be employees of ad hoc bodies like the MECON Welfare Committee. In the case, canteen workers working in the non-executive canteen were demanding parity with workers in the MECON VIP Guest House and the MECON Tea Club. However, the SC held that they were the employees of the Mecon Welfare Committee. The trouble with such a formulation is that bodies like the welfare committee (in some cases canteen committees, etc.) have no corporate existence. They have no common seal and no common succession. It is very difficult to hold such bodies liable in any contract. That being the case, such bodies can hardly have the right to enter into contracts of employment. The correct legal position would be to look at such bodies as agents of the real employer (MECON, in this case) who have been provided with means and materials by such employer to run a canteen. In such cases, the SC does not seem to be so enthusiastic to enforce the letter of the law.

WORKERS' WAGES VS BANK'S DEBTS

This is not a problem confined to workers in the unorganised sector, but it is the workers in the unorganised sector who suffer the most when an industry folds up. It is well settled, that bank's will have first right in the debt recovery tribunals and the workers can have a pari

passu charge only if the company is wound up, under section 529 A of the Companies Act. However, a recent judgement of the SC has gone one step further. It has held that the secured creditor can even implead himself in any recovery proceedings by workers where the goods secured are required to be sold to pay off the workers and get preferential payment. In Central Bank of India Vs Siriguppa Sugars and Chemicals Ltd. & Ors, the workers and sugarcane cultivators had obtained orders from the Labour Commissioner (under section 33C of the ID Act) and the Cane Commissioner for amounts due. The High Court (HC) directed that the sale of sugar can be used obtain this amount. The bank got itself impleaded in the HC. Against the order of distribution made by HC, paying the amounts decreed to the workers and the cultivators, the bank came to the SC. In this matter the court has held that the right of a pawnee is higher than the right of a worker or of a cultivator (except in winding up) and therefore the banks debt would first have to be satisfied and only if any money was left after that would the workers and cultivators get any money. Thus, now the banks can even come and take away the money awarded to workers under section 33C. This fly in the face of the earlier accepted concept that earned wages have the first charge upon the goods that are the result of labour for which such wages are due. The SC has effectively held that the workers may be forced to work for (and the cultivators may be forced to grow for) satisfying the debt of a bank!

There are many other questions concerning unorganised workers that are being answered to their disadvantage by the SC. At present there are very important cases pending before the SC concerning boards of security guards and head-load workers, concerning the question of who are their employers and who are covered. Much as one may anticipate what is going to be the outcome of these matters, the critique of the court's stand in the matter of board's will best be made after these judgements. The court has also yet to come up against the recent law concerning construction workers. There are also other rights of workers in the unorganised sector, which have been negated by recent judgements of the SC. The above are only a few illustrative points, but they clearly point the way of what is to come. The neo-liberal conception of the workers being a free agent in a contract with the management, overlooks the reality of a country where the number of unemployed and their proportion is growing; where the quality of employment is deteriorating and where writ of the capitalists looms large. Even the conception of the courts in general and the SC in particular is changing. The people no more see the courts as their last bastion of hope and the SC as the last friend of the poor worker, unable to defend his own rights. It has taken the shape, in popular consciousness, of the front paw of globalisation. More vicious than even laissez faire capitalism ever was, neo-liberal philosophy now informs the decisions of the courts. There is not even a fine line of logic behind most of such decisions but only the eagerness to tear apart all restraint upon the great god 'Profit'. One may have to seek the answer not merely within the confines of the law alone. The task of the progressive lawyer today is ever more to inform the people of how their rights are being plundered and to lead them in the direction of changing the legal edifice altogether rather than merely fighting this frustrating battle inside the courts.

— November-December 2008

Judiciary Leaves Contract Labour in the Cold

Unlike in the past when courts took a magnanimous view keeping the interests of labour hired on contract, and permanent work meant permanency, the contractualisation of the permanent workforce is taking place with the blessing of the judiciary.

JANE COX

In the last few years the Supreme Court (SC) has progressively turned the clock back on the legal rights of contract workers, and crucially on their right to be declared permanent. This change in the attitude of the apex court from the 1950s to those of the last 15 years or so is a change from the one reflecting Nehruvian socialism to that of the market forces of neo-liberalism and globalisation, at a time when the mantra of international capital is wage cuts and casualisation of workforces.

From 1950s onwards, there was a series of judgements of the SC declaring the master-servant relationship to exist in areas where workmen would otherwise be considered to be contract workers or contractors themselves. This was done especially applying the control test adopted from old English cases distinguishing between contracts of service and contracts for service (which had largely arisen in the context of industrial accident cases). For example

(a) Shivanandan Sharma Vs Punjab National Bank (1955 (1) LLJ 688)

(b) Dharangadhara Chemical Works Vs State of Saurashtra (1957 SCR 152)

In Dharangadhara Chemical Works labourers known as agarias seasonally manufactured salt from rainwater for the chemical works. The agarias worked on piece-rate with their families and could engage further workers at their own cost. No hours of work were prescribed, no muster maintained and they could go after arranging for the manufacture of the salt. They were held to be workmen under section 2(s) of the Industrial Disputes Act, 1947, applying the test of the right of the master to control not only the work done but also the *manner in which it was done*.

This approach was then expanded in the "Beedi and tailoring cases", as in the Constitutional Bench decision in *Mangalore Ganesh Beedi Works (1974(1) LLJ 367)* and the judgement in *Silver Jubilee Tailoring House (1973 (2) LLJ 495.* In Silver Jubilee Tailoring House, the tailoring workers worked through "contractors" on piece rate, often part time and even worked from home and also took work from other tailoring shops. In *Mangalore Ganesh Beedi Works* many were home workers, rolling the beedis in their own homes along with their children, with material supplied and collected by contractors. Even then, it was held that the ultimate power of the employer to reject the goods was sufficient to render them workmen of the

owners of the beedi factories/tailoring shop for the purposes of the Beedi & Cigar Workers Act & the Shops & Establishments Act. The court also emphasised that in modern industry, control could not be the only test, the degree of control would vary according to the business and that other factors were relevant including whether the person is "part and parcel of the organisation" – the integrational test. The workers in these cases were held to be so part and parcel of the organisation.

A more radical line was taken in the case of *Hussainbhai Vs Alath Factory Ehezhilali Union (1978 (4) SCC 257)*. The workers were employed through contractors to make ropes. In the judgement, Justice Krishna Iyer applied the economic "choking off test" to hold that the workmen, though supposedly employed through contractors, were the employees of the owner of the rope factory.

"*Where a worker or group of workers labour to produce goods or services and these goods or services are for the business of another, that other is, in fact, the employer. He has economic control over the workers' subsistence, skill and continued employment. If he, for any reason, chokes off, the worker is virtually laid off*".

And in this case, the "integrality test" was taken to mean that the work done by the workmen was an integral part of the industry concerned.

There was, however, a clear and very sharp change in the approach of the court in the early 1990s coinciding exactly with the government policies of liberalisation, globalisation and privatisation. For example

(a) Dena Nath vs National Fertilizers Limited (1992 (1) SCC 695)

(b) Gujarat Electricity Board Ukai vs HMS (1995 AIR SC 1893

where it was held that as section 10 of the Contract Labour (Regulation & Abolition) Act, 1970, does not expressly lay down any right of contract workers to absorption as permanent employees on abolition, this means that there is no such right and that after a notification under section 10 is issued abolishing a contract labour system, the workers would have to raise a separate demand under the Industrial Disputes Act, 1947, for permanent employment and pursue the matter before an industrial tribunal. Thus contract workers, normally earning minimum wages if they are lucky, will spend, on a conservative estimate, at least 10-15 years to reach the SC only to find that should they win they have actually succeeded in abolishing their own job and will have to start all over again in the industrial court to get the right to be employed where they were to start with. For the few who have the support, tenacity and funds to do all that, their only hope would be that their children might reap the benefit as by the time they would get an order from the industrial court and the management has challenged that before the single judge and division bench of the High Court (HC) and then back to the SC, they would be either dead or retired. In these two case it was also emphasised that as there was a penal clause in the Act, the consequences of non compliance of any of its provisions would only be penal and not affect the substantial employment rights and status of the workmen. Thus overruled the long line of judgements of various HCs like that of the Madras HC in *Best vs Crompton (1985 (1) LLJ 492)* where it was held that if the contractor or principal employer did not obtain a valid licence or registration certificate under the Act, then the workmen would become the direct and permanent employees of the principal employer.

A very brief respite was got with the landmark judgement in Air India Statutory Corporation vs United Labour Union (1997 (1) CLR 292). The three-judge Bench of the Court emphasised that

"*The Preamble and Article 38 of the Constitution envision social justice as the arch to ensure life to be meaningful and livable with human dignity… In other words, the aim of social justice is to attain subsequential degree of social, economic and political equality, which is the legitimate expectation and constitutional goal. Social security, just and humane conditions of work and leisure to workman are part of his meaningful right to life and to achieve self expression of his personality and to enjoy the life with dignity…*"

The court then went on to almost equate the directive principle to provide employment with the fundamental right to life under Article 21 of the Constitution:

"Due to economic constraints, though right to work was not declared as a fundamental right, right to work of workmen, lower class, middle class and poor people is a means to development and source to earn livelihood. Though, right to employment cannot, as a right, be claimed, but after appointment to a post or an office, be it under the State, its agency, instrumentality, juristic person or private entrepreneur, it is required to be dealt with as per public element and to act in public interest assuring equality, which is genus of Article 14 and all other concomitant rights emanating there from are species to make their right to life and dignity of person real and

meaningful… To the workmen right to employment is the property, source of livelihood and dignity of person and a means to enjoy life, health and leisure." (para 50)

It was in this background that the SC held that on the abolition of a contract labour system under section 10 of the Act the contract workers automatically become the workmen of the principal employer. It was stressed that there was no express right to automatic absorption provided in section 10 of the Act as no such express provision was needed. The very concept of abolition of a contract labour system must mean improvement of the lot of such workmen and not its worsening. Justice Majumdar in his concurring judgement stated that to hold otherwise would mean that

"The contract labourers who were earlier having regulatory protections would be rendered persona non grata and would be thrown out from the establishment and told off the gates. Then in such a case the remedy of abolition of contract labour would be worse than the disease and it has to be held that the legislature whilst trying to improve the lot of erstwhile contract labourers… had really left them in the lurch by making them lose all facilities available to contract labour on the establishment as per Chapter V and desired them to wash their hands off the establishment and get out and face starvation…. If on abolition of contract labour system, contract labour itself is to be abolished, it would cause economic ruin and economic death to contract labourer and his dependants for amelioration of whose lot order under section 10 is to be passed. (para 69)

No sooner was this judgement given, it was quite spectacularly reversed by the Constitutional Bench decision in *Steel Authority of India (2001 (2) CLR 349)*. The approaches of the respective benches in these two matters reflect the turn in the tide of the attitude of the apex court from the last remnants of Nehruvian socialism to the naked market forces of Neo-liberalism and globalisation.

The minute the Air India judgement came, management's and their organisations went up in arms and called for the reversing of the judgement. In the frontline of the battle was SCOPE – The Standing Committee of Public Sector Enterprises. Its Secretary-General, MS Hakeem, immediately issued a statement requesting the Supreme Court to review the decision as

"In today's scenario contract labour cannot be wished away… Employees need the flexibility to streamline their operations and produce goods and services efficiently and at the least cost. To meet the basic requirements of business … their manpower needs will be dictated by the order book position. The workers' need for security and social protection can be met when our industry and trade have a competitive edge in the international market." (Times of India, September 1999).

Hakeem also called upon the government to withdraw all notifications so far issued under the Contract Labour Act, abolishing contract labour systems.

The public sector undertakings did get the issue of automatic absorption as laid down in the *Air India* judgement referred for rehearing before a five-judges Constitutional Bench of the Supreme Court in the SAIL matter However the *Air India* judgement was referred to the Constitutional Bench only on the question of automatic absorption. The validity of the 1976 Notification of the Central Government was not part of the Reference Order.

The Constitutional Bench totally reversed the Air India ruling and held that contract workers have no automatic right to absorption when a contract labour system is abolished. In fact it held that once a notification for abolition is issued, then *"the contract labour working in the concerned establishment…. will cease to function."*

The approach of this Bench and that of the three-judge Bench in the Air India case was diametrically opposed. In Air India the court held that there was no express provision in the Contract Labour Act for automatic absorption on abolition, as there doesn't need to be. The whole purpose and scheme of the Act implies that there will be automatic absorption. The Constitutional Bench however held the absolute opposite – that the failure to provide such a right in the Act, not only meant that no such right could be inferred, but that it had been deliberately and consciously left out. The court gave three broad reasons for reaching this conclusion. The first reason was based on the costs which would be cast on managements by employing permanent workers:

"We noticed that it was clear to the Joint Committee (who drafted the Act) that by abolition of contract labour, the principal employer would be compelled to employ permanent workers for all types of work which would result incurring high cost by him, which implied creation of employment opportunities on regular basis for the contract labour. This could as well be yet another reason for not providing automatic absorption."

(The Solicitor General had argued vehemently be-

fore the Court that if SAIL were forced to absorb the contract labour, they couldn't afford it. He and the other management lawyers strongly pressed that the interests of workers today really lie in the so-called "employment generation" which they claim the contract labour system provides).

The second reason given by the court for holding that there can be no inferred right to automatic absorption on abolition under the Act, seems to be on the basis that such a right would be unfair to one of contract workers themselves

"*Section 10 is intended to work as a permanent solution to the problem rather than to provide a one time measure by departmentalising the existing contract labour who may, by a fortuitous circumstance, be in an establishment for a very short time as on the date of the prohibition notification. It could as well be that a contractor and his contract labour who were with an establishment for a number of years were changed just before the issuance of a prohibition notification. In such a case there could be no justification to prefer the contract labour engaged on the relevant date over the contract labour employed for a longer period earlier. These may be some of the reasons as to why no specific provision is made for automatic absorption of contract labour in the CLRA Act (Page.83)*."

To solve this 'problem' however, the court didn't hold that in such a situation the contract workers who had been employed for a number of years earlier should be absorbed. The court, after holding that "….Contract labour working in the concerned establishment at the time of issue of the notification will cease to function" offered these contract workers the consolation that

"*…the contract labour is not rendered unemployed as is generally assumed but continues in the employment of the contractor as the notification does not sever the relationship of master and servant between the contractor and the contract labour. The contractor can utilise this services of the contract labour in any other establishment in respect of which no notification… has been issued.*"

The Constitutional bench has held that all contract workers can do once a contract labour system is abolished is to raise a demand for absorption under the Industrial Disputes Act and litigate the matter before an industrial tribunal. Even after reaching the industrial court, all the contract workers are entitled to so far as permanent employment is concerned, is a "preference". But that too, only if the principal employer "intends to employ regular workmen" for the work, and if the contract workers are "otherwise found suitable" by him, and they possess the necessary technical qualifications.

Though the issue of the validity of the 1976 notification of the Central government had not been referred at all before the Constitutional Bench, and it was accordingly not argued, the Constitutional Bench struck down the 1976 Notification altogether on the ground that, "*a glance through the Notification*" shows that it does not comply with the conditions laid down in section 10 of the Contract Labour Act. In the Air India case the three-judge Bench actually called for the papers from the Central government with regard to the investigation carried out by it under section 10 before issuing the notification. After going through the papers the court held that the investigation was proper and therefore the notification was valid. Not only has this notification, which covered lakhs of workers throughout the country, been struck down. But in light of the observations it seems that no omnibus notifications covering more than one establishment will be held valid. It is of course such omnibus notifications which are most effective in abolishing the contract labour system on a large scale.

(d) In subsequent judgements on sham and bogus claims, the court is now making the criteria to prove a sham and bogus contract more and more difficult and changing the interpretation earlier given to certain criteria. For example

Workmen of Nilgiri Co-op Marketing Vs State of Tamil Nadu (2004 (1) CLR 802), where included in the integration test are factors such as who appoints and who takes disciplinary action. The trend in the last few years has been rather than directly stating that contract workers should have no rights, to harp on so-called technical lacuna – such as in Section 10 – to deprive the workmen of the rights they had, at least on paper, for the last 40 odd years, whilst at the same time, shedding crocodile tears for the plight of this exploited section. In *Cipla vs MGKU,* the court similarly read down the provisions of the MRTU and ULP Act 1971 to hold them to be summary and therefore, the courts to have no jurisdiction where the master-servant relationship is denied. (Under the MRTU Act, workers in Maharashtra can directly approach the courts without having to go through conciliation process, and obtain ex-parte ad-interim stay orders. It was under this Act that contract workers could fight for permanency with the protection of a court stay against termination of services).

In more recent non-contract worker cases, the approach of the Court has been more open and bold. As for example in the Constitutional Bench decision of Secretary, State of Karnataka and others vs Umadevi and Ors (2006(4) SCALE 197) which basically heralds a return to straight contract law in industrial relations with absolute minimal intervention. Here the court not only held that even if casual workers have worked for more than 10 continuous years (in the Tax Department of the State of Karnataka), and more than 240 days each year, there is no obligation to absorb them and that they accepted the terms of the contract (which in some cases was less than the minimum wage) with "eyes open". "Hungary stomachs" might have been a better analogy. Till now, perhaps the single most distinguishing feature of industrial law from other branches of civil law is that recognising the unequal bargaining status of the two parties involved, so many implied terms are read into the contract.

Ultimately the SC itself has summed up its entire new approach to labour and industrial law. In *UP State Brassware Corporation Ltd vs Udai Narayan Pande (2006 – 108 FLR 201)* where 50 odd years of precedents regarding back wages were revised in one foul swoop, the court observed:

"*The changes brought about by the subsequent decisions of this court probably having regard to the changes in the policy decisions of the government in the wake of prevailing market economy, globalisation, privatisation and outsourcing is evident.*"

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Co-opted by Globalisation

The legal principles relating to misconducts, natural justice and 'relation back' have been affected as the judiciary has allowed itself to be swayed with the demands of capitalism.

VIJAY KUMAR

The Labour jurisprudence has been undergoing tectonic shift from last seven-eight years due to paradigm shift in interpretation of labour enactment by the highest court of the land ie Supreme Court (SC) of India. It would be in order at the outset to notice the recent judicial trends emerging from the apex judiciary. The reference to some of the recent pronouncements is as follows:

- Recently the SC in two cases emphasised about the shift in interpretation of labour legislation on the wake of globalisation and the economic forces unleashed by it vide UP State Brassware Corporation Ltd Vs Udai Narain Pandey - (2006 (1) SCC 479 - Para 43) and J K Synthetics Ltd Vs KP Aggarwal (2007 (2) SCC 433).
- Keeping with the recent trend, the apex court held recently in a case that merely because labour law is a social piece of legislation, it does not mean it should be construed in favour of workman even when he is not entitled to the benefit vide Beed District Central Co-op Bank Ltd vs State of Maharashtra (2006 (8) SCC 514 Para-3).
- Yet in another significant pronouncement SC held recently that the recent judicial trends indicate that the court must be loath to interfere with quantum of punishment vide JK Synthetic (supra). Similarly, in another case reported in 2005 (3) SCC 134 (Mahindra & Mahindra Vs NV Narwad) that court should not interfere with the punishment unless the same is shockingly disproportionate. Again, the SC held in a case reported in 2005 (2) SCC 481 (BHEL Vs M Chandrasekhar Reddy & Ors) that once employer loses confidence in the event of proved misconduct, it is not open for the tribunals to interfere with the punishment of termination.
- That the SC held in another case concerning the claim of regularisation that burden is always on the employee to establish continuous service in preceding Calendar year vide ONGC Ltd Vs Shyamal Chandra Bhowmik reported in 2006 (1) SCC 337. In another case the SC held that being in continuous service for 240 days or more in itself would not entitle the workman for permanency vide Manager RBI, Bangalore Vs S Mani & Ors. Reported in 2005 (5) SCC 100. One of the most refreshing pronouncement by the SC on the status of temporary workmen was given in a case of Birla VXL Ltd Vs State of Punjab - LLJ 1999 (1) 220 wherein it was held that "the termination of service of temporary workmen on the expiry of terms stipulated in the contract of employment would not amount to retrenchment and that the employer

was not required to comply with the requirement of Section 25-F of I.D. Act."

- The SC also held in another case that despite the absence of limitation requirement, the reference under Section 10 of Industrial Dispute Act, 1948 has to be made by an appropriate government within reasonable time vide Haryana State Co-op. Development Bank Vs Neelam reported in 2005 (5) SCC 91.
- The interpretation made by the Seven judge constitution bench of the SC in the famous Bangalore Water Supply Case was and is still holding field but recently the bench of the SC expressed doubt over the soundness of this wide interpretation of industries has referred the matter to larger bench for reconsideration vide State of UP Vs Jai Bir Singh 2005(5) SCC 1.
- The SC again held in the context of illegal strike that Illegal Strike would amount to unauthorised absence and thus in turn would amount to abandonment of service 2004 (4) SCC 268.

These judgements are indicative of unmistakable shift in interpretation of labour jurisprudence by the SC towards employer. Having traced these recent trends, I propose to deal with the themes.

MISCONDUCT

The misconduct in the realm of service and labour jurisprudence has distinct technical connotation. There cannot be any misconduct in absence of transgression of any rule, established norms and contravention of law as held by the SC in case of State of Punjab Vs Ram Singh, Ex-Constable, reported in 1992 (4) SCC 54 and reiterated in a case of Inspector Prem Chand Vs Government of NCT, Delhi reported in 2007 (4) SCC 566 wherein it was held that mere error of judgement resulting in doing of negligent act would not amount to misconduct. It was also held that the definition of misconduct cannot be put in straightjacket and the context and the duty imposed would be extremely germane factors. But this connotation of misconduct is undergoing significant change due to shifting interpretation. For instance, the acquittal in criminal trial does not render the removal of service illegal. This is justified on the ground that in criminal court, the prosecution has to prove its case beyond reasonable doubt while departmental enquiry has to proceed on the basis of preponderance of probability. Again, distinction and that too specious one is made between acquittal for want of evidence and acquittal on merit. This distinction is patently fallacious and has no place at all in criminal jurisprudence and similarly it should have no place in labour jurisprudence. Similarly, the order of removal is sustained even after acquittal in criminal trial on the ground that unless the evidence adduced before departmental enquiry and criminal trial are identical, there is no question of automatic protection from removal from service vide 2007 (9) SCC 755. Similarly, in another case of Principal Secretary, Government of AP Vs M Adi Narayan reported in 2004(12) SCC 579, the apex court held that the allegation of disproportionate asset automatically amounts to misconduct after rejecting the plea on behalf of delinquent that the allegation of disproportionate asset is liable to be investigated and prosecuted under Prevention of Corruption Act and thus fall outside the realm of labour jurisprudence. Again, in a case of theft, the SC has held that the quantum of theft is not important and what is important is the loss of confidence of employer in employee vide the judgement in the case of APSRTC vs Raghuda Shiva Sankar Prasad reported in 2007 (1) SCC 222. On the similar line is the judgement in another case of UPSRTC vs Ram Kishore Arora reported in 2007(4) SCC 627 wherein it was held that criminal breach of trust would automatically amount to serious misconduct. All these judgements have the inevitable effect of watering down the connotation of misconduct as a transgression of rules and law. Similarly, in another case of Regional Manager, Rajasthan Road Corporation Vs Sohan Lal reported in 2004 (8) SCC 218, the SC held that the past conduct of delinquent is not relevant at all. This is again complete repudiation of the well entrenched position of law in service jurisprudence that the past conduct is always relevant factors for determining the quantum of punishment. The ultimate effect of this shifting trend is that the misconduct is determined not with reference to any objective norms after scrupulously following the principle of natural justice but with reference to pure and subjective ipsi dixit of employer which would be evident from the judgement of the SC in a case of APSRTC (supra).

JUDICIAL AUTHORITY

Traditionally, it was well settled that erroneous interpretaton or even erroneous order passed by judicial or quasi-judicial authority would not amount to miscon-

duct in view of distinct technical connotation of misconduct as was held in a case of Junjarrao Bikhaji Nagarkar Vs UOI & Ors reported in 1999 (7) SCC 409 (para 40) which was again overruled in yet another case reported in 2006 (5) SCC 680. Thus, the thrust of recent judicial trends in overall labour and service jurisprudence including the concept of misconduct is towards diluting the safeguard and widening the concept of misconduct to the extent that it could be determined on the basis of subjective satisfaction of the employer in utter disregard to the irreducible minima of fairness and the principle of natural justice evolved to safeguard the right of workmen and delinquent.

NATURAL JUSTICE

Ever since the historic judgment of the SC in a case of AK Kraipak Vs UOI & Ors reported in 1969 (2) SCC 262 the frontier of natural justice kept on expanding till few years back. Due to this creative expansion of the principles of natural justice, the dividing line between quasi-judicial action and pure administrative action got rightly blurred. The SC speaking through Justice Chinappa Reddy in a landmark case of SL Kapur Vs Jagmohan reported in 1980 (4) SCC 379 held that the principle of natural justice knows no exclusionary zone. The principle of natural justice in the domain of labour and service jurisprudence reached its finest hours in case of Delhi Transport Corporation Vs DTC Mazdoor Congress and Anr reported in 1991 (Supp) 1 SCC 600 that the natural justice is a facet of Article 14 as a part of inseparable embodiment of rule of fairness in action or non-arbitrariness. This creative expansion of natural justice through dynamic judicial interpretation has been regressively reversed in recent year particularly in labour and service jurisprudence. In recent time, there is no dearth of authorities wherein the concept was diluted by holding that unless prejudice is established, the failure to comply with natural justice would not visit the impugned action of removal from service and imposition of penalty with illegality. This is nothing but complete dilution of progressive evolution of principle of natural justice. Similarly, the principle of natural justice was diluted by specious judicial contrivance in the name of useless formality theory which in substance means that if in a given set the compliance with natural justice would be futile exercise and would amount to mere empty formality, it need not be observed and the breach of the wholesome principle of natural justice would be of no consequence whatsoever. (See the judgement of the SC in a case of Divisional Manager Plantation, Andaman and Nicobar Vs Munna Barreck reported in 2005(2) SCC 237 and A Sudhakar Vs Post Master General, Hyderabad reported in 2006(4) SCC 348 by way of pure illustration). This progressive dilution of the principle of natural justice acquired absurd proportion in a case of Ganesh Santaram Sirur Vs SBI reported in 2005(1) SCC 13 wherein it was held that the failure to comply with the principles of natural justice by appellate authority before enhancing the penalty after taking into consideration unproved charges would be of no consequence in view of gravity of main allegation. This is extremely regressive view and amounts to undoing the rich, glorious and creative judicial evolution of the principle of natural justice over a period of time.

NATURAL JUSTICE AND BIAS

One of the inevitable consequences of watering down the principle of natural justice has been virtually taking away or wiping out the element of bias. It bears repetition that the second principle of natural justice that no one can become judge in his own case has hardly any sanctity left in labour jurisprudence. The departmental enquiry is conducted by the management. The prosecuting officer is appointed by management and even disciplinary authority is part of management. Despite this inherently iniquitous position, the SC has ruled that this will not amount to bias in a case of Delhi Financial Corporation Vs Rajiv Anand reported in 2004(11) SCC 625. It is well settled principle of our jurisprudence that to bring home the charge of bias, the test laid down is the likelihood of bias and in the case of labour jurisprudence the loss of faith in employee on impartiality of disciplinary authority. It is submitted that the very structure of labour jurisprudence as a result of shifting interpretation of the SC in favour of management and against the employee/workman is anchored in bias. In fact, the bias is the functional rationality of employer and unfortunately it stands sanctified by judicial imprimatur from the apex judiciary itself.

QUANTUM OF PUNISHMENT

Despite the amendment in Section 11-A of the Industrial Dispute Act, there has been spate of recent judicial authority emanating from higher judicial level to the effect that arriving at a finding of punishment being

shockingly disproportionate is a sine qua non for reduction of penalty vide judgement in a case reported in 2008(1) SCC 224 the highest court of the land deprecated the practice of Labour Court and High Court interfering with quantum of punishment. Again, in a case of Divisional Controller, KSRTC Vs AT Man reported in 2005 (3) SCC 254 it was held that punishment is irrelevant in a case where employer has lost confidence in employee. To the similar effect, is the judgement in a case of Ramanna Vs APSRTC reported in 2005 (7) SCC 338. The effect of these judgements is that discretion of labour court is completely taken away.

GLOBALISATION AND LABOUR

The phenomenon of globalisation seems to have engulfed all walks of life including the judicial interpretation. Far from interrogating the baleful consequence unleashed by forces of globalisation, the recent trends of the SC already extracted hereinabove are unmistakable pointer to the fact that the apex judiciary of the country has been co-opted by the powerful forces of globalisation. This has fateful implications for Indian poor and conscientious citizens or groups. For instance, the SC in one of its progressive judgement in a case of Union of India Vs Association for Democratic Reforms and Ors reported in 2002 (5) SCC 294 has read the right to be informed about the credential of MLA/MP as a part of fundamental right implicit in freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. Similarly, the SC has been reading so many derivative fundamental rights by the process of, what is known in American Constitution Literature, "penumbral emanation", under Article 21 of the Constitution but the same SC ruled that right to strike is unconstitutional despite earlier rulings and jurisprudential position that right to freedom of speech and expression encompasses right to dissent and right to strike is inescapable concomitant of right to dissent. Thus, on the one hand SC is expanding the ambit of right of free speech and expression and on the other hand and particularly in the context of labour jurisprudence curtailing it by outlawing the strike and bandh. Similarly, the SC has read out so many derivative rights under right to life and liberty guaranteed under Article 21 of the Constitution in the light of ideals enshrined in derivative principles like right to education, right to health, right to clean air and hygiene and so on and so forth but when it comes to enunciating the derivative rights in favour of labourers and employee despite numerous provisions in directive principles likes Article 39 (a) (b) (c) (d) (e), Article 41 (Right to work), Article 42 (just and humane condition of work), Article 43 A (Participation or worker in the management of industries) etc., the SC is turning other way around. On the one hand, the SC despite the deletion of right to property guaranteed under Article 19 (1) (f), has interpreted recently in a case reported in 2007 (8) SCC 705 that right to property is an aspect of human rights but seems to be completely impervious and insensitive about the human rights of workers and employees. Similarly, the apex judiciary has been taking recourse to international treaty and covenant to shape the content of fundamental rights but there has been no attempt whatsoever to rely on norms of International Labour Organisation or other international covenant to fashion additional rights to workmen and employees. Thus, the duality in the very functioning rationale of the SC is too obvious to need any elaboration.

CONSTITUTIONAL POSITION

These shifting trends of judicial interpretation in the realm of labour and service jurisprudence have inevitable effect of frustrating; indeed subverting, one of the basic postulate of Indian constitution, social justice. Social justice has been declared as a basic feature of Indian Constitution by the apex judiciary itself. Even otherwise, the interplay of and combined reading of Article 15, 16 and numerous provisions of directive principles and particularly Article 38 and 39(b) & (c) would lead to ineluctable conclusion that social justice is fundamental feature of Indian Constitution. In fact, the equality which has overarching importance in Indian Constitution and for that matter in any democracy cannot be understood without juxtaposing with the social justice. The principle of social justice is in-built in the text of equality clause itself.

CONTRACT AND QUASI-CONSTITUTIONALITY

The constitutional protection by Article 16 and 311 is available only under the State employment and in view of the rampant practice of and ever increasing trend of reliance on outsourcing and contract labour, the employment in state sector has shrunk alarmingly. Today, the overwhelming number of employment is entirely with private sector either organised or unorgan-

ised. This overwhelming number of employment is without any constitutional protection whatsoever. The poignancy and pathetic predicament of employment outside State sector is further aggravated by regressive shifting of its interpretation by the apex judiciary. European court of human right through it dynamic interpretation has been subjecting even the contract in respect of private employment and other area of private sphere to the discipline of the norms of constitutionality, i.e. characterised by quasi-constitutional principle. This is high time the higher judiciary of the country should adopt the same approach and principle so that right to millions and millions of workers employees working in private sector whether organised or unorganised could be effectuated by reference to the ameliorating provisions of the Indian Constitution.

Thus, the perceptible shift in the very approach adopted by the highest judiciary in labour jurisprudence is marked by distinct and demonstrable element of bias in favour of management and against the employee. The multinational companies or right wing economic forces have been clamouring for drastic change in all labour legislation so that regime of hire and fire could be resurrected. These multinational complies and right wing economic forces failed to get it done through Parliament but succeeded in getting it done indirectly through progressive dilution of all the safeguards guaranteed to workmen and employees through blatantly righteous interpretation by the apex judiciary. The approach adopted by the SC in labour and service matters in recent times is a matter of great concern and amounts to undoing of historical struggle through which these rights were secured.

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Judiciary Jettisons Working Class

The humane and compassionate approach vis-à-vis the working class since Independence has become a relic of the past. Courts have for sure been swayed by the new economic policies guided by demands of globalisation and privatisation.

GAYATRI SINGH

Through the period between Independence and until the mid 1990s the judiciary played a leading role in setting up by precedence a wonderful edifice for the protection of labour rights and for maintaining the dignity of labour. By the mid 1990s, however, the ideology of globalisation, privatisation and structural adjustments began to hold sway and the approach of the legal system began to change from a pro labour stand to one markedly against labour. As a result organised labour was almost completely denuded of its rights under law, workers became increasingly demoralised, frustrated and resentful of the legal system and litigation fell precipitously. What all this will have as consequences for society at large is not very clear now. But one thing is certain: if organised labour believes that Indian democracy in the era of globalisation has no place for labour rights then labour will seek options outside the democratic system and it is we who will pay the price for labour militancy.

CONTRACT LABOUR

Among the early decisions which set the trend in demolishing the rights of labour as guaranteed not only under the statutes but also in the decisions of the Supreme Court (SC) was the decision of the apex court in Steel Authority of India Ltd Vs National Union Waterfront Workers (2001) 7 SCC 1, which set aside the earlier decision of a three-judge Bench of the SC in Air India Statutory Corporation Vs United Labour Union (1997) 9 SCC 377. These two decisions in fact show the dividing line between the social democratic period of Indian labour jurisprudence and the globalised period where rights were disregarded and profit making was the sole objective.

In the Air India Statutory Corporation case the Supreme Court interpreted the Contract Labour Act, 1970 in a straightforward and logical manner keeping in view that the statute was enacted in order to ameliorate the harsh and terrible conditions under which contract labourers toiled in this country. They had no security of tenure and could be fired at will. They were invariably paid less than the minimum wage. And they toiled for decades as contract labour without the chance of becoming permanent even though they were engaged in regular work positions. Their conditions were akin to slave or bonded labour. Any protest from their side would invariably result in the employer telling his contractor to get rid of the workman. Workmen thus terminated had little recourse against the principal employer and would have to pursue an illusory figure who had no existence apart from his contract with the principal employer. In short, the contractor would disappear into thin air. Often the contractor would pretend to close down his work on a labour dispute arising, get rid of the workmen and then pretend to start a new contract in his wife's name with fresh workers. The Contract Labour Act was intended to extricate contract workers from this sorry state of affairs.

Section 10 of the Contract Labour Act provides a remedy for contract workers in case the work is of a permanent nature. Thus where contract workers continue working for long periods of time, often under different contractors but at the same work place, workmen could approach the Contract Labour Board for a recommendation to the effect that the contract labour system ought to be abolished. The matter would then go to the appropriate government which would consider the recommendation and then issue a notification ordering the abolition of the contract labour system.

A farcical dispute arose in law as to whether the abolition of the contract labour system would result in the absorption of workmen as permanent employees. Obviously it did. The whole idea of the statute was that for permanent work there should be permanent workers. Employers on the other hand argued that no such conclusion could be drawn. Ultimately the SC in the Air India Statutory Corporation case took the view that on abolition of the contract labour system the workers would be deemed to be absorbed on a permanent basis.

But the imperatives of globalisation could not possibly accept this conclusion. The employers want 'hire and fire'. The only way this can be achieved is by keeping workers in a permanent state of insecurity. The Supreme Court constituted a five-Judge Bench in the Steel Authority of India Ltd (SAIL) case and in a convoluted judgment held that the abolition of the contract labour system could not result in the absorption of labour. Thus, the abolition of the contract labour system in effect resulted in the abolition of the contract labour rights.

A study done of the effect of the SAIL judgement on millions of contract labourers throughout the country would show that as a result of the SC decision litigation on contract labour dropped dramatically, existing cases were treated very shabbily. Millions of contract workers were victimised, permanent work positions were converted on a very large scale into contract labour employment and these labourers worked often with wages less than the minimum wage in harsh and unsafe conditions without any legal remedy. Today both in the public as well as in private sector about 80 percent of the work force is on contract. At best the wage paid would be the minimum wage even for workers who are nearing retirement. Such are the conditions in which the workers find themselves. No decision of the apex court has caused so much misery to the working people as the SAIL judgment has. By holding thus, the apex court effectively destroyed a social legislation meant for the upliftment of the contract labour and acting directly contrary to the mandate of Parliament and denuded contract labourers of their rights under Statute.

CASUAL WORKERS

Five years later came the decision of the SC in Secretary, State of Karnataka Vs Umadevi (2006) 4 SCC 1 where a five-Judge Constitutional Bench of the SC put the final nail in the coffin of labour rights by holding that ad hoc, casual and temporary employees who were taken on duty by the employer contrary to the establishment rules, even if they are employed for more than a decade on continuous work, cannot seek regularisation of their services. The logic was that all such employees were a backdoor entry and deserve no sympathy because they deprived other potential aspirants of employment. Public employment was to be done in accordance with the rules and the decision frowned upon any other kind of recruitment. All this sounds fair enough. But the end result was that millions of casual and ad hoc workers who had worked continuously for long periods of time in permanent work positions were then destined to continue as such for the remainder of their lives or, worse still face termination of their services. Many of them were qualified. Most of them had acquired skills during employment. They were needed. In most cases their services were appreciated. They were loyal to the organisation and an asset to it. In such circumstances to condemn them to permanent temporariness or to remove them from service almost at the fag end of their career was gross injustice.

And if they came through the backdoor, the question that arises is that who ushered them in so? The recruitment of casual and temporary workers in permanent work positions was done by the top management in all cases, for various reasons which benefited management itself. A casual worker would do the same work as a permanent employee on less than the minimum wage and without provident fund, gratuity, bonus or leave. Millions of such workers were employed in the public sector which is supposed to be, according to the apex court, a model employer. Many millions more were employed thus in the private sector breaching a basic principle of labour jurisprudence that permanent work implies a permanent work position and permanency for the workmen. Yet in Umadevi's case not one of those employers who recruited the workers was punished. It is they who knew the rules and breached them, not the workers. The workers could not in their wildest imagination understand that their recruitment on pitiable wages and unfair working conditions was illegal. Thus the Umadevi decision punished the victim.

It is said in Umadevi that employment should always be in accordance with the rules. This means that posts will be advertised and that if there are permanent

work positions casual workers would not be taken for such work. And yet, two years after Umadevi, employers in the public and private sector merrily continue recruiting casual workers in permanent work positions.

The observations of the apex court in Umadevi's case are a double-edged sword. It constitutes a prohibition on the recruitment of casual workers except for casual work and, as stated above, it punishes the workmen for being in the establishment. The other edge of the sword, namely, the injunction against backdoor entry has never been used. No employer has been prohibited from continuing with the backdoor entry system. In fact, in case after case the courts are told, and let pass, that government has imposed a cut in permanent recruitment and has reduced the number of sanctioned posts under globalisation and that, therefore, it is not possible to increase the number of permanent work positions. But the work of the departments are increasing. Therefore, backdoor entry also increases. But there has not been even a single case where public sector employers have been punished for not only continuing but also indeed expanding backdoor entry notwithstanding Umadevi. The long and the short is this, Umadevi was intended to prevent casual workers in the public sector who had a genuine case for regularisation, from becoming permanent. Only history will decide whether such a course of action was justified.

In between these two landmark decisions came a host of mainly two-judge Bench decisions of the apex court that undermined labour law completely. What is sad about these decisions is that the clamp down was totally unnecessary in most cases. If labour is violent the courts react to discipline labour. If labour is unproductive the courts intervene to improve productivity. The tragedy of this period of judicial decision making is that it takes place at a time when labour was completely subdued, disciplined and productive. The various reports coming out from government on the labour scene indicated that most of the labour disputes were unrelated to labour agitations. Through in the eighties the labour movement was quite militant in certain parts of the country, by the nineties it had calmed down. In fact, employers were acting militantly everywhere. Workers were being locked out for years on end not because of any agitation but on account of the financial problems of the management. Instead of closing down or retrenching the workers, closures in fact were resorted to in the guise of lockouts to avoid paying workers their legal dues. Millions of workers in factories throughout India from the nineties onwards went home or expired before retirement without the payment of their legal dues. Much of the litigation in the courts from the nineties onwards related to the recovery of legal dues. A large bulk of the litigation was in respect of the unfair treatment of contract and casual workers. Thus labour lawyers throughout the country who were engaged in insurgency litigation in the eighties, were reconciled to poverty litigation in the nineties. It is in such a circumstance that the apex court intervened and demolished the last vestiges of labour rights.

BACK WAGES

Take the cases relating to payment of back wages for workers who were found by the labour tribunals to have been wrongfully dismissed from service and then reinstated with full backwages. What was so pressing for the apex court to take such workers and make an example of them? Why was it necessary for the court to reverse all the earlier decisions to the effect that when a worker is reinstated by the tribunal he would normally get backwages? Those who practice on the side of labour realise that in the vast majority of cases, workmen who are dismissed from service suffer terrible consequences. Their families are broken. Their children are taken out of schools. Family members die only because the workman is no longer able to provide medical care for them. The workman and his family are traumatised. The worker has to find a lawyer and has to suffer legal proceedings for a decade if not more. He has to find money to pay to his advocate. The employer files appeal after appeal and even the lowest worker will be dragged right upto the SC. With all this when it is found that the termination was illegal why should it not be that the workman will draw full backwages. And even if the workman has been fortunate to find temporary employment elsewhere what difference does it make? Can anyone really compensate for the decade of mental trauma and family suffering? Can payment of backwages ever compensate for a loved one who could not be saved because money for medicines was not available? Who will compensate for children being pulled out of school?

The manner in which two-judge Benches of the apex court bypassed the three-judge Bench decision in Hindustan Tin Works Pvt Ltd vs Employees (1979) 1 SCR 563, leaves much to be desired. If there was a disagreement with this decision, the proper course of ac-

tion would be to refer the issue to a larger Bench. This was not done. In Hindustan Tin Works case the apex court said that once the termination of service is set aside the workman is bound to be treated as if in service and would be paid full wages for the entire period of unemployment. Wages have to be paid. The apex court said, "where termination of service is questioned as invalid or illegal the workman has to go through the gamut of litigation. His capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying (Otherwise he) would be subjected to a sort of penalty for no fault of his. Therefore a workman whose services have been illegally terminated would be entitled to full backwages. Any other view would be a premium on the unwarranted litigative activity of the employer." This position was taken by another three-judge Bench of the SC in Surendra Kumar Verma Vs CGIT (1981) 1 SCR 789.

Starting with Hindustan Motors Ltd Vs Tapan Kumar Bhattacharya (2002) 6 SCC 41 come a series of decisions of the apex court, all of two-judge benches, questioning the principle of payment of backwages on an order of reinstatement being made. Many of the judgements do not take note of the earlier binding precedents of the larger Benches. In General Manager, Haryana Roadways vs Rudhan Singh (2005)5 SCC 591, it was held that the length of services was an important consideration for deciding backwages. Pray how? If a workman has worked for five years and the litigation goes on for fifteen, is the workman's backwages to be taken away merely because the employer is a vexatious litigator? In Allahabad Jal Sansthaan Vs Daya Shankar Rai (2005) 5 SCC 124 backwages were denied on the ground that the workman did not contribute to production as he was not on work! This was taken to its logical conclusion in Reserve Bank of India Vs Gopinath Sharma (2006) 6 SCC 221 where the apex court went to the extent of saying that the workman was not entitled to backwages on the principle of "no work no pay". Any labour lawyer knows that this principle applies only when the worker is found to be at fault in withdrawing his labour and has no relevance whatsoever to a situation where the termination of services of an employee has been declared illegal by the Industrial Tribunal.

At about the same time there are a series of decisions of which State Grassware Corporation Ltd vs Udai Narain Pandey (2006) 1 SCC 479 holding that the workman was required to plead and prove that he was not gainfully employed after the termination of his services, thus reversing the earlier trend holding that the employer had to lead evidence to the effect that the workman was gainfully employed. It is difficult to understand how an unemployed workman is to lead evidence regarding unemployment.

GLOBALISATION

There is a not so surprising observation in the decision in paragraphs 42 and 43 where the court says, "a person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an Industrial court shall lose much of their significance. The changes brought about by the subsequent decisions of this court, probably having regard to the changes in the policy decisions of the government in the wake of prevailing market economy, globalisation, privatisation and outsourcing, is evident."

For a two-judge bench of the apex court to give its stamp of approval to globalisation, privatisation, outsourcing and the prevailing market economy made very depressing reading. Make no mistake about it, the poor are against globalisation, while the rich are in favour of it. This is true not only of the poor and working people in India, but also of the entire developing world. No arguments were addressed to the court on these issues. No data was presented. No issues were framed. Parties were not put on notice that the court intended to pronounce on the goodness of globalisation. How then did this happen? The apex court of this country is not expected to take such a pronounced stand on an issue so important to the lives of the working people without a proper issue being framed in an appropriate case. Moreover this was an issue that only a Constitutional Bench of the court could decide.

In State of Punjab Vs Devans Modern Breweries Ltd. (2004) 11 SCC 26, a minority dissenting judgment explained the importance of globalisation in an extraordinary fashion. The court said, "In fact, the States are encouraging liberalisation to such an extent that in the near future alcohol beverages may be allowed to be sold in small grocery shops. The executive authorities are contemplating to grant permission to open liquor shops at the airports. The society has ac-

cepted pub culture in the metros. A view in the matter, therefore, is required to be taken having regard to the changing scenario on the basis of ground reality and not on the basis of the centuries' old maxims."

And what is wrong with centuries' old maxims? Are all these to be swept aside because of globalisation? The old maxims taught us to respect the environment. Are we now to disregard them because of the sort of unrestrained development that globalisation requires? The old maxims taught us to treat labour with dignity. Must we now have hire and fire, and all our workers in temporary work positions for all their lives? Our maxims taught us that education should never be a profiteering venture and that all the people of India rich or poor have a right to be educated. Should we now have, as the apex court has dictated in TMA Pai Foundation Vs State of Karnataka (2002) 8 SCC 481, unregulated commercialisation of education because of the imperatives of globalisation? Our Constitution tells us that all persons have a right to healthcare and that persons below the poverty line have a right to free medicines and treatment. Have we not switched over to the user fees system dictated by the World Bank where even the poor have to pay for medicines, bandages, food and the hospital bed, otherwise they are evicted? There is much to be said in favour of the century old maxims.

MISCONDUCT

At about the same time a series of decisions were reported on the aspect of misconduct by the workmen. There is absolutely nothing wrong in punishing a workman for serious misconduct such as assault, sabotage, gross indiscipline, and so on. But it is incomprehensible as to why workers are to be severely punished and made an example of in cases of minor misconducts. Take the bus conductor cases. Corruption is rampant in society and the courts can do nothing about it. Corruption is rampant in the judiciary and the courts can do nothing about it. But bus conductors who are found, as a first offence, to have a small unexplained amount of money on his person during a check, or found to have not given tickets to some passengers or the like, are now the subject matter of series of apex court decisions on the point. In Regional Manager RSRTC vs Sohan Lal (2004) 8 SCC 218, a bus conductor against whom an allegation was made that he had not issued tickets to six passengers had his services terminated. In the High Court (HC) the conductor offered to forego his entire salary for the period of unemployment and agreed that he would be taken as a fresh employee. Holding that the termination of services was disproportionate, the HC accepted the offer of workman. This was set aside by the SC saying "the quantum of loss is immaterial". Similarly in V Ramana Vs AP SRTC and others (2005) 7 SCC 338 where the allegation against the bus conductor was that he had not issued tickets and maintained records properly and it was submitted by him that there were minor lapses and small amounts at stake the SC upheld the extreme punishment of termination of services.

In LK Verma Vs HMT Ltd.(2006) 2 SCC 269, the SC explained the reason for its toughness in the following words: "In several decisions of this court it has been noticed how discipline at the workplace/industrial undertakings received a setback. In view of the change in economic policy of the country, it may not now be proper to allow the employees to break the discipline with impunity." But as pointed out in the earlier part of this article there is no evidence at all to indicate that after the 1990's there has been any labour militancy at all. In fact all the reports of the government indicate that the employers are on the offensive, aggressively locking out workers, absconding with their legal dues and using strong arm tactics in many parts of the country to dissuade workers from joining trade unions. It is inconceivable how the court could conclude that stronger measures were necessary because of the indisciplined work force.

240 DAYS

Then we have a series of decisions relating to retrenchment compensation payable to workmen on account of their termination of service after the workman had put in 240 days of continuous service. In this series the apex court reversed the burden and placed it on workman to demonstrate that (s)he had put in 240 days of work. Additionally the court said that the filing of affidavits or the giving of testimony on oath would not suffice. The workman would have to produce the wage slip showing attendance and some record showing payment of wages, to succeed in the case. In the earlier line of decisions the courts have ruled that the employers were bound to produce the muster and wage registers and if they do not do so, adverse inference would be drawn against them. This was now reversed by the court in the recent decisions and even if the employer failed to

produce the registers, adverse inference would in many instances not be drawn by the court. The requirement that the workman should produce his attendance and wage record flies in the face of the reality of modern day contractual employment. In hardly any establishment are the contract workers given wage slips or attendance records. The large majority of contract and casual workers in the country would have absolutely no record of the payment of wages or of attendance at the factory. To tell such workers that their oral testimony and the testimony of their co-workers would not be acceptable is to tell these workers not to come to court at all.

In RM Yellatti Vs Assistant Executive Engineer (2006)1 SCC 106, the SC while noting that daily wage earners were not given letters of appointment or letters of termination or any written document which they could produce as proof of receipt of wages and muster rolls are maintained in loose sheets and workers are not required to put their signatures anywhere, nevertheless held that "mere affidavits or self serving statements made by the claimant workmen will not suffice". Similarly in Rajasthan State Ganganagar S Mills Ltd Vs State of Rajasthan and another (2004) 8 SCC 161, the apex court held that, non-production of the muster roll by the employer was of no consequence.

In Batala Coop Sugar Mills Ltd Vs Sowaran Singh (2005) 8 SCC 481 the SC held that unless the casual employee provided "proof of receipt of salary or wages for 240 days or order or record of appointment for this period", on this deficiency alone his case is likely to be dismissed.

SUBSISTENCE ALLOWANCE

Likewise on the issue of subsistence allowance it was quite unnecessary for the apex court to intervene on an issue that was so well settled in law. The apex court had held again and again that there can be no compromise on the payment of subsistence allowance during the pendency of a domestic enquiry. Payment was not predicated upon prejudice. It had to be paid no matter what. In Captain M Paul Anthony's case (1999) 3 SCC 679, the apex court compared the non payment of subsistence allowance with "slow poisoning". Disregarding this long line of decisions in Indra Bhanu Gaur Vs Committee, Management of MM Degree College and others (2004) 1 SCC 281, the apex court for the first time introduced the element of prejudice and held that unless prejudice was shown due to non-payment of subsistence allowance, the termination could not be set aside. The court found that "the appellant could not plead or substantiate that non-payment was deliberate or to spite him or due to his own fault." This requirement that the workman should show that the non-payment was deliberate and malafide changed the law on the subject completely without reference to the earlier decisions.

INDUSTRY

Thereafter a fundamental attack on one of the basic pillars of labour jurisprudence viz the issue as to what constitutes an industry within the meaning of 2(s) of the Industrial Disputes Act, was made before the SC recently. The matter was heard by a five-judge bench and was referred to a larger bench. All the five judges unanimously found that the decision of Justice Krishna Aiyer and others giving an expanded definition to the section deserved reconsideration. Several two-judge benches of the SC had on earlier occasions attempted to reopen the issue but were unsuccessful. These were State of Gujarat Vs PN Parmar (2001) 9 SCC 713 and Coirboard Vs Indira Devi (1998) 3 SCC 259. Now with the decision of the Constitutional Bench in State of UP Vs Jai Bir Singh (2005) 5 SCC 1, the stage is set to fundamentally undermine a basic principle of labour law. If reconsideration is done, it is possible that a large number of establishments will fall outside the purview of labour law and workers in government establishments, workers in agriculture, workers in forestry departments, workers on projects of the government, workers in educational institutions, hospitals, clubs and so on will be denuded of their protection under labour law. Behind the legal battle lies a political battle where there are forces at play intent on completely demolishing labour law.

NATURAL JUSTICE

Then natural justice for workmen during a domestic enquiry took a hit in Divisional Manager, Plantation Division, Andaman & Nicobar Islands Vs Munnu Barrick and others (2005) 2 SCC 237 where the apex court held that even if the enquiry report of the domestic enquiry is not provided to the workman even then the termination of services will not be set aside unless the workman establishes prejudice having regard to the "useless formality theory"!

11(a) INDUSTRIAL DISPUTES ACT, 1947

In Mahindra and Mahindra Ltd versus NB Narawade (2005) 3 SCC 134, contrary to the decision in The Workmen of M/s Firestone Tyre and Rubber Company of India (Pv.) Ltd Vs The Management (1973) 1 SCC 813) and a host of subsequent decisions, where the apex court held that under section 11 (a) of the Industrial Disputes Act, the Industrial Tribunal has jurisdiction to reappraise the entire evidence and come to an independent decision afresh; the SC held that the discretion under Section 11(a) is available only when the punishment is so disproportionate so as to disturb the conscience of the court or where there are mitigating circumstances requiring the reduction of the sentence such as the past conduct of the workman.

ABANDONMENT

In UP State Bridge Corporation Ltd and others Vs UP Rajya Setu Nigam S Karmachari Sangh (2004) 4 SCC 268, once again contrary to a long line of decisions of the apex court itself to the effect that abandonment of service by an employee must have the element of mens rea or the intention to abandon service, the SC held in a case of an illegal strike that solely on account of participation in an illegal strike, workmen services could be terminated on the ground of abandonment.

STRIKE

Continuing on the issue of strike, in TK Rangarajan Vs Government of Tamil Nadu and others (2003) 6 SCC 581, the SC went to the extent of saying that there is no legal or statutory right to go on strike. This is strange particularly in view of the fact that all employees proposing to go on strike have to give a notice to the employer and once that notice is given, unless the government prohibits the strike by notification, the strike is deemed to be legal. The law on this point is well settled by a long line of decisions of the apex court. To say therefore, that there is no legal or statutory right to go on strike is contrary not only to the statute but also contrary to the decisions of the SC. The decision makes no reference to the long line of judgements of the SC itself. The court goes to the extent of saying that even if there is injustice no strike can be resorted to. Now there are legal and justified strikes as explained by the SC in the India Marine Service Pvt Ltd Vs Workmen (1963) 3 SCR 575 and The Statesman Ltd. versus Their Workmen (1976) 2 SCC 223. Yet in the present decision the SC makes a sweeping condemnation of the strikes in the following terms "strike as a weapon is mostly misused which results in chaos and total mal-administration. Strike affects the society as a whole."

In Ex Captain Harish Uppal Vs Union of India (2003) 2 SCC 45, the SC held that lawyers have no right to go on strike, not even a token strike, even for a just cause. If this was the law in Pakistan, General Musharaff would still have been president!

PRIVATISATION

BALCO Employees Union Vs Union of India (2002) 2 SCC 333 is the leading judgement of the apex court in the period of globalisation on the issue of privatisation. The court held that a disinvestment policy and individual instances of privatisation cannot be examined by the court at all. In so holding the SC missed the bus in the sense that there were numerous instances where privatisation of public sector companies were done by government in such a corrupt and non transparent manner in order to benefit ministers and others and in all these cases the BALCO judgement was cited to tell the judges of the lower courts that they cannot touch the issue at all.This judgement did grave disservice to the nation. Had the courts been permitted to review cases of privatisation on the grounds of lack of transparency or of corruption or malafides or oblique motive, then the public exchequer would have been saved of thousands of crores of rupees and valuable public property would not have been frittered away for private gain. Even the request of the Union that the prospective buyer should disclose its plans for investment and modernisation of BALCO after disinvestment was rejected by the Supreme Court. Despite the decision of the apex court in the National Textile Workers Union case the Supreme Court in the BALCO case held that the workers were not to be consulted. The most damaging aspect of the decision was the observation in para 71 which was totally uncalled for, particularly in view of the fact that the SC itself admitted that the decision of the apex court in Samatha vs State of AP (1997) 8 SCC 191 was not applicable in the BALCO case. Nevertheless, the SC observed that it had "strong reservations with regard to the correctness of the majority decision in the Samatha case". Now Samatha was a three-Judge Bench landmark decision of the SC which held that no person who is not a member of the Scheduled Tribes, not even a government corporation can

take the lands of the tribals by way of transfer. This judgement is widely hailed by tribal organisations throughout the country as a landmark judgement which helped prohibit the transfer of lands from tribals to non-tribals throughout the country. To cast a shadow of doubt on a three-Judge bench decision in the BALCO case, where the Samatha judgment was not applicable at all, did grave disservice to all the tribals living in the scheduled areas of this country.

CRIMINAL PROCEEDINGS AND DOMESTIC INQUIRY

Though it is true that criminal proceedings stand on a different footing from domestic enquiries, if a workman is honourably acquitted in a criminal trial then if a domestic enquiry is proceeding on the same set of facts, the enquiry must be quashed on the principle of issue estoppel. However, in Krishnakali Tea Estate Vs Akhil Bharatiya Chah Mazdoor Sangh and another (2004) 8 SCC 200 the SC permitted the domestic enquiry to continue even though the criminal court had honourably acquitted the workman.

REINSTATEMENT

Finally, in Haryana State Coop Land Development Bank Vs Neelam (2005) 5 SCC 91, the SC made reinstatement of workmen very difficult by holding that if the vacancy created by the termination of service is filled by a subsequent worker, then even if the tribunal holds that the termination of services is illegal, reinstatement may not be ordered on account of the subsequent filling of the vacancy. It is thus now open for the employers to contend that the vacancy created by termination of services was subsequently filled and thereby defeat the workman's legitimate claim for reinstatement notwithstanding the illegal termination of services.

SICKNESS, DRT, SARFAESI AND RECOVERY OF DUES

In thousands of cases across the country, workers in sick or closed companies are being denied their earned wages and legal dues. Hundred of cases are pending before the BIFR and the AAIFR, some of them for over a decade. Companies routinely pretend that they are seriously interested in revival but in reality their only concern is to use the shield of Section 22 of SICA to keep the creditors and the workers at bay while the assets of the sick companies are clandestinely sold leaving nothing behind but an empty husk. That all this goes on in the presence of BIFR and AAIFR is a matter of serious concern. It is high time that an independent social audit is done of these institutions, as the trade unions are extremely frustrated with their functioning. With the enactment of The Recovery Of Debts Due to Banks And Financial Institutions Act, 1993 numerous proceedings for recovery were filed by banks and other financial institutions. Shockingly the Debt Recovery Tribunal (DRT) made order after order permitting sale of the land, machines and factories thus jeopardising the workers employment and with hardly a care about the recovery of the dues of the workmen. In the era of globalisation nobody was concerned about the payment of the workers dues. Banks, including nationalised banks recovered their amounts fully, while tens of thousands of workers and their families starved due to the non-payment of their earned wages and legal dues.

The main decision of this court on this point is National Textile Workers Union Vs PR Ramakrishnan and Ors (1983) 1 SCC 228 wherein certain observations were made in the majority judgement of the Constitutional Bench of this court regarding certain contemporary international common law principles regarding the role of workmen in public limited companies. In the context of workmen seeking to assert their right to oppose the winding up of a company and to make alternative suggestions to secure their livelihood, this court held: "It is well established principle of administrative law that no order entailing adverse civil consequences can be made by the state or a public authority unless the person affected is afforded an opportunity to show cause against the making of such order by controverting the allegations made against him and presenting his own positive case…The concept of a company has undergone radical transformation in the last few decades…The traditional view that the company is the property of the shareholders is now an exploded myth…The ownership of the concern was identified with those who brought in capital. That was the outcome of the property minded capitalistic society in which the concept of company originated. But this view can no longer be regarded as valid in the light of the changing socio-economic concepts and values…It is true that the shareholders bring capital, but capital is not enough. It is only one of the factors, which contributes to the production of national wealth. There is another equally, if not more, important factor of pro-

duction and that is labour…In fact, the owners of capital bear only limited financial risk and otherwise contribute nothing to production while labour contributes a major share of the product. While the former invest only a part of their moneys, the latter invest their sweat and toil, in fact their life itself. The workers therefore have a special place in a socialist pattern of society. They are no more vendors of toil; they are not a marketable commodity to be purchased by the owners of capital. They are producers of wealth as much as capital. They supply labour without which capital would be impotent and they are, at the least, equal partners with capital in the enterprise. Our constitution has shown profound concern for the workers and given them a pride of place in the new socio-economic order envisaged in the Preamble and the Directive Principles of State Policy. The Preamble contains the profound declaration pregnant with meaning and hope for millions of peasants and workers that India shall be a socialist democratic republic where social and economic justice will inform all institutions of national life and there will be equality of status and opportunity for all and every endeavour shall be made to promote fraternity ensuring the dignity of the individual…No doubt, it was the creative genius of the bourgeoisie that invented the corporations and the companies, invested them with a corporate soul and a juristic personality and called them legal entities in order to meet the growing and complex demands of modern industry and management, to conduct business and commercial activities more conveniently and efficiently and, essentially, to foster, consolidate and stabilise the capitalist system of society under whose aegis alone the exploiting class could thrive and continue to exploit the working class. Corporations became the symbol of competitive capitalism. But the historical processes continue at work. The movement is now towards socialism. The working classes, all over the world are demanding 'workers' control" and "industrial democracy". They want security and the right to work to be secured…Prof. Grower in his The Principles of Modern Company Law says, "One section of the community whose interests as such are not afforded any protection, either under this head or by virtue of the provisions for investor or creditor protection, are the workers and employees of the taken over company. This is a particularly unfortunate facet of the principle that the interest of the company means only the interest of the members, and not of those whose livelihood is in practice much more closely involved."

Then in Allahabad Bank Vs Canara Bank (2003) 4 SCC 406, in a stunning judgement the Supreme Court, interpreting Section 529-A of the Companies Act, held that workers dues stand first in priority over secured creditors. This judgement which did substantial justice to the workmen, was subsequently downplayed by another decision in the case of Andhra Bank Vs Official Liquidator and another 2005 5 SCC 75.

Then the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (SARFAESI) was enacted and this statute did not even have the bare minimum protection for the workers in terms of 529-A of The Companies Act as was found in Due to Banks And Financial Institutions Act, 1993. As a result properties of Sick Companies were taken over by the Asset Reconstruction Companies and sold often for a song and the banks were paid their dues while the workers starved. Once again the apex court intervened in a negative manner in Central Bank of India Vs Siriguppa Sugars and Chemicals Ltd 2007 8 SCC 353 holding that in the absence of winding up the workmen were to be treated as unsecured creditors.

This decision did grave disservice to millions of workers in the country who were employed in sick or closed factories where winding up proceedings had not commenced. These factories were in such a bad shape that the properties and assets were slowly frittered away leaving only an empty husk. Were workers to be penalised and denied their legal dues merely because a winding up petition had not been filed? Is it correct in law that workers are to be treated as unsecured creditors? Does this proposition not imply that the workers legal dues will never be paid in most circumstances and if they are paid only after the worker expires?

There is a common law Right to Life and the securing of the means of livelihood, which far supersede the right of a bank to make profits. This common law right is reinforced in the case of nationalised banks governed by the Constitution of India. Workers of enterprises that have admittedly gone bankrupt [though a winding up petition has not been filed] have a first priority in contemporary International Common Law and under the Constitution with respect to recovery of their earned wages, provident fund, gratuity and other legal dues, in preference to all other creditors including secured creditors who are, in this case, mainly nation-

alised banks. There is no decision of SC directly on this point.

The presumption made in cases tangentially on this issue to the effect that in the absence of a statute akin to 529-A of the Companies Act in the case of winding up, workers must be treated as unsecured creditors thus effectively depriving them of their entire legal dues, makes the mistake of ignoring the application of common law principles that can be made applicable when statutes are silent on an issue. These presumptions also ignored well-settled Constitutional Law principles for the preservation of life and they also bypass the Equity Jurisdiction.

The legal presumption to the effect that workman must be treated as unsecured creditors has drastic national consequences in that workman throughout the country will suffer destitution while the nationalised banks recover their claims. This cannot be.

CONCLUSION

The judiciary has abandoned the working class. Globalisation had caused a sea change in the thinking of judges. The impressionist view that globalisation offers a panacea for everything will soon be proved wrong as the crisis in the present international financial situation demonstrates. Millions of middle class people have been rendered destitute by the meltdown in the markets. Workers provident fund amounts were also directed to be invested in the share market by no less a person than the Prime Minister of India. Globalisation no longer glitters but the damage caused by the decisions of the last ten years to labour rights is irreversible. Contract and casual workers fell into destitution. Labour and Industrial Courts became virtually defunct. The working class lost faith in the judiciary because it failed to maintain a balance between capital and labour. Democracy was delivered a fatal blow.

— November-December 2008

Market's Mask Falls as Robots Charge

The brutality of the state apparatus was on display 24/7 as the rulers fiddled while the hard working labourers' blood was shed in broad daylight in Gurgaon. Revolting and stultifying, corporate bulldozing and political complicity allowed the Haryana Police to take centrestage with their fangs bared. The lathi knew no mercy and the worker's body became a ready target to inflict the unjustifiable.

PREM KRISHAN SHARMA

The myth of 'market economy with human face' has exploded in Gurgaon with a vengeance. The mask has been thrown and the ugly brutal face of multinational capitalism is being exhibited shamelessly. This time the electronic medida has really done a commendable service by showing the details of police crackdown. Everybody who was viewing that spectable must have been conviced that those uniformed lathi-wielding robots were not government agents but someone on the payroll of the multinationals.

It was the same old story repeated time and again. Wherever workers of any industry organised themselves and put up their demands, the huge labour relations machinery of State remains idle. No effective intervention is made. Actually it plays in the hands of management and deliberately allows the situation to reach a stage when the patience of workers begins to dwindle. Then on some pretext a retaliatory action is taken by the management victimising some prominent members of the work force in order to further worsen the situation. The earned wages of the workers are withheld so as to put them into starving conditions. This is the time when only one spark is needed to bring the police into action against tired and harassed workers. Naturally, this time it has to be more beastly as a multinational was their master.

One can ask that what the labour department was doing the whole of the last month during which the trouble was slowly brewing. It is not a case where the situation was the result of some sudden happening. A demand charter had been given, attempts were made to negotiate the matter but the management remained obstinate. There was much time available with the authorities to sort out the matter but it seems that all the labour laws have become redundant these days and the labour relation machinery has become a slave of the capitalists. It is all the more so when some multinational is in the picture.

The fact that the Prime Minister showed concern about the incident and the state government awarded compensation to all the injured persons and at the same time asked two

officers to proceed on leave is no consolation. In fact, it is only eyewash and does not show that they have got any intention to go into the root cause of the problem. Even if some officers are made scapegoats and some public money is distributed it will not wipe out the scars of the policies which are the real reasons behind such developments.

It may be noted that not a single word has been said about the just demands of the workers and their action to pursue the demands. The government is too cautious not to annoy the employers and is too eager to assure them about continuity of the policies in their favour. Actually, the situation demand a complete reversal of these policies. The incident is a reminder that no human mask fits on the face of the cutthroat market economy.

The gesture of the government only proved two things. One that the government expected that the use of force by the police was excessive and two that it wants to cool down the excepted anger of the Left parties who are themselves following a blind path. They are only interested to hold on to their present superfluous status without having any long-term vision.

The issue involves much larger question. Does liberalization and market economy mean that the interest of the toiling people should be given a complete go by? They are only allowed to sustain their animal existence. They cannot dare to raise their voice without inviting brutal retaliation. They must not hope that their voice will be heard by the powers-that-be. Is it a worldwide phenomena or it is only in India where it is being zealously given an anti-people interpretation? After all it is well known that we Indians are habitual in aping our more affluent masters' outward appearance rather than intent.

As a matter of fact, this incident must act as an eye-opener for all the persons and the groups who have people's interest in their mind. On the one hand, it is a warning for them that they should be prepared for such brutalities even if any murmur is made to oppose the system. On the other hand, they should take it as a reminder that time has come when isolated resistance will be futile. There is an urgent need to streamline and unite the people's voices everywhere whether they be people's movements, workers and peasants struggle or civil society groups. That is the only hope for the future.

— August-September 2005

Contempt for Labour: Taking Indian Labour for Granted

There is a basic lacuna in every labour legislation which denies the ultimate benefit of the law to the labourer, by not giving him the right to prosecute the offender. This is real contempt indeed – the contempt of labour.

MUKUL SINHA

Can a workman, after years of litigation, ever expect to get the order of the Labour Court/Industrial Tribunal implemented? Or will the employer be free to disregard such awards/orders with impunity? In a system which swears by the rule of law, such a question by itself would perhaps be contemptuous. Disobedience of an order of a competent court would certainly mark the end of the rule of the law, which obviously cannot be tolerated in the system. Obedience to the orders of a court of law is sacrosanct and fundamental to the system. The Constitution of India has conferred the inherent power to the Supreme Court and the High Courts to punish offenders for contempt. The Contempt of Court Act has further expanded the powers of the High Court to punish for the contempt of all courts subordinate in the same manner, as if it in its own contempt. The law seems to be quite clear - no one will have the privilege to disobey the orders of the court, and if they do, they will be punished for contempt.

This fundamental axiom seems to have been momentarily forgotten when a Division Bench of the High Court of Gujarat, in Muljibhai Bhurabhai v. Upendra Vyas[1] held that the breach of an order of the Labour Court or the Industrial Tribunal would not amount to contempt within the meaning of Contempt of Courts Act. Relying upon a passing observation made by the Supreme Court in a case way back in 1994, the High Court concluded that the Labour Court / Industrial Tribunal were not 'Courts' subordinate to the High Court within the meaning of the Contempt of the Courts Act, and therefore no action of contempt would lie against any employer for any alleged breach of such orders.

The ramifications of this judgement of the High Court of Gujarat were enormous.

The efficacy of adjudication by the Labour Courts or the Industrial Tribunal itself came under a cloud. The workers and the trade unions, who had very little faith in the recovery proceedings under the Section 33(c) (2) of the Industrial Disputes Act, were deeply disap-

pointed with the judgement of the High Court, since the last hope for the workers to get the awards implemented through the mechanism of the Contempt of Courts Act was taken away.

The all round frustration and disappointment resulted in several expressions of protest. In one instance, the workers locked up all the Labour Courts across all of Gujarat, as if to say that such courts had lost their sanctity after the High Court had held that the forums were no longer 'Courts' under the Contempt of Courts Act.

Fortunately, another Division Bench of the High Court of Gujarat, after about six months, took an exactly opposite view in Jaisinh Jhodhabhai Vyasa and Grofed Employees Union v. Laxmanbhai A. Zalah[2] and held that the wilful disobedience of an award or order of the Labour Court would amount to contempt of the court. Since then, the High Court of Gujarat has once again been entertaining applications under the Contempt of Courts Act for alleged breach of the Labour Court's awards.

But the debate is still not over. Presently two judgements of two Division Benches, holding exactly opposite views exist. This contradiction is still to be resolved by any judgement of a larger bench of the High Court of Gujarat or by any judgement of the Supreme Court. Quite apart from this contradiction, a larger question should be posed at this juncture: why is the Indian labour being treated so shabbily by law makers, though there is no dearth of labour laws?

The number of laws that have been enacted for the welfare of labour in India is perhaps the highest in the world. From the right to receive minimum wages under the Minimum Wages Act, to the right to receive pension after retirement, there are numerous legislations giving various types of protection to labour. The Industrial Dispute Act, 1947, still remains the primary law central to the dispute resolution mechanism between the employer and the employees. This is the Act under which the Labour Courts and the Industrial Tribunals are created to adjudicate upon the labour disputes. Yet, despite the plethora of labour legislations, the common complaint across the country is that labour legislations are implemented only in their breach.

Quite apart from the question as to whether the High Court can enforce the awards / orders of the Labour Court by exercising powers under the Contempt of Courts Act, it has to be noticed that none of the numerous legislations permit the aggrieved worker to directly prosecute the employer before any Criminal Court. All such legislations, including the Industrial Disputes Act 1947, do not allow the prosecution of the offender without the express sanction of the appropriate government. Thus the final key remains in hands of government officials, and it is a common enough experience that the official hand can be easily manipulated.

This, in fact, remains the basic lacuna in every labour legislation which denies the ultimate benefit of the law to the labourer, by not giving him the right to prosecute.

It can be seen that on the one hand there is no effective mechanism to implement or enforce rights under the labour laws. On the other hand, labour has not been given the right to prosecute the offender. It appears that law makers have a distrust for labour, and have therefore deliberately denied them their fundamental right to prosecute those who commit the breach of the labour laws. This is real contempt indeed - the contempt for labour.

— April-May 2002

Endnotes

1. 2000 (2) Gujarat Law Herald (GLH), page 768.
2. 2001 (2) GLH page 68.

SECTION 9

It is ironical that patents were originally intended to be governmental incentives to innovators to prevent secrecy and encourage disclosure of inventions in exchange for limited legal protection. Today, patent laws serve exactly the opposite purpose as tools of monopolisation. As is the case with most of the issues of neo-liberal policies in India, the new patent laws are not about globalisation of India's trade interests; these are about Indianisation of western (read American) global trade interests.

Amended Patents Act 1970: A Critique

The Indian government has always been in a bind as far as the TRIPs agreements within the WTO regime are concerned. Its recent position on patents means that it is going to make its products extremely expensive and out of reach for its own people and their brethren within the developing world.

B K KEAYLA

TRIPS is one of the most contentious agreement of the WTO which has been debated world-wide in the developed and developing countries and also in important international institutions. In the recent past, a number of studies and research papers by important institutions and eminent economists have been published about the implications of TRIPS on the developing countries. These studies can serve as useful guide for safeguarding the interest of the industry and public. However, all the member countries of the WTO including India are under binding commitment to implement the TRIPS provisions in their national patent laws.

With the enactment of Patents (Amendment) Act 2005 the amending process of Indian Patents Act 1970 to bring it in line with the TRIPS Agreement has been completed by the government. The earlier two amendments were enacted by Parliament during 1999 and 2002. In the amending process some safeguard provisions have been incorporated. However, still some more possibilities in this direction within the framework of the TRIPS Agreement have been ignored. In addition there are a few others stipulations which need to be rectified to avoid legal disputes. The original Patents Act 1970 was a balanced Act which helped the growth of industry and also adequately covered the public interest angle. The pharmaceutical industry produces high quality products of almost all therapeutic groups and exports the generic produce to the developing and developed countries at most competitive prices. The developing countries are now apprehending difficulties in importing pharmaceuticals from India because of the tight provisions in regard to the compulsory licences for effective role of the domestic enterprises in the patented products.

PUBLIC RESPONSE

The National Working Group on Patent Laws has been deliberating on various WTO Agreements including the TRIPS Agreement ever since 1988 when the Uruguay Round of GATT Negotiations were in full swing. Its main objective has been to provide studies for informed debate in Parliament and in public on the Uruguay Round Agenda / Final Act of WTO on availability and affordability of medicines. The group has also been organizing national and international seminars/conferences.

The National Working Group on Patent Laws also established four Peoples' Commissions on TRIPS issues. The first Commission was established to deal with the constitutional issues of the Final Act of WTO including TRIPS Agreement in November 1993 with the Chairman and the members being eminent former Judges of Supreme Court of India. Again in 1999 another Commission was established to deal with the transitional period obligations in the TRIPS Agreement. The Chairman of this Commission was also former Judge of Supreme Court and members were senior scientists and economists.

The Third Peoples' Commission was established during 2002 on appropriate patent law for India. The Chairman of this Commission was the former Prime Minister of India and the members were eminent and senior experts. The Fourth Peoples' Commission was established on review of patent legislations in February 2004, again with the former Prime Minister of India as the Chairman and a number of senior and eminent experts as members. Reports of all these Commissions were submitted to government and also made available to all political parties and Members of Parliament. No opportunity was provided to these Commissions for discussion with the government. In addition to these reports there were, as stated

earlier, a number of other publications which were made available to the concerned Ministries of the government and to the Members of Parliament. All these efforts are being pointed out to bring home that the process of amending the patent law to fulfill obligations to bring the patent law in line with the TRIPS Agreement has been completed without adequate deliberations between the government and the public.

CONSIDERATION BY PARLIAMENT

The Patents (Second Amendment) Bill 1999 was referred to the Joint Select Committee of Parliament and it submitted its report in December 2001 with a few notes of dissent. The Doha Declaration on TRIPS and Public Health of November 2001 which clarified flexibilities and freedom available to member countries in formulating their law was, however, not considered by the Committee and certain safeguards possible were not provided by the committee in their report. The revised Bill as amended by the Joint Parliamentary Committee was debated in the Rajya Sabha and 18 amendments were moved by important Members of Parliament. The debates in both the Houses indicate that there was some understanding with the then concerned minister about the issues raised by the members of Parliament for taking them into consideration in the final amending Bill introducing the product patent regime for all industrial sectors. The amendments proposed by the MPs were either negated or withdrawn.

The NDA government introduced the final amending Bill in the Lok Sabha (Lower House) in December 2003 and the Bill was referred to the Parliamentary Standing Committee on Commerce. This Bill however, lapsed due to general elections to the Lok Sabha. The new UPA government promulgated an Ordinance in December 2004. The Ordinance was almost an exact copy of the December 2003 Bill. The Ordinance was to be replaced by a formal enactment of the Bill and the same was introduced in the Lok Sabha in March 2005. Again the Bill was the copy of the Ordinance. UPA government and the Left parties negotiated certain important amendments and the same were brought forward as government amendments. There was then no difficulty in passing the Bill during the debate in both the houses. The opposition members stage walkouts in both the Houses. The Bill could have been referred to the Standing Committee of Parliament as its provisions were to be effective from 1.1.2005 as stipulated in Article 1 of the Bill. The committee could have provided opportunity to outside experts to project some other important amendments left out. However, the government managed to avoid referring of the Bill to the Standing Committee of Parliament.

The above would show that the process of amendment of the Patents Act 1970 was more guided by the political compulsions. Thus there was no national consensus in amending the Patents Act 1970. As pointed out earlier there are still a few important provisions which have been ignored in the amending process. The government has now set up a technical expert group to look into two specific amendments relating to the definition of 'pharmaceutical entity' and exclusion from 'patentability of micro-organisms'. The flexibilities and other aspects which require consideration are dealt with in Part III of this Paper. It is also hoped that Technical Expert Group would invite stakeholders for evidence.

PATENT SYSTEM FOR INDIA

Patent system is not new to India. The first patent law was enacted in 1858. A comprehensive law was, however enacted by the British rulers in 1911. This act was designed to serve the foreign interests and for control over markets for finished goods by multi-national corporations. In so far as pharmaceutical products were concerned over a period almost 85 per cent of medicines were supplied by the multi-national corporations. Kefauver Committee of USA which deliberated extensively on the availability of medicines worldwide and the role of the multi-nationals pointed out in their report that the prices of antibiotics and other medicines in India were the highest in the world. The Indian people were virtually fleeced on the availability and affordability of medicines.

NATIONAL PATENTS ACT 1970

Immediately after Independence in 1947 our leaders were seriously concerned about the enactment of a national patents system relevant to the stage of our development. The objectives were that there should be faster industrialization of the country and law should be designed to serve the public interest in a balanced manner. Two important committees headed by Justice Bakshi Tek Chand and Justice Rajagopal Iyenger dealt with the patent law issues relevant for our country in their re-

ports. Based upon the recommendations in these reports a comprehensive Patents Bill was framed and debated extensively in parliamentary committees and both Houses of Parliament. Finally the National Patents Act was enacted in 1970. This law served the objectives which our leaders had in view.

With the passage of time the Indian companies in pharmaceutical field grew at a fast pace and their share of market in the availability of medicines went up to about 85 per cent. As regards the prices of medicines due to competitive environment and because of the new patent system the prices of medicines became the lowest in the world. The industry has also developed enough surplus capacity to meet export demands from the developed and developing countries.

The main features of the Patents Act 1970 were as follows :

- There was no product patent for pharmaceuticals, food and chemical based products. These industrial sectors were covered by process patent only.
- The term of the patent was 7 years from the date of application or 5 years from the date of sealing of patent which ever period was lower.
- In order to ensure pronounced role of the domestic enterprises in the patented product a system of 'licensing of right' was also provided for the sectors covered by the process patent.
- There was no constrained on exports.
- The patent holder was under obligation of working the patent. There was also provision for revocation of patent for non-working.
- For licences of right the royalty ceiling was stipulated at 4 per cent.

TRIPS PATENTS SYSTEM

The TRIPS Patents System is based upon a joint statement (paper) presented by the multinational associations of USA, Europe and Japan to the GATT Secretariat in June 1988 during the Uruguay Round Negotiations. The main features of the TRIPS patent system are as follows:

- TRIPS provides for patent protection for any inventions whether products or processes in all fields of technology provided that they are new, involve an inventive step and are capable of industrial application.
- The foreign patent holders have been absolved from working of their patents and imports by them are to enjoy the same patent rights without discrimination as to the place of invention, field of technology and whether the products are imported or locally produced.
- The term of all patents shall not end before the expiration of 20 years from the date of application.
- There is no 'licensing of right' provision. The compulsory licence provisions are having tight conditionalities with constraints for exports.
- There is no royalty ceiling for compulsory licences. The royalty payment is based on the economic value of the licence.

The above features of the TRIPS Agreement have been implemented in the amending process of our Patents Act 1970

FLEXIBILITIES OF TRIPS AND DOHA DECLARATION IGNORED

The approach of amending the Patents Act 1970 to bring it in line with the provisions of the TRIPS Agreement should have been carefully worked out so that all flexibilities available in the TRIPS Agreement which were also clarified in the Doha Declaration on TRIPS agreement and public health had been implemented with utmost precision. Certain important flexibilities of TRIPS ignored relate to those provisions which are stipulated in the following Articles :

Article 7 - Transfer of Technology & Balancing of Rights and Obligations

Article 8 - Promotion of public interest in sectors of vital importance.

Article 27.3 (b) - Patenting of micro-organisms and non-biological and micro-biological processes.

Article 31(b) - Compulsory licence for commercial activity on reasonable terms & conditions.

Article 70.3 - Mail Box products in public domain as on 1.1.2005.

As regards the Doha Declaration the members right to protect public health has been recognized. It has also been clarified that the members have right to grant compulsory licences and freedom to determine the grounds therefor. Further it has also been clarified that each provision of TRIPS could be read in the light of its objectives (in Article 7) and principles (in Article 8). If all the above flexibilities had also been applied in the amending process , the public interest about the

availability and affordability would have been protected to a considerable extent.

RECENT INTERNATIONAL STUDIES IGNORED

There have been several important studies in recent past on implications of the TRIPS Agreement. These studies should have served as a guide to frame amendments to Indian patent law. These studies are :

- Research Report by USA National Institute for Health Care Management Research and Educational Foundation. (NIHCM)
- US Fedral Trade Commission Report 2003
- Report of the U.K. Commission on Intellectual Property Rights
- U.K. Royal Society Report on 'Keeping Science Open'

The gist of these studies relate to wide range of questionable inventions patented in USA, having only incremental modifications which are discouraging generic companies and blocking of competitive products into USA. Another situation which is emerging in USA is about the flood of patent applications rising to over 300 thousands annually resulting into grant of poor quality or questionable patents. UK Commission on IPR made specific recommendations to contain patentable subject matter by defining patentable inventions and other terminologies appropriately.

These studies thus are extremely useful pointers to be careful in dealing particularly about the need to determine the scope of patentability and freedom to determine proper definitions of 'invention' and other terminologies which are extremely important for amendments to Indian Patents Act to bring the same in line with the TRIPS Agreement. It is pertinent to note that economists of repute who otherwise are fully supportive of the free trade theory and the WTO (Jagdish Bhagwati, Dani Rodrik, Michael Finger) have, of late, recognized the inequity of the TRIPS agreement from the point of view of developing countries and some have even questioned the logic of incorporating TRIPS into the WTO system in the first place.

Even a large number of mass organizations and international organisations have pointed out to the government authorities in India to use flexibilities in their laws so that the countries dependent upon supplies of pharmaceuticals are not deprived of imports from India.

Dr. Yusuf K Hamied, Chairman and Managing Director of Cipla Limited and a leading scientist in his recent Paper "Trading in Death" has made strong observations on the new Indian Patent Law keeping the critical health scenario in India in view :

"The truth is that health in India is in a permanent and perpetual crisis. The disease profile is as follows : 80 million cardiac patients, 80 million afflicted with mental illness, 60 million diabetics, 50 million asthmatics, 50 million hepatitis B cases, and one in three Indians is a latent carrier of TB. The World Bank has said that India will have 35 million HIV cases by 2015, or approximately half of all the AIDS cases in the world. Given these facts, the patent regime in this country should be devised so that the utmost priority is granted to securing the people's rights of access to affordable and quality healthcare, without monopoly".

Keeping the views expressed the important provisions of the Amended Patents Act 1970 which need to be reviewed and amended are dealt with as follows:

SCOPE OF PATENTABILITY

Section 2 : Definitions and Interpretations

1. Clause (j)

Clause (j) defines invention as follows :

(j) "invention" means a new product or process involving an inventive step and capable of industrial application;

In order to limit patentable subject matter it is suggested that the definition of invention could be changed as follows :

"invention" means a basic new product or process involving inventive step and capable of industrial application".

The U.K. Commission on I.P.R. has also recommended that developing countries should aim at limiting the subject matter of patents. Even increasing volume of patent claims going up over 300 thousand in USA and China - claiming patents even for minor incremental changes etc. The scope of patentable inventions can be contained only through the definition of "invention".

2. Clause (ta)

Clause (ta) defines pharmaceutical substance as follows :

(ta) "pharmaceutical substance" means any new entity involving one or more inventive steps.

The above definition is quite broad and not specific. Even Mashelkar Committee on R&D for pharmaceuticals had made re-commendation in this respect. The definition aught to be as follows :

(ta) "pharmaceutical substance" includes new drug molecule involving one or more inventive steps.

Section 3 : Inventions not patentable :
What are not inventions.

3. Clause (d)

Clause (d) reads as follows :

"(d) the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.

The explanation under clause (d) reads as follows:

Explanation: For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy.

The above explanation can give different interpretations for different purposes. Moreover when new molecules only are to be patentable salts, esters, etc. and other derivatives of the known substance should not be treated as patentable inventions. The purpose of clause (d) and explanation should be to contain the patentable subject matter. The explanation should be either deleted or modified as follows:

Explanation: For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, complexes, combinations and other derivatives of known substance shall not be patentable.

4. New clause (ja)

New clause (ja) may be incorporated as follows:

(ja) inventions which do not strictly meet the criteria of industrial application e.g. onco mouse, stem cell, partial gene fragments, research tools, PCR technique, machine based embedded bio-informatics software, genomic information and data base.

5. Clause (j)

Clause (j) in the Patents Act reads as follows:

(j) plants and animals in whole or any part thereof other than micro-organisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals.

Micro-organisms and non-biological and micro-biological processes are under mandated review in the WTO. The review was initiated in 1999 and till now final decision has not yet been taken. In addition to this no definition of micro-organism has been provided in the amended Act or even in the TRIPS Agreement. Micro-organisms occur in nature, there are genetically modified micro-organism and then they perform certain activities. Since micro-organism occurs in nature they are discoveries and not inventions and as such they should not be patentable. Genetically modified micro-organisms perform certain activities and as such only specific activity can be patented only as process patents. Because of these reasons it is desirable that micro-organisms are excluded from patentability. As an alternative since provision has been made in the amended Patents Act the implementation of patentability of micro-organism may be postponed till the decision has been taken in the WTO on mandated review. The date of its implementation may be notified at the appropriate time.

6. Section 5

Section 5 : The amended Act provides that Section 5 shall be omitted. However, it is important to be more specific about the scope of patentability. Because of the new scope of patentability Section 5 should read as follows:

Section 5 - Patents shall be available for basic new inventions including pharmaceutical substances as defined in Section 2 clause (ta) whether products or processes in all field of technologies provided that they are new, involve an inventive step and are capable of industrial application excluding inventions not patentable as stipulated under Section 3.

7. Section 11 A Sub-section (7)

The third proviso of this sub-section reads as follows :

"provided also that after the patent is granted in respect of applications made under sub-section (2) of section 5, (Mail Box applications filed during 1995-2004) the patent holder shall only be entitled to receive reasonable royalty from such enterprises which have made significant investment and were producing and marketing the concerned product prior to the 1st day of January 2005 and which continue to manufacture the products covered by the patent on the date of grant of the patent and no infringement proceedings shall be instituted against such enterprises.

Article 70 para 3 of TRIPS stipulates as follows:

'There shall be no obligation to restore protection to subject matter (i.e. mail box applications) which on the date of application of this Agreement for the Member in question (i.e. 1.1.2005) has fallen into the public domain'.

The above stipulation in the TRIPS Agreement clearly provides that any mail box product which has fallen in the public domain as on 1st day of January 2005 should not be patentable.

The stipulation in the provison stated above could mean that we are making more stringent provision than the TRIPS stipulation. This matter needs to be seriously considered and no patent protection provided for such products. Thus the existing manufacturers can continue production.

Even the provisions in sub-clause (7) about 'reasonable royalty' and 'significant investment' can create unnecessary claims and objections to meet the objectives of allowing enterprises to continue manufacturing of the product if the patents are granted. In addition the applications should be dealt with only on the basis of proposed new definitions of invention and pharmaceutical substances.

8. Section 25

Section 117 A in sub-section 2 provides for sections for which appeals shall lie to the appellate board. The amended version of this section provides that only sub-section (4) of Section 25 relating to post-grant opposition would be appealable. No appeal possibility is thus available in regard to pre-grant opposition. It is important that even any decision taken relating to pre-grant opposition should also be appealable both by the patent applicant and the opponent. In view of this, it would be appropriate if decisions taken under the entire Section 25 become appealable.

9. New Section 84 A

Article 31(b) of the TRIPS Agreement clearly stipulates that the member can allow the use of the subject matter of a patent provided that:

(b) such use, may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time.

Based on the above stipulation in the TRIPS Agreement a large number of countries (developed and developing) have made specific compulsory licence provisions in their patent laws. As examples, the provisions in the patent laws of Brazil and China are reproduced as follows :

BRAZIL

The Patents Act of Brazil provides for compulsory licence for exploitation of the patent as follows :

Article 73. An application for a compulsory licence shall be drawn up by setting out the conditions offered to the patent owner.

(1) On filing of the licence application, the patent owner shall be invited to submit his comments within a period of 60 days, on expiry of which, in the absence of a reply from the patent owner, the proposal shall be deemed accepted under the conditions offered.

CHINA

The Patents Act 1992 of China provides for Compulsory Licence for exploitation of the patent as follows:

Article 51. Where any entity which is qualified to exploit the invention or utility model has made requests for authorization from the patentee of an invention or utility model to exploit its or his patent on reasonable terms and such efforts have not been successful within a reasonable period of time, the patent office may, upon the application of that entity, grant a compulsory licence to exploit the patent for invention or utility model.

The stipulation in Article 31(b) of TRIPS is a very

important provision for substantive role by the domestic enterprises. In fact this provision is heart and soul of TRIPS for developing countries. This stipulation in TRIPS is almost similar to 'licences of right' provision in original Patents Act 1970. Even meeting of export demands would be possible only when such a provision is there in the law as there should be some enterprise already producing for domestic demand. Only the producing enterprises can meet the export demand. It would be pertinent to mention that it takes almost three to four years to develop technology and stabalise the product. As such an enterprise already in production of the relevant patented products has to be there in the country to respond to export demand. In view of these consideration and the examples of other countries it is extremely important that provision is made through a new Section 84A as follows :

Section 84 A

1. When the proposed user has made efforts to obtain authorization from the patentee to use the patent on reasonable commercial terms and conditions and that such efforts have not been successful within a period not exceeding 100 days, the controller shall at any time after the date of grant of patent grant compulsory licence to the applicant on such terms and conditions as he may deem fit.
2. The commercial terms and conditions offered by the applicant shall be considered reasonable by the controller if royalty and other remuneration offered by him are within five per cent of the annual sale turnover at net ex-factory sale price (exclusive of excise duty and sales tax).

It is important to point out that world over the important international organisations, mass organisation in South East Asia and American and European continents are perturbed over the amendments made to the Patents Act 1970 without the above provision in Section 84A. Even important newspapers in their editorials and articles by world known economists have commented upon the seriousness of the situation which might emerge from the amended Indian Patents Act affecting the availability and affordability of medicines in the poor country who are dependent upon exports from India. The concerns have been expressed because certain TRIPS flexibilities concerning public interest and particularly the role of the domestic enterprises have been ignored. The concerns have been raised by the World Health Organisation, Geneva, UNAIDS, Geneva, Special Envoys of the UN Secretary General for HIV/ AIDS in Asia and the Pacific and in Africa and International Council of Medecins Sans Frontiers, Geneva. Their concern can be satisfied only when the suggested provision in Section 84A is implemented. It seems the government has missed this provision under pressure and provided the same as a condition under Section 84 dealing with compulsory licences due to abuse of patent rights by the patentee which is clearly a misplaced provision.

Section 90

10. **Sub-section 1 clause (vi)**
    provides for a shorter term for the compulsory licence. No one would be interested to take compulsory licence for a shorter period and hence shorter term may be deleted. Moreover no basis can be provided or determined to provide for shorter term.
11. **Section 92**
    Circumstances of extreme urgency may be defined as notified 'health emergency' in the country as whole or in a region and environmental emergency relating to soil, water or air pollution limited to the region or the country as a whole.
12. Provision about 'right of priority' should be expanded to provide that in regard to pharmaceutical and agro-chemical right of priority will be only upto 1.1.1995 and not for an earlier date. As regards the other products where product patent has been provided as from 1.1.2005 right of priority should not be applicable prior to 1.1.2005. Non-provisioning of these aspects will bestow unnecessary advantage to the patent applicants.

PRICE CONTROL

TRIPS Agreement is silent about the price control of patented products. The products protected under patents would enjoy monopoly in the market place and would certainly command high prices. Appropriate law should be strengthened to deal with the prices of the patented products at least for the initial period of 5 years. The importance of this aspect can be understood on the basis of example of prices of similar product in India, Pakistan and Indonesia. A pack of ten 500 mg tablets of Ciprofloxacin cost Rs. 29 in India whereas the price in Pakistan is Rs. 424 and in Indonesia it is

Rs. 393 (converted to Indian Rupees). The prices of other pharmaceutical products are also almost in the similar proportion.

CONCLUSIONS

The originators of inventions should get their just reward by way of suitable royalties and there should be no grudge in providing the same. The doors should be opened for obligatory licensing involving the domestic enterprises in the production of patented drugs. The suggestions made in this Paper are within the framework of the TRIPS Agreement. Judicious and careful implementation of TRIPS is needed for its smooth application and balancing of rights and obligations of the patent holder in a manner conducive to social and economic welfare as stipulated in Article 7 of TRIPS Agreement. India can play an effective role in the region about the availability of generic drugs by the pharmaceutical industry only after the ignored issues are provided through further amendments to the Patents Act 1970.

— June-July 2005

It's Not in the Genes!

Many countries do not allow patents on life forms like animals, plants and their genes. Introducing an organised trap on genes will have serious negative repercussions on our agriculture and food security and will impact both conventional plant and genetic engineering based breeding. Our laws should be contextual to our needs.

SUMAN SAHAI

The Indian Patent Act, 2005, amending the Indian Patent Act 1970 for the third time in the post WTO phase allows product patents in the drug and chemical sector, something that has long been opposed by the Indian drug industry, patents on micro organisms, microbiological processes and non biological processes. The last really means that apart from microorganisms, the processes of genetic engineering (non-biological and microbiological processes) can be patented. Plants and animals cannot be patented, nor can their parts, like genes or cells.

Even before the patent ordinance, predecessor to the Patent Act was promulgated, there was great debate and assumption that genes would be considered 'products' under the amended Patent Act and would therefore be patentable. The argument was extended further that plants that contained such (to be) patented genes, would naturally then have to be patented. Not surprisingly, those most vociferously pushing these views are patent attorneys, multinational seed companies and members of the International Seed Federation.

The Indian Patent Act has so far taken a clear stand on not allowing patents on genes. The amended Act of 2002, which had introduced patents on microorganisms, had unambiguously ruled out patents on plants or plant parts like genes. The relevant clause under chapter II describing inventions that are not patentable, reads as follows,

"The following are not inventions within the meaning of this Act....plants and animals in whole or any part thereof, other than microorganisms, but including seeds, varieties and species…"

In plain text this means that while microorganisms can be patented, animals, plants, plant varieties, plant species, seeds, and any plant parts like plant tissue, genes, cells, cell organelles like mitochondria etc., cannot be patented. There is no scope for interpreting genes to be patentable products since their exclusion is clearly laid out in the Act. The intention to exclude genes is made doubly clear as the Act that took the radical step of introducing a patent on a life form like microorganisms, for the very first time, selected to expressly exclude other life forms like plants or any parts of plants (like genes) from the purview of patents.

It is to be hoped that the wisdom that attended the earlier decision to keep genes out of

the Patent Act will also inform the framing of the current amendment. Introducing patents on genes will have seriously negative impacts on our agriculture and food security since it will impact our self reliance in producing plant varieties and seeds according to our needs. Gene patents will impact both conventional plant breeding and genetic engineering based breeding.

The new biology of gene discovery and isolation, genetic transformation and genomics has just begun to develop in our country and we have a very long way to go before we can develop technological skills of such a high order that we wish to block competition in order to maintain our newly acquired technological dominance. When we reach that position, we may want to revisit our law and consider gene patents but it would be unwise today. Today we need to keep genes off patents because we want our scientists to have access to all the genes available, not just to breed new varieties but also to develop technical skills.

As of today our public sector labs cannot claim any novel gene discovery, certainly none that has shown any promise. Most of the GM research is being done with genes licensed from corporations. This costs money and there is an inherent technology dependence trap here. Over 40% of the research on genetically engineered crops in this country is using Monsanto's Bt gene. The Bt gene has been licensed by every conceivable GM research group and is being incorporated into plants as diverse as cotton, potato, rice, brinjal, tomato, cauliflower, cabbage, maize and even tobacco!

The question then to ask is, what do we have, that we want to protect with a patent? Because surely that should be the goal of our patent law, otherwise all that we will end up patenting is the genes we license from corporations which will push up their license fees even further. If our labs have not yet developed the capacity to isolate their own genes to develop crops suited to our interests, then a product patent on genes is the very last thing that we need. Introducing a patent on genes today will allow corporations like Monsanto to monopolise sectors of plant breeding and seed production and choke off competition from Indian labs since Indian scientists will be unable to use patented genes.

Our agricultural research sector was able to achieve significant breakthroughs in plant breeding which resulted in increasing food production during the time of the Green Revolution. This was possible only because there was no Intellectual Property Regime and certainly no patents on genes, plants or plant varieties. This allowed scientists to share each others' work and build upon it to create new varieties of seeds for farmers. Introducing gene patents will change all this and transfer the control over seed production into the hands of those who hold such patents. Surely those entrusted with drafting such bills and taking key decisions on their contents, cannot see this as an acceptable situation, given our food security concerns and the political imperative to be self sufficient in food production.

A nascent or developing sector is hurt, not helped by stringent IPRs and patents are the most stringent form of IPR. Developed countries like Italy and Spain held off product patents on pharmaceuticals till the early 90s , until they felt technologically strong in this field. Every country has framed its patent laws depending on its relative strengths in various sectors and whether it felt it was strong enough and had developed enough innovating capacity to stand alone. Till this happens, researchers and entrepreneurs want to access as much innovation from outside sources as possible without having to pay exorbitant license fees. Nations also keep vulnerable areas outside the purview of patents. India, like many other nations keeps the field of atomic energy outside the purview of patents because it considers this a vulnerable sector where it does not want to run the risk of being overwhelmed by foreign patents. India is strong in agricultural sciences and plant breeding but it is yet to master the new biology involving genes and genomics. Our patent law must accommodate this vulnerability. We should tailor our patent law to suit our current needs. When our needs change, our patent law can be amended.

Apart from all this, there is a legal aspect. Genes cannot be considered 'inventions' since they exist in nature, they can only be discovered. This makes them non patentable since only inventions, not discoveries can be patented according to all patent laws including our own. Countries like the US have started allowing patents on discoveries because of the strong presence of Life Science corporations who demand such patents. They use a definitional artifice to convert 'discoveries' into 'inventions' by making the provision that the process of discovering and isolating a gene from the whole organism makes it an invention and therefore patentable! We have no reason to engage in this artifice since it does not serve our interests.

Another argument that does the rounds is that of

international obligations. According to the proponents of gene patents, gene patents are required for us to comply with our international commitments in the WTO. That is simply not true. Our commitment in the WTO/TRIPS is to provide a sui generis form of Intellectual Property Right for plant varieties, which we have done by enacting the Protection of Plant Varieties and Farmers Rights Act, 2001. This fulfils our obligations.

A final aspect of gene patents is the ethical objection to patenting life forms. This has not been discussed in our country adequately but it should be. Are we, as a multi- cultural, multi-religious society, willing to grant a kind of ownership through patents, over life? Genes are life forms, so also are seeds, plants, microorganisms and animals. Would Hindus want to have genes from cows in the food they eat or would Muslims accept the presence of genes from pigs in their food? Equally, what would vegetarians feel about the presence of animal genes in anything edible? And there is the question of people who find the notion of human genes in food akin to cannibalism and hence revolting. Every society needs to resolve these questions for itself after considerable debate and discussion and a consensus view will have to be followed. One simply cannot take decisions, with such deep cultural implications, simply because the industry sees a profit to be made or because some international commitments were made without adequate reflection.

Breaking scientific barriers can bring great benefits but some developments can hurt religious and cultural sensibilities and should be avoided. The science of genetics with its great potential for good can also have unacceptable aspects. It is because of these kinds of serious reservations that many countries do not allow patents on life forms like animals, plants and their genes. We must discuss these issues in our cultural context before rushing off to grant patents on genes and seeds.

— June-July 2005

East is not West

With the advent of industrial age, the advanced capitalist countries quickly caught on to the efficacy of a monopolistic patent regime while countries in the developing world are still trying to catch up with the race post-independence. In the absence of a constructive debate and economic muscle, their patent regime has been floundering.

V G HEGDE

In the last one decade, the Indian Patents Act, 1970 (`1970 Act' herein after) has been amended twice to give effect to the obligations under the World Trade Organization. The first amendment was necessitated, in fact, before India became party to the WTO. On the eve of December 31, 1994 just few hours before the formal arrival of WTO as a multilateral institution, India brought out an Ordinance to give effect to Article 70 of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) concerning specifically to the `exclusive marketing rights' and what was termed as `mail-box' provision, while availing the benefit of 10 year transition period. The second amendment came in 2002 substantially altering the `definitions' clause and chapter XVI of the enactment relating specifically to the working of the patents. The Third Amendment Bill has just now been passed by both the Houses of Parliament amending the enactment, primarily paving the way for product patent regime in the area of chemicals, pharmaceuticals and medicines. This third amendment has raised several public interest issues concerning the hike in the price of the essentially life saving pharmaceutical and medicinal products. Government says there will not be a sudden increase in the prices. But, there are others who argue that this will hit the poor hardest.

PATENTS AND ECONOMIC DEVELOPMENT

It has been an established fact that the patent has an intrinsic relationship with the developmental goals pursued by a country. In the early part of 1960s, the United Nations, in particular the United Nations Conference on Trade and Development (UNCTAD), (which was established during this period) brought out several studies concerning this aspect. These studies and reports have clearly brought out the fact that there is a close relationship between the kind of patent regime a country adopts and pursuance of its developmental goals. In other words, it all depends on what kind of patent regime is envisaged by a country to suit its various development goals in different sectors.

Patent, basically, creates a monopoly and allows the owner of the patent to exclusively manufacture and market the product patented by him. This is for a definite period. Accordingly, there are many factors which need to be taken into account before a patent regime within a country should be finalized. India did undertake this exercise before bringing into existence its own patent law in 1970. It may be interesting to note that it is not for the first time that patents have raised this kind of heat and dust. History shows that countries, considering that it was essentially a monopoly right, have looked at it guardedly while pursuing their developmental goals. On the other end of the scale, many developing countries while emerging from the colonial yoke, had very little time to think about what kind of patent regime they wanted. On the other hand, they continued with their old patent system which primarily served different set of developmental goals suited to their colonial masters. The post-Second World War era saw many emerging developing countries questioning some of the basic presumptions of certain provisions of the international patent system.

One of the primary reasons for evolution of a patent system relates to its apparent relationship with issues concerning transfer of technology. Developing countries, with a view to acquire new and high technology, were prepared to give concessions and other incentives to

the huge multinational corporations (MNCs). These MNCs, with their extensive reach and financial muscle, controlled the emerging new and high technology market. Technology, it may be noted, played a crucial role in the production process enhancing the value of the products thereby contributing the developmental goals of the economies of the developing countries. This was the thinking which prevailed in the decades of 1970s and 1980s. During the decade of 1980s, technology emerged as a major marketable commodity. It was an important factor in the process of production by enhancing either the quality of production or the quantity. But, the new and emerging technologies were not promptly transferred to the developing countries. On the contrary, they were the recipients of out-dated and useless technologies without actually transferring the `knowledge' encapsulated in these technologies.

Patent laws, as evolved during this period within many developing countries including India, took a cautious approach and `local working' of the patent in public interest was given a prime place. Local working of the patented product, it may be noted, always required transfer of knowledge encapsulated in the patent grant. Indian enactment of 1970 balanced the public interest concerns on the one hand, private rights of the holders of technology on the other. It affected the interests of developed countries, particularly the MNCs. Accordingly, during the decade of 1980s, evolution of a `uniform' and `strong' patent regime became a strong rallying point for major developed countries. The launching of Uruguay Round of Negotiations of the General Agreement on Tariffs and Trade on September 15, 1986 at the Punta Del Este, Uruguay, provided the perfect setting for evolving such a uniform regime. The evolution of an international patent system, as we see it today, primarily took place within Europe.

EURO-CENTRIC IN NATURE

In order to overcome the complexities of protecting technological innovation and the consequent varied definitions of patents, its regulation within the different legal systems, efforts were made to evolve a uniform criteria at the international level during the later part of the 19th century. This effort was essentially a Euro-centric, triggered as an aftermath of the industrial revolution. Industrial revolution, as is well known, was all about the technological revolution to enhance production process. Technology, as a tool, emerged during this period and changed the whole method of production. This process of evolution continues even today. It (technology) also presented certain peculiar problems. It could be copied fairly easily by a skilled person in the same arena or else it could be reconstructed by a term known as "reverse engineering". This could eventually harm the efforts of an original inventor. So, at that time, many European countries who had a leading role in industrial revolution argued for an international protection of patents so that these technologies could be safely taken to other countries for `working' without being copied or reverse engineered locally.

This is how the Paris Convention for the Protection of Industrial Property, 1886, evolved and this was the first international convention on patents providing for the uniform rules. However, it is argued that patents were in existence much before this, dating back to 13th and 14th centuries. Although the origin of the patent system dates back to 13th century, the system prevalent at that time did not address the issues of progress and economic development. It may be noted, as mentioned above, that the patent system and the economic development are intrinsically linked.

EARLIEST KNOWN PATENTS

The first known patent, for an invention was issued in 1421 by the Italian City States of Florence and Venice. The Venetian Patent Act which was purportedly in operation during 1474 incorporated in its preamble the purpose of grant of patens as "to increase the honour of the inventors". It also termed "patens" as a "means to a social end". It is argued that the emphasis on the promotion of the social interest in the Venetian enactment has created an impression that the object of Venetian patent grants had all the ingredients of the modern patent system. Unlike the modern patent system, the Venetian Patents Act did not purport to create an exclusive monopoly right so as to facilitate increasing return to the inventors. Its idea was limited to "honour" the inventors. It was basically confined to the creation of artifacts and handicrafts. Above all, there was a marked break in the process of production, distribution and in the area of commercial handling during and after the advent of industrial revolution.

MONOPOLY IN ENGLAND

The origin of the modern patent institution is usually traced to the provisions of the Statute of Monopolies

of 1623 in England. This finding, however, has not been uniformly accepted. According to one view, this Statute has been called the Magna Carta of the rights of inventors, not because it originated patent protection of inventors, but because it was the first general law of a modern state to lay down the principle that only the `first and true' inventor of a new manufacture should be granted a monopoly patent. Others have felt that it was not a patent law in the sense that it did not represent a new regulatory system, it did, however, abolish the royal prerogative to grant monopoly privileges excepting only the privileges granted for a term of fourteen years for the sole working or making of any manner of new manufacture.

From England the system of conferment of monopoly of privilege spread to the continent of Europe and to the United States of America. It is not clear whether this development took place out of necessity or out of mere imitation in order to accommodate quickly the fruits of the then emerging industrial revolution. Probably, the economic growth and prosperity through the commercialization of new inventions provided the necessary justifications for adopting a patent system. At the same time, patenting became a tool to import new inventions into the country which in turn was employed in such a manner as to produce goods in large scale. For this purpose, raw materials were shipped from the colonies of Western countries. So, it is rightly asserted that the history of the West in the East has largely been the history of repeated attempts to capture world markets as areas of exclusive domain. In its expansion, the West has used many techniques. Patenting also served this purpose.

PATENTS UNKNOWN TO EAST

Patenting was unknown to the societies of the East as it evolved, as it exists today in the West, during the latter part of the nineteenth century. Patenting of knowledge and its commercialization was a concept unknown to these societies, although they had developed their own way of preserving the Knowledge. Knowledge was considered as sacred and accordingly it was systematically assimilated and safeguarded within communities. While the access by a stranger or an outsider to this knowledge was carefully restricted, the same was not linked to commercialization or commodification. Perhaps this could be attributed to the nature of the knowledge or technology produced in the East and also as much to the nature of the evolution of these societies. This is a phenomenon which could be seen in all the traditional and tribal societies not only in Asia, Africa and elsewhere.

Even today this dilemma could be seen in perspectives of major developing and less- developed countries of Asia and Africa. Latin America, for historical reasons, has remained an exception. Some of the representatives from Latin American countries, it has been pointed out, were brought forcibly on a ship to Paris in 1886 to sign the Paris Convention on Industrial Property. Africa did not exist as a `civilized' continent. Asia also did not have a clue about this concept at that point of time the way it was being evolved. Japan was the only Asian country which managed to enter this Paris Club in the early parts of 1900. However, communities which lived in Africa and Asia had developed their own systems of preserving their knowledge base through community participation. The preservation of knowledge-base through community participation is the most interesting one and takes care of the public interest concerns of a monopoly right like `patent'. This is one idea which is fast emerging as a solution to many of the issues concerning the preservation of `traditional knowledge'.

One of the important conceptual problems which dominated the patenting debate concerned the issue of `public interest' and `private right'. We could briefly examine this in the context of Western and Eastern approaches. Patent should protect the rights of an inventor, it was argued. Inventor is the one who toils for long hours to invent something new and he should be allowed to profit from it. While this is one view, the other view regarded patent as a monopoly right; accordingly it should be restricted in its scale of operation. It should be granted for a definite period. Monopoly as monopoly per se in legal terms was regarded as inimical to the pubic interest. Accordingly, a view emerged that in the event of non-working locally of a patent grant within a stipulated period of time, there should be an option to compulsorily license it to a third party in public interest.

All the major legal systems, therefore, while evolving patenting norms incorporated provisions to balance `public interest' and `private rights'. It worked fairly well till that time the subject matter of patenting was within the domain of new mechanical devices, pharmaceuticals and medicines and so on. But, the whole issue became complex when `traditional knowledge' pre-

Evolution of Indian Patent Law

Like most of the colonies, the patent regime in India was introduced by the Britishers to protect their own interests. Since Independence, but for the 1970 Act, there has not been any serious debate on the issue

The Indian patent system has a long history. It was introduced by the British to protect their own new technological inventions within their `colonial territory'. It was not introduced keeping in view of the developmental concerns of the local people in any of the colonies held by them. The first enactment was - Act for Granting Exclusive Privileges to Inventors of 1856. This enactment provided for the protection of inventions in India. Later, a new enactment was introduced in 1859 modeled on the English Patent Act of 1852. Under this Act, an inventor of a new manufacture by filing a specification of his invention obtained the "exclusive privileges of making, selling and using the invention in India and authorizing others to do so for a term of 14 years from the time of filing such specification. For the purpose of providing protection for designs, the "Patents and Designs Protection Act" was passed in 1872. An amendment Act, affording protection to inventors desirous of exhibiting their inventions at exhibitions was passed in 1883. Subsequently, in 1888 the law continued in three Acts of 1859, 1872 and 1883 was consolidated into a single Act. The same was revised and replaced by the Indian Patents and Designs Act, 1911. This Act established for the first time in India a system of patent administration under the management of the Controller of Patents. In the period from 1911 to 1970 various amendments to this Act were introduced.

Efforts to evolve its own patent law by India began soon after independence. The focus was to evolve a law and policy based on the detailed assessment of the local situation. The Bakshi Tek Chand Committee which was constituted in1949, soon after India's independence, had noted that the existing colonial law on the subject i.e., Indian Patents and Designs Act, 1911 had failed to stimulate inventive activity. Subsequently, a Committee was set up in 1957 under the chairmanship of Justice Rajagopala Ayyangar to look into the revision of patent laws in India. This Committee submitted its Report in 1959. The 1970 Indian Patent Law was primarily based on the recommendations of this Committee. This Committee, inter alia, noted - "The patent law of an underdeveloped country like India should be so designed as to enable the country to achieve rapid industrialization and to attain, as quickly as possible, a fairly advanced level of technology giving inventors and investors sufficient inducement and protection by patent grants and at the same time safeguarding its national economic and social interest".

Before finally adopting the 1970 Act, the Indian Parliament debated the contours of its new law in great length. It was also examined by a Parliamentary Committee. The same kind of serious consideration does not appear to have gone into these current far-reaching amendments.

served within the traditional societies are to be protected by way of a patent. How to stop the piracy of substantive contents of a knowledge or information which would be used in patenting in other countries? Many Asian and African tribal communities and traditional societies have been passing their knowledge base through oral traditions for which no documentary proof is available. This has become a major issue in other forms of intellectual property rights such as copyright and geographical indications. Without even acknowledging these communities, several others have made huge profits by clandestinely acquiring IPR protection. By the time the world comes to know about the original owners of the intellectual property, the profit would have flowed in sufficient quantities. Patents, after all, are about the commercialization and about making profits. If there are no profits and if the profits are trivial, no one will bother about the worth of that knowledge. No doubt, this should be halted and it could be done through proper evolution and application of norms both at the national and international levels. While the World Intellectual Property Organization (WIPO) has attempted to evolve an international convention to protect such subject matter, it has also brought into existence what is termed as `Patent Law Treaty' which seeks to harmonize the procedural aspects of patenting across the countries.

The evolution of patents or patenting, it could be said, is moving in two different strands. One, to preserve the unique features of traditional knowledge with territorial application of international norms and the second, by way of harmonization of the formal procedural requirements of patenting. The latter is the logical development of the concerns which developed essentially during the industrial revolution and as result of which the Paris Convention, 1886 evolved.

PATENTS FINALLY IN WTO

As mentioned already, countries which owned and worried about the international dimension of the appropriation of technological innovation sought to create strong patent regimes. The strong patent regimes, they argued, would facilitate maximum returns from the market in the shortest time. The life of the new and high technology was, it should be noted, shortened due to its faster diffusion rate and its easy copying. Diffusion and copying allowed fairly easy operation of the process of `reverse engineering' in reconstructing the whole technological innovation. This, in fact, favoured immensely the developing countries.

On the other hand, the imperfections of the international technology market, its lack of transparency and its oligopolistic character have been posing new set of problems to developing countries, coupled with uncertainty. It has been pointed out that these uncertainties emerge from the importance attached to national policies and the inadequacies of the present state of knowledge about the exact impact of the new technologies on the overall economic development.

It is also noted that new technological developments are weakening the traditional pattern of a simple technological innovation being followed by poor countries. Reference should also be made to the monopolistic tendencies in the international market for technology, especially high technology, the role of MNCs and most importantly the diminishing role of innovation. It should be further noted that the international market for high technology is heavily dependent on IPRs to create barriers for new entrants in such a way as to protect infant high technology industry. Accordingly, the mandate for Uruguay Round of negotiations referred to the "effective and adequate protection of trade-related aspects of IPRs" which included, inter alia, patents as well.

In all fairness, it should be stated that the Uruguay Round mandate on TRIPs was forced on developing countries by few developed countries so as to protect the interests of their MNCs. Major arguments for bringing in the issue of IPRs within the ambit of GATT were motivated by the moves made by these companies. A powerful group of US chemical, pharmaceutical, computer, entertainment, publishing and electronics corporations lobbied the US Government to introduce intellectual property issue into the multilateral trade negotiations under the GATT.

In the 1980s, the Chairman of Pfizer, a large US pharmaceutical manufacturer, Ed Pratt was considered to be the driving force behind this move. He was made the Chairman of the Advisory Committee for Trade Negotiations by President Ronald Regan in 1981 to shape the US trade policy. This Committee, it should be noted, played an active role in formulating overall agenda of the Uruguay Round, particularly concerning IPRs. Ed Pratt, in a systematic move, first formed alliances with the US motion picture and computer industries before approaching European and Japanese Industrial groups. Thirteen major US corporations formed the `Intellectual Property Rights Committee" (IPC) which set down an agenda for what it wanted to achieve through international trade negotiations. Developing countries, including India, opposed the inclusion of IPRs in the GATT negotiations on the ground that it should be dealt by WIPO. Developed countries, on the other hand, argued for the inclusion of what was termed as `trade-related' aspects of IPRs. They said they are not interested in creating new standards and principles for IPRs. While they said so, TRIPs Agreement in the final run up created obligations resulting in the creation of an `uniform' standard of protection.

There were basically two broad approaches in the TRIPs negotiations. Developed countries had taken an approach which was generally grounded on the premise that inadequate and discriminatory protection of IPRs constituted a major distortion of and impediment to trade and should as such be dealt within the framework of GATT. On the other hand, the developing countries argued that it was not for the GATT to consider the protection of IPRs through the elaboration of substantive norms and standards to be applied by all countries. However, during the mid-term review of this mandate in 1989, developing countries, mainly India and Brazil, agreed to negotiate the mandate on TRIPs. The reasons for this capitulation lay elsewhere - perhaps in the bilateral approach taken by the US by invoking its section 301 of the Trade Act of 1974. This US domestic law authorized the United States Trade Representative (USTR) to identify countries that deny adequate and effective protection of IPRs. India and Brazil were primarily targeted. The Uruguay Round of negotiations formally concluded on 15 April 1994.

For nearly two years, beginning 1991, there was no consensus on various aspects of the WTO Agreements among developed countries. There were major

differences in the areas of dairy products, civil aircrafts and other agricultural products among the major developed countries, particularly between the USA and the EC. Once it was decided that these contentious issues would be moved to a separate set of plurilateral agreements the stage was set for the conclusion of the Uruguay Round of Negotiations under the auspice of the WTO. The famous Dunkel Draft issued by the then Director General of the GATT Arthur Dunkel while took care of the concerns of the developed countries, completely overlooked the concerns of developing countries in the area of TRIPs. The WTO Agreements were a package as a complete deal i.e., you accept them as a whole or leave. India after considering pros and cons, through a Parliamentary Committee, decided to accept the Final Act of the Uruguay Round of Negotiations in 1994 and was one of the original signatories.

THIRD AMENDMENT
SOME LEGAL CHALLENGES

As mentioned above, the Indian law was amended and was passed by the Indian Parliament with certain changes. The primary focus of this Third Patent (Amendment) Bill was to introduce product patent regime in the field of chemicals and pharmaceuticals by deleting section 5 of the 1970 enactment. The major features of the third amendment relate to inclusion of clauses relating to `compulsory licensing' for essentially life-saving drugs, definition of `new entities' (with regard to chemicals) so as to curtail `ever greening' of patent applications for any new use for the existing products. Two issues - one concerning `micro-organisms' and the other with regard to the definition of `new entities' will be examined by an expert technical committee. Pre-grant and post-grant oppositions have been provided so that unwanted and unwarranted patent applications could be sifted through at the application stage itself and also allow others who are working or researching in the field to challenge the `invention' at the application stage itself. Despite these laudable in-built provisions to protect the Indian public interest, there are other substantive areas which need consideration.

DOMESTIC VS. GLOBAL

It should be noted that patent, despite its international origins, has continued to be defined and regulated territorially subject to the local laws. In other words, it provides each country an opportunity to subjectively assess the `inventiveness' of an invention. This subjectivity and interpretative matrix within domestic law, no doubt, could vary. The US Patent and Trade Mark Office cannot be equated with the patent office of a tiny country. If that tiny country, if it wishes taking into account its own domestic concerns, could block the patent already granted in the USA as per the norms embodied in the TRIPs and other related international conventions on patents. However, that tiny country should be a party to all these international conventions. Even then, there are a number of interpretations relating to certain exceptions such as `public interest or public order', `emergency or national emergency', `health', environmental protection and so on. Some of these exceptions have been provided in the Article 7 and 8 of the TRIPs. At this stage, we are not sure whether interpretations to be attributed to these situations by the concerned country as conclusive or not. WTO Dispute Settlement Body and the jurisprudence surrounding it does not seem to accept this `local' interpretation. Since there is no uniform definition of a patent, the crucial question is - what kind of standards should be applied to a patent? This is decided by several criteria.

Before examining some of these we may briefly look at what actually a patent means in the layman's world. The question, therefore, is - what is a `patent'? According to Concise Oxford Dictionary, for instance, it is "government authority to an individual or organization conferring a right or title, especially the sole right to make or use or sell some inventions". In other words, patent is a document granting this authority to protect an invention or its process. Patents are simply an exclusive right granted under law for a definite period to somebody to enjoy the fruits of an invention. To put it differently, it is a monopoly right created in favour of somebody with the sanction of law.

We can, therefore, agree that there can be no precise criteria to define a `patent' in the available numerous, territorially applicable laws on patents within countries. These laws, it may be noted, define an `invention' with the following broad criteria, namely, that it should be - (a) new; (b) could be a new manufacture; possibly a new process and (c) that it should be industrially applicable and commercially viable. The application and interpretation of these criteria could vary from country to country taking into account the factors such as (a) research and scientific skills in a given country,

including its skilled workforce; (b) extent of industrialization or commercialization; and (c) efficiency and the responsiveness of the patent institutions in a given country, in particular its patent office.

India, for example, introduced a definition of a `patent' in its 1970 Act by way of an amendment in 2002 in section 2 (m) as "patent granted under this Act". But, it goes on to define an `invention' in section 2 (j) as a "new product or process involving an inventive step and capable of industrial application". Again, both these phrases `inventive step' and `industrial application' have been defined. Once again, the forthcoming third amendment proposes to change this definition of `invention' to include what is a `scientific invention' and also to redefine and include what is not an `invention'. Each country looks at these definitions differently and perhaps could evolve its own jurisprudence on the subject. Accordingly, the essential issue of WTO-consistency of the patent amendments remains in the realm of uncertainty until perhaps India faces a challenge before the WTO Dispute Settlement Body.

TRENDS IN PATENT LITIGATION

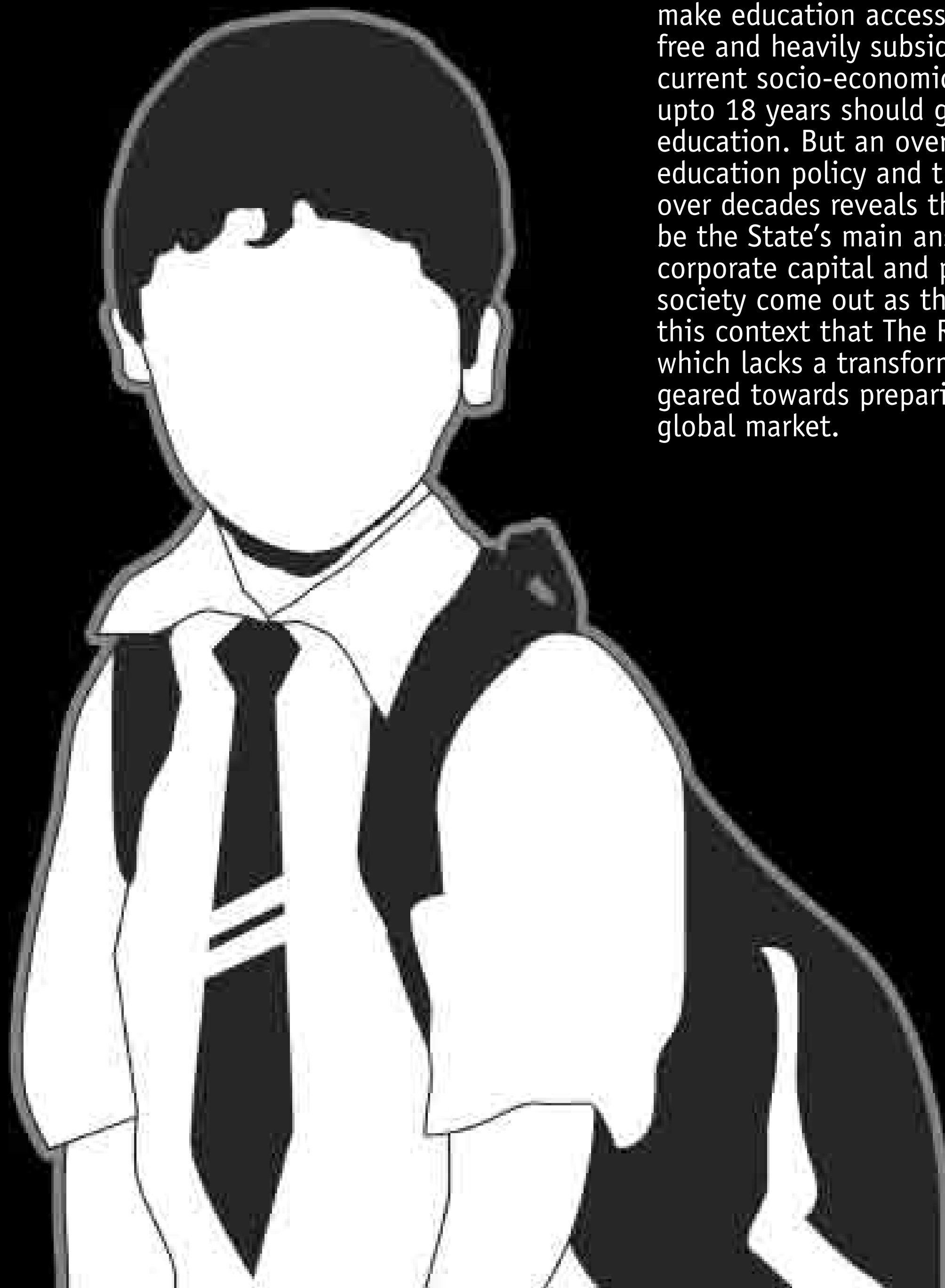
There is a prediction that on account of introduction of product patent regime and other resulting changes in the Indian law, there will be a considerable activity in the field of patent litigation. While accepting this as a possibility, what we should look at is the quality and content of the litigation. In the first instance, it should be noted that the patent litigation has always been client-driven. In other words, patent law is an essential tool in protecting monopolistic positions and to find ways to extend it. TRIPs Agreement terms in its Preamble IPRs as a `private rights'. Therefore, the whole focus of the TRIPs shifts to private gains rather than to emphasis on public interest. So, any amendment to Indian law which was primarily based on public interest concerns needs now to adhere to this change of emphasis to become WTO-consistent. As we could see there may not be frequent references to `patentability' criteria or for that matter on issues concerning - what exactly is an `invention'? What is a `public interest' and so on? Patent attorneys or courts will not debate this unnecessarily or may not have time to debate this without purpose. A survey of the Indian cases at the High Courts and above for the last three decades, including even the cases before the patent offices show that majority of them concern primarily the procedural issues such as extension of time, condoning the delay in the payment of fees, appeals and so on. Very rarely substantive issues are brought before the courts. Take the example of celebrated decision of the US Supreme Court in the case of Diamond vs. Chakravarty, a case decided in 1980 concerning the patentability of microorganisms. This case decided, very narrowly by the US Supreme Court (5 to 4) did not actually go into the merits of the case. The Court merely decided on the basis of the interpretation of the word `manufacture'. The Court did not enter into a lengthy debate whether microorganisms should be patented or not. Even then, this case has been cited as a landmark decision opening the doors for the patenting of life forms. Similarly issues raised before the European Patent Office in the case of Harvard Mouse decided in the 1990s, the substantive issues were not touched. The EPO's Technical Board of Appeal left the debate on the patenting of animals to a more appropriate time. In other words, courts and the litigants may not have the time, inclination and energy to go into the more detailed analysis of some of these issues. While in a given case it may not be necessary, the extent of protection granted or the legal interpretation provided may only take into account strictly the rights and obligations of the parties concerned.

In the final analysis, IPRs should be dealt with as bundle of rights regulating varied resources in any given country. IPRs include not only patents, they also include copyrights, trademarks, geographical indications, industrial designs and trade secrets. While there is a move to strengthen patent regimes, similar efforts do not appear in other sectors of IPRs. Copyright violations in the field of music, folk and traditional resources are increasing. Selective approach to negotiate a single IPR, patent in this case, would certainly harm interests of developing countries, certainly the Indian interests. We should also link up the developments taking place in other forum. For example, efforts to evolve a regime on intangible cultural property within UNESCO needs mention here. This effort, it should be noted, addresses less commercial concerns. Efforts should also be made to evolve regional conventions and approaches to IPR protection. Since IPRs are largely cultural-specific a regional approach to their protection would be of immense importance.

— June-July 2005

SECTION 10

In a poor country like India the only way to make education accessible to poor is through free and heavily subsidised education. In the current socio-economic conditions children upto 18 years should get free and compulsory education. But an overview of India's education policy and the direction it has taken over decades reveals that free market seems to be the State's main answer to education where corporate capital and privileged sections of society come out as the only winners. It is in this context that The Right to Education Act, which lacks a transformational vision, is geared towards preparing foot soldiers for the global market.



Education Policy & RTE Bill: A Historical Betrayal

Though an important component that shapes human life and dignity, elementary education is presently denied to more than half of the children between the age group of 6-14 years. Arguing that in the present socio-economic conditions children upto 18 years should get free and compulsory education viz. upto class 12, this article takes a historical overview of India's education policy, critiquing the direction the government has taken over the decades. This has culminated in the Rights of Children to Free and Compulsory Education Bill, 2008, prepared in the neo-liberal framework. In a game where free market seems to be the State's main answer to education, corporate capital and privileged sections of society come out as the only winners.

ANIL SADGOPAL

The Constitution directs the Indian State to "provide within a period of 10 years from the commencement of the Constitution, free and compulsory education for all children until they complete the age of fourteen years" (the original Article 45[1], Part IV). In Article 46, the State is directed to "promote with special care the educational and economic interests … of the Scheduled Castes and the Scheduled Tribes …" As per Article 39 (f) in Part IV of the Constitution, the State shall "direct its policy towards securing … that children are given opportunity and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment."

The Article 45 has been interpreted[2] to include (a) early childhood care, nutrition, health and pre-primary education (kindergarten, nursery) for children below six years of age; and (b) elementary (not primary) education of eight years (Class I-VIII) for the 6-14 age group children. Although the Article 45 was placed in Part IV[3] of the Constitution and, therefore, not enforceable as a fundamental right, the sense of urgency attached to its fulfillment *"within a period of ten years from the commencement of the Constitution"* is remarkable. This is the only constitutional provision with a timeframe. *The timeframe ended in 1960!* The post-independence history stands witness to the neglect and disdain with which this critical provision has been treated by the State.

At present, more than half of the 6-14 age group children are denied elementary education.[4] It is noteworthy that, unable to face this harsh reality, the government falsely equates the category of "non-enrolled children" with the ambiguous category of "out-of-school children". Both of these categories do not include the much larger category of those children (the so-called 'drop-outs') whom the State failed to provide elementary education (i.e. up to Class VIII), as required by the *original* Article 45. The data on the provision of early childhood care, nutrition, health and pre-primary education for children below six years of age is too scanty to deserve reference. Here, too, the limited role of integrated child development services (ICDS) through *anganwadis* in providing some nutritional supplement is misperceived as being equivalent to the afore-mentioned holistic vision emerging out of Article 45 read along with Article 39 (f), as resolved in NPE-1986. The status of such provisions in the case of the Scheduled Castes (SCs) and the Scheduled Tribes (STs), noted in Article 46 for 'special care', is much worse.

There are at least two significant dimensions flowing out of the Constitution that elaborate and enrich the vision of education. First, the Preamble to the Constitution provides the overall framework within which the Article 45 has to be envisaged. This means that education must be directed to build citizenship for a democratic, socialist, secular, egalitarian and just society. Second, education must be in consonance with Articles 14, 15(1) and 16 of Part III which respectively guarantee equality before law, prohibit the State from discriminating "against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them" and secure equality of opportunity in matters of public employment. Both the Articles 14 and 15(1) have far-reaching implications for education. By reading Article 45 in conjunction with Articles 14 and 15(1), the right to education movement inferred more than 10 years ago that the State is duty bound to build a system that provides **education of eq-**

uitable quality to all children without any discrimination whatsoever!

At the time of the commencement of the Constitution, there might have been some validity in the Article 45 being limited to "all children until they complete the age of 14 years". This limited its scope to education up to Class VIII, while also covering early childhood care, nutrition, health and pre-primary education for those below six years of age. However, the socio-economic conditions have undergone a radical change since then. Under the present conditions, education until only Class VIII leads a child essentially nowhere since the doors to further education and employment open only after Class XII. This implies that the Article 45 should have been amended at least a quarter century ago to include "all children until they complete the age of 18 years" so that the State is under obligation to provide equal opportunity to all children to study up to Class XII. Such an amendment had also become mandatory as per the international covenants like the Convention on the Rights of the Child to which India became a signatory in 1992 wherein "a child means every human being below the age of 18 years." More importantly, the lack of this amendment makes a mockery of the fundamental right to social justice under Article 16 since essentially no public employment or appointment worth the name is available without a Class XII certificate — the minimum eligibility for pursuing all higher education courses. This means that the benefits of reservations have been limited since independence to a small section (not more than 10 percent) of SCs, STs and OBCs. The exclusion of the majority of poor Muslims from higher education and public employment also needs to be understood in this context as their social status is broadly equivalent to OBCs (Sachar Committee Report, 2007).

The misconceived language education policy that we follow has a serious impact on the attainment of the fundamental right under Article 19 (a), i.e., the fundamental right to freedom of speech and expression. Since 1970s, the language education discourse has been both dominated and distorted by the increasing demand for "English medium" schools or sections within a school. While the official policies and conditions that led to the demand may be debatable, it is reasonable today to grant that all children must have *equal opportunity* to acquire a reasonable proficiency in English, as part of their broader right to learn other subjects as well. The question we need to address, however, is with regard to the policy framework that is required to achieve the objective.

The knee-jerk policy response assumes that learning of 'good' English is best achieved through English medium schools, starting from nursery or kindergarten stage upwards to higher education. Apart from being an unscientific assumption, it fails to take into account the socio-cultural background of a child. This policy discourse also ignores the global research that reinforces the powerful pedagogic role played by the mother tongue as part of multi-linguality (this may include English too) of the majority of the children in plural societies like ours in acquiring subject knowledge as well as learning languages other than one's mother tongue.[5] Basically, the policymakers have failed to come to terms with the fact that the most effective way to learn any language (including English) is through the

Here is a snapshot emerging from the dominant reports in the Indian media

- Government Schools Under Sale!
- Government Schools Being Outsourced!
- Tenders Invited for Setting Up Schools!
- Education Hubs Being Set Up!
- "ONE TEACHER, SEVERAL CLASSES" (A Powerful Mobile Company's Advertisement.)
- Planning Commission consults corporate houses on education.
- Parents given further tax exemptions for private school fees leading to major revenue losses to the government.
- Sixth Pay Commission provides special bonus for sending children to private schools.
- Anti-fee hike agitation but the government unable to regulate fees in private schools.
- Public Funds & Resources Given to Companies, NGOs & Religious Bodies for Setting Up Schools Under Public-Private Partnership!
- B.Ed. college in a garage with admission fee of Rs. 5 lacs/year.
- Computer Firms Making Curriculum for the government!
- Policy Making Handed Over to Corporate Houses!

medium of child's mother tongue as a component of her multi-lingual ambience. The consequence of this misconception and lack of a sound policy is the widespread phenomenon of a rapid attrition of the capacity to articulate one's thoughts or ideas. The vast majority of the Indian children grow up in the prevailing multi-layered school system without acquiring the capacity to learn and articulate in either the state language or English and, in the process, losing the capacity to do so in one's mother tongue as well. Apart from violation of Article 19(a), this policy failure has far reaching implications for the survival of India as a nation that creates, transacts and applies knowledge for human development.

A historic judgement by the Supreme Court of India in 1993 radically transformed the status of Article 45. In its Unnikrishnan judgement (1993), the Supreme Court ruled that Article 45 in Part IV has to be read in 'harmonious construction' with Article 21 (right to life) in Part III of the Constitution, as right to life loses its significance without education. Hence, the Court declared that ***Article 45 has acquired the status of a fundamental right.*** The years that followed have seen how the State allowed the neo-liberal policies to dilute and distort the notion of fundamental right emerging from the Unnikrishnan judgement. We shall examine the deleterious impact of these neo-liberal policies on access to schools and the quality of school education provided therein. The processes of dilution and distortion were also evident in the Saikia Committee Report (1997) and the 83rd Constitutional Amendment Bill tabled in the Rajya Sabha in July 1997.[6] The 86th Constitutional Amendment Act (2002) is clearly a result of this neo-liberal assault on the Constitution and designed to legitimise the fault lines introduced by the World Bank policies in India's educational system with consent of the central government.[7]

The Unnikrishnan Judgement went a step further. It ruled that the right to education continues to exist under Article 41 (Part IV) *even beyond the age of 14 years* but is limited by the State's "economic capacity and [stage of] development". The Constitution is clearly directing the State to envisage the entire sector of education– from kindergarten to higher and professional education in a holistic manner. Any policy to ***limit, distort or fragment*** this vision of education amounts to a violation of the Constitution of India which represents people's aspirations from the freedom struggle against imperialism!

During the constituent assembly debate in 1948-49, a member contended that the commitment made in the draft Article (later to be known as Article 45) to provide "free and compulsory education" to children *upto 14 years of age* should be limited to *only 11 years of age* as India would not have the necessary resources. The dilution would have been made but for Dr Babasaheb Ambedkar's clarity of mind that it is at this age of 11 years that a substantial proportion of children be-

Persistent Violation of Article 45

The shifting goals of elementary education

1.	Constitution of India	—	1960
2.	National Policy on Education-1968	—	NONE
3.	National Policy on Education-1986	—	1995
4.	National Policy on Education-1986 (Modified in 1992)	—	2000
5.	DPEP+* (18 States, 280 Districts)	—	2000/02
6.	Sarva Shiksha Abhiyan (2000)	—	2010
7.	Sarva Shiksha Abhiyan (2007)	—	NONE
8.	UNESCO Global Monitoring Report (2002)*	—	Not even by 2015!

+World Bank-sponsored District Primary Education Programme (DPEP) of the 1990s.
*Limited to only primary education of four or five years (Class I-IV/V),
as required under the World Bank-UN framework in the Jomtien Declaration (1990).

come child labourers. He forcefully argued that the place for children at this age in independent India should be in schools, not in farms or factories. This is how an unambiguous commitment to provide *free* education through regular full-time schools to all children up to 14 years of age (including children below six years) became an integral component of India's Constitution. Clearly, the Constitution does not permit parallel layers such as literacy classes, non-formal centres and education guarantee centres for children. This implies that the persistence of **more than half of our children** today in the school-going age group of 6-14 years **as out-of-school children**[8] (atleast five crores of them being child labourers) constitutes a clear violation of the Constitution. Likewise, the provision of non-formal education in the national policy on education–1986 (NPE-1986) as well as the parallel streams of facilities of varying qualities in the World Bank-sponsored District Primary Education Programme (DPEP) of the 1990s and the ongoing Sarva Shiksha Abhiyan (SSA) violate the basic spirit of the Constitution as all these are designed to co-exist with child labour, apart from promoting inequality through education.

The rhetoric of lack of resources for mass education has continued to dominate policy formulation since independence. In August 2005, the prime minister referred to lack of resources as being the chief reason for referring the draft Right to Education Bill to a high-level group of ministers. In June 2006, the central government, claiming lack of resources, decided not to present the bill in Parliament in spite of it becoming obligatory under Article 21A introduced through 86th Constitutional Amendment in December 2002. Instead, the government sent a highly diluted and distorted draft bill to the state/UT governments advising them to get it approved in their respective legislatures. This amounted to blatant abdication by the Centre of its constitutional obligation to give effect to the fundamental right accorded to elementary education for children in the 6-14 years age group. Wide protests by both the state governments and various people's groups eventually persuaded the central government to withdraw its misconceived step. But the rhetoric of resource crunch continued to influence policy decisions. The February 2008 Draft Right to Education Bill, like its predecessor drafts, also could not reach Parliament on the same grounds. The high-level group of ministers is on record in not only maintaining this stance but also in suggesting that the norms and standards proposed in the schedule of the draft bill be diluted in order to reduce the financial requirement of implementing the bill. **There is no evidence of any data being presented at any of the public forums, including the CABE, to substantiate the government's argument that there is indeed a resource crunch. Also, the rhetoric of lack of resources refuses to address the critical issue of lack of priority in the ruling class agenda for mass education.** Ironically, this rhetoric dominated the discourse on right to education when the government was boasting of touching nine percent economic growth rate and claiming to become a superpower by 2020!

ARTICLE 19(a) IN JEOPARDY

(Fundamental right to freedom of speech and expression)

1. Undermining children's languages.
2. Ignoring multi-linguality as a foundation of learning.
3. Destroying mother tongue as a component of multi-linguality.
4. Equating mother tongue with state language.

↓

Children without identity.

↓

Children losing capacity to learn think and create.

↓

LOSS OF RIGHT TO EXPRESS & ARTICULATE

NEO-LIBERAL POLICY TRENDS

The doors of the Indian economy were formally opened to the neo-liberal agenda with the government's declaration of new economic policy in 1991. However, the global market forces, led by the superpower USA and other G-8 countries and represented by the IMF-World Bank regime, had started operating in India quietly much earlier. From mid-1980s onwards, there are definite signs of the presence of their advocates at the highest echelons of Indian government and their agenda having an impact on the formulation of Indian policies.

Here is a comparative presentation of India's Constitution and the Jomtien Declaration with regard to the goals, concept and scope of education under the two frameworks

CONSTITUTION OF INDIA (1950)	World Bank-UN JOMTIEN DECLARATION(1990)
Elementary education of 8 years guaranteed.	Basic education limited to primary education of 5 or less years.
Children up to 14 years of age have a fundamental right to education, including those below six years of age; the Right continues to exist under Article 41 even beyond the age of 14 years but is limited by the State's "economic capacity . . ." (Supreme Court's Unnikrishnan Judgement, 1993). All sectors of education - kindergarten to higher/professional - envisioned holistically.	Only a symbolic reference to fundamental right in the Preamble and that, too, limited to 6-11 year age group children; early childhood care and pre-primary education included in the scope of basic education, though not as a universal entitlement - a myopic and fragmented vision.
Guarantee of free education.	No reference to free education.
Education aimed at building citizenship for a democratic, socialist, egalitarian, just and secular society.	The definition of education as "basic learning needs" allows its reduction to literacy-numeracy, life skills and behaviourism.
The State is obliged to ensure reprioritisation of internal resources in order to provide for education.	State's obligation substituted by external assistance and partnership with NGOs, religious bodies and the corporate capital.
Equality in and through education in all its dimensions.	Equality normally limited to "opportunity to achieve and maintain an acceptable level of learning."
Guarantee of education of equitable quality - a common school system based on neighbourhood schools implied.	No such guarantee - allowing space for a multi-layered school system of inferior parallel layers.

In the National Policy on Education–1986 (NPE-1986) and its companion Programme of Action–1986 (POA-1986) itself, we can identify several trends that reflected World Bank's thinking. These became evident later in the late 1980s or 1990s when the high profile total literacy campaigns (under the National Literacy Mission), UNICEF-assisted Bihar Education Project, World Bank-funded UP Basic Education Project, SIDA/DFID-assisted Lok Jumbish (Rajasthan), and finally the World Bank-sponsored District Primary Education Programme (DPEP) in 18 states (about 280 districts) became the face of the 1986 education policy. These trends, also served the vested interests of the Indian ruling class, apart from being *politically and financially* convenient to the central government.

- The education commission (1964-66), popularly known as the Kothari Commission, conceived education as a critical socio-political process for building citizenship for a democratic, egalitarian, just and secular society. With the onset of the neo-liberal framework, the most significant impact has been on these goals which were diluted, distorted or trivialised. The change of the name of the ministry of education to the ministry of human resource development in 1985-86 marks the beginning of the State's ac-

ceptance of the pro-market agenda in education!

- NPE-1986, along with POA-1986, as also their modified versions of 1992, introduced several retrogressive policy measures (e.g. introduction of non-formal education as an inferior parallel layer and minimum levels of learning). These measures paved the way for the neo-liberal agenda embedded in the structural adjustments and social safety net and were later echoed in World Bank's interventions in 1990s as well. Some of these ideas also flowed from the Jomtien Declaration (1990).
- Education was increasingly viewed as literacy and numeracy 'skills' (often reduced to functional literacy), rather than a process of unleashing the human potential and enriching the consciousness in all its dimensions. This trivialisation went to the extent that (a) the literacy campaigns became synonymous with educational campaigns; and (b) the literacy rate became the dominant (often the sole) parameter for measuring or assessing educational progress (it is like turning the parameter into the goal itself!). The literacy campaigns diverted political attention away from both school and higher education through the 1990s.
- Advocating a mechanistic view of curriculum fragmented into numerous market-oriented competencies, the minimum levels of learning (MLLs) were introduced by the ministry of HRD[9] in 1990 in the most undemocratic and secretive manner. This was amongst the earliest instances, later to become a practice, of policy changes being introduced without democratic consultation or debate at legitimate forums like the Central Advisory Board of Education (CABE) or even NCERT[10]. The MLL concept was steeped in anti-child behaviourist approach, de-linking of the cognitive (related to thinking and knowing functions) from the non-cognitive (related to emotions, values and psycho-motor skills) domains.[11] The advocacy of MLLs by World Bank's DPEP from 1993-94 onwards was endorsed by the European Commission, DFID and UN-funded primary education programmes. MLLs continue to define the framework of curricular planning and testing in Sarva Shiksha Abhiyan (SSA) as well. The MLL story tells us why we must not underestimate the neo-liberal agenda of influencing the character of knowledge in school curriculum designed to undermine critical thinking and orient public mind in favour of consumerism.
- The most visible structural distortion of the school system comprised the introduction of a non-formal (NFE) stream of educational facilities (not school!) of inferior quality for more than half of the nation's children below the school system. The 1986 policy also introduced a layer of expensive residential Navodaya Vidyalayas above the school system for a handful of children (about 80 children per district per year). The government sought to justify the Navodaya Vidyalayas, among others, on the untenable ground of acting as 'pace-setting schools' for the ordinary government schools in its neighbourhood—an objective that turned out to be entirely misconceived.[12] The policy shift also introduced the under-qualified, untrained and under-paid 'instructor' appointed on short-term contract in the NFE centres. The 'instructor' of the 1986 policy became the 'para-teacher' of World Bank's DPEP in the 1990s, providing the major basis for fragmenting (and finally almost demolishing) the cadre of school teachers.
- The above shift towards institutionalising multiple parallel layers within the school system contradicted the 1986 policy resolve to build a national system of education rooted in the Constitution. This shift, however, made a farce of the policy statement that "effective measures will be taken in the direction of the common school system recommended in the 1968 policy (section 3.2)." During the 1990s, the World Bank and its associated UN and other international funding agencies made strategic use of this faultline of multiple parallel layers in the 1986 policy **to first weaken and then to destroy the credibility of the school system altogether!**

WORLD BANK-UN FRAMEWORK OF EDUCATION: EXAMINING ITS PREMISES

In March 1990, India signed the *'World Declaration on Education For All'* and *'Framework for Action to Meet Basic Learning Needs'* adopted at the 'World Conference on Education for All: Meeting Basic Learning Needs',

held at Jomtien, Thailand under the joint sponsorship of three UN agencies (UNDP, UNESCO & UNICEF) and the World Bank. The twin documents together known as the Jomtien Declaration have since become the chief strategic instrument of the neo-liberal forces in school education. It laid the foundation for the World Bank intervention by advocating international aid for primary (not elementary) education in the developing countries, making it 'unnecessary' for them to mobilise resources by re-prioritising national economies. The call for external financing of primary education was part of the IMF-World Bank's structural adjustment programme (SAP) and social safety net. The social safety net adjustment credit, however, turned out to be a minimal compensation against the substantial withdrawal of state funding under SAP (see Tables 1a,b). A detailed critique of the Jomtien Declaration is separately available.[13]

The pre-condition of SAP meant, among other things, that the Indian government was *obliged to steadily reduce its expenditure on the social sector,* particularly health and education. This was a rather enigmatic pre-condition in a country where the vast majority of the people did not have access to quality health or education. In education, it made even less sense as it was imposed by those powerful capitalist economies, led by the USA, who were apparently advocating the much-proclaimed 'education for all' (EFA) programme along with the move towards the so-called 'knowledge economy'. One can't, therefore, avoid asking the question: **What was the hidden agenda?**

The central thesis of the Jomtien Declaration in the Indian context was five-fold.

First, the State must *'progressively'* abdicate its constitutional obligation towards education of the masses in general and school-based elementary education (Class I-VIII) in particular, become dependent on external aid even for primary education (Class I-V) and work in partnership[14] with NGOs, religious bodies and corporate houses[15];

Second, the people *neither have a human right* as enshrined in the UN Charter *nor a fundamental right* to receiving free pre-primary and elementary education (from kindergarten to Class VIII) of *equitable* quality as implied either by the Constitution under Supreme Court's Unnikrishnan Judgement (1993) or even the much diluted 86th Constitutional Amendment (2002);[16]

Third, education is not aimed at building a conscious citizenship for a democratic, socialistic, egalitarian and secular society. Instead, it is *synonymous with literacy-numeracy and life skills* (mostly confined to sexual behaviour) required for social manipulation, mind control and regimentation for advancing the market economy;

Fourth, the school system may comprise parallel layers of inferior quality education for various sections of society, thereby becoming a multi-layered school system. This conception will directly amount to denial of quality education to the under-privileged masses lacking capacity to pay[17]; and

Fifth, *education is a commodity* that can be traded in the global market and offered for WTO negotiations.

The Jomtien Declaration dominated policy formulation and educational planning in several developing countries throughout the 1990s. A decade later, the Dakar Framework (2000) further elaborated and reinforced the basic premises of the Jomtien Declaration. The Indian government kowtowed to continue the neo-liberal agenda. As the DPEP was about to end within the next 3-4 years, this implied that **the Indian government was ready to carry forward the DPEP package, along with its lacunae and failures, into the then emerging Sarva Shiksha Abhiyan (SSA),** thereby ensuring that the neo-liberal framework will continue to determine the future policies.

At the September 2000 Millennium Summit, the IMF-World Bank, along with the Organisation for Economic Co-operation and Development (OECD) and the UN agencies, devised a set of eight Millennium Development Goals (MDGs). In line with the Jomtien-Dakar Framework, one of the eight goals directly relating to education reiterates the agenda of "achiev[ing] universal primary education."

The comparison between the Constitution and the Jomtien Declaration equally applies to the MDGs, if not even more. Yet, the Indian government has circumscribed educational planning and financial allocations within the highly diluted norms set by the MDGs, as indicated below:

" . . . it is imperative to give good quality elementary education to all children in the age group of 6-14 years. Policies and programmes in this direction are also necessary for honouring the **country's commitment to the 'millennium development goals' and 'education for all'** … for increasing public expenditure on ed-

Table 1 (a)
External Assistance to DPEP

Years	National GDP (Rs. in lakh crores)	Total Exp. on Education (Rs. in crores)	External Assistance (Rs. in crores)	External Assistance as percent of FGDP	External Assistance tance as percent of Total Exp. on Eduction
1999-2000	17.62	74,816	682.8	0.039	0.91
2000-01	19.18	82,486	858.3	0.045	1.04
2001-02	20.82	79,866	1,100.0	0.053	1.38

Table 1 (b)
Assistance to All Externally Aided Education Projects of MHRD*

Years	National GDP (Rs. in lakh crores)	Total Exp. on Education (Rs. in crores)	External Assistance (Rs. in crores)	External Assistance as percent of FGDP	External Assistance tance as percent of Total Exp. on Eduction
1999-2000	17.62	74,816	729.1	0.04	10.97
2000-01	19.18	82,486	947.6	0.049	1.15
2001-02	20.82	79,866	1,210.0	0.058	1.52

* 'All Externally Aided Projects' of the Ministry of HRD include DPEP, Shiksha Karmi (Rajasthan), Mahila Samakhya (Gujarat, U.P., Bihar & Karnataka), Lok Jumbish (Rajasthan) and GoI-UN Programme (Selected Blocks) as well as others.
Source:
(i) Economic Survey 2002-03 to 2004-05, Ministry of Finance, Govt. of India.
(ii) Analysis of Budgeted Expenditure on Education, 1999-2000 to 2001-02 and the next two years, Ministry of HRD, Govt. of India, Analytical Table Nos. 1.
(iii) Tilak, JBG (2003), A Study on Financing of Education in India with a Focus on Elementary Education, South Asia EFA Forum, NIEPA, New Delhi, May 2003, Table 31

ucation to six percent of GDP and for universalising elementary education at the national level. (emphasis added)"[18]

What is worse is the stance of the internationally funded and high profile NGOs who are eager to substitute the EFA-MDG *framework in place of the conceptually far more powerful founding document of the Indian Republic!*

STRUCTURAL ADJUSTMENT: THE HIDDEN AGENDA OF PRIVATISATION

What the country needed in 1991, when the new economic policy was announced, was a firm resolve to first rapidly fill up the **cumulative gap** resulting from continued underinvestment since the Kothari Commission (1966) and then maintain the investment level of six percent of GDP. To be sure, this was just about beginning to take place, as is evident by the steady rise in educational expenditure soon after the 1986 policy, as a result of the public pressure. Yet, what the World Bank persuaded India to do in the 1990s was precisely the opposite. The long-awaited **agenda of systemic transformation** in education in the 1986 policy, though only partial and hesitant, **was given up after 1991 and replaced by a set of un-researched, untested and arbitrary schemes or projects** assisted and sponsored by the World Bank, UN agencies and a host of other international agencies. The undeclared but operative strategy in such schemes and projects was to *let the vast government education system (from schools to universities)*

starve of funds and, consequently, deteriorate in quality. As the school quality would decline, resulting in low learning levels, the parents, even the poor among them, would begin to withdraw their children from the system. A sense of exclusion from the socio-economic and political space would prevail.

When the children are either **'pushed out' of the schools or decide to 'walk-out'** in protest against the poor quality and irrelevance of education (**no child ever drops out,** the official or World Bank claims notwithstanding!), two possibilities would emerge. First, low fee-charging unaided private schools (recognised or unrecognised) would mushroom to meet the new demand. Second, the government would have an *alibi* for closing down its own schools. The consequent low enrolment in government schools would be claimed as the ground for declaring them 'unviable'. The school campuses could then be converted into commercial ventures such as the fee-charging elite private schools or the shopping malls, especially in urban areas, as is the emerging phenomenon all over the country. Yet, closure of government schools would be unabashedly termed "rationalisation" of the school system in the official reports[19].

Let us summarise the hidden agenda of privatisation. The World Bank-UN strategy essentially comprised three sub-strategies, viz., i) convert the school system into a multi-layered system with several inferior quality parallel layers; ii) dilute norms and standards in the government schools pertaining to infrastructure and other such essentials of quality education (see Table 2); and iii) close government schools under the pretext of 'rationalisation'.

WORLD BANK'S DPEP: THE ASSAULT

Although claiming to be located in the 1986 policy, the District Primary Education Programme (DPEP) was, in fact, embedded in the Jomtien Declaration. Beginning in 1993-94 with 42 districts in seven states in Phase I, the DPEP had steadily spread its coverage to almost half of India's districts in 18 states (about 280 districts) by the time its third and the last phase was initiated in 2002-03.

During this short period, the programme was able to inflict a major damage to the school system. The following is a list of the outstanding damages that can be identified:

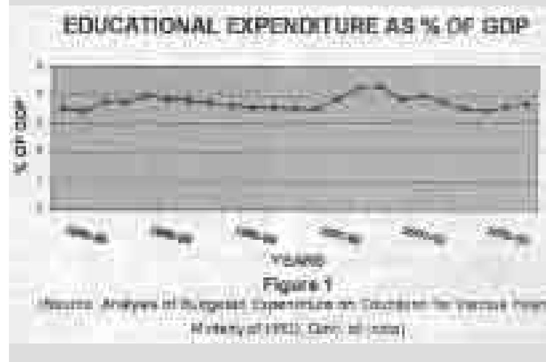


Figure 1

- *Reduced* the holistic goals of education to literacy-numeracy and questionable life skills;
- *Diluted* the commitment of the Constitution as well as the 1986 policy for early childhood care, pre-primary education and eight years of elementary education (kindergarten to Class VIII) to five (or less) years of primary education (Class I-IV in several states or I-V in others), with a major adverse impact on the policy norms of locating an elementary school in proximity to a habitation[20];
- *Dissociated* curricular and pedagogic planning of the lower primary education from that of the upper primary, secondary and senior secondary education, thereby leading to fragmentation of school education and its knowledge framework;
- *De-linked,* both conceptually and operationally, the issue of access to education from quality of education, thus distorting educational planning;
- *Introduced* parallel layers (parallel to the mainstream formal schools) of relatively inferior quality such as the alternative school, education guarantee centres and a variety of non-formal 'facilities'. This resulted in **a multi-layered primary education system** wherein each layer was meant for a separate social segment;
- *Systematically replaced* the regular teacher with an **under-qualified, untrained and underpaid person appointed for short-term contract** a para-teacher. This led to fragmentation of the teacher cadre, lowering of status and weakening of teachers' democratic movements (now being substituted by ICT-based NGO-managed and internationally funded teachers' networks!);
- *Violated* the 1986 policy Operation Blackboard norms of 'at least three teachers and three classrooms per primary school' (along with a veran-

dah and separate toilets for girls and boys) by introducing the dubious notion of multi-grade teaching wherein *one teacher is trained to perform the 'miracle' of teaching five classes simultaneously in one classroom!*

- *Diluted* the infrastructural, teacher-related, curricular and other norms and standards, approved under the 1986 policy, pertaining to quality of education (see Table 2);
- *Institutionalised* discrimination against the SCs, STs, most OBCs (Other Backward Classes) and Muslims21, particularly the girls among them, since the introduction of parallel layers, para-teachers and multi-grade teaching adversely affected these sections of society;
- *Promoted* a money-oriented culture, quite alien and also undesirable to the education system, by lavishly paying hefty honoraria and consultation fees to all and sundry, including the questionable joint review missions (JRMs); this has caused irrevocable damage since all such academic contributions were invariably made during the pre-DPEP phase either on official duty or on an entirely voluntary basis (with reimbursement of only travel and contingent expenses); it would be quite difficult, if not impossible, to reverse this mal-practice, once the project-based external assistance is withdrawn;
- *Rendered* the departments of education in state governments superfluous by setting up parallel NGO-type structures for channeling finance and governance of DPEP (and later SSA) and diverting political and administrative attention away from not only the publicly-mandated departments but also SCERTs, DIETs and other state-level institutions of educational research, curricular planning and textbook development, teacher training and innovation. This has caused much confusion in governance, planning, budgeting, assigning personnel and public accountability;
- *Undermined* the in-built systems of accountability, monitoring and evaluation of the programmes and projects. A farce of high profile and expensive joint review missions (JRMs), with participation of foreign experts[22], was built up during DPEP whose cost was also charged to the loan account, payable by India, but whose methodology and reports have never been subjected to public scrutiny.[23] Several Indian experts in JRMs have reported that their reports were 'doctored' by the 'debriefing' authorities in the state capitals, ignoring their protests. At the end of the project duration, both the World Bank and the governments (Centre and/or state) would quietly move on to the next project (in this case, SSA) without ever publicly assessing how far the original targets have been achieved and, in case of failure, without objectively analysing the causes thereof.

The above story of DPEP is hard to believe. An independent academic assessment of DPEP by a collective of university-based academics led them to make the following observation:

"Behind the smokescreen then is a vivid story of the rollback by the state, of contracting commitments for formal education, of the dismantling of the existing structures of formal education, proliferation of 'teach anyhow' strategies, a thrust on publicity management, and a neo-conservative reliance on community."[24]

This story did not end with DPEP but continues to date, by being internalised in the government's flagship Sarva Shiksha Abhiyan programme. The common link between DPEP and SSA is ofcourse the World Bank and its allies such as DFID, European Commission and others, which together contribute 35-40 percent of the SSA plan.

IMPACT OF WB POLICIES ON EDUCATION SYSTEM

The following *retrogressiv*e policy changes relating to the entire education system (including secondary and higher and technical/professional education) under the influence of the World Bank-UN intervention may be listed:

A. General and conceptual impact

i) The goal of education excludes building a democratic, egalitarian, just, secular and enlightened society. Instead, education has become an instrument for only improving productivity, promoting consumerism and establishing market control over knowledge and the public mind such that every human being becomes a 'useful' resource for the global capital.[25]

ii) Knowledge is not a heritage of humankind meant for optimising human welfare but a

saleable commodity for profit, subjugation and hegemony in the hands of the capitalist class. Educational development is not guided by the framework of either universal human rights or fundamental rights under the Indian Constitution but by the global market framework. Democratic structures of policy formulation and decision-making are either being by-passed or dismantled altogether.[26] The State is steadily abdicating its constitutional obligation towards education and letting market become the unregulated "service provider" of education from pre-primary to higher and technical/ professional levels. Schools, colleges and universities are becoming "service providers" and students their "consumers". In this "provider-consumer" relationship, every student must eventually pay "user charges" which implies payment of the full cost of the "educational service".

In contradiction to the Constitution, education of equitable quality is no more the objective of educational planning. Instead, the quality of education shall be determined by the paying capacity of the student.

A common space for children from culturally diverse and economically disparate backgrounds to socialise and grow together is no more considered either desirable or feasible. This shift violates the logical foundation of publicly funded free and quality education system that has been the basis of capitalist development of the advanced countries.

Using the questionable rate of return theory, primary (or elementary) education is juxtaposed against higher education while allocating public funds. This undervalues as well as negates the critical role of higher education in creation and transaction of knowledge, thereby making developing countries dependent on the advanced countries for their 'knowledge economies'.

In higher education, only those disciplines will be supported through public funding which, at present, do not have any market value. The disciplines which have a market value shall receive no public support whatsoever as the market is expected to promote such disciplines. This implies that profit will determine the character of knowledge.

Jomtien Declaration's insistence on developing only "observable and measurable targets" have been used to trivialise the goals of education and distort the curriculum, pedagogy and testing in violation of the spirit of the Constitution. This behaviourist prescription reflected in the MLLs is what has adversely impacted upon DPEP and SSA.

In the name of social participation, the Jomtien Declaration has provided for the State to 'devolve' responsibility to NGOs, private companies and even religious bodies.[27] Keeping in mind the fund-driven nature of NGOs, profit-motivation of corporate houses and rising religious fundamentalism, this stance of the Jomtien Declaration has dangerous implications.

B. Specific impact on school education

i) A multi-layered school system is being built-up through a series of arbitrary and short-lived schemes and projects instead of building a publicly funded common school system functioning through neighbourhood schools.[28]

ii) The public expenditure on education as percent of GDP has been declining steadily since 1990, except for a two-year period from 1999-2001 (Fig. 1). The level of expenditure as percent of GDP in 2005-06 was as low as it was before the 1986 policy. This decline took place *despite the levying of two percent educational cess[29] by the UPA government and almost one-third of funds for SSA coming from international agencies, including the World Bank.* Clearly, the SAP displaced both the 1986 policy and UPA's national common minimum programme which had resolved to raise educational expenditure to at least six percent of GDP.

iii) In Fig. 1, attention is drawn to the rise of educational expenditure as percent of GDP during the two-year period of 2006-08, i.e., from 3.5 percent of GDP to 3.7 percent. This rise is definitely not due to any rise in expenditure on SSA (i.e. elementary education) as during 2007-09 the central government's allocation for SSA *declined in absolute terms,* a trend that is also evident successively in the third year (2009-10 interim union budget presented before the general elections). The rise noted above during 2006-08 period can be explained on the following three grounds:

(a) Increasing the number of seats (along with all the contingent facilities including faculty) for the upper castes in professional institutions as a compensatory measure for the reservations provided to OBCs in these institutions;

(b) Providing for a set of high profile central universities, IIT, IIMs, IIITs and IISERs for the selected elite to serve the global market while the majority of higher educational institutions shall continue to be in poor shape due to paucity of funds; and

(c) Opening 6,000 model higher secondary schools (2,500 of which shall be in PPP mode) for the selected few at the Block-level (a continuation of the Navodaya Vidyalaya model) without ensuring education of equitable quality for all at the secondary level.

Interestingly, **the afore-mentioned rise exposes the so-called 'inclusive' agenda of the XI Plan wherein only those will be included whose inclusion will be in the interest of the neo-liberal capital and the global market.**

iv) Declining public expenditure in school education implies gradual deterioration of infrastructure, poor pupil: teacher ratio, attrition of curriculum, lack of textbooks and teaching aids and also fall in the standards of teacher training institutions. This will predictably result in low learning levels which the World Bank and internationally funded NGOs (PRATHAM's ASER Report, Mumbai, January 2006) have promptly documented as if they were waiting for the evidence of poorly functioning government schools to appear.[30] This deterioration in the quality of government schools provides the essential groundwork for privatisation and commercialisation of school education.

v) In order to promote privatisation, the government resists public pressure for legislative action to set minimum norms and standards or for instituting credible systemic reforms in the government schools. This must be the logic behind the central government's considerable delay in passing the law for implementing fundamental right to education as required under Supreme Court's Unnikrishnan Judgement (1993) or even the diluted Article 21A of the 86th Constitutional Amendment (2002). The norms and standards proposed in the schedule of 'The Right of Children to Free and Compulsory Education Bill, 2008' (passed in Rajya Sabha in July 2009) are a major compromise with the quality of education – not an unsurprising consequence of World Bank's neo-liberal assault.[31]

vi) The existing school regulation laws are being gradually diluted or withdrawn all together, as also implied in the aforesaid bill wherein the duties of the State do not include regulation of the fee structure and other aspects of the functioning of private schools.

vii) In the case of urban government schools, located on land carrying high market value, a policy of public-private partnership is already in place in order to transfer their assets to the private capital, even without waiting for the pretext of deterioration of their quality and consequent fall in enrolment.

viii) Primary education of five years or less is increasingly being viewed as the desired end objective for the children of the masses and this should replace elementary education of eight years, guaranteed under the Constitution, to be followed by skill development courses for serving the global market.

ix) Only those children who are either high 'performers' or 'achievers' in competencies needed by the market or those whose families can afford the cost of education shall be allowed to proceed beyond primary education. For the rest, access will be confined to vocational skills so that they can serve the needs of a hierarchically controlled market-driven economy. The XI Plan proposal of setting up 6,000 model schools is precisely in fulfillment of this purpose, so that the high 'performers' or 'achievers' from among the poor could be identified by screening and then honed for the global market.[32]

x) Parallel layers of education of varying quality shall be the only educational facilities provided to more than half of India's children. SSA, patterned after World Bank's DPEP, is designed to achieve this purpose.

xi) Public-funded teacher training institutions are being allowed to deteriorate and be replaced by private institutions. Well-trained teachers shall be available only for private schools. Regular trained teachers in government schools shall be replaced by 'para-teachers'. This, too, is the guiding theme of SSA. The financial estimates for implementing 'The Right of Children to Free and Compulsory Education Bill, 2008' are also based on this logic.[33]

xii) Programmes like bridge courses and 'back-to-school camps', as provided for in SSA, shall be encouraged for the present as sops for the masses, even though they hardly provide access to functioning schools.

xiii) In the name of 'English-medium' schools, the majority of the children will be deprived of the power to articulate their thoughts in either their mother tongue or English, thereby resulting in lack of subject knowledge, critical thinking, creativity and, therefore, also general democratic consciousness. Given the inferior quality education, the only option for them will be to acquire some marketable vocational skills and join the hierarchically exploited skilled workforce in the global market.

xiv) Those who manage to cross the barrier of senior secondary education will be able to access higher and technical/professional education in private institutions only with bank loans subsidised through public funds. This is yet another camouflaged form of public-private partnership. In order to be able to return the loan following completion of education, these specially selected 'high achievers', too, will be compelled to mechanically contribute to corporate growth without ever being able to reflect upon the contribution they would be making to enhance the capacity of the neo-liberal capital to further exploit the global resources. The market objective of having an 'intellectually vibrant, creative and technologically competent' elite segment of society but entirely subservient, regimented and ideologically co-opted could not have been better achieved!

xv) Parallel institutional structures for financing and managing education are being created *outside* the government such that the State's role may be made superfluous.[34]

xvi) Using the rhetoric of decentralisation and 'community' participation, the legitimate functions of the government are being hurriedly 'devolved' to the Panchayati Raj institutions and other local bodies without ensuring that (a) the government's obligation for adequate financing of education is fulfilled; (b) the local bodies have the necessary vision, administrative acumen or the legal powers to meet even the minimum challenges; and, more importantly, (c) the caste-ridden, patriarchal and generally retrogressive character of these bodies will not be counter-productive. While resisting legislation to guarantee fundamental right to education of equitable quality and to institute a common school system, the State shall have no hesitation whatsoever to legislate to transfer its constitutional obligations to the local bodies for which World Bank shall make available both direct and indirect funding. The real agenda behind all this is to dilute the role of the State and to enable the local bodies to *directly* negotiate and sign MoUs with World Bank. An identical process has already begun in several states by paving the way for privatisation of natural resources like land, forest and water. The next is the turn of about 1.2 million government schools when the local bodies in urban/rural areas shall be persuaded by the World Bank to transfer their assets for privatisation.

MINISCULE INVESTMENTS AND DISPROPORTIONATE INFLUENCE

In spite of the high profile character of the externally assisted projects such as DPEP, the finance provided by them is miniscule, if not just outright ridiculous. From 1999-2000 to 2001-02, for example, when external assistance to DPEP was at its peak, the external assistance ranged between 0.039 percent and 0.053 percent of GDP respectively. For all externally assisted educational projects put together, it was only marginally higher (see Tables 1a,b). Even as percentage of the total expenditure incurred on education by the Centre and the states together, the external assistance ranged between 0.9 percent and 1.5 percent. Yet, we have seen in the preceding sections how the World Bank and other international agencies managed to dilute and distort both the constitutional vision of education and the 1986 policy passed by Parliament.[35]

What further evidence is required for the steady attrition of India's sovereignty that has been taking place since 1991?

The disproportionate influence exercised by the World Bank and its allied agencies required a two-fold strategy. First, the quality of school education was made to deteriorate by diluting the norms relating to various critical parameters. The comparison of the norms, as per the 1986 policy, recommended by the government of India's expert group (1999) and the SSA norms (one-third of SSA funds come from World Bank and allied agencies) shows how

Table 2
Dilution of Norms and Standards in Elementary Education
the neo-Liberal strategy for demolition of the government school system

No.	Norms	Expert Group	SSA
1.	Pupil:Teacher Ratio	1:30	1:40
2.	Av. Monthly Salary of Teachers	Primary – Rs. 5,000 Upper Primary – Rs. 6,000	Rs. 3,000
3.	Enrolment in Private Schools	NIL	15 percent
4.	Parallel Layers of Inferior Quality Schools	NIL	A major role for Alternative Schools & EGS Centres
5.	No. of Additional Teachers Required	35.6 lakh (minimum of 3 teachers in each primary school)	11.5 lakh (minimum of 2 teachers in each primary school)
6.	Total No. of Classrooms Required	43 lakh (minimum of 3 rooms in each primary school)	11 lakh (minimum of 2 rooms in each primary school)
7.	Free Uniforms, Scholarships, DIETs	Provision made	Not provided
8.	Integrated Education Development: Cost per Disabled Child	Rs. 3,000	Rs. 1,200
9.	a) Grant per School	Primary – Rs. 3,000 Upper Primary – Rs. 5,000	Rs. 2,000
10.	b) Grant per Teacher	Primary – Rs. 500 Upper Primary – Rs. 700	Rs. 500
11.	(a) + (b): Financial Implication	Rs. 670 crores	Rs. 395 crores
12.	c) Teaching-Learning Equipment:	Rs. 1,029 crores	Rs. 402 crores

Source: Tilak, JBG (2003), A Study on Financing of Education in India with a Focus on Elementary Education, South Asia EFA Forum, NIEPA, New Delhi, May 2003, Appendix A.1 and A.2.

SAP conditionalities were dictating terms for educational planning and allocations.

The second strategy emerged out of the 'knowledge agenda' of the global market. For this purpose, the World Bank has carefully funded research, project evaluation and appraisal, consultancy, publications and international exchange of academia **in order to co-opt intellectuals in its neo-liberal project, prevent generation of counter-knowledge and thereby subtly modulate the political economy of knowledge. The market control over generation, character, content and distribution of knowledge is certainly the most powerful method of manipulation and regimentation of the public mind, policies and critique, thereby maintaining the hege-**

mony of the global capital over world's natural and human resources. The people's movements need to decipher this epistemic challenge of the global market forces and imperialist globalisation with a view to not only resist it but also to build a **political programme of emancipative knowledge** dedicated to human welfare and peace.

ALTERNATIVE VISION

The only known option for the people of India is to struggle for establishing a fully publicly funded common school system based on neighbourhood schools (CSS-NS). Such a system exists in several of the advanced economies of the world, including the G-8 countries. However, while envisioning such a system, we have to be careful that the Indian version is not a poor carbon copy of what exists in the advanced economies. For this, one has to ensure that *it is conceived in consonance with the socio-economic, cultural and historical conditions of each geo-cultural region of the country,* while sharing a broadly common vision of education rooted in the Constitution.

The CSS-NS implies a heterogeneous classroom representing the diversity (along with disparity) prevailing in the neighbourhood. Only then, all sections of society, including the most powerful, will have a vested interest in improving the government school system. The neighbourhood school needs to be envisioned as *a common public space where children of diverse backgrounds can study and socialise together.* This is a pre-condition in a society like ours for forging a sense of *common citizenship*. Therefore, the CSS-NS has the potential of becoming a powerful means of promoting solidarity in the working class for undertaking democratic struggles for social transformation.

Also, can there be a fundamental right to unequal and inferior quality education? Does the Constitution permit a fundamental right to education that violates the principles of equality and social justice enshrined in Articles 14, 15(1) and 16? Naturally, do not. Given this, do we have any option other than the CSS-NS that will be in conformity with the vision of education emerging from the Constitution?

Some of the salient features of the CSS-NS could be spelt out as follows:

a) The entire school system is to be conceived such as to guarantee through an unambiguous legislation entirely free education of equitable quality from kindergarten to Class XII.

b) All schools shall have a common set of minimum norms and standards pertaining to infrastructure, quality of teachers, teacher recruitment, pupil: teacher ratio, educational aids, ICT facilities, libraries and laboratories, facilities for music, fine and performing arts and sports; in the present circumstances, for want of a better model, we can say that no school shall have norms and standards lower than those of Kendriya Vidyalayas, while striving for even better norms.

c) Each school, state-funded or otherwise, shall be required by law to act as a genuine neighbourhood school such that all children residing in its neighbourhood, irrespective of class, caste, religion, gender, language or disability (mental or otherwise), shall be admitted therein and study and socialise together without any discrimination whatsoever.

While delimiting the neighbourhood, the inviolable guiding principle for the prescribed authority shall be to optimise socio-cultural diversity.

d) Although CSS-NS shall be entirely state-funded, the governance shall not be state-controlled. The role of the State shall be limited to policy-making, legislating, guaranteeing adequate funding and monitoring.

e) CSS-NS shall have a system of governance that will be decentralised, democratic, flexible, transparent and accountable to the public, particularly to the parents. A carefully balanced and incremental devolution of powers will have to be undertaken while keeping in mind the role of the local bodies under the 73rd and 74th constitutional amendments. A structured space for adequate participation in decision-making will have to be ensured through legislation for women, SCs, STs, OBCs and other sections in proportion to their representation in the body of parents as well as the community.

Within a broadly common national curriculum framework, clusters of schools at the level of a district/block or even sub-block level shall have a structured and negotiated space for flexibility to innovate at the level of curriculum, texts, pedagogy and evaluation parameters, as long as this is periodically reviewed in a democratic manner.

All schools shall follow a common language education policy based on a set of linguistically and pedagog-

ically sound principles and aimed at optimising the child's capacity to think, learn and articulate. The CSS-NS shall recognise the powerful pedagogic role of mother tongue as part of multi-linguality of the Indian child in acquiring knowledge and learning languages other than one's mother tongue. This, of course, includes learning of the state language at an appropriate stage but does not permit the prevailing assumption that the state language is the mother tongue of every child living in the concerned state (Article 350A must also be respected). Equal opportunity for learning good quality English and ability to use it as a means for acquiring higher knowledge will certainly have a legitimate space within this framework but not for imposition, discrimination or substitution of the child's cultural identity and historical ethos.

All schools shall provide equitable infrastructural and pedagogic space for the disabled children to study and socialise in common classrooms, irrespective of the nature of disability. All necessary support systems and educational aids will have to be guaranteed in each and every school as a fundamental right of all disabled children. Capacity to fulfill this objective is to be viewed as a test of the pedagogic and cultural sensitivity of the CSS-NS. Special classes/ schools or home-based education will be sought as only the last options.

The entire epistemological (related to the genesis, sources and character of knowledge), cultural and pedagogic framework of teacher education needs to be critically reviewed, radically restructured and creatively re-synthesised in order to meet the challenge of building the CSS-NS. A new vision of teacher and teacher education is long overdue. This indeed is to be envisaged as a pre-condition for moving towards CSS-NS and, therefore, allows no compromise whatsoever.

Private schools can exist as long as they act as neighbourhood schools and accept all other aforesaid obligations, in the same manner, as do the state-funded schools. In CSS-NS, there is adequate space for philanthropy, flexibility and creativity but not for hegemony (cultural or otherwise), subjugation or profiteering.

Critical pedagogy to guide the transformation of the present multi-layered hierarchical school system into CSS-NS, since it implies much more than structural change; it implies an education that liberates the child's mind, enabling her to *resist injustice, deconstruct capitalism and neo-liberalism and struggle for social transformation*.

CONCLUDING REMARKS

There is an adequate ground for contending that the fundamental right to education can be gained only through a publicly funded common school system based on neighbourhood schools as envisaged above. Resisting commoditisation of education and its inherent knowledge is integral to the agenda for moving towards this goal. Further, changes in school education are envisaged organically as part of changes in the entire education system, including higher, vocational and professional. In this sense, the struggle for building the common school system is simultaneously a struggle for epistemic and social transformation as well. To be sure, this struggle is also a part of the growing movement in the country against imperialist globalisation and for redeeming India's democracy, sovereignty and role of productive labour and knowledge in creating an egalitarian and just society.

–May-August 2009

Endnotes

1. Although amended through the 86th Constitutional Amendment (December 2002), the original Article 45 still holds since the aforesaid Amendment has not been notified as yet (i.e. as of February 2009).
2. See Report of the Committee for Review of NPE-1986 (1990), Govt. of India, Sections 5.1.1 to 5.1.6 and 6.1.1 to 6.1.3 along with the related recommendations.
3. The Part IV of the Constitution comprises the Directive Principles of State Policy that are not "enforceable by any court" but are "nevertheless fundamental in the governance of the country" and the State is duty bound to "apply these principles in making laws" (Article 37). In contrast, the Part III comprises Fundamental Rights that are enforceable in the courts. However, underlining the criticality of Part IV, the Supreme Court ruled in its Unnikrishnan Judgment (1993) that whereas the Part IV provides the goals of the Constitution, the Part III provides the means to achieve these goals.
4. This estimate is arrived at by adding the government-reported number of children in the "non-enrolled" category to the number of the so-called 'drop-outs' by Class VIII (Selected Educational Statistics, MHRD, Govt. of India, 2004-05).
5. The global research on language education, including research in India, is documented in NCERT's National Focus Group Position Paper on 'Teaching of Indian Languages' (NCERT, New Delhi, November 2006) which also makes profound recommendations on how to incorporate multi-linguality as a guiding principle for a coherent and pedagogically sound language education policy in India.
6. This phase of the Right to Education discourse has been documented in the background paper presented at the 'Convention on Education as a Fundamental Right', organized by the Department of Education, University of Delhi, Delhi, December 18, 1997 (Dr. Manmohan Singh represented the Congress Party in this Convention along with the senior leaders of other political parties as well).
7. For detailed analysis, see this author's papers entitled, 'Political Economy of the Ninety-third Amendment Bill', MAINSTREAM, December 22, 2001, New Delhi, pp. 43-50; 'C for Commerce', TEHELKA, June 14, 2008, pp. 44-45, http://www.tehelka.com/story_main39.asp?filename=cr140608cforcommerce.asp
8. See Footnote 5.
9. This exercise was pushed by a retired Director (an NRI) of the UNESCO Institute of Education, Hamburg, Germany.
10. Although the NCERT was made to publish the Ministry's report on MLLs, it did not advocate this idea until the National Curriculum Framework was re-written in 2000 under the NDA government. By this time, the neo-liberal agenda had started dominating the thinking of the India Inc.
11. DPEP Guidelines, Ministry of HRD, Govt. of India, Ch. III, p. 21, May 1995; Dhankar, Rohit, Seeking Quality Education: In the Arena of Fun and Rhetoric, in Seeking Quality Education for All: Experiences from the District Primary Education Programme, Occasional Papers, The European Commission, June 2002 and Lessons to Learn, Seminar, No. 436, December 1995.
12. See Report of the NPE-1986 Review Committee (i.e. Acharya Ramamurti Committee), Ministry of HRD, Govt. of India, Ch. IV, Section E, p. 100, 1990.
13. Sadgopal, Anil, A Post-Jomtien Reflection on the Education Policy: Dilution, Distortion and Diversion, in The Crisis of Elementary Education in India (Ed. Ravi Kumar), SAGE Publications, New Delhi, pp. 92-136, 2006.
14. The agenda of privatization and commercialization of education inherent in this innocuous looking notion of 'partnership' has after the passage of 17 years appeared in India's XI Five Year Plan in the form of 'Public-Private Partnership' (PPP) wherein the Indian State will transfer public funds and other critical resources (e.g. land), apart from legitimacy and credibility, to the private capital for commoditization of education. This is now the central theme of the XI Plan. In a subtle endorsement of PPP, a suggestion has even been made to set up "10 IIT-IIM level national institutes of teacher education" in PPP mode (Krishna Kumar, Partners in Education?, EPW, 19 January 2008, p. 11). See this author's detailed interview in Hindi entitled, Sarvajanik-Niji'Saajhedaari' Ya Loot, SHIKSHA-VIMARSH, Jaipur, Rajasthan, January-April, 2008, pp. 68-96. See also Footnote 27.
15. For instance, the Karnataka state government has constituted a World Bank-assisted body under Wipro's Azim Premji Foundation chairpersonship to advise on policy matters and also invited the same corporate group in 2007 to set up SIEMAT, a formal institutional structure for policy formulation relating to educational governance and teacher training - a move presently stalled due to public protests. See also Footnote 28.
16. In contrast, USA provides entirely free education from kindergarten to class XII which includes free textbooks, stationery, teaching aids (including computers), tests, co-curricular activities, games and sports, bus transport and lunch. Several other G-8 countries also provide free education.
17. The 'alternative modes of finance' for primary education suggested by the World Bank-UN collective in its Background Paper (Annexure 2, p. 146) on the Jomtien Declaration include private schools and user charges; http://unesdoc.unesco.org/images/0009/000975/097552e.pdf
18. Economic Survey 2007-08, Ministry of Finance, Government of India, Section 10.25, p. 249.
19. In 1999, the District Collector of Indore (Madhya Pradesh) in his report to the state's Chief Minister used the term 'rationalisation' to justify the closure of 30 government schools in the Indore city which were later turned into commercial ventures or police stations. Neither the Collector nor the Chief Minister expressed any concern about where had the children gone who had either entered low fee-charging private schools in the neighbourhood or given up on education altogether!
20. The 1986 policy norm for elementary school (Class I-VIII) would require this to be established within three km of each habitation, while also ensuring that every habitation would have access to a lower primary school

within one km. More than half a dozen states like Maharashtra, Gujarat, Karnataka, Andhra Pradesh, Meghalaya and Assam have primary schools ending at Class IV, thereby denying rural children access to Class V within one km of their habitation. This critical issue of school mapping was entirely ignored by the DPEP. In contrast, the Report of Bihar's Common School System Commission (2007) examined this issue and worked out its implications in terms of the size of the elementary schools, the primary: middle school ratio and the consequent increased financial allocations in order to ensure Fundamental Right to elementary education. This policy gap in Bihar noted in the Commission's report in 2007 is despite the implementation of the UN-assisted Bihar Education Project since 1990 and the World Bank-assisted DPEP since 1997.

21. Considered as being largely equivalent to the poorer sections among OBCs, as per the Sachar Committee Report (2007).
22. The basis of selection of foreign experts for the JRMs and their academic credentials have been solely in the domain of the World Bank or their allied international funding agencies. Even more importantly, the value of the contribution made by the foreign experts to JRMs is highly questionable in light of their rushed visits, absence of scientific planning, unfamiliarity with the complex local conditions and lack of transparency of their findings or reports.
23. Even the MoU signed between the World Bank and Govt. of India has never been made public.
24. Krishna Kumar et al, 2001, Economic and Political Weekly, 36 (7), 560-568.
25. In this instrumentalist paradigm, in the case of women, education is primarily expected to lower infant and child mortality rates, reduce fertility rates and improve household nutrition and health (see Primary Education in India, World Bank, Allied Publishers Limited, New Delhi, 1997, pp. 30-31, 39).
26. The proposal of school vouchers and Public-Private Partnership in education entered the XI Five Year Plan without such recommendation by either the CABE or any of its seven sub-committee reports in July 2005, in spite of the CABE being the highest democratic consultative structure (with representation of all state/UT education ministers, central educational authorities, academicians, writers, artists and social activists) for policy advice in education. See also Endnote 15.
27. In June 2007, the HRD Ministry engaged the Global E-schools & Communities Initiative (GeSCI), a conglomerate of Ireland, Canada, Sweden, Switzerland and Finland, to prepare the draft ICT policy for schools. In turn, GeSCI roped in the Centre for Science, Development & Media Studies (CSDMS), a Delhi-based NGO which works in collaboration with Microsoft and others corporations (Outlook, 24 November 2008). See also Footnote 16.
28. A publicly funded school system, similar to the proposed Common School System, exists in USA and other G-8 countries.
29. The education cess, introduced in 2004-05, is a special cess or surcharge levied at the rate of two percent on all major central taxes viz. income tax, corporation tax, excise duties, customs duties and service tax. The revenue from this cess is meant for elementary education. While the overall budgetary support is the source of funding for most developmental sectors, this is not the case with elementary education which receives substantial resources through this earmarked educational cess. From 2007-08 onwards, one percent additional cess is being levied to raise funds for secondary and higher education as well.
30. None of these reports analyse the systemic issues, documented in this paper, that are responsible for such deterioration of quality, lest the neo-liberal framework is deconstructed. This is also true for the World Bank-sponsored research on teacher absenteeism and James Tooley's study of Shahadara's low fee-charging private schools in Delhi which tend to present privatization as a panacea for educational backwardness.
31. See Sadgopal, Anil, C for Commerce, TEHELKA, June 14, 2008, pp. 44-45. http://www.tehelka.com/story_main39. asp?filename=cr140608cforcommerce.asp; Education Bill: Dismantling Rights, THE FINANCIAL EXPRESS, November 9, 2008, http://www.financialexpress.com/news/education-bill-dismantling-rights/383177/
32. See Sadgopal, Anil, The 'Trickle Down' Trick, TEHELKA, September 29, 2007, http://www.tehelka.com/story_main34. asp?filename=Ws290907 The_Trickle.asp
33. See Sadgopal, Anil, Education Bill: Dismantling Rights, THE FINANCIAL EXPRESS, 09 November 2008, http://www.financialexpress.com/news/education-bill-dismantling-rights/383177/
34. The central government went to the extent of even setting up a private company called Ed.CIL in mid-1990s to manage certain key aspects of the World Bank and other internationally funded programmes in education.Likewise, SSA depends upon a host of ad-hoc schemes introduced by corporate houses, NGOs and religious bodies.
35. Since 1991, more than a dozen policies, measures and/or schemes of education (including DPEP and SSA) have been instituted in the country which violate either the Constitution or contradict the 1986 policy or both. Yet, such programmes/ projects and their violative elements have not been formally and explicitly debated and approved by the Parliament. It is part of the neo-liberal agenda promoted by the World Bank to either weaken, bypass or demolish democratic structures and processes in order to allow the neo-liberal capital unregulated and unquestioned space for profiteering.

Hidden Apartheid

Children upto 18 years have a right to education and this is non-negotiable. Aruging that those who are perceived as drop-outs are actually pushed-out from the system. The State should immediately take complete responsibilty of ensuring compulsory education for all.

SHANTHA SINHA

There is an explosive demand among poor parents for education throughout the country. For them, education is an important tool to break the cycle of poverty and marginalisation. They see education bringing in equity and justice. They are willing to make enormous sacrifices to get their children educated. About six months ago, a team from National Commission for Protection of Child Rights (NCPCR) visited the residential bridge course (RBC) set up by the Sarva Shiksha Abhiyan in a remote tribal pocket at Jhajha (Jamui district) of Bihar. At the public hearing it was heard how an intense programme of social mobilisation with active role of the local youth and the gram panchayat members motivated over 400 tribal girls who had never been to school getting ready to join the RBC. However, the government had place only for 50. It was decided by the community that all the girls, aged 14, would go for this bridge course as once they turned 15they would lose their educational opportunity.

After the meeting and a drive of two kilometers, a group of tribal women stopped the convoy and told the NCPCR team that they wanted their children to complete at least class X but had no school after class V in the vicinity and their children had to walk 16 kilometers to go to the nearest school which was only up to class VIII. The NCPCR team asked them why they had not raised this issue at the public hearing and the women answered quite piquantly whether the authorities have to be told and did not know that their children too required education up to class X and more. This defied the conventional wisdom that tribal parents are not interested in getting their children educated and especially they do not want their girls to goto school.

Dantewada district in Chhattisgarh is an area that has been caught in a situation of civil unrest with the presence of naxals as well as the police, making it impossible for the local population to articulate their difficulties in accessing their entitlements. In the last six months, about five gram panchayats in the Sukma block have mobilised children in their villages to join the local schools with support from NCPCR and in coordination with the district authorities and NGOs. The news of children going to schools in these gram panchayats spread around in the neighbouring blocks. Many a tribal parent sought education for their children to extricate them from adversities once and for all. They did not want their children to suffer the same fate as they did.

Likewise the NCPCR team found in its visit to the northeast that at the relief camps of dis-

placed persons in Tripura and Assam there was a crying demand for education. In Manipur too, where despite suffering from HIV and AIDS children want to be educated. Among the migrant child labourers from Rajasthan to Gujarat, Orissa to Andhra Pradesh, Maharashtra to Gujarat, Bihar to Mumbai, it has been found that if only the education system had the capacity to reach out to each of them, these children would not have joined the labour force. In all the public hearings, the NCPCR heard voices of rescued child labourers yearning for education and struggling hard to win their battle for schools. It is evident that education alone can realise the possibility for the poor to change their predicament.

ABSENCE OF SOCIAL NORM

Despite a growing demand for education, a large number of children are not in schools. This appears as contradictory, but reasons are obvious. Firstly, there is a societal tolerance of child labour and absence of social norm for right to education. It appears normal that poor children are engaged in work. There is neither shock nor outrage that children are out of schools. In fact, the presence of a large number of children out of schools and engaged in some form of labour is even justified. Often it is stated that such children have to work because they are poor and the family needs the income earned by the children for their sustenance.

POOR INFRASTRUCTURE

The other reason for children being school dropouts is the lack of availability of schools, teachers and infrastructure. While there are enrolment drives and programmes of sensitisation of poor for accessing schools, there is no corresponding effort to create the necessary infrastructure to absorb the demand. There is a strong co-relation between the availability of infrastructure and the proportion of children in schools at each stage. It is not anticipated that a poor child entering class one would have to complete class 10. Exclusion of poor children from the system is pushing them away from the system. The school dropouts are indeed school push-outs. Further, instead of reinforcing sturdy institutions and strengthening existing structures and processes, the government has set up parallel systems in form of ad hoc programmes through the Sarva Shiksha Abhiyan. The quality of the programme is based on the decisions of concerned officials presiding at that point of time. With new officers replacing the old ones there is a shift in the implementation of the programme. For example, the programme may shift from emphasis on quality of education and teachers training, to bringing school dropouts into schools or provision of more classrooms and so on. Thus lack of institutionalisation of the schemes that are being implemented hinders the continuity of the programmes.

FIRST GENERATION LEARNERS

The entire education system including the schools is not designed for the first generation learner. For instance, in their urge to compete with the private schools there is an insistence on poor children to wear school uniforms in government schools. Those unable to get a school uniform are not allowed to attend school and thus get excluded. In the public hearing NCPCR held in Tamil Nadu, a child's only pair of school uniform got wet in the rain and so she went to school without the uniform. She was insulted by her teachers in such an inhuman way that by evening she committed suicide. The attempt is not to dramatise this particular incident but to show that even an issue like that of being reprimanded for not wearing a school uniform can have a profound impact on a child's mind for attending or not attending school.

Similarly, the inability of a child to procure a birth certificate or a transfer certificate can be detrimental to the child's continuance in school. In one such incident, the principal of a school issued a transfer certificate with his signature in blue ink and the next school did not accept the document as the signature of the principal should have been in green ink. By the time the issue was negotiated, the child lost one academic year and dropped out of school. Inability to produce birth certificates has led to denial of admission to millions of children.

MARKET DEMAND FOR CHILD LABOUR

In fact, the market utilises the large-scale exclusion of children from schools to its advantage. The path of children who are school dropouts is sealed for good. This is especially so with regard to the business that depends on unskilled labour force in the unorganised sector. They prefer children as they are source of cheap labour and can be forced to work for long hours. This can be affirmed if one looks into the stories of migration, trafficking, and child labour in our country.

FULL TIME FORMAL SCHOOLS

The Commission is of the view that children's right to education is non-negotiable. All children up to the age of 18 years must be provided access to schools. They have to be in full time formal system of education and not in the shift system. There have been stories in Maharashtra, Delhi, Madhya Pradesh, and Uttar Pradesh where they have shift systems in which children attend classes from morning 8 am to afternoon 1pm. It is noticed that shift system violates child rights as it eventually forces them to slip into the work force and not continue in the education stream.

The quality of learning and investments made at each stage reflects on the quality of learning in other stages of education. A weak pre-school education would have an impact on the higher levels and vice-versa. In this manner there cannot be competing demands on investments for education from within the education stream. All the stages of education are equally important, from pre-school to primary, elementary, secondary, and higher secondary level. Provisions have to be made to include children who have dropped out of school into age specific class giving them an opportunity for lateral entry.

EDUCATION NOW A COMMODITY

Most private schools in the country today are guided by the logic of the capital and have emerged as commercial ventures, small or big, successful or limping projects. This scenario is vastly different from the private schools which had emerged decades back to serve the educational needs of children and were non-profit organisations and charitable trusts that depended on State aid. Now in the framework of market, services are offered to such children who can buy education. Like any other product, it is in form. In their urge to acquire the 'brand' product as any consumer, the clients begin to spend more than what they can actually afford just as consumers of any commodity in the market. Education is becoming a commodity for sale and transaction, available only for those who can afford it.

Encouraging private schools as commercial enterprises compromises the principle of universalisation of education as it offers services only to those who can pay for it. Thus those who are deprived and marginalised are automatically out of its net. If left unregulated, the higher end suppliers would foster further exclusion, and thus reinforce class differentiation. The rich and the poor would never meet and there is every possibility of widening the divide. It would operate inadvertently as a system of hidden apartheid. This is contrary to the very tenor of schools that have always been institutions based on universalistic principles, nurturing equity and social justice and fostering inclusive democracy.

NEIGHBOURHOOD SCHOOLS

It is in this context that it becomes imperative to see the role of schools as institutions that are indispensable for creating conditions for an inclusive democracy and as instruments for building capacities of the citizens. In a situation where children from the neighbourhood join schools in that locality, and when equal standards are maintained in all schools in all neighbourhoods, creation of citizenship and not consumers is fostered. The very act of studying along with their peers in the neighbourhood, transcending class differentiation integrates children into a web of interaction, encouraging them to utilise creative modes of thinking and pursuit of knowledge. They enable children transcend their immediate environs and locate themselves in the context of a reality which is informed by a sense of larger society and its complex milieu. Thus the first step towards equity and bridging the gaps in the social and cultural hierarchies are actually addressed in schools that provide access to all in the neighbourhood, without spelling out preferences of any kind. Under such a circumstance, children aspire for similar kind of learning regardless of their class or cultural background.

This implies that the State must provide services to protect the rights of all children. It must lay down absolute standards for what constitutes a school in terms of education, infrastructure, teachers, and all other facilities and ensure that they are guaranteed. In emphasising the State as the essential guarantor of right to education, private schools too would have a role to play in ensuring that every child is in school. The State would have a role to bridge the gaps in both the government-run as well as private schools and improve their standards.

CONCLUSION

The successful accomplishment of ensuring that children's right to education is guaranteed would need a wholehearted attempt by all forces/institutions, both within the government and those that lay outside. All have a role to play in this. The commitment to provide

education for each and every child in the country must therefore become pervasive and indeed an obsession. In fact there has to be an agreement that there is a role for all the institutions and the battle is in arriving at this agreement and commitment for children. This would require firmness in wading through the logic of market and profitability that has unfortunately seeped into the delivering of services in education. This is certainly not an easy task. But the debate must go on and capture the imagination of one and all into partaking in the project of universalisation of education in India. If this goal is clear, then the arguments that emerge and the difficulties that are stated will be seen as a justification for maintaining the status-quo, which is denial of right to education to the children in our country. On the other hand if it is understood that children's rights have to be protected no matter what, then there would be solutions to make it practical for the rights to be enjoyed.

Education being a public good must nurture and enhance the principles of inclusion, non-discrimination, equity, and justice. It must be an entitlement and a right that is guaranteed by the State. In a context when it is becoming an acceptable discourse to run down the State giving it a cause to abdicate its responsibilities, there is a need to constantly bring to the forefront, the rights based perspective that resonates with the values of democracy, justice, and equity as enshrined in the Constitution of India.

— May-August 2009

Retreat of the Judiciary
Last Frontier Lost?

At a time when right to education is becoming an impossible dream, the State is gradually evading its responsibility, allowing private profit seekers to run amok in the absence of any control or regulatory mechanisms. At this juncture, the judiciary was expected to deliver the last ray of hope. Ironically, if recent judgements are any indicators, the courts seem to have tilted in favour of privatisation, making education inaccessible to vast population more than ever before.

MIHIR DESAI

After independence, India adopted what is known as the policy of welfare statism. This meant that the basic needs of the people, including health and education, were to be looked after by the State. Though the stated objectives were desirable, with half the population being below the poverty line, there was no way that could make education affordable except through State intervention. Planning documents and educational policies repeatedly reiterated this need.

Education, and more importantly primary education, was declared to be a sovereign function. State intervention was through three methods:

1. Direct establishment of educational institutions;
2. Subsidising education in private sector through grant in aid;
3. Prescribing strict regulatory measures including fees, salaries, etc. even in institutions which were self financed.

These policies were adopted not just at the primary level but also at the secondary school stage, degree college level and in higher educational institutions. Thus, the State through its various instrumentalities not just established primary schools but also degree colleges and colleges of higher education such as medical colleges, engineering colleges (including IITs), law colleges, etc.

Aid for school education has been provided essentially by the state governments while aid for other sectors has been through a combination of state and central agencies like University Grant Commission.

During the last two decades there has been a startling change in State intervention in education and this has been reflected in the following ways.

- Reduction in the number of educational institutions established by the State. Especially at the level of higher education the State has stopped establishing any new educational

institutions of its own. Even at the level of schools very few new educational institutions are being established by the State. When seen in the context of the increase in population the reality is stark.

- Reduction in number of institutions to which aid has been granted. Earlier any new school or college would be entitled to grant in aid from the State but the State is increasingly taking a position whereby any person starting an educational institution does not need to seek any aid from the State.

In respect of private educational institutions, virtually every state government has passed regulatory measures. In no other private sphere are regulations so extensive. No educational institution can be started without prior permission of the State. The infrastructure to be provided for each classroom is prescribed. So are common syllabuses. The maximum fees that a school could demand were prescribed. The method of appointment and termination of services of employees was provided. The wage scales of employees were prescribed by the State. Separate tribunals were set up to deal with grievances of employees. Education was the only private sphere where reservation in jobs and admissions has been introduced for the backward castes.

These regulations have been made applicable not only at the school level but also at the higher educational level. Private educational institutions have always disliked these regulations and long and extensive battles have been fought in the Supreme Court concerning these regulations.

BEGINNINGS OF THE BATTLE

At the forefront of these battles there have been the so-called minority educational institutions, which have certain protection under the Constitution. Under Article 30 of the Constitution, every minority has a right to establish and administer educational institutions of its choice. The argument has been that in view of this, any regulatory measure on a minority educational institution would be in violation of its fundamental right to administer the educational institution and therefore bad in the eyes of law. This struggle in the Supreme Court has been going on since 1957 and continues till date. It needs to be stressed that till the early nineties by and large the Supreme Court has been resisting this fierce attack from elite institutions but in the last decade or so it has virtually given a carte blanche to unbridled privatisation of education.

In 1957, the Supreme Court was first time called upon to decide on regulatory measures concerning minority educational institutions. Minority status is available both to religious and linguistic groups. The Supreme Court held that minority status has to be decided on the basis of population of a state and not of the country as a whole. This meant that for instance, in Maharshtra, all religious groups besides Hindus are minority and all linguistic groups besides those having Marathi as their mother tongue are classified as minority groups. The Court held that though the minority institutions had the right to administer their institutions, the right to administer did not include the right to mal-administer and thus regulatory measures were permissible to the extent that they enhanced educational excellence. Over the years, however, certain restrictions have been placed on the extent of regulations such as the method of recruitment of principal, reservation in posts and seats, etc.

The State has been progressively withdrawing from the educational sector. At the same time because of the extensive regulation of the private sphere including in the ceiling on fees, method of admission of students and the regulation of service conditions of employees the impact of privatisation was not fully felt.

But in the last few years, the Supreme Court has passed a number of judgements, which have had a tendency to open up the floodgates of privatisation without in any effective way trying to control its ill effects. The battle for privatisation has largely been led by the engineering, medical and other professional colleges which are the main money- spinners.

MOHINI JAIN CASE

It all started with Mohini Jain.[1] The case was decided by a two-judge bench of the Supreme Court presided over by Justice Kuldip Singh. Karnataka government enacted anti capitation fee legislation which regulated tuition and other fees. Under the Act, a notification was issued fixing fees for private medical colleges. This was challenged. To begin with the court went into the issue weather citizens of India have a right to education and if so whether such a right is infracted by high fees, etc. The court observed:

"The right to education, therefore, is concomitant to the fundamental rights enshrined under Part III of

the Constitution. The State is under a constitutional mandate to provide educational institutions at all levels for the benefits of the citizens. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer sections of the society. …Capitation fee is nothing but a price for selling education. The concept of 'teaching shops' is contrary to the constitutional scheme and is wholly abhorrent to the Indian culture and heritage."

THE SUPREME COURT MADE A VERY IMPORTANT OBSERVATION

"We hold that every citizen has a 'right to education' under the Constitution. The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The state may discharge its obligation through state owned or state recognised educational institutions. When the State government grants recognition to the private educational institutions it creates an agency to fulfil its obligation under the Indian Constitution. The students are given admission to the educational institutions- whether state-owned or state recognised- in recognition of their right to education under the Constitution. Charging capitation fee in consideration of admission to educational institution, is a patent denial of citizens right to education under the Constitution. ….Capitation fee makes the availability of education beyond the reach of the poor… The capitation fee brings to the fore a clear class bias. It enables the rich to take admission whereas the poor have to withdraw due to financial inability."

This judgement should have settled the issue. It laid down three principles:

- Right to education including right to higher education is a fundamental right;
- The State is obliged to establish educational institutions to carry out this task
- Capitation fee in any form leads to class bias and is unconstitutional.

UNNI KRISHNAN JUDGEMENT

But the matter did not rest here. Private medical and engineering colleges challenged the decision in Mohini Jain's Case and this was placed before a five judge Bench of the Supreme Court.[2] The Court, in Unni Krishnan's judgement held that though Mohini Jain was right in holding that right to education was fundamental, it was not right in holding that the fundamental right extended at all levels of education. In Unni Krishnan the Supreme Court held that every child in the country has a right to free education until he completes the age of 14 years. After this age, the right would depend on whether the State has financial resources or not.

The second aspect which was considered by the Court was whether private educational institutions should at all be permitted. The Court held that private educational institutions are absolutely necessary and they must be allowed to continue.

The third and major part of the judgment dealt with higher and professional education. In so far as self financed private educational institutions are concerned the Court held that, while commercialisation of education was not permissible, they must be allowed to recover the costs by charging higher fees.

The Supreme Court formulated a scheme for 'professional colleges' which would include medical and engineering colleges and also other such colleges. Fifty per cent of the seats were to be filled as 'free seats' i.e. seats to be filled in on the basis of overall merit with fees charged as per government rates. The balance 50 per cent of seats were to be filled by students who were willing to pay higher fees.

While the Court did try to balance between rights of poor and rich the flood gates had been opened. On the one hand it held that right to professional education was not a fundamental right, thus there was no obligation on the State to establish or aid professional colleges, on the other hand it held that even in professional colleges 50 per cent admissions would be on the basis of normal government fees. Of course it was not necessary that the 50 per cent free seats would only be available to poor persons. One should always bear in mind that Unni Krishnan's scheme and large part of the observations were confined to professional colleges.

T.M.A. PAI FOUNDATION

11 Judges of the Supreme Court decided this case which in a sense is a watershed in the judicial history.[3] The main issue which was raised before the court concerned minority educational institutions and their right to grant admission to students. But the scope was expanded and the Court largely opined on non minority educational institutions.

While speaking of education in general the Court

observed, “the governmental domination in the educational field must be resisted.” This was a shocking departure from the earlier view which regarded education as a sovereign function and looked at private intervention only as a supplemental effort.

The court also observed that private educational institutions should not only have a sufficient leeway to charge fees which enable them to recover the costs of education but fix fees in a manner that sufficient surplus is generated for future expansion of educational activities. So the students will not only have to pay for their own expenses but also for the future generation. “It has therefore to be left to the institution, if it chooses not seek aid from the government, to determine the scale of fee that it can charge from the students.” Though the court was not called upon to do so, it extended these observations also to unaided private schools. Similar observations have been made concerning non professional colleges.

Finally, the Court struck down the scheme prescribed under the Unnikrishnan Judgement concerning free seats and payment seats. Private unaided colleges have virtually been given a carte blanch in terms of fees and admissions.

T.M.A. Paid Foundation came up for interpretation in two subsequent judgements of the Supreme Court. In Islamic Academy of Education[4] one of the issues was whether educational institutions were entitled to fix their own fee structures? The Court directed every State Government to appoint a committee to fix fee structures especially of engineering and medical colleges after giving hearing to the managements and by taking into account the need of the colleges not just to recover costs but also to generate sufficient surplus.

In P.A. Inamdar Vs. State of Maharashtra[5] again Pai Foundation case came up for further interpretation. The Supreme Court held that any reservations especially for backward classes in unaided private professional colleges was not permissible. On the other hand the Court advocated reservation for Non resident Indians at 15 per cent. The Court also held that the decision in Islamic Education Society in so far as it sets up two committees one for fee structure and the other for admissions is valid.

CONCLUSION

The State’s intervention in education has been decreasing alarmingly while the private players have entered the field in a big way. The sufferers are the large chunk of poor persons for whom education is becoming more and more inaccessible. It was hoped in this context that the Supreme Court would focus more on how to make education including higher education available to the poor. On the one hand it should have emphasised the role of the State in continuing to perform its role in providing education and on the other it should have ensured that private educational institutions are regulated sufficiently so that the poor have access to education. It has miserably failed on both these counts.

— February-March 2006

Endnotes

1. 1992 3 SCC 666
2. Unni Krishnan Vs. State of A.P. 1993 1 SCC 645
3. T.M.A. Pai FoundationVs. State of Karnataka 2002 8 SCC 481
4. 2003 6 SCC 697
5. 2005 6 SCC 537

Old Issues for the New Year

The Right to Education Bill 2005 seems utterly hollow. It has not defined the role of the Common School System (CSS) in any way. Neither does it talk of providing free and compulsory education to children in a manner whereby all categories of schools become part of this network.

RADHIKA MENON

The contradiction between what the government says and what the government does, could not get wider than what is happening in the area of elementary education - which has swallowed up reams of pale green paper in government offices, corporate bond sheets, not to mention the NGO handmade paper. In the muddle, however, there is a method. Educational categories have been confused in the last 16 years of liberalisation, particularly in the area of elementary education. The confusion in the lexicon became a means for passing of primary education as elementary education when instead the Indian Constitution, had promised eight years of compulsory education, way back in 1950. Instead of getting the children to score the goals of eight years of education, the government of India (in tandem with World Bank, UNESCO, UNICEF and UNDP and a large number of NGOs) went ahead and moved the goal post closer through the basic education framework, whereby basic learning needs actually became as basic as literacy or as high as primary education.

ELEMENTARY OR BASIC EDUCATION

In the flush of all the new things flooding the country in the 90s, elementary education composing of eight years of education suddenly became an obsolete terminology and basic education the fashionable term. This fad became a convenient tool for the government to pass off schemes such as Education Guarantee Scheme, Shiksha Karmi projects and other such non-formal measures as schools. The tragedy was, that what was passed off, as a school was not even a school- no, not even an alternate one. These were places where there were no classrooms, where a single teacher minded scores of children without being able to either give attention or educate any of the children. In the period when poor children were being offered NFE (Non Formal Education) without even one trained teacher, the rich could access the much formalised and standardised International Baccalaureate within air-conditioned environs and a teacher-pupil ratio of 1:10. However, the protests of the people at least led to the return of elementary education-as eight years of education- back into the lexicon of the MHRD under UPA government, which even gestured to correct the Right to Education Bill. The NDA government had earlier completely messed up with the bill and the short-

changing of people had led to cries of protest from various quarters. Yet, in all the promises made lies the chasm between the said and the done, since a principle of co-existence was adopted between elementary education and basic education. The CMP speaks of elementary education but is silent on the Sarva Shiksha Abhiyan- the blue- eyed programme of NDA government, which the UPA Minister, Arjun Singh, did not fail to declare as " the National Agenda" in August 2005. It must be noted that SSA hopes to "universalise elementary education by community-ownership of the school system." It also claims to be "a response to the demand for quality basic education all over the country." Now for one, elementary education and basic education does not mean the same. Secondly, the quality of education promised in SSA is ridiculous as it legitimises EGS, alternate schools and cheap interventions of the government introduced in the post liberalisation period, even as people were demanding better quality education. Notably, the much talked about educational-cess has also been diverted to SSA and crores of rupees are being pumped into creating an in-equitable educational order. Thirdly, the hype associated with increasing the quality is dubious and for this it is sufficient to look at the norms of SSA. It claims that the SSA would strive towards providing two classrooms and two teachers in primary school. Remarkably, this is lower than what Operation Blackboard earlier had transitorily suggested -at least three classrooms and three teachers in primary schools. The difference is significant since it implies scaling down of both the infrastructure as well as the human resources associated with schooling, so where is all the money going? That is another story. While government primary schools are dismissed off as being of poor quality by all and sundry, the inadequacy of teachers is a major issue. Most primary schools have one teacher who looks at the educational needs of children at various levels of learning. Apart from this they have to update several registers, supervise the mid-day meal and cooking, promptly respond to calls for survey and even be prepared to go off and count the number of animals in the village that they are posted in! The SSA instead of enhancing the number of teachers in the primary school has gone on to reduce it from the Operation Blackboard levels. Also while it talks of eight years of schooling, in practice it also says that post primary education should be "as per requirement based on the number of children completing primary education, up to a ceiling of one upper primary school/section for every two primary schools". This naturally means that not all children would get eight years of schooling, as it also has to be ensured that only 50 percent reach the upper primary. Hence most would be provided only basic education and not elementary education.

COMMON SCHOOL SYSTEM

In the meantime, there has also been a renewed discussion on Common School Systems (CSS). In India, it first found policy mention in the post independence period in the Kothari Commission of 1964. Despite the Common School System being one of the oldest policy suggestions, it has also been one of the most misunderstood. The CSS does not mean that education is pulled out of all social context and that specific requirement of certain groups and communities need to be brushed over, as is purported by the choice theorists and the private school admirers.

It is worthy to observe here that America and other advanced capitalist-developed countries, not to mention socialist societies have built their educational foundation on the Common School System. Considering the democratising possibility of a Common School System, it could have been a powerful means for bringing together diverse groups of children, which it also did in areas where neighbourhood government schools were the only means of formal education. However, the CSS in principle never got practised widely in India. And in the post liberalisation period with equity given the boot, CSS was forgotten.

In 2004, with the re-formulation of the Central Advisory Board of Education (CABE), the CSS, which had in the meantime entered the cold storage found discussion space again. In 2005, the Common School System was defined as those schools that are "founded on the principles and values enshrined in the Constitution and provides education of a comparable quality to all children in an equitable manner irrespective of their caste, creed, language, gender, economic or ethnic background, location or disability (physical or mental), and wherein all categories of schools - i.e. government, local body or private, aided or unaided, or otherwise - will be under obligation to (a) fulfil certain minimum infrastructural (including those relating to teachers and other staff), financial, curricular, pedagogic, linguistic and socio-cultural norms and (b) ensure free education to the children in a specified neighbourhood from an

age group and/or up to a stage, as may be prescribed by the appropriate authority." This definition is explanatory, but it makes greater sense when the minimum infrastructure is spelt out and the age and stage of minimum education negotiated. But this definition has already been brushed aside even before the ink dried on the paper as the CABE definition of CSS proceeded parallel to other activities like SSA, which goes counter to what CSS should imply. Similarly, 'The Right to Education Bill 2005' also did not care to define the Common School System. Neither did it talk of providing free and compulsory education through CSS to all children in a manner wherein all categories of schools become part of the CSS network. Instead it clubs private unaided schools with certain State run schools such that they have to provide only 25 percent of its seats to students from weaker disadvantaged sections. These State run schools include the Kendriya Vidyalaya, Navodaya Vidyalayas, Sainik schools and other schools that the government may periodically notify and which receive funding that allows infrastructure, teachers and activities that ensures that talent flowers. The establishment of special schools for nurturing talent, unfortunately, has been a convenient ploy adopted by governments since the NPE 1986, for discarding its responsibility towards the larger set of schools where a majority of the pupils, including substantial section of the students from disadvantaged sections study.

The 'twenty five percent' reservation is also curious, since there is no reason why it should be 25 percent and not 50 or 75 percent. It is possible that this has been based on the Delhi High Court ruling wherein private unaided schools have been asked to fulfil its promise made to the land allotment agency -the DDA- on providing free ship. But even an examination of this indicates that this has hardly succeeded in ensuring quality education to all the poor children. The schools have gone out of the way to keep the poor children out and have devised all possible measures to keep out those who need it with excuses of how the poor child would get traumatised by being in a rich setting! Several schools have even claimed that no poor child approached them and hence they are not to blame for the non-fulfilment of the stipulated numbers. Still others have filled up the quota with the children of their staff. While there is need to spell out what the CSS means in greater detail in the Right to Education Bill 2005 and work further non-negotiables that are essential for ensuring any meaningful free and compulsory education, the bill has found a natural hurdle. The arm that gives is also the arm that twists, particularly when it comes to making the financial requirements. The Prime Minster appointed a committee, which included the Planning Commission and the MHRD, which declared on 4th January 2006 that the financial assumptions of the bill were on the higher side and felt it was "irrational" to bring the non formal system into the formal system of education as the former had been "successful". Educationists and social activists hotly contest the success of the non-formal streams and it is yet to be proved that non-formal set ups are superior to formal ones. And it is still unexplained why, if the non-formal schools are so successful, are there so many formal private schools being allowed to mushroom. But whatever be the matter, we have a tale where the same government, which had re-initiated the discussion on the CSS has simultaneously worked out a method for finishing the same. The 86th Constitutional Amendment, which was depicted by the NDA government as the celebrated entry of education into fundamental rights, also cleverly made it the fundamental duty of parents to educate their children (without clarifying what the State's responsibility would be in the kind of education provided). That legacy continues in the absence of any concrete financial promises and particularly with the dismissal of demands for regularising the non-formal into the formal stream. Yet the fact of the matter is, these issues are far from a closed subject for people who are going beyond all their possible means to educate their children and also for those who see the democratising potential of equitable education in an inequitable society like ours.

— February-March 2006

Minds Sans Borders: National Curriculum Framework 2005

The Central Advisory Board of Education has approved, despite strong notes of dissent, the National Curriculum Framework, 2005. With minor cosmetic changes, without addressing major issues, including the most dangerous trend of communalisation of education.

ARJUN DEV

In September 2005, the Central Advisory Board of Education (CABE), which had been reconstituted by the UPA government, accorded its approval to the National Curriculum Framework - 2005 (NCF-2005) which had been prepared by a committee set up by NCERT a year earlier. There was some controversy when its draft was first placed before NCERT's Executive Committee and General Body, and subsequently meeting of the CABE held in June 2005, and its approval was withheld. SAHMAT brought out a publication which provided a critical appraisal of the draft. The revised draft, which was approved by the CABE despite criticism by some members, is based on exactly the same premises as the earlier one and is open to the same objections. Its implementation through syllabi and textbooks is already under way insofar as the school system under the control of the union government is concerned.

The concept of a NCF was visualised as an integral part of the concept of building a National System of Education (NSE) which was articulated in the National Policy on Education (NPE) and was adopted by the country's Parliament in 1986. The NPE stated, "The concept of a National System of Education implies that, up to a given level, all students, irrespective of caste, creed, location or sex, have access to education of a comparable quality." The NSE, envisaging a common educational structure which had been accepted by all states and union territories, the NPE further stated, "will be based on a national curriculum framework which contains a common core along with other components that are flexible". (Para 3.4) The importance of the national curriculum framework cannot be exaggerated as it is expected to be implemented throughout the country as part of an effort to build a national system of education.

The preparation of the first national curriculum framework by NCERT in 1988 was followed by its implementation throughout the country under a centrally sponsored scheme for reorientation of content and process of education. By the early 1990s, almost every state and

union territory claimed to have prepared new syllabi and textbooks in light of NPE and the National Curriculum Framework for elementary and secondary education brought out by NCERT in 1988. How, and whether at all, the present HRD ministery authorities and NCERT propose implementing it throughout the country, and not just in the CBSE, is not known.

The BJP-led NDA government began the use of the State authority to convert every organisation which was within the purview of the Union Ministry of HRD into an instrument for implementing the communal agenda of the RSS Parivar. For school education, the main instrument for this purpose was NCERT. In November 2000, the Union Minister of HRD released a new curriculum framework prepared by the new authorities of NCERT - National Curriculum. Framework for School Education (NCFSE). The basic thrust of the NCFSE was grossly violative of the secular principles on which the NPE was based. Following its 'promulgation' by the Union Minister of HRD, new syllabi and textbooks were prepared in all subjects and introduced in the CBSE-affiliated schools from the academic session 2002-03. The NCFSE and the syllabi and textbooks based on it were condemned by academics and secular opinion throughout the country as well as by every political party, except the AIADMK, which was not a part of the NDA. The present Union Minister of HRD described the BJP-led government's policy as 'Talibanisation' of education. While a three-judge bench of the Supreme Court rejected the PIL which had challenged its legality, two of the three judges directed the Union of India to reconstitute the CABE (which the Union Minister of HRD had pronounced dead) and place the NCFSE before it for its consideration. The BJP-led government ignored the directive and did not reconstitute the CABE.

The communalisation of education was among the major issues in the 2004 parliamentary elections that led to the ouster of the BJP-led government. The UPA's Common Minimum Programme promised to 'take immediate steps to reverse the trend of communalisation of education, which had set in the past five years' and the UPA government's HRD minister described what he intended doing as 'detoxification'.

When the UPA government came to power, it was expected that the NCFSE and the syllabi and textbooks based on it would be dropped and the 1988 curriculum framework based on it would be restored to. This did not happen except that history textbooks of pre-BJP period were partially restored. The UPA government reconstituted the CABE, but did not consider it necessary to place before the NCFSE for its consideration. The NCFSE, the source of communalisation of school curriculum, thus was not rejected and has remained as the national curriculum framework under the UPA's regime during the past two years. This framework, along with the syllabuses and textbooks, would begin to be replaced in a phased manner from the next academic session with the process to be completed in 2008-09.

The 'immediate steps' promised in the CMP 'to reverse the trend of communalisation of education' failed to materialise. What did materialise within two months of the UPA coming to power was that communalisation of education was no longer an issue. On 21st July 2004, the secretary, secondary and higher education, wrote to NCERT to undertake the review of the NCFSE-2000, as, according to the letter, the NPE required the national curriculum framework to be reviewed every five years. In fact, there is no such stipulation in the NPE. The problem with the NCFSE, therefore, was not that it provided the blueprint for communalising school curriculum but it required being reviewed because of a non-existing provision in the NPE. (In any case, though it was formulated in 2002, it had come into operation just two years before the secretary's letter to NCERT.) This letter further stated that "While undertaking the review, we are sure you would take into account the Yashpal Committee Report on 'Learning Without Burden' and Chapter eight of the Programme of Action (1992), prepared under the National Policy on Education." It is not clear why the secretary singled out chapter eight which deals with secondary education and ignored various other chapters dealing with early childhood care and education, elementary education, vocational education, and evaluation process and examination reform that have a bearing on the curriculum framework.

It is further intriguing that the letter made no mention of another report which had been prepared by a group set up by the HRD and submitted to it in September 1993, about two months after the Yashpal Committee Report had been submitted. This

How education was communalised

Human resource development minister in the BJP-led NDA government convened a conference of education ministers of States and Union Terrotories (Uts) in October 1998. This conference ended in a fiasco after the participating ministers threatened to walk out unless the agenda item on 'Indianisation, nationalisation and spiritualisation' of curriculum was formally withdrawn. The document, which the union minister had included in the agenda of the conference, was stated to have been prepared by a group of experts; it had actually been prepared by a body called the Akhil Bhartiya. Vidya Bharti Shiksha Sansthan which had been set up by the RSS and ran thousands of schools in various parts of the country. The Vidya Bharti schools carried on various activities and programmes and introduced its own publications on Sanskriti Jnan. (Knowledge of Culture) to implement the 'educational' and 'cultural' ideology of the RSS. Some of the activities of the sansthan in its schools had become public knowledge before the education ministers met in the conference convened by the HRD minister. The NCERT had released a report in 1993 on some of the publications that were being used in Vidya Bharti schools. Referring to two primary level books used in these schools, the report stated, " The intolerant and extremely crude style and language as well as the totally uninhibited way historical 'facts' have been fabricated are designed to promote not patriotism, as is claimed, but totally blind bigotry and fanaticism." The Sanskriti-Jnan series, according to the report, was 'designed to promote bigotry and religious fanaticism in the name of inculcating knowledge of culture in the young generation'. It recommended that these publications should not b allowed to be used in schools and the government may also 'consider appropriate steps to stop the publication of these materials, which foment communal hatred'. With the coming to power of the BJP-led government, a document prepared by the Vidya Bharti Sansthan to change the curriculum in order to 'Indianise, nationalise and spiritualise' was now sought to be made the official policy of the government of India in the area of curriculum. However, as indicated earlier, the attempt ended in a fiasco - the HRD minister faced by the near unanimous opposition of the ministers of education of states formally announced the withdrawal of the document from the Agenda of the conference. It may be recalled that during the entire period of the BJP-led government's rule, the 1998 conference of education ministers was the only conference convened by the union government to consult ministers of education of States on any matter of educational policy and programme. The Central Advisory Board of Education [CABE] which had all State education ministers as members and had been the main forum to evolve national consensus on educational policies and programmes since before independence was pronounced dead.
After the 1998 fiasco and with the change of 'regimes' in NCERT, UGC and every other educational body under the con-

report, entitled report of the group to examine the feasibility of implementing the recommendations of the National Advisory Committee (the Yashpal Committee), provided a somewhat understated critique of the Yashpal Committee Report and in effect rejected it. The existence of this report could not have been unknown to the secretary, except in the unlikely event of total loss of institutional memory. The stated objective of the committee headed by Professor Yashpal, which prepared the NCF-2005 was to review the NCFSE-2000, in line with what was mentioned in the secretary's letter. However, the committee undertook no review whatsoever. There is precisely one sentence in the 124-page text of the NCF-2005, which mentions NCFSE-2000. And this mention has nothing to do with the NCFSE-2000 being a document, which was the main source of communalising school curriculum and introducing various other distortions in it. The mention is limited to its failure to deal with the vexed question of curriculum load. The real culprit, according to the framers of the NCF-2005, even on this count, was the pre-BJP period's national curriculum framework of 1988 which in its articulation through courses of studies and textbooks resulted in an increase in 'curriculum load' and made learning at school a source of stress'. It may be noted that this assessment had been originally made in the Yashpal Committee Report in 1993 and the group set up by the HRD, which had 'examined' that report had rejected this assessment of the syllabuses and textbooks, which NCERT had brought out as a follow-up of the national curriculum framework of 1988. The framers of the NCF-2005 have made curriculum load, the issue that may or may not exist, the sole basis for preparing it. The document says, "The review of National Curriculum Framework, 2000 was initiated specifically to address the problem of curriculum load on children." The trend of communalisation of education, which the CMP promised to take immediate steps to reverse, has

trol of the union ministry of human resource development, the ideology of BJP began to be implemented in every sector of education. UGC advised the universities to introduce courses in astrology and Paurohitva (to meet the newly discovered demand for Hindu purohits abroad) and promised the necessary funds. ICHR withdrew from the press two volumes of its Towards Freedom project. NCERT produced a new curriculum framework and new syllabuses and textbooks based on it. The thrust on value education was claimed as the most distinctive contribution of the new curriculum framework. What it actually sought to do was to basically substitute obscurantism for value education by removing from the curriculum every emphasis on secularism and secular values, by tampering with the concept of scientific temper, by its emphasis on religion as the source of values and on teaching of religions (which in the textbooks became teaching about the superiority of one religion - Hinduism - over all others), by its reference to the concept of IQ, long since rejected in education for being unscientific, racist and discriminatory, and of academically obscure, if not meaningless, concepts of Emotional and Spiritual Quotients, by seeking to inculcate in the learner a 'reasonable' (not a rational) outlook, and by superior 'indigenous knowledge'. The history fabricated by the RSS which was integral to the ideology of Hindu communalism now had the authority of the state behind it and new history books, which played up the 'Hindutva view of India', written by compliant historians were put out to replace those prepared by some of the country's best historians which had been brought out by the NCERT in the period before the BJP-ledgovernment came to power. The authors of the pre-BJP history books were condemned by HRD minister and NCERT's director appointed by him as being worse than cross-border terrorists. Amartya Sen in The Argumentative Indian has referred to the rewriting of Indian history during the period of the BJP-led government's rule, particularly to NCERT's textbooks in which 'there was not only the predictable sectarian bias in the direction of the politics of 'Hindutva', but also numerous factual mistakes of a fairly straightforward kind'. "Many Indians", according to him, "felt greatly alarmed at that time that the Hindutva movement would stop at nothing short of alienating India from its own past through their control over schools and textbooks". He has mentioned how a textbook on the history of modern India made no reference to the assassination of Mahatma Gandhi. This omission had been justified by NCERT's director on the ground that 'everything can't be mentioned'. In the subsequent edition of the book, a mention of the assassination was made but when asked why there was no reference to the assassin being a Hindu fanatic, the director's response was that doing so would be academically and pedagogically unsound.

The framers of the new curriculum framework (of 2005) have observed total silence on the issue - they have, as they have said, 'tended to avoid the blame game'.

become a non-issue. In fact, even the word 'communalism', much less the role of education in combating it, doesn't occur in the 124-page text of the NCF-2005. The fact that chapter eight of the programme of action (1992) mentioned in the secretary's letter has been completely ignored in the process is a small matter when even the national policy on education is hardly referred to. There is a total absence of any reference to many major recommendations of the national policy on education. This is not surprising because most of the formulations in this NCF will have the effect of negating the main thrust of the policy, which was on building a national system of education.

— February-March 2006

Higher Education: Ugly Face of Knowledge Economy

With the basic issues of quality, equity and access to higher education in India still unresolved, the country is ill prepared to generate knowledge creators or workers of the highest quality largely due to government apathy. If the current trends are any indication, reliance on the market forces is further aggrevating the crisis.

N RAGHURAM

Higher education in India is gasping for breath, at a time when India is aiming to be an important player in the emerging knowledge economy. With about 300 universities and deemed universities, over 15,000 colleges and hundreds of national and regional research institutes, Indian higher education and research sector ranks the third largest in the world, in terms of the number of students it caters to. However, not a single Indian university finds even a mention in a recent international ranking of the top 200 universities of the world, except an IIT ranked at 41, whereas there were three universities each from China, Hong Kong and South Korea and one from Taiwan.

On the other hand, it is also true that there is no company or institute in the world that has not benefited by graduates, post-graduates or Ph.D.s from India: be it NASA, IBM, Microsoft, Intel, Bell, Sun, Harvard, MIT, Caltech, Cambridge or Oxford, and not all those students are products of our IITs, IIMs IISc/TIFR or central universities, which cater to barely one per cent of the Indian student population. This is not to suggest that we should pat our backs for the achievements of our students abroad, but to point out that Indian higher educational institutions have not been able to achieve the same status for themselves as their students seem to achieve elsewhere with their education from here.

While many reasons can be cited for this situation, they all boil down to decades of feudally managed, colonially modelled institutions run with inadequate funding and excessive political interference. Only about 10 per cent of the total student population enters higher education in India, as compared to over 15 per cent in China and 50 per cent in the major industrialised countries. Higher education is largely funded by the state and central governments so far, but the situation is changing fast. Barring a few newly established private universities, the government funds most of the universities, whereas at the college level, the balance is increasingly being reversed. The experience over the last few decades has clearly shown that unlike school education, privatisation has not led to any major improvements in

the standards of higher education and professional education. Yet, in the run up to the economic reforms in 1991, the IMF, world bank and the countries that control them have been crying hoarse over the alleged pampering of higher education in India at the cost of school education. The fact of the matter was that school education was already privatised to the extent that government schools became an option only to those who cannot afford private schools mushrooming in every street corner, even in small towns and villages. On the other hand, in higher education and professional courses, relatively better quality teaching and infrastructure has been available only in government colleges and universities, while private institutions of higher education in India capitalised on fashionable courses with minimum infrastructure. Nevertheless, the successive governments over the last two decades have only pursued a path of privatisation and deregulation of higher education, regardless of which political party ran the government. From Punnaiah committee on reforms in higher education set up by the Narasimha Rao government to the Birla-Ambani committee set up by the Vajpayee government, the only difference is in their degree of alignment to the market forces and not in the fundamentals of their recommendations.

With the result, the last decade has witnessed many sweeping changes in higher and professional education: For example, thousands of private colleges and institutes offering IT courses appeared all across the country by the late 1990s and disappeared in less than a decade, with devastating consequences for the students and teachers who depended on them for their careers. This situation is now repeating itself in management, biotechnology, bioinformatics and other emerging areas. No one asked any questions about opening or closing such institutions, or bothered about whether there were qualified teachers at all, much less worry about teacher-student ratio, floor area ratio, class rooms, labs, libraries etc. All these regulations that existed at one time (though not always enforced strictly as long as there were bribes to collect) have now been deregulated or softened under the self-financing scheme of higher and professional education adopted by the UGC in the 9th five-year plan and enthusiastically followed by the central and state governments. This situation reached its extreme recently in the new state of Chattisgarh, where over 150 private universities and colleges came up within a couple of years, till the scam got exposed by a public interest litigation and the courts ordered the state government in 2004 to derecognise and close most of these universities or merge them with the remaining recognized ones. A whole generation of students and teachers are suffering irreparable damage to their careers due to these trends, for no fault of theirs. Even government-funded colleges and universities in most states started many "self-financing" courses in IT, biotechnology etc., without qualified teachers, labs or infrastructure and charging huge fees from the students and are liberally giving them marks and degrees to hide their inadequacies.

It is not that the other well-established departments and courses in government funded colleges and universities are doing any better. Decades of government neglect, poor funding, frequent ban on faculty recruitments and promotions, reduction in library budgets, lack of investments in modernization leading to obsolescence of equipment and infrastructure, and the tendency to start new universities on political grounds without consolidating the existing ones today threatens the entire higher education system.

Another corollary of this trend is that an educational institution recognized in a particular state need not limit its operations to that state. This meant that universities approved by the governments of Chattisgarh or Himachal Pradesh can set up campuses in Delhi or NOIDA, where they are more likely to get students from well off families who can afford their astronomical fees. What is more, they are not even accountable to the local governments, since their recognition comes from a far away state. Add to this a new culture of well-branded private educational institutions allowing franchisees at far away locations to run their courses, without being responsible to the students or teachers in any other way. This is not only true of NIITs and Aptechs, but is also increasingly becoming a trend with foreign universities, especially among those who do not want to set up their own shop here, but would like to benefit from the degree-purchasing power of the growing upwardly mobile economic class of India. Soon we might see private educational institutions getting themselves listed in the stock market and soliciting investments in the education business on the slogan that its demand will never see the sunset.

The economics of imparting higher education are such that, barring a few courses in arts and humanities, imparting quality education in science, technology, en-

gineering, medicine etc. requires huge investments in infrastructure, all of which cannot be recovered through student fees, without making higher education inaccessible to a large section of students. Unlike many better-known private educational institutions in Western countries that operate in the charity mode with tuition waivers and fellowships (which is why our students go there), most private colleges and universities in India are pursuing a profit motive. This is the basic reason for charging huge tuition fees, apart from forced donations, capitation fees and other charges. Despite huge public discontent, media interventions and many court cases, the governments have not been able to regulate the fee structure and donations in these institutions. Even the courts have only played with the terms such as payment seats, management quotas etc., without addressing the basic issue of fee structure.

It is not only students but also teachers who are at the receiving end of the ongoing transformation in higher education. The nation today witnesses the declining popularity of teaching as a profession, not only among the students that we produce, but also among parents, scientists, society and the government. The teaching profession today attracts only those who have missed all other "better" opportunities in life, and is increasingly mired in bureaucratic controls and anti-education concepts such as "hours" of teaching "load", "paid-by-the-hour", "contractual" teachers etc. With privatisation reducing education to a commodity, teachers are reduced to tutors and teaching is reduced to coaching. The consumerist boom and the growing salary differentials between teachers and other professionals and the value systems of the emerging free market economy have made teaching one of the least attractive professions that demands more work for less pay. Yet, the society expects teachers not only to be inspired but also to do an inspiring job!

Yet another worrisome trend in higher education and research is the emerging government policy of according deemed university status to national labs and research institutes, so that these institutes can award their own Ph.D. degrees, without having to affiliate themselves to a university or fulfilling any other role of being a university. National laboratories include those under the Union government's Council of Scientific and Industrial Research (CSIR), Indian Council of Medical Research (ICMR), Department of Atomic Energy (DAE), Defence Research and Development Organisation (DRDO), Department of Space (DOS) etc. Some DAE institutions have already obtained deemed university status, and the UGC has already recommended the case of CSIR for the commission's approval. It is not clear whether all the national laboratories are under consideration for this status, but it is most likely that all of them would eventually like to seek such a status. The national laboratories were specifically established with the aim of making more direct contributions to the technological needs of the country in chosen areas such as medicine, agriculture, petroleum, metallurgy, energy, defence, space etc. It was expected that these national (or regional) laboratories would employ selected scientific manpower generated from the colleges/universities and nurture their talents towards specific applied goals. But this did not happen, as the national labs more sophisticated versions of university departments drawing better monetary and infrastructural support and publishing research papers, for which they need research students, who cannot be retained and tapped unless they are promised research degrees. The present demand for seeking deemed university status could therefore be an exercise to legitimise the current situation of the national labs and redefine their original goals. However, the country needs to decide whether it wants to develop glorified technicians and sycophants or make versatile scientists and conscious citizens. Barring a few exceptions, the monolithic hierarchy of national labs does not provide enough opportunity to young researchers to relate their research to broader social and national values. The more open intellectual environment of universities, which include natural and social sciences, is essential for interdisciplinary learning, personality development, national values and better citizenship. Thus, the issue of deemed universities calls for an open national debate, as it has major implications for our higher education and research in science and technology.

With the basic issues of equity and access to higher education still unresolved, the country is ill prepared to generate knowledge creators or knowledge workers of high quality to tap the opportunities of the emerging knowledge economy. There was a time when the country debated passionately about external brain drain of students going abroad and not returning, and internal brain drain of students taking up careers in areas quite different from their academic backgrounds, and what a waste of national resource it was. This situation has

only worsened with unemployment and underemployment in the era of liberalisation and globalisation, but we don't seem to even talk about it anymore.

Reforms may mean different things to different people, but for those students and teachers who are at the receiving end of their governments, reforms have come to mean withdrawal of government funding, no matter what happens. For those who believed (if at all anyone ever did) that reforms in higher education would reduce bureaucratic controls, attract better talent, provide more operational freedom, improve transparency, increase accountability, remove corruption, encourage self-financing, reward productivity and punish laxity, disappointment is an understatement of the state of affairs in our country.

— February-March 2006

Dropout or Pushed Out?

Lack of well-trained teachers, stale curriculum and uncritical bookish knowledge, especially in a context of stark poverty in India, has pushed students to a difficult crossroad. It is high time activists and academicians see to it that the right to education is universally implemented.

JANAKI RAJAN

In the 1990s, many myths pertaining to school education in India stood debunked. Perhaps the most staunchly held myth, that there exist satisfactory education systems in India, and if children are not to be seen in schools, it is because of parental ignorance or parental greed, which makes them opt for child labour over education, got summarily dismissed. Myron Weiner[1] was amongst the first in the decade to raise the question, do children really drop out? Or, are they pushed out?

For decades, educationists and activists have been lulled by the figures put out in various governmental educational surveys.[2] Enrolment, Gross Enrolment (GER) and Net enrolment (NER) were the terms used in these surveys. The percentage enrolled, as per these surveys, was always near 100. In case of NER, the percentage given was regularly more than 100. These figures strengthened the belief that nearly all is well with Indian schooling.

These terms were challenged by the Government's own Committee, set up to review the National Policy on Education, the Acharya Ramamoorthy Committee[3] which pointed out that 'enrolment' could include any child who has ever stepped into a school to be registered irrespective of whether he or she attended school even for a day. The NER of over 100 was also deceptive in the sense that it sought to imply that any child who did not join school at age 5 or 6, did so in class I a year or two later, hence really there was no huge problem. The Ramamoorthy Committee report, not only stated that enrolment per se did not reflect school participation or learning, it also underscored the fact that those out of school were nearly all from the marginalized sections of society. The report points to the ominous trend that over the decades, visible even while using the deceptive criteria of enrolment, the gap between enrolment of chil dren in the SC, ST categories and the general categories was increasing exponentially. The gap was much wider when it came to girls, both within the SC, ST communities and across communities. The report further warns that this trend is likely to continue if urgent, holistic measures were not adopted which have been amply borne out in 2000.[4]

Although the rates of enrolment have increased over decades, the actual gap between the literacy levels of SCs/STs and those of non-SC/ST population has been consistently widening between 1961 and 1981. While the literacy rate between 1961 - 81 among total non-SC/ST population increased by 13.39%, the SC population rate increased only by 11.11. % and the

ST population by 9.81. Among females, between 1971 - 81, the increase among non-SC/ST population was 9.81 but only 4.49 among SC females and 5.06 among ST females.

Even in 2000, girls' enrolment amongst all sections of society (not necessarily participation) is only 43.7 The gender - gap figures given below shows only a marginal closing from around 30% to around 20% at primary level. A study on Muslim Girls' Education[5] has brought to light the abysmal situation of education of the Muslims, especially girls. The literacy rate among Muslim girls is 40.6 % as against 63.2 among general category of girls. Only 13.5% Muslim girls are enrolled in rural northern India. Even in South India, Muslim girls' enrolment is only 23% in rural and urban areas whereas the comparable rate for non-Muslim girls is over 70%. Less than 17% Muslim girls complete 8 years of schooling. In north India, it is as low as 4.5 %. However, among better off sections, both Muslims and non-Muslim girls' enrolment is around 70%, clearly indicating that the low enrolment of Muslim girls is a poverty issue rather than a cultural one.

It is a tribute to activists and academics, that atleast now, the actual picture of school educational status is slowly emerging.[6] Today, there appears to be a general agreement that only around half the children and two-thirds of girls of school-going age participate in school education.[7] Arguing that enrolment figures did not sufficiently reflect the numbers of children not in school, the term 'school participation' and 'children's achievement' have begun to gain credence as measure of educational status. Sadly, even today, these measures have not yet been scientifically built into the educational system[8] Taking figures from a variety of sources, the picture that emerges: For every 100 children in India who enroll into any school, only 61 make it to class V enrolment, and only 58 make it even to class VIII. A study by NIEPA estimates that of all youth in the relevant age group, only 7% ever acquire any kind of post-secondary education, including the most ubiquitous of certificates. What a waste of youth's potential! But then, it all begins as a waste of children's potential…

WHY ARE CHILDREN NOT IN SCHOOLS?

The NSS Sample Survey (42nd round) shows that the reported causes for children not being in schools are: they find schools boring, they fear failure in examinations, corporal punishment, there is fear of molestation, they find what goes on in school irrelevant to their lives, they cannot attend schools due to economic compulsions. Among the 5 reasons cited above, 4 pertain squarely to the state of schooling. The factor of economic compulsion, that could be attributed to parents, will also need to be seen in the light of experiences of groups such as the MV Foundation, an NGO working in rural Andhra Pradesh and many others who have conclusively demonstrated that parents do make a choice to send children to schools despite economic compulsions provided schooling was found to be meaningful.

The PROBE report[9] fleshes out anecdotally what exactly goes on in schools and establishes other factors:

Growth rates in Literacy

Category	Literacy	Literacy	Literacy	Growth	Rates
	1961	1971	1981	1941-1981	1971-51
General	24.00	29.45	16.23	22.72	23.02
SCs (total)	10.27	14.67	21.38	42.84	45.74
SC (Women)	—	6.44	10.93	—	69.72 S
Ts (Total)	8.54	11.29	16.35	32.20	44.82
STs (Women)	—	4.85	8.04	—	65.72
All Communitiesexcluding Cs and STs (Total)	27.91	33.80	41.30	21.00	22.19 S
All Communities excluding SCs and STs (Women)	—	22.25	29.43	—	32.27

the lack of interest among teachers to provide quality learning experiences to children of marginalized sections, non-functioning schools, social discrimination, location of the schools, lack of flexibility, poor pedagogy etc. Others have raised the issue of the sterility of school curricula, its bookishness, marks orientation and rote learning as highly irrelevant, especially for children living in poverty.[10] While this may be common knowledge to those with any acquaintance with government schooling, given the sheer size and variety of school systems, many of the debilitating factors of schooling cutting across systems have never, even today, been effectively and systematically challenged. Yet other studies have shown that 'social distance' is a crucial factor in whether or not children, especially from the marginalized sector such as SC, STs and girls, choose to go to school or not. The governmental norm of a primary school being provided within 1 km and a middle school within 3 km has been roundly critiqued, though these norms continue to remain especially for girls who will have attained puberty by the time they are in middle schools. If the primary school is situated in a forward caste-area, SC, STs and especially girl children may find the short trip to the school too threatening to attempt in a situation where even today, the SCs and STs are expected to show subservience to the higher castes, failure being promptly met with punitive assault. The norm of a school says, for 800 children in an urban slum, where population density can be as high as 20,000 within 1 sqkm area is meaningless too. The concept of both 'adequacy' and 'acceptability' (by the community) need to be urgently introduced to these norms of school provision.

STATE RESPONSE

In 1993, the Supreme Court delivered a landmark popularly known as the Unnikrishnan judgement.[11] This heralded Public interest litigations, which have proved to be a very effective mechanism to challenge the abysmal state of elementary schooling. In Delhi, particularly, these resulted in spectacular results in favour of children.[12] It is pertinent to note that till 1993, the governmental focus has been on primary schooling (upto 5 years), and that too, through creating several tires and types of schools. For every 9 primary schools, there are only 4 middle schools. In a tribal area, there could be a non-formal literacy centre passing off for schools, whereas there are Navodaya Vidyalayas for the rural privileged, the Kendriya Vidyalayas for the government employees, the Sainik schools for the military, and very poorly functioning schools for the poor across the country. Is it so surprising then that the parents of children in poverty groups forsake school out of sheer disgust at this abysmal provision?

In 1997, the Government of India sought to make Education a Fundamental Right although the Supreme Court had already so ruled, on the plea that being a minority judgement, there was a possibility that it could be overturned in the future, and legislation would ensure a firmer basis. However, this move itself has further eroded children's education. As the provision of education travelled from Part IV of the Constitution (Directive Principles) to Part III (Fundamental Right

Percentage of Girls Enrolment to Total Enrolment by Stages

Cear	Primary	Middle	Sec/Hr. Sec Intermediate	Higher Education
1950-51	28.1	16.1	13.3	10.0
1960-61	32.6	23.9	20.5	16.0
1970-71	37.4	29.3	25.0	20.0
1980-81	38.6	32.9	29.6	26.7
1990-91	41.5	36.7	32.9	33.3
2000-01	43.7	40.9	38.6	39.4

Source: Selected Educational Statistics (different years), MHRD, and GOI as reported in the Report of the CABE Sub-Committee on Girls Education and Common School System.

Education in India Selected Indicators by Gender

CIndicators	1981	1991	2001
Literacy Rate (Male)	53.48	64.13	75.85
Literacy Rate (Female)	28.47	39.29	54.16
Literacy Rate (Total)	41.44	52.21	65.38
Gender Parity Index (GPI) Literacy	0.53	0.61	0.71
GER (Boys) Primary Level	95.8	113.95	105.29
GER (Girls) Primary Level	64.1	85.47	80.06
GER (Total) Primary Level	80.5	100.10	96.30
Gender Parity Index (GPI) Primary	0.67	0.75	0.82
GER (Boys) Upper Primary Level	54.3	76.56	67.77
GER (Girls) Upper Primary Level	28.6	46.98	52.09
GER (Total) Upper Primary Level	25.4	62.14	60.20
GPI Upper Primary Level	0.53	0.61	0.77
GER (Boys) Secondary & High Sec. Level	34.2	33.89	38.23
GER (Girls) Secondary & High Sec. Level	15.4	10.27	27.74
GER (Total) Secondary & High Sec. Level	25.4	19.28	33.26
GPI Secondary & High Sec. Level	0.45	0.30	0.73
Drop Out (Boys) Primary Level	56.2	40.1	38.4
Drop Out (Girls) Primary Level	62.5	46.0	39.9
Drop Out (Total) Primary Level	58.7	42.6	39.0
Drop Out (Boys) Upper Primary Level	68.0	59.1	52.9
Drop Out (Girls) Upper Primary Level	79.4	65.1	56.9
Drop Out (Total) Upper Primary Level	72.4	60.9	54.6

GER: Gross Enrolment Ratio; GPI: Gender Parity Index
Source: Selected Educational Statistics (different years), MHRD, GOI; Selected Educational Statistics, 2001-02

Article 21 A under Right to Life), the phrase 'upto 14 years of age' enshrined in the Constitution was diluted to 'from 6-14 years'. Early childhood care and education, for the 0-6 age group of children, a vital preparatory process for school readiness and language acquisition was sought to be eliminated from the Constitution. Again, it is a tribute to the strength of the protests of activists across India, that this age group of children still find a place in the Directive Principles of State Policy. The initial drafts of the Constitutional Amendment sought to delete this age group of children from the Constitution itself. (One cannot fail to draw the inevitable parallel between the ancient practice in Sparta, where, reportedly, infants were thrown down a hill, and only those who survived were then assumed to be citizens). Even more pertinent, girl children are often kept away from schools so that they may take care of the younger siblings.

The Sarva Shiksha Abhiyan, the central government's flagship programme for universalising elementary education further erodes the spirit of providing quality education to all children. Drawing heavily upon its experiences from the World Bank funded District Primary Education Programme (DPEP), national policy has had scant respect in the 90s for the Constitutional commitment of 'elementary', that is 8 years of formal education and 3 years of early childhood education. Instead, it has sought to promote sub-standard primary (5 years) of education for a couple of hours in the name of non-formal education for children in poverty groups. Contrast this, for instance, with the Kothari Commission's recommendation, re-iterated by the Acharya Ramamoorthy Committee. Analyzing the situation of the type we have in India, Dr. Kothari states that there are very few, high fee-paying private schools catering to the rich in the country, and a vast majority

of ill-functioning government schools meant for the poorer sections. This not only results in widening the gap between the rich and the poor, but the children in the elite private schools are also not getting quality education as they are insulated from social realities. The solution, for free India, the report states, is that all children in a neighborhood, must learn together, irrespective of their social class. Known as the Common School System, this is very much in vogue in most countries in the developed world. How national policy could have ignored this specific recommendation, endorsed by no less that the Central Advisory Body on Education (CABE) is a question all citizens of this country need to ask.

The only possible explanation is that the colonial legacy of exclusivity has held sufficient sway over our elite in educational policies. Across decades and all shades of political policies, while there has been rhetorical consent to the ideas of Common School System, there has never been programme for the same. It is also equally clear that however poor they may be, the marginalized sections of society are not prepared to accept less than the best when it comes to their children's education. Their children are not 'dropping out', but are rejecting an iniquitous system.

In 2003, the Delhi High Court, in response to public Interest litigations upheld that all private schools have come up on land provided to Charitable Societies at subsidized rates for providing public services, and hence must reserve 25% of the seats for children from backward sections. The response of private schools, who occupy more than 50% of the subsidised school land and cater to around 30% of child population who can pay fees, is eloquent testimony of which section of society is a hindrance to finding lasting solutions to provision of quality education to all children.

In sum, it can be safely concluded that it is not children who 'drop out'. Systemic prejudice, irrelevance, safety issues, affront to dignity, irrelevance, and failure of State to provide quality schooling have all taken their toll in driving children away from schools. If any more proof is needed that universal elementary education is not possible without addressing equity issues, a glance at the evaluation report, 2000 on 'Non-Formal Education' of no less the planning Commission should put all rational doubts to rest. It categorically states that non-formal education has proved to be ineffective.

The MIS data and 'monthly report cards' being developed by national agencies are a welcome measure for monitoring the state of elementary education, but unless the criteria for measurement gets realistic, data collection is not likely to prove to be effective. And no programme that ignores gut issues of equity and aspirations of the people is likely to help us achieve the goal of quality elementary education for all.

— Feb-March 2006

Endnotes

1. The Child and the State of India, Labour and Educational Policy in Comparative Perspective, Princeton University Press, 1992.
2. School Educational Surveys, I-VII, MS University, Baroda, NCERT, GOI.
3. Towards an Enlightened and Humane Society, Report of the Review Committee on the National Policy on Education 1986, GOI, New Delhi, 1990. See also Moonis Raza et.al., NCERT.
4. Education for National Development, GOI, New Delhi, 1968.
5. Zoya Hasan and Ritu Menon, Educating Muslim Girls, A Comparison of 5 Cities, Kali Unlimited, New Delhi, 2005.
6. This is not to say that measures to address these issues have emerged. Polarities exist between government; measures such as the SSA and the public calls for systemic reforms leading to overhauling the entire system, to render it socially just and humane through the Common School System.
7. Participate would mean that children attended school full time regularly, and actually learnt from this participation.
8. Elementary Education in India, 2005, NIEPA based on MIS system developed by NIEPA.
9. Public Report on Basic Education in India, PROBE, Oxford University Press, New Delhi, 1999.
10. Reports of the ragpicking community women during the workshop: Differential perceptions of parents, teachers and administration on school education in Jahangirpuri, Delhi, MACESE, Delhi University, 1997.
11. Supreme Court, 1993 wherein education upto 14 year of age legally became a Fundamental Right, and not just a Directive Principle of State Policy.
12. Cases filed by Social Jurist resulted in children from marginalized communities, especially differently abled being ordered by High Court to be admitted, basic facilities such as drinking water, proper classrooms were ensured, street children who were denied access to schools on the pretext that did not possess birth certificates were not only directed to be admitted, but brought about sea change in the rules and regulations for admission in government and Municipal Corporation schools. For the first time, adequate facilitates began to be viewed as part of school provision. The Supreme Court, later made provision of cooked midday meals as also essential part of schooling all over the country.

Demise of Education as a Human Right

The court has worked in tandem with the government to ensure that education no longer remains a crucial part of the State's obligations.

K G KANNABIRAN

Immediately after the Second World War, despite the emerging antagonism of the Super Powers, the newly formed world body proclaimed the Universal Declaration of Human Rights. This document is an act of reasoned deliberations by the declaring participants to the debate. It was felt for the first time that "rights" should be the foundation for the new post war legal order which should motivate politics to translate the Declaration into a reality. Every clause in the Declaration provides a right to eliminate a past injustice and the rights system it has created has for its object full development of the human personality.

The Declaration in clause 26 declares education as a human right only to emphasize its importance and which will enable people to participate in the governance of the societies they live in. Education, it was felt is the key to disciplining governance. Pursuant to this Declaration a whole system of social, economic and cultural rights were worked out into a covenant to which almost all the states became signatories and along with it the International Covenant for Civil and Political Rights which also was signed and ratified by various States, The International Covenant on Economic, Social and Economic Rights, inter alia, deals with Education as a human right in Clause 12 of the Covenant and it is to help ' the full development of the human personality and its sense of dignity; that such education should enable them to participate in a free society and to promote understanding, tolerance and friendship among all nations, racial, ethnic and religious groups.'

The nations signatory to the covenant agreed to provide free compulsory education. Secondary education shall be made generally available and accessible and higher education shall be made equally accessible to all on the basis of capacity, by every appropriate means and in particular by the progressive introduction of free education. Whatever may be the current state of the United Nations these have the status of International Covenants and have acquired the status of customary law after signing and ratification. Directive Principles of State Policy in a way anticipated the Covenant.

Clause 12 of the ICESCR together with Articles 15 and 21of the fundamental rights and Articles 41, 45 and 46 of the Directives formed the background of the debate on education in the Supreme Court in Mohini Jain and later Unnikrishnanan's case. In the latter they were considering the correctness of Mohini Jain v State of Karnataka where the Court found

that right to education is a fundamental right tracing the right to Article 21, which is reinforced by Articles 41, 45 and 46 contained in the chapter on Directive Principles. The government paid no serious attention to its fundamental obligations contained in the Directives for nearly twenty-five years and the reason for this neglect appears to be the fact that they were not accountable to any one, not even to the courts. There were members in the constituent assembly who charecterised this as mere window dressing. Though Sardar Patel described them as non-justiciable fundamental rights, and that they have their political uses. Mrs. Gandhi in her campaign against fundamental rights and courts' role projected the Directive Principles as a charter for social change which should according to her take precedence over fundamental rights.

Since then the debate on the importance of the Directives has been on. Post- Emergency 1975, courts also realized that the colonial mindset they inherited required to be discarded, which meant the recognition of the transition of a person from the status of a subject to that of a citizen. The emergence of a human rights jurisprudence marking a transition from the concept of individual right of a limited kind of the liberal era to the recognition of human rights of the people, individual and collective was a major step in the history of the people. It has brought into vogue the assertion of human rights of a collective politically and by redefining Rule of Law to enable people to assert collective rights in courts, which hitherto remained outside the arena of peoples struggles. Constitution and courts started making sense to the people. These cases came up for adjudication during the period of expanding meaningful deliberations and decisions of the court. A new approach and a new jurisprudence were being brought into existence by courts.

INTERPRETING FOR PEOPLE

When Unnikrishnan came up before the court this new jurisprudence was in its last stages. The questions raised in Unnikrishnan were raised one year earlier in Mohini Jain's case. The court in the latter case thought that the Constitution made it obligatory to provide education to all its citizens. This interpretation alone, said the court, would enable the people to realize the objectives of dignity, political economic and social justice. To achieve this, Fundamental Rights and the Directives have to be understood as one integrated whole and pointed out that without right to education the fundamental rights would make no sense. Right to education, the judges held, flows directly from Right to Life enshrined in Article 21.and that the State is obliged to provide education at all levels to its citizens. After expounding the constitutional philosophy they found that charging capitation fee of large sums by institutions of higher education is a denial of the right to education. This was in the year 1992.

The same question was raised again in 1993 in Unnikrishnan's case. The fundamental nature of the right to education was put in issue once again. Judge Jeevan Reddy patiently examined all over again the principles which led to the finding that under the Constitution, right to education is fundamental and again concluded that "right to education is implicit in the right to life because of its inherent fundamental importance" and pointed out that Articles 41,45, 46 determine the parameters of the right. The right to educate after the primary stage will be determined by the economic capacity and development of the state.

This has left the right to education of students who have completed 14 years of age in a state of uncertainty. For higher education the court formulated a scheme eliminating possible abuse of power and discretions both by the government and the educational institutions by emphatically declaring that both by virtue one being the government and the other being regulated for the performance of a public duty are bound by the injunctions of Articles 14 and 15. For regulating the fee the scheme required the statutory bodies regulating the professional colleges to appoint a committee to fix a ceiling on the fee structure after a thorough examination after taking all relevant matters into account.

The present round of litigation was commenced by the T M A Pai Foundation in the very year in which Unnikrishnan was decided [1993]. In this litigation both aided and unaided majority and minority institutions were petitioners. In 1997 a bench of 7 judges felt that the issues raised should be considered by a larger bench and so 11 judges heard and decided the crucial questions, remitted the rest to be considered by the regular bench.

SHIFTING GROUNDS OF DEBATE

The first thing that strikes you is the shift of the debate from the right to education to the right of the managements of the educational institutions to run their insti-

tutions without let or hindrance. The latter claimed that Unnikrishnan violated their rights under Article 19 (1) g. By introducing a scheme they were burdened with an unreasonable restriction and therefore was constitutionally invalid. The Additional Solicitor General also supported the contention of the petitioners. And there was a consensus that Unnikrishnan should be over ruled.

There was no one to argue that right to education is a fundamental and human right. While the earlier bench did not go into the question whether education is a trade business occupation or profession the Constitution Bench described running educational institutions as an occupation in the nature of a charitable trust! A concept of trust negates rights.

The departure from the social and political philosophy of the constitution is stunning. In all the debate there is no reference to the Preamble, to Articles 21,41,45 and 46 on which the earlier judgments are based and the jurisprudence that has been developed to help majority of the country realize the objectives in the constitution.

The judgment says that Private education is one of the most dynamic and fast growing segments of post secondary education at the turn of the 21st century and that government is not prepared to meet this demand. Countries all over the world switched over to private sector and that their sphere of operation is expanding.

The idea that an academic degree is a public good that benefits the society is no longer accepted. In fact it is increasingly seen as a private good beneficial to the individual The logic of today's economics and the ideology of privatization have contributed to the resurgence of private higher institutions where none or very few existed before. This is the core of the decision. Liberalisation has been adopted as the ruling principle of the decision. The reasoning that followed giving autonomy to these institutions in the matter of the fee structure and disciplinary jurisdiction of these institutions has to follow as a matter of course.

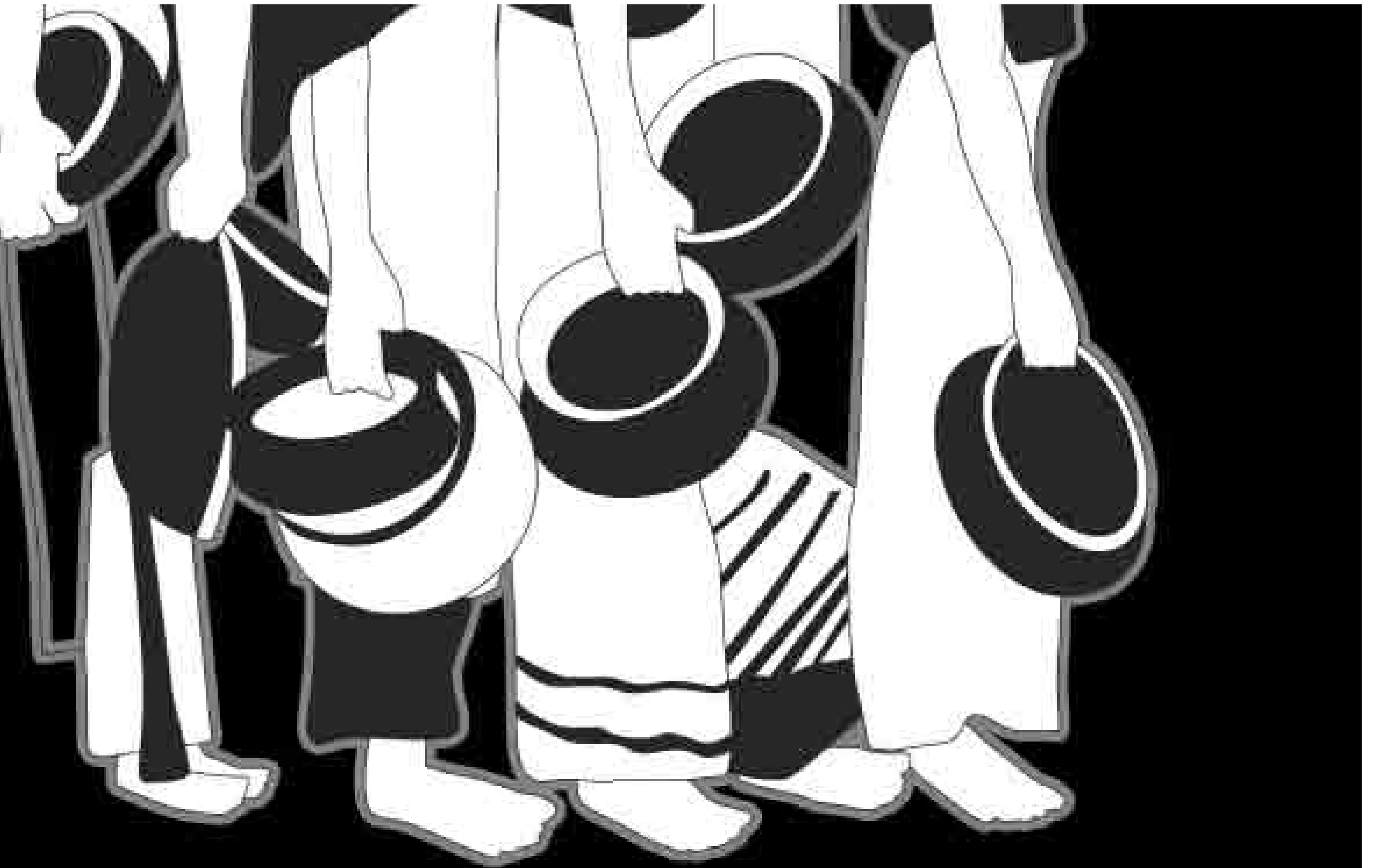
Dr. Ambedkar said: "We do not want merely to lay down a mechanism to enable people to come and capture power. The Constitution also wishes to lay down an ideal before those who would be forming the government. That ideal is of economic democracy". With these words the Constitution Review Committee commences its report on the review of the chapter on the Directives and found no reason to accommodate liberalization and globalization philosophies in the constitution. In its Review of fundamental rights it never suggested reversal of law laid down by the court on right to education.

The Review Committee not only did not reduce the rigor of the constitutional philosophy but pleaded for the committed enforcement of the philosophy. The Articles that prominently figured were Article 29(2) and 30(l) The majority by interpreting Article 29 (2) as indent of and not subject to Article 30 (1) the Court allowed the majority to invade minority institutions and reserved for the majority admission of reasonable numbers and need not be necessarily be 50% as provided by St. Stephens College earlier.

Yet the court declared the law laid down by the earlier decisions unconstitutional, not by a reasoned debate but on the basis of the principles of the philosophy of liberalization, which does not find a place in the Constitutional scheme.

Now early school education up to six years continues to be the obligation of the state and after six years the right to primary education has been made a fundamental right. This legerdemain of transmogrifying an obligation of the state into an individual right, the government has pushed people to the courts and liberated the State and its instrumentality from its political obligations. With this Amendment privatization of education is complete and the court working in tandem with the government successfully pronounced the demise of education as a Human Right.

— April-May 2003



SECTION 11

People die of slow hunger and nothing happens. People die of thirst and emptiness, nothing happens. People die of entrenched malnourishment, especially little children and emaciated women; people make thick, unhygienic, fibrous gruels by crushing mango kernels and drink it as a miracle; people live in huts with one empty mud vessel turned upside down and not one grain of rice; people become thin and their hands tremble, they become diseased and helpless, they can't work, can't beg, can't live, can't die — people wait for death, which arrives, like a long, painful, repetitive cliche.

Lowering Depths, Growing Pangs

Instead of addressing the infinite nightmare of poverty, the Indian government appears to be doing away with the poor altogether by using statistical jugglery and artificially lowering the poverty line.

COLIN GONSALVES

The UNICEF report concluding that child malnutrition in India is comparable to Sub-Saharan Africa comes as no surprise to all those working on food security in India. It may offend the sensibilities of those for whom 'India shining' was an attractive though unrealistic projection, but there is nothing on the horizon but gloom for the poor. When the People's Union for Civil Liberties (PUCL) case started in 2001, there were starvation deaths reported throughout the country. The active intervention of the Supreme Court enthused many and put the issue of food security on the centre stage. I have no doubt that had the Supreme Court not intervened, the thrust of globalisation, privatisation and structural adjustments would have resulted in the closure of the public distribution system and the curtailment of the midday meal scheme and the integrated child development scheme (ICDS). When Chief Justice Kirpal was on the verge of retirement, he asked for an assessment of what had been achieved and I said that we may not have gone ahead for all these years but the court has certainly stemmed the rot. Over the years, we saw the National Democratic Alliance (NDA) replaced by the United Progressive Alliance (UPA). However, the attitude towards hunger and starvation did not change. The principal trump card of PUCL when it began the litigation, namely that 60 million tons of grain lay in the godowns while people went without food, was neutralised by the government exporting 25 million tons of grain over a period of three years instead of using the grain to feed the poor in India. First the NDA government and later the UPA government chose to export this grain at BPL prices to Eastern Europe, some of it as cattle feed.

STATISTICAL JUGGLERY

Anxious to show that globalisation was working not only for the rich but also for the poor, the World Bank organised a seminar of selected economists all of whom wrote papers claiming that poverty in India had come down from 36 per cent to 22 per cent. This was published in a special report of the Economic and Political Weekly. This conclusion was thereafter widely criticised. The most trenchant criticism came from Professor Utsa Patnaik of Jawaharlal Nehru University in her article, 'The Republic of Hunger'. On the basis of the NSS data on calorie intake for 1999-2000, Professor Patnaik found that 70 per cent of the Indian population was

at or below the poverty line fixed by the Planning Commission in 1979 at 2400 k calories per person per day. This was a shocking condemnation of the manner in which India was developing. She also calculated that an average family of five was consuming at least 200 kg of grain less in a year than 50 years ago. Food grains were available but the poor did not have the money to purchase them.

The debate over the extent of poverty in India made us look at the alternative Planning Commission poverty line in terms of cash. That made interesting reading. The latest figures for 2000-2001 were Rs 11 per person per day in the rural areas and Rs 17 in Delhi. A clerk in any office of Delhi would spend that amount of money travelling to and from work by bus! The international poverty line is two dollar a day. Yet in India, a country which swears by globalisation, the poverty line remains at 40 cents a day. Thus by the statistical jugglery of artificially lowering the poverty line, India hopes to do away with poor people altogether!

The Supreme Court intervened on the integrated child development scheme holding the central government accountable for the implementation of its own scheme requiring an anganwadi centre for every 1000 population. Against 12 lakh anganwadi centres needed, the central government had sanctioned money only for six lakh centres. Even these were not functioning in many areas. Though the court directed the government to implement its scheme fully, the finance minister made no allocation in the recent budget.

GLOBALISATION'S MANTRA

Then the UN Special Rapporteur on the right to food, Jean Ziegler, visited India in August last year and made his report to UN. He found that 'levels of malnutrition and poverty remain very high and food insecurity has increased since the 1990s.' He found 'one of the highest levels of child malnutrition in the world, higher than most countries in Sub-Saharan Africa'. He calculated that 80 per cent of the Indian population was living on less than two dollar per day. He saw signs of increased concentration in land ownership and increased landlessness. He reported over 250 cases of starvation deaths from many parts of India and in particular from the tea gardens in West Bengal. He found hunger rampant among the Dalits and Tribals. He personally witnessed practices of casteism and untouchability in villages of Orissa. He concluded that "India was not currently on track to achieve the goals set in relation to malnutrition and under nourishment" in the UN's millennium development goals.

Globalisation has one mantra: subsidies are bad. However, without massive food subsidies the poor cannot purchase grains at all. To tackle the spectre of starving India, the government needs to push up its financial commitments from one per cent to two per cent GDP. Only then can we hope for any change.

— June-July 2006

How the Other Half Dies

This is the story of overflowing godowns and people dying of slow hunger, of thirst and emptiness, of entrenched malnourishment, especially little children and emaciated women. This is a film about the cold-blooded, clinical Assassination of the invisible masses in the 'socialist republic' of India, the largest democracy in the world.

AMIT SENGUPTA

It is the sound of wailing which stalks the countryside which marks the difference between documentary, fiction and realism. The starving Indian village as the tragic metaphoric threshold between the State as a mass murderer and the starving Indian farmer, mostly landless, as the suicidal victim, or the slow, tortured, condemned prisoner of his (or her) hunger-driven fate. This fatedness, therefore, is marked by a design, a man-made design, a structural adjustment paradigm, a liberalisation code, a globalised repetition, which is no more a dead cliche but a cold-blooded recipe for organised killings. The wailing is hence an invisible expression of grief — because, mostly, there is an abject silence of political invisibility; because, neither the State, nor the federal structures, the media, film, print or broadcasting, neither statistics, nor lies, or videotapes, nor the courts or the tribunals, indeed there is nothing which wants to even remotely record the wailing apocalypse of rural India.

Assassination: Watch this film directed by Shahid Jamal and produced by Harsh Dobhal for Human Rights Law Network as part of the on-going Right to Food Campaign, and enter this quagmire of life and death, where life has been crushed by poverty and hunger, and death celebrates the absolute success of absolute victory. The truth that what is passed off as a heart-attack, or as natural death, is basically the abject failure of an entire biological system of the malnourished human body, when every organ's failure is also the sustained and deliberate failure of the Indian State, when every death passed off as a heart attack, etc, is actually nothing but a cold-blooded, planned act of assassination.

People die of slow hunger and nothing happens. People die of thirst and emptiness, nothing happens. People die of entrenched malnourishment, especially little children and emaciated women; people make thick, unhygienic, fibrous gruels by crushing mango kernels and drink it as a miracle; people live in huts with one empty mud vessel turned upside down and not one grain of rice; people become thin and their hands tremble, they become diseased and helpless, they can't work, can't beg, can't live, can't die — people wait for death, which arrives, like a long, painful, repetitive cliche. And others watch them die, waiting, inevitably, for their own inevitable death.

People visit government offices, the block development office, the local administrations, the district administration, the panchayats, the NGOs. They are promised a slice of the moon, but they return empty-handed, on empty stomachs. There are huge buffer stocks, foodgrain exported, as during the NDA regime, (now the UPA is importing foodgrain, planning to cut food subsidy and increase PDS wheat prices), rich farmers are holding back thousands of tonnes of grains, the Food Corporation of India godowns are overflowing, but, still, people are inexplicably hungry, a mass hunger comparable to the once Bengal famine. Middle farmers are committing suicide drinking the same pesticides which have failed them: the debt trap is pushing their dignity beyond sense and sensibility, the profit sharks, private banks and local money-lenders will drink their blood in any case. So tens of thousands of farmers commit suicide while the Indian State absolves itself of all responsibility and constitutional guilt. Even prosperous Punjab is not spared of this man-made calamity. And the stories keep repeating itself, in the same pattern, the same method in the madness, the same logic of organised mass murder of the farmers of India.

So whatever happened to the directive priniciples of the Indian Constitution? Or to India Shining, and the aam aadmi UPA government backed by the 'social justice Left' and their common minimum programme?

First they, the liberalisers, let the foodgrain rot or consumed by rats. Then they export it to sundry countries. Then they don't let the poor access it. Then they see to it that the public distribution system is decisively dismantled so that the open market takes over. In any case, the purchasing power of the poor, as in Ananthapur in Andhra or Kashipur and Kalahandi in Orissa, or in the mass graveyards of the tea gardens of Communist West Bengal, the film shows, is so abysmally low that they can't even access the limited amount of foodgrains listed on their ration cards. Then the liberalisers will say these people are not buying so what can we do? How can they buy when they can't buy, when their purchasing power is so low? So the liberalisers will argue that surely the PDS can henceforth be easily dismantled. That it is really of no use to the poor.

So it's cool. You create the scarcity, so you can push for the open market. No wonder, the British funding agency, DFID, has been decisively blamed for the mass deaths in Chandrababu Naidu's Andhra Pradesh, as documented extensively by Guardian columnist George Monbiot. Naidu was a blue-eyed boy of the World Bank, IMF and the forces of globalisation. And the process begun by him has not ended — this catalytic, pro-market, anti-poor logic moves with relentless, fascist ferocity which is difficult to stop. That is why, India has become the republic of hunger, as economist Utsa Patnaik points out in the film.

Witness the dying and deaths in the tea gardens of West Bengal, in Purulia and Midnapur; witness the same phenomena across vast terrains of Andhra, from Mehboobnagar, Ananthapur, Medak, Nizamabad, Warrangal, Karimnagar, to Melghat, Nandurbar and Vidharbha in Maharashtra, to the slums of Mumbai and the shut-down empty textile mills of this mahanagar, where jobless workers now sell bananas on the streets, as the film shows. This is an unfolding tragedy since the then Prime Minister Narasimha Rao and his Finance Minister, Manmohan Singh, almost 15 years ago, effectively destroyed our social security systems to benefit the global market forces and the new elite in India.

As economist Jean Dreze points out in the film, when the government actually tries to create food for work programmes, the corruption is so entrenched that nothing but a mass mobilisation of people can stop it, as the right to information campaign is currently doing in Rajasthan. Even advocate Mihir Desai points out, that in Mumbai, the ration shops are perpetually fudging the truth, they are always lacking the required amount of foodgrain, and the below poverty line (BPL) cards are basically limited, even if the number of people and the demand is many times more. That is, this is no accidental coincidence — this is a design driven by a corrupt administration machinery and the market logic.

Consequently, thousands of Indians in rural and urban India are dying of hunger and malnourishment, committing suicides, others are waiting for their deaths, while the sound of wailing moves like a symphony of apocalypse now, the song of the funeral, the national anthem of abject condemnation. That is why this film should be screened in every metropolitan club, schools and colleges, university hostels, institutions, cinema halls, newspaper offices, libraries, NGO offices, government and private sector offices, and on television channels, across India. Because this too is sensational stuff. The cold-blooded, clinical assassination of the invisible masses in the socialist democratic republic of India.

— June-July 2006

The Privatisation of Food

The Indian Government pressurised by globalisation is moving toward the closure of the Public Distribution System.

COLIN GONSALVES

India is moving steadily in the direction of curtailment in the procurement of grain, reduction in food subsidies relating to the poor, rise in prices of grain for the poor and closure of the Public Distribution System (PDS). This is going to be one of the largest privatization endeavors ever. The PDS was started in 1964 to ensure food security, support indigenous grain production and self-reliance and to stabilize market prices. It expanded considerably during the 70's and the 80's. From the early 90's, on World Bank and IMF intervention the strangulation of this system began. Prices of grain were increased to such an extent that the poor were priced out. The worst quality grain was sent to the ration shops. In 1992 revamped PDS and in 1997 targeted PDS sharply cut the number of beneficiaries who could avail of grain in the ration shops.

As a result today Above Poverty Line (APL) off take is almost zero and Below Poverty Line (BPL) off take is falling rapidly as the prices increase to market prices. In the six northern states Bihar, Jharkhand, Madhya Pradesh, Rajasthan, Uttar Pradesh and Uttaranchal the PDS system has almost totally collapsed.

In 1997 when targeting was introduced and the universal PDS system was converted into one available mainly to persons below the poverty line, the change was hailed as one likely to benefit the poor. Experience showed otherwise. The poverty line, itself an ambiguous concept, was subject to many changes with governments anxious to show that poverty was declining over the years. Then the income criteria was jettisoned in favour of a complicated survey form. Complaints from all over the country indicate that about 50% of poor households are being excluded because they have a cycle or an old radio and the like. Then the Central Government introduced arbitrary ceilings for each state on the total number of BPL families they could officially recognize. And now the latest catchwords are "vulnerable sections" and "destitutes" as being the sections on which the state has decided to focus its resources and grain. Thus the state has shifted away from its commitment to assuage hunger generally to a very narrow focus of intervening only in cases of sections on the brink of starvation.

If we were to go by the American standards defining a poor family as one, which spends more than 1/3rd of its income on food, then 95% of all Indian households would be considered poor. Going by the Chinese standard of 60% food share, 75% of the Indian population would be considered poor. But the spurious Indian standards shows less about 30% of the population as below the poverty line. A considerable part of this officially poor segment

does not get the benefits of the PDS system because of large-scale corruption and the siphoning away of grain. Their ration cards remain in the ration shops. Their grains are diverted to the open market.

As things stand today per capita consumption of cereals, intake of micronutrients and average caloric intake are all declining. Going by Body Mass Index (BMI) half the population is malnourished. 53% of children are undernourished with 21% severely undernourished.

In 1988 when Kishen Patnaik, the Socialist leader filed a PIL in the Supreme Court, his case was dismissed on an empty assurance by the State of Orissa that things would be looked into. A 1998 enquiry by the NHRC into starvation deaths in Orissa languishes to this day. When the Rajasthan PUCL filed its PIL in the Supreme Court in 2001 petitioners were apprehensive that their petition would be dismissed. But Justice Kirpal took up the case with gusto and several important orders were made requiring government to implement its various welfare and employment schemes and empowering the gram sabhas to conduct social audits.

Despite this case and the enormous attention given to the issue by the national media offtake of grain went up only marginally by 5 million tones. Even today the order for mid-day meals to be given to all primary school children has been disobeyed in more than half the states. It is odd that an Asian superpower having nuclear bombs and one of the largest standing armies in the world should find spending Re. 1.25 per child per day for a mid-day meal unaffordable. The mid-day meal has been lauded as improving nutrition, increasing attendance and also reducing caste discrimination as children of different castes eat together.

In the Ratlam Municipality case the Supreme Court held that when it concerns the implementation of a Fundamental Right the court will not entertain a plea that the state has no funds. Why then is the Indian government so reluctant to give its surplus grain to the poor free or at a highly subsidized rate? The answer lies in the powerful forces operating behind the scenes including the agents of the WTO who, while supporting the huge subsidies given to the American, European and Japanese farmers, argue that India food subsidy should be eliminated and the trade barriers preventing the import of grain be dismantled. The multinational corporations benefit from the Producer Subsidy Equivalent (PSE) and the Total Support Estimates (TSE) which are measures of subsidies for agricultural production. These corporations are poised to flood India with cheap grain. They argue that the indigenous agricultural production be curtailed, that procurement be cut and that the PDS be replaced by an open market system where ration shops will become like any other shop. To meet the obvious objection they make a facile suggestion that the poor be given coupons for the procurement of the grain.

These “reforms” have been tried and have failed disastrously in many countries. Sri Lanka, Zambia, Jamaica, Tunisia, Columbia and many other countries went the IMF way switching from the universal PDS to a targeted system based on income criteria with disastrous results. The coupon system was ridden with fraud and led to food riots in some countries. The overall result was that the poor were thrown out of the food security system. The same bankrupt package of reforms is now being suggested by the High-Level Committee on Long Term Grain Policy which recently submitted its report to government. Perhaps, like the Phillipines, India will one day give up its functioning grains procurement and distribution system and become a net importer of US grain.

We are moving quickly in that direction. Food grain output has dropped sharply in the 1990s. There has been a considerable decline in the area sown to food grains. Rural unemployment and hunger is skyrocketing. As a result, despite the pendency of the case in the Supreme Court the number of starvation deaths reported during the pendency of the case were more than the deaths reported in the year prior to the case. Andhra Pradesh, Maharashtra and Karnataka reported many suicide deaths. Andhra Pradesh reported poor selling their kidneys for food. The Lambada tribals of Andhra Pradesh were discovered selling their children to adoption agencies for Rs. 400 a child. In this state of hunger Chandrababu Naidu was declared Chief Minister of the Year.

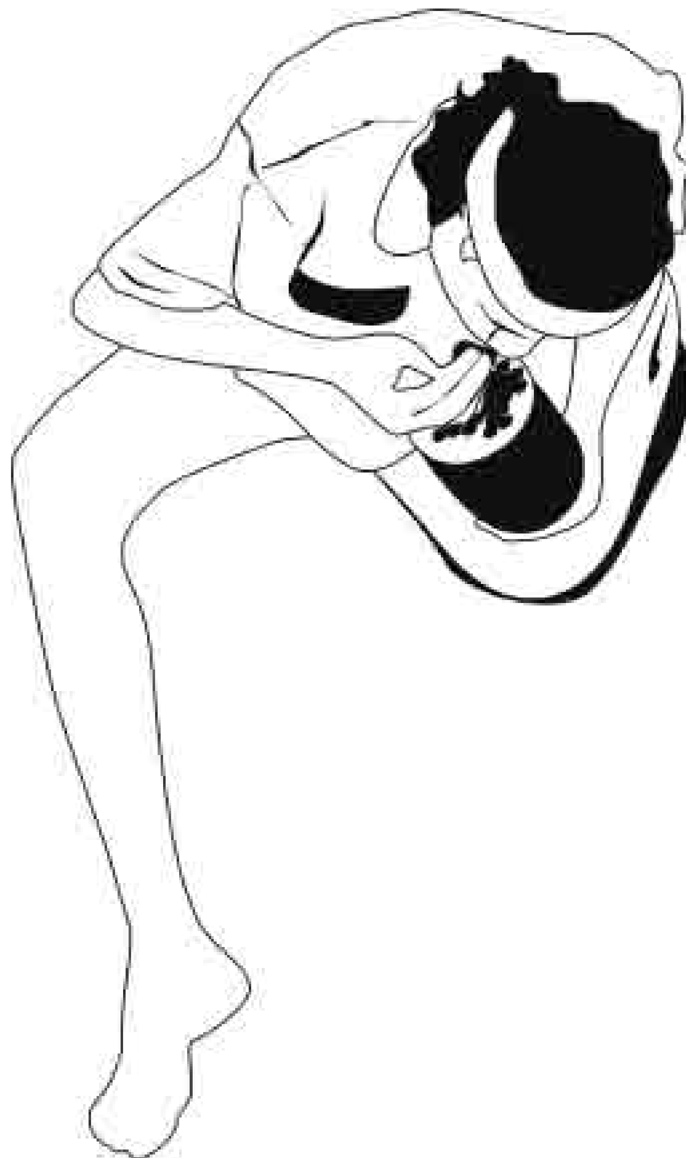
While industrial houses had Rs. 80,000 crore in debt without a director of a single company being affected, acquisition proceedings in respect of the poor saw the taking away of their land, houses, farm tools and even household utensils.

For hunger to be assuaged the state must commit itself to feeding the poor with highly subsidized grain. It must acquire this grain by continuing with the present system of procurement. 40 MTs are procured every

year. An efficient Food For Work programme itself requires atleast 20 MTs. Such a programme would create employment, build rural infrastructure and reduce hunger. The government, however, is moving in the opposite direction. It has replaced the Employment Assurance Scheme which guarantees 100 days of employment in a year to anyone seeking work by the Sampoorna Gramin Rozgar Yojana, which guarantees less than ten days in a year. The total quantity of free grain to the states is 5 MTs out of the 56 MTs currently lying in the godowns.

The inevitable conclusion is that the imperatives of WTO and globalisation require that market forces should prevail and that the poor not be given food at a subsidized level, even if they are to starve. The Indian government seems to be on the brink of capitulating to this pressure.

— April-May 2003



From the Courts to the Streets

Be it local action or judicial activism and lobbying at the state level, there is an urgent need to bring the right to food campaign to a higher plane, drawing on the whole spectrum of democratic institutions. Civil disobedience should also be considered given that the campaign is concerned with serious violations of fundamental rights.

JEAN DRÈZE

The "rights approach" to development is a subject of much debate at this time. The notion is inspiring, but its practical implications are often far from transparent. In India, however, the rights approach to development seems to be taking shape within significant domains.To illustrate, there is wide recognition today of elementary education as a fundamental right of all Indian children, and this acknowledgement has played an important part in the comparatively rapid progress of school attendance in the nineties (it is another matter that many children learn next to nothing at school). Similarly, India's "right to information" movement is a visionary response to the disempowerment of the underprivileged in many walks of life due to the inaccessibility of public records. More recently, the right to food has been invoked by citizen's organisations to challenge the scandalous persistence of endemic hunger in India – one of the most undernourished countries in the world.

BROAD DEFINITION OF HUNGER

The right to food is about freedom from hunger. This can be interpreted in two different ways, associated with different readings of the term "hunger". In a narrow sense, hunger refers to the pangs of an empty stomach. Correspondingly, the right to food can be understood, roughly speaking, as the right to have two square meals a day throughout the year. In a broader sense, hunger refers to undernutrition. The right to food (i.e. to be free from undernutrition) then links with a wide range of entitlements, not only to food itself but also to other requirements of good nutrition such as clean water, health care, and even elementary education.

Our ultimate concern should be with the right to food in that broader sense. At this time, however, the right to food in the narrow sense also deserves close attention, given the availability of enormous food stocks in the country (more than 65 million tonnes at the time of writing). These food stocks present a unique opportunity to ensure that nobody goes to bed on an empty stomach. This, in itself, would not eradicate undernutrition, but it is clearly a requirement of the realisation of the right to food in a broader sense.

It is with this in mind that the People's Union for Civil Liberties (Rajasthan) submitted a writ petition to the Supreme Court in May 2001, demanding that the country's gigantic food stocks should be used without delay to prevent hunger and starvation. One year has gone by since the first Supreme Court hearing on this matter. It is a good time to take stock of what has been achieved, and to consider what remains to be done.

The right to food was in the spotlight for a little while, in late August and early September 2001, when the initial Supreme Court hearings coincided with a wave of starvation deaths in Orissa. Hardly a day passed, during that brief period, without hunger being the subject of front-page articles or thundering editorials in the national press. The issue was also raised in parliament, at political rallies, in TV shows, and all sorts of public debates. I even remember thousands of posters springing up in the streets of New Delhi, with arresting cartoons contrasting well-fed rats with famished human beings, and shrill slogans condemning the scandal of "hunger amidst plenty". From all this it looked like hunger had become a major political issue at long last. This mirage, however, vanished on 11 September with the terrorist attacks on the World Trade Center and the Pentagon. Hunger instantly disappeared from the agenda as "terrorism" became the overwhelming focus of media attention, followed by the war in Afghanistan. Then came the 13 December attack on the Indian parliament and the precarious military stand-off between India and Pakistan, followed by the Gujarat massacres, and then another round of nuclear sabre-rattling. In the process, hunger and other social issues have been obliterated from the agenda, whether that of the government (which has become obsessed with "security" issues) or that of opposition groups (which have been constrained to put social issues on the back burner in order to oppose militaristic and communal tendencies).

DESIGNED TO FAIL

With the public looking the other way, the government found it easier to evade the Supreme Court's strictures. In August, the central government had felt the heat, to the extent of taking some concrete steps to address the problem of "hunger amidst plenty". On 15 August, the Prime Minister announced what looked like a massive programme of employment generation, the Sampoorna Grameen Rozgar Yojana (SGRY). On 31 August, the central government passed a fairly draconian order aimed at streamlining the public distribution system. Since then, however, nothing has happened. If anything, the early steps were reversed. For instance, the SGRY "guidelines" are virtually designed to ensure that the state governments fail to implement the programme – as is indeed happening today. Similarly, the release of foodgrains through the public distribution system was lower in 2001 than at any other time during the last twenty years (Economic Survey 2001-2, page S-22). As for food stocks, they have increased further since the Supreme Court hearing began.

On 28 November, 2001, the Supreme Court passed a significant "interim order" pertaining to eight nutrition-related programmes. In brief, the interim order has three significant components: (1) it converts the benefits of these nutrition-related programmes into legal entitlements; (2) it directs the state and central governments to adopt specific measures to ensure public awareness and transparency of these programmes; and (3) it directs all state governments to introduce cooked mid-day meals in primary schools within six months. This interim order was intended to clear the way for consideration (at future hearings) of other directions sought by the PUCL petition, notably the introduction of an all-India "employment guarantee programme".

The interim order has made an impact in some states. In particular, several states have introduced mid-day meals in primary schools, or are in the process of doing so. The interim order has also constrained some state governments to streamline and improve other food-related programmes. Yet the overall impact of the order, so far, has been quite limited. A number of states, notably Bihar and Jharkhand, have blissfully ignored it, in spite of a fair amount of public pressure. And even the states that have introduced school meals have a long way to go in making adequate arrangements for transport, fuel, utensils, hygienic preparation, and so on.

The consequences of this inertia are clearly visible on the ground. During the last few months, I have had occasions to spend time in highly deprived areas such as Surguja in Chattisgarh, Shankargah in Uttar Pradesh and Palamau in Jharkhand. Everywhere I went, the situation was similar: the public distribution has more or less broken down, and there are no employment programmes in the villages. The only food-based programme that seems to be achieving a modicum of

success is the Antyodaya Anna Yojana, a programme of food-based social security for destitute households. Except for this limited scheme, India's food mountains remain out of reach of hunger-affected people.

MERCILESS ROBBERY, STARVATION

Consider for instance Manatu block in Palamau district, Jharkhand. Several "starvation deaths" have been reported there in recent months, initially in village Kusumatand and more recently in other villages as well. I visited Kusumatand on three occasions in late June and early July, initially with a fact-finding team composed of members of Gram Swaraj Abhiyan and the "right to food campaign". In spite of some prior experience of India's most deprived areas, I was shocked by what I saw in Kusumatand. The entire hamlet lives in a state of permanent semi-starvation. Most people survive on small quantities of khudi (broken rice), supplemented with whatever wild food is available in the season, such as mahua, saag or gethi (a local root). When we visited the village, many people were eating lumps of plain saag, without rice. Some of them had nothing else to eat. Out of 21 randomly-selected households, 20 reported that they had to skip meals regularly.

In spite of this glaring emergency, the food assistance system is paralysed not only in Kusumatand but in the entire block. A quick survey of 36 villages in Manatu revealed that not a single BPL (below poverty line) family in these villages had received any grain from the public distribution system during the last two years. Employment programmes are nowhere to be seen, even though Manatu has been declared "drought-affected" in November 2001. Even Antyodaya households have been mercilessly robbed: in the 36 sample villages, Antyodaya households received only 25 per cent or so of their official entitlements (currently 35 kgs of grain per month) since the programme started in mid-2001.

This situation highlights the limitations of the legal process when it works in isolation from other forms of social action and political mobilisation. The Supreme Court orders are extremely useful in strengthening the bargaining power of all those who are working for the realisation of the right to food in India. But it would clearly be naive to expect these orders to be implemented without further public pressure. And even if they are implemented, the realisation of the right to food requires much more than legal provisions and sanctions. For instance, if a daughter does not receive a fair share of food in the family, and is undernourished as a result, taking the parents to court may not be the best course of action. The right to food is not just a legal right. For these and other reasons, the right to food campaign has to expand well beyond the confines of the Supreme Court, towards a broad-based popular movement. The process is already under way. On 9 April 2002, a national "day of action on mid-day meals" (planned in response to an appeal initially made by Bharat Gyan Vigyan Samiti) achieved success in building public pressure for the introduction of mid-day meals in primary schools. More importantly, it brought together disparate groups with an interest in the right to food, paving the way for further concerted action in the future.

There have been further initiatives of this kind in recent weeks. On 9 July, for instance, a lively public hearing on hunger and the right to food was held in Manatu. For the government officials and private contractors who normally plunder development funds with impunity at the block headquarters, it was a shock to see the premises overwhelmed by thousands of hunger-affected people who were demanding their due. People listened for hours with remarkable attention and interest as the participants presented spirited testimonies about the hunger situation in the area and the dismal record of food-related programmes.

A public hearing may not sound like an effective response to the problem of hunger, but in fact it is a major step towards breaking the vicious circle of poverty and disempowerment in which the people of Manatu are trapped. The hearing was an opportunity for people to learn about their entitlements (most of them were in the dark in that respect) and to voice their demands. It gave them a glimpse of the possibility of change, a sense of their collective power, and an opportunity to discuss what can be done. The public hearing in Manatu was also a wake-up call for the bureaucrats, contractors, dealers and money-lenders who have been mercilessly exploiting the local people for so long. Last but not least, this event established the credibility and skills of Gram Swaraj Abhiyan, the local organisation that had convened the public hearing. Plans are afoot to follow up this event with a range of further activities, including the creation of a jan suchna kendra near the block office, a state-wide dharna for school meals, and also constructive activities in destitute hamlets such as Kusumatand.

Having said this, local action has stringent limitations as long as state policy remains what it is. To illustrate, there is little point shouting for school meals outside the block or even district offices as long as the state government fails to embrace the Supreme Court order in this respect. Similarly, there is no point struggling for local improvements in the public distribution system as long as issue prices are not lowered by the state government: as things stand, the issue prices of wheat and rice in Jharkhand are not very different from market prices, making a mockery of the whole programme.

This brings us back to the complementarity between local action and other processes, such as judicial activism and lobbying at the state level. In all these respects, there is an urgent need to bring the campaign to a higher plane, drawing on the whole spectrum of democratic institutions. Civil disobedience should also be considered, given that the right to food campaign is concerned with serious violations of fundamental rights.

These are: Targeted Public Distribution System; Antyodaya Anna Yojana; Mid Day Meal Scheme; National Old Age Pension Scheme; Annapurna; Integrated Child Development Scheme; National Maternity Benefit Scheme; National Family Benefit Scheme.

— August-September 2002

In Nawab Khan's case in 1997, the Supreme Court observed that "it is the duty of the State to construct houses at reasonable rates and make them easily accessible to poor. The State has the constitutional duty to provide shelter to make the right to life meaningful." Dealing with the aspect of encroachers the Supreme Court said, "the mere fact that encroachers have approached this court would be no ground to dismiss their cases. Where the poor have resided in an area for a long time, the State ought to frame schemes and allocate land and resources for rehabilitating the urban poor."

SECTION 12

Damn the Poor, Mumbai is Going Global!

Mumbai is a classic case of the excesses of globalisation where the architects of the future city are designing it exclusively for the seekers of profit making, for powerful and influential, for the richest of the rich and land mafias. Since Mumbai is a strategic point for multinational companies, a corporate friendly environment will link up the city with other global, commercial hubs and de-link it from its own people and immediate periphery.

HARSH DOBHAL

Mumbai wants to get rid of its poor as fast as possible. Demolish their homes, throw them out, intimidate them and if they demonstrate against state atrocities, beat them up, arrest them and put them in jail. On April 6, Maharashtra police, always precise and prompt when it comes to hitting the poor very hard, brutally lathicharged thousands of demonstrators protesting against recent slum demolition drive which has displaced about 3.5 lakh people in Mumbai. Narmada Bachao Andolan leader Medha Patkar, leading the protest, was once again humiliated, beaten, dragged and put in police station. About 22 others were arrested under non-bailable sections while over 50 were injured, including women and children, some of them seriously.

This city is in for an overhaul, being re-shaped in the image of a 'global city. The administration, having completely failed to chalk out a comprehensive planning for public welfare, has been very efficient in handling over the city to powerful builders and land sharks. BJP Shiv Sena or NCP. Congress coalition, successive governments have been pathologicvally obsessed with converting Mumbai into a dream city, a mini Singapore with spiraling flyovers and world-class malls, dotted akylines and glittering five star hotels. A modern, slick and beautiful city, sanitized and clean, cleansed of its poor, meant for the rich and powerful. A corporation friendly city with no place for the people who have built it and who have no plans to abandon the "dream land" they had migrated to decades back in search of livelihood. Mumbai's own citizens, who have given to this city many times more than it can ever pay them back. Honest and hard working, who have given their sweat and blood to build this city, its roads and buildings, its electricity lines and complex water networks, its gutters and sewages, its bylanes and walls, brick by brick. Who have carried the burden and the refuse of the city for decades, on their heads, backs and shoulders. That is why they don't want to leave the city for they love it much more than the harbingers of 'one dimensional' develop-

ment, perhaps they understand this city with much more intensity than political leadership and transnational corporations. What they don't understand is Maharashtra Chief Minister Vilasrao Deshmukh's obsession for free trade and free market, his love for land mafias and mighty commercial builders who want to turn Mumbai into an 'international' city that can capture the perverse imagination of multinationals, business tycoons and world financial institutions, a city that can match Manhattan and New York, even if built on the human graveyards. After all, Mumbai is the financial capital of India, the fastest growing consumer market with its ever burgeoning, decadent middle class. Why should Mumbai not qualify for being a centre for transnational trade?

Mumbai is a classic case of the excesses of globalization. The architects of the future city are designing it exclusively for the seekers of profit making, for powerful and influential. For the richest of the rich, land mafias and from here with other global networks. Since Mumbai is a strategic point for multinational companies, a corporate friendly environment is the need of the hour. Mumbai will be linked up with other global, commercial hubs, de-linked from its own people and its immediate periphery.

And the de-linking process has taken off. Poor are being deprived of their livelihoods, housing, education, health, public transport and even the basic amenities, a hapless populace being pushed to the wall. Every iota of human rights trampled upon. The 'global' city is being built on the debris of homes to about 3.5 lakh people from 90,000 familites. The citizens of a free, democratic India, the poorest of the urban poor – unorganized labourers, hawkers, lorry drivers, rickshaw pullers, daily wagers, whose shanties were razed in December and January before Sonia Gandhi halted the drive while Maharashtra government contended that it was merely removing "illegal" encroachments on "public" lands. That is why about 3000 dishoused of Mumbai traveled all the why to Delhi last month in the hope of getting a compassionate audience from the central government and Congress leader Sonia Gandhi. There is no hope in Maharashtra where politicians have made it a habit to go back on their election promises soon after the polls. Deshmukh had made a pre-election promise to regularize slums built before 2000 and they had voted for Congress party for this reason, overthrowing Shiv Sena and BJP. But the Chief Minister, in keeping with the tradition of political parties, was quick to make a dramatic turnaround and change the cut off date from 2000 to 1995 soon after elections.

Betrayed by Maharashtra government, they squatted around Jantar Mantar in New Delhi. Completely non-violent and peaceful, they wanted to draw the attention of a government busy complying with TRIPs related obligations of WTO and hobnobbing with other political parties for approval of the Patents (amendment) bill iin the parliament. With a concern as stark and immediate as next meal and the roof over their heads, they came back, empty handed, after Sonia Gandhi gave some vague assurance of "protecting" their rights. Back in Mumbai, they have been thrashed by police, dragged by hair, children lathicharged, hit all over their bodies and locked up in police station. Others are focing extreme repression. There is terror in the air, the police at the vacated lands and the builders' private 'security forces' continue to intimidate. The iron fencing in Ambujwadi, Indiranagar, Rafiq Nagar and Wadala has uprooted thousands. Dalits at Ambedkar Nagar and Ghatkopar, others at Ambosoevad-Malad-Malvani or Bhimnagar Vikroli-Kannmavar Nagar, have been badly hit, destruction of every right.

Maharashtra government's justifications for demolition are as hollow as its pre-election promises. The official line contends that slums eat up space and infrastructure. But the government has been proved wrong on both these counts. The infrastructure excuse has been questioned by an NGO YUVA which has come up with a study establishing that, slum dwellers actually use very little infrastructure as only 5.26 per cent slum-dwellers have access to individual water taps and 62 per cent of them use public or shared toilets. Then, displaced slum dwellers are asking, if the government lacks infrastructure, how can it afford to give quick permission to build about 100 forty-storeyed buildings all over the city. Obviously, while the government cares only about the rich and upper middle class, while poor people find no place in its agenda.

'Lack of space' justification is again contested vociferously by civil society groups. Mumbai was once known for its thriving textile mills that have all been closed in last decade and half. These lands were leased to the mill owners by the government over 50 years ago but they have not returned the land after shutting the mills. About 2,000 acres of lands are lying waste in defunct mills and docks. But the government has no plans

providing housing for the poor in these lands. In fact in the absence of a comprehensive plan, these lands are going for unbridled sales.

India's biggest slum demolition drive was launched in December last year. With Sushilkumar Shinde as Chief Minister in 2003-2004, 'Mumbai First', a powerful lobby of builders, industrialists and ex-bureaucrats, iinitiated the 'development plan' for Mumbai with the multinational, McKinsey. The Maharashtra government adopted the plan, without consensus, not even in the Legislative Assembly. The Mckinsey report had little for the poor, instead it suggested that slums should be reduced to 10 percent. The Maharashtra Housing Development Authority stopped constructing low-cost houses after 1990. 'Mumbai First' and other groups propounded the idea of "developing Mumbai into a world class metro" and complained that there was no land for real estate.

'Mckinsey' and 'Mumbai First' have reasons to smile. Deshmukh has been remarkably docile and obedient, police prompt and ruthless. Slum dwellers have been warned in no uncertain terms that they should forget Mumbai, government has no plans to house them. Their children have been thrown out of schools, their schools bags and pencils, and their dreams, have been curshed with their homes long back. Demolitions have flattened their slums and hutments, more could be underway. Mumbai has become the hunting ground for national and transnational corporations. The World Bank has been extremely generous to have come forward with one billion dollar to push the 're-modelling' plan, to develop the city into a global financial centre. Of course, there will be a time to pay back, with heavy interest.

For now, damn the poor, Amchi Mumbai has gone global!

— April-May 2005

Linking Urban Poverty and Housing

The situation of the urban poor is as bad as, or even worse, than the rural poor as the most deprived and marginalised in the rural areas migrate to urban centers for want of income to sustain livelihood. The forces of the globalisation and urbanisation are throwing up new challenges where urban poverty and related growth of slums have come to reflect a skewed development process.

RANJIT AMBASTHA

About half of the world's population of 6 billion people now lives in towns and cities. Population growth is faster in urban than in rural areas. In the year 2000 the percentage of population living in urban settlements was 37 percent in Africa, 38 percent in Asia and 76 percent in Latin America. This is projected to grow to 53 percent, 55 percent and 85 percent respectively in the year 2025.

Statistics published in 1996 show that over 1.5 billion people live in the towns and cities of Asia, Africa and Latin America and at least 600 million of them live in poverty. There are poor people in the cities of the North – in Europe and in North America. Developing countries are, however, experiencing faster rates of growth of urban population. In fact, it is expected that by the year 2015, ten of the world's fifteen largest cities will be in Asia with three of these are projected to be in India (UN study, 1995)

NATIONAL TRENDS

India's population has crossed the one billion mark and has become the second largest after China at 1027 million with an urban population of 27.7 percent (285 million in 2001). The decadal growth rate over 1991-2001 is 21.35 of which the urban growth rate is 31.13 percent whereas the rural population of India grew by only 18 percent. During the last 50 years the population of India has grown two and half times, but the urban population has grown nearly five times. India has a large network of cities and towns. In 1991, the network consisted of twenty-three cities with a population of over one million, 300 cities with a population ranging between 1,00,000 and one million and nearly 4290 towns. In 2001, the network of cities and towns expanded to comprise thirty-five cities with over one million population, 388 cities in the population size category of between 1,00,000 and one million, and approximately 4700 towns. Urban population is growing at the rate of 3 percent whereas slum population is increasing at the rate of 5-6 percent.

Take the case of two states where Oxfam GB is implementing its urban programme. In Uttar Pradesh (U.P.), 20.7 percent of the population lives in urban areas. (34 million out of a total population of 166 million). The state has the second largest urban population in India after Maharashtra. Out of the `35 million-plus cities' in the country, six are in U.P. These are- Kanpur-2.69 million, Lucknow- 2.26 million, Agra 1.32 million, Varanasi-1.21 million, Meerut-1.16 million and Allahabad 1.05 million.

According to the Planning Commission estimates based on NSS 50th round, nearly 35 percent of the urban population was below poverty line in the state. This was little higher than the national average but much below the figure for Madhya Pradesh (see below)

In Madhya Pradesh, 26.6 percent of the population lives in urban areas (16,102,590 of 60,385,118 persons). Within the State, Bhopal is the highest urban population district with 80 percent of its population being urban-based. After Bhopal comes Indore (71%), then Gwalior (60%), Jabalpur(57%), and Ujjain (39%), all of which havhigh urban populations. Three cities in the state enjoy the million plus status- Indore- 1.64 million, Bhopal-1.45 million and Jabalpur-1.12 million. There are 26 towns having a population of 0.1million or more. Urban population growth was highest, by 194 percent, in Sidhi District. The other highest urban growth districts of the State are Dhar (60%) Raisen (50%), Balaghat (49%) and Indore (49%). 43 urban agglomerations in Madhya Pradesh are found to have slums. In absolute numbers the total slum population recorded is 23,88,517. This is 24 percent of the total population of these towns. According to Planning Commission estimates based on NSS 50thround, nearly 48 percent of the urban population was below poverty line in the state. This is one of the highest in the country.

URBAN POVERTY AND VULNERABILITY IN INDIA

The urban poor are estimated to be 75 million comprising 38 percent of the urban population in 1988. This number rose to 76 million in 1993-94 i.e. 32 percent of the urban population. It is estimated that about 100 million of the total urban population in the country lives in slums and other low-income informal settlements with poor infrastructure and services (Urban Crisis In India, P.G. Dhar Chakravorty, 2002). For the first time, Census of India 2001 has collected detailed data on slum areas in India, particularly on cities/towns having a population of 5,00,000 or more in 1991. In 26 States and Union territories, slum population has been evident in 607 towns and cities. According to 2001 census, the total slum population in the country was 40.3 million in 2001 (14.2 percent of the total urban population) and 22.6 percent of the total urban centers reported slums. This may be a significant underestimate. In a study conducted by Oxfam GB in Indore, slum population constitutes about 65 percent of total population of the city. Similarly, Lucknow has about 40 percent of slum population where as the Census of India, 2001 does not recognise any slum population in Lucknow.

In India, although urban poverty was lower than the rural poverty by at least six percentage points in the 1970s and early 1980s, currently it is at par with or only marginally below rural poverty. At present 33 per cent population in urban areas live below the poverty line as against 37 per cent in rural areas (Datt, 1997). The proportion of people living below the poverty line in many states is now higher in urban areas than in rural areas. Most of the health and human development indicators for the poorest quartiles in the urban poor are worse than or equal to poorest quartiles in the rural poor. Poverty ratios were highest for Madhya Pradesh, Bihar, Orissa, Uttar Pradesh and Andhra Pradesh,as per the official estimates both in 1993-94 and 1999-2000. Punjab, Delhi, Chandigarh, Haryana, Himachal Pradesh, Jammu & Kashmir and Assam had the lowest poverty ratios in both the periods. Other states like Tamilnadu, Maharashtra, Gujrat, Karnataka and Kerala were at middle level.

Urban poverty in India and elsewhere in the world manifests itself in many forms. The most visible forms are proliferation of slums and bastees, fast growth of informal sectors, increasing casualization and under-employment of labour, acute pressure on civic services, high rate of educational and health contingencies, rising crime rates and violence, which mainly affects women. Thus, the poor are not only income poor, but are also marginalised and vulnerable on other counts. A series of Impact Assessment commissioned by DFID India in 1997 demonstrated that poor urban people highlight employment, assets and savings, and income as the key determinants of their well being. This is significantly related to the security and predictability of income, as well as to the security of assets, including land tenure. The analysis also suggested that households experience multiple vulnerabilities- ill health, insecure and limited income sources, and unsanitary and precarious living conditions- and, if located in a non-recognized slum, there are all the attendant difficulties around tenure security.

Urban poverty and growth of slums in India have come to reflect a skewed development process. Urban centers still serve as safety valves for rural economies as they are fast becoming engine of development and forcing migration of poor cheap labor from rural to urban areas and engaging them in the subsistence and low productive informal sector. Urban economy, in fact, is highly subsi-

dized because of this. Those who come to the cities in search of employment from rural areas are mostly from the poorer sections and mostly from lower rungs of the caste system, i.e., scheduled castes and scheduled tribes. They often face cumulative deprivation and marginalisation due to poor skills, education, health, access to market & credit and breaking up of their social network. Caste, religion and gender determine to some extent the types of work available to individuals and hence these have a role in determining vulnerability, especially of the income. They continue to remain vulnerable mostly in terms of inadequate income and inaccessibility to legitimate affordable housing and are forced to encroach upon vacant private and public lands to form slums with none or inadequate basic services. These people are facing increased threat to their livelihoods. In the urban context, housing and tenure security, which ranges from legitimate temporary shelter to ownership of a house, is the most basic need along with secured income. Both are vital for improving slum people's livelihoods and have cause and effect relationship on their livelihoods. Through affordable housing & tenure security poor communities will be able to sustain their income faster and at the same time by enhancing the income they will be able to secure housing, which would have long lasting positive effect on their livelihoods.

POLICIES, PROGRAMS AND INSTITUTIONS FOR URBAN POOR

Government policy on urban poverty takes a three-pronged approach: (a) enhancement of productive employment and income for the poor; (b) improvement in general health and welfare services; and (c) improvement in infrastructure and built environment for poor neighborhoods. Currently the SJSRY (Swarna Jayanti Sheheri Rojgar Yojna) is the main urban antipoverty program. It integrates all the above approaches and many previous schemes, and relies on community development societies and bottom up planning process as the vehicle for implementation. It has seven components. These include the urban wage employment; the self-employment; formation of self-help groups; the development of women and child amongst others.

Realising the basic needs of housing for urban poor Government has been implementing the Valmiki Ambedkar Malin Basti Awas Yojna (VAMBAY) and trying to make it available to the needy at an affordable cost. Government announced an allocation of Rs. 100 crores for this scheme. In addition a number of other schemes like Nirmal Bharat Yojna (National Urban Sanitation Program), National Slum Development Program (NSDP), the Integrated Development of Small and Medium Towns (IDSMT) and Liberation of Scavengers etc. are aimed at urban poverty reduction.

The plans and policies of the government do not address this issue in a holistic way. The city master plans do not recognize the marginalized settlements and do not provide space in the future plans for their specific needs. Housing sector policy paper of the World Bank (1993:II) stated that nothing influences the efficiency and responsiveness of housing supply more than the legal and regulation framework within which housing suppliers operate. The low plan outlay provided for urban development and housing in successive five year plans (maximum 3%) which has resulted in overall decline, congestion and deterioration in urban life and environment. The mismatch between demand and supply, growing land prices and speculative nature of land markets in cities have made it impossible for the poor to afford legal access to residential land, regardless of how minimal their land needs may be. Other government programme on urban poverty alleviation are also not seem to be designed and implemented with the vision of long-term solution. Poverty alleviation schemes run by the government, multi lateral institutions and NGOs fail to address the most vulnerable groups. The schemes have not been substantially effective even among the targeted groups in Indore (A study on Urban vulnerability in Indore, Oxfam GB, 1998). At the same time, housing/ slum policies also lack the perspective of right balance of growing secured housing and income needs for securing the sustainable livelihoods for urban poor. The data indicates a need to accelerate public support schemes to promote informal sector activities to enhance the productivity of enterprises in the informal sectors and establish positive linkages with loan finance, raw material, marketing facilities as well as safety net for the workers, especially home based women artisans.

The UNCHS Habitat Agenda of 1996 lays emphasis on removing legal, administrative, and institutional and gender biased hindrances, in gaining access to basic shelter needs. The National Habitat Policy (1998) reveals, therefore, a conscious corporate and cooperative sector, housing finance institutions and research institutions with government playing the role of a facilitator in the process. The Common Minimum Programme (2004) of the new United Progressive Alliance government at the center in

India has emphasized on the rights of the urban poor by focusing on the increased investment in social housing, stopping forced eviction and rehabilitating the urban poor near the place of occupation.

EMERGING ISSUES

It is clear from the above that urban population, especially the poor have been increasing rapidly in the cities. The situation of the urban poor is as bad as or even worse than the rural poor as the most deprived and marginalized in the rural areas migrate to urban centers for want of income to sustain livelihood. The forces of the globalization and urbanization are throwing up new challenges for understanding the urban poverty. What comes out is to have an approach towards "Inclusive city" (incorporating the needs of every section, especially the poor), to address the issues of livelihoods in general.

Most important issue emerging is housing and tenure security as the first key need. The house and tenure security in urban area helps poor people to lead a dignified living by getting assurance of living and earning a livelihood. In urban context land and house are not only associated with living space but mostly it works as work place. It also has strong links with income and vulnerability. There are very limited organizations working on this issue. These are some of the issues that the study reveals. Income is central to the poor's own conception of vulnerability, as emerging from the above analysis. Increased income level leads to increase in food consumption and spending on health and education apart from investment in household assets and tenure security. Enhancement of income of poor families should form the secondary focus of the programme as the research findings are indicating that enhanced income would lead to more secured livelihood, including the security of tenure. Availability of credit to the poor families is also very critical, as this seems to help them to come out of the clutches of exploitation and build on their income. Taking loans is common among the sample, with 44 percent holding debt. Taking an advance from one's employer is the most common source for loans, showing the importance of having at least one family member in a steady form of employment. The research also illustrates that 78 percent slum dwellers are saving regularly. The most common place to save is in the home and that shows the unproductive use of their savings as well as importance of its liquidity. Thus one more core area seems to be emerging is working on the issue of thrift and credit for enhancing the household income and working on the appropriate safety net.

The precarious living conditions affect the health and income of slum dwellers. Thus, access to basic services is also very important for the slum dwellers irrespective of tenure status. Water and sanitation seem the most crucial for pushing the slum population in non-chronic diseases. As per the Oxfam GB research non-chronic illness is the most frequent event type, with 42 percent households experiencing at least one in the four-week period. Treatment of such illness accounts for about 30 percent of the household income, which is quite substantial. Thus by helping the community to get better water and sanitation provisions, the household income can be enhanced by reducing such expenses.

The major programs of the government for redressal of poverty in the urban areas in the past have focused on provision of housing, environmental improvement in urban slums and urban basic services for the poor. These have had mixed results. The practices are such that house built for the urban poor is both inadequate in number and unaffordable or it does not reach to the poor. The programs for the urban basic services also included elements of training and income generation and employment generation under various schemes. But the achievements were limited due to ineffective and disintegrated implementation of such projects. Local governments and basic line departments of the government, which have most of the responsibility for managing the urban change and overseeing poverty reduction initiatives, often lack capacity and resources and cannot solve the problem alone. Community and private sector resources must be mobilized. (Report on the Cities Alliance Annual Public Policy Forum 2001) Thus there is a need to take up the twin challenge of empowering the urban poor community and sensitizing and strengthening various key stakeholders to meet these challenges.

A broader agenda on tenure and housing rights and provision of other basic services and livelihoods needs to be developed after critically analyzing them. It is thus suggested that civil societies as a group must support the poor urban community in a manner that helps them to assert their basic rights including opposition to the forced eviction. Advocacy, campaigning and direct intervention activities through collective approach seem to be very critical to find long lasting solution.

— September-October 2004

Right to Shelter: A Fundamental Right

"Every woman, man and child has the right to a secure place to live in peace and dignity." This, though accepted by the Indian government within the UN forum, has remained a mere platitude on paper in its dealings with its people.

MAHARUKH ADENWALLA

For some it is exhilarating to stand by a window and watch the raindrops pitter-patter into a puddle. For others the onset of monsoon is looked upon with apprehension. In Ghatkopar, a suburb of Mumbai, about two thousand families reside in huts built precariously on hilltops that are prone to landslides, especially during the rains[1]. "Every woman, man and child has the right to a secure place to live in peace and dignity[2]". This though accepted by the Government of India within the UN forum has remained a mere platitude on paper in its dealings with its people. A roof over the head assures a family the security and opportunity to concentrate on other aspects necessary for its healthy development, such as employment and education. Most slum or pavement structures are a mere shield from the elements and an attempt at privacy, with no amenities provided by the concerned authorities. This too is grudged. Homes are repeatedly demolished as being "encroachments", and recent laws treat people residing in them as "in eligible" and offenders[3]. These very people though an integral part of the urban economy, are not eligible to reside in the cities they help tick.

The Supreme Court as far back as 1981 has interpreted right to life[4] to include "the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms,… [5]". A proper home being essential for the optimum development of a person was reiterated by the Apex Court in 1990 when it observed that:

"Basic needs of man have traditionally been accepted to be three – food, clothing and shelter. The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is the bare protection of the body; for a human being it has to be a suitable accommodation which would allow him to grow in every respect – physical, mental and intellectual. The Constitution aims at ensuring fuller development of every child. That would be possible only if the child is in a proper home. It is not necessary that

every citizen must be ensured of living in a well-built comfortable house but a reasonable home particularly for people in India can even be mud- built thatched house or a mud-built fire-proof accommodation[6]"

Hence, the law of the land unequivocally asserts that housing is a fundamental right, and it is obligatory upon the state to provide housing to its people. Sadly, not only has the state failed to meet the housing deficit[7], it has carried out demolitions and rendered people homeless, mostly without providing them with alternative accommodation. Pray under what legal and moral sanctions are these homes demolished. Or is it that the guarantees enshrined under the Constitution do not extend to the poor of India.

The Government of India unabashedly signs and ratifies instruments at the international platform, but neglects to conform with its commitments at the domestic level. The International Covenant on Economic Social and Cultural Rights [ICESCR] was acceded to by India on 4th April 1979, but today 25 years later there is total disregard for the promises made therein. Under Article 11(1) of ICESCR the State Parties[8] have expressly recognized "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." The international community under the auspices of the United Nations has recognized forced evictions to constitute a gross violation of human rights, and has placed squarely upon governments the ultimate responsibility for preventing them[9].

Jurisprudence emphasizing the importance of shelter is not reflected in the recent policies of the State government. Most States have adopted the phenomena of "cut-off date", meaning if you are residing in a structure prior to a particular date your existence will be tolerated. Cross this date and you are a criminal. Under the new amendment to the Maharashtra Slum Areas [Improvement, Clearance and Redevelopment] Act 1971 if a person cannot prove that he has been residing in a slum structure prior to 1-1-1995 not only is his structure demolished, but he too is "punished with imprisonment for a term which shall not be less than one year but which may extend to 3 years and with fine which shall not be less than Rs.2,500/- but which may extend to Rs.5,000/-". The message sent by the Maharashtra government is clear : you are welcome to Mumbai with your riches, but entry is shut for those in search of means for survival. Previously the hut was demolished as being unauthorized, but today people are rendered "unauthorized" and their poverty penalised. The protection given to a pre-1995 slum structure also comes with its limits; if the land is required in public interest, the residents are to be shifted to another site. There is no assurance that the relocation and rehabilitation site will be in the vicinity of their acquired home. In the guise of providing alternative sites slum dwellers are shifted not only out of their familiar environment, but out of city limits. The public purpose necessitating relocation could range from road widening to construction of a helipad[10]. Pre-1995 slum dwellers residing within the boundaries of Sanjay Gandhi National Park are refusing to shift to their relocation sites in villages in Thane district, thus compelling the government to identify an alternative site within Mumbai.

The quest for suitable alternative sites is always stymied with "there is no vacant land in the cities". Whilst on the other hand the Government of India repeals a law pertaining to the acquisition of vacant land in urban areas for public housing. In 1999, the Urban Land [Ceiling and Regulation] Act 1976 was repealed on the ground that the law never achieved its objective of preventing speculation and profiteering and to ensure the equitable distribution of land in urban agglomerations. Several loopholes in ULCRA had been identified, but instead of plugging these, Mr. Ram Jethmalani, the then Minster for Urban Affairs, was of the opinion that its repeal would drastically improve the housing situation in the country. How repeal of ULCRA would attain Jethmalani's vision is difficult to understand. ULCRA had set a ceiling to the amount of land that could lie vacant with private agencies in urban areas, a limit of 500 metres had been set for Mumbai and Delhi. Any vacant land in excess of this ceiling was to be acquired by the State governments for public housing purpose. This law if properly implemented could have greatly reduced the housing deficit in the cities. The NDA government preferred to succumb to the wishes of the World Bank rather than provide housing to its toiling citizens. It is hoped that respective State governments recognize the importance of ULCRA in creating land stock for the homeless, and keeping in mind the vast housing deficit, do not repeal its applicability within their States.

There is no comprehensive policy for the rehabilitation of the displaced urbanite. They are at the mercy

of the whims and fancy of State governments who in turn are not concerned with the dislocation of lives caused in the name of progress and development. The UN Committee on Economic, Social and Cultural Rights[11] has laid down seven principles vis-a-vis adequate housing that could be used as the norms when providing alternative accommodation : (i) legal security of tenure, (ii) availability of services, (iii) affordable, (iv) habitable, (v) accessible, (vi) location, and (vii) culturally adequate. In Mumbai, slum dwellers eligible for rehabilitation are allotted pitches admeasuring 10' X 15' without any documentation of tenure or amenities, often several kilometers from their original home. It is imperative that an urban displacement policy be formulated to meet the large scale displacement of traditional communities, such as tribal, fishing, etc., due to indiscriminate urbanization. In the absence of a need-based rehabilitation policy, displaced traditional communities will join the myriad slum and pavement dwellers when denied access to the resources necessary for their survival.

The judicial trend has gradually shifted. Courts now perceive slum dwellers as anti-social elements and a hindrance in cleansing the urban environment. The very same court that once observed, "It is a notorious fact of contemporary life in metropolitan cities, that no persons in his senses would opt to live on a pavement or in a slum, if any other choice were available to him[12]" is now observing that "Rewarding an encroacher on public land with a free alternative site is like giving a reward to a pick pocket[13]". However harshly we treat our people we cannot wish away the judgments that recognized the right to shelter as a fundamental right under the Indian Constitution. People will continue to use these judgments to ensure them their fundamental rights.

Those who do not have the finances to purchase a flat in the private market are perceived, under law, as encroachers upon public land. Once they have delivered the bread to 30 storied skyscrapers, driven the cars of MNC executives, worked the machines in factories, swept the city's roads, cleaned the private toilets, arrested the hoodlums, filed the papers in government offices, pulled back the Judges' chairs; where are they to rest, their children to study, their wives to bathe. A country that does not provide its toiling majority with a roof over its head should be ashamed to look its people in the eye. India instead of acknowledging this debt chooses to imprison and fine slum and pavement dwellers.

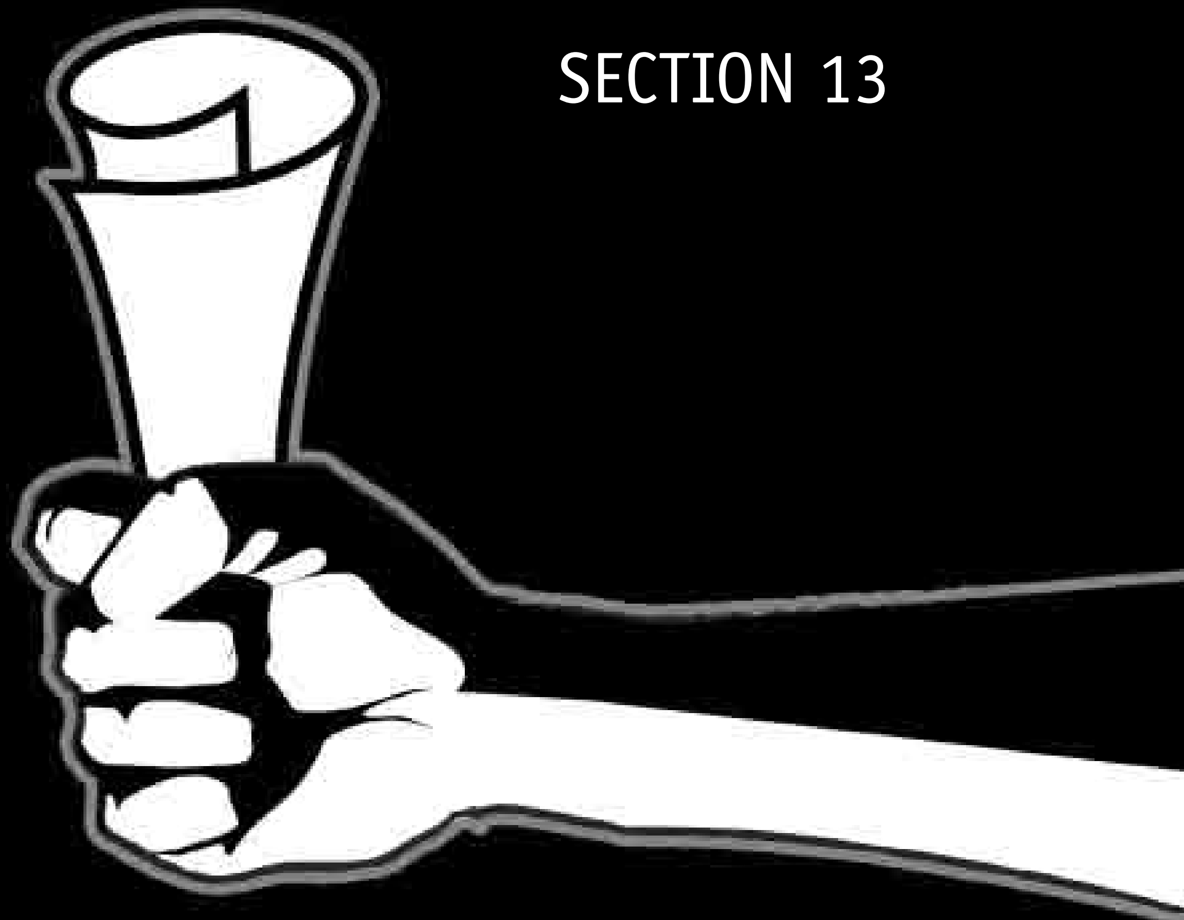
—September-October 2004

Endnotes

1. Article titled When it rains, the ground shakes by Soubhik Mitra appearing in the Afternoon Despatch & Courier dated 30-7-2004.
2. UN Sub-Commission on Human Rights – Resolutiona on Forced Evictions 1991 / 12 and 1993 / 77.
3. The Maharashtra Slum Areas [Improvement, Clearance and Redevelopment] Act 1971 as amended in 2001.
4. Art.21 of the Constitution of India
5. Francis Coralie Mullin vs. Administrator, Union Territory of Delhi & Ors. [AIR (1981) 1 SCC 608].
6. M/s. Shantistar Builders vs. Narayan Khimalal Totame [AIR 1990 SC 630].
7. 22.90 million units as per the 1991 Census.
8. The governments that have ratified ICESCR.
9. UN Sub-Commission on Human Rights – Resolution on Forced Evictions [1991 / 12].
10. In May 1998, about 1000 slum structures were demolished at Ambedkar Nagar, Cuffe Parade for construction of a helipad.
11. General Comment No.4 on the Right to Adequate Housing under the ICESCR.
12. Olga Tellis vs. Bombay Municipal Corporation : [(1985) 3 SCC 545.
13. Almitra H. Patel & Anr. Vs. Union of India : [(2000) 2 SCC 679.

Information has always been power and *babus* in India, like our colonial masters, have always used control over information to dominate over citizens. This in turn has led to unbridled corruption. The RTI is, therefore, a powerful tool for checking corruption. Its use in the initial stage not only by the middle classes but also by grassroots organisations has achieved remarkable success. This is what the bureaucracy really fears. If the Act is used well, it could be a revolutionary instrument in the hands of the people.

SECTION 13



The Right to Transparent Governance

If government is a collective entity in the modern democratic era, transparency makes it distinct from the rule of yore. The gains of democracy cannot be complete without access to information. Deprivation stems from opaque laws, norms and practices, dispossessing people of their rights. Transparency opens the doors to progress and empowers people on a just basis. Societies that compromise the freedom to know limit the choice of their people and cripple their right to decide.

ARUNA ROY, JEAN DREZE & NIKHIL DEY

The right to transparent governance can be summed up in two basic principles: the state's obligation to disclose, and people's right to make informed choices. This right is partly a matter of legal instruments, such as the Right to Information Act, but it involves much more: empowering people to make effective use of these laws, so that democratic institutions are more participatory. While this seems to place this discourse in the context of the rights of the citizen, and the obligation of the government, transparent governance ultimately requires building a culture of transparency in public life, where the obligation is generic. As we shall argue, this process must be led and defined by poor and marginalised communities, not only to expose the inequities thrust upon them, but also to open up so-called democratic institutions that have facilitated the arbitrary use of power by ruling elites.

This point becomes clearer if we look at the nature of prescriptions for "good governance" used by rulers in national governments and international institutions. A whole new regime of laws designed and crafted by international capital is being pushed through national legislatures without even consulting the citizens of the countries themselves. In the name of economic freedom, communities are in fact being forced to give up control over natural resources, the right to take decisions about their own environment, economies, and eventually even their own lives. Once these laws are in place, "good governance" is prescribed as a means to efficiently implement these laws that do great injustice to poor and marginalised people. In a limited sense, "transparency" is also an important component of this model of "good governance", where transparency is used as a tool of management to more effectively implement the objectives of the rulers.

Democracy and its institutions need to be rescued from these manipulations in order to reflect more accurately the will of the people. Transparency, and the people's right to information, can and must be used to expose and dismantle unjust laws and put in place modes of decision-making that give people "the right to make informed choices". Thus, it is important to link transparency and the right to information with a conception of democratic governance that is truly participatory.

There are at least four reasons why the right to transparent governance is of fundamental importance at this time. First, transparency is a means of eradicating corruption. Indeed, corruption thrives on secrecy and confidentiality. When transactions are open books, the private appropriation of public resources is that much harder. The power of the right to information in curbing corruption has already been well demonstrated in various contexts, and this is an achievement of major importance given the wide-ranging economic and social costs of corruption. Here again, it is important to distance oneself from elitist perspectives on the eradication of corruption, and to keep people's basic concerns centre-stage. In India, for instance, corruption has become an issue for all sections of society, and the right to information campaign has a very wide reach. The right to information, public hearings, social audits, exemplary action taken in certain cases and other tools of transparent governance have eroded the social acceptability of corruption and made significant dent in the prevalent modes of brazen embezzlement. Nevertheless, unless such campaigns are led and defined by people's movements, anti-corruption efforts could restrict themselves to the concerns of the affluent

(such as the corporate sector's concern to avoid the "transaction costs" associated with corruption). The right to transparent governance should therefore allow people to link their struggles against corruption to their wider struggles against injustice.

Second, transparent governance is essential to restore accountability in the public sector. This is particularly important against the background of growing state abdication from its social responsibilities, evident for instance in the privatisation of public services and development programmes. This abdication often takes place under the cover of "liberalisation", but what is really taking place is a shift in the orientation of state support, from broad-based development to narrow corporate interests. Shortcomings in the functioning of public institutions are being used as an excuse to wind up these institutions, and even the basic responsibilities of the state in the sectors they serve. Countering this trend, and expanding the social role of the state, depends on the possibility of radical change in the quality of public services. Transparent governance would allow people an opportunity to force upon the state their obligation to deliver in an efficient manner the most basic services that every citizen expects to be provided with. It would increase the efficiency of public sector institutions, and reflect popular will to have a stronger and more accountable State that takes responsibility for meeting the basic needs of its citizens. For instance, reversing the privatisation of health and education services requires functional government schools and health centres. Similarly, the case for halting the privatisation of public sector enterprises is much stronger when these enterprises are run in an effective and equitable manner. This is not just a matter of eradicating corruption, but also of ensuring that these facilities and enterprises are accountable to the public. Transparent governance is a tool of public accountability.

Third, affirming the right to transparent governance is an aspect of the larger struggle for participatory democracy. Our future depends a great deal on the consolidation of democracy in the country. This specifically applies to settings where the formal institutions of democracy are in place, yet the ability of these institutions to bring about "government of the people, for the people and by the people" has been undermined by gross social inequalities and the concentration of power. In some respects, these anti-democratic tendencies are growing, due to, for instance, rising economic inequalities and the growing influence of international capital on domestic public policies. However, there is also a positive trend of increasing participation of marginalised people in democratic processes, and of creative thinking and action towards participatory democracy. This movement for participatory democracy needs to go beyond attractive labels towards defining the modes of participatory decision-making and building the institutions of direct democracy. Participatory budget-making, statutory social audits, mandatory public hearings before implementing large development projects are some recent examples of participatory institutions of this kind. Transparent governance is an important aspect of this concern for participatory democracy, even though much more is involved.

Finally, the right to transparent governance is closely linked with other ongoing struggles for economic and social rights, such as the right to education, the right to food and the right to work. For instance, just as transparent governance is essential to realise the right to education (in so far as the latter require an accountable schooling system), the right to transparent governance would be seriously incomplete without the right to education, since "informed choice" requires not only information but also critical understanding. Similarly, there is a strong complementarity between the right to transparent governance and the right to food: transparency is vital for the success of food security programmes, and the eradication of hunger, in turn, is essential to enable people to participate in the democratic process.

The right to transparent governance has recently made a leap forward with the enactment of the Right to Information Act 2005, and the movements that have preceded and followed this breakthrough. In this note, we share some of the insights we have gained from our involvement in this process. The right to transparent governance, of course, goes beyond the right to information. Indeed, governance is an act, while information is just a resource, which or may not be well used. For instance, while "participatory budgeting" is an act of transparent governance, it requires much more than transparent accounts. A "social audit" is another institution of transparent governance that makes use of, but goes much beyond, the right to information. Nevertheless, effective exercise of the right to information is one of the cornerstones of transparent governance, and given the significance of recent developments related to

the right to information, this issue receives a fair amount of attention in this note. Also, the evolution of the right to information campaign in India illustrates many of the points raised in this introduction, especially the role of people's learning and understanding, gained in the course of a long struggle, in changing the discourse of the issue itself. The main focus, therefore, is on India, not because India is a model of transparent governance (far from it), but simply because that is where we live and work.

INSIGHTS FROM THE RIGHT TO INFORMATION STRUGGLE

Today, transparency and accountability are terms in vogue, used liberally by people on both sides of the fence. In this debate, it must be recognised that the one who frames the questions determines the parameters of the answers. When the language of people on all sides of the spectrum is the same, then only action can determine true intent. That is why the struggle for transparent governance must remain grounded in public action by the poor and the marginalised, so that their basic questions of survival are not brushed under the carpet in a sham debate on transparency and accountability. In this section, we illustrate the importance of transparency issues being defined by people themselves with reference to a campaign for the right to information that began over a decade ago in rural Rajasthan. Among other powerful expressions of the collective thinking associated with this campaign are the slogans coined by the participants – some of them are highlighted below.

AWAKENING: WHOSE MONEY IS GOVERNMENT MONEY?

All over India, people at the "grassroots" tend to see the government as an entity over which they can exercise no control. When Mazdoor Kisan Shakti Sangathan (MKSS) was in its formative stages in the late 1980s in central Rajasthan, this was a familiar story. People were fed up with years of mal-administration and the callousness of government functionaries, and had been overcome by a sense of indifference and helplessness about the responsibilities of the State. So much so that even corruption and inefficiency of public works carried out in their own village was shrugged off with the retort "Sarkari paisa hai - balba do" ("It is government money - let it burn"). This perception of government work as alien, people's indifference to corruption and inefficiency, and the deliberate policy of exclusion from decision-making by the ruling elite led to a peculiar impasse. The challenge was to transform this sense of helplessness.

THE FIRST BREAKTHROUGH: INFORMATION

("Hamara Paisa, Hamara Hisaab" - Our money, our accounts!)

In several meetings in which these issues were debated, working men and women in one of the more economically backward parts of central Rajasthan pondered about how to meet this challenge. The answers did not come from university-trained social activists or urban intellectuals. It was Mohanji, Narayan, Lal Singh, Sushila, Chunni Singh and many others who steadfastly maintained that if the records did not see the light of day, no position we took could be vindicated by "objective data". The poor were willing to fight for their rights, but in this unequal battle, they were always told that their "version of the truth" was contrary to the official records. They realised in the course of this battle that they would have to get access to those records and place them in the public domain in order to prove injustice and exploitation they were facing. The struggle for the right to information, therefore, became a part of establishing the right and the means to earn a daily wage, to live with dignity and indeed, the right to survive. It used people's democratic rights to link issues of economic survival with wider ethical issues.

FROM THE INDIVIDUAL TO THE COLLECTIVE

Initially, informed access was sought to records of development expenditure in selected villages. A decision was taken by MKSS to demystify these records and place them before the people of the concerned *Panchayats* (village councils). When the records became public, the first major shift in perception took place. Earlier battles, say for the payment of minimum wages, typically centred on an individual entitlement. It was a demand for "my money". As soon as the records became public, the battle became collective. The records made it clear that there was exploitation not just of the people who had been denied a wage, but of the whole village, where development had been a casualty. The shift in perception from "my money" to "our money" was

quick and dramatic, and an important alliance was formed for the first time between the poor in the village fighting exploitation, and the middle class fighting corruption.

Government functionaries were quick to perceive the threat posed by the demand for disclosure of records. They promptly closed ranks to deny access to the information being demanded. But the pressure point had already been identified, and the new perspective of the people was encapsulated in a simple but powerful slogan: *"Hamara Paisa, Hamara Hisaab!"* (Our money, our accounts!). This slogan was an indication of the theoretical distance people had travelled and the redefinitions that had taken place as a result of their struggles.

THE RIGHT TO KNOW IS THE RIGHT TO LIVE

The right to access records of local public expenditure began with livelihood issues. Lack of access to work, wages, education, healthcare and related opportunities are the biggest concerns of the poor. After years of fighting the government as the "other", the right to information movement finally reversed the perception. People now perceived that all institutions of governance, which should rightfully be theirs, were being hijacked. This helped them in overcoming the biggest adversary of collective struggle: apathy and hopelessness. Another slogan emerged that linked democratic rights with economic rights: "Hum janenge - hum jiyenge" (The right to know - the right to live). This also helped to change the discourse on the right to information across the world.

THE SECOND BREAKTHROUGH: TOWARDS ACCOUNTABILITY

("Yeh Paisa Hamara Aapka, Nahin Kisi Ke Baap Ka" - This money is yours and mine, not anyone's private fiefdom)

In December 1994, when the records accessed were first placed before the people in a *jan sunwai* (public hearing), the response was electric. Not that this was the first time people learnt or thought about corruption. But suddenly the details of whom, where, when and how had been revealed, and the documents had sifted the crooks from the honest. What struck everyone was the absolute disregard for any kind of propriety. Dead people's names on "muster rolls" (labour registers), transport bills from people who did not even have a bullock cart, unregistered companies delivering mythical materials – there was no end to the thieves' creativity. The individual grievance got converted into a larger issue of gross mismanagement of money entrusted to the *Panchayat*.

The perceptional shift from "my money" to "our development" carried the struggle forward into a much larger paradigm of political participation, demanding accountability and genuine self-governance. The school, the road, the pond, the checkdam, social forestry - issues people did not identify with earlier - suddenly became the focus of interest. The linkages between the embezzlement of wages and the breakdown of local infrastructural development bonded the poor and the rural middle class with a common interest in the way public money was spent. The debates on development were now relatively more interesting and meaningful, and those who lived on the fringes of development planning began to realise the significance of issues they had chosen to ignore. These connections stimulated the interest of the common person in the processes of self-governance.

THE THIRD BREAKTHROUGH: RIGHT TO SELF GOVERNANCE

("Yeh sarkar hamari aap ki, nahin kisi ke baap ki" - This government is yours and mine, not anyone's private fiefdom)

The modes of a public audit, and the concept of exercising government accountability to the people, became clearer in the course of this campaign. Another significant shift in public perception also took place. As people began to demand the right to audit the deeds and misdeeds of government, and faced opposition from elected representatives and civil servants, a question arose as to who actually had proprietary rights over the government. The legitimacy of the MKSS conducting audits of public works could perhaps be questioned. But who could question the right of the people to take decisions instead of others ruling on their behalf? The slogan: *"Sarkar hamari aap ki – nahin kisi ke baap ki!"* (The government is no one's ancestral property - it belongs to you and me!) indicated this shift in the idea of ownership of governance itself.

The campaign used democratic promises to demand accountability. An off-the-cuff response of the then chief minister of Rajasthan, stating that he would

give people the "right to information" to enable them to scrutinise the bills and vouchers of the *panchayats*, was taken very seriously - especially as this was said in the state assembly and prominently reported in *Dainik Navjyoti*, a leading Hindi daily in Rajasthan. Repeated visits to government offices, with requests for copies of documents, proved futile and exposed this statement as an empty promise. In the end the "right to know" was interlinked with the right to accountability of all political promises in the mind of the ordinary citizen. This remained a focus during the long *dharna* (sit-in) in Beawar in 1996, and in Jaipur in 1997. By this time it was clear that a new discourse on the right to information was emerging, linking information with the right to life. The slogan *"Hum janenge, hum jiyenge"* (The right to know, the right to live) not only expressed the involvement of the poor with this issue but also activated a large constituency that was willing to campaign for the right to information through struggle and political mobilisation. The more intellectual understanding of it being a freedom of expression issue was strengthened by this new alliance. The great power of this issue, and its strong theoretical foundations as articulated by ordinary people, established the potential for a people's campaign to energise the process of legislation on the right to information.

INFORMATION AS A LEGAL ENTITLEMENT

The need for a strong RTI legislation became apparent, not only because of the Official Secrets Act (1923) — a colonial legacy most British colonies in Asia and Africa have inherited— but also because we needed an overriding law to force the sharing of information in a proactive way by the bureaucracy. The demand for a Right to Information Act in Rajasthan became the platform for making this a national issue in 1996 after the Beawar dharna, when a large cross section of people responded to the issue, and the National Campaign for People's Right to Information (NCPRI) was born. Senior members of the press got particularly interested and the Press Council of India, under the Chairmanship of Justice P.B. Sawant, took responsibility for drawing up the first legislation in consultation with a large section of civil society members of the bench, bar, social activists, politicians, civil servants, editors of the mainstream newspapers, and others. This draft, known as the "Press Council Draft", served as the base draft for all subsequent legislations and was widely circulated to all the states and to the Members of Parliament in 1996. A number of states drafted their own legislation, and beginning with Tamil Nadu which passed its Right to Information Bill in 1996, a series of state laws were enacted. The culmination of this campaign was the enactment of the national Right to Information Act, 2005.

RIGHT TO INFORMATION AND SYSTEMIC CHANGE

While the right to information helps many individuals to sort out personal grievances, its larger potential lies in bringing about systemic change. That kind of change is only possible when a particular question establishes its links with a collective and becomes part of a larger democratic process. With the coming into effect of the national law, we can expect to see more of this new kind of democratic activism.

One example relates to water privatisation in Delhi. In 2006, the resettlement colony-based citizens' organisation, Parivartan, applied for information on the water reforms being undertaken by the Delhi Jal Board. One initial question led to accessing copies of 4000 pages of documents which exposed the role of the World Bank in blatantly pressurising the Delhi government to go down the path of privatising the management of drinking water distribution. Eventually, under intense pressure from citizens' groups, the Delhi government and the World Bank had to withdraw their plan. The government was forced to acknowledge that a process of public consultation had not taken place, and that in fact the citizens of Delhi were opposed to the water privatisation being brought in for them. People demanded the use of the RTI to make the government-run Delhi Jal Board more efficient and accountable, instead of handing over control to multinational managers and companies.

As this example illustrates, the right to information cannot exist in a vacuum. By definition it has to link with an issue or a campaign. This cross-cutting alliance also establishes the nature of the right: it is a democratic and constitutional right for all struggles against injustice and inequality. This recognition has been its strength and explains its integral relationship with other campaigns and movements, providing creativity and strength. The women's movement in Rajasthan, for instance, used it to track the progress on cases of atrocities against women, demanding that the women concerned be informed of the progress on their cases and the con-

tents of various important medico-legal and forensic reports. Civil liberties and human rights groups are using principles of the right to information to ensure transparency and accountability of the police and custodial institutions. People displaced by dams and factories; those denied their rights by the ration shop dealer; communities suffering from the effects of a polluting industrial unit; forest dwellers being evicted from their fields and homes; are some examples (among many) of various people's movements that are using the right to information to bring out the truth in their battles for survival.

As collective issues are being placed in the public domain, more citizens are seeing the right to information as a means of building public opinion to influencing decision-making, and thereby make democratic structures more accountable. It is therefore not just in fighting against arbitrary governance and corruption that the right to information has proved its worth. The principles of transparent governance have also helped campaigns with a proactive agenda of social change and alternative development.

RIGHT TO INFORMATION AND RIGHT TO WORK

The complementarity between the right to information and other campaigns is well illustrated by the recent struggle for a National Rural Employment Guarantee Act (NREGA) in India. As it happens, NREGA was enacted around the same time as the Right to Information Act, in mid-2005, and the campaigns that led to this breakthrough reinforced each other in many ways. From the beginning of the NREGA campaign, the right to information and the right to work were seen not just as means of fighting corruption or unemployment, but as complementary steps towards people's empowerment and participatory democracy. Active use of the right to information was also seen as an essential condition for the success of NREGA, since corruption is one of the chief enemies of effective public works programmes – and was constantly invoked as an argument against NREGA.

THE CONTEXT: HUNGER AMIDST PLENTY

"Bhuke pet bhare godaam!" (Hungry stomachs and overflowing godowns!)

Employment guarantee is a long-standing demand of the labour movement in India. The state of Maharashtra has had an Employment Guarantee Act (EGA) since the late 1970s, though Maharashtra's "Employment Guarantee Scheme" was substantially rolled back in the 1990s along with the general reorientation of public priorities and economic policies that took place in India at that time. However, the demand has made little headway in other states, not to speak of the national level (though sporadic attempts were made to table a national EGA in Parliament, notably in 1990). From 2001 onwards, the demand was revived and consolidated, first in Rajasthan and later at the national level.

In Rajasthan, the demand for EGA became a major political issue in the context of widespread drought and unemployment, especially in 2001 and 2003. Rajasthan has a long tradition of drought relief through rural public works, but drought relief policy falls short of a legal entitlement to work. As discussed earlier, the roots of the right to information movement in Rajasthan go back to the drought of 1987-8, as a struggle against the embezzlement of wages in public works programmes. This was also a major issue in 2001. By that time, however, much had been learnt and significant linkages had been made between the right to information, the right to live, transparent governance and participatory democracy. Also, the focus of the movement had gone beyond implementation issues and included a concern with employment policies themselves. The exciting new preoccupation with the nature of government spending had led people to question the basis of policy. And since the people had seen the links between corruption and its impact on livelihood, they did not have to make an effort to understand that allocations of money also had to be questioned. This was particularly so in regard to the absence or failure of entitlement programmes such as public works, social security and the public distribution system.

These issues gained enhanced visibility and salience as massive stocks of foodgrains piled up around the country, in the midst of widespread hunger. Even as drought decimated crops and livelihoods in 2001, more than 50 million tonnes of grain were lying idle in public godowns. The demand for a massive food-for-work programme, and beyond that, for an Employment Guarantee Act, acquired a new resonance. It also became one of the core demands of the "right to food campaign" that emerged from this unprecedented situation of hunger amidst plenty.[1] From then on, the right

to food, the right to work and the right to information were inextricably linked with each other. Each issue had its own "campaign", but these campaigns constantly informed and strengthened each other.

EMPLOYMENT GUARANTEE AND WORKING CLASS SOLIDARITY

"Trishul nahin , talwar nahin, har haath ko kaam do" (Work, not swords)

The movement for an Employment Guarantee Act also encompassed a larger politics. In particular, it was presented as a counter to the divisive politics of the right wing, which was attempting to mobilise chauvinist Hindu sentiment, for instance (in Rajasthan) through the aggressive distribution of tridents. The presenting of an alternative socio-political worldview, along with the economic case for employment guarantee, was important in building a people-centric perspective in democratic debates. It pitted a positive demand against a negative campaign, and attempted to bring the focus on people's issues.

TOWARDS THE RIGHT TO WORK

"Har haath ko kaam do, kaam ka pura daam do" (Employment for all at a living wage)

The National Rural Employment Guarantee Act (NREGA) was passed in August 2005, after a relatively brief but intense campaign involving a wide range of organisations committed to the right to work, including the Left political parties.[2] Opposition came chiefly from sections of the corporate sector and its offshoots in the finance ministry and elsewhere. One of the main arguments against NREGA was that it would be a waste of public money, due to pervasive corruption in public works programmes. This argument took corruption as an immutable feature of these programmes and denied the possibility of transparent implementation. In refuting this argument, Rajasthan's experience played an important role, particularly the successful abolition of mass fudging in "muster rolls". It has been widely noted that this practice, common in 1987-8, was largely prevented in 2001-3, when large-scale relief works had to be organised once again. This achievement showed that public vigilance is the most effective way of tackling corruption in employment programmes, and was also the key to the possibility of a successful Employment Guarantee Act.

India's NREGA is one of the most daring and important initiatives of collective responsibility in the world today. The argument that India could not afford this kind of expenditure was fought politically. But the act is not just a small economic entitlement. The campaign's main slogan (*"Har haath ko kaam do, kaam ka pura daam do"* - Employment for all at a living wage) linked the demand for work with a wage entitlement that would give people a measure of dignity and create space for their political mobilisation.

The NREGA, linked with the right to information, provides a unique opportunity for mobilisation of vast numbers of the rural poor. It is also an opportunity for political parties and social movements to build campaigns for people's empowerment and rural reconstruction based on a positive agenda. It will give the rural poor a chance to bring into play some of their creative energies. Those who threaten to derail the Act by indulging in corrupt practices can be identified and isolated by using the right to information as well as the wide-ranging transparency safeguards that have been included in the NREGA.

NREGA AS AN OPPORTUNITY TO BUILD A CULTURE OF TRANSPARENCY

One of the ironies of anti-corruption efforts by poor people is that their own exposes have been used to argue against the entitlement itself. It is important to continue to expose the double standards involved in using corruption as an argument against creating entitlements like those offered by the NREGA. Those who invoke corruption to argue against NREGA are unlikely to accept the same argument to discontinue, say, defence contracts or oil deals. Potential corruption must be fought and controlled, and recent experience has demonstrated that this can be done. Mass social audits conducted in Dungarpur District (Rajasthan) and Anantapur District (Andhra Pradesh) have proved that it is possible to build alliances of people's organisations, NGOs, political representatives, civil servants and workers to jointly audit works and prevent mass corruption. Even then, of course, corruption is likely to remain a continuous challenge. But just as in other essential spheres of governance we do not abdicate responsibility because of potential corruption, our commitment to the NREGA should not be shaken by this challenge.

In fact, this challenge can be turned into an opportunity. In an inclusive programme like the NREGA,

every expose will become a means of eroding the culture of secrecy, subterfuge, and corruption that plagues our entire system of governance. This process can help to build a culture of transparency and public vigilance that will benefit the whole system. It will also give birth to stronger citizens' movements to fight corruption. The campaign for an effective Employment Guarantee Act has already begun to do so.

SOCIAL AUDIT AS A TOOL OF TRANSPARENT GOVERNANCE

The potential of NREGA as a means of fostering transparent governance can be seen in some of the mass social audits that have taken place in Rajasthan and Andhra Pradesh in recent months. Armed with copies of official records, hundreds of people walked from one worksite and one village to the next to inspect the works, verify the records, conduct surveys, hold public meetings and create an environment where people are able to claim their entitlements under the Act – whether it is work on demand, minimum wages, timely payments, participatory planning, or corruption-free implementation. The NREGA requires a statutory social audit where relevant official documents are proactively shared with the people. These documents must be presented in a demystified and comprehensible manner. Platforms must be created to present the documents and record people's views. Last but not the least, action must be taken on the resolutions of the people. The social audits in Andhra Pradesh and Rajasthan (with responsive cooperation of the state government in both cases) have gone a long way towards setting this process in motion and creating a vested interest in it amongst the people.

This social audit process was put to test in a more "difficult" region in early December 2006, when the National Alliance of People's Movements (NAPM) and Asha Parivar carried out a successful mass social audit of NREGA works in Hardoi District of Uttar Pradesh. In spite of stiff opposition from many village Pradhans (who were often armed), and despite encountering large amounts of fraud, the social audit in Hardoi succeeded in putting the implementation of NREGA on a new footing in this troubled area. The experience so far indicates that this form of political mobilisation can force the administration to respond, awaken oppressed people to demand their rights, and strengthen democratic processes.

CONCLUDING REMARKS

As we write this note, a large number of Indians face displacement and other infringements of economic and social rights due to corporate-driven public policies. They also face draconian laws passed in Parliament in comparative opaqueness, without public debate, which deprive them of basic resources. The provisions of mandatory disclosure under the RTI Act must be used to resist these anti-democratic tendencies, and to ensure that people are informed and consulted before undertaking policies that displace or affect them. Affirming the right to work is also a part of this democratic battle against elitist economic and social policies.

In the search for a political alternative, it is clear now that ideological battles are not being fought between one party and another. Electoral politics has been largely reduced to questions of who will occupy positions of power. Meaningful political battles will now be found in the varied issue-based struggles for people's real participation and direct control over governance.

In the application of the right to know, a whole gamut of situations of injustice, undemocratic behaviour and arbitrary State action has been contested. Whether it is in relation to the appropriation of natural resources, or the misuse of development funds, or state support for private grabbing of land, the right to information places an activist burden on those who use it, which prevents the setting in of cynicism and apathy. Further, this is not a one-sided process. The first reaction to expect from asking a question is to be questioned oneself, and the process of action and reaction itself leads to an environment of transparency.

The campaign for transparent governance in India has consciously forced the structures of government to respond or react. By law now, records have to be shown. If they are not, reasons have to be stated, and decisions have to be explained. Even the intention to keep certain information confidential and secret has to be stated. This has forced the government to accept that information has to be shared. But going beyond this, the collective responsibilities of citizen and ruler alike are being fundamentally altered. Indeed, public debate and the right to question cut at the roots of bureaucratic and feudal power. Forcing information sharing begins the process of shared decision making, and consequently the sharing of power on a perpetual basis.

— March-April 2007

Endnotes

1. On India's right to food campaign, see www.righttofood-india.org

2. For further details, see e.g. Ian McAuslan (2006), "The Politics of Pro-Poor Policy Change in India: The National Rural Employment Guarantee Act", mimeo, University of Sussex; also Jason Lakin and Nirmala Ravishankar (2006), "Working for Votes: The Politics of Employment Guarantee in India", mimeo, Department of Government, Harvard University

Media Corporatisation and Right to Information

Predatory pricing by large newspaper groups and growing corporate control over television and radio broadcasting have a direct bearing on the right to information.

SUKUMAR MURALIDHARAN

In its most general sense, 'media' is a term that refers to the totality of the social apparatus of organising and disseminating information and images. This should alert one to the obvious bearing that the prevalent models of media organisation would have on the public right to information.It has been a feature of the constitutional debate in the country that most of the authoritative judicial formulations on the right to information have emanated from matters involving the media. Article 19 of the Constitution safeguards a number of democratic entitlements, including the freedom of speech and expression, and the right to practise any profession or carry out any trade. Though no part of the formal wording of the Constitution, the Supreme Court has, perhaps beginning with the case of Bennett Coleman & Co versus the Union of India in 1973, read the right to information as an integral element of the purpose of Article 19. As the majority opinion then put it, "freedom of speech and expression includes within its compass the right of all citizens to read and be informed." The 1981 judgment in the Manubhai D Shah vs Life Insurance Corporation, reaffirmed the point: "the basic purpose of freedom of speech and expression is that all members should be able to form their beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people's right to know."

From these rulings and numerous others, it has become an established principle of our jurisprudence that the media enjoys rights coterminous with the public. This is quite unlike the situation in the US, where the first constitutional amendment, whether by oversight or intent, ensured that the "press" enjoys rights that go beyond the public right to free speech. In contrast, the our Constitution confers on the media no more and no less than the rights due to it as an institution that benefits from the public right to free speech and expression, as enshrined in Article 19(1)(a).

Freedom of the press is derived from the right to free speech, which in turn is related to the public right to information and hence both these elements are coextensive in our jurisprudence. Commercial media institutions and the private individual derive identical rights from a single article of the Constitution. But since the right to information is a counterpart right

of free speech, freedom of the media, in part, is the fulfilment of the public right to information. From here, it would be a short transition to a legal doctrine that media freedom is justified, in whole or in part, by the public function it performs—of informing citizens and the wider community about the various facets of their lives and the times they live in. This is the constitutional position as advanced in significant judgments involving the media.

The Bennett Coleman case is especially significant for the insights it gives on the media as an institutional beneficiary of the public right to free speech. At issue was a government directive limiting allocation of newsprint to publishers in accordance with their reported consumption. In a context of acute shortage, it seemed that the only means available to keep the newspaper industry functioning was to ration newsprint allotment. This made it imperative that newspapers publish no more than 10 pages. Those publishers who were printing more than 10 pages were obliged to bring down their daily offering to that number. But they would not be permitted to reduce the overall circulation to maintain or increase the number of pages. To provide a full day's coverage of news, publishers could rationalise their allocation of space between editorial and advertisement material, or they could maintain profitability by curtailing news coverage to accommodate advertisements.

All this would seem a thoroughly unwarranted intrusion into the micro-management of a newspaper. Expectedly, the apex court ruled that the entire scheme was in violation of constitutional provisions. The majority opinion in the case, authored by Justice AN Ray, held that "individual rights of freedom of speech and expression of editors, directors and shareholders, are all expressed through their newspapers." But if this seemed too narrow a construction of a fundamental right, the apex court, a few paragraphs on, applied the necessary remedies, though without explaining the logic through which the rights of "editors, directors and shareholders" mutated into a right enjoyed by all citizens. "It is indisputable," said the court, "that by freedom of the press is meant the right of all citizens to speak, publish and express their views… The freedom of the press is not antithetical to the right of the people to speak and express."

This judicial formulation presented in an incipient form was a potential area of conflict in the relationship between the media and the public. In one formulation, the public is given the "right to read" all that it is provided by the "editors, directors and shareholders" of the press. In another, the public is accorded the right to "speak and express". In its elision of reasoning, by which one set of rights is transformed into another, the Supreme Court lost an opportunity to provide some measure of clarity on this issue.

To some degree that absence in judicial reasoning was remedied in the significant dissent entered by Justice KK Mathew in the case. Alone on the bench of five judges that heard the case, Mathew spoke of the freedom of the press in terms of the preservation of social diversity and choice. The court had before it the challenge of ensuring that the appropriate conditions existed for bringing "all ideas into the market (to) make the freedom of speech a live one having its roots in reality". In pursuit of this ideal, it was necessary, as a first step, to recognise that "the right of expression" would be "somewhat thin if it can be exercised only on the sufferance of the managers of the leading newspapers".

Freedom of expression, in other words, also involves the right of access to media space. And this would be met only through "creation of new opportunities for expression or greater opportunities (being provided) to small and medium dailies to reach a position of equality with the big ones". "This was as important," said Mathew, "as the right to express ideas without fear of governmental restraint."

"Access" was one of the crucial questions raised by Mathew in his dissent: access of both the public to the media environment and of the media organisation to the essential resources of its trade. Though the latter was the key issue before the bench, the dissenting judgment tied it into the larger question of the public function of a newspaper and its socially enjoined duty to reflect the diversity of its milieu.

The principles evolved when the print medium was the dominant form for information dissemination, could easily be transported to the broadcast domain, since the underlying principles have certain universality. During the 1970s, newsprint was a scarce commodity, much as the electromagnetic spectrum was in the early years of satellite broadcasting. Newsprint has since become abundantly available, much like frequency slots for broadcast channels. Advertisement revenue, once regarded as a limited resource, has since grown enormously, though competition between newspaper

groups for cornering the increasing share of this expanded cake, has greatly intensified as well. And even if the proliferating broadcast channels of the last decade-and-a-half have not been very transparent in their financial accounting, the mere fact that they exist, is sufficient proof that the aggregate of advertising spends in the economy has been percolating, albeit in varying degrees, to all of them.

The principal restraint then to using the electromagnetic spectrum as a public resource lies not in its scarcity as in the powers and privileges that the government may have arrogated to itself. In this respect, the 1995 ruling of the Supreme Court in the case of the Cricket Association of Bengal versus the ministry of information and broadcasting, has been very clear: the government may have a custodian's responsibility, but no inherent right to monopolise the airwaves, since the spectrum belongs to the public. As Justice PB Sawant put it in one of two concurring judgments in the case: "the airwaves or frequencies are a public property. Their use has to be controlled and regulated by a public authority in the interests of the public and to prevent the invasion of their rights." In other words, the uppermost concern in the deployment of the airwaves would be the preservation of the peoples' right to free speech and its correlate—the right to information. "The right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained," ruled Sawant. The went on to add that the challenge of regulation was to harmonise the two, one of which was the "right of the telecaster" and the other, "that of the viewers."

In turn, this requires a regulatory response that departs from an absolutist notion of media freedom. "Broadcasting freedom," said Justice BP Jeevan Reddy, the author of the other opinion in the airwaves case, "involves and includes the right of the viewers and listeners who retain their interest in free speech." With public interest being dominant rather than private profit, Reddy observed, "European courts have taken the view that restraints on freedom of broadcasters are justifiable on the very ground of free speech." The simple reason is that "freedom of expression includes the right to receive information and ideas as well as freedom to impart them."

The judgment on the airwaves issue, in short, urged adopting a new paradigm that transcended the dichotomy between government control and free enterprise. On one side, the judgment asserted, said Sawant, the paramount need to "rescue the electronic media from government monopoly and bureaucratic control and to have an independent authority to manage and control it". When the electronic media is controlled "by one central agency or (a) few private agencies of the rich," there is a need for another body "representing all sections of society". Reddy observed that the nature of this body was for the legislative authorities to determine. The central point was that "private broadcasting, even if allowed, should not be left to market forces, in the interest of ensuring that a wide variety of voices enjoy access".

With these being the central principles, the apex court directed, in Sawant's words, that "the central government shall take immediate steps to establish an independent autonomous public authority representative of all sections and interests in the society to control and regulate the use of the airwaves". Reddy laid down the principles on which this body should function: "the right to freedom of speech guaranteed to every citizen does not encompass the right to use these airwaves at his choosing. Conceding such a right would be detrimental to the right to free speech of the body of citizens inasmuch as only the privileged few—powerful economic, commercial and political interests—would come to dominate the media."

It would be worthwhile to inquire how recent media trends–the rampant practices of predatory pricing by large newspaper groups, their scarcely-disguised collusion in other circumstances, and the growing corporate control over television and radio broadcasting–impact the right to information in the light of the judicial principles laid down by the apex court. It has been argued that an oligopoly of private broadcasters, however, small in number, would be far preferable to a government monopoly. This argument, though, when viewed in the context of the doctrine of fundamental rights as laid down by the Supreme Court, would seem little less than facile. Clearly, the fact of monopoly ownership over broadcast platforms, in itself, does not constitute a curb on the twin rights of information and free speech. It is only from the denial of public access to media that such an abridgment of the fundamental rights could be deemed to occur. The dominant idiom in media regulation in the country, though, seems to view corporate control over media as a surrogate for

public ownership. And if the recent guidelines issued by the government on community radio are any indication, then public access to the airwaves, where it is allowed, would need to be mediated through an array of bureaucratic controls, that would in effect reduce the principle to a nullity. Just as the right to information becomes enshrined in the statute as a basic entitlement of citizens, the means of information exchange and circulation are rapidly prised out of their hands.

— March-April 2007

Officials' Bland Ways and RTI

If the Right to Information Act is to have any meaningful effect, then information commissioners and public information officers should be given judicial training at the earliest.

COLIN GONSALVES

The Right to Information Act 2005, which came into force on June 21, 2005, was meant to provide for and promote 'transparency and accountability' in the functioning of every public authority. The preamble of the Constitution sets out that transparency of information dissemination is vital to the functioning of every democracy, and is a way to contain corruption and hold governments and public servants accountable. But at the same time, it acknowledges that revealing certain information may lead to conflicts with the efficient operations of government, the optimum use of limited resources, and also maintaining confidentiality of sensitive information. Notwithstanding this conflict, the statute has been brought into force to preserve the high democratic ideal.

Under the Act, the central information commission (CIC) and the state information commissions (SICs) have been constituted. There can be a maximum of 10 commissioners in such a commission. Every public authority is required, within 100 days of the enactment of this law, to designate central public information officers (CPIOs) and state public information officers (SPIOs). It is to these officers that a request has to be made for collecting information. The request can be made in writing or by email in any of the official languages, and in case the request cannot be made in writing, then the officer is required to assist the person making the request orally.

As expeditiously as possible, but in any case within 30 days, the officer must provide the information or reject the request specifying the reasons. In the case of life or liberty of a person, the time limit is 48 hours. If the decision is not given within the specified period, it is deemed refused. In case of a rejection, the officer is required to communicate the particulars about the appellate authority and the time period for the appeal.

Section 8 sets out the kind of information that is exempted from disclosure. A point of concern was the wrong application of Section 8(e) which reads as under:

"…information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;"

However, almost everything under the sun is sought to be brought under this Section. In an interaction with the CIC, Delhi, it was felt that he was equating a fiduciary relationship with privacy and confidentiality. If a person gives some information to a government official, claiming that it is confidential, that should not be divulged on request by some one else, ac-

cording to the CIC. If he is right, then all information where the officer or the persons providing the information sought for or promised confidentiality, would fall outside the purview of the Act.

That CIC, Delhi, Wahajat Habibullah, was hopelessly confused on this issue is obvious from the discussion that took place in the public hearing on some recent cases where he had upheld the orders refusing to divulge information on the basis of Section 8(e). The first was a case where an officer was not promoted because he was "unfit". Subsequently he was promoted. An application was made seeking information including the medical records relating to this `unfit' status. The application was rejected. Though it is possible to say that the medical records of an employee is information under the fiduciary clause, information could certainly be provided as to whether or not promotion was earlier denied on the ground that the employee was unfit.

The next batch of cases related to corruption cases including matters relating to disproportionate assets, vigilance cases and fraud cases where details of income tax returns and other information were sought for. Citing of the fiduciary clause in such cases was ridiculous. A fiduciary relationship is one where a party stands in a relationship of trust to another party and is generally obliged to protect the interest of the other party. Apart from the fact that the government is not obliged to protect corrupt officers, it is doubtful whether the mere request of the party providing information to the government that the records be kept confidential, can ever prove a fiduciary relationship. It is equally doubtful whether any officer can assure a party that records, which are statutorily required to be produced on demand by the government, will be kept confidential. Even if such an assurance has been given, the Act will override the assurance.

The next category of cases related to examinations where students had asked for details relating to the "cut-off marks", the marks obtained in the examinations and in particular subjects and so on. Though it may be possible to hold that the name of the examiner may not be disclosed, it is certainly incomprehensible why a large number of applications asking for the above mentioned innocuous details should fail on the ground of the fiduciary relationship.

Only time will tell whether this statute, like so many social statutes enacted in the past, will also go the same way and be mired in bureaucracy, red tape and delay or whether the will of the public will prevail so that nothing stands in its way. Every public authority is required to designate an officer senior to PIOs and appeals from the orders of PIOs are to be filed and heard by such senior officers. The time period for filing the appeal is 30 days but this can be condoned on producing "sufficient cause" for the delay in filing the appeal. A second appeal within 90 days can be made before commissions, which can also have the power to directly enquire into any complaint.

PENALTIES

At a public hearing organised by Parivartan, a leading organisation on the right to information, at Delhi on September 25, 2006, participants were particularly aggrieved by the fact that in one after another orders the CIC was not imposing penalties on the defaulting officers. Section 20(1) of the Act is read as below:

"Where the central/state information commission at the time of deciding any complaint or appeal is of the opinion that the central/state public information officer has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time limit; denied the request for information in a malafide manner; knowingly given incorrect, incomplete or misleading information; destroyed information which was the subject of the request; obstructed in any manner in furnishing the information, it shall impose a penalty of Rs 250 each day till the application is received or information is furnished; so however, the total amount of such penalty shall not exceed Rs 25,000."

The general consensus among the participants appeared to be that commissions were too lenient in imposing penalties and, as a result, they were creating an impression among officials that they could flout the law and get away with it. Officials were not turning up for hearings. Letters and notices of the commissions were getting lost in the bureaucratic labyrinth of government offices. In some cases, commissions had not imposed penalties because it was a first-time default. This was impermissible because the section mandates imposition of penalty and no such exception has been made for first-time defaults. Participants at the meeting, quoting from various commissions' orders, pointed out that penalties were not imposed even in cases where the commission had concluded that the case was indeed one for imposing a penalty. Arvind Kejriwal, the head

of Parivartan, said that out of 1,500 cases disposed off, there were only three instances where penalties were imposed. Apparently, even in those cases the penalties were subsequently sought to be withdrawn.

During the proceedings, Central Information Commissioner Wahajat Habibullah felt that while imposing penalties or withdrawing penalties, it was not necessary to give notice to the complainant. This appears to be a position in law ill thought of.

The commissioner then mentioned that penalties can only be imposed under Section 20 of the Act on PIOs, and where no such officer had been appointed, no penalty could be imposed. This is a narrow technical reading of a Section without reference to the Act as a whole. Section 18 refers to a recourse for a senior officer in a situation where the PIO has not been appointed. The duty is cast on the public authority under Section 5 to designate PIOs. Section 20, therefore, ought to be read as empowering commissions to impose a penalty either on PIOs or the senior officers specified where PIOs have not been appointed. By such an interpretation the law will be given its full meaning and defaulting officers can be punished.

While the orders of the commission are put up on the website, it was rather strange that the orders setting aside the penalties have not been put up on the website. Coupled with a fact that the complainants are not given notice of the penalty proceedings, this gives rise to grave doubts in the minds of the public as to the fairness of the proceedings.

The SIC, Punjab, at this stage mentioned that apart from the imposing penalties, the issuing of strictures against officers is another way of punishing erring officials.

The mood of the participants in the public hearing could be summed up in the words of one of the participants: "the commissioner has referred to teething problems. However, if the law is not enforced it will lose its teeth!"

NATURAL JUSTICE AND A PERSONAL HEARING

The CIC was also of the view that it was not necessary to hear the parties personally. He said the hearing could be given either personally or in writing. This stand was contrary to the CIC (appeal procedure) rules, 2005 which is as under:

(2) The appellant or the complainant, as the case may be, may at his discretion at the time of hearing of the appeal or complaint by the commission be present in person or through his duly authorised representative or may opt not to be present.

On this issue, there is widespread indignation and allegations leveled against the commission that they were dealing with matters without doing justice to the parties. The statement of the CIC that this procedure was followed in order to push up the rate of disposal, was countered by Arvind Keijriwal by saying that what was required was that justice be done.

The table given below shows that in a substantial number of cases the applicants were not called at all for the hearing of the case. This is a gross miscarriage of justice. This is particularly true in the case of commissioner MM Ansari, who thinks that there was no need for anyone for the disposal of a case. One wonders what kind of justice is being done!

Equally worrying is the fact that cases are being disposed off by commissions without being given a copy of the reply filed by the officer concerned to the applicant. The applicant suddenly notices that his case is shown as rejected on the website. The table given below shows the case disposal summary. Once again commissioner MM Ansari appears to be conducting matters without any care for the parties before him. It is possible that a lack of judicial training results in individual commissioners functioning in a highly erratic fashion.

This manner of conducting cases without informing the applicants of the stand of the officials and without even telling them of the dates when the cases are likely to come up for hearing indicates a very arbitrary approach. Participants in the seminar repeatedly suggested that the entire progress of a case ought to be put up on the website and an applicant ought to be able to know from the website as to when the case is likely to be heard and the stand of the opposite parties.

Out of 1,500 cases dealt with by the CIC, 781 cases are posted on the website. In all 359 of these 781 cases are exparte decisions. The remaining 719 cases are not to be found on the website. Applicants therefore, understandably, have no idea as to the status of their cases.

The closure of cases without notice to the parties can have several adverse effects. The obvious worst-case scenario is where the application is rejected without notice to the applicant and without a hearing. But even in

cases where, as the CIC indicated during the public hearing, an order is made directing the authority to provide certain information, this order ostensibly in favour of the applicant may never be obeyed. If the case is closed merely on such an order being passed the applicant will be forced to repeat the entire procedure all over again. The appropriate thing to do, when orders are passed by the CIC directing the providing of information, is to keep the case pending for a compliance report to be filed by the authority. This is the procedure followed by the state information commission of Punjab, as stated by Rajan Kashyap, CIO, Punjab.

What if the person making the application is too poor to repeatedly travel to the commission? What if the person is too poor to engage a lawyer? The answer is obvious. Legal aid must be provided to such persons by the state and central legal services authorities. Apparently this is not being done anywhere.

A study of the second appeals before the CIC shows that out of a total of 781 cases decided, 455 cases resulted in rejection of the appeals. This is an overall rejection rate of 57 percent from the entire CIC consisting of five commissioners. If one looks at the record of commissioner Ansari, out of 256 cases decided by him, 206 cases were rejected which is a rejection rate of 80 percent. Such an arbitrary manner of functioning is unacceptable. Commissioner Ansari needs to be trained in quasi-judicial functioning. The scheme of the Act shows that commissions and PIOs have to function in a quasi-judicial manner. Section 18 invests commissions with certain powers of the code of civil procedure. The entire frame of the Act requires the commissions and officers to adjudicate disputes between the public and the authorities. Undoubtedly the principles of natural justice apply. These principles apply whether or not specific reference is made to them in the statute.

A study of the second appeal filed before the CIC as on September 8, 2006 shows that 3,059 appeals were received. Out of these, 1,531 were dealt with and the number of cases pending were 1,528. On an average, the CIC received 2,000 cases per month. Maharashtra state has 10,000 appeals filed. This has caused concern relating to the lengthening backlog of cases. With the current rate of disposal it is apprehended that as time passes it will take longer and longer for cases to be completed. Delhi, for example, has a waiting period of seven months. The answer to this lies not in refusing to inform litigants of the stage of their case and certainly not in refusing to hear them, but in the appointment of more officers and commissioners. Delhi, for example, has five commissioners though the Act provides for a maximum of 10.

EDUCATION AND TRAINING

Section 26 of the Act requires the government to develop and organise educational programmes so that the public and disadvantaged communities learn how to use the Act. Public authorities are also required to participate in such programmes and undertake such programmes. Government is required to "promote timely and effective dissemination of accurate information". The PIOs and public authorities are required to be trained. Nothing of the kind is taking place and, as a result, officers are developing a hostile mentality.

SUB-JUDICE

An interesting point made by commissioners was that merely because a matter was sub-judice is no reason for the commission to disallow disclosure under Section 8 of the Act. It is hoped that commissions throughout the country will take this view.

INFRASTRUCTURE

Commissioner OP Kejariwal said that the infrastructure in some of the commissions was quite pathetic. In many places accommodation was not provided, enough staff not appointed, seats for the litigants were not available and the staff was not trained as a result of which they were insensitive and secretive. Speaking passionately, he said great sensitivity was called for. In the case when an applicant called a public information officer a "thief" and a "liar", commissioner remarked that even in such circumstances one must always remember that the voice of the applicant is one of 'neglect and frustration'.

CONCLUSION

The public hearing at Delhi showed that the Right to Information Act, 2005 was being enforced in a manner that gives rise to grave concern. The bureaucracy in general appears to be staging a counter attack and using all kinds of ingenious methods to evade providing information. The standards of PIOs and commissioners are most uneven with officers and commissioners holding widely divergent and sometimes wholly irrational views. The lack of judicial training has resulted in au-

tocratic functioning with commissioners not giving notice to the applicants and dismissing applications without hearing the applicant. The desire to push up the rate of disposal has resulted in increased injustice. There is anger and resentment among members of the public who perceive that an Act, brought into force due to public opinion to stem the cancer of corruption of society, is being sabotaged by officials.

On the other hand, there are some very fine officers who are using the statute in an innovative way, always aware of the fact that the anger and resentment they see are the signs of "neglect and frustration" over many years. These commissioners and PIOs strive despite the opposition that they face in the bureaucracy, to give the statute full force.

— March-April 2007

Right to Information Emasculated

Effectively unconstitutional when it comes to accountability of public servants, the proposed amendments in the Right to Information Act will take the life out of it.

PRASHANT BHUSHAN

The amendments proposed to the Right to Information Act are a substantial roll back of the Act. The persistent manner in which the government is pushing them despite mounting public criticism, indicates that the prime minister has not outgrown his bureaucratic background. The disclosure of the text of the proposed amendments has given the lie to the statement put out by the prime minister's office to the effect that the amendments actually for the first time empower the citizens to access file notings and that the restrictions relate only to notings on defence and personnel related matters. Apart from the fact that the central information commission had repeatedly ruled that the un-amended Act did not restrict access to file notings, it can be seen that the text of the amendment restricts access to all file notings except "substantial file notings on plans, schemes, programmes of the central government or a state government, as the case may be that relate to development and social issues." This is done by amending the definition of records in the Act.

This amendment will by itself take the life out of the Act. It is the notings that are supposed to deal with the reasons and rationale for any order or decision of the government. Very often, it is the noting of an honest officer, which explains what is wrong with a proposed decision of the government. In the Panna-Mukta oil deal, it was the noting of the then superintendent of police, CBI, which gave the reasons and circumstances that explained why the decision to hand over ONGC's developed oilfields to Enron and Reliance was against public interest. Moreover, it is only the notings of various officers which will eventually reveal whether an officer's role was above board or whether he was acting on extraneous considerations. Thus, notings are often critical for fixing accountability. In the absence of notings, it would almost always be impossible for people to fully appreciate the official rationale for a decision.

Though the amendment restricts notings on most subjects, it may be noted that even if it related to only defence and personnel related matters, it would still be objectionable. This is because information (including notings) on defence and security matters are already exempt under Section 8(1) (a) of the Act, and there is no justification for exempting notings on personnel related matters. The transfers, postings, disciplinary proceedings, suspensions, and promotions of government servants play a critical role in governance. It is well known that

there is a lot of corruption and extraneous influence in such matters, which has been having a deleterious effect on governance. Honest officers are often victimised by punishment postings. Corrupt officers are often rewarded with postings on crucial positions. It is well known that bribes are fixed for postings and transfer of officers in "lucrative" departments like police, excise, income tax etc. In Maharashtra, it was discovered in response to an application under the RTI Act, that the postings of most police officers were on the recommendations of the MPs and ministers. By far, the most effective way of checking such arbitrariness in such personnel related matters is by having complete transparency in such matters, so that people can see not just the final decision (which is always said to be on exigencies of service), but also the rationale and the entire decision making process which led to the decision.

It is often said that such disclosure of notings related to personnel matters would inhibit officers from expressing themselves freely and frankly. The truth, however, is that no honest officer is likely to be inhibited from frankly expressing himself for fear that what he writes may become known. It is only the dishonest officer wanting to make a dishonest noting who is likely to be deterred by such transparency. In fact such transparency would act as a shield for honest persons who are less likely to be victimised if the entire transaction were open to public gaze.

Apart from the amendment to exclude file notings, four amendments have been proposed to Section 8 dealing with exemptions, each of which widens the exemptions under the Act. Firstly, the amendment to the proviso to clause (i) of Section 8 now restricts access to cabinet papers to only the actual decisions and reasons thereof, after the decision, rather than to all papers. This is also unreasonable. In a democracy where the cabinet is just the representative of the people, who are the real masters, there is no justification for excluding all cabinet papers from public view, especially after the decision has been taken. If any papers are of a nature that their disclosure would adversely affect defence or security, those are already excluded under Section 8 (a). Similarly, any cabinet paper whose disclosure would be injurious to public interest in any way is already excluded under the various other clauses in Section 8.

Three new exemptions are sought to be inserted in Section 8. The first relates to the identity of officers who "made inspections,observations, recommendations, or gave legal advice or opinions …" Thus this clause seeks to mask the identity of public officials who have played any role in the decision-making, even on developmental and social issues. Again, the object seems to be to save officials from being held publicly accountable by withholding the precise role played by different officials in the decision- making. This is again anti-democratic and without merit.

Another exemption added by the newly introduced clause (k) in Section 8 is to restrict "information pertaining to any process of any examination conducted by any public authority, or assessment or evaluation made by it for judging the suitability of any person for appointment or promotion to any post or admission to any course or any such other purpose." Again, there is no justification for removing from public scrutiny the process of deciding selections and promotions where there is rampant corruption. The opacity of such systems of recruitment and selection is what is allowing such corruption and arbitrariness to go on. The amendment is designed to allow these bodies to continue with such arbitrary and corrupt appointments and selections.

Another exemption sought to be introduced is to exempt "copies of noting, or extracts from the document, manuscript and file so far as it relates to legal advice, opinion, observation or recommendation made by any officer during the decision-making process, prior to the executive decision or policy formulation". Such a blanket exemption for restricting all access to the entire decision making, before any decision is made would allow the officials to present every decision, however corrupt and against public interest as a fait accompli. Take the Enron deal for example. With such a clause, it would be impossible for people to know how the then finance secretary had effectively prevented the central electricity Authority from carrying out a financial evaluation of the project, by falsely showing that the finance ministry had carried out such an evaluation. Thus the country came to be saddled with a liability of Rs 10,000 crore, which could have been prevented if the correspondence between the finance ministry, power ministry and the central electricity authority had been accessible and known, before the contract with Enron had been signed. This clause seeks to prevent such examination.

Similarly, many genetically modified foods are in the process of being cleared for release currently, without any transparency about the process of clearance and

the various bio safety tests that they have been and have not been subjected to. This amendment will prevent access to this process of clearance until after they have been cleared and irreparable damage to human health and environment has been done.

It can be seen, therefore, that the amendments proposed are not just substantive, but very far reaching which will take the life out of the Act, which only seeks to give effect to the fundamental rights of citizens under Art 19 (1) (a) of the Constitution. These amendments would be clearly unconstitutional as imposing an unreasonable restriction to the citizens' right to know what is being done by their public servants. In any case, such far- reaching amendments to such a critical statute must not be passed by parliament without sending them to the parliamentary standing committee.

— November-December 2006

SECTION 14

With 'growth-at-any-cost' being the sole motto of the Special Economic Zone policy, the cost of this new brand of industrialisation is falling on the marginalised, Indian farmers and tribals. Setting up Special Economic Zones all over the country at the cost of villagers actually means depriving them of their land, hearth and home. Besides this, it is compromising not only environmental safeguards but also national security, sovereignty and the laws of the land. The Indian history is taking a new turn and once more, the process of colonisation seems to have again started in the country.

SEZs

Left Faces Critical Choice

Is it credible for the Left to speak out at the national level against neo-liberalism, but practise that very strategy on its home turf? The Left, especially the CPI(M), must decide whether it wants to fight for radical change and socialism, or merely manage capitalism Chinese-style. If it chooses the second option, it will surely get marginalised and go into historic decline.

PRAFUL BIDWAI

Singur and Nandigram, two villages in West Bengal, have entered India's political lexicon with unique iconic significance. Singur, barely 45 km from Kolkata, is where the House of Tatas is building a factory on 997 acres to make cheap Lakhtakia (Rs one lakh) cars. And Nandigram, 160 km from Kolkata, is the site of an ugly, continuing confrontation between the Left Front-ruled state government and peasant farmers over land acquisition.

Four reasons explain why the two villages have become so politically important—not just for West Bengal, but for the whole country. The first raises the question of consent and consensus in designing and promoting industrialisation projects, and in particular, acquiring land under the colonial Land Acquisition Act, 1894. Should the people have a say in determining whether and how they should be separated from their principal source of livelihood, land-based agriculture? Should armed force ever be used to acquire land for industry?

A second issue concerns the special favourable treatment extended by governments to private investors by creating special economic zones (SEZs) as the principal instrument of their strategy for industrial development, which is being promoted with extraordinary zeal.

A third reason is the significance of Singur and Nandigram as sites of the people's resistance to what they see as predatory projects being thrust down their throats. This resistance has proved as abiding as spontaneous, and in some ways, heroic. Singur and Nandigram will both remain important symbols of mass resistance.

And fourth, there is the issue of the Indian Left's overall development strategy, which, increasingly seems to embrace a neo-liberal model of capitalism. Is it credible for the Left to speak out at the national level against neo-liberalism, but practise that very strategy on its home turf? Has it learnt any lessons from Singur-Nandigram which will impel a course correction? Or has it altogether given up searching for alternatives to neo-liberalism?

On this last question will hinge the future of the Left, now with its highest-ever parliamentary representation in India, a high moral-political stature, and ability to influence the policies of the ruling United Progressive Alliance (UPA). The choices the Left makes on these questions will prove fateful: will it go the way of, say, Brazilian President Lula (Luis Inazio Da Silva) and embrace neo-liberalism after having been elected to power on the basis of people's struggles against 'free-market' pro-investor policies? Or will it imaginatively forge alter-

native policies which deepen people's rights and empower them?

To start with, it is manifestly clear that the Singur and Nandigram crises have not ended. The wounds left by the violence there, respectively in January and in March, have not healed. Singur still seethes with discontent and resentment at what is seen to be a 'sweetheart deal' with the Tatas. And at Nandigram, there is a deep rift between supporters of the Communist Party of India (Marxist) and the Bhumi Uchched Pratirodh Committee, with blockades that divide village from village—and daily skirmishes.

In early May, CPI(M) supporters roughed up artists and intellectuals from Kolkata who were visiting the Nandigram area to take relief to the victims of violence. Not a single Left leader of any standing has gone to Nandigram to apologise for the March 14 firing, or to offer aid to the affected people. The CPI(M) central committee recently admitted that certain "mistakes" were committed in Nandigram, but the state party behaves as if its cadres were the sole victims and were right to "retaliate", indeed, continue to do so.

Equally important, the Singur-Nandigram crises have created fissures within the Left Front, which enjoys a crushing four-fifths majority in the Bengal legislature. For the first time ever, the CPI(M)'s partners—the Communist Party of India, Revolutionary Socialist Party and All India Forward Bloc — publicly criticised the CPI(M) and expressed their fundamental disagreement with its policies, which it has unilaterally imposed upon the Front. This rift too bodes ill for the Left.

It's not hard to see why Singur and Nandigram have a whiff of scandal about them. To woo the Tatas, the government offered them unprecedentedly lavish financial concessions, besides a large plot of land, only four percent of which will be used for the factory. Ashok Mitra, an eminent economist and former Left Front finance minister, calculates that the concessions, including a Rs 200 crore interest-free loan, add up to a humongous Rs 850 crore—on a capital investment of just Rs 1,500 crore!

Clearly, Singur represents an obnoxious form of cronyism. The Left Front government isn't promoting healthy industrial development, not even straightforward capitalism in Singur. The Tata-government deal is a detestable variety of risk-free investment which dispossesses people to generate super-profits.

The Tatas claim the project will directly generate 2,000 jobs. But noted economist Amit Bhaduri estimates it will produce a maximum of 600, besides indirect employment for 900. In the process, Singur's flourishing economy, where two-thirds of the land is multi-cropped with vegetables and paddy, will be devastated, along with the livelihoods not just of landowners and sharecroppers (bargadars), but of landless workers and rural artisans too.

Singur will witness counter-reform, a reversal of the most successful land reform ever undertaken in West Bengal. Even the bargadars' share in the land's produce (75 percent, against the absentee landlord's 25 percent) will be upturned in the land compensation formula. No wonder the government had to resort to repression, including mass arrests, and physical attacks, to enforce the 'sweetheart' deal.

Singur's injustice was compounded by the government's ham-handed attempt to take over an even larger 10,000 acres at Nandigram for a special economic zone for Indonesia's unsavoury Salim group. Here, the resistance was even more fierce. It came not from the Trinamool Congress, but from the Left, including the CPI, the RSP and the Far Left. Nandigram, at the heart of the Tebhaga movement of the 1940s, is a CPI stronghold.

Nandigram is part of a larger syndrome which has come to afflict India. SEZs are becoming the main instrument of dispossession of farmers. They are a despicable combination of private greed and State collusion. SEZs are singularly ineffectual and costly ways of promoting enclave-style elitist export-oriented industrialisation. They'll grant wholly undeserved tax cuts to promoters and inflict a loss upon the exchequer, estimated by the union finance ministry, at a horrifying Rs 160,000-crore.

SEZs have not proved a success in most countries, including China. In fact, Shenzhen, China's best-known SEZ, has turned out to be a nightmare for workers. The mere loss of an identity card can turn them into destitutes overnight.

Above all, SEZs are a gigantic real estate scam. Most are meant to grab land close to the big cities and extract monopoly profits. SEZs also put the cart before the horse: displacement without prior rehabilitation, with potentially disastrous social, cultural and political consequences. Prime Minister Manmohan Singh has himself acknowledged this by calling for a "humane"

approach to resettlement.

SEZs have become a bad word in India and their establishment has triggered fierce popular protests in several states. The UPA government has implicitly acknowledged this by announcing new SEZ regulations. It has limited their maximum size to 5,000 hectares and reduced the area for non-core activity. Promoters must acquire 90 percent of the land themselves, the state governments may procure the rest.

However, these regulations are largely cosmetic and won't provide a genuine remedy. Five-thousand hectares is a huge area, considering that over 60 percent of Indian peasant holdings are under two hectares. Leaving land acquisition to SEZ promoters will still leave farmers at the mercy of predatory interests, against whom they have no bargaining power. The new formula will only ensure that the State fails to act as a regulator in the public interest.

The CPI(M) differs with the UPA on SEZs, but only quantitatively, in details, not foundationally. Thus, it wants the land ceiling lowered to 2,000 hectares and some other restrictions. Its government in West Bengal is single-mindedly pursuing SEZs. It has earmarked as much as 140,000 acres of land for acquisition from farmers on which to create these zones in nine districts.

The Front now wants to shift the SEZ proposed by the Salim group out of Nandigram. But it is still committed to favouring the Salim group, a known front for the super-corrupt Suharto family, under whose rule thousands of communists were butchered in Indonesia.

SEZs pose several other fundamental problems. They derive from dogmatic adherence to the notion of "industrialisation-at-any-cost". The West Bengal CPI(M) leadership, and especially Chief Minister Buddhadeb Bhattacharjee, has a crude, reductionist, dogmatic view of history, which sees industrialisation of any kind as the sole measure of progress.

He fails to understand that neo-liberal industrialisation under the command of predatory corporations doesn't produce the collective 'Blue-collar worker' (Marx's proletarian) and lacks the employment and social potential of classical capitalism. Rather, it bases itself upon 'White-collar workers', is extremely capital-intensive, creates enclave-based growth, and doesn't clear "the muck of the ages" that Marx talked about.

Neo-liberal "industrialisation-at-any-cost" involves capital accumulation through expropriation and destruction of livelihoods. A progressive State must not promote, even condone it; rather, it should discipline and regulate capitalism in the interests of society, especially its underprivileged layers.

Supporters of industrialisation-at-any-cost, including Bhattacharjee, contend that very little fallow land is available in India (in West Bengal, only one percent of the total), and hence cultivable land must be "sacrificed" to industry. Historically, they say, industrialisation has never been painless. It has always extracted a price from peasants—even in the USSR and China. India must follow that model of expropriation.

This argument is factually wrong. The proportion of fallow land in West Bengal is not one percent but 18 percent. Conceptually, the argument is profoundly mistaken—and not only because it imposes pain disproportionately on the weak. Industriali-sation in much of Western Europe expropriated the peasantry through "enclosures", systematic impoverishment, and mass-scale human rights violations. The same happened in the Soviet Union under Stalin. But we should not imitate and repeat the blunders from a period when democracy was non-existent and human rights were unknown.

Bhattacharjee is also an unreconstructed believer in "stages" of historical development. For him, "semi-feudal" India must first achieve capitalism and only then attempt socialist reform. That's why he keeps saying that he's working strictly within "a capitalist policy framework". This view severely underestimates the possibilities for social transformation available within India's backward capitalism and for progress towards a more equitable, just society free of social bondage and economic serfdom.

For Bhattacharjee, the ideal model to follow seems to be China, with its giant SEZs like Shenzen, unfettered freedom for multinational capital, and its latest legalisation of private property, now placed on a par with State and cooperative property. He should know better. SEZs like Shenzen have turned out to be workers' nightmares, where no labour rights exist.

Chinese Vice-Minister for Land and Resources Chen Changzhi has just revealed that 80 percent of the 1.84 million hectares of farmland earmarked for industrial SEZs was illegally acquired. This must NOT be a model for India.

That is not all. SEZs will impede the normal

process of industrialisation and inevitably favour already developed states and regions which have a developed infrastructure. They will discourage dispersal of industries and prevent geographically balanced industrialisation—which is precisely what India, with its explosive regional, economic and employment disparities, desperately needs.

The Left, especially the CPI(M), must decide whether it wants to fight for radical change and for socialism, or merely manage capitalism Chinese-style. If it chooses the second option, it will get marginalised and go into historic decline. It must also make a decisive break with the undemocratic organisational culture it has inherited, which punishes dissidence and encourages a "my-party-right-or-wrong" attitude. Unless the Left undertakes ruthless self-criticism, it can't effect overdue course correction.

And without policy correction, the Left will forfeit some of its greatest gains, which have ensured its victory in election after election in West Bengal for three decades—a record unmatched in any democracy. Nationally too, the Left will go into a steep decline if it fails to devise alternatives to policies that have impoverished and dispossessed people and distorted economic and social processes.

The Indian Left has been fortunate to have survived the collapse of socialism. Indeed, it has grown and expanded over the past decade-and-a-half precisely because it has resisted elitist neo-liberal policies. Its lucky run may not last unless it revises its policy orientation.

— *May-June 2007*

A Bridge Too Far

A communist stronghold for ages, Nandigram, along with Singur, is going through hell in a state where the Left Front has never been dethroned in the last three decades. All this because West Bengal has been bitten by the latest brainchild of India's economic liberalisers for attracting global capital. Weeks after unimaginable State-sponsored brutalities on farmers, the wounds are still green and will take a long time to heal.

SATYA SAGAR

The afternoon wind whistles through the cluster of young *Casurina* trees that dot the banks of the Talpati Khal, a canal that runs between the Nandigram and Khejuri blocks of East Medinipur district of West Bengal. Approaching from the village of Sonachura, on the Nandigram side, you come upon the Bangabhera bridge, a narrow cement and mortar structure that spans the muddy waters of the canal.

The locals call this the 'border'. Taking a closer look it is not difficult to see the rationale behind this somewhat strange sobriquet.

Ever since a virtual civil war began in January this year, between the people of Nandigram and state authorities over the latter's attempts to take over farming land for a chemical hub project, this bridge has become like an international boundary dividing two hostile nations.

On the Khejuri side of the bridge fly a chorus of flags of the Communist Party of India (Marxist) or CPI(M), which rules West Bengal, fluttering ferociously, even menacingly for some. As far as the people of Nandigram are concerned, this is 'enemy' territory, the launch pad of regular raids and assaults by the police and the ruling party cadre.

On the other side, the road is all dug up at the point where it meets the bridge—making passage impossible for anything that moves on wheels. And, given the phenomenal violence that has occurred over the past four months — particularly the gory events of March 14, 2007 - no one dares to traverse this distance by foot either.

"We have relatives in Khejuri but we cannot predict what will happen to us if we go there to meet them" says Suhasini Paik from Sonachura, an ageing small farmer, who repeatedly asks our small team of two journalists and one medical worker to stay back for the night to get an idea of the tension in the area. Every night, according to her and other villagers, CPI(M) cadre from Khejuri come on to the bridge, lob grenades and fire guns into the villages nearby forcing residents to flee their houses and sleep out in the nearby shrub land. A day after our visit in the third week of April, news media reported fresh violence in the area — this time guns blazing from both sides of the canal.

THE HISTORY

It was not always like this though. Even just six months ago the two administrative blocks of Nandigram one and two — like the entire surrounding area in East Medinipur and nearby districts — were some of the strongest bastions of the CPI (M), the main constituent of the Left Front government in the state.

Lakshman Seth, member of Parliament representing Nandigram, which falls under the Tamluk Lok Sabha constituency, belongs to the CPI (M). Ilyas Mohammad, the member of the legislative assembly, is from the Communist Party of India (CPI), a Left Front partner. Besides, six out of seven panchayats that fall within the area are controlled by the CPI(M).

Not just that, Nandigram has been a communist stronghold from even before the time of Indian freedom from colonial rule, with the people of Nandigram and Tamluk subdivisions forming their own 'independent' government in 1942, ousting the British administration from the area for months.

Farmers from this area also took part in the *tebhaga* movement in 1946 under the leadership of the then undivided CPI. Nandigram villagers have a long record of fighting the po-

lice and other state authorities, even violently if necessary, to protect their rights. Over the last three decades however, they have remained loyal to the ruling Left Front regime, voting repeatedly for their candidates in all elections.

THE SINGUR EFFECT

All this changed last year when rumours began to circulate in Nandigram that some of the *mouzas* or villages and cultivation land in the area might be acquired by the state government for setting up a Special Economic Zone (SEZ), the latest brainchild of India's economic liberalisers for attracting global capital.

High on the minds of the villagers of Nandigram were events then underway in Singur, 40 kms out of Kolkata, and the site of a small car factory to be set up by the Tata group of companies. What they saw happening there was the forcible takeover of around 1,000 acres of highly fertile farming land by the Left Front government on behalf of one of India's largest corporate houses.

In Singur, while a section of absentee landowners had agreed to sell their land to the state, a bulk of farmers and sharecroppers in the area refused to acquiesce. In response, the state government occupied and fenced the Singur land, imposing section 144 of the Indian penal code to prohibit public protests — in other words using brute force to oust farmers from their own land.

So when towards the end of 2006 state ministers and CPI(M) leaders started talking publicly of setting

"..They killed children... they shot, hacked, even tore them apart"

There is no other word to describe what happened in Nandigram on March 14, 2007 except as a massacre — the true scale of which will never really be known.

On one side were thousands of unarmed Nandigram folk — mostly women and children — gathered in the early hours of morning near the Bangabhera bridge to peacefully block any attempts by the state forces to invade their villages.

Ranged against them was a police contingent of at least two thousand along with several hundred armed cadre of the CPI(M) — some of them allegedly dressed in ill-fitting police uniforms.

Though the Central Bureau of Investigation (CBI), on orders of from the Calcutta High Court, has prepared a report on what really happened on that day, no one knows when, or if at all, the report will be made public. Establishing the truth about the events of March 14 are crucial to firstly bring all the culprits responsible for rape and murder to justice and secondly to restore peace in the area — which is now in the throes of a little civil war of its own. To date, no compensation has been announced for the victims by the government nor has any minister or senior administrator even bothered to visit the place.

Given below are excerpts from a report based on the testimonies of 62 patients and about 200 villagers met by a fact-finding team sent to Nandigram on March 15 and 16 by the Association for Protection of Democratic Rights (APDR) and Paschim Banga Khet Mazdoor Samity (PBKMS).

The event

"People were aware that there would be an attempt by the police and party goons to re-enter the area as a first step towards taking over their land. They decided to offer peaceful resistance by organising a Gouranga puja (incidentally Gouranga is a god that protects those who worship him). They also planned a Koran recitation ceremony.

Once this programme me was known, people flocked to the spots where the puja was being held. At Bangabhera, the puja was in a trench that had been cut in the road earlier. About 5,000-6,000 people were present, of whom 3,000 were women and about 400-500 children. The mob was unarmed as they were in a religious ceremony. The women and children decided to stand in front as the people assumed that the police would not be violent with women and children. A large police force with firearms and tear gas arrived in vehicles and buses on the Khejuri side of the Talpati Khal in the morning. They were accompanied by many armed CPI(M) goons.

At Bangabhera Bridge, they first filled up a large trench near the bridge. None opposed this. They then began advancing across the bridge. There seems to have been no prior warning. A few report that Anup Mondal of the CPI(M) was using a hand mike, but most heard nothing and were not forewarned about the police action.

Without any proper warning the police began throwing tear gas shells. This blinded the crowd and created confusion and

up a huge chemical hub in Nandigram under the Salim group, an Indonesian multinational, the local folk here started getting agitated.

At a public meeting in Nandigram market on December 29, 2006, the CPI(M) member of Parliament, Lakshman Seth, urged farmers to pave the way for development and industrialisation in Nandigram by giving up their lands in return for monetary compensation. Seth, who is also the chairman of the Haldia Development Authority, in his speech, named the villages that would have to make way for the chemical hub. The total area to be acquired was a whopping 14,500 acres to set up the SEZ that would include a mega chemical and petrochemical hub and a shipyard.

Though, according to CPI(M) leaders, no final decision has yet been taken about the exact location of the projects, an informal notice for public information regarding likely location of this project was circulated by the Haldia Development Authority to all blocks and Gram Panchayat offices of the area.

This announcement, however, was enough to aggravate tension in the area as resentment grew among villagers at not being consulted on the issue and at the thought of being kicked out of their ancestral lands. "If we leave our land we will become beggars in the cities," says Jayanti, another resident of Sonchura, explaining the strong sentiments behind the local resistance.

On January 3, 2007, villagers clashed with a police patrol that was surveying the Nandigram area. According to the CPI(M), the police had to be called in after

panic. During this period, the police and the goons began firing and advanced while spraying bullets. While the firing continued for about 15 minutes, the violence followed for the next hour-and-a-half or so. There are many complaints of horrific and deliberate violence during this phase and afterwards. Women were taken away and allegedly raped. Women who tried to hide or wash their burning eyes in the pond were forced to come out and then beaten up again. Houses and shops were looted. Instead of using least force necessary, the policy seem to have been of using maximum force to instil fear and terror in people and to break their spirits. Fourteen persons from amongst those who were resisting the attacks were also arrested. Grievous false offences have been filed against them.

Death toll

According to official statement, 14 persons died due to police firing. Out of them, nine bodies were not identified till March 16, 2007. According to all the 200 or more villagers we met and the patients admitted in Tamluk Hospital and Nandigram Hospital, more than 100 persons had died in the firing.

They alleged that most of the bodies were taken away by the police and CPI(M) goons by trucks towards Khejuri or buried under the newly repaired road at Bangabhera.

Violence against women

The violence that erupted in Nandigram on March 14 found the police and CPI(M) cadres specifically targeting women. Of the 62 testimonies that we gathered in the hospital and from other victims outside, 30 are from women. In the injured list at Nandigram BPHC, out of 69 persons 39 were women. Interviews with scores of villagers and their testimonies brought home one point — that specific and systematic violence was used against the women to humiliate them and to break the backbone of their resistance.

Women who were beaten up complained of the abusive language used that they could not repeat. The lathicharge was more aimed at the breasts, stomach and genital regions of their body. Male police took it onto themselves to lathicharge the women though there were women police around. Women who were not even participating in the puja but standing around were caught in the fire round and beaten mercilessly. Apart from the lathicharge and firing the police and the CPI(M) cadres resorted to various forms of sexual violence which included ripping clothes of women and leaving them naked lying in the open. Girls were pushed forcefully into vans and cars and driven away.

When we met the nursing staff at Nandigram Block Hospital we enquired if any women had been raped. A nurse denied this. However, other people in the hospital informed one of our women team members about two patients who had been raped. It is only after this that these cases at our initiative were registered as rape cases.

Wall to gladden Wall Street

The East Germans had their Berlin Wall, the Israelis have their infamous apartheid wall to keep out Palestinians and now the Indian state of West Bengal has one too — in the district of Singur — to keep farmers out of their own land.

Within just a year after the ruling Left Front government forcibly acquired nearly 1,000 acres of fertile, agricultural land to hand over to the Tata group for a car manufacturing plant, a four meter high wall has come up to prevent its original owners from 'raiding' the land for cultivation. A contingent of several hundred heavily armed policemen, some of them atop high watch towers, guard the property on a 24x7 basis while company excavators dig the land to prepare the foundation for the new factory.

Once upon a time, Mahadeb Das, a small farmer in the area would have been fawning over his four bighas of land and 'counting potatoes' — a product for which Singur is particularly famous all over the state. Today, however, he sits idly in a nearby local youth club office staring at the wall and its uniformed bodyguards — biding his moment.

"As soon as the police leave the place we will bring down the wall and the factory. We will start planting our crops again," he says with a calm confidence. Other youth sitting near him nod in agreement at the idea.

It seems to be a somewhat foolish, though touching, statement to make given that he and other farmers like him are ranged against not just the might of the state government and the Tata corporate empire but also the formidable cadre-based organisation of the ruling CPI(M). The 'red-brigades' of the ruling party are fast acquiring a reputation for intimidating all those opposed to the unabashedly corporate-led industrialisation agenda in the state.

Complicating the battle for Mahadeb and others is also the fact that around 30 percent of the land owners, mostly absentee landlords living in Kolkota, have consented to sell

members of the opposition Trinamool Congress ransacked the office of the local panchayat pradhan. Four people were injured in the police lathicharge and gunfire that ensued while one police jeep was set on fire by an angry mob. On January 5, 2007, several opposition party groups that had already been working in the area — ranging from the Trinamool Congress to the Socialist Unity Centre of India and the Santosh Rana faction of the CPI(Marxist-Leninist Liberation) decided to join hands to form the Bhumi Uchchhed Protirodh Committee (BUPC) loosely translated as 'committee for resistance to eviction from homeland'.

According to locals, the response to this political consolidation of opposition forces got a swift response from the ruling CPI(M). In the early morning on January 7, villagers alleged, CPI(M) cadres, armed with sticks, knives and guns attacked Nandigram, crossing the Bangabhera bridge from Khejuri. The official CPI(M) version is that it is the BUPC members who started the fight by attacking their people camped in Khejuri. Whoever started the fight, in the process three people from Nandigram — Bharat Mandal, Shekh Salim and Biswajit Maiti (just 12 years old) — died of bullet injuries. In retaliation, enraged villagers lynched Shankar Samanta, a local landlord accused of giving shelter to what they called CPI(M) goons and also taking part in the firings after which they ransacked and burnt down his palatial house close to the bridge.

It was following this incident that the locals decided to dig a trench on the road connecting the Bangabhera bridge to Nandigram and block the road further with tree-trunks, boulders and bricks.

CIVIL WAR UNFOLDS

In the weeks and months after the violence of early January, the Bangabhera bridge and adjoining areas became a war zone with almost daily attacks by CPI(M) cadre who had gathered in Khejuri, villagers said. These cadres included some of those who had left the Nandigram area, along with their families, due to threats from those opposed to the acquisition of land for the chemical hub project.

In response, Nandigram villagers blockaded all entry points into their area making it a no-go zone for the state officials, particularly police. There are reports that some arms and ammunition also found its way into the hands of locals to be used against what has been termed as the superior firepower of the CPI(M) cadre, who, after all, also had the backing of state authorities.

Surrounded as they were by the sea on one side and the CPI(M) on the other three sides, life got tough for Nandigram residents. They had not been able to

their land. The Left Front government has claimed in public statements that of the 997 acres required, it has received consent letters from landowners for 952 acres.

However, an affidavit filed in response to an order of the Kolkata High Court by the West Bengal government on 27 March this year says that compensation cheques have been collected for just 650 acres till date, which amounts to around 67 percent. Further, around 20 per cent of these seem to have retracted after the takeover, under the colonial-era Land Acquisition Act of 1894, that became a fait accompli amidst fear of retribution by the state and ruling party bosses.

According to Mahadeb, it is not just the small farmers living in the area but large numbers of agricultural labour, many of them migrants, whose livelihood will be severely affected by the state-organised land grab operation. The promise made by the government of training the local youth to obtain jobs in the new car factory, he says, is a pipe-dream as the company itself has not given any guarantee of jobs to local people.

Though the battle between farmers and state authorities in Singur has not been as fierce as that in Nandigram, there is no doubt that this is going to be a site of more struggles in the near and even distant future. Once the Tata car factory is set up – it is only a matter of time before other private corporations make a beeline for taking over more agricultural land in the area — a recipe for complete disaster in one of West Bengal's richest farming areas.

"This is a revolution that comes straight from our hearts. We understand the value of land as a fixed asset and as the only source of survival our families can depend upon," says Mahadeb. To understand his point of view will require the breaking of all the corporate-sponsored walls that seem to have sprung up in the minds of Bengal's Marxists-turned-merchant ruling elite.

carry on with their normal agricultural work for all these months. Those who had to go out of the area to work in nearby towns, like the busy industrial port of Haldia would often reportedly be pulled out of buses they were in and manhandled by the CPI(M) cadres. According to reports in the Bengali media, often they would be asked to get down and walk back home.

DOUBLESPEAK

While all this was going on, West Bengal Chief Minister Buddhadeb Bhattacharjee announced at several public meetings that the proposed chemical hub would not be set up at Nandigram if villagers did not want it there. However, the original notification issued by the Haldia Development Authority, outlining the land to be acquired for the SEZ, was never withdrawn or officially annulled. In fact behind the talk of reconciliation and dialogue with the villagers, it appears now that the local MP Lakshman Seth and his men were preparing for a massive assault on Nandigram with two objectives. First was to clear opposition to acquisition of land and pave way for the Salim Group of Indonesia to commence work on the chemical hub. The second goal, keeping with the CPI(M)'s long history of crushing dissent of any kind — within and outside the party — was to teach the recalcitrant people of Nandigram a 'lesson' they would never forget.

While it is not the first time the party has used sheer muscle power to browbeat its opponents, the price it may end up paying for its display of hubris on March 14, 2007 in Nandigram may end up far higher than anything in the past.

— May-June 2007

SEZs for the Rich, Poor to Bear the Brunt

With 'growth-at-any-cost' being the sole motto of the Special Economic Zone policy, the cost of this new brand of industrialisation is falling on the marginalised, Indian farmers and tribals.

ARUN KUMAR

Special Economic Zone (SEZ) policy has taken one more turn with the announcement from the Empowered Group of Ministers (eGOM). The freeze on them is being lifted but several parameters will be changed to accommodate the farmers, tribals and the civil society groups who have been agitating against the SEZs. From the earlier no limit on the maximum size of the multi-product SEZs now the limit has been set at 5,000 hectares. The state governments are prohibited from acquiring land for the private players and they cannot form a joint venture with a private player unless the latter has the land to offer the project. States can acquire land for their own SEZ provided they take care of the relief and rehabilitation as per the new policy to be announced soon.

Now the SEZs will be required to at least use 50 percent of the land for processing unit as compared to the earlier 35 percent so that the real estate component would be lower. Finally, the export requirement has been made more stringent compared to earlier. Clearly, the eGOM has steered a middle path between the proponents of the SEZs, the corporate sector and their political supporters and the opponents who wanted SEZs to be scrapped because of their adverse impact on the poor people in the rural areas. This was on the cards since the prime minister had stated that SEZs are an accomplished fact. He implied that there is no going back on the policy and the government would only do some tinkering to accommodate the opponents. Where does this leave the policy and the poor?

POLITICAL ASPECTS

SEZs have occupied centrestage in the national consciousness for the last eight months due to the events unfolding in Singur (akin to an SEZ though not one) and subsequently due to the occurrences in Nandigram (a proposed SEZ).

News of dissent in the ruling party over the proposed SEZs in Haryana and Punjab has been making the rounds. In West Bengal, the government is determined to continue with its policy of setting up SEZs and continuing with Singur on the grounds of industrialisation of the state. At the centre also it is seen as a strategy for ensuring the continuation of a nine percent growth rate of the economy. If China can succeed through such a policy, it is argued, why not India? SEZs are threatening to sprout all over the country from the most backward states like, Orissa and Chhattisgarh to the most advanced ones like, Maharashtra and Gujarat. They would number not in tens but in hundreds and would cover huge tracts of land across the country. Some of them would be so large as to create entirely new townships and since they promise world class infrastructure, they would be unlike the existing cities.

They promise to create islands of affluence where foreigners and NRIs can come and live in comfort segregated from the poverty and squalor ridden cities. According to an earlier draft of the SEZ Act, they would have been `deemed to be foreign territory for the purposes of trade operations, duties and tariffs'. Even though this phrase is no more used in the Act of 2005, it is feared that they would be functioning as such, given their enclave character.

Currently, seven previously created Export Promotion Zones (EPZs) stand converted to SEZs, 63 SEZs are approved and notified, 171 are approved but not notified, 162 are approved in principle only and 322 applications are pending. Most of them are by Indian businessmen.

Resistance to these zones has built up rapidly in the country even though most political parties seem to be supporting their creation since they are ruling in some state where they would like them to come up. In different parts of the country, farmers and tribals who are sought to be displaced by the creation of these zones are opposing them.

In Singur (not an SEZ), Nandigram and earlier in Kalinganagar in Orissa there has been fierce resistance. The opposition parties in the different states have taken advantage of these movements to put the ruling governments in the dock. However, only some parties like the Trinamool Congress are going the whole way while others are ambiguous at best.

Displacement is a larger issue. Movements around displacement caused by earlier large projects (Narmada Bachao Andolan is an example of that) already existed and the civil society leaders (like Medha Patkar) of these movements are providing leadership to the anti-SEZ upsurge.

New large-scale displacement is being created by the mega projects coming up all over the country. This includes the setting up of steel mills, power plants, airports or the expansion of existing airports, the expansion of the highway network, etc. Millions of families are likely to be displaced in a short period of time.

Why is the rapid creation of these enclaves so important for the government, in spite of the build up of the movements? Politically, perhaps the government believes that the movements will die down since different political parties are in power in different states and they will prevent the opposition to the idea of SEZs from building up. The CPI (M) is a case in point. It is encouraging Singur and SEZs in West Bengal so its opposition elsewhere would be held in check and be tokenistic. Further, it is expected to hold other Left parties in check.

ECONOMIC ASPECTS

Finally, the Central government perhaps believes that the economic gains will dilute the opposition over time. It expects these SEZs to be the nucleus of new investment, jobs and greater exports. Thus, it is propagating the SEZs as the solution to the country's problems. The critics worry about food security being jeopardised and in response, it is argued that less than 0.1 per cent of the arable land will be involved in the proposed SEZs so this will hardly effect total food production. Another argument is that SEZs will accelerate development and create a large number of jobs. The critics argue that it will also destroy lots of low skill jobs in agriculture and forestry. Further, the adverse impact on small scales sector will reduce jobs. So in the net it is not clear that it will lead to more employment.

It is suggested that there are backward and forward linkages of industry so it will promote development. But does agriculture not have such linkages? There is a fear that the large number of tax concessions being granted will lead to loss of revenue. However, the proponents suggest that increased production will result in enhanced tax collections. Will SEZs spur smuggling and tax evasion that will cause the tax loss to be larger than what is being anticipated? The number of questions that are being raised is quite large so that it is critical to understand where the truth lies? Some of these issues are dealt with in this paper.

WHO GAINS, WHO LOSES?

Clearly, those who will benefit or lose from the SEZs will be different sets of people. Those who will be displaced by the SEZs will be the rural people and those who will come in their place will be the skilled urban people. It is true that those who lose land will get "market prices" (according to the government) for their land and theoretically will be able to invest their money in other businesses. Thus, theoretically, not only in the SEZs but the new investments by the former agriculturists would create new non-agricultural jobs and all this maybe expected to lead to a reduction in the rate of increase of unemployment which has accelerated in the last 6 years. It is said that agriculture cannot create jobs anymore and these jobs have to be created in non-agricultural sectors. The SEZs are likely to curtail the rights of labour given that there will be no labour commissioner and the developer of the SEZ will govern the place along with a development commissioner. There will be no democratically elected body. Under Section 49 of the Act, there will be substantial powers to formulate new laws:

"49. (1) The Central Government may, by notification, direct that any of the provisions of this Act (other than sections 54 and 56) or any other Central Act or any rules or regulations made thereunder or any notification or order issued or direction given thereunder (other than the provisions relating to making of the rules or regulations) specified in the notification—

(a) shall not apply to a Special Economic Zone or a class of Special Economic Zones or all Special Economic Zones; or

(b) shall apply to a Special Economic Zone or a class of Special Economic Zones or all Special Economic Zones only with such exceptions, modifications and adaptation, as may be specified in the notification.

Provided that nothing contained in this section shall apply to any modifications of any Central Act or any rules or regulations made thereunder or any notification or order issued or direction given or scheme made thereunder so far as such modification, rule, regulation, notification, order or direction or scheme relates to the matters relating to trade unions, industrial and labour disputes, welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits applicable in any Special Economic Zones."

It is likely that environmental considerations will be diluted. Many tax concessions have been announced. Given these considerations, profitability is being ensured so investment will flow into the SEZs to take advantage of these features. It is also possible that there maybe relocation of units from their present locations to the SEZs so that the net investment would be lower.

It is true that new industry and businesses set up in the SEZs will generate new jobs. However, at first people would be displaced, work on the creation of the new infrastructure would then begin and new industry would take even longer time to come up so new jobs will not immediately come. Further, the new infrastructure and industry is much more capital intensive than agriculture or non-farm rural activities it would displace so that fewer jobs would be created.

Further, the farmers receiving compensation for land would not really know of any activity other than agriculture so they are unlikely to be able to invest in new businesses and may simply waste most of the capital they get. Even the most sophisticated businessmen, especially in the new environment, usually specialise in a few businesses and do not venture into businesses they do not know about.

In this age of specialisation many businesses talk of core competencies and shed their other businesses or outsource them. How do we expect the ill-trained farmers to seamlessly transit to other businesses? This is unlikely. Further, every business requires some minimum capital to start but a large number of Indian farmers are small or middle farmers who would get marginal amounts of compensation that would be totally inadequate to start any kind of business even if they were competent to do so.

Finally, consider the impact on small businesses which are failing in large numbers due to the new economic policies. The SEZs will accelerate this process since reservations will get further diluted. This will result in loss of a large number of jobs.

Many of the displaced are not likely to receive much compensation. This would include the landless who will not receive any compensation and those performing non-farm activities like the potters, herdsmen, carpenters, etc. These people, traditionally integrated into the farm economy, would be completely at sea without much of capital. Such people would constitute about half the population of the villages and can only add to the ranks of the unemployed.

The jobs the SEZs are likely to create will be of the high skill variety that the displaced farmers (with different skills or with low skills) would not be able to perform. Further, given their enclave-like character they would not encourage the entry of low-skilled workers displaced from the rural economy flooding their territory. Such people would of necessity become encroachers and slum dwellers in some urban areas. Thus the existing urban areas would face problems while the new enclaves would flourish creating differential urbanisation and more problems.

The displaced would require training to get even the low skilled jobs in the SEZs. The poor who have not even attended schools or drop out by the fifth grade are unlikely to be able to afford the training required and would be ruled out of working in these enclaves. Even if the training is sought to be given, it will be for low skills (like guards) or will take considerable time by which time others would get the jobs and the displaced people would languish.

In brief, the rising unemployment and underemployment (doubled in the last 6 years according to the Economic Survey 2006) can only go up. Instead of farmers committing suicide, it will be the former farmers (and the landless) who would commit suicide.

Are farmers' suicides important? According to a secretary in the Government of India too much is being made of this phenomenon. According to the crime sta-

tistics of India, quoted by her, only 16 percent of the suicides are committed by farmers. There are several lacunae in this argument. One is not talking of the absolute numbers but of the increase in the suicides. Farmers are supposed to be hardy people and do not easily commit suicides.

According to available information, the number of suicides is increasing and specially in some of the better-off states and amongst the better-off farmers. It is not the landless who are the poorest in the rural areas who are committing suicides.

What one is talking of is the growing distress amongst farmers who are unable to face the emerging challenge of globalisation – an uncertain and unknown entity to them. Further, do we know how many suicides are being committed? Are our crime statistics complete? According to the Crime Statistics, Bihar has the least amount of crime and Kerala the highest (A Kumar, 2002: *The Black Economy in India*. Penguin (India)).

Clearly, in India, a lot of crime goes unreported and unrecorded and that is also the story of suicides, in spite of all the publicity that this phenomenon is now receiving. If we go by the amount of narcotics drugs confiscated each year, then little of it is used in India. What is caught cannot be used and what is not caught does not exist as far as statistics are concerned so very little would be consumed in the country which is patently false. Clearly we cannot go by this argument since what is caught is only a small amount of the total drugs in use in the country.

According to estimates of gold brought into India and what was caught as smuggling, the ratio was 33:1. Thus official data on crime is not reliable and suicides, etc., maybe more in number than what is officially reported.

DISPLACEMENT IN THE PAST

Displacement in India is not new. Since Independence, the nation has pursued the policy of development from above and set up large industries or industrial estates and projects like, mines, dams, ports, expansion of road and rail network. Each one of them has displaced people in large numbers. We have also had the experience of setting up export zones and electronic zones. In most of these cases, the displaced people have hardly found new employment in these projects while the educated elite (the five percent of the work force in the organised sectors) has benefited substantially.

The experience of HEC, Ranchi or BHEL, Haridwar or the steel plants like, Bokaro and Bhilai has been that the neighbouring areas have remained largely backward. These industries were set up in backward areas and they remain some of the most backward. These have turned out to be mere implants in backward areas with little impact on the surrounding areas. While the country may have had a strategic interest in setting up these industries to achieve relative autonomy, in the absence of basic education for the children of the poor, the jobs went elsewhere. Mostly the local people did not get jobs except menial ones in the townships.

The people of these areas specifically, and the non-elite in general, trusted the post-Independence leadership that there would be trickle down and they would soon benefit. So, either they willingly sacrificed for what they were told was the larger national interest or in the absence of organisation had no choice but to comply with what those in authority wanted. Now they know better that trickle down does not work and do not believe the elite ruling class. A white paper is needed on the impact of the earlier large projects on the people displaced from where these projects came up.

In brief, those likely to be displaced by SEZs are unlikely to find jobs in the SEZs and since they do not have the skills, they would not be able to shift to non-agricultural jobs.

MARKET PRICE, JUSTICE

It is not that those displaced did not receive any compensation. However, since most of them did not know the modern institutions and practices, they did not know what to do with the compensation received. Often money was blown up in drinks and conspicuous consumption. This jeopardised the future of the family. The Government should issue a white paper on what happened to development in these cases in the areas where some of the large projects came up. In some sense, the compensation received by the displaced people was not just. This raises the larger question of whether there is justice to the displaced? In the market, if one receives a payment voluntarily for what one offers, it is a just trade. However, if one is coerced into accepting a price then this is unjust. However, this applies only to a situation where both parties understand markets. If one party does not understand the institution of market and a capitalist economy, then even payment of a market price taken voluntarily by the seller may not be just.

In a capitalist economy, the agents understand the idea that if they liquidate their primary asset, they need to invest the proceeds so as to continue to derive an income for the rest of their lifetime. Most of the poor people have little idea of what it means to invest and what is the risk of investment or how to regulate their investment so as to get a secure future return. Thus, their ownership of an asset is far more important than the financial market compensation they may get for it.

Further capitalism assumes the existence of homogeneous labour which can migrate anywhere to get work. Family ties are not that critical. That is not true for the agriculturists. For them, it is an inter-dependent life and kinship is crucial. Thus, displacement is very painful since it breaks the family and neighbourhood bonds that are not easy to re-establish in a new setting.

The bonds may be between the labourer and the farmer or the farmer and the carpenter or the ironsmith, etc. Especially, if the displaced migrate to an urban or semi urban setting, life is very alienating for them. These relationships cannot be valued in the market. Thus, paying market price cannot be just compensation for the displaced because they lose much more than the land.

Finally, when the land passes on to the businessman and they establish a market in land then a piece of land bought cheaply form the agriculturist shoots up in price. Thus, typically, the agriculturist receives a fraction of the price that the businessman will finally receive. One may ask where is the justice in all this.

Further, often there is a land mafia that operates in most areas where land is likely to be acquired. This mafia often gets to know where land is likely to be acquired and buys up land at prices higher than the current price knowing that the price would soon jump to much higher levels. The mafia also coerces sales by various devices. This is how the real estate developers have become billionaires. The loser in this process of capitalist development is the illiterate and poor rural population.

LOCATION CLOSE TO METROS

Among the many concessions being offered to the developers of the SEZs, one is cheap land close to cities and new highways. Land is being allotted much in excess of the requirement of industries. The implication is clear that land is being seen as urban real estate where huge profits can be made. While Singur is not an SEZ, the Tata group is being given about a 1,000 acre of land when they only need perhaps 70 acre for the car factory. Since the land in Singur is at the intersection of two important highways, it is prime land. This kind of consideration is clearly important for many of the planned SEZs.

While the developers of many of the SEZs and the proponents of these schemes suggest that real estate is not the real consideration and development is the real concern, can these claims be relied on? One line of argument is that since agricultural development has already taken place now it is time to go in for industrialisation since agriculture cannot accommodate more people.

There is another reason for the rush to set up these huge estates. In the last three years, the corporate sector profits have been growing at an average of 30% so that they have a lot of cash to invest. Real estate is a good proposition to park their funds in. Thus, we are witnessing the creation of a large number of new landlords.

Finally, developers hope that there will be a shift of industries to these new sites. There is a precedence to this in the fifties and sixties when industry shifted from East India to West because of rising labour militancy. Many industries shifted from West Bengal to Maharashtra. Very quickly, the number one industrialised state West Bengal became a relatively backward one and Maharashtra became the most industrialised state.

The government and industry are making a large number of promises regarding the SEZs. They are promising more investments in industry and massive creation of jobs. However, as has often happened in the past, industry and businesses have not kept their promises. For instance, Pepsi Cola was allowed to come into the country in the ` bad old days', prior to 1991, on the condition that it would export, it would develop Indian agriculture and create large numbers of jobs. None of these things materialised and most of the conditions were later dropped in the nineties since by then Coca Cola was allowed in without any of these conditions.

In Delhi, hospitals were allotted cheap land (almost free) on the condition that they would cater to the needs of the poor by providing a certain number of free beds, etc. However, not only have they not fulfilled that promise but they have been doing everything in their power (using political influence, etc.) to have the rules changed. Many industries have been set up in the backward areas and as argued earlier, in most cases,

these industries generated few jobs and of these even fewer went to the local people while most of these jobs were cornered by the educated middle class people.

Given this past experience, what is the guarantee that land acquired by industries for the SEZs would only be used for specified purposes and not for speculative purposes as real estate. The example of DLF and others in Gurgaon and other places comes to mind. They acquired advance information as to which areas are likely to be urbanised around the new NH8 and acquired that land from farmers at literally throwaway prices (market prices for that time). They have then released the land slowly over the last 20 years keeping prices artificially high all along and benefiting enormously. Land prices in this period have risen almost 500 times. Far higher than any other index of prices.

When industry goes back on its promises as it inevitably does, would the land revert back to the farmers and what would be the mechanism for this (to whom and at what price?). In a recent judgment the SC has said that the land need not be returned to those from whom the government acquires it. Thus, it is a one-way street and a mistake is costly to the displaced. Many farmers would be displaced and as mentioned above, their social linkages would have been broken. One cannot reestablish the village again after breaking it up. This is not a reversible process. Further, who is going to pay the cost of the transition in which a community is broken up and which involves the suffering of the women and the children displaced from hearth, schools, etc.

MOCKERY OF DEMOCRACY

In setting up SEZs an essentially undemocratic process is being followed. While industry and commerce have been consulted regarding what they need, the farmers and civil society groups have been left out of any consultation process. It is assumed that they will accept meekly the decision to take away land from agriculture for the setting up of commerce and industry. It is assumed that their notion of their own welfare is not important. It is not that the entire country is being turned into SEZs. Certain areas are being selected so that the burden of this kind of industrialisation is going to fall on some people and not all. The question naturally arises whether in a democracy those to be adversely affected need to be consulted or not?

Should it not be the case that if the collective decides against such a project then the government should look for alternative sites where the people agree to the project? If no such site is found, then it means that the majority do not want that kind of development and then in a democracy that decision should be implemented and such a project not be allowed to be set up. If people do not want a certain kind of development, then that decision should be respected. The government should not assume that it knows best and it can force its will.

Finally, for the sake of accountability, land if needed, should be acquired in phases as the project is set up. Thus, it is necessary that the party interested in setting up a SEZ should give a time bound plan and if that is not adhered to then not only should more land not be acquired but what was acquired should be returned. A fine should be imposed on the party involved and distributed to those whose land had been acquired. This would make the system more accountable which today it is not.

For example, if in Singur, the Tatas are now planning to set up a plant to produce one lakh cars then it may be allotted say 50 acres of land with the promise that more would come later as the project progresses to the next phase. After all, if Maruti producing many times more car can function in a plot of similar size then why cannot the Tatas? It is also possible that land to the Tatas be given from out of the closed industries that abound in West Bengal. This would not add to the displacement. It would be a much better solution than giving fresh land and causing displacement and hardship to a large number of people.

MACRO ASPECTS

Today, the government has adopted the policy of `growth at any cost' with the cost falling on the deprived and marginalised sections of the population. The benefits are being taken by the better-off sections of the society and the big businessmen. It is argued that the SEZ policy would lead to a rise in the investment rate in the economy to achieve a 10 percent rate of growth. It is suggested that there would be trickle down and that would lead to the poor also benefiting.

The question is, is this the only way to increase investments and the rate of growth in the economy? One could also ask whether, growth cannot take place through a pro-poor policy? Finally, one needs to be sure whether there will be trickle down to the poor or would there be two separate circles of development a high

growth one with the elite benefiting and a low growth path in which the bulk of the population would be trapped. How often it has been found in the Indian context that trickle down has not really worked or has been far too slow and yet the people are expected to put their faith in these policies once again.

In the last five years, the investment rate has jumped from around 25 percent to around 32 percent without the concessions being announced under the SEZ scheme. Then what is the need for further incentives at the expense of the marginalised sections of the population? The issue is what are the prerequisites to investment increase? And, what is the role of concessions in the investment process?

The concessions in taxes and relaxation in environmental regulation and labour laws are expected to make operations in the SEZ highly profitable. All this is being done in the name of exports, to make these zones export competitive by helping industry in these zones to have lower costs of production and higher profits. There is no doubt that with the concessions announced and the privileged position that is being granted to the SEZs, they will get investment so that they will generate employment and output. However, it is equally true that they will also displace production that was already ongoing in the area where SEZs will come up. The past investments in agriculture, non-agricultural activities and in the creation of habitation in that area will be destroyed. Thus, the issue is what would be the net increase in investment, employment and output.

Further, given the concessions, much of the investment in SEZs is likely to be at the expense of the investment in the rest of the economy. Finally, some may even close their units in the rest of the economy to shift to the SEZs. Due to these three factors, the net investment will turn out to be much less than what would be the gross flow of investment to the SEZs. In fact, because the price of output from SEZ is likely to be lower than that in the rest of the country, a lot of smuggling will take place and the output in the rest of the economy will be adversely affected. This will further affect employment. Since industry set up in SEZs is likely to be of the modern variety, it will use much more capital per worker and generate much higher output per worker. Thus, the SEZs are likely to generate little employment compared to what it will displace both inside the SEZ and outside it (and that too of the skilled variety). This will undermine any trickle down that is being talked of.

SEZs are likely to involve concessions in income tax, corporation tax, excise, customs and sales taxes so that there will be substantial revenue loss compared to the potential tax collection. Further, to the extent, industry will shift from the non-SEZ areas where they are required to pay taxes to the SEZs where taxes would not be required to be paid, there would be a decline in tax collections.

Further, due to smuggling of cheap goods from SEZs to the rest of the country, there will be further loss of tax collection. When smuggling takes place easily from outside the guarded borders, it is not difficult to imagine that this would be easy from the unguarded SEZs. The resultant revenue losses will aggravate the deficit in the budgets and will result in cut back in expenditures to fulfill the FRBM Act requirements. Most of the time these cuts tend to be in the social sectors which will worsen the situation for the poor.

Finally, as has happened so often in the past, there will be over investment in the SEZs. As suggested earlier, this would be at the expense of the non-SEZ areas of the country. This would result in imbalanced development and a rise in uncertainty for the economy with consequential impact on the poor who by then would be out of jobs.

In brief, the macroeconomic situation will face major challenges. Employment in the SEZs would rise but would be adversely affected elsewhere. Output net of the loss of production in the activities that were carried on prior to the setting up of the SEZs, in the small scale sector and in the displaced industries would rise much less than claimed. Similarly, investment would rise but much less than being suggested because of the destruction of assets in SEZs and the small scale sectors and displacement from the rest to the SEZs. Loss of tax revenue would be substantial and would affect the budgetary calculus. All in all, the macroeconomic portents are not very promising.

ENCLAVE DEVELOPMENT

It is also clear from the earlier section, the SEZ areas will develop substantially at the expense of the non-SEZ areas. This is likely to accentuate the already rising disparities. Loss of taxes will lead to shortage of funds for development in the non-SEZ areas.

There is likely to be diversion of resources from the non-SEZ areas to the SEZs. For instance, water aquifers would be used rapidly as has happened in the

past and the poor people in the surrounding areas will be starved of water. The only way to prevent differentiation from rising further is to declare the whole country an SEZ. One may ask why limit the supposed benefits of SEZs to only limited areas and aggravate disparities?

CONCLUSIONS

This paper has analysed some of the key features relevant to the creation of SEZs. It is argued in the article that the SEZ policy is a part of the policy of `growth at any cost' with the cost falling on the already marginalised sections in the rural areas. Huge concessions are being offered to the developers of SEZs and the entrepreneurs for locating in the SEZs. The beneficiaries are likely to be the affluent and skilled sections of the population. Thus, those who gain and those that lose will be different sections of the people.

It has been argued that those displaced will not get the market price for their land and even if they do, this price would not take into account many of the hidden costs, like, being a part of a community. As such, payment of a market price for land will not be a `just' compensation, specially to those who do not understand the institutions of saving and investment.

Displacement will not be just of agriculturists but of a far larger number of people associated with a way of life which will be totally disrupted. Market price does not factor this in since it is at best based on the future flow of incomes (with capitalist development) from the piece of land acquired. It is not valued from the point of view of the displaced to whom the way of life being destroyed may be worth much more, specially, in the long run. Unfortunately, some Marxists seem to be going for a new form of class struggle where the workers and capitalists will together fight the marginalised, the farmers and tribals who instead of getting their support are being treated as anti- industrialisation.

The eGOM has not been able to resolve the problem of acquisition of land. If the government does so, it would pay much less than the potential market price but if this is left to the private sector, land mafia would be involved and the price paid would be much lower than the market price. There is really no solution. Further, it is argued that many in the rural areas do not possess land and will get little compensation when they are displaced. They will join the ranks of the unemployed in the urban areas. Those who do get compensation will find that they would not be able to start businesses since they lack the experience for it (this is the age of core competency). Finally, at a time when the crisis in the small scale sector would only worsen, asking the inexperienced farmers to start small industry or business would be doing them a disservice.

It is argued in this paper that employment generation in SEZs will not be able to compensate for the loss of employment in the activities the SEZs will displace and in the small scale sectors which are likely to be hit hard. Further, the output increase will be much less than claimed and investment will be at the expense of the non-SEZ areas and less than claimed since there will also be destruction of capital. Finally, it is pointed out that the more successful the SEZs the more would be the loss of revenue to the government due to the tax concessions. There is likely to be large scale smuggling and new possibilities of transfer pricing and siphoning out of profits. There would be enclave development and disparities would rise. Migration to urban areas will rise and they will face further collapse. The excess land being allotted to the SEZs will result in the creation of new landlords. Government is creating new landlords 60 years after independence and long after it was thought prudent to end landlordism in the country. Reports suggest that some large SEZs being set up by the corporates will be known as "*…desh*", like, Bangladesh, where the well off will live in style.

If the overall gains from SEZs are so unclear and the government is going ahead with the scheme, then it can only be because it wants to give concessions to certain sections (who are pushing for it). The central government is playing the same role as the World Bank and IMF do in making nation states to compete for capital and give concessions to it. The SEZ policy is making the states compete with each other to get capital. Those states that do not go for SEZs will suffer because others will go ahead and attract investment.

Given the negative features of SEZs, even allowing 5,000 hectares is too much land for one SEZ. Having hundreds of them sprouting in the country is even worse. In brief, if SEZs are the logical culmination of the current Indian strategy of `growth-at-any-cost' with the cost falling on Bharat then one needs to not only scrap SEZ policy but the development strategy itself.

— May-June 2007

GDP
10% growth
FDI
MNCs
WTO
IMF
World Bank

Carving out Foreign Territory in India

Setting up Special Economic Zones all over the country will be at the cost of villagers — depriving them of their land, hearth and home. Besides this, it will compromise not only environmental safeguards but also national security, sovereignty and the laws of the land.

S H IYER

The concept of Special Economic Zones (SEZs) was first heard in March 2000. The government of India announced a policy of SEZs with a view of augmenting infrastructure facilities for export production and thereby permitting public, private, joint sector and also the state governments to set up Special Economic Zones. Under the policy, the SEZs were deemed to be `foreign territory' for tariff and trade operations. It was expected by the government that SEZs would bring large dividends to the State in terms of economic and industrial development and the generation of new employment opportunities. The SEZs, according to the government, are to be engines of economic growth.

In the year 2005 Parliament enacted an Act known as The Special Economic Zones Act, 2005 (Act 28 of 2005) with an objective to provide for the establishment and management of the Special Economic Zones for the promotion of exports. Let us first look at its main features:

SALIENT FEATURES AND FACILITIES

- A designated duty free enclave and to be treated as `foreign territory' for trade operations and duties and tariffs
- No licence required for import
- Exemption from customs duty on import of capital goods, raw materials, consumables, spares, etc
- Exemption from central excise duty on procurement of capital goods, raw materials, consumable spares, etc., from the domestic market
- Supplies from DTA (Domestic Tariff Area) to SEZ units treated as deemed exports
- Reimbursement of Central Sales Tax paid on domestic purchases
- One hundred percent income tax exemption for a block of five years, 50% tax exemptions for two years and upto 50% of the profits ploughed back for next 3 years under section 10-A of Income Tax Act
- Supplies from DTA to SEZ to be treated as exports under 80 HHC of the IT Act
- Carry forward of losses
- Total Income-tax exemption for 3 years and 50% for 2 years under section 80-LA of the Income-tax Act for offshore banking units
- Reimbursement of duty paid on furnace oil, procured from domestic oil companies to SEZ units as per the rate of drawback notified by the Directorate General of Foreign Trade
- SEZ units may be for manufacturing, trading or service activity
- SEZ unit to be positive net foreign exchange earner within three years
- Performance of the units to be monitored by a Committee headed by Development Commissioner and consisting of Customs
- Cent percent foreign direct investment in manufacturing, sector allowed through automatic route barring a few sectors
- Facility to retain 100% foreign exchange receipts in EEFC Account
- Facility to realise and repatriate export proceeds within 12 months
- Re-export imported goods found defective

ENVIRONMENTAL CLEARANCE

- No Environment Impact Assessment is required for setting up of SEZs.
- In case the SEZ area is located near the coast, clearance is required from the ministry of environment and forests under Coastal Regulation Zone (CRZ) Notification. The following activities have been permitted within the coastal area of the SEZ:
- Non-polluting industries in the field of Information and technology and other service industries are permissible in the CRZ area of Special Economic Zone.
- In CRZ-III area development activities may be permissible for recreational facilities, including golf courses, desalination plants, hotels and non-polluting service industries.
- The embargo that in CRZ-III, an area upto 200 metres from the high tide line would be 'no development zone' will not apply to area falling within the notified SEZ.
- Clearance from the concerned state government would be required in the case the SEZ area contain forestland.
- It is proposed that authority to grant approval for the following be delegated to a committee under the development commissioner of the zone.
- For allowing utilisation of forest land as well as permitting compensatory afforestation.
- Activities within coastal zone.

SPECIAL COURTS

The Act empowers the state governments to designate special courts to try all civil suits and notified offences within the Special Economic Zone and no court other than the court designated under the Act shall try any suit or conduct any trial of notified offences. Appeal lies before High Court against decision or order of the designated court.

COMPULSORY IDENTITY CARD

Every person, whether employed or residing in SEZ shall be provided an identity card by the Development Commissioner.

SPECIAL ECONOMIC ZONES IN GUJARAT

On 19-7-2002 the government of Gujarat, industries and mines department came out with a Government Resolution (GR) formulating policy regarding establishment of Special Economic Zones in Gujarat in accordance with guidelines issued by the government of India. By this GR the Government of Gujarat decided that the SEZ policy would apply in all SEZs in the State viz. Kandla, Surat, Mundra, Dahej, Poshitra and other SEZs that may come up in Gujarat.

The salient features of the SEZ policy under above referred GR are as under:

MANAGEMENT OF ZONES

- The management of the Special Economic Zones will be under the designated development commissioner.
- The development commissioner will grant all the permission, as single point clearance from his office
- These will include registration of the unit, allocation of land, permission for construction of building and approval of building plan, power connection, environmental clearance, water requirement, etc.
- SEZs in the state will be declared as Industrial Township (Notified Area).

UNHINDERED POWER SUPPLY

- SEZ units shall be exempted from electricity duty for ten years from the date of production or rendering of services.
- SEZ units will be granted automatic approval to set up captive power plant.

ENVIRONMENT

- Gujarat Pollution Control Board (GPCB) has declared 80 industries which are exempted from requirement of obtaining NOC.

WATER

- The SEZ developers will be granted approval for development of water supply and distribution system to ensure the provision of adequate water supply for SEZ units.

LABOUR REGULATIONS

- The powers of the labour commissioner, Government of Gujarat shall be delegated to the development commissioner in respect of the area

within the SEZs. An officer will be designated and placed under the supervision and, control of development commissioner, SEZ. He will function as registration officer, conciliation officer as well as inspector under various labour laws to provide single window service.

- As a part of liberalisation process for filing returns, a consolidated annual report (CAR) has been designed, consolidating various periodical returns (quarterly, half-yearly etc.) under the following Acts.
  – Workman Compensation Act 1923
  – Payment of Wages Act 1936
  – Factories Act 1948
  – Minimum Wages Act 1948
  – Maternity Benefit Act 1961
  – Payment of Bonus Act 1965
  – Contract Labour (Regulation and Abolition) Act 1970
- The Units in SEZ will be required to file annually consolidated annual report (CAR) to development commissioner, SEZ. The units in SEZ will not be required to file periodically separate returns.
- All industrial units and other establishments in SEZ will be declared as "public utility service" under the provisions of Industrial Dispute Act.
- For inspections relating to workers' health and safety, units will be permitted for obtaining inspection reports from accredited agencies as may be notified by the state government.

SALES TAX AND OTHER LEVIES

- Complete exemption on payment of stamp duty and registration fees on transfer of land meant for industrial use in the SEZ area.
- Complete exemption on payment of stamp duty and registration fee for loan, agreements, credit deeds, mortgages, etc. pertaining to SEZ units or which will be executed within the SEZ area.
- Transaction within the SEZ shall be exempted from all state taxes including sales tax, VAT, motor spirit tax, luxury tax and entertainment tax, purchase tax and other state taxes.
- Inputs (goods and services) made to SEZ units from domestic tariff area (DTA) will be exempt from sales tax and other state taxes.
- Any sales from SEZ to DTA will be treated as import and import duty will be applicable as per GOI policy. Sales tax will be applicable to SEZ goods as applicable to other imported goods. Same rules and procedure will be applicable to SEZ goods as applicable to normal imports.
- Due to tax system constraints, if it is not possible to grant direct exemption to any transaction, such payment of state taxes will be reimbursed to the SEZ units.
- The SEZ developer and SEZ units will be eligible to avail exemptions under (a) to (f) above during implementation period as well.

LAW AND ORDER

- The State Government shall take required suitable steps within the SEZs for the maintenance of law and order.

GUJARAT SEZ ACT, 2004

Prior to enactment of the Special Economic Zones Act, 2005 (Act No.28 of 2005) by Parliament, the state Legislature of Gujarat has enacted a state law viz. the Gujarat Special Economic Zones Act, 2004 (Gujarat Act No. 11 of 2004). Today we have two Acts in Gujarat.

The salient features of Gujarat SEZ Act are as under:

- **Units treated as foreign territory –** SEZ will be treated as foreign territory for trade operations and duties and tariff. No licence is required for import.
- **Freedom of operations –** SEZ unit may be manufacturing, trading or service activity. They have full flexibility of operations. There will be no routine examination by customs of export and import cargo. No separate documentation is required for customs and EXIM policy. Customs clearance will be in-house, at no extra charge.
- **Foreign direct investment –** 100% Foreign Direct Investment (FDI) in manufacturing sector is permitted except in few sectors like arms and ammunition, explosives atomic substance, narcotics and hazardous chemicals, distillation and brewing of alcoholic drinks and cigarettes, cigars and manufactured tobacco substitutes.
- **Supplies to SEZs are exports –** Supplies to

SEZ from manufactures in India (called DTA – i.e. domestic tariff area) will be treated as 'exports'. Supplies from within India to SEZ units will be entitled to duty drawback u/s. 75 of Customs Act.

- Manufactures in India supplying goods to unit in SEZ are exempt from Central Sales Tax Act.
- Units in SEZ have to be net foreign exchange earners.
- **No excise on goods made in SEZ-** As per section 3(1) of Central Excise Act (as amended w.e.f. 11-5-2002), there will be no excise duty on goods manufactured or produced in SEZ unit. They are 'excluded excisable goods' and not 'exempted excisable goods'.
- **Trading units permitted -** Trading Units are permitted in SEZ. The trading unit can sell goods in DTA on payment of applicable duty, subject to achievement of NFE cumulatively.
- **Captive power plants -** SEZ units can have captive power plants. They can supply surplus power to another SEZ/EOU/STP/EHTP unit. They can also supply power to another unit in DTA.
- **Sub contracting outside -** There is full freedom for sub-contracting., i.e. giving material outside for job work.
- **Job work -** units in SEZ can undertake job work on behalf of domestic exporters. There should be direct exports from the zone.
- **Insurance outside India -** The SEZ units can take any general insurance policy from insurers outside India provided the premium is paid in foreign exchange.
- **De bonding –** A unit in SEZ can either de-bond or convert itself into EOU. In either case, it will have to physically move out of SEZ.
- **Income tax exemption -** As per section 10A(1A) of the Income Tax Act, units in SEZ will be exempt from income tax for first five years from year of commencement of manufacturing. For subsequent two years, income tax exemption will be 50% of their export income.
- **Labour laws -** Indian SEZ will have to comply with labour laws. However, a state government can declare units with the SEZ as public utility. It can also delegate powers of the labour commissioner to another officer exclusively for SEZ or even to development commissioner of SEZ so that resolution of disputes can be expedited. (Indian labour laws which provide good working conditions and reasonable wages and security are acceptable to all. However the laws are over protective to labour. This increases indiscipline and reduces productivity to such an extent that Indian goods become uncompetitive.)
- **Management Remuneration -** Restrictions in respect of managerial remuneration under Companies Act have been relaxed in case of Companies in SEZ. The remuneration can be upto Rs. 20 lakh per month (Rs. 2.40 crore per annum) without approval of the central government.
- **Customs and Excise -** The goods admitted to SEZ are exempt from customs duty [section 76E of Customs Act]. Unit in SEZ is not required to be registered with Central Excise authorities.
- **Duty free inputs/ capital goods -** There will be no customs and excise duty on import of capital goods, raw materials, consumables spares, etc.
- **Supply to EOU/SEZ unit in foreign exchange -** The SEZ unit can supply to EOU/SEZ unit and obtain payment in foreign exchange. They can also sell to DTA in foreign exchange.
- **Foreign currency account -** A unit located in SEZ can open, hold and maintain a foreign currency account with an authorised dealer in India. All foreign exchange funds received by SEZ are credited in this account.
- **Supplis to SEZ are 'exports'-** Supplies from other manufacturers in India (i.e. in DTA) to the units in SEZ are treated as 'exports' and suppliers to the units in SEZ get eligible benefits.
- **Goods supplied to SEZ/EOU exempt from duty -** The goods supplied by manufacturers in India to EOU/SEZ unit are exempt from excise duty.
- **The Minimum Wages Act, 1948** – Sec.19(i)- Development commissioner, SEZ Gujarat-Appointed as an inspector for the purpose of the said Act for all special Economic Zones in the state of Gujarat.
- **Amendment of certain Acts -** Each of the Acts specified in the second column of the Schedule II shall be amended in the manner and to the extent specified against it in the third column thereof.

- **Amendment of Section 2 OF XIV of 1947-** In the Industrial Disputes Act, 1947 (XIV of 1947) in its application to the state of Gujarat (hereinafter referred to as "the "Principal Act") in section 2.
- In clause (k), the words and letters "but does not include the termination of the service of a workman in accordance with the provisions of Chapter V-D' shall be added at the end;
- In clause (00), In sub-clause (c), the word "or" shall be added at the end;
- After sub-clause (c), the following sub-clause shall be added namely:
  "(d) termination of the service of a workman in an industrial establishment situated in the Special Economic Zone declared as such by the government of India;"
- After clause (q), the following clause shall be inserted, namely:
  "(qa) "termination" means discontinuation by the employer of the service of a workmen in industrial establishment situated in the Special Economic Zone declared as such by the Government of India for any reason but for punishment inflicted by way of disciplinary action, but does not include-
- Voluntary retirement of the workman; or
- Retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or
- Termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or termination of the service of a workman on the ground of continued ill-health.
- **Insertion of new chapter V-D IN XIV OF 1947-** In the principal Act, after Chapter V-C, the following Chapter shall be inserted, namely:

CHAPTER V-D

Special Provision for SEZ -

- The provisions of Chapters V-A and V-B shall not apply to an industrial establishment to which Chapter V-D applies.
- The provisions of this chapter shall apply to an industrial establishment set up in the Special Economic Zone declared as such by the government of India.

DEFINITION OF CONTINUOUS SERVICE - FOR THE PURPOSE OF THIS CHAPTER

- a workman shall be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike, which is not illegal, or a look out or a cessation of work which is not due to any fault on the part of the workman;
- where a workman is not in continuous service within the meaning of clause 91) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
- for a period of one year, if the workman, during a period of 12 calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
- 190 days in the case of a workman employed below ground in a mine; and
- 240 days, in any other case;
- for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
- 95 days, in case of a workman employed below ground in a mine; and
- 120 days, in any other case.

Explanation - for the purpose of clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which

- he has been laid off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946) or under this Act or under any other law applicable to the industrial establishment.

- he has been on leave with full wages, earned in the previous year
- he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment and
- in case of a female, she has been on maternity leave; so however, that the total period of such maternity leave does not exceed 12 weeks.

RIGHT OF WORKMEN LAID

Whenever a workman (other than a badli workman or a casual workman) whose name is borne on the muster rolls of an industrial establishment and who has completed not less than one year of continuous service under an employer is laid off, whether continuously or intermittently, he shall be paid by the employer for all days during which he is so laid off, except for such weekly holidays as may intervene, compensation which shall be equal to 50 percent for such weekly holidays as may intervene, compensation which shall be equal to 50 percent of the total of the basic wages and dearness allowance that would have been payable to him had he not been so laid off.

Provided that if during any period of 12 months, a workman is so laid off for more than 45 days, no such compensation shall be payable in respect of any period of the lay off after the expiry of the first 45 days.

Provided further that it shall be lawful for the employer in any case failing within the foregoing proviso to terminate the workman in accordance with the provisions contained in section 25 ZA at any time after the expiry of the first 45 days of the lay off and when he does so, any compensation paid to the workman for having been laid off during the preceeding twelve months be set off against the compensation payable for termination.

Explanation – "Badli workman" means a workman who is employed in an industrial establishment in place of another workman whose name is borne on the muster rolls of the establishment, but shall cease to be regarded as such for the purpose of this section, if he has completed one year of continuous service in the establishment.

Muster rolls of workmen - Notwithstanding that workmen in any industrial establishment have been laid off, it shall be the duty of every employer to maintain for the purpose of this Chapter a muster roll, and to provide for the making of entries therein by workmen who may present themselves for work at the establishment at the appointment time during working hours.

Workman not entitled to Compensation - No compensation shall be paid to a workman who has been laidzoff-

- If he refuses to accept any alternative employment in the same establishment from which he has been laid off, or in any other establishment belonging to the same employer situate in the same town or village or situated within a radius of five miles from the establishment to which he belongs, if, in the opinion of the employer, such alternative employment does not call for any special skill or previous experience and can be done by the workman, provided that the wages which would normally have been paid to the workman are offered for the alternative employment also;
- If he does not present himself for work at the establishment at the appointed time during normal working hours at lease once a day;
- If such laying off is due to strike or showing down of production on the part of workman is another part of the establishment.

Conditions for termination of workman -

- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be terminated (otherwise than as punishment inflicted by way of disciplinary action) by that employer unit-
- the workman has been given one month's notice in writing and the period of notice has expired, or the workman has been offered in lieu of such notice, wages for the period of the notice
- the workman has been paid compensation equivalent to 45 days salary for every completed year of continuous service in such manner as may be prescribed
- Where the workman has been insured through insurance policy by the employer for the social security to receive the compensation in the case of termination, equivalent to forty-five days salary for every completed year of continuous service, the employer, instead of making payment of compensation under clause (b) of subsection (1), shall forward all the necessary documents of such workman to the insurance company within 15 days after termination.

Compensation to workman in case of transfer of undertaking - Where ownership or management of an undertaking is transferred whether by agreement or by operation of law, from the employer in relation to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of section 25ZA, as if the workman had been terminated;

Provided – that nothing in this section shall apply to a workman inany case where there has been a change of employers by reason of the transfer, if-

- the service of the workman has been interrupted by such transfer
- the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer; and
- the new employer is, under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his termination, compensation on the basis that his service has been continuous and has not been interrupted by the transfer

A 60-day notice before intention to close down undertaking- An employer who intends to close down an undertaking, shall serve at least 60 days before the date on which the intended closure is to become effective, a notice, in the manner as may be prescribed, on the state government stating clearly the reasons for the intended closure of the undertaking.

Compensation - Where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall be entitled to compensation in accordance with the provisions of section 25ZA, as if the workman had not been terminated.

SEZS TODAY

While Andhra Pradesh and Maharashtra are on top of the list of number of SEZs in the country, it is Haryana which has bagged the largest SEZ in the country. So far the government has already approved 150 SEZs and 117 more SEZs are awaiting government's nod. The number of SEZs approved for Andhra Pradesh are 27 whereas for Maharashtra 26, Tamil Nadu 20, Karnataka 19, Gujarat 13 and Haryana 8 have been approved. So far no SEZ has been proposed for the north-eastern States like Assam, Nagaland, Mizoram, Meghalaya, Manipur, Arunachal Pradesh and Tripura.

IMPACT OF SEZS

Large scale displacement

The SEZs spread over hundreds of square kilometres will affect a very large number of villages in the region. Lands will be acquired from all these villages for setting up of the SEZ and the port. Already, in Positra village of Jamnagar district the land acquisition awards have been given and in 16 villages land acquisition procedures have begun. In Okha Mandal Taluka itself, 45% of the taluka's total area will be lost through acquisition for the SEZ. More than 25,000 people of these villages will be affected by displacement. Nearly 60% of the land in the region is classified as cultivable land, contrary to the argument that the region has only wastelands that can be acquired without harming the local economy. The population's main source of livelihood is agriculture.

Land for industries

Under pressure from multinational corporations, the state may declare that land in SEZ is required for a `public purpose' without recognition and protection of people's right to their natural resources and without consultation with them. The expression `public purpose' is defined by the Land Acquisition Act, 1894. Amendment is sought to be made so as to permit land acquisition on behalf of private companies not only for public purposes but also for engaging in production for private profit. The state is increasingly interested in farmers' lands for the purpose of setting up SEZs. Since the Land Acquisition Act only enables the state to acquire land for a public purpose, the government has proposed to amend the law to allow confiscation of land by the state on behalf of private industry and to introduce only cash compensation instead of providing alternative land. A new form of *Zamindar* is sought to be created with new *Zamindars* like Reliance.

Exploitation of labour

A Special Economic Zone is a geographical region that has economic laws more liberal than a country's typical economic laws. The SEZs are expected to have hi-tech industries and the port is also going to be a mechanised

port, suitable to the process of globalisation. This would mean that the local population that is not skilled enough for such jobs, would not find any employment in the new economic activities. They would find employment as unskilled labour. Since, the labour laws of India are not going to be made applicable in the SEZ, the protection under existing labour laws would not be available to the workers. That would mean that the unskilled labour in the SEZ would be working as daily wagers on the mercy of the contractors who would hire them. Thus, the self-reliant agricultural community will be converted into bonded labour, a dependent community.

Violation of Constitution

When the local population dependent on agriculture will lose their lands, they will lose their livelihood. Article 21 of the Constitution of India guarantees fundamental right to life and livelihood for all the Indian citizens. The Indian Constitution is framed by the people and for the people of India, keeping the interests of Indian people in mind. The Constitution of India will be violated for the interests of foreign business and against the interests of the Indian citizens!

People are living in fear

Ever since the people of the region have heard that they will lose their homeland, they are living in fear. Their mental peace has been disturbed. They are unable to sleep and are in depression. Outside their homeland, they will not only be subjected to hardship but will also be pauperised. Women too are terrified that they will lose their bearings in the new place and be put to tremendous hardship.

Destruction of culture

The tribes living in villages have a unique culture. Therefore, displacement from their homeland will break their symbiotic relationship with their local environment. Such projects that displace such unique cultures will lead to destruction of Indian culture. While, the political parties are vociferously shouting for protection of Indian culture, albeit in a very distorted fashion, their economic programmes will lead to destruction of the real Indian culture, which is an irony of fate for this nation! Okha Mandal region has numerous local historical monuments and religious places. Among these are the Dwarkadhish Temple in Dwarka, Nageshwar Jyotirling, Gopi Talav of Shyamalasar and other historical pieces. These historical and religious places will be lost to the 'foreign territory'.

Environmental damage of unique ecosystem

The proposed SEZ near Positra in Jamnagar district will come up at the site that is declared as Marine National Park and Sanctuary in the Gulf of Katchh under the Wild Life Protection Act, 1972. This is the only Marine National Park requiring special protection. It is also well known that this is the only area in the world, which is the home of soft corals, and therefore it is a very sensitive area ecologically. It is a breeding ground of a number of marine species that come all the way from other continents to breed here. The marine life in the sanctuary will be severely affected.

National security

Gujarat's coastline has been found to be used for anti-national activities. Therefore, opening up of the coastline of Gujarat, which is highly sensitive from national defence purpose, to unknown foreign companies, could compromise national security.

Surrendering sovereignty

The SEZ will be treated as 'foreign territory' on which the Indian laws will be relaxed. It is shocking that a part of a sovereign republic like India will be handed over to unknown foreign interests. We know that the British, under the aegis of the East India Company, established their first factory and a colony at Surat after taking permission to do so from Moghul Emperor Jahangir and then they spread their tentacles all over India and colonised the country for nearly 400 years. India achieved Independence from the British rule in 1947 after sacrificing many citizens. it is just half a century when India gained Independence from colonial subjugation when there will be a new form of colonial subjugation introduced in India. Now Indian history is taking a new turn and once more, colonisation has already started in the country. Development of India is of course necessary. However, development cannot take place at the cost of displacement of villagers, in violation of the Indian Constitution, destruction of unique local cultures and causing harm to local religious sentiments, severe environmental damage to a unique ecosystem, compromising national security and above all surrendering national sovereignty to foreign interests.

— March-April 2007

SECTION 15

India's neighbourhood has witnessed an upsurge in people's movements for assertion of their rights in the face of oppression by the State – people's revolution in Nepal, dawn of democracy in Burma, stiff resistance to genocide in Sri Lanka, protracted struggle for identity by the Chakmas of Chittagong Hill Tracts of Bangladesh, rights movement in Pakistan, decades-long Tibetan struggle for independence. There are important lessons for India.

South ASIA

The Lost World of the Chakmas

Trapped in a time warp is a tribe that has otherwise traversed through time and history. The Chakmas from the rugged hill terrains of Chittagong Hill Tracts of Bangladesh have been the worst victims of a colonial past, partition of the subcontinent, creation of Bangladesh and now regional politics of India's north east. This ancient clan today desperately needs to be uplifted from the depths it has been spurned into.

KENN LARSEN

In the hilly area of eastern Bangladesh known as the Chittagong Hill Tracts (CHT) resides an ancient tribe of Chakmas with their own unique historical traditions, culture, language and religion. Their origin and history is veiled in mystery with very little contextual evidence in existence. The relatively few scholars who have taken interest in the tribe differ in their views, while some believe they are descendents of one of the princely kingdoms in Champaknagar in northern part of India, others stipulate they migrated from central Myanmar and Arakan. Shrouded in mystery or not, what is clear is that the Chakmas have been subjected to many transitions following colonial presence, in which they have had little or no say at all. Currently residing in the Chittagong hills as well as in India, the Chakmas are a suppressed lot. In India they are denied citizenship and access to fundamental rights notwithstanding their presence and exertion of influence in the country for generations. But as often seen in history, inhabiting lands for generations is not always a precondition for exercise of the rights. The case of the Chakmas is no different — it is the struggle of an ancient tribe in a modern world fighting for their basic human rights and preservation of culture. And being the largest of the 14 major tribes residing in the CHT, the fate of the Chakmas is the fate of the indigenous people altogether.

COLONIAL PAST

The path leading to the current circumstances surrounding the Chakmas is paved by a series of historic events beginning with their early contact with the British through the East India Company in 1760. After their arrival in the region, the East India Company established control over the province of Bengal, ceding the three districts of Burdwan, Midnapore and Chittagong to British authority. Consequently, the Chakmas were forced to pay an annual contribution in cotton for which they were allowed to trade in the plain. The Chakma chief became responsible for tax collection and developed into a colonial personage with some of the trimmings of indirect rule. However, disillusionment of being subject to colonial rule soon turned to restlessness, and the then chief of the Chakma tribe, Ronu Khan, formally declared war against the British in 1877. The war ended a decade later following an economic blockade that forced the Chakmas to negotiate a settlement. The new Chakma chief accepted British suzerainty and agreed to keep the peace in return for autonomous rule and restrictions on the immigration of non-indigenous ethnic communities in the region. The administrative system was formalised in 1900 by the introduction of the Chittagong Hill Tracts Regulation and 35 years later reaffirmed with the Government of India Act. Thus the region was designated as a "totally excluded area" and its inhabitants given the protection of specific legal provisions.

POLITICAL DIVIDE

The year 1947 saw the complete erosion of this administrative system with the British leaving India and the following Partition of the land into two separate states — India and Pakistan — on the basis of religion. Under the terms of Partition agreement, CHT was originally to be placed under India, but instead the residing tribes found themselves surrounded by the borders of Pakistan. The special status of the region was initially acknowledged in the coun-

try's first constitution, but revoked in 1964 when the Pakistani government suddenly refused to provide any special rights or constitutional safeguards. This led to an influx of Bengali settlers into the area, which had severely changed the demographic composition of the region. Essentially, the Chakmas were given the choice of either moving out of the region or abandoning their way of life and merge with Bengali nationalism. During this period, the building of a long planned hydroelectric dam was also set in motion in the Chittagong district. The project was completed in 1960 and resulted in the creation of a large artificial lake, whereby approximately 40 percent of the tribal land was submerged. The lack of cultivated land forced around 100,000 tribals, most of them Chakmas, to resettle in surrounding areas and some crossed the border to Burma and the present day state of Arunachal Pradesh. There were minor compensations given to the displaced but many did not receive anything at all. Given that the Chakmas and the residual tribes in the area were overwhelmingly Buddhist at the time of Partition, they felt stronger affiliations with the Hindu people of India than the Muslim dominated Pakistan. Together with the revoking of the special status of the CHT and the construction of the hydroelectric dam, a fear of being driven from their land and losing their cultural identity began to form shape.

FIGHT FOR RIGHTS

In due course, east Pakistan receded and became Bangladesh in 1971, thereby redirecting the borders and changing the conditions of the people in the CHT once again. Immediately after independence, the Chakmas opted for the retention of the CHT Regulation 1900, but the claims were ultimately ignored. This led to the formation of a regional political party in 1972, Parbatya Chattagram Jana Samhati Samity (PCJSS) where the Chakmas and other CHT tribes joined hands to make their demands heard. However, the continued immigration of Bengalis into the area and the further ousting of the indigenous people eventually proved too powerful for diplomatic reasoning, and an armed conflict between the military wing of PCJSS — Shanti Bahini (SB) — and the Bangladeshi armed forces ignited. The CHT consequently turned into a militarised zone and remained so for the following two decades, where an outnumbered SB fought for the existence of their people against an enemy large in numbers and military might. Throughout the war, there were reports on numerous violations of human rights against the indigenous people, which were confirmed by various national and international media and human rights organisations. These included forced expulsion of the indigenous people from their lands, torture, rape and even massacres. At least 13 major genocidal attacks took place in the 1980s and the early 1990s and no attempts had subsequently been made to persecute the assailants. Although both sides were involved in military operations against civilians, the Bangladesh army conducted organised and systematic attacks on the indigenous population with a conscious disregard to civilian or military status and proof of affiliations with the SB. In June 1986, the Far Eastern Economic Review reported:

"…a reorganised Shanti Bahini force carried out its biggest coordinated attack on April 29 as it simultaneously raided several Bangladeshi army camps and the outposts of paramilitary Bangladesh Rifles and followed it up with swoops on new settlements of immigrant Bengali Muslims. In turn, the Muslim settlers and government forces carried out reprisals on tribal villages forcing the natives to flee to India."

The very next day of the attack by the Shanti Bahini, Bangladesh armed forces raided six villages in the district of Matiranga, two villages in Khagrachari and 24 villages in Panchari. After ransacking the village houses and desecrating and destroying Buddhist temples, the security forces began raping the women and torturing and murdering the villagers with no regards to age or gender. The ones who escaped the bloodbath either sought refuge in the forested surrounding hilly areas or headed towards the borders of India and Burma. However, undertaking such a journey was particularly risky as the Bangladesh military retained a significant presence in the CHT and the borders were heavily guarded by the country's paramilitary border guards, the Bangladesh Rifles (BDR). On May 18, 1986, a group of 200 indigenous people, mostly old men, women and children defied the odds and reached the borders of Tripura in India. They had managed to remain undetected by the Bangladesh army since fleeing the atrocities committed in Matiranga. However, a few miles before reaching security, they were spotted by the BDR and subsequently escorted back to hostile lands. The BDR then incited the residing Bengali settlers to act "correspondently" and avenge the actions of the SB and stood still as witnesses as this group of old men,

women and children was brutally slaughtered. Due to many such horrendous actions throughout the war, around 70,000 indigenous people with the majority being Chakmas were forced to flee the lands of their ancestors – lands that had been their possession before India, Pakistan and Bangladesh ever entered any history books. Many made it to safety but some faced a destiny known only to their assailants.

Eventually a peace accord was signed in 1997, which reduced the level of systematic violence and general lawlessness of the region. It recognised some of the old demands found in the CHT Regulation 1900, but crucial parts are yet to be implemented or cleansed from any political self-interest. This includes the formation of a land commission to reclaim and dispose off land to its indigenous owners, a scheduled hill tracts district and regional councils to formally administer the region and ensure just treatment to all groups, and finally a dispersion of all Bangladeshi military camps in the area. The presence of the latter poses a constant threat to the Chakmas and there have been several military attacks against the indigenous population of late. Moreover, the military is reported to be actively involved in helping Bengalis to settle in the CHT, which renders the Chakmas and the other natives without any momentous means of opposition. A climate of fear is building and currently subverting what remains of any organised peaceful resistance on the part of the indigenous people. The situation is further endangered by the fact that the Bengali settlers have nowhere to go if the land commission and its directives are carried out, and therefore are unlikely to leave in a peaceful manner. However, not every Bengali settler wish to remain in the CHT and have voiced their willingness to leave provided that land is given in areas outside the CHT. In essence, it is clear that the peace accord is adhered to in ways that are disadvantageous to the tribal groups, leaving them vulnerable to illegal oppression by the Bangladeshi authorities as well as the Bengali settlers. Whether or not there are religious-nationalistic grounds, it is indeed a fact that the Buddhist tribal groups have faced extensive oppression at the hands of the various Islamic governments. The constitution of Bangladesh solely recognises Islam as the state religion and Bengali as the only language. This amplifies the creation of a homogenous Bengali Muslim society with no room for other groups or national identities. Furthermore, representatives of the Bangladesh government have under the auspices of the United Nations occasionally declared that there are no "indigenous" people in Bangladesh. Although this can be cast aside as a debate on semantics, constitutionally, there is one people, one language and one religion in Bangladesh. The ill-treatment and torture, threats and killings, along with destruction of houses and temples have forced many of the indigenous people to search for a better life elsewhere. Many of those have thus placed their hopes for a better life outside Bangladesh and across the borders to India.

STATELESS PEOPLE IN INDIA

The first group of refugees from the CHT was given migration certificates to enter India in 1964. This was a testament to the willingness of the government to accept the Chakmas as future citizens of India. Currently, approximately 80,000 Chakma refugees are residing in the state of Mizoram, 50,000 in Tripura and 100,000 in Arunachal Pradesh. Many of those have come to lead a better life and have eventually developed strong ties with the region. They have voted for state elections and paid taxes on the lands. The new generations have been born in India and never known any other home. Despite the initial willingness of the Indian government to accept the Chakmas as statehood, many are still denied citizenship and the rights and privileges they are entitled to. Even after 43 years since the first wave of Chakma refugees crossed the Indian borders from Bangladesh, they are the victims of many unjust practices directly flowing from this stateless position. The nature and gravity of the problems faced by the Chakmas differs from state to state, ranging from the non-availability of employment, trade licenses, education, security and basic health facilities. Hunger and poverty are a chronic and pervasive problem for the community and they have faced wholesale confiscation of ration cards and subsequent denial of assistance. In 1991, government agencies stopped providing Chakma farmers with improved seeds, fertilisers, pesticides, agricultural tools and implements at subsidised rates, which are necessary for the economic development of this tribe. This continued bureaucratic denial of the right to apply for citizenship must be seen as in direct violation of the laws in India. By any reading of the Indian citizenship law, the Chakmas are legally eligible to be citizens by birth, or because they came to the country on a certain date as the following provides:

Section 5(1)(a) of the Indian Citizenship Act,

1955 as amended by Act No 51 of 1986 states: *"Persons of Indian origin who are ordinarily resident in India and have been resident for five years immediately before making an application for registration shall be eligible to be registered as citizens of India."*

Sections 3(1) and 3(1)(a) state: *"Except as provided in sub-section (2), every person born in India, on or after the 26th day of January, 1950, but before the commencement of the Citizenship Amendment Act, 1986; ... shall be a citizen of India by birth".*

This was also cemented by the ruling of the Supreme Court in 1996, in which every Chakma refugee who met the requirements should be counted as eligible to Indian citizenship in the state of Arunachal Pradesh — a ruling that was transcendent to all other states. The Chakmas, especially in Arunachal Pradesh, are subject to severe unjust and inhuman practices; not only have the state authorities refused to comply with the verdict of the Supreme Court, some reports even suggest that the tribals have been subjected to sectarian violence supported by the state government. The fact of the matter is that the Chakmas are facing the same struggle in India from which they have tried to escape for almost half a century in their land of origin and they have nowhere to turn to seek help. In recognition hereof, they have tried to change their circumstances on their own by accessing the political processes that affect them. In 1991, the Chakmas of Arunachal Pradesh formed the Committee for Citizenship Rights of the Chakmas of Arunachal Pradesh (CCRCAP), but indicative of their desperate situation, this move met with condemnation by Indian authorities and nationalist movements. As such, the All Arunachal Pradesh Students Union (AAPSU) responded with a "Quit Arunachal Pradesh" notice to the Chakmas, demanding their departure from the state by September 30, 1994. In fear of the fatalistic repercussions, a large number of Chakmas fled the state to take refuge in the neighbouring state of Assam where the state government issued a "shoot at sight" order against them. This was brought to the attention of the National Human Rights Commission (NHRC), which directed the state government of Arunachal Pradesh and central government to provide information about the actions taken to protect the lives of the Chakmas. In the meantime however, all state party-leaders and the AAPSU held a meeting on September 2, 1995 where they passed a unanimous resolution to resign from national party membership if the Chakmas as well as the Hajongs, another refugee tribe from the CHT, were not deported by December 31, 1995. The Chakmas are thus unwanted people in both India and in their former ancestral lands in Bangladesh. Over the years, some of the CHT refugees have returned to Bangladesh under the conditions that the Bangladesh government return their lands as well as ensure their safety. However, only a small percentage of these promises were kept. And although the land legally belongs to the indigenous people, many of the crucial land documents have been destroyed or lost during their escape to India and the only records of the deeds are presently in the hands of the Bangladeshi authorities.

CURRENT AFFAIRS IN BANGLADESH

Bangladesh has suffered from political violence and countless transitions of power since its birth in 1971. Corruption has been prevalent together with malicious rivalry between political parties leading to further political instability in the country. Following a buildup of violence, a "caretaker" government took over the leadership of the country on January 11, 2007 with the aim of rooting out corruption and initiate democratic reforms. Many politicians and officials were arrested and military officers removed from positions within the state of affairs. This development culminated with the democratic election on December 29, 2008 whereby Sheikh Hasina and her Awami League party took office. Violence and threats against the Chakma and the indigenous people of the CHT intensified as well. As political rights may officially have been installed and many necessary changes made within, it still remains to be seen whether the rule of law in Bangladesh continues to be subverted to individual political concerns, weak institutions and a gross disregard for human rights. There have been no elections held in the local bodies of the CHT, where non-elected officials are still presiding. It is clear that democracy in the CHT must be implemented in line with the rest of the country and the government of Bangladesh will have to provide a timeline to hold such elections in both the hill district councils and the regional council of the CHTs.

WAKE UP CALL

The Chakmas are thus languishing as stateless people. For more than two centuries, they have not been in charge of their own faith and have to a larger or lesser

extent been deprived of their right to land, culture, language and religion. In Bangladesh, they have faced cruel and horrific treatment at the hands of the military and been the target of genocide. In both India and Bangladesh, they lack the protection of the country's legal safeguards, the access to equal participation in political processes, and other rights and privileges conferred by citizenship. As a consequence they are victimised, exacerbated by the fact that any abandonment of the Chakma people is politically costless due to their stateless position. But, time is running out. The ones who are left in the CHT are losing their unique culture through the influence of Bengali nationalism. If nothing is done to bring the world's attention to the atrocities committed against this ancient tribe and aid is not provided, it is only a matter of time before this unique culture is lost forever.

Learning from the history of the Tibetan refugees, who have had their conditions improved due to enormous exposure through media and within political circles, Chakmas have to follow the similar way to have any future. Given that Bangladesh is heavily dependent on foreign aid, a part of the solution to the problem lies in the hands of the donor countries. It is crucial that they use their economic levers to exert force for a change in the policies towards the CHT. And as Sheik Hasina and her Awami League won by a landslide and now has a strong mandate, they have a unique opportunity to address the human rights problems in the CHT that have been ignored by successive governments. Bangladesh has also ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights1, and together with international support, this is a road for the Chakmas to pursue. One must remember that it is not the pursuit of the right to self-determination that creates conflict, but the denial of the same. There are no longer any safe lands deep in the jungles to where the Chakmas can resettle and practice their culture. What is left for the Chakmas is either to face unjust treatment and merge with ways alien to theirs, or retreat into the dense forest of their minds. The latter, too, will only last for a time.

— September-December 2009

Endnote

1. Article 1 of both covenants reads: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic,

The Tragedy of Politics in Sri Lanka

Widespread human rights abuses, a culture of impunity characterised by disappearances, abductions, extrajudicial killings and torture are rampant in Sri Lanka. And all supported by international community in the name of the "war against terrorism". The State repression is manifest on many fronts impacting all communities in Sri Lanka.

AHILAN KADIRGAMAR & CENAN PIRANI

In the last few months, the Sri Lankan security forces have managed to ruthlessly push the LTTE into a 40 square km strip of land in the north of the island, and along with the LTTE leadership and its cadres, a sizable civilian population, anywhere from seventy thousand to one hundred and fifty thousand, have also been cordoned off in this area. As the security forces continue their offensives purporting to rid Sri Lanka of the LTTE, they also claim the lives of these civilians daily.

For those civilians that attempt to leave the territory they are faced with the possibility of death and, not in the least, violence from both sides. The LTTE have shot at and sometimes killed those that have attempted to leave the area and reports suggest punishment is becoming increasingly brutal. They are also forcefully recruiting civilians from the trapped populations to fight against the government forces. Those that do manage to escape the area and are not killed by security forces gunfire are then interrogated by security forces out of the suspicion of LTTE affiliation. International human rights groups are calling for ICRC access to observe this screening process, suspecting torture and killings. Those that make it past this process are then interned in detention camps that are under-resourced and which they are not permitted to leave.

A surge in attention and pressure by international actors is necessary in this situation to ensure safety for the civilian populations. Currently, the UNHCR and ICRC are attempting to address civilian concerns in the camps and gain further access to security forces interrogations of Tamils entering the camps. The UN High Commissioner for Human Rights has warned that both warring parties could have committed war crimes. The UN secretary general has made repeated statements about the deteriorating humanitarian situation and sent his under-secretary for humanitarian affairs to visit the north. The Indian foreign minister has also made repeated statements and made a visit to Sri Lanka. There have been statements and engagement by the British foreign secretary and the US secretary of state. The big powers have not only raised concerns about the humanitarian situation but also called for a political solution to the conflict. The international media has attempted to cover the current situation and the civilian suffering despite restricted access to the affected areas in the north. The media has also been resolute in uncovering the state sponsored attacks against media people inside

Sri Lanka who are critical of the government's war or even those who sympathise with the civilian plight.

Thus the humanitarian situation is also linked to the widespread abuses of human rights and a culture of impunity characterised by disappearances, abductions, extrajudicial killings and torture. This is done all in the name of the new "war against terrorism". In this way, the aggressive State repression under the Rajapaksa regime is rampant on many fronts impacting all the communities in Sri Lanka. At the current moment, international engagement towards a political solution and measures to address the humanitarian situation, continues to be difficult given the discourse in the south of Sri Lanka, which often overplays the fear of international intervention. Sinhala nationalists have strengthened their position in the country by riding both the war euphoria and by making strong claims for state sovereignty. For example, recent unofficial reports that the US might evacuate civilians trapped in the Vanni is one such instance of heightened debate within Sri Lanka. Indeed, any unilateral intervention by the US would be detrimental to both Sri Lanka and the region, and hence the need for multi-lateral engagement.

However, the Sinhala nationalists are using the slightest rumours of intervention and even international engagement to strengthen their xenophobic stand, which is also increasingly used to attack dissent in the country. While the Rajapaksa regime has promoted Sinhala Buddhist nationalism over the past few years, the mounting economic problems and the need for donor assistance are likely to pose problems for this insular and chauvinist outlook. Rhetoric and nationalist mobilisation aside, the current human rights and humanitarian situation continues to be dire. Here, the UN has more credibility within Sri Lanka and is more accountable on such issues compared to the big powers, who are themselves not free of human rights abuses. While there is no substitute to building a vibrant human rights movement within the country, the urgency of the situation calls for the UN to continue to challenge Sri Lanka at UN forums and push for a greater role of UN agencies and the ICRC on the ground.

It is on engagement towards a political solution that the big powers like India, the US, the EU and Japan will have to be watched. Indeed, the two significant steps in keeping the devolution debate alive in recent years; both the December 2006 majority report of the experts committee to all party representative committee (APRC) and the January 2007 report of the chairman of the APRC, came out in part from a push by India. However, the political process lost track when the President interfered with the APRC and pushed for the January 2008 sham interim proposals that were to implement selective provisions that were already in the 13th Amendment. In a worrying move, India welcomed these sham proposals as a good first step giving undue legitimacy to the maneuvering of the President.

When it comes to the political actors in Tamil Nadu, over the last year, they have for the most part played only a negative role in trying to prop up the LTTE, which has consistently opposed any attempt at a political solution. The Sinhala community, while a majority in Sri Lanka, continues to fear and has a minority complex in relation to the larger Tamil population in Tamil Nadu. Much like the LTTE's extreme Tamil nationalism reinforced Sinhala Buddhist nationalism and vice versa, Tamil chauvinist mobilisation in Tamil Nadu could continue to reinforce Sinhala chauvinism in Sri Lanka. More productive actions on the part of actors in Tamil Nadu over the last few months would have been making a clear distinction between the LTTE and the Tamil people, pushing for a greater UN role to address the humanitarian situation, and calling on Delhi to push for proposals beyond the 13th Amendment and a non-unitary constitution. It is to be seen if in the post-LTTE era Tamil Nadu and Delhi would shift their engagement beyond their narrow Tamil nationalist and security with development agendas respectively.

Despite the importance of international engagement, within Sri Lanka itself any political solution is unlikely to work unless there is political will on the part of the President and the government to implement it. In that context, reviving the devolution debate also functions to check the resurgence of Sinhala Buddhist nationalism in the country and begins to shift the political ground towards addressing minorities concerns. Equally important is to challenge the attacks on democracy by the Rajapaksa regime. If there is one great lesson to be learned from Sri Lanka's history, it is that the attacks on the minorities will lead to the deterioration of democratic political culture in the country. And the corollary also is true that without considerable democratisation and demilitarisation in the entire country, a political solution is not likely to succeed.

— January-April 2009

Nepal's Revolutionary Impasse

The election results have upset the old order that monopolised power in Kathmandu with the Maoists emerging as the single largest party, representing the national mood for change. As the vested interests, domestic and international, continue hampering government formation, nobody should forget, including the Maoists, that the spirit of the April revolution is still lingering in the hearts of the Nepali people.

HARSH DOBHAL

Ever since I remember, we have been seeing all these political parties, power hungry and fighting among and within themselves. The king was for long merrily pitting them one against another. And nothing changed in my country. That is why this time I voted for the Maoists and if they betray, they too will be thrown to the dustbin of history. But nobody can deny that Nepal has ushered into a new political era only because of the struggle launched by the Maoists.

These words coming from a young taxi driver in Kathmandu appear to make more sense than much of the loose talk that is masquerading as political analysis in the post-election climate in Nepal. Blame game, number game, imagined fears about a future Maoist-led republic, contradictory legal interpretations, contending interpretations of people's mandate, obstacles in the way of government formations and bargaining about how to secure a share of the pie that is still in the sky -- all these are the manifestations of the fierce political dogfight currently underway in post-election, post-Gyanendra Nepal.

The elections to the Constituent Assembly have upset the old order that monopolised power in Kathmandu, with the Maoists emerging as the largest single party. But will the vested interests, both domestic and international, permit the Maoists to lead the government and initiate the drafting of a revolutionary new constitution and the fashioning of a new polity more relevant to the needs of Nepal? The odds are not promising.

Barely two years after ending the decade-long armed insurgency, the Maoists stunned political pundits, the Nepali people, political parties, neighbouring India and indeed the world by garnering a share of votes that few had imagined they would dream of. The Maoisit victory has profoundly changed the rules of the political chess game in a country ruled for the past 240 years by a monarchy inclined towards autocracy. The results are not surprising in a country where under the crushing machines of feudalism and imperialism a great many Nepali people still live in conditions that appear medieval.

After fighting a revolutionary battle for about 11 years with the active participation and support of the marginalised sections, the CPN (Maoist) displayed remarkable flexibility and

an accommodative attitude towards all political forces, a political phenomenon that is perhaps unparalleled in the contemporary political history of the post cold-war era. This is the only party which accepted the pluralistic form of multi-party democracy after fighting an underground war, coming overground, agreeing to disarm and join the government with other parties. That they put forward a series of unprecedented proposals for the restoration of democracy, the disarming of the militia and drafting of a new Constitution is by all yardsticks a brave decision to outline the roadmap for a brave new Nepal. During the last one decade and prior to the peace agreements of the last two years, a protracted power struggle was waged between those who wanted government to remain within the framework of constitutional monarchy, in which political parties were often reduced to the status of pawns at the hands of an obdurate king who did not seem to comprehend the niceties of constitutionalism, the Maoists rebels who promised rule of the people through revolutionary politics and the monarch who claimed to govern for the people but retained command of the army in order to rule ruthlessly with absolute powers.

Finally, in culmination of a process that started in 2005, after lengthy negotiations prior to and after the peoples' movement of April 2006, resulting in understandings and agreements, betrayals and back-outs, after endless delays for elections caused by various interest groups and political parties, Nepali cast their vote on April 10 with the fervent hope that the elections would usher in a polity for crafting a new future for millions of citizens. In the elections the Maoists got 220 seats out of 601, while the two mainstream parties, the liberal-right Nepali Congress (NC) and the moderate left to centrist Communist Party of Nepal (Unified Marxist Leninist) or UML, bagged 110 and 107 respectively. The rest of the seats went to other parties, mainly from the terai plains in the south of Nepal bordering India. Before elections, the debate in the Nepali media and elite political circles was not whether the Maoists would form the government and how but whether the Maoists would accept the verdict, the expectation being that they would perform poorly and would not accept the outcome. What would happen next was the main anxiety. The people of Nepal reversed this pre-election analysis, which proved to be a big disconnect with the political reality on the ground.

Retrospectively, the Maoists always had a consistent basic agenda – forming a republic and abolishing the monarchy – while the mainstream Nepali Congress (NC) and CPN (UML) only shifted towards this agenda under public pressure as it became more politically expedient and their political future more uncertain. And since these two parties have not primarily and ideologically been committed to this agenda, there have been growing concerns after elections as to how these parties will conduct themselves in the new political landscape. Lacking in political self-confidence and accustomed to being servile to outside interests, these parties may well see the Maoists as a bigger threat to them than the monarchy and hence may wish to see it continue as a countervailing force to genuine radical democratic politics.

The primary mandate of this election is to fulfil two basic demands: write a new Constitution and abolish the monarchy. But concerns are growing among the leadership of these political parties, which engaged with Maoists to bring them into mainstream politics and which had never imagined that they would get such a massive verdict in their favour, that they might be sidelined by the Maoists and that a more radical and inclusive agenda might prevail, which will break the old elite's monopoly of social and economic power in the country. Hence, once again delaying tactics are prevailing. Postponements, delays, negotiations, bargaining – these acts of political desperation are all symptoms of the old order trying to retain as much of their power as possible, even in the face of a mandate that is dramatically different from their objective. King Gyananedra is busy organising massive religious ceremonies, performing prayers of propitiation to retain a monarchy, whose last representative and destroyer he may well be.

Representatives of all the reactionary forces who hitherto controlled Kathmandu are trying to regroup, in a last ditch attempt to thwart the implementation of the electoral verdict. People in Kathmandu openly say that these parties will delay government formation and even when it is formed, they will do their best to destabilise the government and discredit the Maoists. In the past, the Maoists have clearly accused Prime Minister Girija Prasad Koirala and his Nepali Congress of trying to protect King Gyanendra and warned on various occasions to start a new ‘people's revolt' for the abolition of monarchy. Now, people see the dawn of a new political era and a new multi-party democracy, which was long awaited. However, under complicated dual system

that was applied for elections to the Constituent Assembly, the Maoists obtained a simple majority in the 240 seats assigned for the first-past-the-post system, getting 30 odd percent of the popular vote and 120 seats. A total of 335 seats were assigned under the proportional representation system, of which the Maoists secured 100 seats. In all, they have 220 of the 575 elected seats, with an overall vote share of 36.60 percent leaving them short of a simple majority in the house and far short of the two-third majority that is required for effecting major constitutional changes.

Against this, the Nepali Congress secured only 18.30 percent of the popular vote and the UML 17.14 percent, obtaining, respectively 110 and 107 seats. The Maoists therefore are the largest single party with the largest share of the vote, but procedurally they can be neutralised even if they form the government with the help of other parties. One political analyst put it as a verdict "reflective of the spirit of janandolan" or April 2006 revolution, and reflective of the spirit of the Interim Constitution which expects the major political parties to work together towards the framing of the new Constitution and towards building a new State. Since the Maoists have more seats in the Constituent Assembly, it is for them to form the government and build a coalition. But then the forces of status quo are also scared that as per the Interim Constitution, a two-third majority is required to remove a prime minister, which means that they can't remove a Maoist prime minister. The same provision has made it practically impossible to remove the incumbent, and hence they are reluctant to see a Maoist leader occupy that position. That a section of the Maoists want a presidential form of government is a different political ballgame altogether. Various unofficial attempts are on to change procedure. Sections of the Nepali Congress want to amend the Interim Constitution to enable the Constituent Assembly to remove the prime minister with a simple majority. By making such attempts, according to former Finance Minister Devendra Raj Panday, "the NC and UML are damaging whatever is left of their political base. First they engaged with Maoists and now if they think that the Maoists will wither away, they are discrediting themselves."

In fact, the Maoists have been challenged and impeded at every step by these two main political parities and other interest groups – feudal, autocratic, bureaucratic, military, aristocratic, right-wing Hindu outfits, royalists, and even sections of civil society and the media. These obstacles to government formation are also seen as excuses for bargaining for major portfolios.

Since it is not possible to form a single party government, the only option is the formation of coalition with a consensus. In the absence of the required numbers and with the active and insidious abetment of external forces, lack of sufficient legal and constitutional framework, the Maoists are being stopped from forming a government, with even the absurd suggestion being put forward that the party that obtained exactly half the number of seats that the Maoists have got should lead the government. The political situation and the legal provisions are being interpreted according to all manner of convenience and interest while the spirit of basic constitutional, moral and political norms, the spirit of peace agreements is being violated.

There is a fear that in this climate of manipulation the Maoists could become like the UML, which had long ago abandoned its social, economic and political agenda, and vision for change in the attempt to come to power. While all agree that Maoists have to be flexible and make a number of compromises, there are deep underlying fears that they might sway off the boundaries of their defined political vision. The Maoist leadership has already made it clear that it will work with private business and industry, seek private investments, work with donors like the World Bank and Asian Development Bank and seek engagement with the international community, particularly India. It is understandable that pragmatically the Maoist leadership is aware of its own limitations and of the ground realities, especially when they are short of the required majority. But then, there are tremendous expectations from the people who voted for them. They have chosen the Maoists as an alternative force of social change and, indeed, peace.

They have to try hard to learn some of the rules of the new game they find themselves playing, to negotiate with the reality and at the same time remain true to their social and economic agendas which have catapulted them to the proximity of power from the dense heat of the underground. As the political bargaining, accusations and counter accusations go on among the major political players in Kathmandu, nobody should forget that the spirit of the April revolution is still lingering in the hearts of the Nepali people.

— May-June 2008

New Eyes for New Burma

Democracy to Burmese is not a one dimensional, monochrome animal to be admired in a glorified zoo but a multi-coloured bird set to fly free for all to savour and see. In Burma it's not just elections but also environment, gender, race, diversity and the big 'realpolitik' stuff.

SATYA SAGAR

If sheer sacrifice of body, mind and soul for a noble cause were convertible into hard currency Burma's legions of pro-democracy warriors would be among the richest citizens in the world. However, in reality Burmese happen to be among the poorest on the planet which is only a reflection of how money, historically, has always been a measure of dead, inanimate property and not of breathing people and the living processes they create. And yet, for all their great sacrifices the saga of the Burmese struggle for democracy seems to run like an old horror movie one that has been seen too many times before. A copybook, brutal dictatorship facing against classic people's uprising-producing lots of pain and suffering but too few victories for the latter.

Why aren't the Burmese people winning in their battle for democracy and managing to bring about regime change despite all their valiant efforts? What will it really take to achieve a transition to democracy in this seemingly hapless nation stuck for decades under one of the most brutal ruling classes in modern times?

The record is so dismal that some Burma watchers have glibly predicted that it is difficult to think of the country's future without the military handling the levers of power in one way or the other. Even worse, they claim the country will fall apart if the military is not in the driver's seat or at least close enough to bark orders.

I think they are completely off the mark with their grim prognosis, misled among other reasons, by their simplistic equation of democracy with parliamentary elections and a handful of its associated institutions. A better understanding of the Burmese experience really lies in going beyond short-term, media-driven notions of success and failure of mass movements.

In fact, the good news that is crying out to be recognised today is that Burma's brave activists—despite repeated setbacks—are forging through their struggles the foundations of a democratic society that may well go on to become Asia's finest. A more nuanced view of the history of democracy around the world shows that the long-term prospects of building a genuinely democratic Burma appear extremely promising for a variety of reasons. The first and foremost one is simply the participation of more and more ordinary Burmese in the fight for democratic rights even if the price means certain imprisonment, injury or even worse — brutal murder. The recent demonstrations in Burma against the military regime, that saw several hundred thousand people hit the streets in towns and cities across the country, were carried out under some of the most politically repressive conditions in the world. While Buddhist monks were at the forefront the movement really derived its power from the support extended by citizens from all walks of life.

In contrast, almost a century ago, the first stirrings of revolt against British colonial rule involved only a handful of Buddhist monks and student activists. Later in the thirties and forties while Burma's legendary 'thirty comrades', led by Aung San Suu Kyi's father General Aung San, steered their nation to independence from both British and Japanese rule, all this was done with little participation from the bulk of the population.

In 1948, when Burma became a free nation, the deeply authoritarian structures of both feudal, traditional society as well as the newly imported machinery of the nation-state remained unchallenged by both leadership and ordinary citizens alike.

This combined with the weakness of the anti-colonial struggle and the resulting absence of a democratic political culture meant that despite adoption of multi-party elections Burmese democracy and the institutions it spawned were on shaky, slippery ground.

By 1962, using the excuse of 'preserving national unity', following demands by Burma's ethnic minorities for greater autonomy, the Burmese military managed to take over the young nation. Since then it has tightly held on to power through a mix of high intrigue and naked force.

The military dictatorship has not had an easy time all these years though. Apart from inheriting the armed insurgencies led by the Burmese Communist Party and various ethnic rebel groups in the hills and forests, the junta has faced wave after wave of protest from student activists in the urban areas.

The biggest uprising till date was of course the one in 1988 that unfortunately for all its intensity failed to dislodge the regime from power. The dictatorship was however forced to hold national elections in 1990, which they lost by massive margins, underlining their complete lack of legitimacy forever.

It is true the military rulers managed to claw their way back and recoup some losses since then, thanks mostly to external support from the ASEAN group of nations, China and others interested in the loot of Burma's treasure trove of natural resources. The ceasefire agreements signed with various ethnic rebel armies following the break up of the Burmese Communist Party also brought some respite to the regime.

But, all this while opponents of the Burmese junta were not sitting idle widdling their thumbs. While the latest round of demonstrations in Burma has been dubbed as being 'spontaneous' by the media in reality preparations for the showdown have been on for months if not a few years.

Under very difficult circumstances thousands of young and old activists have been carrying out propaganda and organisational work within the belly of the beast in myriad ways helping achieve — bit by bit- what Aung San Suu Kyi famously called 'Freedom from Fear'.

There has been of course the clever use of new technologies such as mobile phones and the internet but some of the methods used—like invocation of black magic curses or spreading of subversive jokes about the junta—are difficult to understand as 'political activity' by many outsiders. Within Burma though they find resonance among ordinary folk and manage to rattle the highly superstitious and image-conscious military rulers.

Last year in October, for example, the 88 Generation Students led by the legendary Min Ko Naing launched the 'White Expression' and called for 'national reconciliation' and the freedom of all political prisoners.

As part of the campaign, students urged the Burmese people to show their support by wearing white clothes, or, at least, white handkerchiefs, white triangular brooches or badges. 'Whiteness' represents purity, sincerity, honesty and altruism in Burmese culture.

"Burmese students have been at the forefront of the democratic struggle generation after generation. We have been sincere, honest and altruistic in our struggle on behalf of all the ethnic peoples of Burma. With this 'whiteness' that we urge the people of Burma to work for national reconciliation," declared the group.

As the blog site 'Burma Digest' noted, the adoption of the colour white was tactically significant since schoolboys and girls wear white shirts and blouses in Burma. The members of the junta's political party, the Union Solidarity and Development Party, also favours white. The laymen who dwell in Buddhist monasteries are clad in white robes. The campaign in that respect was nothing short of 'the re-appropriation of whiteness' by the students for their good cause.

The call for 'national reconciliation' showed the political astuteness of the former student activists who later were also at the forefront of the agitation against hikes in fuel prices that triggered off the massive protests in September this year.

Outside Burma thousands of Burmese political exiles spread to different corners of the globe have also been working tirelessly towards the liberation of their country. Apart from contributing funds for the upkeep of their families back home many of them are instrumental in funnelling information, ideas and innovative means of dissent within the isolated Burmese population.

Their activities and presence overseas has popularised the Burmese struggle for democracy among ordinary people everywhere and made it one of the globe's topmost causes today. The phenomenal goodwill they have earned and enjoy from people around the world is itself enough to see a future democratic Burma through to the 22nd century. (Not accounting for survival of our species due to global warming of course!)

Those who claim there is a shortage of manpower to run Burma after the military regime is toppled should see for themselves how hundreds of young Burmese activists have been training over the years in disciplines ranging from medicine and engineering to journalism and fine arts.

This is apart from the rich experience they have already gained by simply living in foreign lands amidst alien cultures, picking up new skills, absorbing the best and diversifying their vision of life, economy and politics.

On another front, one more great achievement of the Burmese pro-democracy movement has probably been the coming together of mainstream ethnic Burman activists with those from ethnic minorities fighting against the centralised nation-state created after independence from colonialism. In countries like India, with an even larger ethnic and cultural diversity, some semblance of national unity was possible only because of the popular and widespread mass movements against British rule—a trend missing in pre-colonial Burma.

Both in 1988, when ethnic rebel groups welcomed and sheltered Burmese student activists, and in the September 2007 uprising when they extended full support to the cause of Burmese protestors there has been a valuable strengthening of ties. While differences do remain in their visions of what a future Burma will exactly look like, the process of shared participation in struggle against the military regime is creating spaces for dialogue quite unimaginable a couple of decades ago.

But of all the achievements of the Burmese struggle listed so far the most valuable one has been a deeper and richer understanding of the concept of democracy itself.

Today when an average Burmese activist talks of democracy he or she does not simply refer to the replacement of an unelected regime by an elected one. They understand—from bitter experience—it is not so much about who wields state power but how and on whose behalf it is exercised.

Democracy to them is not a one dimensional, monochrome animal to be admired in a glorified zoo but a multi-coloured bird set to fly free for all to savour and see. It is not just elections but also environment, also gender, also race, also diversity and not just about the big 'realpolitik' stuff but the little things in life that make it worth living.

That is why there is no one overarching Burmese pro-democracy movement but thousands of them walking, talking, fighting, declaring little republics of freedom wherever, whenever the opportunity arises.

And that is why those who are fixated with finding the climax of this long running saga should consider getting a new pair of eyes to witness the birth of Burmese democracy—cell by cell, nerve by nerve. We can already hear the baby crying, surely its smile cannot be too far away.

— November-December 2007

Red Tibetan

Despite being a diehard Communist, Phunwang has been in and out of Chinese prison because he is a Tibetan as well. Once he was privileged to be an interpreter and more between the Dalai Lama and Chairman Mao. He has suffered, yet his goodwill cuts across Beijing and Lhasa.

ANANT K ASTHANA

World knows little about the communist Tibet produced and certainly not much about Bapa Phuntso Wangye alias 'Phunwang', one of the most important Tibetan revolutionary figures of the 20th century. Born in 1922, Phunwang grew up in a region inhabited mainly by ethnic Tibetans but not considered part of 'political' Tibet. During his schooling in Nanjing, the capital of China under Guomindang, he developed an inclination towards the writings of Marx, Lenin and Stalin. There he founded a secret Tibetan Communist Party and in his early days resisted Chinese domination over his homeland through guerrilla techniques. In 1949, when communists took control over China, he merged his independent Tibetan Communist Party with Mao's Chinese Communist Party. He was the translator for the young Dalai Lama during his famous 1954-55 meetings with Mao Zedong. In spite of his devotion to socialism and staunch faith in the Communist Party, Phunwang's persistent commitment to the welfare of Tibetans and strong advocacy for the interests of Tibetan nationality made him a suspect in the eyes of Han Chinese party colleagues. In 1958, he was secretly detained then imprisoned for 18 years in solitary confinement. From 1985 to 1993, Phunwang served as a deputy director of the Nationalities Committee of the National People's Congress and was an advisor to the 10th Panchen Lama. In 1990, Tibetan People's Publishing House published his major study *New Explorations of Dialectics* that attracted wide appreciation throughout China. This led to a conference focusing on his works. In his late 1980s, he continues to work with Chinese government and holds a good reputation even among most anti-communist Tibetans.

Devastation of Tibet under communist rule, is often described and explained in a dominant context of struggle between two opposing ideologies based on religion and atheistic communism but with Phunwang, Tibet as he describes 'Tibetan nationality' stands as a victim of 'Han majoritarianism' for which he claims there is no scope under Marxism. In 1979, in a conversation with a delegation sent by the Dalai Lama, Comrade Phuntso Wangye declared, "I was and am still a communist who believes in Marxism… I am a communist, true, but I was also in solitary confinement in a communist prison for as long as 18 years and suffered from both mental and physical torture" but then he does not blame party, at all, rather he says, "I was put into prison by people

who executed the laws, broke the laws and violated party discipline and the laws of the country." Prominent Tibetans, of course in exile, accuse him of being a 'Red Tibetan' who led the 'Red Han' into Tibet and he, unhesitantly admits, "To be accurate, I led the People's Liberation Army. I was the Tibetan who guided the people, who in the words of Chairman Mao, were there to help the Tibetans - the brotherly Tibetans - to stand up, be the masters of their homes, reform themselves, and be engaged in construction to improve the living standards of the people and build a happy new society. But I never meant to lead the Han people into Tibet to establish rule over Tibetans by the Han people." Few months back in July 2007, in Beijing, he accused Chinese government hawks of closing the door on dialogue with the Dalai Lama and misleading the leadership about the exiled Buddhist monk's influence.

Contemporary discourse on Tibet tends to depict realities in black and white, where all the Tibetans are oppressed and the very term 'Chinese' stands for 'oppressor' but Phunwang differs on such bland categorisation. He wants the world to believe that there were people in China who wanted to help Tibetans as brothers and that he made alliance with such brotherly Chinese only, not with Hans who wanted to rule over Tibet. He was a staunch communist who thought that the people whom he is helping to enter Tibet will be as staunch communists as himself and, therefore, would help creating a new Tibet as they did in case of China.

Phunwang, an admirer of Dalai Lama's Middle Way Approach, continues to speak out for Tibet intelligently and forcefully without fear and holds a view that there are no major differences between the Dalai Lama, who wants autonomy, and the Chinese government, which cherishes national unification. In an interview with Melvyn Goldstein in 2002, Phuwang describes, "First, in the decade between 1939 and 1949, we struggled to achieve progress and development for the Tibetan nationality, social reforms in Tibet, the happiness of the Tibetan people, and the reunification and liberation of the entire Tibetan nationality. Although we did our best, under the prevailing historical conditions, we failed to make much progress. After the new China was founded in 1949, I continued to work unwaveringly for the progress and development of the Tibetan nationality through new channels, in new ways, and with new methods under the new historical conditions…I believe that under today's historical conditions, Tibetans and other minority nationalities should unite with the powerful Han nationality for their mutual benefit. This has been my basic point of view since the founding of new China."

He accuses 'Wrongful line of Leftism' for causing harm and destruction to Tibet and its unique culture in the late 1950s but all his defence of 'Real communism' goes unattended and unappreciated by exile intellectuals who perceive Phunwang as a traitor. "Therefore, if the essence and goal of our guiding the Han into Tibet was for the Han people to rule the Tibetans or that the Han themselves wanted to rule the Tibetans, we would have been traitors to Marxism and traitors to the Tibetan Nationality and people," says Phunwang in a powerful rebuttal of accusations made against him.

Gelek Namgyal, a from Tibetan Parliamentary and Policy Research Centre, New Delhi on being asked to describe Phunwang's general reputation among Tibetan in exile says, "He is a Tibetan nationalist who wanted to reform feudal system in Tibet."

There is no doubt that story of 'Phunwang' gives wonderful perspectives and insights about Tibet's occupation by communist forces and what actually went wrong. "Phunwang sees China as a multiethnic state where large minorities like Tibetans constitutionally have the right to cultural, economic and a modicum of political autonomy, and should be considered equal in all ways to the Han (majority ethnic) Chinese. The issue for Phunwang is not that Tibetans demand to separate from China, but that they want the Han Chinese to treat them as equals. And it was to say this to people in China and throughout the world, that Phunwang took a great risk and gave me interviews over many years," says Melvyn Goldstein. He exposed Phunwang to the modern world by his wonderful biographical book on Phunwang *A Tibetan Revolutionary: The Political Life and Times of Bapa Phuntso Wangye* written with the help of Wiliam Siebenschuh and Dawei Sherap.

In spite of growing curiosity about the life and personality of Phunwang, he by and large remains a controversial figure in Tibetan world, whose loyalty towards Tibetans is often disputed on the grounds of his contribution in facilitating Chinese occupation over Tibet.

— September-October 2007

Rangzen!

Despite gobbling up Tibet, China has failed to break the spirit of the Tibetans emanating from a rich spiritual tradition. The task before those who remain in Lhasa, or who took flight, is to rebel instead of getting lured by sops like autonomy. Tibetans want Rangzen: independence.

JAMYANG NORBU

There is a rare and defining moment in human history when a crushing and seemingly permanent tyranny reveals on the surface of its implacable structure the first tiny cracks of impending collapse — allowing the faint stirrings of hope in the hearts of long oppressed peoples and subjugated nations. Such a transition was heralded in Eastern and Central Europe and parts of Central Asia by the fall of the Berlin Wall. For the people of Tibet such a moment may be at hand. China's economic boom has created enormous and irresolvable problems and conflicts that are tearing at the fabric of Chinese society and undermining the Communist regime. Endemic official corruption, desperate peasant uprisings, large-scale labour unrest, harsh religious repression, ever-widening economic disparity, ecological devastation (of apocalyptic magnitude), absence of independent courts and the almost non-existence of civil society, have been the cause of over 83,000 demonstrations and riots (according to official Chinese government reports), many violent, all over China in the year 2005. Through the first eight months of the next year (2006), the reported number of incidents of such public unrest has already exceeded 1,00,000.

In recent years, certain senior members in the Communist leadership have reportedly expressed their misgivings about what might happen in 2008 when hundreds of thousands of foreign visitors and the world media descend on Beijing for the Olympic games. According to a well-placed observer of the Chinese scene, this situation could provide an unprecedented opportunity to the voiceless, the dispossessed and the oppressed of China (peasant groups, clandestine labour organisations, underground churches, secret religious societies and dissident groups) to express and demonstrate their grievances before the eyes of the world.

At such an important turning point in Asian history, it is vital that Tibetans do not hesitate or weaken their commitment to the struggle for independence. It is also crucial that Tibetan friends and supporters, and also the world at large, realise the absolute necessity of Rangzen for the survival of the Tibetan people and their civilisation, and appreciate how this claim for an independent homeland is eminently reasonable, moderate and just.

ORIGINS OF TIBETAN IDENTITY

Few people in the world are so distinctly defined by the kind of land they live in as the Tibetans. Tibetan national identity has not just been created by history, nor only by religion, but has its roots deep in the Tibetan land. Tibetans are people who live, and have always lived, on the great Tibetan plateau, high above and apart from the rest of the world. The passage to Tibetan-inhabited areas from the surrounding lowlands of Nepal, India and China is not only unmistakable and dramatic but clearly a transition to a unique world.

Tibetan identity is so rooted in the land that Tibetans of the past regarded the major mountains of their own specific regions, Yarla Shampo of Yarlung, Amnye (grandfather) Machen of Amdo, Nyenchenthangla of the Northern Plains, Khawa Loring and Minyak Ghangkar of Kham, and many others, as their ancestors or ancestral deities. This belief far predates the legend of the compassionate monkey ancestor of the Tibetans, which is probably a later Buddhist innovation. The worship of these mountains, which Tibetans still faithfully, but somewhat unconsciously, perform in their routine *sangsol* (smoke offering) and *lungta*

(wind horse) ceremonies, is the original expression of Tibetan nationalist identity, according to the distinguished Tibetan scholar, Samten Karmay.

Few other people are so specifically identified by geography or climate except perhaps for Eskimos, Bedouins, Polynesian Islanders and the Bushmen of the Kalahari. But very early in their history Tibetans managed to transcend this merely environmentally defined existence to create a powerful national identity through the unification of the various kingdoms and tribes throughout the plateau. The sense of wonder and pride that these first inhabitants of a united Tibet felt for their new nation and empire is evident in this ancient song on the manifestation of Tibet's first emperor:

This centre of heaven,
This core of the earth,
This heart of the world,
Fenced round by snow-mountains,
The headland of all rivers,
Where the peaks are high and the land is pure,
A country so good,
Where men are born as sages and heroes,
And act according to good laws
A land of horses ever more speedy…

Though the imperial period of Tibetan history ended around the tenth century, its legacy of nationhood was permanent. Later monarchs consciously drew inspiration from the imperial age in their efforts to create a united and free Tibet. Jangchub Gyaltsen (1302-1364) of the Phamodruba dynasty overthrew Mongol rule in Tibet (over a decade before the Mongol Yuan dynasty ended in China) and ushered in a golden age that Tibetans call "*Gamu Ser Khor*", since the land was so safe and peaceful it was said that an old woman carrying a sack of gold could pass without fear from one end of Tibet to the other. The Great 5th Dalai Lama (1617-1682) reunited Tibet, from the regions of Ngari in the west, to Dhartsedo in the southeast and Kokonor to the northeast, for the first time since the collapse of the Tibetan Empire in the 9th century. More recently, the Great 13th Dalai Lama's (1876-1933) untiring and monumental struggle to regain and later defend Tibetan independence was no less an expression of this heritage of national freedom that Tibetans have maintained throughout their history.

LEGITIMACY OF INDEPENDENCE

It is absolutely essential that we Tibetans understand how longstanding and legitimate our claims to nationhood are. Many nations in this world are, in a sense, largely products of history. The United States, Canada, and Australia do not, in a true sense, derive their national origins from the land, as Tibet does. Other countries such as Kuwait, Jordan, Singapore, and many African states are creations of western colonial policy, or from the debris of colonial rule. More recently, out of the collapse of the former Soviet Union, countries like Belarus, Turkmenistan, Uzbekistan, Kazakhstan, etc. - which never existed as nations before, have come into being.

In light of international attention to that part of the world, one might add that there had never been a Palestinian nation. What you had, historically, was a sub-province *(vilayet)* of the Ottoman Empire that later became a British protectorate. Iraq too is a nation cobbled together by Britain after World War I out of three *vilayets* of the defeated Ottoman Empire: Mosul, Baghdad and Basra. The intractable and violent divisions in that country today: sectarian (Shia v Sunni), ethnic (Kurd v Arab) and tribal (Tikriti v others), reveal the tenuous nature of the union.

This is not to argue that Tibet has any more right to exist as a nation than these states and territories just mentioned - after all, it is the natural and fundamental right of all peoples to determine their own way of life - but to underline the fact that Tibet's status as a nation is as legitimate, if not more, than that of any other country in the world. That we did not join the League of Nations or the United Nations, or that some big powers did not recognise Tibet as a nation, because they did not want to jeopardise their trade links with China, does not detract from this legitimacy.

Trade with China is in fact the overarching reason why Britain and the United States have in the last two centuries refused to support, even acknowledge, the fact of an independent Tibet. No less an authority than Sir Charles Bell "the architect of British policy in Tibet" affirmed this in the 1930s: Britain and the United States, and probably most of the European nations, regard Tibet as being under Chinese rule … besides, we are always being told about the vast potentialities of trade with China. To my recollection we were told this fifty years ago, but during those fifty years no such vast potentialities has materialised; the potentialities are still

no more than potentialities. However, the foreign nations wish to gain a good share of this trade, and to that end try to please China. But it is an outrage that they should sell Tibet in order to increase their own commercial profits in China.

The fact that Tibet has, for periods of its history, been conquered by foreign powers or that some Tibetan ruler used foreign military backing to gain political control of the country makes no difference to its rightful status as a free nation. Even when Tibet's political and military power had declined considerably in the 18th and 19th centuries and a degree of Manchu rule was exercised over the country, the uniqueness of Tibet's civilisation and its racial and national identity was recognised by people all over Asia, not least by the Manchus themselves, who only appointed Manchus and Mongols of high birth as their commissioners in Tibet, never a Chinese. In fact, Manchu relations with Tibet were handled by the Li Fan Yuan (one of the two 'departments' of the Manchu 'Foreign Office'), which also handled relations between the Manchu court and Mongol princes, Tibet, East Turkistan (Xinjiang) and Russia.

Buriats and Kalmucks in Russia, and millions of Mongols regarded Tibet and especially its capital, Lhasa, as the centre of their culture and faith. The Russian explorer Prejevalsky in 1878 sent a memorandum to the Geographic Society and the War Ministry in which "... he drew a picture of Lhasa as the Rome of Asia with spiritual power stretching from Ceylon to Japan over 250 million people: the most important target for Russian diplomacy."

There is probably no country in the world that has not at one time or another been under the rule of another. Few, if any, of the UN member states could claim independent statehood if they had to demonstrate a history of continuous and uncompromised independence. As the Irish delegate pointed out in the 1960 UN debate on Tibet, most of the countries in the General Assembly would not be there if they had to prove that they had never in the past been dominated by another country.

Britain was for nearly four hundred years a part of the Roman Empire. Russia was under the Mongols for well over two centuries, and of course the United States started off as a British colony. China itself was ruled both by the Mongols and Manchus, and repeatedly defeated in war by the Tibetans, who even captured and briefly held the Chinese capital of Chang An in 763 A.D. And lest we forget, a large part of China was under Japanese occupation earlier last century.

INSIDE TIBET NOW

There is probably no place in the world (except possibly for North Korea) controlled in the Stalinist police-state method like Tibet — most noticeably Lhasa city. To a great extent this grim reality is overlooked by western tourists and even naive exile-Tibetan visitors, too ignorant of the chameleon qualities of the Chinese totalitarian system, and impressed, in spite of themselves, by the scale of China's brave new capitalist society — and possibly sometimes tempted by the opportunities. Visitors to present day Tibet, including Western Tibet 'experts', encountering a population going about its daily business and not expressing open defiance of Chinese occupation, and then concluding that Tibetans are satisfied with the status quo, invariably fail to take into account the realities of life under Communist Chinese rule. Vaclav Havel has tellingly described the double personae that people living under coercive and repressive regimes adopt with regard to their intellectual, social and political behaviour. Put bluntly, in a state that penalises people for holding 'wrong' opinions, not only are visitors unlikely to become aware of the true feelings of the people, but even the State itself would be ill equipped to take an accurate reading of those opinions.

In 1979, the Chinese authorities were stunned by the overwhelming emotional reception accorded to the Dalai Lama's emissaries when they arrived in Lhasa. The authorities appear to have actually believed, at some level, that only a 'handful' of Tibetans supported Rangzen, until the problem forced the authorities to take repressive measures well beyond a basic restoration of order.

Behind the tawdry facade of concrete buildings, discos, karaoke bars, whorehouses, nightclubs and hotels, the Chinese Government's chillingly unambiguous 'Merciless Repression' (1988), 'Strike Hard' (1996, 2001 and 2004) and 'Fight to the Death' (2006) campaigns are being rigorously implemented. The People's Liberation Army, forced labour camps *(laogaidui)*, State psychiatric units *(ankang)*, the Public Security Bureau (gongan), the People's Armed Police and the 'mutual watch' system *(danwei)*, implemented through work units, re-education teams, neighborhood security

watches and ubiquitous informers, all operate freely and openly. They are unfettered by anything remotely resembling independent courts, a free press, civic bodies, independent watchdog organisations, moral or religious voices, nor the presence of a single representative of the world media. Even in the worst governed countries on this planet one usually finds some such institution or the other, frustrating, if not preventing the absolutism of tyranny that Chinese leaders practice with impunity in Tibet.

In May 2006, Zhang Qingli, Communist Party Secretary of TAR, announced his 'Fight to the Death' campaign against the Dalai Lama. Tibetans, from the lowliest of government employees to senior officials, have been banned from attending any religious ceremony, from entering a temple or monastery or keeping private chapels, altars or religious images and objects in their homes. Previously only party members were required to be atheist. Patriotic education campaigns in the monasteries have been expanded. Tibetan officials in Lhasa as well as in surrounding rural counties have been required to write criticisms of the Dalai Lama. Senior civil servants must produce 10,000-word essays while those in junior positions were required to write 5,000-character condemnations. Even retired officials are not exempt.

This year during the Buddha Purnima *(sagadawa)* festival school children and Tibetan officials were prohibited from performing the circumambulatory walk around Lhasa's via sacra, the Lingkor. To ensure compliance party secretary Zhang Qingli ordered that schools remain open on Sundays during the festival period and had security personnel make spot checks on the homes of state employees. But in defiance of Communist Party diktat the Lingkor circuit was packed with shoulder-to-shoulder crowds of worshipping Tibetans from all walks of life. It was observed that a number of those performing the circuit, presumably officials, had their faces hidden behind mufflers, surgical masks, dark glasses and hats pulled low.

Inside Tibet, after decades of soul-destroying Communist indoctrination and one of the most cruel and unrelenting systems of repression in the world, the Tibetan hope for independence, *Rangzen*, still stubbornly refuses to be crushed. Though large-scale demonstrations are not possible right now, a steady stream of courageous individuals, nuns, monks and lay people, have through the months and years, raised the forbidden Tibetan national flag, put up anti-Chinese posters and cried out in public for *Rangzen*. On October 2, 2003, Nyima Dragpa, a 20-year-old Tibetan monk from Nyitso monastery, died in prison from being repeatedly tortured. He was serving a nine-year sentence for 'splittist' activities - for putting up posters calling for Tibetan independence. On 3 September 2006, at the busy Barkhor Street in Lhasa, a lone 23-year-old Tibetan monk staged a short demonstration calling for independence in Tibet. Within minutes, he was dragged away by Chinese security personnel. In these and hundreds of other similar cases it might be noted that the watchword, the rallying cry was always, without exception, "*Rangzen*".

WHY RANGZEN IS ESSENTIAL

It can be argued that some countries have been part of other nations and empires and have not only managed to survive but in some cases have even benefited from foreign rule - the most obvious example being, of course, Hong Kong under Britain. But even China's most ardent supporters will concede that Chinese rule in Tibet has been nowhere as visibly successful or even comparatively humane and liberal as Britain's in Hong Kong.

Yet even relatively benign foreign rule appears on the face of evidence to be detrimental to the culture and morale of the native people. Australia and Canada are developed countries with rich economies and various democratic institutions to protect the rights of their people, including (at least these days) their indigenous populations. But many of the native people in these countries are demoralised, stricken with poverty and disease and victim to alcoholism and despair; a situation disturbingly similar to what is beginning to happen inside Tibet.

It seems that the only way to survive under foreign rule with any self-respect is by constantly defying the oppressing power and maintaining the hope of eventual freedom. Even the respect of your conqueror is granted, it seems, only if you resist his tyranny. Of all the millions of Native Americans who suffered and died under the injustice and violence of the white man, only the names of great war-chiefs as Geronimo, Crazy Horse and Sitting Bull are still remembered with respect by Americans. Those native leaders who tried to live peacefully under the white man and went to Washington DC to submit to the 'Great White Father' are forgotten.

George Orwell, in one of his newspaper columns, reflected on the fact that though the ancient civilisations of Mesopotamia, Egypt, Greece and Rome had rested entirely on slavery, in the same way as modern society depended on electricity or fossil fuels, we cannot recall the name of a single slave, except perhaps for Spartacus. And we remember him '…because he did not obey the injunction to 'resist not evil', but raised violent rebellion'.

The hope for any kind of autonomous status under China is not realistic because it assumes that the Chinese system is flexible or tolerant enough to accommodate different political or social systems within it. One can envisage autonomous areas within, let us say, India, because of its genuine, functioning multi-cultural and multi-racial makeup. Democratic institutions in India as the constitution, independent judiciary, free elections, free press, civic bodies, independent watch dog organisations and moral and religious voices serve in a variety of ways to deter government or majority exploitation or repression of minorities. The Chinese political system is, by its inherent nature, unable to do anything of the kind. The Chinese leaders are as much victims as their people of a long and oppressive cultural and political legacy — what a leading Australian sinologist, W.J.F. Jenner, has termed 'the tyranny of history' — which has paralysed the realisation of positive fundamental changes in Chinese society and politics. Jenner raises "…the dreary possibility that China is caught in a prison from which there is no obvious escape, a prison continually improved over thousands of years, a prison of history - a prison of history both as a literary creation and as the accumulated consequences of the past".

The 'one nation, two systems' granted to Hong Kong was an exception, agreed upon because the deal was advantageous to Beijing. If China had not made that concession it would have probably damaged international confidence in Hong Kong's economy and caused a major financial problem in China. In the years following the Communists took over, journalists, radio talk-show hosts, political-satirists, lawyers and other voices of democracy in Hong Kong have been systematically harassed and intimidated with threats of violence and death-threats in an increasingly 'suffocating' political atmosphere. Many have left Hong Kong. The Basic Law that was supposed to guarantee the ex-colony's freedom has been effectively neutered and the island's Parliament and executive brought under Beijing's control. Unlike the citizens of Hong Kong, Tibetans passionately feel they are different in every way, culturally, racially, linguistically and even temperamentally, from the Chinese. Economic improvement in the lives of Tibetans in Tibet, even if it did happen (which it hasn't in a meaningful sense) would not significantly alter their feelings in this regard. It must be remembered that the Lhasa demonstration of 1987 occurred at a time when the economic situation in Tibet had improved markedly compared to the preceding period. The Tibetan attitude in this matter is best expressed in this excerpt from a dissident document that was circulating in Tibet in the late eighties:

If (under China) Tibet were to be built up, the livelihood of the Tibetan people improved, and their lives so surpassed in happiness that it would embarrass the deities of the Divine Realm of the Thirty-Three; if we were really and truly given this, even then we Tibetans wouldn't want it. We absolutely would not want it.

WHY GIVE UP NOW?

There is certainly no denying that the situation inside Tibet is grim, especially when we take into account the fact of Chinese population transfer to Tibet, and its acceleration since the completion of the new railway. But the standard argument by proponents of the Dalai Lama's Middle Way policy, that to prevent Chinese immigration we must give up the freedom struggle and live under Chinese rule, is demonstrably false. Has anyone in the Chinese leadership or bureaucracy remotely suggested that they might reconsider their population transfer policy if Tibetans gave up their claim to independence? If the freedom struggle was abandoned and the situation inside Tibet were to become peaceful and settled, then Chinese immigration to Tibet would definitely increase – far more than has happened in the last five years. And it does not require any profound understanding of international law to appreciate that if the Dalai Lama and the Tibetan government-in-exile accepted Chinese sovereignty over Tibet, then China's population transfer to Tibet would, in a definite and complete sense, become legitimised in the eyes of the world.

The only way to resist Chinese immigration is by intensifying the freedom struggle and destabilising the situation inside Tibet to a degree where foreign investors, Chinese entrepreneurs and job seekers would not regard Tibet as a tolerable location much less a prof-

itable one. Even if Tibet's independence cannot be realised in the immediate or near future, what must be established in the eyes of the world is that the Tibetan plateau is an actively 'contested' area, and that the issue of Tibetan independence is far from closed.

Yet no matter how grave the fact of Chinese immigration into Tibet, we must bear in mind that this is not an entirely irreversible situation. Stalin forced large-scale immigration of Russians into small non-Russian nations as Lithuania, Latvia and Estonia. In 1939, the combined population of these three states numbered about six million, about that of Tibet's. Stalin also executed thousands of the native people and deported hundreds of thousands of others to Siberia. It was generally thought in the world then that these nations were finished. In the fifties, sixties and seventies the very existence of these countries seemed to have been eradicated from human memory, in spite of the fact that the officially recognised representatives of those countries maintained their presence in London and New York. Even the Nobel prize-winning Polish writer, Czeslaw Milosz, born and educated in Lithuania, and speaking out for the Baltic people in the concluding chapter of his book *The Captive Mind*, leaves a lingering and sorrowful impression that, like the Aztecs wiped out by the Spanish conquistadors, the history of these Baltic nations had come to an end.

But after the collapse of the Soviet Union these three small nations became independent. Though these states still have considerable Russian populations, they are not the absolute threats to the survival or integrity of these nations as it was once thought they would be. The thing to bear in mind is that these small nations, once believed to be completely eradicated by Soviet totalitarianism and Russian immigration, are now free countries - flying their ancient flags, speaking their own languages and living in freedom.

Tibet never disappeared quite so completely as the Baltic States, even during our worst period under the Chinese. And right now, in spite of the cynicism of governments and business interests everywhere, Tibet does, in one way or another, continue to draw people's attention worldwide. Certainly, it is not always the kind of attention we want. Nevertheless, there is some awareness of Tibet's situation throughout the world and often concern for its plight. If there was a period when we might have had a passable excuse for giving up, it would be the sixties and seventies, when it seemed that International Communism and Chinese control of Tibet would go on forever, in *sæcula sæculorum*; and when most intellectuals and celebrities in the free world appeared to be besotted with Communist China and the thoughts of Chairman Mao.

Right now, the attention and sympathy that Tibet enjoys in the world may have diminished quite a bit since its heydays in the nineties, yet they are still remarkably abundant. The fact that this sympathy does not translate, as a matter of course, into political support for the Tibetan cause is certainly unfortunate. We Tibetans, especially the religious leadership, must accept significant blame for our inability to present our political objectives clearly and consistently to the world. In fact, these inconsistencies have spread confusion among our own activists and supporters and bogged down every kind of effort on behalf of the cause.

INTERNATIONAL DIMENSIONS

Since the nineties, the Tibetan leadership and a section of its western supporters have contrived to blend 'global concerns' such as the environment, world peace and spirituality with the Tibetan issue. With this a condescending and superficially 'progressive' position has been adopted by new age Tibetans and friends that views Tibetan aspiration for Rangzen as being unsophisticated, limiting and 'nationalistic' in the politically incorrect sense. Of course, such a viewpoint is not only mistaken but demonstrates how people tend to mix their need for a cause of some kind with their other needs or tendencies towards political correctness, social acceptance, personal advancement and sometimes even material gain.

The real battles for freedom are fought in local and mostly desperate struggles, by people prepared to give up not just respectability and careers, but even their lives. Freedom struggles are by their very nature disruptive. Yet, however unsettling, or whatsoever kind of a source for economic hardship and human suffering, the indomitable (yet specifically local) struggles of Mahatma Gandhi, Martin Luther King Jr., Nelson Mandela and Aung San Suu Kyi have inspired freedom-loving people all over the world; far more than, let us say, the well-intentioned efforts of diplomats, career activists or even the secretary general of the UN to ensure what is termed 'world peace' but which can perhaps be more accurately described as the preservation of the international status quo.

Each victory of freedom over tyranny is a tremendous boost to other causes. I am sure Tibetans remember how genuinely thrilled we were when Bangladesh became independent, and even more encouraged and proud when we learned that Tibetan paratroopers had made an important contribution to the victory. After India gained her independence, a whole succession of African and Asian nations also became free from their European masters. In the nineties, with the fall of the Berlin wall, a series of countries gained their freedom, this time from the Soviet yoke. Tibetan independence could well precipitate, or at least herald, a new era of freedom not only for neighbouring regions as East Turkistan and Inner Mongolia but even for the people of China itself.

We must also bear in mind that at present the most repressive and murderous regimes in the world: Kim Jong Il's North Korea, the military junta of Burma, Robert Mugabe's Zimbabwe, Islam Karimov's Uzbekistan and the government of Sudan which to all purposes has been committing genocide in Darfur, survive, even thrive because of Chinese economic, diplomatic or military support.

DEMOCRACY AND RANGZEN

Only in a truly democratic Tibetan society will creativity, fresh thinking, and new leadership — desperately needed in the freedom struggle — not only emerge but also be valued and be effective. Furthermore, only democracy can provide for adequate transparency in the functioning of the government and for genuine accountability on the part of our leadership; and is, therefore, the only way in which the true feelings of the Tibetan people for *Rangzen* can be fully represented. To the oppressed people of Tibet, democracy represents not only a goal of eventual freedom from Chinese tyranny but also the best hope for a truly just and equitable government of their own choice. As such, the promise of a true democratic Tibet will be an effective repudiation of Chinese propaganda claims that Tibetan independence would mean a reversion to theocratic feudalism. Hence, democracy becomes a potent weapon for the cause and its genuine and effective implementation in our exile-society an absolute necessity for the credibility of the freedom struggle. Though a small beginning has been made to implement democracy in exile, much more needs to be done. Unless a genuine party-based election system replaces the current structure, which resembles nothing more than Nepal's old cosmetic *panchayat* 'democracy', the exile administration and parliament will never truly reflect popular will, nor implement policies based on the people's desire for an independent Tibet.

Yet, reform of the election system alone will not ensure a democratic and dynamic society. Tibetans must embrace democratic thinking and culture with the same zeal and commitment our ancestors displayed in adopting Buddhism from India. The enduring vitality of Tibetan Buddhism can be credited, in no small measure, to the monumental scholastic labour of the great Tibetan lotsawas in collecting, studying and translating Indian texts from the seventh century to the thirteenth century. This remarkable achievement created the bedrock of intellectual foundation on which all Tibetan Buddhist institutions, doctrines, and accomplishments, right to the present day, have been realised. To guide the course of our nation's political future Tibetans should study and discuss the ideas and philosophies that created western democracy and civil society, through the great books of the French and British enlightenments, the writings of the American founding fathers and leaders of the Indian freedom struggle, and subsequent works by liberal thinkers and democrats of our time. It is only with such intellectual effort, political commitment and moral passion will we be able to bring about the restoration of an independent Tibet and the establishment of a true democratic system of government based on the rule of law and the primacy of individual freedom.

HOPE IS VITAL

Of course, there is no guarantee that independence will happen soon, or even in our lifetimes - though I am somehow convinced it will. Yet it goes without saying that maintaining the goal of Rangzen is vital to its eventual achievement. It must be remembered that it was the hope of independence that kept our exile society strong and united in the difficult early years. Many of the problems our society now faces with religious and political quarrels, decline in educational standards, the lamentably disgraceful commercialisation of our religion, cynicism in the administration, and loss of self-respect and integrity among the ordinary people, have definite roots in the gradual relinquishing of the freedom struggle by the Tibetan leadership during the last two decades.

The hope of independence is vital for people inside Tibet. Keeping alive the freedom struggle in exile gave people inside Tibet hope, and in spite of the terrible sufferings they underwent, it gave them some assurance that their civilisation and their traditional and spiritual world had not disappeared entirely. In order for Tibetans to preserve their identity, culture and religion, the hope of a free Tibet must always be preserved. If we resign ourselves to being a part of China then we will certainly lose not only our national but our cultural identity as well. Beijing might allow us to remain Buddhists, of a docile and unquestioning kind, as you would expect, but we must bear in mind that there are a lot of other Buddhists sects and cults in China. It would, indeed, be tragic if at the end we were to be dubbed as a quaint Chinese Buddhist sect in the mountain regions of the People's Republic despite our two-thousand-year-old civilisation, culture and history.

The only way for individuals to survive distinctly as Tibetans, not just within Tibet itself or in exile in India, but even in isolation in a foreign country, or alone inside a Chinese prison cell, is by holding fast to the hope of an independent Tibet and by demonstrating to oneself and the world unremitting defiance of Communist China and its inherent inhumanity and evil.

The greatest of modern Chinese writers, Lu Xun (1881-1936), lived in a China that seemed absolutely incapable of reform or regeneration; a China of opium smokers, corrupt officials, brutal warlords, ruthless revolutionaries and cynical intellectuals. It was for many a world without hope. Yet, I feel Lu Xun would probably not have advised Tibetans to curl up and die in the face of their present predicament. He was a congenital pessimist but he had this to say on the matter of hope:

"Hope can be neither affirmed nor denied. Hope is like a path in the countryside: originally there was no path - yet, as people are walking all the time in the same spot, a way appears."

— September-October 2007

Let a Hundred Flowers Bloom!

Nepal stands at the Himalayan threshold of history where the little and beautiful country with its simple and hardworking people can teach a few lessons of struggle and enlightenment to the rest of the world. From Kathmandu to the Maoist liberated zones, the spirit of the April revolution is still simmering.

AMIT SENGUPTA

The spring thunder of Nepal, its volcanic stream of heightened consciousness, reached the thatched home of young Setu Bika and her emaciated children. Her ghettoised, impoverished dalit village, 10 km from Nepalgunj on the UP border, slowly unfolded its own landscape of dead, barren, crushed dreams: it's the revolution that has come, it will shatter the infinite feudal caste system, destroy the parasitic monarchy, dismantle the corrupt and bloated elitist superstructure entrenched in Kathmandu. It's the revolution that will bring living waves of hope, a new body language which rejects untouchability, a new social discourse of empowerment, and imagined communities of fearless freedom, bereft of hunger, indignity.

So she told her neighbour Sushma, "I am going to join the movement. Take care of my kids." Her husband was not there, he worked as a daily wager in Ahemedabad.

So Setu walked to Nepalgunj. She joined the massive upsurge at the King Gyanendra Chowk where his statue was being erected on a platform. Thousands were pouring in, despite the armed might of the king. Setu became part of this huge river, alive and angry, until that tear gas hit her body, blinding her, choking her, killing her.

The crowds swelled. Across the caste divide, they picked up her body and marched: how can you kill an unarmed woman in a peaceful demonstration?

The next day thousands more joined the rally from across the villages. They moved towards the Gyanendra Chowk and destroyed the platform. They built another and put a board — Shahid Setu Bika Chowk. The revolution's tribute to subaltern history: a poor dalit woman's memory had replaced the monarch.

It was not only the huge rings of protestors who moved towards the Ring Road in Kathmandu in lakhs, even while their comrades were being shot and hospitals were filling up with the injured; it was also the unfinished circle of hope created around the mountains, plains and terai of Nepal, across villages and small towns, across the beautiful landscape on the shores of Nepal's many great rivers, from Gandak to Mahakali to Karnali, where the entire countryside braved the army and police.

And the red flag transcended all colours because 70 percent of Nepal is controlled by the Maoists; they were underground but everywhere, and it was they with their massive sup-

port base among the poor, dalits, madhesis, adivasis, mountain people, marginals, students, teachers, lawyers and intellectuals, who changed the course of the movement. They joined the civil society groups and the mainline parties and created the scaffolding on which the movement took flight on the wings of desire. They were the spark which lighted the prairie fire. They were the life-blood of the revolution. And if the power elite and SPA politicians betray yet again, it will be the Maoists who will enact the final theatre of liberation: the second revolution.

Because the people want a republic. The people hate the perverse monarchy. From Kathmandu to Pokhara, Kaski, Dang, Rolpa, Tansen, Butawal, Lumbini, Kapilvastu, Nepalgunj, Mahakali, Karnali, Mahendranagar, this was the narrative of incredible resistance and struggle, with the stoic Maoists in ceasefire in the backdrop. Stoic: because the Maoists have been intensely reasonable, despite being the biggest force in Nepal and despite having sacrificed 10,000 plus cadre and supporters to the 10-year long people's war.

Roads, squares, bridges, markets are being renamed by the people, new songs are being written. Mahendranagar has been renamed Bhimnagar in the name of a radical peasant leader of the 1960s, Bhim Pant, who was killed by the king's mercenaries. There are intense discussions across the hinterland where public meetings signal an intellectual and ideological rennaissance: from the UML veteran to the 20-year-old Maoist, everyone is speaking their mind. At the grassroots, across the spectrum, people want the king to go, people want democracy, including the cadres and local leaders of the Kathmandu parties.

Nepal stands at the Himalayan threshold of history where the little and beautiful country with its simple and hardworking people can teach a few lessons of struggle and enlightenment to the rest of the world. It is still on the threshold, waiting in anticipation, but the spirit of the April revolution is still simmering, like an oasis in the desert, waiting for the runner to bring the good news.

Run, Nepal, run. You have nothing to lose but your shackles.Let a hundred flowers bloom. Let a hundred schools of thought flourish. Bring the revolution home.

— September-October 2006

If They Betray April, Here Comes the Second Revolution

The conservative political parties will be compelled to compromise with the Maoists even at the risk of displeasing their US and Indian mentors. Or else, the tide will rise once again and completely wipe away the royal family and all the turncoats who are foolhardy enough to betray the April revolution.

HARI ROKA

In violation of a solemn undertaking made a few months earlier, the antiquated riffraff who dominate the April Parliament have declined to dissolve the house. Their rationale is as predictable as their duplicity is typical. This anomalous Parliament, whose composition and temper do not reflect the prevailing sentiments on the ground, is the relic of a shabby compromise, following the Jan Andolan of 1990, between ascendant political entrepreneurs who led the larger parties and declining feudal proprietors who were anxious to avoid structural reform that would threaten their class interests. The dissolution of the April Parliament will herald the end of the 1990 compromise and a State that pandered to the interests of a narrow alliance of classes in the guise of a multi-party democracy.

The cardinal flaw of the 1990 State was its inability to unite the loose ruling class coalition into a bloc with a clear unity of purpose in perpetuating its power. Accordingly, treachery, duplicity and intrigue were the characteristic traits of the polity, with angular personalities like Sher Bahadur Deuba and, to a marginally lesser extent, Girija Prasad Koirala and Madhav Nepal epitomising in extreme form this political disposition that prevented them from uniting even in the face of the most severe threat to their collective existence. Notwithstanding the bleated apologies these gentlemen offered to the Nepali public in September and October last year, deceit and guile continue to this date, despite the legible message of the April revolution, because such a disposition is inherent in the character of the flimsy State that is so much on the brink of collapse that the US and India have taken it upon themselves to save it.

What the obtuse bureaucracies of these two big powers do not realise is that the internal haemorrhage of the State of 1990 is inextricably linked to its external dependence, which is its defining characteristic. This analytically deficient, dysfunctional State, the adulterated product of a conflict between propertied classes of the old kind and the new kind, had no will of its own to fashion a larger social coalition. Instead, within four years of its existence, it imprudently succumbed to the blandishments of multilateral financial agencies to imple-

ment economic policies, formatted far from the real locus of the Nepali class struggle, which fatally destroyed the potential for internal hegemony, precipitated the Maoist movement and forced the parliamentary forces to rely on a military tied to the palace and dependent on foreign help.

The forces represented by the old polity and its external patrons see the April Parliament as the crucial institution to prevent the transition to a new arrangement that will end their monopoly of power exercised through the old State. This accounts for why they persist in linking the dissolution of Parliament and the formation of an interim government to the management of Maoist arms. However, the very reasons that compelled the two main political parties to come to terms with the Maoists in November last year continue to operate even today. Therefore, regardless of the shrill and frantic urgings of US ambassador James Moriarty and the more clandestine pressures being applied by India, these parties will have to face up to the reality and decide whether they want a role for themselves in a future dispensation or be consumed by forces that they have never been in a position to either win over or defeat.

In the 15 months between February 2005 and April 2006, the Nepali Congress (NC) and the Communist Party of Nepal-Unified Marxist-Leninist (UML) were forced to consider whether they ought to support the king as subordinate partners to uphold the old State or support the Maoists as subordinate partners to discard the old State. They eventually opted for the latter choice because the palace did not offer them a deal that was sufficiently lucrative. That the parties could seriously entertain both options speaks as much about their internal composition as about their role in the old polity. The former is a reflection of the latter.

The Byzantine intrigues and oscillations in the conduct of the Nepali Congress and the UML indicate the tension between the radical, reformist and reactionary factions within each of these parties. While the respective radical and reformist factions in the two parties can be differentiated by the degree to which they want change, the conservative factions in both the parties are identical in their opposition to any kind of change. That is the only element that provides a semblance of unity between the two parties.

The restoration/revolution dialectic of the present situation is fundamentally determined by these contradictory tendencies in both the main parties. The likely conduct of the two parties in the ongoing negotiations will be determined by their internal balance of forces and the total balance of forces in the polity, including the widely differing agenda of the cadre and their conservative leaders. This also imposes severe limitations on the extent to which foreign forces can influence the outcome. What turn the parties will finally take depend on the degree to which they succeed or fail in resolving inner-party contradictions.

These contradictions are themselves the inheritance of the long movement against the palace's monopoly of power during the panchayat period. That movement had eroded the foundations of the crisis-ridden monarchic State. Hence these political parties were brought into the structure of the State through a modification of the polity in 1990. This polity, by virtue of its organisational connection with the masses, was expected to organise the hegemony of the State without undertaking any kind of substantive reform.

In effect, these parties were brought in to operate the new polity as plumbers for the old State. Led by conservatives who were themselves opposed to any further change once they had been accommodated into the State structure, the parties failed to secure the legitimacy of the State, the sovereignty of Parliament, the coherence of the polity and, most importantly, the sanctity of monarchy. Since 2001 the king had increasingly begun to take control of the polity, the political parties and Parliament, as their instrument of power, were both discarded to protect diehard conservative interests.

The 2006 April revolution took place despite the opposition of the conservative forces — the parties, the militarised palace and the international community. When the revolution on the streets threatened to overthrow the entire edifice of the State, the conservative forces regrouped and restored Parliament, inviting the entrenched leaders of the two previously dominant parties with pretentious claims of mass support to man the front office and politically repair the leaks in the State structure. But this is the point at which the contradictions within the parties have intensified so that with time unity between factions is likely to be greater than the unity within each party.

The logic of the conservative restoration is likely to come up against some serious structural hurdles that cannot be resolved in the short run. The most awkward aspect of the conservative attempt at restoring the old State is that its public face consists of those forces which

were on the other side of the fence. What this signifies is that the strategic alliance of November 2005 was not yet a mature polarisation, though it was an incipient one. Indeed, that incipient polarisation between conservative and anti-conservative forces will have to be taken to its maturity through realignments. With the parliamentary wings of the NC and the UML enthusiastically embracing their reappointment as official plumbers of the conservative State, this process is likely to be hastened.

This is the case with the UML whose cadre in the districts have already taken a political stance that is far more radical than its Kathmandu leadership was willing to entertain till recently. The liberal strand in the NC has also assumed a stance at variance with the party leadership's stated preference for ceremonial monarchy. The emerging difference between the UML's official position and that of the NC will be accentuated by the historical tendency of the conservative establishment and its patrons in the international community to privilege the latter over the former.

However, there are points of convergence between the NC and the UML, with KP Oli, co-deputy prime minister, who represents the interests of the conservative establishment in the UML, adopting a position that is similar to that of the NC leadership. The implications of this for the UML have still not been revealed fully but the fact remains that Oli and his faction will act as an obstacle to whatever radical position his party is willing to take under pressure from the cadre. What is nevertheless clear is that a real polarisation based on common interests is still shackled by the incongruities in the party political sphere.

This accounts for the uncertainties afflicting the negotiation process at this moment. The longer this uncertainty prevails, the greater will be the likelihood of these incongruities being resolved through splits and reconfigurations within the parliamentary polity. The UML has, for the moment, warded off this prospect through incremental radicalism. The NC faces a far graver danger. Its upper echelons, dominated by the Koirala clan, and its cronies like Ram Sharan Mahat, the finance minister are unabashedly feudal and scarcely distinguishable from unreconstructed royalist outfits like the various versions of the Rashtriya Prajatantra Party.

There are many in the NC who are pessimistic about the party's prospects of surviving intact after Girija Koirala. For the present, he has been able to carry the party along though he has been less successful in getting the parliamentary polity to endorse the blueprint drawn up by the US and India. The only point on which the majority in Parliament agreed pertains to prolonging the life of the April Parliament. Even on this, the UML has shown signs of accepting the need for a new body to replace this defunct institution whose existence is not sustained either by constitutional law or popular legitimacy.

Parties and leaders unable to formulate clear political platforms consistent with the demands of the revolution will become irrelevant. This is the paradox that afflicts the plumbers in charge of the current State. As the public interface between the State and the public, they have to organise popular legitimacy and re-establish the credibility of the moribund polity. Yet, as appointees of conservative forces, they have to ensure that the radical edge of the revolution is blunted. The two are mutually exclusive functions that will eventually force them to make a choice between endearing themselves either to the public or to the conservative forces, ranging all the way from the military to the international community.

So far Parliament has been lurching ineptly between the two options. Its cosmetic initiatives are neither here nor there. Finance Minister Ram Sharan Mahat, staunch upholder of conservative values and a loyal stooge of western interests, presented a pointless budget that was ostensibly intended, in the words of Kenichi Ohashi, World Bank's czar in Nepal, to restore the credibility of the State. It did nothing of that sort, making laughably inadequate provisions for social welfare, concentrating instead on financial allocations strengthening the State institutions. He clearly forgot that this State is not present anywhere in Nepal and cannot be present until structural changes are introduced.

Mahat has neither the intellectual competence nor the political inclination to solve the problems of ordinary Nepalis. Hence his allocation of Rs 21 crore to a king who was saved by the international community from fleeing the country, while promising some paltry handout to widows. Kathmandu's reactionary commentators went to town celebrating the drastic reduction in the palace budget as though Gyanendra was still Vishnu's avatar meriting gratuitous allocations from public funds at the expense of the public. Such are the

puny minds who have been entrusted the Herculean task of restoring the State's credibility.

Of a piece with the budget's conservative bias are the allegedly progressive measures taken by Parliament. When the rest of the nation is debating the procedure for getting rid of royalty, Parliament is busy gender-mainstreaming the institution by removing the restriction on female succession. A gap of this order of magnitude between the agenda of a redundant Parliament and the demands of a simmering revolution cannot be bridged easily. There is a very strong possibility that the supposed middle ground will completely cave in and disappear along with the monarchy thanks to the friendly advice of the conservative establishment and the tactical geniuses in the US and Indian bureaucracies.

The crux of the matter is that Parliament has to be useful to the one or the other side. Since it cannot be useful to both it may as well replace itself with a body that is more in correspondence with the realities on the ground. That is one of the routes to a realistic polarisation in which people are relatively less constricted in their actions by party affiliations. This, in fact, is the only possible solution to a needless impasse that has been engineered by isolated domestic forces and ignorant external forces.

Parliamentary forces have little scope for manoeuvre since the political mainstream now belongs to the radical forces. The official institutional space does not entirely belong to the vacillating parliamentary forces. The army chief ignored the summons of the high level Probe Commission investigating the repression on the April revolution, reportedly after meeting the prime minister. Civil institutions controlled by Parliament will sooner or later be involved in violent confrontations with the army. The change of name from Royal Nepalese Army to Nepal Army has done nothing to diminish the military command's loyalty to the old regime. Neither does Parliament have the courage to replace the old command with a new civilian-friendly command.

These are the main factors that will hasten the polarisation. Eventually, the parties will be compelled to compromise with the Maoists even at the risk of displeasing their US and Indian mentors for two simple and connected reasons. Should they continue to make an issue out of arms management prior to the formation of an interim legislature and government they will have to face drastic consequences. If the peace talks fail on account of the arms management issue the Maoists will have no option but to renew the war, in which case Parliament will have no option but to call in the army over which it has no control. In such circumstances, Parliament will have to take responsibility for all acts committed by a practically autonomous army.

This will not only erode the residual base that they still command in the countryside, but will also strengthen the very forces who discarded them from the polity four years ago. The main parliamentary parties have an instinct for survival, though given their past conduct this is a questionable assumption. Despite US opposition and their own extreme reluctance, they forged an alliance with the Maoists. And they need not labour under any delusion that being in government has increased their power significantly.

The military balance lies along another axis that bypasses them almost completely, so much so that the army is now trying to provoke trouble by attacking the police and harming civilians. In effect, the parliamentary parties have captured the government but they have not captured the State and have no incentive to strengthen it. Either way, the advantage lies with the Maoists and the sooner they build a broad-based alliance for structural change the better placed they will be to get a share of power in the new dispensation.

The logic of the current situation leaves little scope for any deviation from the path laid out by the revolution of 2006. Any attempt to return to the outcome of the 1990 Jan Andolan will be counter-productive. But this is something that neither the Indian nor the US bureaucracy understands. These ebullient exporters of controlled democracy and practitioners of national self-interest suffered a setback at the hands of the Nepali people after they endorsed the king's feeble proclamation of April 19, 2006.

From all appearances, that proclamation was worked out in advance and had the consent of the two main political parties, a fact that they are liable to deny now. But they were paralysed with fright despite the display of muscle power by a congregation of diplomats urging them to dig their own political grave. The next few days saw many of them ignoring this advice and elbowing each other to advertise their radical credentials, while the likes of Ram Sharan Mahat, KP Oli and Sujata Koirala lay low. And, as it often seems to happen, at every crucial juncture when Girija Koirala is required

to take a public stand, providence comes to his aid and strikes him down with ailments that require intensive care and ventilator support. He has prevaricated on a great many issues in the recent past. Soon, far from restoring the credibility of the State, he will forfeit the little that he still has.

In order to maintain pressure on Parliament, civil society, led by the Citizen's Movement for Democracy and Peace, is continuing with street action on the slogans of republican democracy, immediate dissolution of Parliament and compliance with the 12 and 8-point agreement between the Maoists and the Seven Party Alliance. Its periodic meetings have been successful and, should the need arise, the tide will rise once again, this time to completely wipe away the royal family and all the turncoats who are foolhardy enough to betray the April revolution.

— *September-October 2006*

Manufactured Consent

Enter the labyrinth of the established Nepali and international media brands as the flames of radical resistance and change spread in the turbulent landscape of a volatile nation. The people of Nepal by and large disregard these media pundits and experts and defiantly continue to rely on their own sources of news, opinion and analysis, while the rest of the world always remains just a little behind a step.

BELA MALIK & SAMUEL THOMAS

Mass cremation of members of royalty and freedom of press, June 2001, catapulted Nepal onto the international gaze. Busy global journalists flew into Kathmandu and booked themselves into premium hotels. They were at large in the city, thrusting mikes into passersby. The dramatic palace massacre had literally fallen on to the table of a hungry media. A juicy, sumptuous fare, complete with royalty, murder, love, intrigue, whiskey, drugs and scandal. Tumultuous crowds refused to accept the official version of the whodunit, notwithstanding valiant efforts of mainstream media's high priests. Foreign journalists discovered the strong presence of Maoists in Nepal. The set of events could be squeezed to satiate the broad mass base of the 24x7 news channels. After having taken what they could out of the events, the jet-setters vacated their hotel rooms and boarded their flights, pausing in between to identify native stringers sensing that something more will brew in the little Himalayan kingdom.

They were right. The massacre was only the beginning of a royal fare that would keep the media lights on Nepal for years thereafter. The heir-by-default Gyanendra proceeded to stake a claim over 'his' entire kingdom, not willing to share it with the semi-empowered democratic products of the 1990 movement, who till then had trustingly backed him instead of the other possible partners, the Maoists.

Gradually, but perceptibly, the Nepali monarch and his handful of advisers set on their route to absolutism. *The Word on Nepal* had to be doctored for this first. Curbs on the media accompanied restraints on civil rights. All at once in November 2001, the 'war on terror' in Nepal declared a state of emergency, imposed the Terrorist and Disruptive Activities (Prevention) Bill and called in the appropriately-named Royal Nepalese Army (RNA) into battle against the 'terrorist insurgents'. For part of the journey, a section of the Nepali media that was owned and run by the section threatened by the Maoists' radicalism, was complicit; references to Khmer Rouge in Cambodia, Stalin's 'collectivisation' and other familiar refrains were freely evoked to cheer on autocracy from the sidelines. Internationally dominant media did not add much that was useful for political analysts (for a sample, see *National Geographic, http://www7. nationalgeographic.com/ngm/0511/feature3/index.html; see also Amit Sengupta, Demonising the Maoists, June 3, 2006, http://insn.org/?p=3543*).

During the weeks following September 11, 2001, the media used agency copy (mostly embedded) with the 'war on terror' banner. Kantipur publications, for instance, and the government and media worked overtime to equate the 'insurgency' (or, people's war/mass rebellion/resistance against monarchy and State atrocities) with 'terrorism;' it became a method to seek funding, to real easy to slip the 'terror tag' on the Maoist leadership. This was Nepal's McCarthyism, and the bounty hunter option. In an interview, the then home minister, Devendra Raj Kandel, speaking to a Nepali journalist on the sidelines of Deuba's Delhi visit said:

Q: Now that the government has put price tags on the heads of top Maoist leaders and for arms recovered, do you think the people in Nepal and in India will co-operate?

A: Yes, we have put price tags on their heads, as well as rewards to informants giving clues leading to the arrest of Maoist leaders or the weapons looted by them. Now we are

printing bigger, better posters and pictures of Maoist leaders and plan to distribute them far and wide. We will disseminate them in the same way Osama Bin Laden's pictures were re-printed after September 11. The posters will be put up all across the Nepal-India border, so that people easily identify them. We are also giving the pictures to the Indian media. Because the price tag is big enough, everyone should be tempted to co-operate. (Nepali Rs 5 million each for Maoist chairman Prachanda aka Pushpa Kamal Dahal, leader and ideologue Baburam Bhattarai and leader Kiran aka Mohan Baidya, rewards of up to Rs 3 million for the party's central leaders, Rs 2.5 million on other top commanders, and up to Rs 400,000 on arms like rocket launchers, mortars and machine-guns.) *(Full interview:http://in.rediff.com/news/2002/may/08inter.htm.) Also see, http://www.himalmag.com/2003/may/mediafile.htm*

After the disappointing showing by the western press in its coverage of the war in Iraq (see Mediafile, April 2003), it should perhaps come as no surprise that its coverage of events in other parts similarly possesses an air of unreality. Take the *Wall Street Journa*l, which has carried two articles on a newly peaceful Nepal in the last two months. But lack of quantity is hardly made up for in Pulitzer-winning quality stuff.

Writes Dana Dillion and Ha Nguyen in a March 26, *Journal* opinion piece: "At first sight, it might not seem to matter very much who runs a mountainous, seldom-heard-of country tucked between India and China, far from the battlelines of the war on terrorism. But a victory by communists in Nepal would send a signal to other insurgents in Asia that violence pays and that the world has more important things to do than foil their advances. Worse still, once in power, the communists could make Nepal a safe haven for terrorists in the same way as the Taliban allowed Al Qaeda to shelter in Afghanistan."

Kshetria Patrakar, who has spent a bit of time in a certain mountainous, seldom-heard-of country, is sorry to inform the Journal that the words 'communist' and 'Maoist' are not interchangeable, there being about a dozen above-ground communist parties in Nepal, including, at the moment, the Maoists. Moreover, the citizens of the country in question may be disinclined to serve as stage actor-foot soldiers in the ongoing 'war on terror' theatre. Patrakar had thought that reports, opinions and op-eds are supposed to have some informed connection with the subject being covered. And shouldn't peace and stability in Nepal be first and foremost a concern for the people of Nepal, rather than for neo-con strategists of the American right?[1]

In late 2001, journalists, organised under the Federation of Nepalese Journalists, took to the streets in protest against the new incursions on democracy. But such dissenting voices in civil society and the political overground were few. At the same time, individual journalists, seen to be taking one or the other side, were routinely being hounded, arrested, tortured, disappeared and even killed by the RNA. The Maoists too were arresting and killing journalists.

With a civil war on, reporting conflict became increasingly difficult as newer forms of authoritarianism surfaced beneath the veneer of free press and democracy. The rest of the world seldom took notice because the international press did not find anything extraordinary to report in the globalised situation of embedded journalism and a low intensity war on terror. Events of a stunning nature earned column inches, such as the impressive attack by Maoists in Beni, Myagdi district, western Nepal *(BBC, Deadly battle rages in west Nepal, 24 March 2004, http://news.bbc.co.uk/1/hi/world/south_asia/3555049.stm)*.[2]

The coalition of killing propagated and sustained an Islamophobia. In end-August 2004, eleven Nepalis were killed by an Iraqi militant group in Iraq. The gory pictures of execution and grieving mothers were shown repeatedly by the electronic media, creating an atmosphere of anger and rage. Vandalism in Kathmandu followed from the night of August 31, extending to September 1, and the media did not take note of the fact that the acts of vandalism took place in very high security places. Three months ago, battalions of police and army personnel unleashed intense repression against peaceful demonstrations by thousands in the same vicinity. Here, they stood by and watched.

The national media did not interrogate the basic notion of Nepal as a Hindu State, a garden of 36 castes *(chhatis jaat ki phulbari)*, an ocean of calm and fraternity. Mosques were desecrated and Kathmandu held to ransom by rioting mobs. It was presented as the first such communal incident which ignored the incidents and climate of 'otherness' for everyone not fitting the phenotype of upper caste 'Hill Hindu'.[3] The English language weekly, *Nepali Times*, ran a cover headline, 1/11. *This was Black Wednesday.*[4] (Forget for a moment that this

was not November but September, and therefore should have been '1/9'.) It highlighted the attacks on the media houses and on manpower agencies, but did not talk about what was done to the most vulnerable section, the minority community.[5] This is the creation of what is called 'the danger of false clarities' in the global discourse of 'us and the enemy'. It complemented well a right-wing agenda that was being furthered by the palace and the RNA high command to strengthen their position.

On February 1, 2005, Nepal again made it to international headlines. Dramatically, the royal regime cast aside its formal democratic partner and proceeded to announce itself as the government 'in battle against terrorists', for which it needed the complete support of an unquestioning nation. The first attack was on information. A total media blackout was imposed while the rest of the world could only voyeur the frailty of a people cut off from itself.

The independent press in Nepal was badly hit by a series of draconian announcements and notices, such as this one, which appeared in *Gorkhapatra*, February 3, 2005: Invoking Sub Clause 1 of Clause 15 of His Majesty's Print and Publication Act-2048, and considering the nation and national interest, His Majesty's Government has banned for six months any interview, article, news, notice, view or personal opinion that goes against the letter and spirit of the Royal Proclamation on Feb 1, 2005 and that directly or indirectly supports destruction and terrorism. In line with the arrangement in the Print and Publication Act 2048, action will be taken against anyone violating this notice *(http://insn.org/?p=372)*.

Threats, intimidation and unlawful arrests of journalists led to a massive outcry in the 'republic of mediapersons' *(http://insn.org/?p=329)*. News kept running on the blockade of information, censorship, assaults, clampdown, fear of arrests, facilitated by determined citizens and enabled by modern forms of communication (telephone, fax, internet); it was a pointer that autocratic monarchy could not triumph over (see, for example, *http://insn.org/?p=287 and http://insn.org/?p=247*) the will of people and the freedom to dissent.

Blogs sprang up over the World Wide Web. *Habeas corpus* writs were filed, the Supreme Court approached, international organisations issued stern reprimands, journalists kept up the protests through innovative and traditional forms (see *http://insn.org/? p=265 and Laxmi Murthy, Of 'holes in socks' and blank newspapers, Humanscape, April 2005, http://www.humanscape.org/Humanscape/2005/April/ofholes.php*). It was a challenging atmosphere as witnessed by this radio journalist: Instead of the usual spicy mix of current affairs and politics, the subject of Radio Sagarmatha's talk show on Saturday night was as bland as rice. In fact, the subject was rice: the differences, as explained by a scientist, between golden, wild and other varieties. That was the only topic the independent Nepali FM station felt safe to discuss.

"Normally I don't do that kind of programme," a 31-year-old journalist at the station said, laughing nervously as a soldier listened. When the soldier - one of six lounging around the station - moved off, the smile fell away. (*http://insn.org/?p=232*)

The onus rested on the international media to tell it like it is. It highlighted the repression and the resistance against it. Editors of the major media houses joked that the media was treated as the eighth agitating party. Mainstream English-language Indian media played an important role in condemning the coup and the repression. Articles and editorials appeared in profusion urging the Indian government to consider a shift in it twin pillar theory (constitutional king, multi-party democracy). Other international media too helped to undermine the palace's credibility by giving it an extremely bad press. This contributed to ensuring that the key international powers did not continue to arm the palace-army. There was in the Indian media also strong signals to include the Maoists in the mainline discourse, to address the issues raised by them, and to effect a negotiated political settlement in Nepal.

However this critical portrayal did not include questioning the 'Word on War', a few notable exceptions notwithstanding, (for example, Thomas Bell *Nepal backed lynch mob rampage* Kapilvastu/8 March 2005/ The Telegraph, UK), also on *http://insn.org/?p=542*; see also *http://insn.org/? p=597*). Dominant world media intrinsically operated within the binaries of 'us or them', with little regard for objectivity or media ethics.

Around February 2-3, 2005, BBC's stringer Netra KC went missing. Later it was revealed that the BBC anchor had mentioned its Nepal stringer, Netra KC, by name, in a report based on an interview with a Maoist leader. The correspondent also volunteered the riveting

information that since telephone lines were disconnected in Nepal, KC was nipping across the border into India to make calls. The Nepali security forces took the cue and set up an intense hunt for Netra KC who was reported to have gone into hiding, and was therefore "missing", but definitely not abducted as believed. The BBC erred by mentioning his name and giving details of his whereabouts in its attempt to authenticate its story (*http://insn.org/?p=202*; also see Asian Centre for Human Rights, *Footnotes, quotes and acknowledgements in a state of emergency*, February 23, 2005, *http://www.achrweb.org/Review/2005/61-05.htm*).

On March 10, 2005, there was a statement regarding the abduction of an investigative reporter: JB Pun Magar, staff reporter of *Himal Khabarpatrika* and *Nepali Times* was abducted Wednesday by Maoist rebels while on assignment to cover the anti-rebel uprising in Kapilvastu district southeast of Kathmandu. (*http://insn.org/?p=561*)

Appeals were issued to the Maoists to release him and Reporters Without Borders (RSF) promptly condemned the Maoists in a statement on the same date, titled '*Maoists kidnap leading investigative journalist (http://insn.org/?p=563)*. The next day, RSF issued another statement welcoming the release of JB Pun Magar, which also added that a pro-government self-defence militia had actually kidnapped Magar, *and not Maoist rebels,* as originally reported by the local press and RSF. This corrective was titled Nepal: Investigative journalist released by captors' instead of the more accurate 'Nepal: Investigative journalist released; captors were not Maoists'.

No apology was rendered for the misreporting and the quick condemnation before verification. The Committee to Protect Journalists was more circumspect and therefore did not have to amend its statement *(http://insn.org/?p=584)*. It can be argued that even if the RSF did not want to apologise to the people they slandered, then the least they could have done was to condemn the palace-army and its vigilante force for the Magar abduction. The reporter was not, incidentally, reporting on an anti-rebel uprising, but on a planned rampage by State-sponsored vigilante forces.

On May 8-9, 2005, there was a 'clash' between Maoists and the official army in Siraha. The army version was quick on the draw. The Nepali media had to report the doctored version. Reuters *(http://insn.org/?p=1037)* faithfully reproduced the army version that over 30 people were killed, among them over 26 Maoists and four security personnel, and dozens of civilians were injured in the attack. It ended its report with the template: Maoist violence has continued unabated in Nepal since King Gyanendra fired the government on February 1 and seized power saying the move was necessary to quell the Maoist revolt in which more than 11,000 have died since 1996.

An Associated Press report by Binaj Gurubacharya, datelined Kathmandu, May 26, 2005 again gave only the RNA and government version which was "The police and soldiers repelled the attack and killed 41 rebels. Three policemen and a soldier also died in the fighting."

Since the Royal Army was not known to be a seasoned victor there was usually a frenzied air about its propaganda and the Siraha news release was so pointedly out of character that it provoked sceptical disbelief among too many people in Nepal (see two reports on *http://insn.org/?p=1046* and *http://insn.org/? p=1222*). The Maoists attacked security posts in a well-coordinate strike along a major highway in eastern Nepal. The security was taken unaware in a heavily secured area. It later launched a counter-attack including aerial bombing on a populated site. Rather than being a routine Maoist attack effectively repulsed, it was a Maoist combat victory, one that resulted in nine casualties to civilians, mainly dalits, 30 to security, and 36 Maoists. Maoists arrested six security persons. Over 500 dalits were later displaced.

The international media not only did not report faithfully. It did not raise the question as to what the security posts were doing in the midst of such dense population, and why the Maoists were unable to evacuate the civilians before launching their attack and why the Royal Army resorted to aerial bombing on such a heavily populated area. Reuters and AP were among others who simply accepted the army version. The Maoists' press was called propagandist, but it served to provide another version of the truth *(www.krishnasenonline.org)*. To the rest of the world, the international news agencies were providing gratis propaganda for the RNA and raising concerns, yet again, about the authenticity and objectivity of conflict reporting.

Curbs on the media extended the formal lifting of emergency in June 2005. On October 9, 2005, the royal regime promulgated an 'Ordinance amending some of the Nepal Acts related to media', which amended six of Nepal's key pieces of media-related leg-

islation. This was portrayed by the establishment not as a curb on freedom of expression, but only a way to 'instill discipline' (see International Commission of Jurists', *Power to silence: Nepal's new media ordinance*, December 2005, *www.icj.org*, for a critique of this ordinance).

The war waged on, but the State could neither hold the monopoly over the 'Word' nor on the people and areas supposedly under it. International mainstream media found itself out of step. On March 26, 2006, the BBC reported on four missing Polish trekkers. An excerpt from the BBC report: The trekkers had gone missing from the eastern Dolakha district on their way to Lukla in the Mount Everest region... More than 8,000 people have been killed since the rebels began their campaign to unseat Nepal's monarchy in 1996... A little further down: The BBC's Bhagirath Yogi in Kathmandu says the rebels are known to impose 'taxes' upon the trekkers in their strongholds, but usually do not harm them. *(http://insn.org/?p=2946)*

The choice of words implied that Maoists had abducted them. Later it was known that the Maoists had had nothing to do with these trekkers, who were then located. The monopoly of doctoring the 'Word' was not within Nepal.

The ensuing period was spent on surreal reports until politics within Nepal seized the initiative and the April 2006 people's movement occupied the headlines. Again star-struck journalists dropped straight on Kathmandu and proclaimed people's power in ecstatic hyperbole *(http://insn.org/?p=3152)*. On April 21, after the monarch made his first offer, the headlines declared that the king had handed over power, only to realise that this was decisively not it, there was more to come (http://insn.org/?p=3198), and later headlines dutifully broadcast 'too little too late' *(http://insn.org/? p=3208)*.

There were scarcely any reports from the international media on politics outside Kathmandu, which would have revealed that the Maoists, along with other political parties and civil society organisations, played a critical role in mobilising masses for the nation-wide agitation that revealed the cracks within the royal regime. The centre literally could not hold, there were not enough security personnel, guns, tear gas, or lathis to repress the thousands of protestors across the 75 districts of the nation *(Tara Joshi, Despatch from a district, July 13, 2006, http://insn.org/?p=3636)*. It was only the odd journalist who found reporting on ordinary matters out of Kathmandu worthwhile for the world outside (Amit Sengupta, *After victory, revolution!, Tehelka, June3, 2006, http://www.tehelka.com/story_main18.asp?filename=Ne060306after_victory_SR.asp*).

Events in the country eventually led to the stepping back of autocracy, including revival of Parliament in May 2006 and the creation of a media commission to alter the laws and conditions that fettered free media. No more censorship and the media within Nepal was technically free to report. International media hailed the events, announced that all was on track and went on to other pressing headlines and reports.

This was obviously quite uncritical of the progress of events and unmindful of the simmering discontent that continues in Nepal despite the so-called success of what is safely termed to be Jan Andolan II, a peaceful movement resulting in getting the House of Representatives back in business. Conservative sections of the Nepali media, having taken prominent positions in the movement, now thought it could put the breaks on the people's movement to prevent it from turning into a big revolution.

The Maoists and the newly-installed government had to negotiate their way peacefully to a future political configuration. Sensitive and responsible journalism was the need of the day, but it did not always rise to the occasion (see the analysis of a report in the Hindu on *http://insn.org/?p=3515*).

So implicated was the media with sections of Nepal's 'democratic' polity, that it failed to do its job when its government arrested persons using draconian legislation from the autocratic past (Gopal Shiwakoti 'Chintan', *The law in times of revolution, May 13, 2006, http://insn.org/?p=3429*).

Media reportage of industrial dispute in this new 'open' climate was also contentious *(http://insn.org/?p=3483)*. Maoist actions and statements were often freely taken out of context *(http://insn.org/?p=3442)*, including by the much-vaunted independent media blogs. All was not well with the media in Nepal. Sections of the publicised 'community' FM radio on closer inspection turned out to be greased with suspicious sources of foreign money and was not treating their employees on par (see a media monitoring report on *http://insn.org/?p=3483*; and see International Federation of Journalists' statement with one sub-heading 'Maoists threaten radio station' posted on *http://insn.org/?p=3473*).

Elements within Nepal's media establishment are taking upon themselves the job of preventing the radicalisation of the political economy — that will come with a meaningful inclusion of the Maoists in national politics — by attempting to manipulate and subvert the overwhelming climate of pro-republican, pro-constituent assembly, anti-monarchy opinion. They call the peace negotiations as having succumbed to the Maoists 'too much too soon' and liberally refer to an amorphous "people" (see Yubraj Ghimire, 'Success depends on a tightrope walk', Indian Express, 17 July 2006, *http://www.indianexpress.com/story/8645.html*).

Unfortunately for the established international and national media brands, the people of Nepal by and large disregard these media pundits and experts and defiantly continue to rely on their own sources of news, opinion and analysis, while the rest of the world always remains just a little behind step.

— September-October 2006

Endnotes

1. Kashmiri migrants in Nepal never felt safe. The Nepali and Indian mainstream presses were never critical of Muslims of any nationality being arrested or deported. See for example http://www.nepalnews.com/archive/2006/jul/jul13/news08.php
2. The online version does not show the "1/11" cover, see http://www.nepalitimes.com/issue/212
3. See letters to editor in the subsequent issue http://www.nepalitimes.com/issue/213/Letters/2038
4. Nira Wickramasinghe, "Danger of False Clarities: Scrutiny of `Terrorism` in Sri Lanka", Economic and Political Weekly, 10 June 2006.
5. The popularity of alternative web sites such as insn.org, samudaya.org, unitedweblog (www.blog.com.np) and even the Maoist media went up proportionate to the attempts by the government to impose its own sole view of events. It was only seldom that the alternative was dramatically subversive of the regime.
   There were, for example, hardly any cartoons of the king and the establishment in the web sphere (one example is on http://www.geocities.com/man_mako). The Nepali language left-leaning monthly Mulyankan was consistently critical and maintained an independent position. Its circulation only improved in this period.

Constituent Assembly or Counter-revolution?

The crown has been pushed by the people to the precipice. Nepal has to learn from no one. The world has to learn from Nepal. And big brother India most of all will have to learn from its little sister.

COLIN GONSALVES

After decades of extreme repression, the Nepali people rose in revolt in what is now also known as the 'February Revolution', though the uprisings were mostly enacted in turbulent April. Seeing the resoluteness of millions of people, the king stepped back after he was told by his army generals that they would not open fire on unarmed civilians. In a strategic move, the Maoist armed forces (the People's Liberation Army — PLA) stayed on the fringes of the movement and let the people lead the struggle. It was perhaps a wise move, for had they led the struggle, a bloodbath may have followed. The king's retreat saw the demonstrations evaporate overnight thus losing momentum at a time when the king's departure from Nepal was imminent. An explanation can perhaps be found in the tiredness and suffering of the Nepali people who wanted peace above anything else.

When we visited Nepal in May 2006, we found the new spirit of optimism. Political discussions were taking place everywhere. In old Kathmandu's Darbar Square you could see hundreds of candles burning and young people everywhere. With the average age of the population at 20, the future of the Republic of Nepal lies with the young people. The conversations focused on the leadership role of the Maoists during the non-violent April uprising in what is also called the 'February Revolution'. There is overwhelming admiration for the sacrifices made by these young revolutionaries and their willingness to die for a cause. There is no doubt in anyone's mind that if it were not for the Maoists armed cadre, change in Nepal would never have come. This is not to say that the movement was only a Maoist movement. It wasn't. It was a movement of the masses, sometimes guided, sometimes led and sometimes supported by the Maoist underground. The people of Nepal are the heroes of the February Revolution.

This revolution succeeded despite opposition from not only the king of Nepal and his army but also three hegemonic nations – India, China and the United States — whose embassies in Kathmandu are overactive but entirely in the wrong direction. The American forces openly interfere in Nepali affairs and it is said that apart from providing cash and weaponry also train the Nepali army. China openly supports the king. Human rights have ceased to be

on its agenda for many years now. And Indian foreign policy may well be characterised as love for the king in the garb of constitutional or ceremonial monarchy which quickly changed to love for democracy, initial disrespect for democracy, shifting support for the army, disregard for the people of Nepal and a fear of the Maoists. Indian foreign policy has been uncertain and floundering.

It is truly a wonder that the Nepali people, after facing decades of torture, executions and disappearances, including bombings from the air by the Royal Nepalese Army (RNA), should break through and assert the will of the people. So many families have a tale of sorrow having lost a brother, a sister, a mother or a father to the bullets of the RNA.

OF INHUMAN BONDAGE

There is a close bonding between India and Nepal but there is also great stress. The porous border has made our two countries inseparable. But we have also caused considerable harm to the people of Nepal. One has only to visit the Tanakpur Barrage constructed unilaterally by India in 1989 that gave rise to a huge controversy because the waters of Nepal were directed to India. GP Koirala thereafter signed a treaty legitimising the barrage and in 1996, a seven party alliance signed the Mahakali Treaty betraying the people of Nepal and giving away the Mahakali's waters to India. The Mahakali barrage was built, the flags of Nepal were removed, almost all the water was sent to UP and hardly any went to Nepal. It is acts like these that create a love-hate relationship between Nepalis and Indians; love for the Indian people and bitterness against the Indian government.

Indian democracy, like the Indian State, has lost its vision, sense of balance and sense of direction. Having lived through one of the most vibrant national movements in world history, it is a shame that we cannot even recognise, let alone identify with, similar movements when they take place nearby. Instead, our reaction is the same as that of our colonial rulers. Suspicion of the poor, manipulation of the weak and downright bullying are the only diplomatic tools we seem to understand and use.

This lack of ethical moorings was visible in the panic reaction to the February Revolution. Manmohan Singh, decided to send Karan Singh to Nepal. Apparently, Karan Singh, proud of his royal lineage, said to reporters as he left India that he was going to visit his in-laws. That too in the middle of a revolution! Jaswant Singh, who was also keen to visit the king, has close links with the royal family. Thus, at a critical moment in history, the Indian State and the leader of the opposition in the Rajya Sabha sided with the monarchy.

The consequent change of heart which quickly followed was perhaps because of the massive show of strength by the people of Nepal and the certainty of victory which would have left India isolated as both America and China are today. Foreign Secretary Shyam Saran then rightly said that India would abide by the wishes of the Nepali people. In any review done of the regressive role played by the bureaucrats of the Indian embassy in Kathmandu, the initial decision (which was later changed) to supply weaponry to the king must be centrestage. Indian bullets for Nepali hearts!

Any introspection must also look at why the Maoist movement was destined to succeed. The average age of the Maoists underground, which consists of 20,000 regular army soldiers and 80,000 village militia, is about 20 years. Almost 30 percent of this army is dalit and an equal percentage consists of women. These are the two most downtrodden sections of the society for whom GP Koirala and politicians of his ilk have neither a political programme nor any inclination to serve.

BETRAYAL AND HOPE

Land reforms are critical. Out of 42 lakh agricultural families, 10 lakh families are landless. Only eight percent of women have land in their names and only four percent have both land and houses in their names. There are 60,000 'haliya' families who are bonded 'ploughers'. There are lakhs of 'khamaiyas' or bonded labourers trapped in bondage because of 'saunki' or debt. The tenants have fallen into dire poverty.

Prior to 1996, a tenant could acquire ownership of 25 percent of the land. The fourth amendment in the Land Reforms Act, 1962, increased the right of the tiller to 50 percent of the land. The fifth amendment of 2000 restricted the right only to those tenants who were registered in the government records. The sixth amendment of 2004 extended the last date of applications up to April 13, 2005. But there was confusion everywhere and most tenants missed the deadline. The Civil Code, 11th Amendment in 2002, gave women equal ownership of ancestral property, but on marriage, property would revert back to the parents. Thus, the

laws were very complicated and people unfriendly. To make matters worse, a 'citizen card' was needed for everything. Proof of land ownership was a perquisite. It cost Rs. 1,200 (in Nepali currency) to get a card. This was beyond the reach of most people.

The land issue is central to the February Revolution. The Maoists did, using force, political and social empowerment, and mass mobilisation, what the State ought to have done using Parliament and the judiciary. The movement grew because as areas were liberated, land was handed back to the landless and the dalits in many places. There is a lesson to be learnt in this for India.

Earlier this year, when I went along with veteran civil liberties lawyer KG Kannabiran to meet with Union Home Minister Shivraj Patil, I saw how closed the Indian State was to in understanding Naxalism and violence. Kannabiran pleaded with the minister but he seemed preoccupied. In the end, he casually suggested that Kannabiran ought to press the Naxalists to disarm, promising to act thereafter. Such an approach is no approach at all. In the history of democratic States dealing with armed struggle movements such as the Irish Republican Army (IRA), disarming of the militia comes at the end of a protracted negotiation process and never in the beginning.

In the case of the Andhra Pradesh Naxalites, the principal issue, apart from cold-blooded murders in fake encounters by the Andhra police, is land. Land ceiling laws exist. But they are violated throughout the country and landlords have successfully used the legal system to obtain stay orders, which continue for decades thus effectively sabotaging the land reforms process. Today, the Naxalites do, by use of force, what the State legislature and judiciary ought to be doing by taking recourse to the Constitution of India.

In the context of entrenched upper caste feudalism, capitalism and globalisation, the poor just do not count and reform laws intended to benefit the poor are not taken seriously. Naxalism then is the natural outcome of the globalisation process, which isolates, impoverishes and marginalises the majority of the working people and pushes them inexorably towards rebellion. The very nature of capitalism and the imperatives of globalisation create militants such as the Naxalites who see force as the only way to defend the right to life.

Returning to the situation in Nepal, the retreat of the king appeared to be tactical. The head of the armed police and the intelligence police chief were suspended but the army top brass were not touched. The upper layers of the RNA owe their allegiance to the king and not to the Constitution. The palace brigades even more so. It would be foolish for anyone to assume that the king will be disrobed by the cosmetic reforms brought about by Parliament, by changing the name of the army and removing the word 'Royal', and by cutting the budget of the palace. Indeed, it is said that a counter-revolution is being planned. The upper rungs of the army are active in scheming a comeback. And in Nepali civil society there are many fallen stars who are ready to join hands against the revolutionary forces.

To sustain the revolution, Parliament, as it is currently constituted, must be dissolved. It has all the old discredited cronies. Their strategy is to prolong the life of Parliament and to delay as much as possible the elections for the Constituent Assembly. It is said that if elections were to be held today, the Nepali Congress would be wiped out together with many of its allies in the seven party alliance. An old and ailing GP Koirala would be relegated to the dustbin of history.

AND JUSTICE FOR ALL

One of the first decisions of Parliament after the February Revolution was to appoint the Krishna Jangrai Maaji Committee to probe into atrocities committed by the security forces. Maaji was formerly a judge of the Supreme Court who resigned. He is widely recognised as an upright and just man. Nevertheless, in intense times such as these, routine procedures and practices must be jettisoned.

One decision that Parliament can and ought to take is to implement the recommendations of the 1990 Mallik Commission which found the then prime minister, cabinet ministers, police and army officials guilty of acts of atrocities against the people of Nepal. But the government declined to act and betrayed their mandate. The Attorney-General complained that the report was flawed. It was never implemented. A public interest litigation was filed in the Supreme Court asking for directions to the government to implement the recommendations, but this was rejected. This gave the army and the police virtual impunity. The UN Commissioner for Human Rights in Kathmandu, Ian Martin, has gone on record to say that it was a mistake not to implement the report. As a result, the very same officers committed atrocities once again in the mass

demonstrations that led up to the February Revolution in Kathmandu and all over Nepal.

The performance of the Supreme Court was hardly glorious. The challenge to the imposition by the king of a state of emergency was left undecided by the court until the people decided the question through a revolution. There is a judge on the court who has gone on record saying that the king was above the Constitution. Having said that, *habeas corpus* and some other human rights cases were dealt with promptly by some benches during the insurrectionary period. All in all, as for the apex court, it was a mixed record. The Constitution needs to be scrapped. It ought to be replaced immediately by an interim Constitution drafted by a committee appointed by popular vote. It must make a radical departure from traditional constitutions. Though it may borrow some articles from the Indian and South African Constitutions, it must make a radical departure and proceed to lay down for the first time the basic structure of a Constitution for a democratic socialist republic where capitalism will be relegated to a corner and fundamental rights reign supreme.

TALES OF REPRESSION

No attempt to reconstruct society can ever be complete without a public stocktaking of the thousands of young Nepali boys and girls who were tortured, executed and abducted by the police and security forces. From the Maoists groups alone thousands of people were jailed.

We met with Krishna Prasad Prajuli, father of Shiva, a 28-year -old boy from Leknath municipality, district Kaski, who has been missing since 2001. He was taken by the civil army from Pumdi Bhundi (outside Pokhara) while he was returning after visiting his relatives. After picking up Shiva, the army raided Krishna's house thrice. He said that many others who were picked up from his village have disappeared.

We met with AN Baral, father of Netra Prasad Baral, a 24- year-old youngster, who was picked up from village Bharatpur by the army and taken to Phulbari Barraks at Mahendragarh. He sent a letter to his father. He was studying for his BA. Netra was handcuffed and blindfolded and never seen again.

We met with Govinda Gautam whose uncle Damodar Gautam (Sangram) was picked up at 8.30 pm from Dhanakuna by the army about three years ago. He was injured in a mine blast at the time he was picked up. He was an innocent by-stander. In agony he begged for water from the army. Instead, the commander pissed in his mouth. He was kicked and thrown into a truck. He said that he wanted to see his 9-month-old son before he died. Govinda's father was in the police, but he was told by the army that if he interferes he would be behind bars.

We met with Tara Adhikari, 34. She is a vegetable vendor. Four years ago her husband, Chhabhi Adhikari 34, was killed by the army. Two years ago her sister-in-law, Munna Adhikari, 24, was also killed by the army. They were Maoist full timers. They came from village Sahimaran in Kaski district. They found the corpse of Munna. She was blindfolded with her hands tied behind her and shot in the temple.

We met with Dilliram Adhikari , 40, resident of Pokhara, and a teacher since the 1980s in the government school. In January 2006, at midnight, Inspector Narendra Chand together with the army and the police from Phulburi, beat him and kept him in detention for a month. Mary Arnot of the International Committee of the Red Cross helped him get out.

We met with Biswa Prasad Lumichane in the Kaski Karagah prison. He was on the second day of his hunger fast with several of his male comrades. There were more than 70 young boys and men in the jail. Along with him were women comrades who are separated by a wall: Asha, Sharmila and others who all had suffered in different ways, wounded by a bullet, given electric shocks, tortured, their heads pushed under water in drums. We met Leela Thapa who was ordered to be released by the Supreme Court. She was on fast in jail together with Ambika Mudbari who has been six years in jail and has been charged with collecting donations for the Maoists. She was tortured by putting her head in a water drum.

They demanded that those who have disappeared be accounted for, that prisoners of conscience be released, the Terrorist Act be repealed and war criminals be punished. There were eight women under preventive detention and six under the Terrorist Act. Though the jail had capacity for only 60 persons, there were 200 persons kept like chickens. There were only four toilets for 200 people.

BEWARE THE ROYALISTS

The forces of reaction seek to waste time while they regroup thinking that the revolutionary fervour will cool down with time. They may be right. But then, they

may be wrong. The mass demonstrations we have seen in recent months prove that public memory is long and public anger is near the surface despite the reforms that have taken place. Like in all things, it would the greatest mistake for anyone to compare Nepal with any other society and draw parallels for lessons to be learnt. This is because Nepal could well be, despite its poverty, one of the most socially and politically advanced countries in the world today.

Nepal has to learn from no one. The world has to learn from Nepal. And big brother India most of all will have to learn from its little sister.

The key to success lies in speed and in not following precedents because all precedents are invariably limited by capitalism. Nepal is no longer and need no longer be the capitalist country with a capitalist Constitution even though it may exist within global capitalism. This is what the Nepal experiment is all about.

— September-October 2006

Children of a Lesser God

The founding fathers had envisaged a multicultural society where all religions would be treated equally by the law of the land. But in today's Pakistan, religious discrimination has been made an integral part of the country's Constitution.

SABA WALLACE

There cannot be a bigger disadvantage for citizens of a State than being unequal in the eyes of the law. Modern day Pakistan is an example of how the State has allowed religious discrimination to fester within its constitutional framework. When the State fails to set examples of non-discrimination, certain elements in society take advantage of the situation in order to perpetuate injustice. To bring communities to a point where they talk about their similarities rather than their differences is difficult, especially if these rigidities are coupled with limited resources. Irrespective of who happens to be on which side of the divide, society begins to decline as a whole in such cases. Biases and prejudices in a political order find their links in race, colour, sex and religion to form a system of injustice. Several laws and regulations, especially the articles and provisions of the Constitution of Pakistan discriminate against religious minorities. While some provisions clearly treat Muslim citizens preferentially, the others completely ignore the fact that Pakistan is a multi-religious society.

SUBSTANTIVE LAWS

Laws that discriminate on the basis of religion are a source of human rights violations. The Commission of Inquiry on the Status of Women, constituted by the Pakistan Government in 1997 and the National Commission on the Status of Women in 2003, recommended the repeal of most of these laws:

- A Shariat Act was passed by Parliament in 1991, which made Shariah the "supreme law" of the land. The Act also protects outdated and redundant laws for religious minorities.
- Zakat and Ushar laws discriminate not only between non-Muslims and Muslims but also between Muslim sects. Deducting Zakat by the banks has caused division and discrimination among the citizens of Pakistan. Moreover, these taxes, according to interpretations, are not to be spent on the welfare of religious minorities.
- The Hudood and Zina Ordinance are part of the criminal law. It fails to make a distinction between rape and adultery. Moreover, the law makes religious laws and punishments applicable on non-Muslims, which are not part of their belief system.
- The Qisas and Diyat Ordinance (Shariat laws regarding homicide and blood money) are a part of the Pakistan Penal Code since 1990. Even though it has been criticised by eminent jurists and human rights activists and should not be applicable to non-Muslims.
- The Law of Evidence 1984 reduces the value of court testimony of a Muslim woman and non-Muslim citizen to half of that of a Muslim male, in cases constituted under Islamic laws.

- Many lives have been lost and hundreds of families have suffered due to blasphemy laws (Sections 295 - B & C, 298 - A, B & C), enforced gradually from 1980 to 1986. These laws are tools of persecution of religious minorities.

Although the separate electorate based on religious apartheid was abolished in 2004 after a struggle for two decades, it continued to be in practice in 2003 as far as local bodies system were concerned. There are also a number of regulations and policies biased against religious minorities like syllabus for educational institutions, government controlled media, concessions for jail inmates, admissions and filling vacancies.

PROHIBITION LAWS

Liquor was banned for Muslims in 1976 but non-Muslims were allowed to consume, purchase and manufacture liquor on special permits by rule under the Hudood Ordinance 1979. This law became a source of religious discrimination, as non-Muslims were seen as "officially catered for immoral acts" by the orthodox Muslims. A study of the reported cases in 1998/99 by the National Commission for Justice and Peace concluded:

- It is only hypothetical to say that prohibition laws have worked in Pakistan and it would be wishful thinking to maintain that these laws had any good impact on the society. However, there is no doubt about its adverse effect on non-Muslim citizens.
- The majority of liquor consumers are from the majority community and not the minority communities.

THE CONSTITUTION OF PAKISTAN

Although the extent of religious freedom may be measured by the State's basic document, the Constitution, the exercise and enjoyment of such a right is, however, dependent on the socio-political philosophy and socio-cultural environment that exists in the State. In the case of Pakistan, there has been tremendous drift downwards in the context of religious freedom. Its founders were clearer about providing religious freedom to the citizens during the freedom struggle when the new state of Pakistan emerged as a result of the partition of India. Muhammad Ali Jinnah, the father of the nation (Quaid-e-Azam), while giving his presidential address to the Constituent Assembly of Pakistan at Karachi on August 11, 1947 said,

"…I cannot emphasise it too much. We should begin to work in that spirit and in course of time all these angularities of the majority and minority communities, the Hindu community and the Muslim Community --- because even as regards Muslims you have Pathans, Punjabis, Shias, Sunnis and so on --- will vanish. Therefore, we must learn a lesson from this. You are free; you are free to go to your temples, you are free to go to your mosques or any other place of worship in this State of Pakistan. You may belong to any religion or caste or creed - that has nothing to do with the business of the State. …Now, I think we should keep that in front of us as our ideal and you will find that in course of time Hindus would cease to be Hindus and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in the political sense as citizens of the State."

The situation, however, changed soon after his demise in 1948. The infant nation fell prey to palace intrigues and hobnobbing of the politicians with the establishment. The vested interest took refuge in religion and used religious parlance in socio-political field. A radical change was introduced in the socio-political corpus through Objectives Resolution passed by the Constituent Assembly of Pakistan on March 12, 1949, which provided an Islamic base to the new state. This was a departure from the stand taken by the founders.

In order to examine the fundamental rights including religious freedom to the citizens, a brief reference to the three constitutions framed and enforced in 1956, 1962 and 1973 would be proper. The first two constitutions were abrogated by the martial law regimes. Gen. Zia-ul-Haq, the military dictator who captured power by overthrowing an elected government on July 5, 1977, held the 1973 Constitution in abeyance. After four interim and four elected governments, the country returned to military rule on October 12, 1999, under Gen. Pervez Musharraf. General elections were held in the country three years later. The National Assembly and the Provincial Assemblies of the four provinces have been elected and installed, the upper house, the Senate, was elected in early March 2003, and thus Parliament was supposedly complete as an elected legislature. However, power still rests with the President, who is the Chief of Army Staff and the head of the National Security Council. There are certain glaring discriminations within the Constitution.

- Article 2: Islam is the State religion…
- Article 41 (2): The head of the State has to be a Muslim…

- Third schedule Article 91 (3): The oath for Prime Minister suggests that this office is also reserved for a Muslim. He is required to declare his belief in finality of Mohammad (PBUH) as a Prophet, Quran and Sunnah.

The effects of such reservation mean that a State sets a bad precedent for its citizens by such a reservation. It sends an unequivocal message that the rule of merit can be compromised for the inclusion of the preferred and that the exclusion of minority religions is no vice. Furthermore, this exclusion, once underway, knows no bounds. It has created space for power politics making political stability an elusive dream. This is bound to happen when the very principle of the equality to all citizens is compromised in the Constitution itself. The trickle down effect of these Articles has had a detrimental effect on mindsets where religious intolerance is concerned with the majority refusing to accept the right of religious minorities to occupy even the pettiest of government jobs.

For example, there is a chorus heard every now and then by religious and sectarian organisations demanding removal of Ahmadis from "key posts". The consequence of such provisions and policies based on religious discrimination has also culminated in a drastic change in representation of religious minorities between the fifties and the nineties in the superior services, judiciary and administration. An in-depth look into the Constitution reveals further discriminations.

Article 227 clearly states that no law repugnant to Islamic injunctions, as expounded by the clergy, can be enforced in Pakistan. For the last 49 years a council of Islamic ideology, has been functioning in the country. The council has an advisory constitutional role. It had the Islamic sanction of a law till 1977 but was given the power of mandatory intervention when the amendments were introduced by General Zia's regime through Article 203 A-J. The Council neither had representation of religious minorities nor did it bother to take the sentiments and interest of religious minorities into account in its recommendations. Yet, the consequences of its actions are borne by the whole nation. The Government is entrusted to promote the Islamic way of life under Article 31. The Federal Shariat Court has power to declare any law defunct if repugnant to Islam and to suggest amendments in such laws under Article 31-D.

The federal Shariat Court is a parallel judicial system, whose utility remains unevaluated by a competent body. Its jurisdiction extends to the whole of Pakistan. A non-Muslim can neither be a Judge nor appear as a lawyer and witness in the federal Shariat Court. One can only be a petitioner whereas the petition is to be decided according to Islamic injunctions.

The religious minorities are an integral part of the Pakistani society. If they are to get justice under a currently undemocratic and anti-people set-up, the people of Pakistan need to raise their collective voice against this intolerance thereby giving way to a civilised and democratic society. It is only possible when they are willing to enforce it through their political struggle.

Although it is the political will of the people of Pakistan to redefine the ideological frontiers of the State, in order to ensure fundamental rights to citizens belonging to different religions, races, languages and cultures, the State will have to enact laws based on internationally acknowledged principles of legislation.

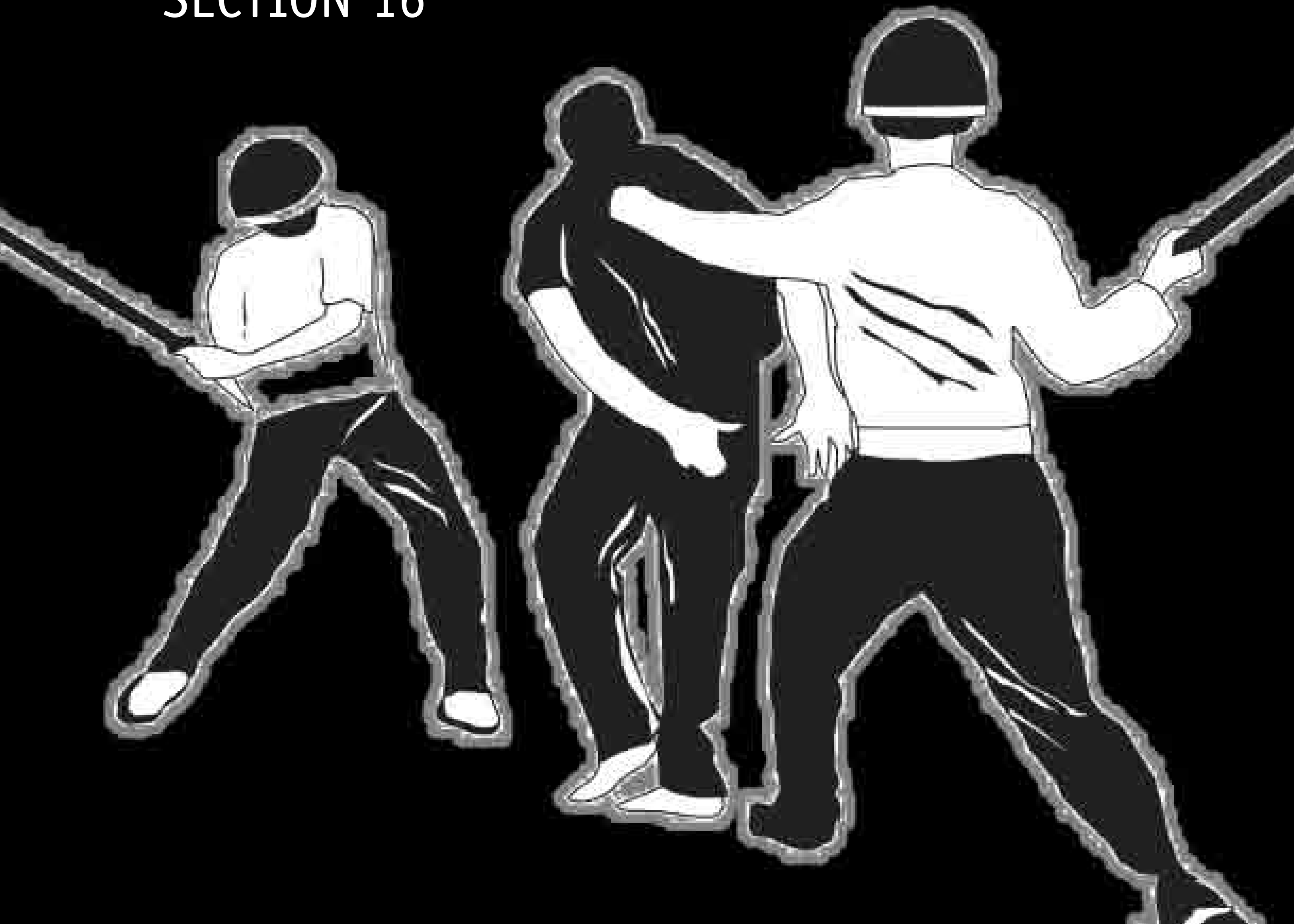
One of the first steps in this direction would mean striking down discriminatory legislations violating the religious, social, political, economic and cultural rights of minorities, repealing blasphemy laws which encourage religious persecution and educating people through the print and electronic media. The State's response towards sectarian violence has been pathetic and based on adhocism. If it is serious about building a civil society, it should change its policy of appeasement, ban Jihadi forces spreading hatred and violence with immediate effect and purge the educational curriculum of distorted history, literature of hate and religious extremism that has generated intolerance and violence in the society.

Religious minorities in Pakistan must recognise their roles as natural allies of the true democratic forces and understand that the only way of liberating themselves is through a joint political struggle. These minorities are an integral part of the nation and it is their natural and legitimate right to be part of the political system. To be able to join the mainstream of national political life, they must redefine their role in the political corpus, shun sectarian agendas and demand their rightful place in Pakistan.

— November-December 2005

In India there is a deafening demand for enacting new, more stringent legislations to tackle terrorism and violence by the radical left outfits. While more and more innocent persons have become victims of unrestrained police action, the conviction rate under even a draconian law like TADA has been abysmally low, below 2 percent in fact. The number of killings in response to terrorism, on the other hand, is exceptionally high. Tough laws encourage a corollary moral environment in which the threshold of tolerance for impunity by the state is raised, because the imperatives of the situation are deemed to require it. In effect, what it means is that the special laws do not prevent terror and rarely punish the guilty. If tougher laws could solve the problem, then why did it not prevent the terror attack on Parliament despite the fact that POTA was in place? Why did MCOCA fail to prevent 7/11 in Maharashtra? Why does militancy in northeast not subside despite 50 years of AFSPA. Why does Jammu & Kashmir periodically burst into flames?

SECTION 16



The Law of Terror

In the aftermath of the recent blasts in Delhi and other places there has been a concerted demand for a law that will help the state combat terror. The logic of this anti-terror doctrine, the validity of its central tenets and the efficacy of its use have to be questioned.

HARSH DOBHAL

Ever since its inception, Israel has implemented some of the most stringent counter terror measures having, perhaps, the most experience in this area than any other country in modern times. Soon after its establishment, the Jewish state enacted the Prevention of Terrorism Ordinance which, and subsequent enactments, produced the dreaded intelligence agency like Shin Bet, gave authorities immense prosecutorial powers to detain individuals and question (read torture) them, permitted the targeting of suspected terror areas and centres, and allowed the bombing of such areas (collateral damage became an acceptable norm), thus inflicting enormous damge on civilians. This ordinance was amended later to make it even stronger so that even sympathising with what the authorities perceived as terror groups was deemed illegal. Despite these severe measures in place, Israel lives in the shadow of dread and there is no respite from the barrage of lethal attacks that routinely take lives. In this tiny country, periodically in the grip of nation-wide fear, there is hardly anyone whose someone – an associate, a friend, brother, uncle, a distant relative, a close friend's colleague or a neighbour--has not been a victim of these attacks. Strong laws have demonstrably had no effect in stamping out terrorism.

If anything, Israeli citizens have paid a high personal price by accepting a drastic dilution of their basic liberties in this ineffectual fight against terrorism. They are often subjected to a high degree of surveillance over their daily lives. Searches of individuals and their belongings, screening, security checkpoints, CCTV cameras and constant monitoring of public and private spaces are routine. Such is the security mania in the country that at Tel Aviv airport all foreigners have to face a rigorous interrogation by security personnel and disclose all manner of personal details on travel plans, purpose of visit, contacts in Israel (and with Palestinians if any), sources of income and, if you happen to be a research student, the topic of your thesis, the reason for choosing the topic and even the chapterisation and conclusion of the study. If all such queries are not answered to the satisfaction of the security personnel or if they think they detect any nervousness, a more intensive grilling follows that could last for hours. This is the anatomy of everyday life in a besieged country that has gone to extraordinary lengths to cultivate an enemy.

Israel's human rights violation record and its anti-terror policies have been condemned world-wide and the country is still struggling to fight its isolation in international forums, including at the United Nations. The state has indulged in gross human rights violations of unparalleled magnitude against Palestinians, using coercive and ruthless methods of interrogation to gather information on terror activities and conducted assassinations of Hamas leaders in Palestine and of other targets even in other countries. Israel has often been accused of anti-Arab profiling. Democratic opinion across the world has repeatedly condemned the Israeli policies of economic sanctions, restrictions on Palestinian mobility, segregation of cities from cities, villages from villages and imposing immense hardships on ordinary Palestinians, crippling their economy, paralysing everyday life through the use of disproportionate force, including the deployment of tanks and missiles for destroying Palestinian civilian structures.

Despite such a zero tolerance approach to terrorism and an ostensibly near foolproof mechanism in place for decades, which has earned it international opprobrium, Israeli citizens continue to face terrorist threats on a daily basis. Not everybody in the country is an obsessive xenophobe or Arab hater. There is a whole generation that has only seen violence, like their parents have, and who want to carry on life in a normal way, in peace and harmony, without any suicide bombings or any draconian laws that pervade society and intrude into their daily lives. Though the Israeli state is an unabashed coloniser, what is generally lost sight of is the fact that ordinary people in the country want peace for themselves and with Palestinians, while their leaders, cutting across the political spectrum, continue playing on their fears for domestic political dividends. Even a left-of-centre party like Labour partakes of the same truculence as its more right wing counterparts, because the terms of politics in security matters are set by the latter. India is moving on a somewhat similar pattern.

While there cannot be any comparison between the political situation in West Asia and India, for Israel has been in conflict with the Palestinians since its establishment over issues like land, water and the future of millions of Palestinians, there is a family resemblance in the way in which enemies are perceived and how they are dealt with. The social pathologies of amplified fear are used to engineer a similar environment of extreme insecurity to politically validate the suspension of constitutional liberties and the targeting of innocents in the name of combating a menace that is permanently in the air. A chorus of demands from within civil society for harsh laws to empower the police and security forces to dangerous levels of lawlessness and vendetta can quite easily be orchestrated in an atmosphere of terror-induced insecurity. Therefore, the amplification of the perceived threat through official exaggerations and incessant re-runs of gruesome spectacles in the visual media can potentially lead to a grotesque Hobbesian contract by which society voluntarily surrenders its liberties and its freedoms to create an intoxicated Leviathan. This is where the parallels between India and Israel lie and these are surely not coincidental.

During the late 1990s, especially after the NDA government came to power, Indo-Israel strategic cooperation (including in the field of anti-terrorism) intensified, culminating in the visit of then home minister L K Advani and Jaswant Singh to the Jewish state in 2000. The composition of Advani's delegation had drawn much attention from media as it comprised heads of intelligence agencies, RAW, IB, and central police organisations fighting terrorism. Advani formalised Indo-Israeli cooperation in his meetings with the Mossad chief and Israeli ministers dealing with security. Israel was keen to support India's anti-terrorism efforts. There was a newly discovered convergence in threat perception shared by the two countries. Hence, the symmetries in the security environments of the two countries have a certain tangible kinship.

Advani's cabinet colleague Jaswant Singh, who had also visited Israel days before Advani, made energetic efforts to cement the growing ties between the two countries but reiterated New Delhi's continued support to the Palestinians for their "inalienable rights to reside in internationally-recognised territories." Singh also made a controversial remark in reply to a question at the Israeli Council of Foreign Relations on why India took so long to establish diplomatic relations with Israel. He blamed it on India's past politicians and their urge to cling to office with the backing of the Muslim votes saying that India's Israel policy became captive to domestic policy that came to be unwittingly an unstated veto on India's larger West Asia policy.

Jaswant Singh's remarks signified an obvious shift in India's West Asia policy and its increasing fondness for Israel. Long before he became a cabinet member of

the government that enacted POTA, Jaswant Singh had, in his 1988 article, "Beleaguered State" in the journal Seminar, offered the following trenchant criticism on the use of stringent laws in Punjab--

"Unfortunately, [the Indian] government is a classic example of proliferating laws, none of which can be effectively applied because the moral authority of the Indian government has been extinguished, and because the needed clarity of purpose (and thought) is absent. Not surprisingly, therefore, [the government] falls back to creating a new law for every new crime . . ."

There is something predictable but diabolical about Jaswant Singh's paradigm shift, who during the hijack of the IC-814 flight to Kandahar had personally escorted three terrorists in exchange for the lives of the hostages. Since then India has witnessed a spurt in terror attacks over the years and the recent sickening and morally repugnant explosions have generated an extraordinary climate of fear in a society conditioned to accepting the globally dominant narrative of terror and the overriding necessities it demands.

Post 9/11, post December 13, 2001, post 7/7 2005, post-September 2008, the Israeli model of fighting terror has increasingly gained currency among the mainstream of the international community, so much so that it is now the accepted global model. The central tenet of this doctrine is that terror attacks are perpetrated by irrational, hate-filled Muslim youth fanatically pursuing the dream of global jehad. The stereotype is now cast in stone, and like all stereotypes it relies on caricature and results in hate. It justifies retribution and repression and fulfils its own nihilistic prophecies, setting in perpetual motion an endless cycle that cannot be terminated by special laws.

Yet, today in India there is a deafening demand for enacting new, more stringent legislations to tackle terrorism. Such laws, curtailing fundamental rights, are driven by political expediency. Those demanding such laws should not forget that TADA, POTA, MISA had all to be repealed. Most of these laws already had their run without ending the threat of terror attacks or even minimising them. While more and more innocent persons have become victims of unrestrained police action, the conviction rate under even a draconian law like TADA has been abysmally low, below 2 percent in fact. The number of killings in response to terrorism, on the other hand, is exceptionally high. Tough laws encourage a corollary moral environment in which the threshold of tolerance for impunity by the state is raised, because the imperatives of the situation are deemed to require it. In effect, what it means is that the special law does not prevent terror and rarely punishes the guilty. If tougher laws could solve the problem, then why did it not prevent the terror attack on Parliament despite the fact that POTA was in place? Why did MCOCA fail to prevent 7/11 in Maharashtra? Why does militancy in northeast not subside despite 50 years of AFSPA. Why does Jammu ad Kashmir periodically burst into flames?

Stringent laws do not lead to superior intelligence nor to efficient prosecution. They just permit prolonged detention without proof of guilt. We rarely get to know who the perpetrators of such crimes are. As the BJP's Jaswant Singh, no less, pointed out 20 years ago, stringent laws have not solved the problem of terror attacks. Not in Israel, not in India, not anywhere else. We have to look for solutions elsewhere.

— September-October 2008

Binayak Sen:
Victim of State Vendetta

For over two months a civil rights champion has been behind the bars because of the arrogance of the powers-that-be in Chhattisgarh. This is because of the black laws being used by the State to cover up its misdeeds.

HARSH DOBHAL

Dr Binayak Sen, a human rights activist, a paediatrician and a public health doctor, was arrsted on May 14, 2007 in Bilaspur, Chhattisgarh. His crime: He and his organisation (People's Union for Civil Liberties - PUCL) had helped draw public attention to the unlawful killings on March 31, 2007, of several adivasis in Santoshpur, Chhattisgarh.

Sen was detained under provisions of the Chhattisgarh Special Public Security Act, 2006 (CSPSA), and the Unlawful Activities (Prevention) Act, 1967), which was amended in 2004 to include key aspects of the Prevention of Terrorist Activities Act (POTA), 2002.

A number of organsiations and individuals across the world have protested against the arbitrary arrest of Dr Sen following which a police probe into the incident was ordered on May 5. As is the pattern, the evidence was destroyed promptly. Bodies of the victims were exhumed in the week immediately preceding Sen's arrest. Autopsy report has confirmed that three of the victims were hit on the head and waist by bullets at close range. Others had been brutally axed to death. Police have been quoted as admitting that it was "certain that some police personnel crossed the limits and killed innocent villagers branding them as Maoist militants... Now the government has to decide whether the cops involved in killings should be arrested or not." However, a minister from chattisgarh has ruled out any arrest of any police personnel involved in the ghastly killings of the innocents.

Binayak Sen's arrest has once againg raised disturbing questions regarding threats, harassment and intimidation by the State against those who defend and protect human rights. The rights to freedom of expression, association and assembly are fundamental human rights. Activists continue to be targeted for harassment and intimidation by state officials. Their activities, their rights to freedom of expression, association and assembly are being restricted.

What was wrong in what Sen, vice president of the PUCL, was trying to highlight? In his capacity as an active member of the PUCL, he has helped organise numerous fact finding missions into human rights violations that included extra-judicial killings, tortures, rapes and unlawful detentions. Sen was actively pursuing these investigations and high-handedness of the State, including cold-blooded murders of unarmed civilians by police and government-backed 'Salwa Judum'. Sen and his organisation has been on the forefront of chronicling

fake encounters, rapes, burning of villages, displacement of Adivasis and loss of their livelihoods. He has always stood against senseless killings and advocated for peaceful methods

Dr Sen's arrest is clearly an attempt to intimidate human rights activists and democratic voices that have been speaking out against rights violations. In recent days, the targets of state harassment have widened to include Dr Ilina Sen, who for years has been active in the women's movement, Gautam Bandopadhyaya of Nadi Ghati Morcha, PUCL's Rashmi Dwivedi, and other activists of PUCL in the region.

Dr Sen has been involved in many other activities. He is renowned for extending health care to the poorest of the poor, a dwindling tradition among health professionals in India. For the past 30 years, he has been promoting community rural health care centres in the country. He helped to set up the Chhattisgarh Mukti Morcha's Shaheed Hospital, a pioneering health programme for the region. The hospital is owned and operated by a workers' organisation for the benefit of all, regardless of caste or other distinctions.

Dr Sen is an advisor to Jan Swasthya Sahyog, a health care organisation committed to developing a low-cost, effective, community health programme in the tribal and rural areas of Bilaspur district of Chhattisgarh. He was also a member of the state advisory committee set up to pilot the community-based health worker programme across Chhattisgarh, later well-known as the Mitanin programme. He also gives his services to a weekly clinic in a tribal community.

His arrest is a grave assault on the democratic rights movement in India. Democratic voices across the globe have stood up in defence of Dr Sen and other human rights activists. Noam Chomsky headed a list of prominent persons issuing a press statement on June 16, 2007. "Dr Sen has been detained under the Chhattisgarh Special Public Security Act, 2006 and the Unlawful Activities (Prevention) Act, 2004 on charges that are completely baseless. Both these extraordinary laws have been criticised by numerous civil rights groups for being extremely vague and subjective in what is deemed unlawful, and for giving arbitrary powers to the State to silence all manners of dissent."

Protests against Dr Sen's arrest has been joined by other prominent personalities such as Nobel Prize winner Amartya Sen, Magsaysay Prize winner Aruna Roy, Booker Prize winner Arundathi Roy, retired Chief Justice Rajindar Sachar of the Delhi High Court, film maker Shyam Benegal and many eminent medical professors and scientists in India, the USA, the United Kingdom, Australia and elsewhere.

Sen remains in police custody till date. Chhattisgarh High Court has rejected his bail. Human rights activist like Mr Sen form the backbone of a vibrant democratic struggle. Strangely, the State does not look upon such activists as partners in the democratic process. They are periodically targeted, subjected to a suspicion, hostility and vendetta. More often, they are also perceived as threats to the "national interest."

Consequently, individuals, organisations, lawyers, journalists, and physicians, among other freedom and justice loving persons find themselves at considerable risk when they take on issues dubbed as 'sensitive' by the government. Nothing can illustrate this more conclusively than Dr Binayak Sen's recent unjustified and illegal arrest under some of the black laws that the state opted for the sake of expediency.

— July-August 2007

Impunity Impairs Indian Constitution

How can the blinding of prisoners in Bhagalpur, extra-judicial killings in Punjab and Jammu and Kashmir, or police encounters elsewhere have the tacit approval and complicity of the State even while the culprits escape the logic of punishment.

K G KANNABIRAN

Impunity Perhaps no word defines the experiences of Latin America so well as this one. Lack of punishment, of investigation, of justice. The possibility of committing crimes — from common robberies to rape, torture, murders – without having to face, much less suffer, any punishment. And therefore, the implicit approval of the morality of these crimes. Forgiving and forgetting without remembering – or remembering too well, but not caring. What is forgotten can easily be repeated. And what is done without any punishment, can be repeated without fear. In somewhat Latin American fashion that it had social sanction. We were then confronted with long periods of imprisonment without trial. Then we had the Justice Bhargava Commission into deliberate liquidation of Naxalites in the name of encounters. Chaitanya Kalbagh, then with India Today, gave details of around 1,200 persons killed in fake encounters in UP and the justification offered was that they were all dacoits. Walter Thevaram shot into the news from Madras for brutally putting to end young persons, allegedly Naxalites. Chaitanya Kalbagh and SV Rajadurai, a well-known writer from Chennai, filed writ petitions in the Supreme Court. In Andhra Pradesh it has been a continuous campaign. Life and liberty, as constitutional values, appealed neither to the executive or the judiciary ever. Quite a few hundreds of Bengali youth were killed to put down the nascent movement and SS Ray, a central minister without portfolio then, is alleged to have played a leading role. In Punjab, quite a few hundreds were picked and shot and quite a few hundreds disappeared. An audit of bodies cremated by the police was undertaken by Jaswant Singh Kalra, who himself disappeared. The PIL pending in the Supreme Court was transmitted to the NHRC and is still pending there. There is no need to enquire into governmental impunity—the records are available. Quite a large number of human rights defenders were killed under the pretext that they were supporters of militancy/terrorism.

Post-emergency there were several other commissions looking into several other misdeeds in the name of governance. Neither the governments nor the people learnt anything from these. The fractured Rule of Law of the Emergency days lingers even today. The institutional destruction that the Emergency inflicted was never repaired. No institution is functioning as the Constitution contemplated. Nobody is willing to do a political or a moral reading of the Constitution. Though I have borrowed the idea of a "moral reading of the Constitution" from Ronald Dworkin, I am not using it in the sense in which he used it. I am using this in the context of the Preamble, the Fundamental Rights, the Directives Principles and the Fundamental Duties laid down by our Constitution. Politicians do not relate their activities, or their programmes to the Constitution. Public servants do not think that the duties and tasks assigned to them are related to the Constitution. This failure to restructure institutions has led to all-round impunity we are witnessing today

Police, as the law-enforcing arm of governance, can, if intelligently used, inculcate the habit of legality among the people. As the democratic content in governance was diminishing, the sanction of impunity to the law-enforcing agency was on the rise. We have established

that for the police to enjoy total impunity we need not have a dictatorship governing us. Under our Constitution blocking the limited scope for bringing about social transformation is fascism. In a pluralistic society like ours not allowing the minorities to grow and develop in equality, where every member of the minority community has a right to be treated as equal, would be fascism. The concept of fraternity and human dignity emphasises substantive and not formal equality. In a country teeming with obscurantist oppressive religious and caste practices, not allowing women, Dalits and backward castes to progress and develop into complete human beings with an equal and effective role in all decision—making processes despite Article 14, 15 and 16 would be fascism. Any effort to perpetuate the status quo would be fascism and the means to enforce fascism has always been sanction of impunity to the law enforcing agencies.

In India, the vulgarised caste structure, which repressed the backward and scheduled castes for centuries, has adopted a western liberal Constitution, has produced its own variety of distorted democracy that has transposed authority, not yet freed from its religious connotations and the impunity prevalent in a hierarchically dominant caste system and has produced what I would call "parliamentary fascism". Elections do not make any difference to the political party which inflicted brutalities. Delhi killed quite a few thousands of the Sikh community members and the killers were elected. Mumbai after Babri Masjid killed quite a few thousands of Muslims and Srikrishna Commission did not inflict even a dent either in Bal Thackeray's following or the BJP, the architect of the destruction of Babri Masjid. Gujarat is yet another example where impunity reigns.

Gujarat is a state where constructional democracy is incarcerated, where the chief minister's party peers and their supporters are praising his non-existent achievements. It is reminiscent of what we read in school -- the emperor's robes. Quite a few thousands were killed, cut into four and consigned to flames, causing disappearance of evidence of the genocide. Old religious places of worship were demolished and roads laid over them. The chief minister has his well organised mafia to swing into action and this is what silences the people and reading the Constitution legally we can always argue that the first three freedoms also would mean freedom not to speak, not join an association and not to be a party to any meeting or assembly! In all these areas Rule of Law is not allowed to operate but where it does it is all allowed to function by fits and starts.

In the State of Andhra Pradesh for over four decades killing people in custody or summary extra-judicial executions of extra parliamentary political dissent has become part of the administrative system. The police set-up rather than political leaders decides what is good politics for the people. Any debate about this is kept away from the national press and national debate. The State has been able to manage its murders beautifully. It is important to realise that impunity and democratic governance have an inverse relationship.

The armed forces and the paramilitary forces in Jammu and Kashmir have for over 50 years employed impunity. People's protests against impunity was never heard by the rest of the country and only when peace process emerged that we are hearing of extra-judicial killings and editorials are written about the recent outbursts against such killings. Impunity destroys living condition by spreading fear to even complain against visible injustices. Impunity has destroyed the beautiful landscape and its people and transformed Emperor Jehangir's couplet to 'if there is hell on earth, this is it"

North-eastern states have always been occupied territory coexisting with our brand democracy. We are so used to parliamentary fascism that recently a committee under a former Supreme Court Judge was appointed to suggest some measures for improving the conditions in the north-eastern states. The committee recommended not only the repeal of the Special Armed Forces Act but also asked to incorporate the provisions of the Unlawful Activities Prevention Act as amended in 2004. I do not think that they looked into the Report of the Constitutional Review Committee on the north-east.

In this background of impunity the Malimath Committee was appointed by the BJP when it assumed the captaincy of the NDA and ruled for a full term. This committee was headed by Judge Malimath ably assisted by a known jurist and a pioneer in setting up of elite law institutions among others. In the report of the committee there is no reference to impunity. One major, almost path breaking recommendation they made, is that the major premise of criminal justice should be pursuit of truth. A justice system of this world cannot set itself the task of pursuit of truth. Whose truth is it anyway? Unable to answer the question posed by the Procurator

of Judea after conviction of Jesus Christ, jurists never contemplated pursuit of truth as goal of any adjudicating tribunal. It has always been investigation of facts leading to an offence. It is a very haphazard treatment of criminal reform hurriedly brought together and presented to the then home minister and deputy prime minister. The elitist jurists and the police intellectuals are trying to push in these recommendations. And as for police reforms, instead of reforming the police, the government has set about the task of giving more powers to the police. If the police reforms do not address the question of impunity, they are not going to be reforms worth the name. What is needed is a complete check on impunity.

We are strengthened in our resolve by the Resolution of the parliamentary Assembly of the Council of Europe on 18 April 2007 at Strasbourg that calls for a "zero tolerance " of Human Rights violations. But that cannot be possible as long as there is no political will to tackle the culture of impunity. The clear outcome of impunity is denial of justice to the victims. The report was in the context of European countries. But it is timely. We made it clear in Response to Police Reforms Drafting Committee, which is as follows:

"Black's *Legal Dictionary* quotes just a Latin Maxim and translates it into English, which reads, "Impunity confirms the disposition to commit crimes." This disposition is not sanctioned by any Constitution, any law, or any international covenant either before the Universal Declaration of Human Rights or after it. Yet this "disposition to commit crimes" has become the unfailing habit of almost all the governments in the world including Indian government.

"As we are concerned with the "disposition to commit crimes" by our government we wish to point out that we have still a live Constitution, despite some unsuccessful attempts to change it, which grants us only a limited government. The Constitution not only places limitations on governance but on all the instrumentalities of the State in so far as the peoples rights and the State's fundamental obligations are concerned. The governments' "Disposition to commit crimes" has become endemic and also unbounded. It ranges from a very covert act to the overt act of mauling and killing. Any Police Act should in our view eliminate this disposition to commit crime. In our view if you can liberate the police and paramilitary forces from this ugly (needless to say unconstitutional) disposition to commit crimes order will be restored and Rule of Law will run on Schedule. Special courts and special laws are necessary for governing a subject population which is always suspected to be in preparedness for a revolt, but not a democracy with a functioning Constitution. In fact, special laws and special courts are placebos, which governments offer despite knowing that they will be ineffective and are enacted only to enhance the content of impunity in themselves'"

As long as the government does not wean away the public servant from the disposition to commit crimes, the present state of disorder will continue in more aggravated forms. This will be more so if the government does not bring in a pluralistic egalitarian transformation provided for by the Constitution. The government should abide by the fundamental freedoms more particularly Article 14 and 21. The direct consequence of pig-headed governance is terrorism. There is no point in crying hoarse against terrorism for that will be the only answer to the State with a quasi-militaristic disposition. We also set out below the international efforts made to tackle this problem of impunity in governance, if only to understand the magnitude of the problem and possibly act to preserve the constitutional value system and democratic practices.

Impunity has become an endemic problem in several countries across the world and the Parliamentary Assembly of the Council of Europe adopted the Report recommending zero tolerance to human rights violations. The Human Rights Commission in October 1997 adopted Revised final report prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119. I am setting out the resolution in full so that we may realise the ugly distortions that were treated as governance and this can also provide guidelines for conduct for eliminating impunity and make governance constitutional.

In its forty-third session (August 1991), the sub-commission requested the author of this report to undertake a study on the impunity of perpetrators of human rights violations. Over the years, that study has revealed that the process by which the international community has become aware of the imperative need to combat impunity has passed through four stages.

FIRST STAGE

During the 1970s, non-governmental organisations, human rights advocates and legal experts and, in some

countries, the democratic opposition - when able to state its views - mobilised to argue for an amnesty for political prisoners. This was typical in Latin American countries then under dictatorial regimes. Among the pioneers were the Amnesty Committees in Brazil, the International Secretariat of Jurists for Amnesty in Uruguay (SIJAU) and the Secretariat for Amnesty and Democracy in Paraguay (SIJADEP). Amnesty, as a symbol of freedom, would prove to be a topic that could mobilise large sectors of public opinion, thus gradually making it easier to amalgamate the many moves made during the period to offer peaceful resistance to or resist dictatorial regimes.

SECOND STAGE

This stage occurred in the 1980s. Amnesty, the symbol of freedom, was more and more seen as a kind of "insurance on impunity" with the emergence, then proliferation, of "self-amnesty" laws proclaimed by declining military dictatorships anxious to arrange their own impunity while there was still time. This provoked a strong reaction from victims, who built up their organisational capacity to ensure that "justice was done", as would be shown in Latin America by the increasing prominence of the Mothers of the Plaza de Mayo, followed by the Latin American Federation of Associations of Relatives of Disappeared Detainees (FEDEFAM), which later fanned out onto other continents.

THIRD STAGE

With the end of the Cold War symbolised by the fall of the Berlin Wall, this period was marked by many processes of democratisation or return to democracy along with peace agreements putting an end to internal armed conflicts. Whether in the course of national dialogue or peace negotiations, the question of impunity constantly cropped up between parties seeking to strike an unattainable balance between the former oppressors' desire for everything to be forgotten and the victims' quest for justice.

FOURTH STAGE

This was when the international community realised the importance of combating impunity. The Inter-American Court of Human Rights, for example, in a ground-breaking ruling, found that amnesty for the perpetrators of serious human rights violations was incompatible with the right of every individual to a fair hearing before an impartial and independent court. The World Conference on Human Rights (June 1993) supported that line of thinking in its final document, entitled "Vienna Declaration and Programme of Action" (A/CONF.157/24, Part II, Para. 91). This report therefore comes under the general heading of the Vienna Programme of Action. It recommends adoption by the United Nations General Assembly of a set of principles for the protection and promotion of human rights through action to combat impunity.

SET OF PRINCIPLES

The following three sections summarize the overall presentation of the set of principles and their justification in reference to victims' legal rights:

(a) The victims' right to know
(b) The victims' right to justice and
(c) The victims' right to reparations

In addition, on a preventive basis, a series of measures aimed at guaranteeing the non-recurrence of violations.

THE RIGHT TO KNOW

This is not simply the right of any individual victim or closely related persons to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a "duty to remember", which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negotionism; the knowledge of the oppression it has lived through is part of a people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right.

Two series of measures are proposed for this purpose. The first is to establish, preferably as soon as possible, extra-judicial commissions of inquiry, on the grounds that, unless they are handing down summary justice, which has too often been the case in history, the courts cannot mete out swift punishment to torturers and their masters. The second is aimed at preserving archives relating to human rights violations.

E-J COMMISSIONS OF INQUIRY

These have two main aims: first, to dismantle the machinery which has allowed criminal behaviour to be-

come almost routine administrative practice, in order to ensure that such behaviour does not recur; second, to preserve evidence for the courts, but also to establish that what oppressors often denounced as lies as a means of discrediting human rights advocates all too often fell short of the truth, and thus to rehabilitate those advocates.

Experience shows that care must be taken not to allow such commissions to be diverted from their purpose and to furnish a pretext for not going before the courts. Hence the idea of proposing basic principles, derived from a comparative analysis of past and present commissions' experience, without which commissions risk losing their credibility. These principles relate to the following four main areas.

INDEPENDENCE AND IMPARTIALITY

Extra-judicial commissions of inquiry should be established by law. They may be established by an act of general application or treaty clause in the event that the restoration of or transition to democracy and/or peace has begun. Their members may not be subject to dismissal during their terms of office, and they must be protected by immunity. If necessary, a commission should be able to seek police assistance, to call for testimony and to visit places involved in their investigations. A wide range of opinions among commission members also makes for independence. The terms of reference must clearly state that the commissions are not intended to supplant the judicial system but at most to help safeguard memory and evidence. Their credibility should also be ensured by adequate financial and staffing resources.

SAFEGUARDS

Testimony should be taken from victims and witnesses testifying on their behalf only on a voluntary basis. As a safety precaution, anonymity may be permitted subject to the following reservations: it must be exceptional (except in the case of sexual abuse); the chairman and a member of the commission must be entitled to examine the grounds for the request of anonymity and, confidentially, ascertain the witness' identity; and reference must be made in the report to the content of the testimony. Witnesses and victims must have psychological and social help available when they testify, especially if they have suffered torture or sexual abuse. They must be reimbursed the costs of giving testimony.

GUARANTEES

If the commission is permitted to divulge their names, the persons implicated must either have been given a hearing or at least summoned to do so, or must be given the opportunity to exercise a right of reply in writing, the reply then being included in the file.

PUBLICITY FOR THE REPORTS

While there may be reasons to keep the commissions' proceedings confidential, in part to avoid pressure on witnesses and ensure their safety, the commissions' reports should be published and publicised as widely as possible. Commission members must enjoy immunity from prosecution for defamation.

PRESERVING ARCHIVES

The right to know implies that archives must be preserved, especially during a period of transition. The steps required for this purpose are:

(a) Protective and punitive measures against the removal, destruction or misuse of archives

(b) Establishment of an inventory of available archives, including those kept by third countries, in order to ensure that they may be transferred with those countries' consent and, where applicable, returned

(c) Adaptation to the new situation of regulations governing access to and consultation of archives, in particular by allowing anyone they implicate to add a right of reply to the file

THE RIGHT TO JUSTICE

This implies that all victims shall have the opportunity to assert their rights and receive a fair and effective remedy, ensuring that their oppressors stand trial and that they obtain reparations. As pointed out in the preamble and in the set of principles, there can be no just and lasting reconciliation without an effective response to the need for justice; as a factor of reconciliation, forgiveness, insofar as it is a private act, implies that the victim must know the perpetrator of the violations and that the latter has been in a position to show repentance. For forgiveness to be granted, it must first have been sought.

The right to justice entails obligations for the State: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them. Although the decision to prosecute is initially a State responsibility, supplementary procedural rules should

allow victims to be admitted as civil plaintiffs in criminal proceedings or, if the public authorities fail to do so, to institute proceedings themselves.

As a matter of principle, it should remain the rule that national courts have jurisdiction, because any lasting solution must come from the nation itself. But all too often national courts are not yet capable of handing down impartial justice or are physically unable to function. The delicate question then arises of the jurisdiction of an international court: should this be an ad hoc court, like those established to deal with violations in the former Yugoslavia or Rwanda, or a standing international court such as is proposed in a document currently before the United Nations General Assembly? Whichever solution is finally adopted, the rules of procedure must satisfy the criteria of the right to a fair trial. Those trying the perpetrators of violations must themselves respect human rights.

Lastly, international human rights treaties should include a "universal jurisdiction" clause requiring every State party either to try or to extradite perpetrators of violations. The necessary political will is still essential, of course, to enforce such clauses. For example, humanitarian provisions in the 1949 Geneva Conventions or the United Nations Convention against Torture have scarcely ever been applied.

RESTRICTIONS

Restrictions may be applied to certain rules of law in order to support efforts to counter impunity. The aim is to prevent the rules concerned from being used to benefit impunity, thus obstructing the course of justice.

PRESCRIPTION

Prescription is without effect in the case of serious crimes under international law, such as crimes against humanity. It cannot run in respect of any violation while no effective remedy is available. Similarly, prescription cannot be invoked against civil, administrative or disciplinary actions brought by victims.

AMNESTY

Amnesty cannot be accorded to perpetrators of violations before the victims have obtained justice by means of an effective remedy. It must have no legal effect on any proceedings brought by victims relating to the right to reparation.

This UN Human Rights Commission proceeding should strengthen the courts and the human rights activists and organisers resolve to fight against impunity. Courts may use the above as guidelines.

— July-August 2007

Sharmila is not alone in her struggle. Women in the northeast have a history of concerted political action, intense resistance and sacrifice, especially the great mothers of Manipur. Sharmila is continuing that legacy, taking it to new heights.

How Many Days Must a Woman Fast Before She's Free...

Six years of satyagraha. Sharmila continues her fast, in custody, confined to a room in AIIMS, writing poetry, reading books, doing yoga. The struggle against AFSPA continues in Manipur and in Delhi.

HARSH DOBHAL

New private ward. All India Institute of Medical Sciences (AIIMS), New Delhi. As you enter the building, about a dozen policemen and intelligence personnel stop you. After seeking permission from a reluctant inspector, about five suspicious and armed policemen stationed at the door of room number 57 carry on the interrogation and more questions follow.

Inside the room, a frail young woman is lying on her back on the hospital bed in a rather awkward position. She is doing halasan, a plough position of yoga. Her body carefully covered with a blue blanket. Clean complexion, sharp eyes, unkempt hair and a white strip of medical tape around her nose. Che Guevara's The Motorcycle Diaries is next to her head; she has just finished reading the celebrated book on his young journeys by the legendary revolutionary. "This is a very good exercise for kidneys and to cure diabetes. I do it everyday for few hours." She talks and continues her yoga. "You can talk; it doesn't matter if I am doing yoga."

A voracious reader, she has been relentlessly reading books on Japanese folk tales, yoga, Nelson Mandela, Che, Gandhi. Friends have been coming with gifts, diaries, calendars and she looks forward eagerly to pass these on to other visiting friends, her personal life being intensely sparse, stoic and simple. She liked reading the biography of Nelson Mandela and has now sent it to the central library of Manipur, along with the other books she happens to come across.

Irom Sharmila Chanu, 34, poetess, painter and Gandhian activist from Manipur, has been on fast-unto-death since November 4, 2000, being force-fed through a pipe in her nose. Her categorical demand — repeal the Armed Forces Special Powers Act, 1958 (AFSPA) which gives draconian powers to the security forces, who have used the Act brutally and repeatedly in the northeast. Having completed six years of this 'satyagraha fast' on November 4, this year, Sharmila has come to symbolise the steadfast scaffolding of the movement against the injustices committed under AFSPA and in support of the protracted struggle for justice, human rights and peace in Manipur and the northeast. An iconic legend in Manipur's politics, her fast is perhaps the longest political protest of its kind in history and in any part of the world.

Irom Nanda and Irom Sakhi Devi of Kongpal Kongkham village, on the periphery of Imphal, had no idea what was in store for their daughter, the youngest among nine siblings (five brothers and four sisters) and dearest to all, when she was born on March 14, 1972. "I am the youngest daughter born to an illiterate, compassionate and strong mother — we were nine children, my eldest brother died due to an illness. I am not important for this world, just like a worm that can be crushed. I failed my class XII exam. I don't like speaking too much, but it is inevitable when someone comes to conduct an interview," she told a friend who has been attending her in hospital. Sharmila never went to college.

On the first day in hospital after regaining little strength, Sharmila said that she did not need assistance to wash her clothes. "This is my work. I must keep my muscles strong. In Manipur, I cleaned the floor of my cell each day." She has basically remained in custody all these years.

As a 15-day-old child, Sharmila was fed with boiled rice juice as her mother could not breastfeed her. Few days later, brother Singhajit would take her to "other mothers" in the neighbourhood who had recently given birth to babies. "She was fed by many mothers of Manipur. If any woman came to our small grocery shop with a small baby, we would request her to feed Sharmila," he says. "Perhaps that is why she has grown so socially conscious and politically committed."

As she grew up and "when I look back now, I realise I had a few different habits as a child. I used to sit in the Shiva temple, close to my house, and talk about regular, everyday things," says Sharmila.

When doctors at AIIMS insisted that she must seek discharge from the hospital and the police complicated the issue by saying she would not be allowed out, she realised these were nothing but pressure tactics. Anguished that the doctors would ask her to pay the hospital bill, she told a friend: "What do they want from me? I possess nothing, only my organs." As expected, the hard years of continuous fasting have taken their toll on her health and her fasting is now having a direct impact on her body's normal functioning. Apart from other medical problems she has developed, her bones have reportedly become brittle. The doctors at AIIMS have not released any medical report on her health.

"I need to keep myself healthy. The force-feeding is completely unnatural." She walks for about two hours, if given permission, in the hospital corridor with at least one security personnel stationed at each side of the corridor. "I must be strong. I have to fight." Apart from learning shorthand, Sharmila has also completed a course in yoga and naturopathy.

When she began her fast on November 4, 2000, most people had little inkling of her resolve. Some of them shrugged it off, others took it non-seriously, a handful ridiculed it. But for Sharmila, life had taken a different turn, a tough long-distance journey with a clear destination, a U-turn with no return ticket.

The decision to go on long fast, though well-thought over, was not an action planned well in advance. In fact, Sharmila had joined the anti-AFSPA movement just two weeks before she began fasting. A three-member Indian People's Inquiry Committee (IPIC) headed by Justice H Suresh had visited Manipur in the second week of October in 2000. The committee travelled to various areas of Manipur and met a number of victims, their relatives and friends, to hear their tales of injustice – cases of rape, violence, killings and disappearances. It held workshops and extensive discussions with human rights lawyers, journalists, academics and others. Sharmila was a part of this process as a volunteer and that was her first political participation and initiation. During the IPIC investigations, she was particularly shaken by the testimony of a young girl who was raped by the security forces at Lamden village. Sharmila and two other women volunteers had privately talked to the girl.

As the IPIC completed its investigations by the third week of October, something had already sparked inside Sharmila's soul by now. For the next few days, she met with several human rights activists, lawyers and journalists to learn more about repressive laws, army atrocities and AFSPA in particular.

On November 2, 2000, security forces fired at and killed 10 innocent people waiting at a bus stop at Malom, about 15 km from Imphal. That was a Thursday when Sharmila would observe her weekly fast since her childhood. "The same fast continues till date, though she declared it on November 4," brother Singhajit informs.

Though there was nothing new for the people in Manipur about the Malom massacre as they had witnessed similar cold-blooded killings before when the security forces would go berserk and kill ordinary people, Sharmila could not bear the sight of the blood spilled

on the street. That single event changed her life. By now she had already taken a decision. She went to her mother on the evening of November 4 and took her blessings "to do something better for the people". That was the last time the mother and daughter saw each other. "My mother knows everything about my decision. She is extremely simple, but she has the courage to let me do my bounden duty… My mother has given me her blessings. If I meet her, it may weaken both of us." Ever since, Sharmila has not combed her hair, not looked into the mirror and not a single drop of water has crossed her mouth. She cleans her teeth with dry cotton.

Armed with her mother's blessings, Sharmila headed straight to the site of the bloodbath. And thus began her historic, peaceful fast. By November 21, she was arrested on charges of 'attempt to suicide'. The administration began force-feeding her nasally, confining her to the Jawaharlal Nehru Hospital in Imphal. It has been six years since. Under judicial custody, she has refused to break her fast or seek bail. As is the pattern, on the completion of one year, she is released by the court, as the maximum sentence given to her for 'attempting suicide' can't exceed one year. She is repeatedly rearrested within 2-3 days as she continues her fast without water. And this yearly cycle continues, till date.

"I was shocked to see the dead bodies. There was no means to stop further violations by the armed forces…. It (fast) is the most effective way because it is based on a spiritual fight… My fast is on behalf of the people of Manipur. This is not a personal battle, it is symbolic. It is a symbol of truth, love and peace," she says.

This year, on October 3, as she was again released by the court, her brother and a friend kept her away from the media limelight for one night. Next day, dodging media and security personnel, they literally smuggled her out of Manipur. She landed in Delhi the same day, in an attempt to highlight the issue nationally. From the airport, she headed straight to Rajghat to pay homage to Mahatma Gandhi's <samadhi>. "If Gandhiji were alive today, he would have launched a movement against the AFSPA. My appeal to the citizens of the country is to join the struggle against AFSPA," Sharmila told journalists. Later that day, Sharmila went to Jantar Mantar and continued her fast with a stream of people coming to express support. Three days later, in a midnight swoop, police picked her up and admitted her in AIIMS.

Sharmila is not alone in her struggle. Women in the northeast have a history of concerted political action, intense resistance and sacrifice, especially the great mothers of Manipur. Sharmila is continuing that legacy, taking it to new heights. The state erupted in flames in 2004, after the brutal rape and murder of a young woman activist, Thangjam Manorama Devi, by the Assam Rifles personnel. The brutal incident triggered an unprecedented form of protest by Manipuri women that shook the nation's conscience. In an attempt to draw the attention of an insensitive and cold-blooded security and political establishment in Imphal and Delhi, otherwise obsessed with giving its army and police unrestricted powers in the name of national security, Manipuri mothers, for the first time, turned to their bodies to give vent to their resentment. They bared themselves in front of the Assam Rifles headquarters in Imphal and challenged the army to rape them. "Come Indian Army, Rape Us," said their banner, as they protested, fully naked.

Meanwhile, Sharmila continues her fast, in custody, confined to a room in AIIMS, writing poetry, reading books, doing yoga. The struggle against AFSPA continues. In Manipur and in Delhi. Indomitable, firm and resolute, Sharmila's clarity is lucid; she is in no mood to turn back. "Unless and until they remove the AFSPA, I shall never stop my fasting."

In her satyagraha for truth and justice, in her pain and suffering against the violence of the State against its own citizens, this gutsy woman is trying to make a simple point. But will the 'largest democracy in the world' ever get this message and act – for the sake of humanity?

— November-December 2006

The Mask

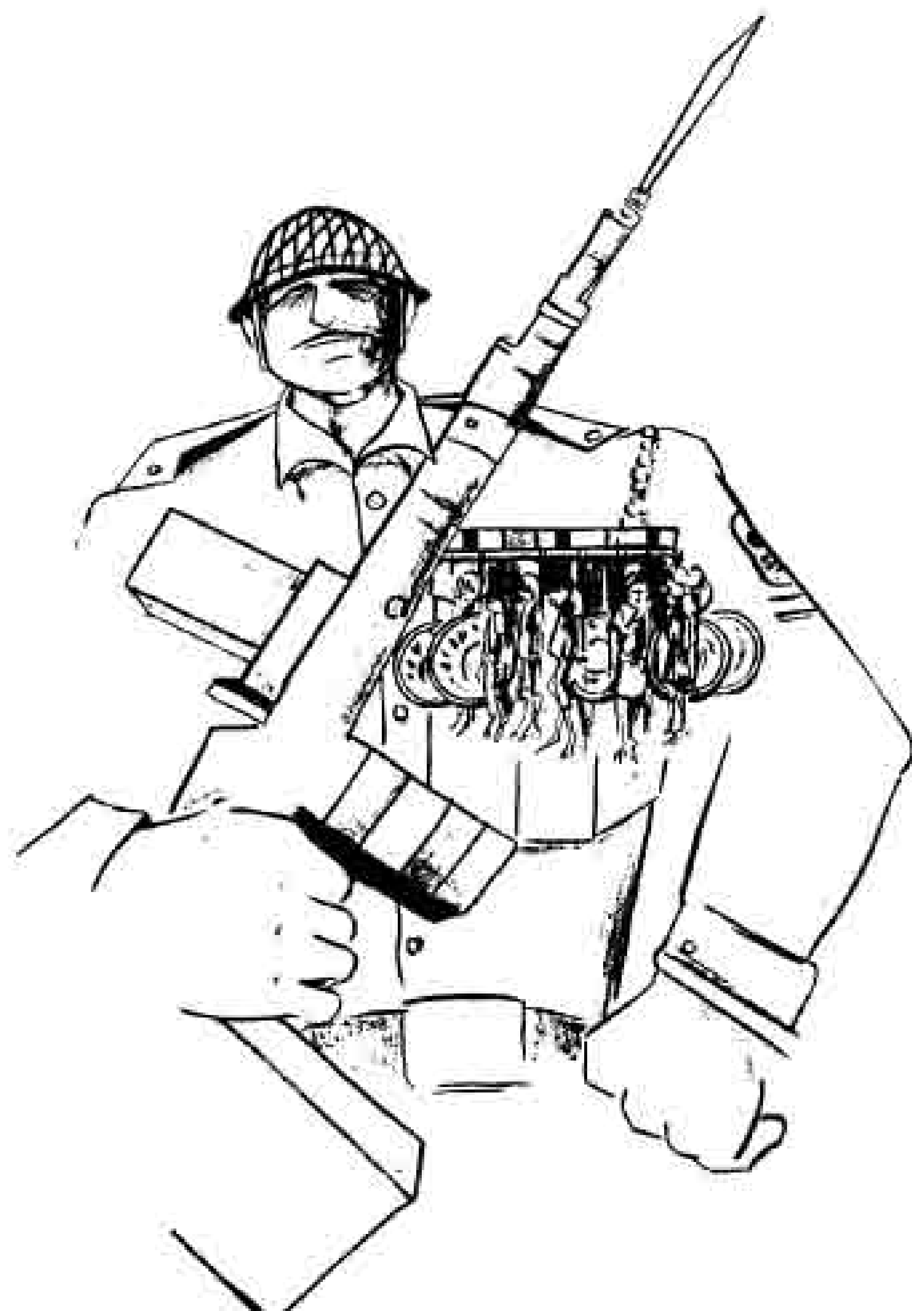
The battle against AFSPA is one for democracy. It must not be allowed to become a pretext for further shrinking of our democratic spaces. And this is precisely what the Jeevan Reddy Committee is trying to do.

MANISHA SETHI

You can feel the cold hand of fear grip you every evening in Imphal. The roads are deserted, save for the armed patrols, their guns ready and pointing. It is December 2004, barely months after the gruesome rape and murder of Thangjam Manorama and the tumultuous protests that rocked the state in its aftermath. A team of students, academics and activists are in Manipur to investigate what AFSPA means at ground level. An endless litany of unspeakable brutality—a school boy's brains splattered on the bus stop while waiting for his school bus, three boys gunned down while returning home from choir practice, an old couple shot at when they stepped out in the night to relieve themselves, a young man picked up from a sports ground never to return home alive. The tales of horror leave us feeble with grief and anger.

While we are in Imphal, the impending visit of the Justice Jeevan Reddy Committee is notified through newspapers, and Manipuri opinion is sharply divided. A section, dismissing it as a political stunt has called for a boycott of the committee when it comes visiting, while there are others who urge the importance of communicating their abhorrence for AFSPA to the committee. There is however widespread disaffection with the terms of reference laid out for the 'review' committee: to examine the act and advise the government whether to "amend the provisions of the Act to bring these in accordance with the obligations of the government towards protection of human rights or to replace it by a more humane Act".

It's over a year since Justice Jeevan Reddy Committee submitted its findings and recommendations and the government has persistently stonewalled all demands for making the report public. Irom Sharmila's sudden arrival in Delhi earlier this month renewed the clamour for the release of the report. Though the government has continued to rebuff this demand, it was however 'leaked' to the media. The report was greeted in parts by jubilation, frustration, but above all by confusion. Does it recommend a repeal of AFSPA? Or does it not? Or is it saying something else, while calling for a scrapping of the despised law? The bewilderment is derived from the semantic play that the report indulges in. The intent of the committee can be deciphered from the first few pages itself. On page nine, the report states: "We must say that while an overwhelming majority of the citizen groups and individuals pleaded for repeal of the Act, they were firmly of the view at the same time, that the army should remain to fight



absolute revocation or at least the 'humanisation' of the law. For an overwhelming majority, the army is a symbol of hatred and colonisation, as it was for the brave women whose bare breasts dared the Indian army to rape them.

Where are we headed then? The answer is obvious: towards creating a legal mechanism for the army's operations, to provide it legal immunity from what the army perceives as "spurious and motivated accusations of excesses" in the discharge of their duties, while categorically recognising that the Act has become a "a symbol of oppression, an object of hate and an instrument of discrimination and high-handedness."

Calling AFSPA "too sketchy, too bald and quite inadequate in several particulars," the committee does commend its repeal but suggests reinforcing the existing Unlawful Activities Prevention Act's (ULPA) stipulations to enable it to deal with the conditions in the northeast.

Consider now the draft of the provisions which the committee has recommended to be inserted to the Unlawful Activities (Prevention) Act, 1967 titled, "Deployment of the Armed Forces of the Union:" Its section 4 says that "the force deployed …shall act in aid of civil power and shall, to the extent feasible and practicable, coordinate their operations with the operations of the security forces of the state government. However, the manner in which such forces shall conduct their operations shall be within the discretion and judgment

the insurgents. When explained that the continuance of army operations would require a legal mechanism, quite a few of them agreed but suggested that such a mechanism should duly take into account the need to protect the rights and interests of citizens as also of the State."

Unfortunately, the annexure with details of the presentations and submissions made before the committee belie this claim: far from an 'overwhelming' number of individuals expressing a 'firm' opinion for the continued presence of army, it is a paltry 14 (out of a total of 196 depositions) who wish the army to continue its operations against the insurgents while advocating either the

of such forces." Let us not forget that the Act is also invoked "in aid of civil power" and also engenders the suggestion of coordinating with the local administration—which is of course followed only in breach. By insisting that such coordination should be dependent upon its feasibility and practicability, to be judged by the armed forces, this draft provides an unequivocal blueprint of virtual army rule.

Section 5 (b): "In the course of undertaking operations … *any officer not below the rank of a non-commissioned officer,* may, if it is necessary, in his judgement, for an effective conduct of operations,

- use force or fire upon, after giving due warning, an individual or a group of individuals unlawfully carrying or in possession of or is *reasonably suspected* of being in unlawful possession of any of the articles mentioned in Section 15 of this Act.
- enter and search, *without warrant*, any premises in order to arrest and detain any person who has committed a *terrorist act* or against whom a reasonable suspicion exists that he is likely to commit a terrorist act
- enter, search and seize, *without warrant*, any premises, and destroy, if necessary, the firearms or any of the articles mentioned in Section 15 from any premises/vehicle, vessel or other means of transport and for that purpose to stop the vehicle, vessel or other means of transport."

Though the draft inserts a clause for ensuring the presence of witnesses while searching, seizing and destroying vehicles or property, it is otherwise a spitting image of AFSPA. It continues to allow even non-commissioned officers to conduct operations on the basis of 'reasonable suspicion' alone and without a warrant.

The safeguards that it offers are stale and routinely flouted with abandon; the requirement for arrest memo, handing over the arrested person to the nearest police station (changed from "minimum delay" to "forthwith"), the possibility of endless deployment of the armed forces through repeated reviews and extensions. Indeed the Supreme Court's list of 'dos and don'ts' issued to the army has remained a cruel joke despite it being legally binding.

The ULPA itself is one of the most draconian laws today; it defines terrorism in expansive terms, holding even sympathisers and supporters culpable (thus thousands of those who marched on the streets of Imphal demanding justice for Manorama may be booked under ULPA on grounds that they are backed by militant groups as Shivraj Patil once famously said); it renders intercepted private communication through emails and phones as admissible evidence in court. Moreover, like AFSPA, its clause (b) of section 49 provides protection to "any serving or retired member of the armed forces or para-military forces in respect of *any action taken in good faith* in the course of the operation directed towards combating terrorism."

Fortified by the recommendations of the review committee, the all-new ULPA will be a recipe for unmitigated violation of civil rights. The presence of armed forces for long periods, the declaration of certain areas as troubled, security from legal suits, and now, add to it the jingoism of 'war on terror' that the ULPA entails. Already, it is not merely the central armed forces which indulge in excesses. Emboldened by the impunity they enjoy, the police and state forces have a free hand as well- the killing of three Kuki boys in Imphal in 2004, and the rape of a school teacher, Naobi, were all the handiwork of police commandos.

The biggest concession to the plethora of human rights violations that the committee makes is by way of recommending the constitution of a 'grievances cell' in each district of a state where the forces are deployed. The cell is to comprise the sub-division magistrate (chairperson), a representative of the forces operating in the district and an officer of the police. Can anyone seriously consider such a body—with no representation from the civil society, not even the state human rights commission—to be independent and impartial? Especially when it is mostly their own personnel accused of violations.

The Jeevan Reddy Committee offers an exceedingly clever report. By giving vent to the feelings of the people of the northeast, their accusations of discrimination and human rights violations, and by mouthing the popular aspirations of the people for the repeal of AFSPA, it appears to stand in their defence and solidarity. Must the people be forced to choose between the two draconian laws?

The battle against AFSPA is one for democracy. It must not be allowed to become a pretext for further shrinking of our democratic spaces. And this is precisely what the review committee report attempts to do. It concludes rather poetically: "At the end of a long night, there is a dawn." One can only quote from Faiz: "This trembling light, this night-bitten dawn, this is not the dawn, we have waited for so long…"

— November-December 2006

This is FAKE...
The Repeal of AFSPA

Suggesting amendments to the Unlawful Activities (Prevention) Act, the Jeevan Reddy Committee Report, while reviewing AFSPA, is effectively suggesting the expansion of army rule to the whole country.

COLIN GONSALVES

The June 2005 report of the committee appointed by the central government to review the Armed Forces Special Powers Act - 1958 (AFSPA) has recently been made public. It makes interesting reading. The committee consisted of Justice BP Jeevan Reddy, former judge of the Supreme Court, Dr SB Nakade, P Shrivastav, former special secretary, ministry of home affairs, Lt General (retd) VR Raghavan and journalist Sanjoy Hazarika. The core of the Reddy report are the Part IV recommendations and Part V, which are the suggested amendments to the Unlawful Activities (Prevention) Act, (ULPA) 1967.

The recommendations begin with a sort of statement of principles. Even if a law is not made, the central government can nevertheless order the army into any particular state under Article 355 of the Constitution to protect the State against "internal disturbances". It can do so even without their being a request of the state government. When the army is deployed in any state the fundamental rights of the citizens are required to be protected and they remain "sacrosanct and effective". The deployment of the armed forces should be undertaken with "great care and circumspection" and ought to be "an exception and not the rule". The armed forces are not to be deployed too frequently and for "long periods of time". Keeping this in view, the AFSPA is "too sketchy, too bald, and quite inadequate"... "The Act, for *whatever reason*, has become a symbol of oppression, an object of hate and an instrument of discrimination and high-handedness". All this is unexceptional. The problem starts when the committee departs from these principles, makes its recommendations and suggests amendments.

The first conclusion of the committee report is then set out thus: "It is highly desirable and advisable to repeal this Act altogether, *without, of course, losing sight of the overwhelming desire of an overwhelming majority of the region that the Army should remain* (though the Act should go). For that purpose, an appropriate legal mechanism has to be devised".

To justify the transfer of the provisions of AFSPA to another statute, in this case the ULPA, the committee reasons in an interesting fashion as follows: "a major consequence of the proposed course would be to erase the feeling of discrimination and alienation among the people of the northeastern states that they have been subjected to, what they call, "dra-

conian" enactment made especially for them. *The ULPA applies to entire India including to the northeastern states. The complaint of discrimination would then no longer be valid.*"

The committee then notices that the ULPA "does not provide for an internal mechanism ensuring accountability of such forces with a view to guard against abuses and excesses by delinquent members of such forces… over the years many people from the region have been complaining that among the most difficult issues *is the problem faced by those who seek information about family members* and friends who have been picked up and detained by armed forces or security forces. There have been a large number of cases where those taken away without warrants have "disappeared", or ended up dead or badly injured. Suspicion and bitterness have grown as a result. There is need for a mechanism which is transparent, quick and involves authorities from concerned agencies as well as civil society groups *to provide information* on the whereabouts of missing persons within 24 hours." The committee then sets out the suggested constitution of these "grievance cells". The committee recommended that it should be composed of three persons "namely, a senior member of the local administration as its chair, a captain of the armed/security forces and a senior member of the local police". The role of the grievance cells is to "receive complaints regarding allegations of missing persons or abuse of law by security/armed forces, make prompt enquiries and *furnish information* to the complainant."

Thus, it can be seen that the grievance cells are dominated by these security forces and the police and have no power to punish at all. All that they can do is enquire into an allegation and provide information.

That it is important to have a civilian oversight commission along the lines prevalent in the UK is obvious from the fact that the principal grievance against the security forces is that there is no accountability at all and that they torture, rape and kill at will. No enquiry has ever come to light where the security forces have been severely punished. It is surprising, therefore, that the Reddy committee should not take this aspect seriously at all. An independent enquiry is very important for one more reason. In appendix A, entry 24, the committee recommends "if on enquiry it is found that the allegations are correct, the victim should be suitably compensated and the necessary sanction for institution of prosecution and/or a suit or other proceeding should be granted under section 6 of the Central Act".

Obviously the word 'enquiry' refers to the enquiry conducted by the grievance cell. If this cell is to comprise the very forces committing the offence, one can hardly expect anything to come out of these enquiries. The promise of compensation and prosecution is illusionary and far from fruition.

The insertion of a provision relating to grievance cells could possibly have an adverse impact on *habeas corpus* and other petitions filed in the high courts or the Supreme Court. These courts have been regularly ordering judicial enquiries in respect of allegations of torture, executions and disappearances. Should such a clause be inserted it could well be contended that the enquiry ought to be conducted not by an independent judge but by the grievance cells set up under statute.

After setting out the principles that the use of the armed forces ought to always be for a limited period, the committee suggests an open ended time schedule in the following manner:

"While deploying the forces under sub-section (3) the central government shall, by a notification published in the gazette, specifying the state or the part of the state in which the forces would operate and the period (not exceeding six months) for which the forces shall operate. At the end of the period so specified, the central government shall review the situation in consultation with the state government and *check whether the deployment of forces should continue and if it is to continue for which period.* This review shall take place as and when it is found necessary to continue the deployment of the forces at the expiry of the period earlier specified."

It can be seen from this that there is no limitation at all on the deployment of armed forces in any state nor are there any guidelines laid down apart from the general statement of principles for the deployment of the armed forces.

Then comes the most dangerous part where a provision is sought to be inserted which is even more pernicious than the provisions of AFSPA read together with the Supreme Court judgment in the Naga Peoples Movement for Human Rights case. Simply put, the Supreme Court interpreted the provisions of AFSPA to mean that the security forces cannot substitute the civil administration and the police and are always to act "in aid of the civil power". What this meant was clarified by the Supreme Court to include taking the police force

into confidence, normally not acting without the consent of the police, at all times working in tandem, handing over suspected terrorists to the police forthwith and without interrogation.

The suggested amendments are clearly at the behest of the security forces who saw for themselves a larger role than merely acting "in aid of the civil power". The committee has qualified the clause "in aid of the civil power" by saying that the forces will do so *"to the extent feasible and practicable… However, the manner in which such forces shall conduct their operations shall be within the discretion and judgment of such forces."* The committee further concludes that the deployment of security forces in any states can happen *"notwithstanding that no request for such force is received from the state government concerned."*

Then comes the clincher. The suggested provision for opening fire is so overbroad that there is no reference to opening fire in self defence or opening fire in the context of the likely commission of a terrorist offence. Mere reasonable suspicion that a person is in possession of arms is sufficient to open fire without anything more. There is no indication that the principle of the minimum use of force is applicable at all. A non commissioned officer can order security forces to open fire. There are no guidelines for opening fire. There are no guidelines for any enquiry to be conducted after the forces open fire and injure persons. This repressive provision suggested by the Justice Jeevan Reddy Committee is as follows: "In the course of undertaking operations mentioned in (a) above, any officer *not below the rank of a non-commissioned officer, may, if it is necessary, in his judgment,* for an effective conduct of operations; use force or fire upon, after giving due warning, an individual or a group of individuals unlawfully *carrying or in possession of or is reasonably suspected* of being in unlawful possession of any of the articles mentioned in Section 15 of this Act."

It can be seen from the above that the only guideline for opening fire is that the non commissioned officer must, in his judgment, feel it is necessary to do so!

The committee suggests that the armed forces after *arresting* a person should forthwith handover such person to the police. The observation of the committee is as follows: "If the forces deployed under sub-section (2) or sub-section (3) of Section 40 A arrest any person, under the preceding section, they shall forthwith hand over such person to the officer in charge of the nearest police station."

The word "arrest" is a dangerous loophole. The police regularly make a distinction between "detention" and "arrest" and the period between the two sometimes runs into months. Under AFSPA, the security forces were not permitted to arrest any person. They were merely required to take a person into custody and hand that person over to the police.

One of the "do's" suggested is that "if any person dies during the course of these operations, his dead body should be handed over immediately to the police along with the details leading to such death." There is no requirement for an independent enquiry to be conducted. There is no punishment for torture, forced disappearances or homicide. Thus the main grievance of the people of Manipur that the armed forces have raped women, tortured and executed persons and caused forced disappearances has been left unattended by the committee.

— November-December 2006

Will AFSPA Go the POTA Way?

The Jeevan Reddy Committee seems least concerned about evolving a democratic mechanism to end the injustices stalking the northeast. It has instead recommended transfer of the most draconian provisions of the Armed Forces Special Powers Act to the Unlawful Activities (Prevention) Act.

K G KANNABIRAN

The committee headed by former Supreme Court Judge Jeevan Reddy, formed to review the Armed Forces Special Powers Act (1958), has submitted its report and two well-known journalists have commended it for acceptance. This is a repeat of the legerdemain performed in repealing the Prevention of Terrorist Act (POTA).

The United Progressive Alliance (UPA) coalition's election manifesto had the parliamentary Left's support. The UPA promised POTA's repeal to the electorate, not because its constituents disagreed with POTA, but in reaction against a communal party in power that had passed it. The ruling alliance, as per its election promise, legislated a repealing act and gave it a liberal dressing with a provision for review of pending cases under POTA.

But in 2004, the government introduced the most egregious provisions — into the Unlawful Activities (Prevention) Act, 1967 ((ULPA). The ULPA was designed for, and until now confined to, banning organisations because independent India did not have its own law on the post-Independence statute book. Surely, when POTA was repealed, we were aware of the international compulsions with reference to the war on terror. After 9/11, we did not have the legislative sovereignty to dispense with a law on terror, so we simply inserted those provisions into an existing Act.

Prime Minister Manmohan Singh, who wanted a clean slate, appointed a committee to also look into the much-maligned AFSPA and the various disturbed areas acts, etc. He appointed former Supreme Court Judge and former Law Commission Chairman Jeevan Reddy as chairman, with four others to assist him in his endeavour for a solution to the long-standing problems in the north east. But it seems that resolution of people's problems seems to mean a rehash of repressive laws.

The Jeevan Reddy Committee Report is divided into five parts. The first part introduces the problem. The second part has the legal and constitutional aspects to be dealt with by the committee. The third part deals with feedback received by the committee from the 'civil society groups' in the northeast.

The committee visited Guwahati on February nine and 10, 2005. There was a general complaint against army high-handedness and personal experiences were narrated.

For instance, TC Mazumdar, after narrating the humiliating treatment he suffered at the hands of the army, unequivocally urged for AFSPA's repeal. He also opined against the ULPA. The bar association president pleaded for the AFSPA's repeal. A section of the people wanted withdrawal of armed forces, and the other section wanted the army's presence to fight the insurgency.

In Dibrugarh, scholars, businessmen and the vice-chancellor described the AFSPA as discriminatory and anti-people. In Meghalaya, the Peoples Human Rights Council (PHCRC) declared that AFSPA has failed to contain insurgency. They pointed out other Acts in force like the ULPA as amended to deal with terrorism. The committee's interaction with academicians also revealed the definite opinion against AFSPA and the need to end the discriminatory treatment in this region.

In the committee's interaction with people from Kohima, people's organisations and mothers' organisations complained of the privations suffered due to army atrocities. They reiterated the need to repeal AFSPA as existing laws were sufficient to address the problem.

But in Arunachal Pradesh, it was mainly state officials and army officers, and not ordinary citizens, who met the committee. The view of such officials on AFSPA's enforcement is irrelevant in cases like these when the people's experience should be the primary concern.

The committee talks about repealing or modifying AFSPA. Since the ULPA is in force all over India and organisations in the north east are already covered by various provisions of the Act and Schedule as well, the committee thinks that "a major consequence of the proposed course (to repeal AFSPA and effectively replace it with a modified ULPA) would be to erase the feeling of discrimination and alienation among the people of the northeastern States" who have been subjected to "draconian" enactments made especially for them. The ULPA applies to entire India including to the northeastern states. The complaint of discrimination would then no longer be valid."

It is disappointing if this is a former Supreme Court judge's understanding of the concepts of "discrimination" and "equality" embedded in the Constitution, as it will bring about the integrity of the country only through sheer power and abuse.

The repressive methods of AFSPA have been tried and tested for more than five decades and we do not need this legal exercise to realise it. The committee after setting out the people's views did not evolve a more democratic and political method of resolving the problems of the northeastern states. It did not call for expertise on working out pluralist democracy among the various ethnic and tribal groups.

The fourth part of the report states that the proposed amendments to the ULPA would be more comprehensive as it would expressly permit deployment of armed forces and para-military forces to achieve its objective, namely, curbing terrorism. But apparently a human mask is needed to make it acceptable.

The committee recommends the incorporation of chapter IVA of AFSPA into the ULPA which the committee itself painstakingly drafted. After this, it recommends the ULPA to the government as an instrument for bringing about the desired integrity of the country.

Unanimous opinion in the north east is that the AFSPA should be scrapped. However, the people's anger is not confined to that statute only. To say so would be to have a limited understanding of the people's views. As long as the Army rules in this region, it does not matter which repressive law is in the place of the AFSPA.

In fact, POTA was smuggled in so surreptitiously that initially not many noticed its transmigration. LK Advani, proud of being the architect of POTA, was mourning its absence during the recent Mumbai blasts. He was not aware that Dr Manmohan Singh had stolen his thunder.

— November-December 2006

SECTION 17

At a time when commodification has reached heights it has never before scaled in history it is only natural that human beings should also become commodities capable of being bought and sold on the international market. South Asia is fast becoming a favourite destination for sex tourists. The Indian government supports international conventions but its practical response has been weak, ineffective and half-hearted.

Beware of the Second Sex Stereotypes

The discourse on anti-trafficking is fixated on the assumption that prostitution is a violation of human rights. That prostitutes are, if not fallen women, victims, who only need to be rescued and rehabilitated. Or that they have to be controlled and regulated to protect the moral interests of 'families' and 'decent people'. These one-dimensional arguments effectively ignore the fundamental freedoms and rights of women who become sex workers by choice or compulsion.

MIHIR DESAI

In May 2003, the US Congress passed the United States Leadership against HIV/AIDS, Tuberculosis, and Malaria Act (Global AIDS Act) and in December 2003, it passed the Trafficking Victims Protection Reauthorisation Act (TVPRA). The Global AIDS Act bars the use of federal funds to "promote, support, or advocate the legalisation or practice of prostitution or sex trafficking". TVPRA also requires that recipient organisations of anti-trafficking funds state that they do "not promote, support, or advocate the legalisation or practice of prostitution". Initially, the restrictions only applied to foreign non-governmental organisations (NGOs). However, in June 2005, USAID released its most recent policy directive on the 'Anti-Prostitution Loyalty Oath' requiring all foreign and US-based NGOs to have anti-prostitution and anti-sex trafficking policies before they are eligible to receive US global AIDS funding. In New York, Judge Victor Marrero issued a preliminary injunction, saying the policy violates the right to free speech.

It is obvious that the US government and its allies as well as some of the major funding agencies are opposed not just to trafficking but prostitution itself. The issue is not whether adult women are coerced or deceived into prostitution, but even if they are voluntarily into prostitution it is abhorrent. What needs to be stopped is prostitution itself, and not the coercion or deceit connected to it. Prostitution in itself is a violation of human rights of women. Since prostitutes are victims, the only rights they have concern the right to be rescued and rehabilitated. That hardly anybody ever gets rehabilitated is another matter altogether. There is no recognition of rights within prostitution. This school believes that even if a woman chooses to be a prostitute out of poverty, such a choice can hardly be called a choice and thus even she needs to be rescued.

Of course, there are minor variants of this theme. But the underlying ideology of the major anti-trafficking groups abroad as well as in India is that prostitution per se is bad. It is degrading to women and the long-term attempt should aim at abolishing it altogether. Katheleen Barry's Book on Female Sexual Slavery (1979) is one of the most articulate work on this issue and the organisation founded by Barry, The Coalition Against Trafficking in Women (CATW) is the leading international anti-trafficking organisation. According to their definition, there can be no such thing as 'voluntary' prostitution, as all prostitution is a violation of human rights, and 'trafficking in women' is taken to mean any migration for prostitution (CATW, 1998).

The alternate trend, while recognising that coercion and deceit have to be fought as also child prostitution, recognises that a number of women enter into the profession voluntarily or want to continue in the profession voluntarily and their right to have safe work environment and access to health care and social security need to be protected. This position makes a distinction between 'trafficking in women', 'forced prostitution', and 'voluntary prostitution'. The Global Alliance for Trafficking in Women (GAATW) is the primary exponent of this position. According to GAATW, "Traffic in persons and forced prostitution are manifestations of violence against women and the rejection of these practices, which are a violation of the right to self-determination, must hold within itself the respect for the self-determination of adult persons who are voluntarily engaged in prostitution." (GAATW, 1994) This position recognises that a large number of women do enter or continue in the profession out of choice

(albeit for many the choice may be determined by economic conditions) and it is crucial that what they do is recognised as work and it is important to help them in getting better and non abusive working conditions and other rights within prostitution. The present trafficking discourse totally ignores this aspect and it does so because of its underpinning ideology of treating all prostitution as inherently violating human rights.

The other problem is that criminalising most activities connected to prostitution also acts harshly. Anti-trafficking programmes that aim to fight the industry and protect the women, often have good intentions but have negative effects. These programmes often operate with the help of the police on a particular problem in countries where sex workers find that the police are the greatest perpetrators of violence.[1] The debate is an old one but has resurfaced from time to time and most recently since the mid-1990s when the UN protocol on trafficking was under consideration. At the cost of being simplistic, one can say that the main issue is how does one view prostitution or sex work? Is prostitution morally degrading and therefore should be opposed? Do the women involved in sex work have any agency at all or are they to be treated only as victims who require to be 'rescued and rehabilitated'?

The present trafficking discourse is premised (whether the actors in this discourse are conscious of it or not) on the assumption that prostitution in itself is a violation of human rights and also that no woman who exercises a free choice will ever enter into prostitution. Prostitutes are, if not fallen women, at least victims who need to be rescued and rehabilitated. Such an argument can never talk about rights of prostitutes, but only about their rescue and rehabilitation.

It is important to understand that nobody can justify coercion or deceit being used against women for doing sex work. No one can also justify use of coercion or deceit in marriage. But if women voluntarily want to get married nobody should stop this and then one needs to talk about their rights within marriage. Similarly, even if a woman is unwillingly forced to get married, but subsequently sees the marriage as the only viable option, we cannot talk about rescuing her from marriage but only ensure that her rights within marriage are protected. The present discourse on trafficking misses these points altogether.

There are women who become prostitutes out of choice. There are women who enter the profession through deceit or coercion, but would like to continue in the profession, as they do not see a viable alternative. Because of the complete emphasis of the present discourse on rescue and rehabilitation (which rarely happens) the issue of rights of sex workers who want to remain within the profession are totally ignored. Indeed, international studies have shown that even in developing countries, significant number of women fall in this category.

The question of choice is not so simple. The majority believe that no woman would exercise a free choice in order to become a prostitute. Others believe that even if some women choose to be prostitutes, such a choice would be determined by poverty and so would hardly amount to free choice. No woman chooses to be a prostitute but is invariably forced into becoming one. Thus, trafficking is conflated with prostitution and again the issue is not of rights of prostitutes but of rescuing them. This is a curious way of looking at the issue. Free choice in this world is as illusory as free market. It does not exist. Nobody who has a free choice would like to clean sewers. Nobody who has free choice would like to work in sweatshops or be a construction worker. It is true that a number of women turn to prostitution out of the sheer need to avoid starvation, but unless one is in a position to solve the issue of starvation it does not serve any useful purpose in 'rescuing' women from prostitution. It would be a violation of her human right to tell a prostitute that you should rather starve than be a prostitute. As the Sonagachi womens' manifesto says, "But when do most of us women have access to choice within or outside the family? Do we become a casual domestic labourer willingly? Do we have a choice about who we want to marry and when?"

A number of women do enter prostitution for improving their living conditions or for extra financial gains. They may not want to give up this profession even if they have some other source of livelihood available. The trafficking discourse of course believes that this is morally wrong and such women should not have any rights. This is precisely the question that was raised during the ban on bar dancers in Mumbai. The State and a number of organisations argued that those bar dancers who are not trafficked only want 'easy money' and that this was morally wrong. In fact, a number of international studies, including in developing countries, show that many women enter into sex work as an 'advancement strategy' and not just as a 'survival strategy'. As a Filipino sex worker commented: "Why should I

go back to the hard life? I've already been there, that's why I am in the bar. Why be a martyr?"

The hard question that needs to be answered is that if a woman can sell her labour to make 'easy money', is it morally wrong for her to sell her sexual favours to make 'easy money'? If one can speculate in the stock market to make easy money, why should we look down upon women who sell sex or dance in bars to make easy money? Why should the burden of protecting the morality of society be always on women? Why should sexual purity and chastity be the hallmark of morality? Is this not just a simple reflection of patriarchal ideology which all of us claim to be battling against?

The Network of Sex Work Projects' commentary on UN Trafficking Protocol says: "Historically, anti-trafficking measures have been more concerned with protecting women's 'purity' than with ensuring the human rights of those in the sex industry. This approach limits the protection afforded by these instruments to those who can prove that they did not consent to work in the sex industry. It also ignores the abusive conditions within the sex industry, often facilitated by national laws that place (migrant) sex workers outside the range of rights granted to others as citizens and workers."

Delving a little deeper will make us realise that women's independence was, and is, seen as a threat to the stability of the family and by extension, of the nation. Contemporary efforts to stop trafficking draw on underlying moral values of feminine dependence and ideals of women's role in the family. As Jo Doezema has said, "The myth of trafficking in women is ostensibly about protecting women, yet, the underlying moral concerns are with controlling them. Policies adopted to stop trafficking that are based on the mythical notion of the 'coerced innocent' and the 'evil foreign trafficker' serve to reinforce the construction of State/gender relations that determine that women's purity and dependence are essential to family well-being and national honour. …it is one thing to save 'innocent victims of trafficking', quite another to recognise that 'guilty' sex workers deserve respect for their rights as workers, as women, and as migrants. Women who migrate to the sex industry can only be freed from violations of their human rights if they are first freed of their mythical constraints. They must no longer be used as the canvas upon which societies' fears and anxieties are projected; be defined no longer as innocent, sexless, 'non-adults' or as the oppressed sex of backward countries; but as agents endowed with the ability to think, to act and to resist." The reason why the Bush government and many other governments want to push the prostitution equal to trafficking agenda is two fold. One, this falls very much in line with the Christian as well as other religious Rightwing agenda of defining women as sexually passive and within their paradigm of an ideal society being a heterosexual, monogamous society in which the only permissible sex is that which is within marriage. Sex for procreation rather than sex for pleasure is the ideal. The second reason arises out of the hypocrisy of neo liberal politics that insists on free global movement of goods, capital and finance but not of human beings. Trafficking is an ideal ruse to push through anti immigration laws and policies. Thus, both moral as well as economic reasons are behind the present discourse.

Historically, prostitution has been looked at in four different ways. As Marjan Wijers has said, "All legal regimes, with the exception of labour approach, have as a common starting point the moral condemnation of prostitution and are designed to control and suppress the sex industry. Prostitution is seen either as a social evil that should be eliminated or as an inevitable or even a necessary evil that has to be accepted and controlled." The huge amount of funding which goes into trafficking issues is to a large extent based on this approach which essentially condemns either the prostitute or prostitution and does not look at a prostitute as a bearer of human rights, but purely as a victim.

This notion even extends beyond prostitution as the recent debate around the ban on bar dancing in Bombay showed. A large number of anti- trafficking groups supported the ban because for them the ban was a way or rescuing these 'fallen' women or at least preventing them from being exploited. Of course, the bar dancers themselves and many women's and human rights organisations opposed the ban.

Let us look at the four legal models concerning the way prostitution has been looked at:

THE PROHIBITIONIST MODEL

Under this model there is a complete prohibition on prostitution. This act and related activities are seen as crimes and all, including the prostitute, are liable for criminal action. Not that this regime has ever been able to stop prostitution. In fact, such a regime has led to major victimisation of prostitutes since under this they are totally vulnerable to brothel keepers, pimps and the police.

THE ABOLITIONIST MODEL

This is the model followed in India as also in many West European countries. Under this, prostitution itself is not a crime but any person exploiting a prostitute or living on the earnings of a prostitute is a crime. Thus, though prostitution itself is not criminalised, it is a crime to run a brothel or to be a pimp. The presumption is that the prostitute herself is a victim but prostitution cannot exist by itself and "it persists only through the efforts of procurers and pimps, the third parties who induce women into prostitution to profit from her earnings."[2]

Thus, do not criminalise the prostitute but those who make her into one. Prostitutes themselves are not considered to have any agency and those prostitutes who demand rights are said to be suffering from false consciousness or are mentally damaged. Soliciting in public places is also seen as a crime. Though legally a prostitute is permitted to function, the reality is, it is made impossible for her to do so legally since even to function as a prostitute requires some kind of organisation, such as renting a place, advertising, soliciting customers, etc. While at one level this model respects to a limited extent to the individual rights of a prostitute, in effect, it marginalises and stigmatises them. Apart from other things, any demand for rights or organisation is seen as encouraging prostitution.

THE REGULATIONIST MODEL

The model is based on the theory that prostitution is reprehensible but is impossible to abolish. Prostitution is seen as a necessary evil required to be regulated from the point of health and wider morals of the general public. Regulations are made not from the interests of the prostitutes but looking at the interests of 'families', 'decent people' and society at large. It implies mandatory registration, medical check up (to ensure that they do not pass on diseases to their customers, etc.), prohibiting prostitution outside a limited area, permission only to local prostitutes and not to migrants, etc. The State, even here, does not take the responsibility of providing proper living and working conditions for the prostitutes.

LABOUR MODEL

This model looks at sex workers as equal participants in the fight against exploitation. This treats prostitution as sex work and treats it like ordinary work entitling them to the same protection as would be available to other workers, at least from the informal sector. It means demanding better living and working conditions, access to health care, access to childcare and education. Getting women into prostitution through deceit or force or procuring minors is still seen as a crime. For instance, in Netherlands, which follows this model, the core of the crime is deceit and coercion. But brothels are permitted subject to a licensing system guided by hygienic conditions, fire safety, etc. This would mean they would be also entitled to he protection of labour laws, social security, etc.

CONCLUSION

The anti-trafficking model, as is presently understood, despite its facial innocuousness, has over a period exposed itself as highly insufficient, problematic, moralistic, deeply rooted in patriarchal norms and harmful to the interests of many sex workers. Moreover, given the history of the use of anti-trafficking measures to police and punish female migrants and female sex workers, and to restrict their freedom of movement rather than to protect them from violence and abuse, serious doubts are raised as to the appropriateness of the existing anti-trafficking framework (Weijers, 1998). As a consequence, the search is on to find a new framework to cover human rights and labour abuses in female migration, both within and between countries, for work in the sex industry, as well as other informal labour sectors (Leigh and Weijers 1998).

It is time now to abandon the anti-trafficking framework. It needs to be replaced by a framework, which, while dealing effectively with coercion and deceit in sex work, as also child sex work, is able to share the concerns of sex workers, migrants and human rights activists. This is all the more so because, presently, anti-trafficking has become synonymous with anti- prostitution.

— June-July 2006

Endnotes

1. "Sex Worker Rights, Abolitionism and a Rights based approach to trafficking" Jo Doezema".
2. Marjen Wijers- Legal approaches to prostitution and their impact on sex workers.

Human Rights and Trafficking in Persons

States must elicit the participation of the community in identifying and rescuing human beings who have been trafficked as well as assisting the law enforcement machinery in tracing the traffickers so that they are punished.

SAVITA BHAKHRY

Trafficking in human beings, more so in women and children, is one of the fastest growing forms of criminal activity, next only to drugs and weapons trade, generating unaccountable profits annually. The reasons for the increase in this global phenomenon are multiple and complex, affecting rich and poor countries alike. India is no exception to this. The points of origin are often the more deprived places, regions or countries, and the points of destination are often — although not always — urban conglomerates within or across borders. For all those who view trafficking in economic terms, it is the real or perceived differential between the economic status of source and destination area that is important. In practice, however, human beings are trafficked from one poor area to another poor area for reasons best known to the traffickers, a fact that has been corroborated by research studies and documentation across the world.

The fact is that the process of trafficking is designed and manipulated by traffickers for their own ends for which they employ all kinds of means. It would, therefore, be wrong to assume that human beings are always traded from undeveloped to more developed places, as this is not always so. This, to a large extent, also signifies that trafficking primarily is a human rights issue for it violates the fundamental human rights of all those who are trafficked and analysing it solely from an economic lens inevitably masks its human rights dimensions. Moreover, since tools of economic analysis are designed to explain and evaluate issues in terms of their overall efficacy, these tools, by and large, are not that well designed to protect and promote the goals of human rights[1].

The protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organised Crime (Trafficking Protocol) that was adopted in the year 2000 and came into force in December 2003, has perhaps brought the much-needed and widespread consensus on a working definition of trafficking at the global level. Article 3 of the protocol defines trafficking as:

- 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion,

of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, and servitude or the removal of organs;

- The consent of a victim of trafficking in persons to the intended exploitation set forth in sub-paragraph (a) of this article shall be irrelevant where any of the means set forth in sub-paragraph (a) have been used;
- The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not really involve any of the means set forth in sub-paragraph (a) of this article;
- 'Child' shall mean any person under 18 years of age.

The definition clearly spells out that trafficking covers not only the transportation of a person from one place to another, but also their recruitment and receipt so that anyone involved in the movement of another person for their exploitation is part of the trafficking process. It articulates that trafficking is not limited to sexual exploitation only for it could occur also for forced labour and other slavery like practices. This means that people who migrate for work in agriculture, construction or domestic work, but are deceived or coerced into working in conditions they did not agree to, are also defined as trafficked people. Interestingly, the protocol definition does not require proof of movement of the victim across borders or otherwise. Trafficking is just as much trafficking even when it occurs in the victim's own village, town or city.

Given the fact that the protection and support provisions elucidated in Articles 6, 7 and 8 of the protocol are not binding on States who have ratified the same, yet it is the first of its kind to address, more or less, all aspects of human trafficking. Besides, it also takes a different approach from that contained in the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of others that focused only on prostitution and considered all prostitution, voluntary and forced, to be trafficking. It is not that this protocol does not recognise the existence of voluntary and forced prostitution but prefers to address "the exploitation of the prostitution of others" and "other forms of sexual exploitation" only in the context of trafficking in human beings. It is precisely for this reason that the terms 'exploitation of the prostitution of others' or 'other forms of sexual exploitation' have not been defined in the protocol for it leaves it to the prerogative of the State's parties as to how they would like to address prostitution in their respective domestic laws[2].

The protocol does not make it mandatory for States to abolish all possible forms of prostitution. It does, however, require States to act in good faith towards the abolition of all forms of child and adult prostitution in which people are recruited, transported, harboured, or received by means of threat or use of force, or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of one person having control over another, for the purpose of exploiting that person's prostitution.

It would not be out of place to mention at this juncture that prostitution as actually practised in the world also encompasses the elements of trafficking. This is because it is rare to come across a case in which the path to prostitution and/or a person's experiences within prostitution do not involve, at the very least, an abuse of power and/or an abuse of vulnerability. Power and vulnerability in this context must be understood to include power disparities based on gender, race, ethnicity, caste and poverty. Put simply, the road to prostitution and life within 'that life' is rarely the kind that is marked by empowerment or adequate options.

States parties, thus, with legalised prostitution industries have a heavy responsibility to ensure that the conditions, which actually pertain to the practice of prostitution within their borders, are free from the illicit means delineated in sub-paragraph (a) of the protocol definition, so as to ensure that their legalised prostitution regimes are not simply perpetuating widespread and systemic trafficking. As current conditions throughout the world attest, States that maintain legalised prostitution are far from satisfying this obligation because most prostitution is accomplished by one or more of

the illicit means outlined in sub-paragraph (a) of the protocol and therefore constitutes trafficking[3].

There is an urgent need for countries to review laws that do not take into account a comprehensive understanding of trafficking and ensure that adequate protection is provided for both adults and children who are victims of this heinous act. This applies to India too.

Since violations of human rights are both cause and a consequence of trafficking, any strategy to address the issue of trafficking in children and adults from a rights-based perspective must focus on the promotion and protection of all human rights. Anti-trafficking measures in no way should adversely affect the human rights and dignity of persons and, in particular, the rights of all those who have been trafficked. This would entail action at many levels — local, regional, international, by a range of actors — the State and it's agencies, NGOs and 'professional' intermediaries, including local communities at different stages of the trafficking continuum.

Rights-based strategies to address trafficking can be broadly subsumed under the following three categories:

BEWARE AND BE AWARE

- Awareness of, and sensitisation to, the issue of trafficking, particularly its adverse impact on the rights of women and children, is an important element of prevention. In fact, efforts should be made to target vulnerable sections/groups of the society. In doing so, potential victims should be made aware of the dangers so that they are able to make a more informed decision regarding their potential migration.
- Education, at primary and secondary level, should be guaranteed and made accessible to all young people. Efforts should be made to incorporate human rights and gender sensitive concerns at the school and university level.
- Imparting continuous training to all stakeholders who assist in preventing and combating trafficking, by mainstreaming gender and human rights concerns, is another essential element of prevention. This would promote greater understanding among the stakeholders and, consequently, enhance the safety and wellbeing of trafficked human beings.
- Training should be imparted on investigation and prosecution techniques with recourse to the practical, and psycho-socio needs of the victims. This would enable the law enforcement machinery to look at trafficked human beings as 'victims' instead of as perpetrators.
- The media has an important role to inform and educate the public through newspapers, radio and other modes of communication, and should be targeted as a key partner in preventing and combating trafficking. It would be beneficial if the media is sensitised to the phenomenon and its complexities, in order to ensure that they inform the public more accurately about the problem.
- Education and raising awareness of trafficking should be aimed at the tourism industry, airlines, hotels, travel agents, package holiday companies, etc.

Along with the above, there is need to continuously sensitise ministries/departments that assist or have the potential to assist. Examples: education, justice, women and child development, tourism, trade, immigration and external affairs.

STRATEGIC ROAD MAP

- Effective prosecution of traffickers is one of the essential elements of a rights-based strategy. This requires a legal framework that makes trafficking in human beings a serious criminal offence. The United Nations has provided elaborate guidelines[4] for such a legal framework, encouraging States to pass laws on the crime as well as provide for effective criminal penalties for traffickers, including agents or middlemen, especially where children are involved or where there is a collusion of State officials. Assets accumulated by the traffickers should be confiscated for the benefit of victims.
- Along with legislative reforms, States should also develop law enforcement techniques that will be effective in identifying and punishing traffickers. Law enforcement officials must be sensitised and provided with necessary training which would facilitate them in proper investigations and prosecutions of trafficking offences. The UN principles and guidelines recommends that governments establish specialised anti-trafficking units, comprising both men and women, to pro-

mote professionalism. Likewise, the judiciary, particularly judges who hear cases of trafficking, need to be trained and sensitised.

- Crime prevention and prosecution need to be balanced with protection of the rights of the trafficked human beings. This is because they need to be protected not only from retaliation by the traffickers, but also from re-victimisation by governments, including the judicial system. It is a common perception that traffickers harm victims and governments rescue and protect them. Although victims suffer serious criminal violations at the hands of traffickers, more often than not, once they are released from the slavery-like or forced labour conditions, they are subjected to serious human rights violations at the hands of the government. It is in this area where there is an urgent need for human rights protection.

The UN principles and guidelines on human rights and human trafficking recommend that law enforcement officials work in partnership with non-governmental organisations to help ensure greater protection both to the victims and survivors. It delineates that States should ensure that rescue operations in no way should harm the rights and dignity of victims. This apart, victims should be decriminalised and provided with free legal assistance. This should include information on their rights and access to legal redress and court proceedings, in a language they will understand. Further, witness protection programmes should be developed to protect victims and their families, who may face retaliation and threats.

States should elicit participation from the community in identifying and rescuing human beings as well as assisting the law enforcement machinery in tracing the traffickers so that they are punished. For, without the involvement of the community, nothing can be achieved.

— June-July 2006

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Endnotes

1. See also Sigma Huda, "Integration of the Human Rights of Women and a Gender Perspective: Report of the Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children, Commission on Human Rights Document E/CN.4/2006/62, 20 February 2006.
2. See United Nations Crime Prevention and Criminal Justice Document A/55/383/Add.1, paragraph 64.
3. Sigma Huda, op.cit., pp 9-10.
4. For more details see United Nations document E/2002/68/Add.1

Power of the Accused

Victims are key witnesses in most cases of trafficking. But in the absence of strong legal protection, they hesitate to testify against their tormentors. And the consequent acquittal of the criminals encourages those trading in human beings to operate more freely and fearlessly, thus making a mockery of the rule of law.

ANURADHA SINGH

In May 2006, a Delhi court pronounced a judgement acquitting two persons accused of trafficking two minor girls. Nassir and Mumtaz, involved in trafficking Sabba and Sadia (names changed) from a small village in Midnapur in West Bengal, were let off on grounds of no evidence. The accused, who hailed from the same village as the victims, had enticed the two girls to accompany them to Delhi with promises of employment and lucrative money. Both had no clue about the designs of their traffickers till they found themselves forced into prostitution.

WHY DO WITNESSES DISAPPEAR?

The trial in the case began one year after Sabba and Sadia were rescued while Nassir and Mumtaz were sent behind bars. By that time the victims, who were also key witnesses in the case, were untraceable. The police tried for months but failed to locate either the girls or their families. As a result, the prosecution could not produce evidence against the accused who were eventually acquitted. No one knows what happened to the two girls. Did they choose not to testify, or were they intimidated, tortured or blackmailed? While their disappearance left many questions unanswered, what is clear is the fact that whereas police could not locate these witnesses, their tormentors' acquittal can make them even more vulnerable to being re-victimised and re-trafficked. Not an unusual pattern in South Asia, especially India.

This is yet another example of how traffickers operate freely, facing relatively low risks, not to mention the huge profits they make off their deals in human trade which has emerged as one of the most lucrative businesses in the new global political economy, next only to the trade in weapons and drugs. The reasons behind such an alarming increase in trafficking is generally attributed to poverty, lack of sustainable livelihood, structural inequities in society, increase in internationally organised criminal groups and so on. While these factors increase the vulnerability of the marginalised and disadvantaged groups, what plays a vital role is the lack of effective 'victim and witness' protection measures. In the absence of such protection provisions, victims, who are survivors, feel intimidated and hesitate in complaining against the offenders or refuse to testify against them in a court of law. That is why the rate of prosecutions and convictions is extremely low despite the rapid rise in this criminal nexus.

VICTIMS/WITNESSES AT RISK

Trafficked victims acting as witnesses are a distinct group, distinct from those witnesses who are not victims themselves and those who are victims but not witnesses. This distinct status means that such 'victims-witnesses' have unique characteristics and are subject to unusual risks, which require special protective measures. The potential of a victim to give evidence and his/her decision to cooperate with the law enforcement agencies and to testify as a witness in court proceedings has a strong impact on the level of risks involved and calls for additional measures of protection. The readiness of the victim to file a report to the police and act as a witness is an important factor for effective investigation and prosecution. Countries that have the most comprehensive victim assistance measures fare better in prosecuting traffickers than countries that do not have such strong legal provisions. Therefore, protection of and support to the victim-witness is crucial to pursue effective prosecution of the offenders, which strengthens the protection of a victim's rights.

International legal instruments outline a broad range of interrelated measures that national governments should undertake to protect and assist such victims. Historically, the provisions of many international treaties address the various human rights violations. It is only the Trafficking Protocol (2000) and the UN Convention against Transnational Organised Crime (2000), which not only redefined the international context of the crime but also established new standards with respect to protecting the rights of victims, especially those who act as witnesses.

There is a huge influx of immigrant labour in India from neighbouring countries like Nepal, Bangladesh, Myanmar, Bhutan and Sri Lanka under the guise of employment. Unfortunately, trafficking here is often perceived only as a 'law and order problem' and is primarily located within the crime prevention framework. Lack of appropriate laws often erroneously penalise women, young girls and children who are forced into the sex industry on charges of prostitution. Besides, with the absence of a victim-witness protection protocol in the existing legal system, the victims hesitate to testify against the traffickers, ultimately leading to their acquittal. This leads to a situation where the criminals get opportunity after opportunity to operate freely and more fearlessly. Protection to victim-witnesses is also necessary to restore a sense of human dignity which stands shattered in the event of total failure of prosecution. Even with specific legislation and strict penalty against criminals, successful prosecution is almost impossible without the testimony of a victim which identifies the trafficker and substantiates the crime. With the effective victim-witness protection laws in place, victims will no more be afraid of reprisals and repercussions, have faith in the police and legal system, and thereby shall come forth willingly to testify.

Victim protection can be ensured only when it is initiated as a process, which would involve responsibilities right from the time of rescue, investigation, pre and post-trial and at the time of reintegration. As a matter of priority, as soon as victims are rescued, they should not be immediately treated as offenders of other existing laws with regard to prostitution, migration or labour. The next step should be to provide a safe and humane shelter and assist them with psychosocial, medical and legal supports. A proper assessment of the risks involved should be made and an appropriate witness protection group established. This group may comprise individuals from the legal system, police and NGOs who must develop victim-witness protection measures and implement them, ensuring confidentiality. Protection can be given to victims either on an application made by them, by their families, by any person associated with the case or by the court on its own motion. When the circumstances warrant, victims should be relocated to their native place but only after proper verification so that they are traceable at the time of investigation or trial. Measures should be taken up so that they can regularly keep in touch with concerned officials and provide them with information about their activities and addresses.

In the early stage of investigation, the victim should not be brought in close proximity with the accused. Since the accused has the right to defend him/herself, and has access to investigation records, the confidentiality of the victim's identity and address should be maintained so that she/he is not threatened or blackmailed. It should be ensured that a social worker or a support person, preferably a female, is present at the time of the investigation/interview of the victim by the police after a rescue operation. Only those trained in victim-witness interviewing should take the statement and the police and other authorities should treat them with sensitivity and dignity.

Trafficked victims are not accused persons and,

therefore, should not be meted out the same treatment as to those accused of the crime. Access to victims must be made only under the supervision of a child welfare committee or any other competent authority dealing with issues related to women and children. A social worker must accompany the victim whenever she leaves the place of safety. Legal representation for the rescued person must be with her voluntary and informed consent and in consultation with the support person.

HOW TO PROTECT THE VICTIM?

Certain procedural measures should be followed at the trail stage. Victims must be kept in safe custody at a well-guarded rehabilitative institution and those wanting to meet them must be monitored and supervised. During the trial, victims should be protected at all times, separated from the accused and should be made familiar with the proceedings of the court system. The trial could be held in-camera and through full close-circuit camera. If circumstances necessitate, the court may order taking evidence at a place other than the court premises. For minor victims, special courts should be set up which have screens to shield the victims from hostility or the glare of the accused. Questions relating directly to the evidence of the crime should be given to the presiding officer of the court and should not be posed directly to the victim.

The court may provide for the victim-witness to give evidence by means of video conferencing, videotape, teleconference or communication through an interpreter. Procedural amendments should be made in the existing legal system to admit as evidence the statement recorded in this way. A friend or legal counsel of the victim should be present in the court to protect the interest of the victim-witness during the trial.

Most importantly, the cross examination of the victim should be conducted as expeditiously as possible in order to prevent her/him from feeling re-traumatised while recollecting the entire incident. Cases of trafficking should be done on a day-to-day basis in fast track courts and long drawn adjournments should be avoided and strongly resisted. For effective prosecution, the evidence of the victim should be taken by special measures, or by direction of the court made admissible under the Evidence Laws.

It is important to realise that only with proper acknowledgement of the importance of victim-witness measures the protection rights of the victims–witnesses will be strengthened and would empower them to come forth and either report or testify against the offenders, thereby leading to an increase in the conviction rate of the traffickers and their effective prosecution.

— June-July 2006

Liberalised Sex Slavery, Transit Point India

India is fast becoming a favourite destination for sex tourists from the US and western countries. Commercial exploitation of women and children is becoming a rage. The Indian government supports international conventions but its practical response has been weak, ineffective and half-hearted.

ANINDITA BHOWMIK & SAMPURNA BEHURA

The international community considers trafficking in human beings a contemporary form of slavery. It is a growing phenomenon globally. In recent years it has become the third largest source of transnational illegal activities after arms and drugs.[1] Globally, forced labour, including sexual exploitation, generates 31 billion dollars, half of it in the industrial world and a tenth in transition countries, according to an International Labour Organisation (ILO) report.[2]

Historically, trafficking in human beings was associated with slavery and bonded or forced labour. With time, it almost became synonymous with prostitution or commercial sexual exploitation. This understanding was first used with reference to the 'white slave trade' (white women for prostitution) and this was slowly extended to the rest of the world. This explains why commercial sexual exploitation of women and children is the only area on which targeted intervention has been made by most civil society groups, governments and international bodies.

It is, however, important to note that trafficking is not confined to the commercial sexual exploitation of women and children alone. It has myriad forms and the number of victims has been steadily on the rise over the past few decades. It takes place through and for marriage, sexual exploitation, begging, organ trading, military conflicts, drug peddling and smuggling, labour, adoption, entertainment and sports. While there is no precise data, estimates provide that approximately 800,000-900,000 persons are traded annually across national borders.[3] Of these, 70 per cent are women and 50 per cent are children.[4]

GLOBAL RESPONSE

Trafficking in humans is multidimensional, with close links to illegal migration and organised crime. The international community has recognised the growing threat and there are a number of international conventions and protocols prohibiting trafficking. These take note of the human rights violations and abuses suffered by a victim and provide safeguards for the same.

The prohibition on slavery and slave trade was one of the first rights to be recognised under public international law. The Convention on Slavery of the League of Nations[5] (1927) is widely acknowledged to be the first modern international treaty for the protection of human rights. The United Nations Universal Declaration of Human Rights[6] (1948) extended the prohibition against slavery and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery[7] (1957) expanded the prohibition, making it applicable to debt bondage, serfdom, servile forms of marriage and the exploitation of children, practices that are held to be "similar to slavery'.[8] Although many aspects of slavery or servitude are present in trafficking like the detention or sale of the victim, degrading treatment, absolute control over the victim, it has been difficult to sustain claims that trafficking is included in the jus cogens norm prohibiting slavery and the slave trade.[9]

In 1930, the ILO Forced Labour Convention (Convention 29)[10] was signed by the international community to take measures to prevent compulsory labour 'from developing into conditions analogous to slavery.'[11] The definition of forced labour, as present in this convention, is widely accepted even today. However, no UN body has ever formally invoked this international prohibition on forced labour in a case of trafficking or commercial sexual exploitation.

In the early 20th century, the understanding of trade for commercial sexual exploitation was almost exclusively confined to white women. During the first half of the century, many international conventions dealing with the traffic of women and children were concluded and in 1949, they were all incorporated in the Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others.[12] This convention has numerous important provisions dealing with international cooperation and protection of foreign victims.

However, it has been strongly criticised for being ineffective as it has focused only on prostitution, including consensual prostitution, rather than trafficking and for not having any implementation and supervision mechanisms to guarantee its effectivity. It views organised prostitution as the sole precursor for trafficking. Minimising demand through the control of prostitution, it is assumed, can control the illegal trade. The convention proved unable to protect the rights of women and in combating trafficking. Further, by confining the definition to 'trafficking for prostitution' it excludes a vast number of women from its protection. No independent body has been established to monitor the implementation and enforcement of the treaty.[13]

The prohibition of forced prostitution and commercial sexual exploitation of women have been incorporated into other instruments like the Convention for the Elimination of Discrimination Against Women (CEDAW).[14] Article 6 of the convention says that all States party to it shall take appropriate measures, including legislation, to suppress all forms of commercial and other exploitation of women.

Children are becoming victims, and it is on the rise globally. Recognising this, the Convention on the Rights of the Child provides comprehensive safeguards for children. It stipulates prevention of the abduction or sale of children for any purpose, including economic, sexual exploitation or abuse. The prohibition on the exploitation of children has been reiterated and its scope expanded through the 1999 ILO Convention on the Worst Forms of Child Labour.[15] The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[16] supplementing the United Nations Convention Against Transnational Organised Crime[17], also called the Palermo Protocol, has been agreed upon by the international community. Trafficking in persons is defined as under:

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

The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons'...

The Palermo Protocol carries special safeguards for the care of children who have been victims, including legal protection. It lays emphasis on the fact that persons who have been trafficked are victims and should not be punished for any offences or activities that are related, such as prostitution or immigration violations. The protocol clarifies that trafficking includes not only the transportation of a person from one place to another, but also their recruitment and receipt so that anyone involved in the movement of another individual for exploitation is part of the process. It also states that this is not restricted to commercial sexual exploitation alone but also takes place for forced labour and other practices akin to slavery. Hence, people who migrate for work in agriculture, domestic work, construction and other occupations, who are deceived or coerced into working under conditions they did not agree to, fall within the ambit of the definition of a person who has been trafficked.

The existing international laws provides limited protection, though crucial, to victims through their status as migrants or aliens or as migrant workers. Yet, the distinction between trafficking and migration for work is hardly ever made. Consequently, the rights of a trafficked person as a worker are rarely articulated or protected.[18] The International Convention for the Rights of All Migrant Workers and Members of their Families,[19] adopted by the UN General Assembly in 1990, provides safeguards for the rights of migrant workers, it has been ratified by only 23 countries and is thus not in effect.

There is a marked reluctance on the part of most countries to enact a legislation protecting anything but

the basic human rights of migrants. Most governments have dealt with the increase in the international demand for migrant workers by imposing tighter immigration controls, which aggravates the problems faced by migrant workers and the violation of their human rights continue unabated. Having said this, the international community has time and again accepted that the problems of trafficking and migration are interlinked.

The Palermo Protocol is the primary international instrument against trafficking in humans. It represents a significant development in the global battle due to its consensus on the need to develop national policies and programmes that effectively prevent trafficking but do not inhibit labour migration. Its major limitation is that the protection and support elements are not binding on the countries that have ratified the convention. Any protection should ensure that all organisations and officials should refer a victim to the relevant agency for advice and assistance, regardless of their willingness to assist in a prosecution or their illegal immigration status.

SEX TRADE IN SOUTH ASIA

The incidence of trafficking has grown to alarming proportions globally in the past two decades, especially within South Asia. The region has become a major source and destination as well as a transit point.[20] Women and children across this region are traded within their own countries and across international borders against their will in a clandestine slave trade. In view of this alarming trend, there have been important steps taken at the regional level in the past five years. Presently, international conventions are invoked to protect the rights of trafficked persons within the region, especially women and children. Simultaneously, regional instruments like the Rawalpindi Resolution of 1996[21] and the SAARC Convention on Preventing and Combating Trafficking in Women and Children[22] have been developed to specifically address the problem.

The South Asian countries first expressed their commitment towards the elimination of human trafficking at the SAARC Summit in Male, Maldives, 1997, through a declaration that expressed grave concern at the trafficking of women and children and pledged action on the part of member nations.[23] The issue occupied a prominent place in the SAARC Summit in Colombo, Sri Lanka, 1998. The international significance of a 'SAARC convention' on trafficking in persons cannot be underestimated. It is an important step since it recognises the need for extraterritorial application of jurisdiction and extradition laws.

Nonetheless, the convention has been criticised for limiting its application only to the commercial sexual exploitation of women and children and for not addressing trafficking in the broader perspective. It lacks a strong treaty body and does not clarify the rights of victims. It does not clarify the recipient country's accountability in the rescue, rehabilitation, repatriation and reintegration of persons who have been trafficked. A country that is a destination point must be made accountable for the well being of trafficked victims by providing physical and mental health care, legal advice and financial assistance and compensation. The immigration policies should be modified so as to facilitate a victim to initiate legal proceedings against the trafficker in the country of residence. Assistance should be provided to the victim even in case of her being unwilling to cooperate in legal proceedings.

Pornography, which is one of the major reasons for trafficking, is not included in the convention as an offence. This is a glaring lapse because trafficking of children for pornography is a major concern in South Asia, especially in Thailand, Cambodia and India. The convention fails to protect the rights of victims such as the confidentiality of records, right to privacy, identity protection and access to justice.

ACTION INITIATED

In recent years, India has become a major transit point as well as a source and destination point for the trafficking of women, children and men for sexual or labour exploitation. Indians are forced into the coercive labour market in the Middle East countries. Children may be forced to beg or work as camel jockeys. Bangladeshi women and children are trafficked to India or transit through India en route to Pakistan and the Middle East for sexual exploitation, domestic and forced labour. Nepalese women and girls are trafficked to India for sexual exploitation, domestic or forced labour or work in the circus industry. India is fast becoming a favoured destination for sex tourists from Europe, US and other western countries. Internal trafficking of men, women and children is widespread. Numerous studies show that the majority of women in the Indian commercial sex industry are victims of sexual servitude or were originally forced into commercial sexual exploitation. India is also home to millions of vic-

tims of forced or bonded labour.[24] The government of India does not fully comply with the minimum standards for the elimination of this mass exploitation. India has consistently affirmed its commitment to the SAARC declarations but has yet to ratify the 2002 Anti Trafficking Protocol. India's only central legislation against trafficking, The Suppression of Immoral Traffic in women and Girls Act, 1956 (SITA), was originally passed as a result of the United Nations Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949, to which India is a signatory. The Act was amended twice. It was first amended in 1978, and then amended and renamed as The Immoral Traffic (Prevention) Act (ITPA) in 1986.

The quality and extent of the government's response to trafficking, especially in law enforcement, is grossly inadequate. The cities of New Delhi, Mumbai and Chennai and the states of Maharashtra and Tamil Nadu have shown an improvement in law enforcement efforts. There has been an increase in the prosecutions and convictions in Tamil Nadu and New Delhi.

The US Department of State Trafficking in Persons Report, 2005,[25] places India on the Tier 2 Watch List for a second consecutive year for its lack of progress in forming a national law enforcement response to inter state and transnational trafficking and the lack of coordination between law enforcement agencies across states. Though comprehensive statistics are not available, data from major cities and states across India showed 195 prosecutions and 82 convictions were obtained for different offences related to trafficking for sexual exploitation in 2004.[26]

The proposed amendments to ITPA seek to remove those sections from the Act that criminalise prostitutes while protecting their rights as victims. The Juvenile Justice Act, 2000, provides modest criminal penalties for sexual offences committed against minors, including commercial sexual exploitation, but provides protection to victims through the Child Welfare Committees in each state or through officially maintained or approved protection homes.

Indian laws fail to provide sufficient protection to those forced into bonded labour. Children, who are trafficked for hard domestic labour, with no rights, find no protection in any legislation. Widespread corruption among law enforcement officials and their complexity in many cases are a major impediment to eliminate this organised exploition.

The central government has initiated many efforts to protect victims. The department of women and child development (DWCD), the central government's nodal anti-trafficking office, has improved the coordination of support services through greater cooperation in the various states. In New Delhi, a unique initiative has been launched whereby the police has to provide victims with counselling by a recognised NGO within 24 hours. This has led to greater cooperation between the victim and the police in investigating and prosecuting traffickers. The police in Mumbai have adopted policies designed to protect the rights of victims and police personnel have been instructed not to arrest women for soliciting customers under ITPA.[27]

In 2004, the central government designated the secretary for women and child development as the country's nodal officer to coordinate and oversee all national anti-trafficking programmes. The National Central Advisory Committee on Trafficked Persons, which includes civil society groups and state level agencies, has introduced amendments to ITPA. It has created a national plan of action that calls for greater coordination with the NGO sector. In 2004, the National Human Rights Commission released a comprehensive report on trafficking in India and recommended action asking the government to prevent and put an effective end to trafficking in the future.

The international community has time and again demonstrated its commitment. Individual states need to pass comprehensive legislations to prohibit and punish all forms of trafficking. Yet, states must also realise that these initiatives alone cannot counter this organised, global brutalisation of men, women and children, and that policies need to be designed and implemented to strike at the root causes of trafficking.

India too has recognised the need for urgent action to fight the growing problem of trafficking. However, it has proved to be an uphill task for the Indian government. There is an urgent need for a comprehensive legislation that seeks to combat all forms of trafficking while embodying the standards by the Palermo Protocol and the SAARC Trafficking Convention.

— June-July 2006

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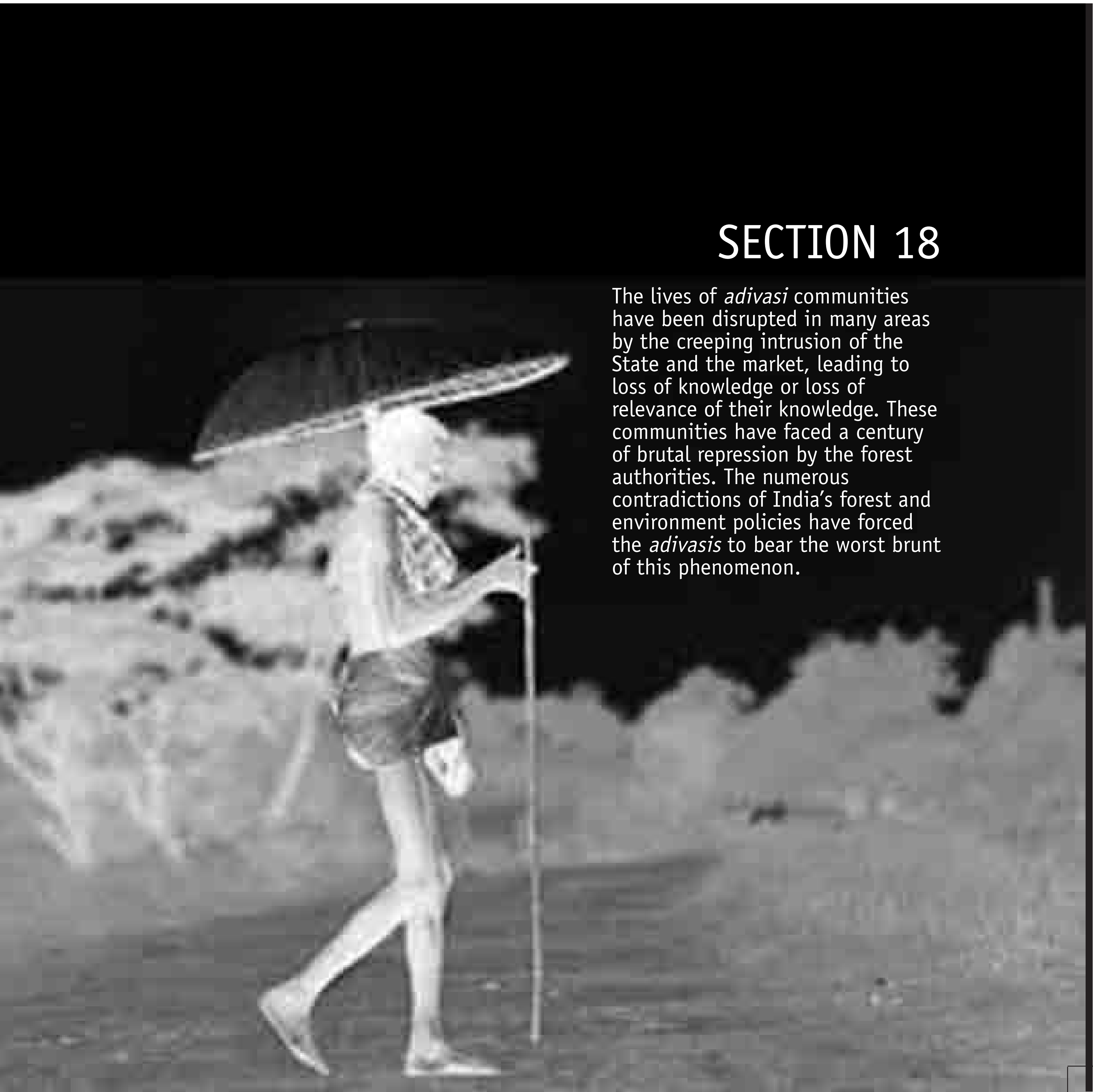
FOR SALE
JUSTICE
SOLD
TRAFFICKED
HOTEL
BEAUTY PARLOUR
MASSAGE PARLOUR
DANCE BAR
POLICE STATION
DOLLAR • DINAR • POUND
RIYAL • ROUBLE • YEN
RUPEES • EURO • LIRA
CHILDREN
• STARVED
• SEXUALLY ABUSED
• TERRORISED
• RAPED
• TORTURED
INDIA
CHILD TRAFFICKING
• CHEAP LABOUR
• CHILD SLAVERY
• CHILD ABUSE
TRAFFICKING OF DISABLED PERSONS



SECTION 18

The lives of *adivasi* communities have been disrupted in many areas by the creeping intrusion of the State and the market, leading to loss of knowledge or loss of relevance of their knowledge. These communities have faced a century of brutal repression by the forest authorities. The numerous contradictions of India's forest and environment policies have forced the *adivasis* to bear the worst brunt of this phenomenon.

The Economics of Green Hunt

In Jharkhand, the State is behaving like an agent of corporations, grabbing resources from tribals in violation of their traditional rights and handing them over to corporations, even using gun power if necessary. These are the findings of an HRLN fact finding team that visited the state's most backward but resource-abundant regions.

SARITA BHOI

The Wednesday morning of March 31 this year brought a day that Ram Soren (name changed to protect identity), a resident of a remote village in Giridih district, would always remember with a shudder. "I was fixing the roof at the time when I saw police beating up Tara, a fellow villager. The police called me too and started asking about the murder of a certain constable named Chhotu Chowkidar. They asked me if I had seen the Naxals that night and if I knew of their meetings to which I answered that I was not aware of it. Thereafter they called two more boys and beat all of us brutally. About 200-300 CRPF personnel had surrounded the village at the time of the incident," recounts the frail villager.

The next day was Neetu Soren's turn to face the high-handedness of the police. "Three police personnel came inside my house with their shoes on. They asked me to open a room that was closed and asked why I had stored 50 kilos of salt in my house to which I replied that whenever we have money, we buy large quantities of food at one time for domestic use. They alleged that this was for the Maoists and asked me if the Maoists came to my house. When I came out of the house, I was shocked to see about 20-30 police personnel outside my house".

The fear in Neetu's eyes is routine in Jharkhand's remote villages where the state has launched a massive manhunt in the name of "Operation Green Hunt". Quite often the phrase is loosely used in media reports to refer to police efforts towards tackling the problem of Maoists in the region. However, the question that goes unasked is how this operation is violating the space and privacy of people living in this area and how the state oppression in the name of internal security and restoration of law and order is giving rise to trepidation among innocent tribal people.

Interestingly, the area where the operation is currently going on is full of natural resources. The anti-Naxal operation was initially launched in the Kolhan region where the Jharkhand government has signed many MoUs with corporate houses for the establishment of mining industries, power projects and steel plants. This operation is being carried out in the districts of Giridih, East Singhbhum, West Singbhum, Khunti, Lohardagga, Latehar,

Saraikala Kharsawan and Hazaribagh -- where there is massive opposition from villagers on the proposed development projects. However, the government foresees this area as the key investment corridor.

THE PARADOX

In the present day's industrial setting dominated by the neo-liberal discourse of development, Jharkhand has emerged as one of the main destinations of Foreign Direct Investment (FDI). Here FDI is concentrated in the secondary sector and not in the service sector like in other states. This compounds the problem of rapid industrialisation with large-scale displacement and tribals' alienation from their land. It is against this background that we are looking at the issue of Operation Green Hunt in Jharkhand.

The paradox of "rich resources, poor people" in the tribal areas has been a concern for everybody for quite some time. The issues of tribal rights and their access to land and other natural resources has emerged as a central theme in the impoverishment and disempowerment of tribal communities.

The social base of the problem and the subjects of study in this context are the Scheduled Tribes, who constitute 26 percent of Jharkhand's population and are the most marginalised and poor social group in the state, with over 72 percent living under the poverty line. Though land and land-based resources are central to the livelihoods of tribal people, they have poor access to land and forests. Most tribal communities in Jharkhand have strong cultural and social relationships with land, many of them practicing communal ownership of land, especially swidden land. During the last two centuries, tribal communities have been dispossessed of their land -- while the plain land was given to non-tribals, the swidden land was taken up by the state. The state in turn has categorised these areas as forest land or revenue land.

The loss of private landholdings by tribals has been a cause of concern over the history of the Indian polity. A number of laws passed by both the pre-independence State and the post-colonial State to check land alienation have suffered shortcomings and have been unable to check the transfer of land from tribals to non-tribals. Also, as this study found out, tribals' poor access to land is not only an outcome of their alienation from land, but is also the outcome of the land and forest policies followed by the State. In Scheduled areas of Jharkhand, three-fourth of the land is owned by the State and less than ten percent land is owned by tribals. At the same time, the per household land ownership among tribal households is extremely low. The situation of marginal ST households, which constitute more than 50 percent of tribal landowners, is even more precarious, with their average landholding consisting of extremely small portions of land. Given that land is the most important source of tribal livelihood, the extremely low holdings could be an important factor behind the social group's acute poverty. This study was conducted to understand the contrast of abundant land owned by the State as against the meager holdings of tribals, the denial of tribals' rights to natural resources because of the process of industrialisation, and their violation through State oppression disguised as Operation Green Hunt.

The overshadowing of the large-scale loss of tribal access to land and forests through processes of displacement and industrialisation has been facilitated by the state itself. The structural mechanism to ensure the fundamental rights of adivasis -- rights to basic civic amenities like food, water, healthcare, education, mode of transport (roads and public transportation system), electricity, etc. -- in fact ensures that these rights are denied to the tribal people through a long term systematic process of indiscriminate industrialisation.

GRABBERS & FACILITATORS

The corporate houses, both private and public, are the agencies that directly carry on the programme of industrialisation. However, the State, functioning within a system of competitive politics and a so-called democratic framework, continues to be the prime mover and guardian of the whole enterprise. It is acting as an intermediary agency to protect and appease corporate lobbies for the larger interest of capitalist groups who aspire to establish large companies in the tribal areas, thereby ensuring the establishment of a neo-colonial system. What has also come out of this study is the observation that the State and the companies are collectively bribing the local people and are manipulating facts in the process of signing of MOUs for land acquisition.

The process of industrialisation has not only generated a good deal of social tension and political turmoil leading to political instability, but has also violated the basic principle of human rights. Paving the way for industrialisation through State oppression in Jharkhand is a classic example of violation of fundamental human

rights in the name of economic development.

Of late, social movements opposing the corporatisation and industrialisation of tribal-dominated states, such as Jharkhand, have been crushed under the neoliberal economic discourse of the State. This has given rise to militant movements. The Naxalite movement is one of the results of this kind of exploitation.

For example, the slogan *"Jangal Zamin Azad Hai"* (forest and land are free gifts of Nature) succinctly expresses the opposition to external control and commercial use. Unfortunately, social movements organised to protect tribal rights have often been mistaken by the State as militant movements -- thus branding social activists as criminals and banning such slogans. Criminalising social movements to appease and protect corporate interests is a regular feature in the government discourse.

Against this background, resistance movements of tribal people against industrial units need to be probed into deeply. Protests against industrialisation by the affected people is not new in the state, but the ongoing movements are different in that they have brought about an extraordinary unity among the tribal and backward masses against the industrial establishments as well as against the state government, forcing all political establishments to rethink the process of industrialisation.

The solution appears to have moved too far. The growth of pan-tribal unity is an emerging political phenomenon against the militant and autocratic state political leadership.

People's protests against displacement are widespread all over the state and are gaining momentum against the industrial houses. While the state government looks upon all these resistance movements as law and order problems, and has been trying to tighten the security arrangements in and around the industrial hub, the people have raised important questions which merit serious attention of the corporate bodies.

Besides the questions of rehabilitation and resettlement, questions regarding betterment of the quality of life of the project-affected people are closely associated with all these movements.

Mostly the people who are hit extremely hard by industrialisation are the tribals. Since the government bureaucracy is not responsive to the needs of the displaced people, the people's discontentment against industrialisation finds expression through various means which have serious social, economic and political implications. In short, it's a wake up call.

— May-August 2010

Missing the Woods for Trees?

The Forests Rights Bill, if passed, would be a big step towards democratising the forest department and would create a genuine political process around forest management and rights in tribal areas.

SHANKAR GOPALKRISHNAN

It is not often that issues concerning forest communities attract the attention of the national English language media. As with the people of North East and Kashmir, their issues and concerns are reported only as footnotes to larger stories. But now, for the first time, forest issues have been splashed across the major English language newspapers and everyone, from Rahul Gandhi to Prakash Karat, has something to say.

The subject of all this uproar is the recently drafted Scheduled Tribes (Recognition of Forest Rights) Bill, 2005. The new Bill seeks to legally recognise the existing rights of Scheduled Tribes in forests and to change the way the forests are managed in their areas. If passed, the Bill will mark a landmark change in the way our legal system treats forests and forest communities. Moreover, it contains institutional prototypes that may well be a model for other areas as well.

But why should such a law unleash such fierce debate? The answer lies in India's system of forest management and its history.

FOREST DEPARTMENT

India's forests are generally considered as uninhabited and undisturbed by human beings, a 'wilderness' policed and protected by the forest and conservation authorities. However, such notions are far from reality. 'Human-free wilderness' does not exist except in remote areas. More than four million people live inside our sanctuaries and national parks (leave alone the far larger reserved forest areas). Entire communities, especially tribal ones, have evolved in and with the forests. These communities have faced a century of brutal repression by the forest authorities.

Secondly, the forest authorities have both failed to protect the forest and actively engaged in forest destruction. Official data shows that 60% of the forest area under official control is classified as 'degraded.' Between 1951 and 1979, 3.33 million hectares of natural forest was cleared for 'industrial plantations'. Commercial planting has destroyed 90% of our indigenous grassland ecosystems. Meanwhile, the forest authorities' participation in illegal activities is extreme. In the taluka of Gudalur, Tamil Nadu, between 1996 and 2002, the forest authorities connived with land grabbers in the destruction of 3,000 acres of dense natural forest. The association of poaching, timber and mining mafias with the forest authorities is legendary. Indeed, in Orissa alone, in the last five years, the Union Ministry of Environment

and Forests has retrospectively approved the illegal clearing of 1224 hectares of forest by mining companies. Most recently, the Project Tiger debacle indicates that the corruption is deep rooted within our nation's most famous conservation effort. The current forest management system is thus marked by two features: repression of forest communities and large-scale forest destruction. This, in turn, has happened because our forest department is and always has been a colonial institution.

A COLONIAL ENTERPRISE

Before the British Raj, India's forests came under a patchwork of community management systems that recognised certain rights but also ensured sustainable use. Initially, the British rarely interfered in this framework (and never did so in the Northeast and in what are now called Scheduled Areas). But, in the mid-nineteenth century, massive growth in the railways and in ship building required vast quantities of timber. What better place to get such timber than India's vast forests?

The policy that resulted has many parallels with that most infamous colonial intervention, the Permanent Settlement. Just as the Settlement created a class of zamindars in order to 'develop' the land and ease revenue collection, the Forest Acts created a different kind of zamindar - the forest department - to 'manage' forests for increased yields and to ease timber harvesting. A series of land grabs followed. In Uttaranchal in 1893, all uncultivated 'common lands', including village forests, pastures, sacred groves etc. were declared 'state forests'. In Himachal, all areas classified as 'waste lands' were also declared state forests. Today, they form 66.4% of the state's land area, though more than half of this is physically incapable of supporting forest. Similar steps were taken across India. Meanwhile, the British created the forest department and appointed what they called 'scientific foresters' to head it. This department assumed total control over state forests and was given sweeping powers to police these. When it came to forests, the Department became investigator, prosecutor and judge, all in one.

The first Forest Act led to massive tribal uprisings, such as the Bhil rebellion and the Munda revolts. Within the colonial government, earlier opponents of the forest policy saw these revolts as vindication. The result was a compromise - the vague provisions of the Indian Forest Act (IFA) that require the survey and settlement of existing rights before declaration of a reserved forest. Needless to say, this was almost never done.

Independence brought little succor, despite the Constitutional protection for Scheduled Tribes (who form the majority of forest communities). In fact, the situation got worse. The IFA was de facto extended to the Vth Schedule Areas and to the forests of the Princely States. Since then the forest department has only grown; between 1961 and 1988, the area of reserved forests in India increased by 26 million hectares - more than 60%. The settlement provisions of the IFA and its corollary, the Wildlife Protection Act (WLPA), are still routinely violated. A recent study found that 40% of Orissa's forests were 'deemed' reserved, while till date rights have not been surveyed.

This combination of unsettled rights with absolute power has created the paradoxes of India's forests. On the one hand, the Forest Department has forced forest communities into permanent insecurity, subjecting them to harassment and physical or sexual assault, all backed by the Damocles' sword of eviction. On the other, the forest authorities are still completely unaccountable; this creates boundless opportunities for corruption and criminalisation, which are only made easier by the repression of communities.

ATTEMPTS AT RESOLUTION: THE RUN-UP TO THE LAW

There have been a few attempts to address this situation. Many state governments issued orders for regularization of cultivated lands, but these were rarely implemented. The Forest (Conservation) Act, 1980, which required central government approval for dereservation of forest land, ended such state-level efforts, but in 1990 the Union Ministry of Environment and Forests issued five circulars for similar purposes. Only Maharashtra and Madhya Pradesh have made even token attempts at implementing them - both after a Supreme Court order. Meanwhile, Joint Forest Management (JFM) schemes tried to involve communities in conservation.

But every one of these efforts stayed within the existing structure. Some regularization orders even required proof that the claimant had earlier been booked for 'encroachment'. JFM committees typically function under the de facto control of the local forest guard. Thus, the schemes did not challenge the absolute au-

thority of the Forest Department, and very little changed on the ground. The consequences of this failure became very apparent in May 2002, when the Ministry of Environment and Forests directed the states to evict all 'encroachers' in the wake of a Supreme Court ban on regularizations. The years since have witnessed unprecedented eviction drives, which have primarily targeted forest communities; 40,000 families were evicted in Assam alone , and the countrywide total is estimated to run into lakhs. These drives are continuing to this day: an estimated 10,000 families have been evicted in Madhya Pradesh since April 2nd .

It was these mass evictions that triggered the first real steps forward. In Maharashtra, after a demonstration by more than one lakh tribals in Mumbai on October 10, 2002, the government announced a new government resolution for regularisations. The new GR recognised that government records could not be the method of determining rights. It made oral evidence admissible and required that verification should take place by an elected committee before the gram sabha. This was a landmark move. It acknowledged that communities too had knowledge and rights in forests, and thus struck a blow at the Forest Department's colonial foundations. Mass movements used the space created by this GR to effectively push for recognition of tribals' land rights.

But evictions continued elsewhere. The Campaign for Survival and Dignity, a federation of tribal and forest community organisations from 10 states, came together against these evictions. Subsequently, the NDA government issued two new circulars (which were stayed by the Supreme Court) and the UPA government's Common Minimum Programme called for a halt to evictions. Forest issues had found their way into national politics. In July 2004, in its response to the Supreme Court stay, the ministry of environment and forests filed an affidavit in which it admitted that forest communities had suffered a "historical injustice" and that the "rural poor, especially tribals, had been deprived of their livelihood rights" . The Ministry did nothing to follow up on this admission, but in January, following pressure from the Campaign, the Prime Minister directed the ministry of tribal affairs to draft a law for forest rights. The choice of ministry was another victory: the government accepted that the forest authorities would not and could not draft a truly just law.

THE NEW LAW

The resulting bill, namely the Scheduled Tribes (Recognition of Forest Rights) Bill, 2005, has two main principles. The first is that currently existing rights to land under occupation (from prior to a certain cut-off date, currently 1980), to minor forest produce, to traditional forest uses and so on are vested with forest dwelling Scheduled Tribes in the areas where they are scheduled (whatever area is specified next to the tribe's name in the Schedule). The gram sabhas in these areas are responsible for verifying these rights. Two higher committees then prepare a record of rights based on *gram sabha* resolutions and hear appeals against the *gram sabha*. There is a separate provision for appeals by state authorities.

The second principle is that Scheduled Tribes communities must protect forests. They are prohibited from felling existing trees, harming wildlife or biodiversity, or engaging in 'unsustainable use.' Under the Act, rights-holders lose their rights if they commit any of these offenses more than once. In addition, the community is given the 'right' to protect forests, and in some versions was given powers to participate in the identification and punishment of forest offenders. The law thus legally requires community involvement in forest conservation.

This twin combination, if passed in a fully meaningful form, would be a huge step towards democratizing the forest department. It would make possible a genuine political process around forest management and rights in tribal areas. The law also contains several potentialities that could be expanded through political struggle, including a recognition of shifting cultivation, collective ownership, etc.

CRITICISM

Negative responses to the draft law can be divided into two camps: criticism by those who share the Bill's basic goals, and opposition, mainly from groups who are either misinformed or fundamentally opposed to democratising forest policy. The opponents have gotten far more press coverage than the critics, but since the latter are more substantive, I will consider them first.

The first criticism is the exclusion of non-tribal forest dwelling communities, who are at present in significant numbers in states such as Tamil Nadu and Jharkhand. The original draft had included a section that required a public verification process based on the

Maharashtra model for non-tribal forest dwellers. This approach recognised that these communities were as repressed as tribals, while accepting that they may not share tribal communities' collective relationship with the forest. This imperfect compromise (based on a generalisation about tribal-non-tribal differences that is only partially true) was dropped by the government in later drafts, which now only apply to forest dwelling Scheduled Tribes. This is a major blow to the legislation and an injustice to communities who are either non-tribal or are wrongly excluded from the Scheduled Tribes list.

The second criticism, voiced by environmentalists like Ashish Kothari and Neema Pathak, is that the Bill is unclear on its relationship with existing forest laws, and more broadly on how conflicts between rights and conservation will be handled. They have suggested that gram sabhas can be required to place conservation above rights, an approach that could make it possible to sabotage the recognition of rights but could also be a clearer statement of community powers in forest conservation.

The third criticism is that the Bill's reliance on gram sabhas ignores the fact that these institutions either do not function or can be dominated by powerful interests. But this criticism applies to any democratic institution. By granting powers to gram sabhas, this law creates the space for political mobilization in those institutions; no law can substitute for political action on its own.

Overall, despite these criticisms, the main organisation backing the law - the Campaign for Survival and Dignity - is still calling for the law to be passed immediately, even in its current form. These problems can be addressed either in the Rules or in later amendments. But to call for amendments now would open the floodgates to those who are opposed to the Bill in its entirety, resulting in either its dilution or its cancellation.

THE OPPONENTS

These opponents have mounted an increasingly shrill press campaign for about two months now. It was initiated by officials in the ministry of environment and forests, who correctly recognized that the bill is a tremendous threat to their powers and control. These officials leaked an internal letter from the ministry, which claimed that the bill 'amounted to distributing a national resource' to 'only 8.2% of the population.' The letter also distorted the Bill's contents by claiming that every tribal family would receive 2.5 hectares of land - while the Bill states that only rights to land under cultivation since 1980 would be granted, up to a maximum of 2.5 hectares per family .

A series of press articles followed, quoting unnamed 'sources' who claimed that the Bill would destroy 16% of India's forest cover; this was later increased to 60%. The unnamed sources were accompanied by alarmist quotes from a few wildlife activists, particularly Valmik Thapar. Editorial commentators began roundly attacking the bill on the basis of this false information, even claiming that India's tigers would be destroyed. Indeed, the Indian Express ran five opinion pieces in as many days attacking the bill.

The press campaign is based on three points: one cannot hand over 'national resources' to private holders, one cannot distribute 2.5 hectares to every family, and tribal communities will be 'used' to take over lands. Not one of these claims has anything to do with the actual contents of the Bill. The Bill only recognises existing, long-term rights of forest communities; it does not transfer resources to anyone. But so much misinformation had been spread that this largely escaped most reporters' and editors' notice.

CONCLUSION

After this massive campaign, the Bill was quietly dropped from the budget session of Parliament, despite pressure from the left parties, sympathetic MP's and the Campaign for Survival and Dignity. The government now intends to call for a public debate. If the present 'debate' is any indication, this will see more misinformation and propaganda by the Bill's opponents. Whether the Bill succeeds will depend on whether or not its supporters can win the political battle against vested interests that have no commitment to either India's forests or the rights of forest communities.

— June-July 2005

Adivasi Tradition as Crime

In order to preserve their traditions, customs, cultural identity and community resources, adivasis practiced a centuries-old customary mode of dispute resolution at *gram sabha* level. This tradition was formally acknowledged by the Indian Parliament when in December 1996 it passed 'The Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996'. However, this tradition of dispute-resolution is made out as a criminal offence.

STAN SWAMY

The Adivasi Community has had centuries-old tradition of dispensing justice at village / area level. The traditional village headman (Munda in Munda & Ho communities, Pahan in Oraon community, Manjhi in Santal community, Doklo in Kharia community) has the authority to settle village - level disputes. He calls village meeting, summons the disputing parties, discusses the case in question, obtains a consensus decision on the matter from all assembled and pronounces the community's judgement which both parties are expected to accept. This may include punishment to the erring party in the form of fine in cash or kind and in extreme situations even social ostracism from the village community.

In case the guilty party refuses to accept the verdict of the village community, then it is referred to the area headman responsible for 20 to 30 villages (Padharaja in Munda & Oraon community, Manki in Ho, Pargana in Santal, Sohor in Kharia community) who together with the all the village heads in his jurisdiction summons the concerned parties, examines the case and arrives at a consensus decision which the parties have to accept. And in rare cases where even this decision is unacceptable to either party, three area headmen representing about 90 to 100 villages gather together and issue their final verdict which has necessarily to be accepted by the disputing parties. Refusal to accept would be dealt with severely leading to even physical ostracism. The most significant factor is the consensus-decision making process so that individual prejudice, lack of competence of some persons etc. are taken care of and collective wisdom is cherished.

This tradition of the Adivasi People was formally acknowledged by the Indian Parliament when in December 1996 it passed 'The Provisions of the Panchayats (Extension to the Scheduled Areas)Act,1996' wherein in Section 4 (d) it affirms "every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution".

ADIVASI TRADITION MADE INTO A CRIME IN PAKUR DISTRICT

The Jharkhand Government has issued notification for land acquisition in nine tribal villages of Pachwara Central Block, within the scheduled area of Pakur District for captive coal mining to supply coal to the power plants of Punjab State Electricity Board (PSEB). The

captive mining will be done by a private company, PANEM Coal Mines Limited. Open cast mining will be done in 11 square kilometers of land which includes: Raiyati land - 640 hectares, Forest - 360 hectare, Homestead - 2 hectares, Waste land - 15 hectares, Nala, River - 34 hectares, Road - 28 hectares, Grazing land - 22 hectares

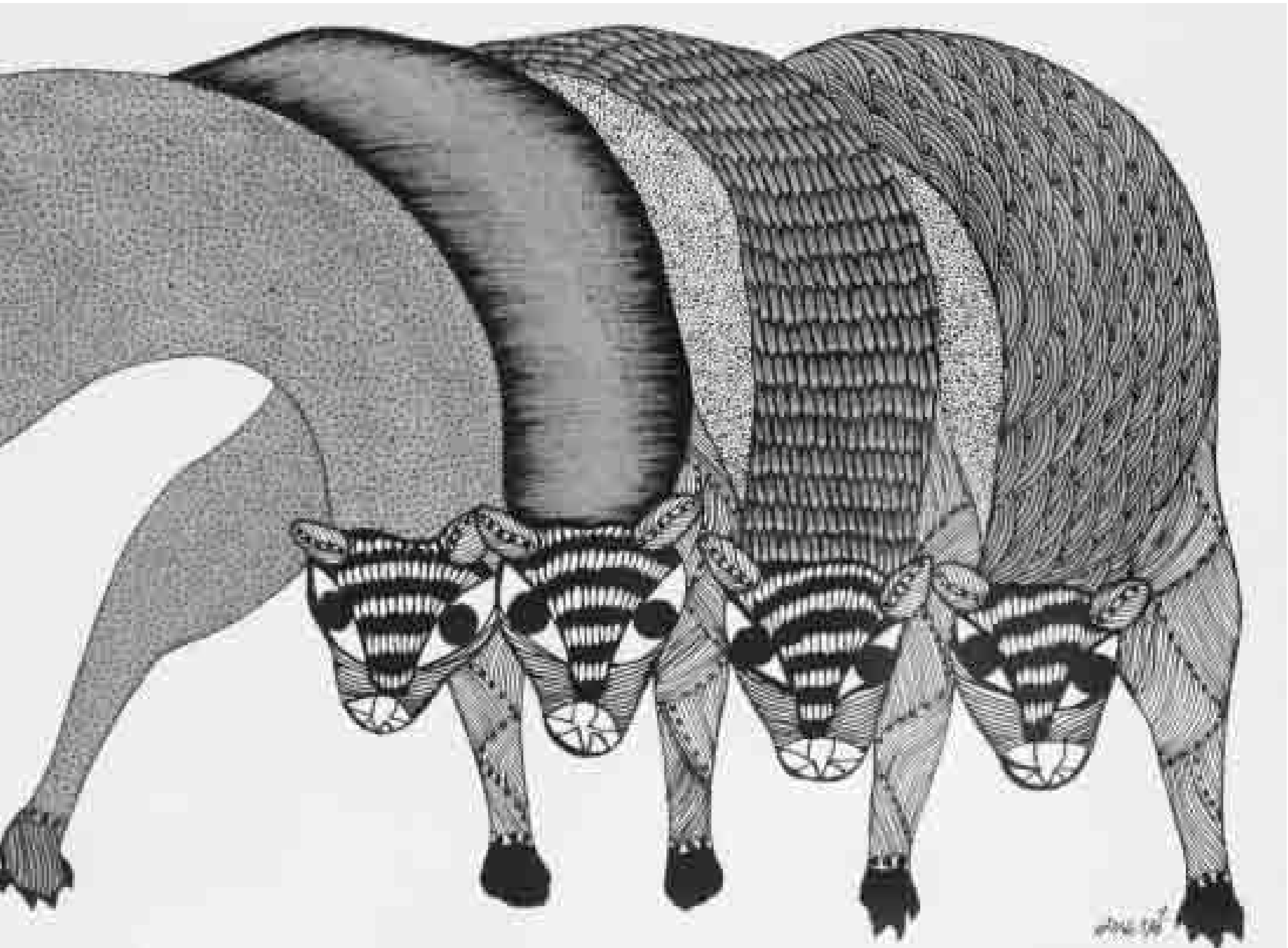
All the above agreements between Jharkhand Government, PSEB and PANEM company were made without any reference to the Tribal People affected by this mining project. Then the Land Acquisition Dept issued Notification No 4 on 13-11-2002 in the local newspapers to which the Gram Sabha of Pachwara sent a letter on 9-12-02 to the concerned authorities reminding them of Panchayat Raj (Extension to Scheduled Areas) Act, 1996, according to which prior consultation with Gram Sabha on any project involving land acquisition in Scheduled Areas is a must. There was no response from the government. Then again the government issued Notification No 6 in local newspapers on 14-5-03 announcing the proposed acquisition of plots. The people again responded on 2-7-03 to the effect that they demand a dialogue with concerned Gram Sabhas. This communication was sent to concerned officials by Registered Post. This letter was returned to them on 23-7-03 with a note "Refused" by the post man. In the meantime, the government has issued Notification No 8 as per which the people have been informed that measurement of those plots of land proposed to be acquired is to take place. People have now hand delivered a letter on 25-7-03 to the officials demanding explanation for their Refusal of the previous letter. Response is still awaited.

The action of the government goes against the prescription of Sec. 53 of Santal Parganas Tenancy (Supplementary Provisions)Act,1949, which enjoins the Deputy Commissioner "to issue notice to the raiyats and other persons interested to appear before him and to file objections, if any…" Let it be noted that the Deputy Commissioner of Pakur Dt., has not issued any such notice to the raiyats as of 25-11-03. Nor has he entertained any of their objections. All that the people are demanding from the Govt is a dialogue through which they will come to know the purpose, the use of their to be acquired land , terms of rehabilitation / compensation etc. And this the govt refuses to oblige. This whole process adopted by the government is unconstitutional and illegal. Hence the village heads of the area decided they would not allow any outsider, be it government officials, PANEM company personnel, into the area by putting up manned barricades.

All the nine villages presently affected and about 35 surrounding villages which will be affected in future stand united in this action. In the meantime, PANEM company is trying to weaken this united struggle by buying off some persons by money and promise of jobs. Hence the Pargana and the Manjhis of the area deemed it necessary to summon such deviants before their traditional court, established their guilt, levied a fine as punishment and issued a warning to the effect that if they would not mend their ways more serious action would be taken against them. Now the local police persuaded one such person to file an FIR against the tribal chiefs in the District Sessions Court and arrested all the village heads of the nine villages including a venerable 71 year-old Pargana (area-headman). The charge-sheet includes offences such as (IPC Section 386 implying forcible extortion and Section 34 meaning group culpability of all the eight Manjhis and one Pargana). The whole group applied for bail in Pakur District Court. All of them got bail. But the police retained one person who happens to be the most outspoken of them all. Other charges have been added against him, including kidnapping and threat to kill. When he applied for bail it was rejected on the ground that these are non-bailable offences and he has been languishing in jail for over 10 months. The crime is that he and the other tribal chiefs' dispensed justice as per their tradition of dispensing justice.

This situation calls into question as to where the adivasi people of Jharkhand and their democratic tradition of dispensing justice stand before the government's administration, the law and order forces and the judiciary. The only constitutional instrument which can do that is the State High Court. Accordingly, Jharkhand Justice Forum, a state level legal body, has filed a PIL in the High Court of Jharkhand challenging the government on its land acquisition process and demanding the recognition of the Adivasi method of justice dispensation as valid and constitutionally binding. It is to be seen whether the High Cort will restore the respect and dignity due to the rich traditions of the Adivasi People?

— April-May 2004



PESA and the Illusions of Tribal Self Governance

Tribal self governance has always been their ideal and their weapon. It is no accident of history that the struggle against colonialism began with the tribal people. Perhaps the struggle against internal colonisation of their homelands and neo-colonialism will take root in their struggles for a just future. Panchayat (Extension to Scheduled Areas) Act (or PESA), whether it is perceived in that manner or not, is in effect a critical step towards de-colonisation. That perhaps explains the resistance of the ruling elites to have it implemented in letter and spirit.

PRADIP PRABHU

Self governance was being put into place. A paradigm in which modern state-craft was to be viewed through the looking glass of history, modern praxis of administration was to be tempered in the crucible of tradition. A new chapter in the history of modern India was waiting to be written or re-written[1]. The authors of the new history would be the tribal people of India.

Ironically, in a country, where the overwhelming majority of the population lives in villages, 'gram' or village became part of the Constitution, for the first time after 42 years. The 73rd Amendment, an important landmark in the nation's democratic history, introduced Article 243 in the Constitution, provided a constitutional frame for democratic decentralization of development and more importantly opened legal spaces for villagers to govern themselves. Panchayati Raj being a state subject, Article 243G required states to frame laws to endow Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government.

These law had to provide for devolution of powers and responsibilities upon Panchayats to prepare and implement plans for economic development and social justice. The 73rd Amendment had taken a tentative step but stopped short of actual empowerment by entrusting the state governments the responsibility to transfer 'powers and authority' to the villagers. But as subsequent events show, the response of the political elites in the states ranged from reluctance to resistance to transfer to the people powers, which were concentrated in the hands of elected representatives. Many states were coerced to introduce changes by withholding central development grants. The changes however did not provide for village self governance.

TRIBAL SELF GOVERNANCE

By virtue of Article 243(m), the automatic extension of the 73rd. Amendment to the Scheduled Areas was barred. The restraint of clause 243(m) was rooted in two realities. The first was the tacit recognition of the long history of tribal affirmation of their right of self governance manifested in their prolonged resistance to colonial rule.

A classical example being the Wilkinson's Rules which provided recognition for the traditional Munda-Manki system of self governance in the Kolhan region of Jharkhand[2]. The second was the recognition that traditional tribal self governing institutions were still functional in tribal areas requiring convergence of the 73rd. Amendment with ground realities. 243(m), therefore, by mandating appropriate modifications to Article 243, provided open Constitutional spaces for traditionally self-governing tribal communities and the opportunity to provide legal spaces for strengthening self-governance as a vehicle of tribal advancement.

Not surprisingly, the requirements of 243(m) were ignored by the state governments, who continued with their Panchayati Raj laws in the V Schedule areas in clear violation of the Constitution. Neither the Center, the Governors nor tribal legislators were concerned with the constitutional infringement. The unsavory situation continued till the Gondwana Sangarsh Samithi of Adilabad challenged the validity of Mandal elections in the High Court of Andhra Pradesh, which struck down the applicability of AP Panchayati Raj Laws in Scheduled Areas.

The challenge put forward by Kashtakari Sanghatna in the Mumbai High Court, the writ filed by the Khud Katti Rayatu Sangha in the Patna High Court and the interim order

of the Supreme Court had the same result; application of state PR laws in the Scheduled areas was deemed unconstitutional. The judgments created a constitutional vacuum, "an unprecedented situation in which formal institutions were unconstitutional and the traditional institutions were still unrecognized by the law".

A Select Committee of tribal MPs from all states and different shades of political opinion, was constituted under the Chairmanship of Dileepsing Bhuria to suggest ways to harmonize the Fifth, Sixth, Eleventh and Twelfth Schedules of the Constitution as they impinged upon the PR institutions and suggest modifications in other Acts to strengthen institutions of local self government in these areas.

It was unbelievable that the Bhuria Committee came up with a path breaking recommendations, which if incorporated in the new law, as subsequently happened, would signal a radical departure from all legislation pre or post independence. The committee, in its radical recommendations which eventually found a place in PESA, re-constructed the character of decentralization, pointing out that decentralization was not complete by transfer of power to the lowest rung of representative democracy, the gram panchayat. Democratic decentralization required empowerment of citizens to govern themselves within a frame of participative democracy.

To ensure that tribal self-governance brought with in its ambit all tribal people, the Committee recommended scheduling of all tribal majority villages. In addition, the committee recommended administrative re-organization to maintain the integrity of Scheduled Areas and rectify colonial practices of divide and rule which fragmented geographically contiguous tribal homelands.

In conclusion, the committee recommended constituting contiguous tribal areas into Autonomous Districts or Sub-districts with Councils endowed with legislative executive and judicial functions, following the pattern of the Sixth Schedule to ensure that tribal self-governance was taken to its logical conclusion.

The Chairman in his letter to the Prime Minister, while presenting the report, eloquently summarizes the spirit behind the recommendations saying 'the most important fact of the proposed law is that it will remove the dissonance between tribal tradition of self governance and modern formal institutions, which has been at the root of simmering discontent and occasional confrontation. We are confident that this will mark the beginning of a new era in the history of tribal people. After the new institutional frame becomes operational, the people will be able to perceive the state apparatus as an extension of their own system in the service of the community, that too, in a crucial phase of modernization firmly rooted in tradition'[3]. Agitations of tribal communities, across the nation, paved the way for the passage of PESA based on recommendations of the Bhuria committee.

PESA

PESA was a qualitative leap forward for the 73rd Amendment. Gram sabha (the village assembly) became part of the Constitution[4]. Democratic decentralization reached its logical conclusion in directly empowering the 'citizen' through 'participatory democracy'.

PESA moved from 'development delivery' to 'empowerment'; from implementation to planning; from 'circumscribed involvement' to 'conscious participation'. PESA constructed tribal self-governance around six axes. The first axis through Sec. 4(b) was a fundamental departure from colonial praxis and the affirmation that an organic self-governing community rather than an administrative unit like a village, is the basic unit of self-governance; in other words it is the people who decide what a village is and not the bureaucrat.

PESA held a habitation to be a natural unit of the community, whose adult members constitute the gram sabha. This traditional institution would function without a formal structure as a unit of direct, participative and consensus driven democracy. The second axis was again a departure from colonial thought and an affirmation that the people and not the state are competent to be seized with all matters concerning their day to day life. Sec 4(d) and 4(m)(ii) the community is declared competent to safeguard and preserve their culture and tradition, exercise command over natural resources, enjoy ownership of minor forest produce and adjudicate their disputes. The third axis seen in Sec. 4(e & f) was also a departure from the thinking of ruling elites which affirmed that common tribals acting through community could decide the path of their development, enjoin the Gram Panchayat to prepare and implement developmental plans subject to Gram Sabha approval and hold the panchayat accountable for management of funds. In sec. 4(m)(vi) the village assembly was em-

powered to monitor all state institutions within its jurisdiction e.g. schools, health centers etc, with the functionaries under its control.

The fourth axis manifested in Sec. 4(i),(j),(k)&(l) was a move away from colonial laws like the Land Acquisition Act and Mining Acts, which admitted that communities have right to be consulted on acquisition of or access to land and land based resources. The fifth critical axis underlying sec 4(m) was a rejection of the notion of the 'all powerful and all competent state' through the affirmation that the tribal community has the capability and competence to adjudicate on and act in its wisdom to put an end to all exploitative relations including land alienation, money lending, market relations and alcohol. The sixth axis laid down in Sec. 4(o) was the most critical rejection of the supremacy of the colonial state enjoying a stranglehold on all power leaving its subjects powerless and the establishment of the supremacy of the gram sabha, whose powers could not be usurped by a superior body.

Power, usurped from the subjects of the state, was re-transferred to the people. PESA was re-writing a peoples' Constitution, keeping democracy alive in the grass-roots.

STATES RELUCTANT TO RATIFY PESA

Notwithstanding PESA's Constitutional status and the mandatory compliance required u/s 5, states with Schedule V areas were reluctant to amend their PR laws. The 73rd. Amendment had already reduced their control and patronage of the ruling elites over the Sarpanchas and panchayat members, PESA threatened to eliminate it. Finally, cosmetic amendments were introduced to give a semblance of compliance under pressure.

The degree of non-compliance varies with states, but the general result is the ineffectiveness of PESA. Madhya Pradesh, which took the initiative to extend PESA to the entire state, effectively neutralized its goodwill by retaining the omnipotence of the State Government. Through the aegis of centralized planning the position of Gram Sabha is effectively undermined. Other states have circumscribed the powers of the gram sabha with the clause 'as prescribed by the state government', interestingly, superseding the Constitution. PR laws of all the states are not in conformity with the central act, vary in their application and at times are even contrary to PESA.

It would not be complete to say that the states were reluctant to introduce the necessary amendments in their state PR laws to ensure conformity with PESA. What is apparent in an analysis of the various laws passed by the states of Maharashtra, Andhra, Madhya Pradesh, Chattisgarh, Orissa, Jharkhand and Andhra Pradesh is an actual de-construction of PESA, through numerous legal contortions, reducing it to a nullity.

PESA is founded on a 'self governable village community' as the first component of self-governance, hence it is paramount that the unit of self governance is an actual self governing village community itself and not a unit decided by some civil servant. Participatory democracy, the second component, inheres in the praxis of a face to face self governing community, like two sides of a coin.

But all the states, without exception, have continued with their earlier revenue definitions of village. Thereby the village consists not only of 10-12 scattered hamlets, but several revenue villages are clubbed together as a Group Gram Panchayat. This effectively precludes the functioning of a 'face to face community' as envisaged in Central act and eliminates the likelihood of a functioning gram sabha, which could shoulder the responsibilities of a unit of self-governance. By manipulating the definition, the law is dead.

In Kalahandi in Orissa, the definition of Gram Sabha, i.e. 'palli sabha', which conforms to the definition laid down in PESA, is being subverted by the officials to push through a project, which obviously the state government is backing against the interests of the tribals. State modifications in their acts have made the provisions impotent.

PESA recognizes that tribal communities depend village commons and forests, which they consider their common property resources (CPR). Access to CPRs is linked to survival and livelihood, the basis of their (anna-aasraa-aarogyaa) food, shelter and health security, a buffer against income fluctuation, crop failure, and water shortage. Traditional ownership of CPRs in tribal areas was collective while access was regulated by customary or 'unwritten law', which found no place under British law, based as it was on written laws and private property.

But in the 50 years post independence, no efforts have been made to reverse these colonial laws based on the principle of 'res nullius'. On the contrary the principle has been further strengthened in legislations per-

taining to CPRs. Govt. of India Survey Report defines CPRs as 'Resources which are accessible to and collectively owned/held/managed by an identifiable community and on which no individual has exclusive property rights'. But the definition itself is in conflict with the legal frame as CPRs are recorded as government lands without community titles. As a result, CPRs, particularly village commons, forests and water, are the locus of conflict between the people and government, on the question of ownership and access, a conflict, which has resulted in their degradation.

The National Water Policy under the guise management commodifies water and envisages private sector ownership. Several states have formed parallel bodies like VSS, water user associations, which subvert the Gram Sabhas. So while PESA provides the opportunity for government to move away from 'eminent domain' to constructive 'trusteeship', state governments still enjoy the colonial legal frame.

Resolution of disputes among members of the community is a critical facet of governance as any society that cannot handle conflict cannot survive. Living in their isolation, tribal societies evolved a fairly sophisticated society, wherein relations were based on internal solidarity and community cohesiveness. Dispute resolution mechanisms, which evolved organically were based on honesty, admission of guilt, restoring harmony, consolidating internal solidarity and geared to integrating disputants back into community rather than merely punishing the wrong doer.

However, these traditional systems have come under attack from an aggressive, adversarial system of jurisprudence, which was put in place by the colonial administration. Although PESA gives accords due priority to traditions and customs, not a single State has adopted PESA. On the contrary all states without exception have failed to respect legitimate legal traditions. In the absence of state respect of traditional systems, even when they do not conform to the adversarial system of present day jurisprudence, and the continual efforts of dominant elites to undermine them, tribal judicial systems are under threat.

While sections 4 e and f and sec 4(m)(vii) of PESA empower the community to take charge of development and integrate progress in their culture and heritage, they also ensure that planning is geared to meet felt needs, programs reach the real beneficiaries, the process remains transparent and accountable.

Ground realities are quite the contrary; empowerment remains on paper, gram sabhas have no role to play and are provided no guidelines/principles to assist them in functioning. Neither official functionaries nor people have any knowledge of social audit, a deterrent to public assertion in the Gram Sabha. Vigilance Committees formed by the GS remain defunct as neither Sarpanch, Panchayat Secretary nor official functionaries take cognizance of the authority of GS.

The strength of social audit depends on public participation and open display of information, both of which are sadly missing. The hope that the infusion of participation and transparency would uproot corruption, nepotism and diminish contractor driven development lies shattered as state governments refuse to put rules in place. The reasons are evident, in a system where development priorities are driven by patronage, political agendas and contractor interests, PESA has no place. State sponsored tribal land alienation for mining, dams and industry have displaced over 10 million tribals to date. 'Public Interest' has undermined 'Peoples Survival'. Hence Section 4(i) of PESA provides a window of opportunity for tribal communities to be taken in confidence as the barest minimum. The reality is exactly the opposite. Government orders mandating consultation have not reached the field units, PR departments play a minimal rule in ensuring compliance, and despite safeguards put in place by PESA, rights of the villagers are being violated with impunity.

The gross failure of state governments prompted the Ministry of Rural Development (GOI) to issue executive orders describing the process of consultation for the purpose of land acquisition and requirement of a letter of consent in the form of GS resolution and when consent is withheld made it the duty of the Collector to call for a tripartite meeting to resolve the issue. However the guidelines have no teeth even when the villagers voice their opposition in the consultation process, the final authority remains with the DC to overrule the opposition, a power that emanates from the colonial concept of 'eminent domain'.

What are observed are adversarial relations between the officials and the villagers, with the state considering the demands and protests of the villagers to be a nuisance and in some cases even anti social. It is critical that the observations of the Supreme Court in '*Samata v State of Andhra Pradesh*'[5] calling for a fundamental change in considering the tribals as shareholders

rather than stake holders which could become the basis of resolution of this ticklish problem is not even considered. Sadly most of the governments are ignorant of the observations of the Samata Judgment or follow them in the spirit in which they are formulated.

PESA directly confers ownership on MFP to the GS u/s 4(m)(ii), but with the large appreciation in value and importance of forest produce in the national economy, states have been nationalizing and commercializing operations for optimizing the revenue of the state and the administration has taken great pains to ensure that the rights granted by PESA are effectively scuttled. Officials and functionaries are not aware on ownership right of Gram Sabha over MFP. They say no orders have been issued and where circulars were issued to the Collectors in MP, they have remained collecting dust on the table for the past five years.

By dubious amendments, states have retained monopoly of valuable produce like bamboo, tendu or musli. Monopolistic trade in MFP is heavily skewed in favour of private trading houses, individual traders and corporate houses at the cost of poor tribals and forest dwelling communities. Most states have specifically excluded National Parks, Sanctuaries and Reserve Forests etc. from the purview of this provision even when these are contiguous to the village boundary and are traditionally accessed as CPRs. GS ownership rights are not based on real assessment of needs but administrative classifications. As the issue is closely linked to the issue of forest management and requires amendment of existing Forest Acts and Rules, GS ownership of MFP remains a mirage. On the contrary, what is observed uniformly in all the areas is that the forest administration does not assist or co-operate with MFP collectors but on the contrary usually harass them. The tribals are mere paid workers or in other words, the employer-employee relationship persists in this field. No wonder the draft Xth Plan at para 4.2.84 speaks of a special training program to sensitize the staff of the forest department…. for the benefit of the tribals[6].

Land is life for the tribals, it forms the basis of their identity as they understand themselves as 'people who belong to the land'. Hence land alienation is cannot be simply equated to loss of property, its impact goes far deeper, loss of land is being uprooted from one's locus of belonging, a loss of identity. India has a sordid history when it comes to protection to the tribals from the scourge of land alienation.

Land laws have failed to stop tribal land alienation following massive incursion of non-tribals into tribal areas. Estimates suggest that 48% of the total land in Scheduled districts is possession of non-tribals, while thousands of cases are pending disposal for decades. Realizing that the tribal would never be able to protect his land and his homeland by relying on the implementation of the laws by the administration or the courts, given their hitherto unsavory history and accepting that in a system of jurisprudence based on documentary evidence and run on adversarial principles the tribal would never be able to assert his rights, PESA took a radical step of conferring the right of identifying 'tribal alienation' where it takes place and with whom it takes place and the responsibility to take action to remedy the wrong at the place where the land lies and in the interests of justice. Sadly, no state has taken any concrete legal steps with the exception of Madhya Pradesh where the Land Revenue Code incorporates the provisions of the PESA: 'if a gram sabha in the scheduled areas finds that any person other than the members of an aboriginal tribe is in possession of any land of a Bhumiswamy belonging to any aboriginal tribe without any lawful authority, it shall restore the possession of such land to whom it originally belonged and if that person is dead, to his legal heirs' and 'provided that the Gram Sabha fails to restore the possession of such land, it shall refer the matter to the sub-divisional officer who shall restore the position of such land within three months from the date of the reference'[7].

The question remains whether other states are willing to do the same.

LAWS REMAIN ON PAPER

What is apparent is the disregard of the state legislatures to put the critical components of PESA in place during the passage of conformity legislations. If the serious inconsistencies in the PESA Act and the PR legislations in the states are bad, worse still is the fact that even the limited state laws remain on paper in the absence of rules and guidelines.

This is because of the typical legal methodology that requires assigning powers to the Gram Sabha or Panchayats at the appropriate level and making it subject to passing the state rules in that regard. With the exception of Madhya Pradesh where some rules are in place, no rules have been made nor any prescribed orders/guidelines have been issued by the respective states

to operationalize the law on the ground. The tacit refusal of the states to formulate the necessary rules and required procedures, which would thereby permit the implementation of the conformity acts appears to have gone un-noticed by the Central government, the Governors of the states, Tribes Advisory Councils and the tribal legislators.

It would be inaccurate to say that the lack of knowledge of a constitutional obligation has gone unnoticed, as tribal organizations in these states have raised the issue time and again. But the willful delay in framing the rules, which have affected implementation and rendered Gram Sabhas and Gram Panchayats dysfunctional, is nothing short of criminal.

FEIGNED IGNORANCE OF THE STATE

Our enquiries in various tribal areas show that about 99% of the members of the Gram Sabha and the elected representatives of PRIs and about 90% of the official functionaries working at the village and block levels have said that they are not aware of PESA or the state conformity Acts and their provisions. While comprehensive training on Panchayati Raj is undertaken at numerous state PR Training institutions, there is absolutely no focus on PESA and obviously the trainers don't understand PESA's provisions. There is no clearly thought-out strategy to implement any awareness programme by the Government.

People and their representatives are more confused by half–hearted efforts made by the officials as State Governments have not made any specific efforts to educate the people about the provisions of the Acts which aim at giving specific protection to the economic and political rights of tribal people in the Scheduled Areas and their traditional and cultural practices. Sad but true. There is blindness and feigned blindness, while the former calls for sympathy, the latter is nothing but criminal.

THE FUTURE IS OURS

PESA is the first law, which is grounded in the principle of participatory democracy at the basic unit of governance namely the gram sabha. Hence PESA is unambiguous that 'empowerment of the gram sabha' is its primary focus and stands on a different footing from the empowerment of Gram Panchayat.

State lawmakers and even tribal representatives, however, argue that real devolution of powers to the people within the present framework of PESA is not possible as the people are not capable of governing themselves; a frightening scenario given the fact that PESA is the first attempt by the Constitution to create a frame for participatory democracy, justifiably the ideal form of democracy.

Whether it is the lack of commitment of governments, its legislators and its functionaries to democracy itself or to real empowerment of the tribal poor so that they can take actionable steps to protect their homelands, culture, ethos and their lives themselves or something else, only history will tell. But the present scenario points out to one un-disputable fact, the opportunity to ensure that 80 million tribal people will have a humane and humanized future may never come again. PESA, whether it is perceived in that manner or not, is in effect a critical step towards de-colonization. That perhaps explains the resistance of the ruling elites to have it implemented in letter and spirit. It is no accident of history that the struggle against colonialism began with the tribal people. Perhaps the struggle against internal colonization of their homelands and neo-colonialism will take root in their struggles for a just future. Tribal self-governance remains their ideal and their weapon. They reach out for solidarity from every committed citizen. The challenge is to act now.

— December-January 2004

Endnotes

1. Sharma, Bhram Dev, Self Rule Laws : Madhya Pradesh; Sahyog Pustak Kutir, , New Delhi 1998, xiii
2. The provision of Scheduled Areas in the Constitution is an indication of tribal resistance. Prolonged tribal struggles against the colonial administration, forced them to create a separate administrative frame in the tribal areas. The tribal regions of Central India were brought under the direct control of an 'agent of the crown' who was given extensive powers to repeal, amend any law of British Parliament or make a separate law in the 'interests of the tribal population'.

   The tribal regions of the North East has only a nominal presence of the government and were self administered areas. The Agency areas as they came to be known were called 'partially excluded areas for the purposes of the administration' and the North East were called 'excluded areas' in the Government of India Act of 1935. The partially excluded areas were brought under the provisions of the Vth Schedule of the Constitution where the 'Agent' was replaced by the Governor enjoying the extensive powers of the agent.

   The excluded areas were brought under the operation of the VIth Schedule. The Constitution created a special niche for the tribal areas, the Fifth Schedule was claimed a `Constitution within the Constitution', financial requirements for welfare and administration were made a 'charge on the Consolidated Fund of India', while the executive power of the Union extended to giving of directions concerning administration and welfare of scheduled tribes. Though little of the history has been recorded for posterity, the tribal people were amongst the first people to protest against the imposition of colonial rule, much before the Sepoy Rebellion of 1857 or the national movement, began under the leadership of the Indian National Congress in 1885. At the heart of the spontaneous uprisings that dot the canvass of colonial history, was resistance to the imposition of the formal colonial administrative system on their traditional self governing community systems.

   The establishment of British authority with its politico-legal systems in tribal homelands led to the dislocation of their social economic life. Tribal lands began to be occupied by outsiders who took umbrage under the colonial courts and jurisprudence. Widespread discontent ensued among the Hos'. The first Ho uprising of 1820 was suppressed by the British. But the Hos' rose again in 1821… .The Oraons' rebelled in 1820, 1832, 1890. The Kols' organized an insurrection in 1831-32 which was directed mainly against Government officers and private money lenders….a more stirring source of inspiration for future struggles was the Santhal uprising of 1855-57. The uprisings were generally repressed. There was little chance for the rag tag armies of fighters in loin-cloth armed with bows and arrows in the face of the colonial firepower. Guerilla leaders like Tantya Bhil or Bhagoji Bhangre were hounded, arrested and as dacoits and brigands. A quick execution by hanging followed a summary trial and conviction.

   The uprisings and the martyrdoms, however, did not go totally in vain. The colonial administration with an eye both to quell the rebellions and contain the problems was forced to undertake a large number of administrative and legislative measures. Laws like the Scheduled Districts Act, the Chota Nagpur Tenancy Act are the result of continuous 'disturbances' in the tribal pockets.

   But perhaps the most significant administrative arrangements that the colonial administration made in the Chota Nagpur area was the Wilkinson's Rules, by which the administration withdrew and left the day to day administration to the Mundas and Mankis.
3. Sri Dileep Singh Bhuria in his letter to the PM, quoted in Sharma B D Whither Tribal Areas : Constitutional Amendments and After, Sahyog Pustak Kutir New Delhi, 1995, p. 8
4. On the level of the political executive, Jawaharlal Nehru the First Prime Minister of Independent India, enunciated the tribal policy called Panchsheel in the 1950'. The declared position was that i) people should develop along the lines of their own genius and the state should avoid imposition but encourage their own traditional arts and culture; ii) tribal rights in land and forests should be respected; iii) the state should train their own people to do the work of administration and development. iv) the state should not over administer these areas or overwhelm them with a multiplicity of schemes but work through and not in rivalry with their own social and cultural institutions; v) the government should judge results not by statistics or the amount of money spent, but by the quality of human character that is evolved.
5. 'Samata v. State of Andhra Pradesh AIR 1997 SC 3297'
6. Draft Xth Five Year Plan (2002-2007) Volume II, Sectoral Policies and Programs, Planning Commission, New Delhi, pg. 468
7. Madhya Pradesh Land Revenue Code under section 170(b)(2)

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SECTION 19

Women make up half of humanity, yet they face discrimination even before they are born; in childhood, in education, at home and at workplace. There are a few laws in place to deal with harassment, domestic violence, discrimination and sexual assault, but these are not enforced effectively. Besides, there are a range of situations that the law cannot comprehend and hence cannot be addressed legally.

Just Justice?
An Analysis of the Domestic Violence Act in Practice

Although the Domestic Violence Act is being used extensively by women to obtain reliefs such as protection, maintenance and residence orders, some confusion remains regarding certain aspects of the law.

KEYA ADVANI

The Protection of Women from Domestic Violence Act (DVA) was introduced in the Indian parliament in 2005, in order to provide a remedy in the civil law for the protection of women victims of domestic violence. On the one hand, the Act has made some significant improvements to the existing laws pertaining to violence against women, which had effectively linked all forms of domestic violence to demands for dowry. On the other hand, the development of the DVA through legal interpretation has been marred by confusion and inconsistency. Some of the provisions of the Act have been scrutinised in various High Courts and in the Supreme Court of India, which has provided some clarity on controversial issues. Many of these ruling by the higher courts have facilitated the development of a culture of women's rights within the precincts of the courtroom. This article highlights some of the most salient features of the Act and analyses the development of the law through precedent-setting judgments of the High Courts and the Supreme Court of India.

DEFINING 'DOMESTIC VIOLENCE'

The DVA recognises the right of a woman to be free from all forms of violence by providing a comprehensive definition of domestic violence, which includes physical, sexual, verbal, emotional, and economic abuse. Section 3 of the Act defines 'domestic violence' as any act, omission, or commission that harms or injures or has the potential to harm or injure a woman or child. In theory, the law treats verbal, emotional, economic, sexual and physical abuse as equally serious offences. In reality, an analysis of case law on domestic violence demonstrates that the courts have rarely taken generally action in cases of verbal or emotional abuse, unless it is accompanied by some form of physical abuse.

The judiciary's response in cases of economic abuse (deprivation of resources, alienation of assets, restricting access to facilities, etc.) has been positive to some extent, as many judgments reflect the judiciary's acceptance that the systematic However as I outline below, the deprivation of financial resources is a form of violence against women. However, there have been few noteworthy attempts to provide any real redress in instances of economic violence. With paltry amounts awarded as maintenance and in the absence of a clear-cut law on a woman's matrimonial property rights, in effect the domestic violence act does little more than provide statutory recognition to economic violence as a form of domestic violence.

A GENDER-SPECIFIC ENACTMENT

One of the most significant features of the Domestic Violence Act is that it is a gender specific enactment; hence only women can avail of the provisions of this Act. The Act clearly defines an 'aggrieved person' as *"any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence…"*[1]

Predictably, this has been a controversial feature of the Act, subjecting it to a slew of criticism and even legal challenges to its constitutional validity. For example, in the case of Aruna *Pramod Shah Vs. Union of India*[2], it was argued that the DVA offends Article 14 (equality before law) of the Constitution of India because it provides protection only to women and not to men. In a strongly worded judgment, the Delhi High Court rejected this argument. Referencing international treaties, including the Vienna Accord, the Beijing Declaration and

CEDAW that oblige States to act to protect women against family violence, the judges concluded, *"there is a perception, not unfounded or unjustified, that the lot and fate of women in India is an abjectly dismal one, which requires bringing into place, on an urgent basis, protective and ameliorative measures against the exploitation of women. The argument that the Act is ultra vires to the Constitution of India because it accords protection only to women and not to men is, therefore, wholly devoid of any merit.*[3]*"* In another case decided in the Madras High Court, *Dennision Paulraj Vs. Union of India*[4], the petitioner challenged the constitutional validity of the Act on the basis that it is a discriminatory piece of legislation because it does not permit the husband to file a complaint under the Act and hence is violative of Articles 14 and 21 of the Constitution and also affects the life and liberty of the husband and his relatives. Rejecting these arguments, the High Court of Madras concluded that, *"the constitution itself provides special provision for women and children…thus…the contention that there could be no special treatment for women is totally untenable. In tune with Article 15(3) of the Constitution of India, the State has thought it fit to frame a special legislation for women and thus, the PWDVA, 2005 came into force.*[5]*"*

The explicit support of the constitutional validity of the DVA by High Courts in these cases indicates a recognition of the fact that domestic violence is a manifestation of the structural inequities between men and women, which derogates a woman's ability to enjoy her fundamental and human right to equality. The right to equality means not merely that men and women have exactly the same provisions under law, but that the actual realisation of the right to equality may require legal measures to redress the structural and historical roots of discrimination against women.

UNMARRIED RELATIONSHIPS

Perhaps the single most significant feature of this Act is that it has widened the scope of protection against violence beyond the category of women in married or consanguineous domestic relationships, to include women in informal or unmarried relationships. Section 2(f) of the Act reifies this provision through its definition of a domestic relationship as, *"a relationship between two persons who live or have, at any point of time, lived together in a shared household…by marriage, or through a relationship in the nature of marriage…"* This provision addresses two primary concerns of women facing domestic violence. First, it awards statutory recognition to informal or 'live in' relationships, by securing the rights of women who have never been married but have been living in relationships in the nature of marriage. This is best exemplified by the holding of the Madras High Court in the case of *M. Palani Vs. Meenakshi*[6], where the man challenged the award of interim maintenance to the woman, on the grounds that they were not married and had not even lived together at any point. Rejecting his arguments, the Judge stated, *"the averments made in the plaint as well as in the counter affidavit will make it very clear that the petitioner and the respondent had a close relationship and had sex. As stated already, the Act does not contemplate that the petitioner and the respondent should live or have lived together for a particular period or for few days…one can infer that both of them seem to have shared household and lived together at least at the time of having sex by them."*[7] The High Court therefore held that there is no stipulation under the Act for the parties to live together for any particular period. Since the man had admitted to sexual contact and it was evident that the couple enjoyed a close relationship, it was immaterial that they had not lived together as a married couple.

The second major concern that is addressed through the above-mentioned Section 2(f) is that it recognises the rights of women whose marriages are not valid under the law, or who are unable to provide documentary proof of their marriage. This is particularly important from a procedural standpoint, because the requirement of proving the validity of marriage has been a major impediment in determining the rights of women to maintenance. Within a pluralistic tradition most marriages are performed as per customary rights and there is seldom any clear-cut proof that a marriage ceremony has been performed. Furthermore, even if documentary proof of a marriage exists, once a woman initiates proceedings in court against her partner, it often becomes virtually impossible for her to return to her matrimonial household to reclaim such documentation. By taking away the necessity of strictly proving marriage, the DVA addresses these concerns and lays down that even if a marriage is not valid or cannot be proved, the woman would still be entitled to her rights under the Act.

Despite the fact that the DVA recognises the rights of women in informal or unmarried relationships, the validity of marriage continues to be raised as a delay or

harassment tactic by many respondents under the DVA. A holding of the High Court of Kerala in the case of *Thanseel Vs. Sini*[8] is an example of the Judiciary's firm stance against using the issue of the validity of a marriage as a delaying tactic in the proceedings. In this case, the man filed a Writ Petition in the High Court at Ernakulam contending that there was no valid marriage subsisting between him and the respondent and that this should be addressed as a preliminary issue in the proceedings. Rejecting his contentions, the judge ruled that, *"the request to decide questions as preliminary issues based on disputed facts cannot obviously be entertained… [the Magistrate] has to consider the entire question and give decision as mandated under Section 12 (5) of the DV Act within a period of 60 days from the date of the first hearing."*[9]

A number of critics have asserted that recognising the rights of women in 'live-in' relationships is tantamount to the destruction of Indian family values, or have belittled this provision as one that only really protects the rights of urban, westernised women. A revised version of the DVA recently introduced in the Kashmir assembly has altogether omitted the statutory recognition awarded to women in live-in or informal relationships (the law has not yet come into effect in the state of Jammu and Kashmir). In reality, however, this provision often protects the rights of those women who were previously denied their rights due to some technical defect in their marriage or because of their inability to procure the documentation proving their marital alliance.

DIVORCED WOMEN

Another commonly raised question is whether a divorced woman is entitled to receive benefits under the provisions of the DVA. Although this question is largely examined on a case-by-case basis, a few High Courts have in fact ruled that divorced women are entitled to claim reliefs under the DVA. In the cases of *Razzak Khan Vs. Shahnaz Khan*[10] and *Priya Vs. Shibu*[11], the High Courts of Madhya Pradesh and Kerala concluded that a divorced woman is entitled to reliefs under the Act. In the case of *Bharati Naik v/s Ramnath Halarnkar*[12], the High Court of Bombay at Goa concluded that a woman who had been divorced for 12 years would be allowed to receive maintenance under the DVA stating, *"in my view, the relationship by consanguinity, marriage, etc. would be applicable to both the existing relationship as well as the past relationship and cannot be restricted to only the existing relationship as otherwise the very intent and purpose of enacting the said Act would be lost as it then would protect only an aggrieved person who is having an existing relationship…"*[13] The Court thus ruled that even a divorced woman can receive maintenance under Section 12 of the PWDVA.

WOMAN VS. WOMAN

While the DVA clearly states that only women can petition for the remedies available under this Act, the question of whether women can be named as respondents continues to be a contentious one. Although Section 2(q) of the Act defines 'Respondent' as *"any adult male person who is, or has been, in a domestic relationship with the aggrieved person…"*, the proviso to this Section clarifies, *"provided that an aggrieved wife or female living in a relationship in the nature of marriage <u>may also file a complaint against a relative</u> of the husband or the male partner"*.

While some High Courts initially ruled against naming the female relatives of the husband as respondents most notably in the case of Ajay *Kant Vs. Alka Sharma*[14] decided in 2007, many subsequent judgments have asserted that the above-mentioned proviso to Section 2(q) makes it clear that *any relative* of the husband, irrespective of gender, can be named as a respondent. This is verified by the holdings of the Rajasthan High Court in the cases of *Sarita Vs. Umrao*[15] and of *Nand Kishore Vs. State of Rajasthan*[16]. In the first case, the court ruled that, *"the term 'relative' is quite broad and it includes all relations of the husband irrespective of gender or sex"* and in the second case, further clarified that, *"Section 2(q) of the Act and its proviso if read together nowhere suggest that relative of the husband or the male partner has to be a male. In proviso to Section 2(q) of the Act the word is 'relative' and not 'male relative'... a female relative is not excluded from the definition of respondent… "*[17] This stance was reinforced in a number of rulings in the High Courts of Gujarat[18], Madras[19], Hyderabad[20] and Bombay[21].

These holdings from High Courts across the country should make it abundantly clear that a female relative of the husband/ partner can be joined as a respondent in cases of domestic violence. However, in the absence of a Supreme Court ruling on the subject, some confusion may prevail on this issue.

OTHER 'RESPONDENTS' IN THE ACT

Another somewhat contentious aspect of the above-mentioned Section 2(q), pertaining to the definition of

'respondent' under the Act, is related to the rights of the aggrieved woman to claim reliefs from consanguineous domestic relationships. The definition of 'respondent', as any adult male person who has been in a domestic relationship with the aggrieved woman, is wide enough in its scope to implicate members of a woman's natal family, or even her adopted family. A handful of rulings, particularly from the lower courts, confirm that the DVA can be invoked in cases where a woman is facing violence in consanguine domestic relationships. One of the first cases to be decided under the DVA in the country, in December 2006, was the case of *Parigaya Vs. Bishnu*[22], where the Magistrate of the Bandha District Court in Uttar Pradesh passed a protection and residence order against a man who had thrown his 60 year old mother out of his home. Another two cases from the Bombay Sessions Court have been significant in this regard. The first, *Sana Sheikh Vs. Ibrahim Sheikh*, is the case of a minor girl who, along with her mother, was the victim of domestic violence at the hands of her father. The father challenged the maintainability of this petition on the basis that the petitioner was a minor who was initiating proceedings against her own natal family. The Court, however, allowed the petition stating, *"it does not mean that a child under 18 years of age is prevented to make any allegation of domestic violence when that child is related by the consanguinity for the purpose of domestic relationship"*. The second case, *Naseem Bani Shaikh Mahmood Vs. Naeem and Nadeem Shaikh Mahmood,* is the case of a deserted woman staying with her natal family, facing abuse at the hands of her brothers and being forced into prostitution. In this case, the district court passed an interim residence order (that was later upheld by the Sessions Court) restraining the respondents from dislocating the petitioner from the household.

The judgements in the abovementioned cases suggest that the courts have begun to develop a more nuanced understanding of domestic violence, recognising that women are not only abused in their roles as wives and daughters-in-law, but can also face domestic abuse as daughters, sisters, mothers, grandmothers, etc. This is, however, an aspect of the law that has not as yet been adequately developed or implemented for the diverse manifestations of violence faced by women within the domestic sphere. For instance, we rarely find the DVA being invoked in cases of 'witch hunting', where women labeled as *dayans* (witches) become the victims of acute violence at the hands of their in-laws or by members of their own families. Although the DVA could perhaps be used to secure protection or relief in such cases of witch hunting, this would require not only the courts, but also lawyers and activists to conceptualise domestic violence in broader terms.

QUICK ACCESS TO JUSTICE

In cases of domestic violence, women are often thrown out of their houses without any money or anyplace to go. With a view to provide speedy access to justice for women in such circumstances, the DVA combines the remedies previously available under a number of civil and criminal laws under a single statute, making it easier for women to access reliefs in a single courts, through a single legal proceeding. Thus, although the DVA is a civil law, it allows women to approach criminal courts (magistrate's courts), since they are often more accessible and provide the possibility of quicker justice. The Act prescribes simple procedures by dispensing with the complex technicalities of civil law to make room for aggrieved women themselves to approach the courts, without the aid of a representative. The Act also mandates that Magistrates should dispose of every application within 60 days from the date of the first hearing[23] and that Courts must grant interim/ urgent orders[24] to help ensure that women facing violence at least have immediate access to shelter, food, protection, and some financial resources even as the case is being heard in court. These 'fast-track' procedures have often been challenged on the basis that the case has not followed the requisite legal and technical procedures.

For example, in two cases brought before the Uttar Pradesh High Court, *Milan Kumar Singh Vs. State of UP*[25] and *Azimuddin Abdul Aziz Vs. State of UP*[26], the applicants challenged the ruling of the lower courts in favour of the aggrieved, on the grounds that the woman's application had not conformed to the format required by the Act, and that she had not followed prescribed procedure. The High Court of Allahabad rejected both these contentions and held, *"the said proceeding was introduced for the salutary purpose of giving protection to women from harassment at the hands of their husbands and from domestic violence, and required to be disposed of expeditiously within 60 days. By filing this case the applicants are only trying to seek stalling the disposal of the said proceedings."* [27]

Interim orders are routinely challenged on the

grounds that a woman has not file a *separate* application for interim reliefs. For example, in the cases of *P. Chamdrasekhara Pillai Vs. Vasala Chandran*[28] and *Vishal Damodar Patil Vs. Vishakha Vishal Patil*[29], filed before the High Courts of Kerala and Bombay respectively, the husbands approached Courts for quashing the ex-parte interim orders passed in favor of the aggrieved, on the grounds that the orders were illegal since the wife had filed no separate interim application. Rejecting these arguments in both cases, the Courts ruled that there was no need for a separate application for interim reliefs, reiterating that the technicalities of paperwork and applications should not impede the quick delivery of justice to women facing domestic violence. Another common contention has been that an order passed by a Court is invalid if the Protection Officer's (PO)[30] report is not submitted before the order was passed. This argument rests on the basis that in the absence of the PO's report, the court has not followed proper technical procedure and therefore the order is not legal and binding. Once again, this technical contention has been rejected by a number of High Courts across the country, including through the High Courts of Madhya Pradesh, Madras, and Bombay in the cases of *Ajay Kant Vs. Alka Sharma*[31], *M Palani Vs. Meenakshi*[32], and *Nandkishor Vinchurkar Vs. Kavita Vinchurkar*[33] respectively. In the last of these cases the judge observed that, *"if the trial court, who is required to pass an interim order, keeps on waiting to get the report of the Protection Officer or Service Provider, it would entail the delay and the idea of considering the case of a needy person at the interim stage will be actually defeated.[34]"*

In all of the abovementioned cases, therefore, the Courts suggest that complaints should not be rejected on the basis of technical issues, as the purpose of the Act is to provide a simple procedure, without any formal legal drafting, for women to access justice quickly and effectively.

Despite these rulings, however, technical concerns and procedural issues continue to be the greatest impediment in allowing a woman to access the reliefs prescribed by the DVA. Although the Act envisages that an aggrieved person can approach the court directly, without the aid of a representative, in reality women still find it virtually impossible to negotiate the law and its provisions without the aid of a lawyer. Furthermore, although the Act stipulates that an application must be dispensed with within 60 days from the first hearing, in reality this has rarely been possible and cases routinely take over a year to dispose. Since there is no time frame stipulated for appellate proceedings, cases that go into appeal are often dragged out for even longer. Finally, even through many courts have ruled that complaints do not necessarily have to subscribe to a given format and that a Protection Officer's report is not necessary while granting interim reliefs, most Magistrates courts continue to reject applications on the basis that they did not fulfill the requisite technicalities.

PROTECTION

Part of the mandate of the DVA is to provide protection to victims of domestic violence. For this purpose, the Act outlines the duties and responsibilities of 'Protection Officers', who are public servants whose duty it is to ensure the victims has access to the legal services authorities, police, courts, shelter homes, counseling center, and hospitals. Moreover, the Courts are empowered to pass 'protection orders'[35], wherein a magistrate can prohibit the respondent from committing (by omission, aid, or commission) any acts of domestic violence against the woman or any of her dependents/ relatives/ friends. A court can forbid a respondent from entering any place frequented by the woman or even communicating with her. Most importantly, the court has the power to prohibit the respondent from alienating any assets or operating any bank accounts held separately or jointly by the two parties.

Protection Orders have been widely issued in courts across the country, but there have only been some points of contention pertaining to the passage of such orders. One such objection was raised in the case of *Azimuddin Abdul Aziz Vs. State of UP*[36], where the husband contended that the Act only provides protection to women while she is living in her matrimonial home and is no longer applicable once she has moved to a different residence. The High Court at Allahabad rejected this line of argument, maintaining that since the respondent had committed acts of aggression even after the woman had left his residence, the Protection Orders would remain in effect.

Although there have been a number of cases in India, where the petitioner was later abused and even killed by the respondent after a Protection Order was passed, the courts have failed to set any landmark precedents in terms of holding the various functionaries under the Act accountable for *inaction* or a *failure* to

provide protection to women. For example, a number of International Courts have held the state directly responsible for a failure to provide protection to women facing domestic violence. This was recently in reaffirmed by the landmark case of *Opuz Vs. Turkey*[37], where the European Court of Human Rights held that the Turkish authorities' failure to react to the problem of domestic violence was tantamount to a form of discrimination against women and ordered the state to pay the victim non-pecuniary damages and called for the Turkish government to modify its tolerant attitude towards domestic violence. In the light of an increasing number of women facing continued violence despite the issuance of Protection Orders, the Indian Courts need to keep in mind the state's national and international legal obligations to protect women from violence and hold the state accountable in cases where it fails to protect women from violence.

MAINTENANCE, COMPENSATION

The Domestic Violence Act stipulates that a woman, her minor children, or her major children suffering from physical or mental abnormalities are entitled to monetary reliefs is cases of domestic violence. Although Section 20 (2) of the Act specifically stipulates that the monetary relief granted to a woman should be, *"adequate, fair, and consistent with the standard of living to which the aggrieved person is accustomed"*, women routinely find themselves having to wage prolonged legal battles for paltry amounts of maintenance, which aren't even adequate to cover their basic living expenses (let alone that of their dependents). This is evidenced in the case of *Madhu Bala Vs. Pritam Kumar Rao*[38], where the aggrieved was shuttled from the Trial Court to the Sessions Court and finally to the High Court, when her husband challenged the sum of Rs 3000 that she had been awarded for monthly rent and maintenance by the Trial Court. Although the High Court finally ruled in favor of the wife, it halved the sum awarded to her to Rs 1500 per month.

One of the objections that is sometimes raised in maintenance cases under the Domestic Violence Act is that one or more of the aggrieved's children is 'illegitimate' and it is therefore not the responsibility of the respondent to maintain them. This was one of the objections raised in the case of *Suresh Vs. Jaibir*[39]. The High Court of Rajasthan overruled the respondent's objections by asserting that, *"the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but is not limited to the maintenance for the aggrieved person as well as her children…"*[40] Since the maintenance clause in the Domestic Violence Act substitutes the earlier remedy under Section 125 of the Code of Criminal Procedure (CRPC), hence all categories of persons mentioned in Section 125 CRPC are entitled to claim maintenance under this section. This includes the wife, minor children, major children suffering physical or mental abnormalities or injuries.

Another point of confusion with regards to maintenance applications is whether in awarding any maintenance under Section 20 of the DVA, the court must also ensure it is in accordance with Section 125 CRPC? Therefore, an oft-raised contention is that any order that has not awarded maintenance in accordance with Section 125 CRPC is illegal. The High Court of Chhattisgarh has ruled decisively against this objection in the case of *Rajesh Kurre Vs. Safuraba*[41] and has clarified that, *" the provisions [of the DVA] are independent and are in addition to any other remedy available to the aggrieved ... the Court is competent to award maintenance to the aggrieved person and child of the aggrieved person in accordance with the provisions of Section 20 of the Act and the aggrieved person is not required to establish his case in terms of Section 125 of the Code."*[42] Therefore, it should be clear that a maintenance claim under the DVA does not need to be established in terms of the CRPC.

Since Magistrate's Courts are well versed with the provisions and requirements of Section 125 CRPC, it is usually not too difficult to get orders of maintenance, however paltry they may be. The difficulty arises, however, when attempting to obtain *interim* orders for maintenance, since first the husband's income needs to be ascertained. The Delhi High Court took cognisance of this problem in the case of *Dr. Meena Chaudhary Vs. Commissioner of Police*, when, realising that the case had been dragging on for a long time while the woman was suffering, the court directed the husband to pay Rs 25,000 to the wife as monthly maintenance, until further orders were passed. However, such orders are few. Orders for compensation are even scarcer.

RIGHT TO RESIDENCE

The right to residence was not, per se, a new right introduced by the DVA, but rather was already implicated

within the marital contract and in the Indian Constitution. The DVA is, however, an attempt to ensure that women can exercise this right in the event that they are facing domestic violence by granting legal recognition to the right to residence and protecting women against dispossession through injunctions and protection orders. The right to residence provision has therefore been hailed as one of the most unique and important provisions of the DVA. The Act allows Magistrates to pass a 'residence order' under Section 19, which could prevent the respondent from dispossessing a woman from the household, prevent him from entering the portion of the house in which she resides, or prevent him from disposing of or renouncing his rights over the household. Through a residence order, a respondent could also be directed to leave the household, or to secure the same level of alternate accommodation for the woman.

The right to residence provision has evolved in the Indian courts largely within the framework of the Supreme Court's judgment in the case of *SR Batra vs. Taruna Batra*[43] in 2007. In this case the woman had sought an order to allow her to re-enter her matrimonial home. While ruling against her, the Supreme Court based its judgment on its interpretation of the term 'shared household' in Section 2(s) of the Act and held that the term indicates a house belonging to or taken on rent by the husband, or a house belonging to a joint family in which the husband is a member. Since the house in question was owned by the mother-in-law, the Supreme Court held that the aggrieved could not claim any rights to residence in this shared household. Furthermore, the Court opined that any claims for alternate accommodation could only be made against the husband and not against the in-laws.

The Supreme Court's holding in the above case subsequently made it extremely difficult for women residing in joint family households to claim their rights to residence. Furthermore, it has become virtually impossible for women who had already left their households due to violence to gain orders allowing them re-entry into the household, especially in joint family scenarios. The Batra judgement has thus proved to be a major blow to women's rights to residence within a social context where a majority of married women reside in joint families with their husband and his relatives.

High Courts across the country have had varied responses to the Batra judgment. While many courts reversed their initial residence orders following the Supreme Court's decision, other courts have taken to examining rights on a careful case-to-case basis, often brining newer and more nuanced interpretations to the Act in order to protect the rights of women living in joint families. The High Court of Madras came up against the Batra judgment in the case of P. *Babu Venkatesh Vs. Rani*[44], a case in which a wife had filed for urgent residential orders against her husband and in-laws after being thrown out of the house in the middle of the night. The trial court had passed an interim residence order in her favour, which the husband appealed before the High Court citing the Supreme Court's holding in the Batra case and petitioning that since the house was in the name of the mother-in-law, the aggrieved woman could not claim a right to reside in that household. Rejecting his appeal, the court held, *"it is brought to the notice of this Court that after the dispute had arisen between the parties, the first petitioner [husband], who was the original owner of the property alienated the same in favour of his mother. Therefore, factually, the ratio laid down by the Supreme Court [in the Batra case] can be distinguished. If the contention of the petitioners is accepted, every husband will simply alienate his property in favour of somebody else after the dispute has arisen and would take a stand that the house where they last resided is not a shared household is therefore the wife is not entitled to seek for residence* right in the shared household."[45] The Court therefore concluded that the Batra judgement had to be put aside in cases where a husband alienates his property once a dispute has already arisen, which would suggest his express interest in divesting a woman of her right to residence.

The High Court of Delhi was also faced with the Batra holding in the case of *Nidhi Kumar Gandhi Vs. The State*[46], a case where woman had been thrown out of her matrimonial home along with her minor daughter. The lower courts had denied her interim residence on the grounds that the father-in-law owned the residence in question, therefore it was not a 'shared household' as per the interpretation in the Batra case. Overturning the lower court's orders and ruling in the woman's favour, the High Court held that if an interim residence relief is sought, this immediate relief cannot be delayed on the ground that conclusive evidence as to ownership of the property has not been provided. *"It was premature…to have straightaway proceeded to apply the law explained by the Supreme Court in SR Batra vs. Taruna Batra without any evidence having been led to de-*

termine whether in fact the [father-in-law] owned the premises… it is indeed inconceivable how at an interlocutory stage where, given the purpose of the Act, a final determination can be made on these aspects."[47] This judgement effectively suggests that the Batra holding should not be applied in cases where the issue is of urgent interim residence reliefs.

CONCLUSION

This article has largely presented rulings that have been in favour of women in order to analyse the role of the judiciary in building a culture of women's rights through progressive interpretations of the DVA. The reader may therefore be left with the impression that barring a few exceptions, the courts have ruled largely in favour of women. This is not the case. A majority of rulings remain either against the woman, or grant insufficient reliefs with no broad ideological conception of women's rights as human rights. Most states still lack the infrastructural machinery to effectively implement the Act, further compounding the violations of women's rights in domestic violence cases. Although the preamble of the DVA recognises that domestic violence is undoubtedly a human rights issue, the Act has not yet succeeded in building a solid foundation. It now lies to the Courts to ensure that the Act actually does justice, by contextualising women's rights in the Domestic Violence Act firmly within a human rights perspective.

–May-August 2010

PROPOSED AMENDMENTS TO RULES UNDER PWDV ACT

The following are some specific suggested amendments to some of the Rules of the Protection of Women from Domestic Violence Rules, 2006.

Rule 3: Qualifications and experience of Protection Officers
Proposed Changes:

1. Full time Protection officers to be appointed
2. Fix areas for each P.O/or appoint a P.O. for at least a Taluk
3. Provide office facility/ with infrastructure etc. to P.O. in the court premises itself
4. P.O's to coordinate the entire team (service providers, counsellors, legal service Authority, police station, short stay homes medical facility, legal counselors etc.)
5. Convene a meeting every month - evaluate and monitor their functions.

Rule 6: Applications to the Magistrate
Proposed Changes:

1. Last paragraph (v) in Form (I) may be given a space to narrate the incidents of violence in brief. A column may be provided to write the income and assets of Respondent also.
2. A similar column may be given in Form II also to narrate the incidents of violence in brief.

Rule 12: Means of Service on Notice
Proposed Changes:

1. In Rule 12(2), the following addition must be made:
   (e): "The notices in respect of the proceedings under the Act shall also be served upon by the Protection Officer to the respondents through email. In case the respondent is not residing in the same district where the case has been filed, or lives outside the country, such a notice shall also be served upon him through the respective court/ protection officer of the district where the respondent resides or through the Indian embassy if he resides outside India, through electronic means in addition to the usual mode of the service of notices as prescribed hereabove."
   In Rule 12 itself, Sub-rule 5 should be added as under:

(5): "If the respondent is not living in India on the date of institution of the case of PWDVA, the copy of the notices must also be sent to the Ministry of External Affairs and Ministry of Home Affairs with the advice that on arrival of such a respondent in India, he/she shall not be allowed to leave the country without an explicit order by the concerned court and all his travel documents must be considered suspended till an order is passed by the concerned court to leave the country. It shall also be the duty of the court that such a respondent shall abide by the orders of

the court and also appear in future hearings, either in person or through duly appointed advocates, even after his leaving the country."

Rule 15: Breach of Protection Orders
Proposed Changes:

1. Breaches of all orders of the court are liable for action under Sections 31 and 32 of the PWDVA.
2. Rule 15 (6) is causing confusion to courts, so amend Rule 15(6) with clarity as follows:
   After the words "…and proceed to summarily try the offence under section 31", delete the following – "in accordance with the chapter XXI of Cr.P.C" and add in its place an follows "as per sec.32". This will ensure that the breach of an order can be taken cognizance of as per section 32 directly, without the need to proceed under criminal procedure code for action under section 31.
   Once a breach of order is brought to the notice of the court and the Respondent appears, there is no need to frame any charge (like in any other offence under IPC). The court can directly invoke punishment for breach under section 32, because section 31 and 32 clearly says what is an offence under this Act.
   Courts are reluctant to take action for breach of orders hence the orders are not obeyed at all. There should be strict guidance to courts to ensure compliance of orders-Courts can direct Respondents to execute bonds, attach salary or proceed under sections 31 and 32.
3. The following suggestions are made to ensure compliance:
   After passing of orders in the case, the courts can post the case to a date after a month to 'Report compliance'. If the order is not complied with, the court can Suomoto take cognizance, or call upon the petitioner to file petition of known complaints of order and to proceed under Section 31, 32.

The Addition of New Rules

HRLN recommends the addition of a new Rule, to address the issue of the breach of orders passed under the Act:

Proposed Addition:

Add another Form under Section 31 of the Act, to be filed by the complainant in cases of breach of order/orders passed Under Act , which includes the following details:

i. Name & address of Petitioner
ii. Name & address of Respondent
iii. Copy of order to be enclosed
iv. State which order is breached by the Respondent
v. Mode of execution
(a) Arrest & detention
(b) Attachment of salary or property
(c) In case of salaried person, add details of salary & employer's address
(d) If self employed, details of employment and place of business, net income etc.
(e) If property is to be attached and sold then attach a schedule of property.
(f) What action is taken by protection officer/police/service provider for implementation of order?

Endnotes

1. PWDVA, Section 2 (a)
2. Aruna Pramod Shah Vs. Union of India, WP. Cr. 425/2008, Del.
3. Supra 2
4. Dennison Paulraj Vs. Union of India MANU/TN0525/08, Mad
5. Supra 4
6. M. Palani Vs. Meenakshi, AIR 2008 Mad162
7. Supra 6
8. Thanseel Vs. Sini WP(C) No. 7450/ 2007, 6/3/2007, Ker
9. Supra 8
10. Razzak Khan Vs. Shahnaz Khan 2008 (4) MPHT 413
11. Priya Vs. Shibu, MUNU/KE/0265/2008, 6/06/2008
12. Bharati Naik v/s Ramnath Halarnkar, Cr. W.P Nos.18/09 and 64/09, Goa 17/02/10
13. Supra 12
14. Ajay Kant Vs. Alka Sharma Misc. Cr. Case No. 1226/2007, 19/6/2007, MP
15. Sarita Vs. Umrao, Cr.R.P 1112/2007, Raj
16. Nand Kishore Vs. State of Rajasthan, RLW2008(4)Raj3432
17. Supra 14
18. Jaydipsinh Prabhatsinh Jhala Vs. State of Gujarat, Spl. Cr. Ap. 2068/2009, Guj
19. S. Meenavathu Vs. Senthamarai Selvi , MANU/TN/2547/2009
20. Afalunnisa Begum Vs. State of A.P , Cr.P. 7160 and 8495/2008, A.P
21. Archana Hemant Naik Vs. Urmilaben I. Naik, Cr.R.Ap. 590/2008, MH
22. Parigaya Vs. Bishnu 772/IX/2006, 05/12/2006 District Bandha, UP
23. PWDVA, Section 12(5)
24. PWDVA, Section
25. Milan Kumar Singh Vs. State of UP 2007CriLJ4742
26. Azimuddin Abdul Singh Vs. State of UP, MANU/UP/0238/2008
27. Supra 28
28. P. Chamdrasekhara Pillai Vs. Vasala Chandran, Crl. MC No. 53/2007
29. Vishal Damodar Patil Vs. Vishakha Vishal Patil , Crl. W.P. No. 1552/2008, 20/08/2008, Bom

30. Under the DVA, a 'Protection Officer' (PO) is appointed by the state government to help an aggrieved woman register her complaint and seek protection. The first step in these proceedings is for the PO to write out a Domestic Incident Report, detailing the instances of domestic violence. The PO also assists Magistrates to implement many of the Act's provisions and to ensure the orders passed by the Courts are properly implemented.
31. Supra 14
32. M. Palani Vs. Meenakshi, AIR2008 Mad162
33. Nandkishor Vinchurkar Vs. Kavita Vinchurkar, Cr. Ap.No. 2970/2008, 5/8/2009, Bom
34. Supra 35
35. PWDVA, Section 18
36. Supra 28
37. Opuz v. Turkey (European Court of Human Rights, Ap plication no. 33401/02)
38. Madhu Bala Vs. Pritam Kumar Rao, RLW2009 (1)Raj827
39. Suresh Vs. Jaibir, MANU/PH/1180/2008, 9/9/2008, Pun
40. Supra 41
41. Rajesh Kurre Vs. Safuraba, MANU/CG/0119/2008, 11/11/2008, CG
42. Supra 43
43. S.R Batra Vs. Taruna Batra, 2007 3 SCC 169 : I (2007) DMC 1 SC
44. P. Babu Venkatesh Vs. Rani, Crl. R.C Nos. 48 and 148/2008 and M.P. Nos. 1/2008, 25/03/2008
45. Supra 46
46. Nidhi Kumar Gandhi Vs. The State, MANU/DE/0077/2009
47. Supra 48

Domestic Violence Outlawed

The Domestic Violence Act mandates certain mechanisms to be put in place in order to protect the rights of women facing violence. However, in most states neither have the functionaries under the Act been appointed nor have the required services been provided. It is necessary to take concrete steps to ensure that the DVA is properly implemented.

GAYATRI SINGH

The Protection of Women from Domestic Violence Act, 2005 is a product of the women's movement, and is, as the title suggests, meant to protect women from domestic violence. Prior to the enactment of the Act the issue of domestic violence was either linked to dowry-related violence or in criminal law, to Section 498-A. The then existing civil and criminal laws had their own limitations as they recognised violence only in a marital relationship. Furthermore, there were no provisions for damages and other immediate relief like protection and residence orders, injunctions etc. The DVA was, therefore, a milestone in recognising domestic violence within any relationship, thereby challenging the traditional treatment of the abuse on women.

A National Consultation, jointly organised by Human Rights Law Network (HRLN) and Majlis recently, sought to place the DVA in the larger context of women's human rights by discussing the ways in which the Act could be effectively used by women, to learn from and share each other's experiences and to discuss and suggest ways by which the tardy implementation of the Domestic Violence Act could be overcome. For example, the Act is mandated to appoint service providers, counselors, and protection officers including providing various forms of services like shelter homes, medical facilities, legal aid etc. Yet, sadly, in most states neither have the functionaries under the Act been appointed nor have the required services been provided. Whereas in some states protective officers have not been appointed, in others those appointed, are paid low salaries and are overburdened with work since they are required to cover the jurisdiction of several police stations. There are various other procedural difficulties facing the implementation of the DVA. As a result, aggrieved women are unable to get any reprieve and due to procedural delays cases linger on in courts beyond the statutory limit of 60 days. It was, therefore, felt that these concerns need to be urgently addressed and proactive steps be taken to ensure meaningful, efficacious and expeditious implementation of the DVA. Besides launching campaigns it was felt that PILs/writ petitions be filed in the respective states. The Rules to the DVA have proven ineffective. Hence the need to amend and clarify the Rules, particularly those relating to the roles and responsibilities

of the protection officers. There is no time bound period within which appeals need to be disposed off. There is also much confusion regarding filing of Domestic Incident Reports (DIR). These challenges need immediate attention.

DEFICIENCIES IN THE ACT

The major deficiency in the DVA is that only temporary protection and residence order can be obtained by a woman without establishing a permanent right over her matrimonial property. The notion of matrimonial property is not recognised in India and consequently women's labour and contribution to maintain the household is not recognised. There is no value given to her work, there is no concept of common property and the property brought into the marriage is not subject to equitable distribution upon dissolution of marriage. So we have a case like SR Batra vs. Taruna Batra where the Supreme Court has held that since the property was registered in the name of the mother-in-law, the wife had no claim over it. The deficiency in the DVA with regard to this clause has been felt by various women's organisations and hence campaigns in various states to explain and provide for matrimonial property rights have been initiated. It was also realised that it was imperative that the campaign on matrimonial property rights be broadened and taken up at a national level.

TRAINING AND EDUCATION

Since society at large is seeped in patriarchal values it is not surprising that a large part of the judiciary is equally influenced by such norms. Magistrates who are required to implement the DVA are amongst the most ill informed about the provisions of the Act and are often times reluctant to provide even temporary and immediate protection orders to women. Various technicalities are raised resulting in cases languishing for years. Therefore, gender perspective trainings should be held on a regular basis, including the training of magistrates and police personnel at the district level. There is an urgent need for incorporating the DVA and other gender laws in academic syllabi at different levels of education.

WIDEN THE SCOPE OF DVA

Many of the provisions in the Act have been narrowly construed and therefore it was necessary for women's rights lawyers to help broaden the meaning of those provisions, to use the provisions innovatively and to understand DVA within the larger framework of women's human rights. To do this it was necessary for lawyers to attempt to inter-connect criminal, civil and family and international laws with the provisions of the Domestic Violence Act. It is also necessary to look beyond the narrow confines of domestic violence, instead looking at individual solutions. Collective action is essential if it is to have any meaning for the vast millions of women who come to courts trying to access justice. The human rights of women should be paramount and not the preservation of the family at the cost of the health and safety of a woman.

The law attempts to confine women within the legal framework by looking at domestic violence as an individual problem to be dealt with individually. This problem is further compounded by the fact that a woman is seen as a victim, undervalued and subordinate requiring "protection". It is, therefore, necessary to bring domestic violence outside the narrow confines of the home and into the public domain. It is necessary to challenge the public-private dichotomy by placing much greater responsibility and liability on the State and its functionaries in matters of domestic violence. If the State and its functionaries are unable to provide a safe environment to women in domestic relationships they should be held liable for failing to take reasonable measures to protect the personal safety of women. The complaint from majority of women is that the police rarely discharge their duties in an effective manner. A fair idea would be to form a network of lawyers through an e-mail group working towards improvements in the DVA, its effective implementation, and sharing of both international and domestic judgements and orders. Another positive step can be that guidelines for writing Domestic Incident Reports be drawn up and that wherever necessary the group would work toward suggesting amendments to the DVA to make the Act more meaningful, efficacious and easily accessible.

–May-August 2010

Starting the Battle

The Visakha guidelines on sexual harassment and the proposed bills on sexual harassment, both government and alternate, seek to ensure a safe working space for women.

MIHIR DESAI

Supreme Court's judgment in Visakha's case is a landmark for more than one reason. Not only was sexual harassment at the work place recognized under the Indian jurisprudence as a crucial problem faced by women workers, it also set out detailed guidelines for prevention and redressal of this malaise. In doing so, the Supreme Court did not merely confine itself into interpreting the law but went into the legislative exercise of law making. The Court travelled beyond its traditional confines of being the interpretative organ of laws and went into the terrain of law making which it has historically shied away from.

But the Supreme Court itself was conscious of taking cautious steps while indulging in law making. It declared that it was not making any law but only declaring the law which any way existed. For doing this the Court came out with a legal principle which though not totally novel was definitely propounded with such force and clarity for the first time.

BREAKING THE SHACKLES

Supreme Court relied upon the Convention for Elimination of All Forms of Discrimination against Women (CEDAW)- an international document which India has both signed and ratified. This document deals in detail with sexual harassment at the workplace. Ordinarily, merely because the Indian Government signs or ratifies an international convention or treaty it does not automatically become part of the Indian law. It has to be given a legislative form and a Bill has to be passed in Parliament for it to acquire the status of law. Till this happens the treaty or convention merely remains an international commitment given by the Indian Government without necessarily having any national ramifications.

But the Supreme Court broke these shackles and held that if the Indian Government makes such commitments in international fora it shall be binding on the Government even within the nation and it will be treated as part of the national law unless there is a law within the country which is in direct conflict with such a law. Thus, if there was a conflicting Indian law on the issue of sexual harassment at the workplace the International convention could not be treated as part of the Indian law till such time as such law was amended or replaced by the legislature. However, since in respect of sexual harassment at workplace there was no conflicting national law, the international commitment as laid out in CEDAW would be treated as part of the Indian law. Since it was to be treated as part of the Indian law what the

The story behind the Supreme Court Guidelines

The Supreme Court guidelines came about due to the gang rape of Bhanwari Devi by a group of Thakurs, as punishment for having stopped a child marriage in their family. This provoked women s groups and NGOs to file a petition in the Supreme Court of India and the result is the Supreme Court guidelines on sexual harassment at workplace. Bhanwari Devi was a village-level social worker or a saathin of a development programme run by the State Government of Rajasthan, fighting against child and multiple marriages in villages. As part of this work, Bhanwari, with assistance from the local administration, tried to stop the marriage of Ramkaran Gujjar s infant daughter who was less than one year old. The marriage took place nevertheless, and Bhanwari earned the ire of the Gujjar family. She was subjected to social boycott, and in September 1992 five men including Ramkaran Gujjar, gang raped Bhanwari in front of her husband, while they were working in their fields. The days that followed were filled with hostility and humiliation for Bhanwari and her husband. The only male doctor in the Primary Health Centre refused to examine Bhanwari and the doctor at Jaipur only confirmed her age without making any reference to rape in his medical report. At the police station, the women constables taunted Bhanwari throughout the night. It was past midnight when the policemen asked Bhanwari to leave her lehenga behind as evidence and return to her village. She was left with only her husband s blood-stained dhoti to wear. Their pleas to let them sleep in the police station at night, were turned down.

The trial court acquitted the accused, but Bhanwari was determined to fight further and get justice. She said that she had nothing to be ashamed of and that the men should be ashamed due to what they had done. Her fighting spirit inspired fellow saathins and women s groups countrywide. In the months that followed they launched a concerted campaign for justice for Bhanwari. On December 1993, the High Court said, it is a case of gang-rape which was committed out of vengeance. As part of this campaign, the groups had filed a petition in the Supreme Court of India, under the name Vishaka , asking the court to give certain directions regarding the sexual harassment that women face at the workplace. The result is the Supreme Court judgement, which came on 13th August 1997, and gave the Vishaka guidelines.

(The excerpts on Bhanwari devi's case has been taken from the book- The Politics of Silence, published by Sanhita, Kolkatta, Aug- 2001)

Supreme Court said it was doing was not creating any law but only declaring the law and filling up some gaps to better implement the already existing law.

Caution was still the byword. So the Court to clarify its stand that it was not encroaching upon the legislative function spelt out that the guide lines it was providing, though to be treated as the law of the land were to continue only till such time as the legislature embarks on the exercise of drafting a law concerning sexual harassment at the workplace.

POST VISHAKA SCENARIO

Visakha's judgment was delivered in 1997 and for six years after that no efforts were made in the direction of enacting a law. So the guidelines continued to be the law required to be followed across the country. But the guidelines were followed more in their breach. Very few complaints committees were set up, service rules were not amended and the judgment was widely disregarded both by public and private employers.

But one of the fall out of the judgment was that many civil society organizations became aware of it and started to publicise it and pushed for its implementation. Around the same time many women who were being sexually harassed started breaking their silence and started demanding action from the employers. In fact a number of these cases arose from university and college campuses. The response of the employers by and large was to sweep such cases under the carpet and at times even to victimize the women. But one could still see an increasing fervor of protest. The media also started giving important space and time to this issue.

One such case happened in the M.S. University at Baroda where a student was sexually harassed by her professor. Her protests led to victimization and certain womens' organizations wrote protest letters to the Chief Justice of India. The letters were converted into a Writ Petition and the Court started supervising the implementation of Visakha's guidelines. Notices were issued to the Central Government, all State Governments and the Union Territories asking them to report to the Supreme Court the measures taken by them for

The story behind the Medha Kotwal case

A long drawn case of sexual harassment in the MS University of Baroda, led to a lot of hue and cry and a letter written by Ms. Medha Kotwal of Aalochana, was converted into a writ petition by the Supreme Court. Dr. Medha Kotwal s case is also looking into the monitoring of the implementation of Vishakha Guidelines across the country. Every State Government has filed an affidavit claiming that various steps have been taken to implement the guidelines. The court then asked the petitioners and other organisations to file a rejoinder detailing the changes/additions that they want in the guidelines.

In view of this, India Centre for Human Rights and Law, Mumbai, along with Human Rights Law Network, Delhi, managed to access the state replies and these were compiled and sent to all campaign members, and this initiated a process of discussion and debate for the rejoinder. A series of consultations were organised to ensure national participation in strengthening the Vishaka guidelines. It was partly due to these efforts that the Supreme Court passed two very significant interim orders in the matter.

In the first order, the court issued notices to various professional bodies, asking them about the steps they have taken towards the implementation of Vishaka.

In the second order, which came in May 2004, the Court said that the Complaints Committee under Vishaka was the disciplinary body in cases of sexual harassment and that the enquiry as conducted by the Complaints Committee, would be final. In the last week of August 2004, when the petition came up before the Supreme Court for further directions, the Solicitor General of India made a statement on behalf of the Central Government that they were extremely serious in getting a law passed on the subject.

The NCW draft bill

The Vishaka judgement as passed by the Supreme Court of India on August 13th 1997, clearly states that the guidelines given in the judgement will be the law for the country till such a time as a law is passed on the issue. In a way, the court had envisaged that at some point, there would be a need for more than just a judgment to deal with the issue. The foundation for legislation on this issue was thus laid down in the judgment itself.

In view of this, the National Commission for Women (NCW) prepared a draft Bill on sexual harassment in August 2001. The draft was widely circulated and discussed by various women s groups. The NCW conducted regional consultations with various groups as well as national meetings in which groups were invited to Delhi to discuss the bill. Thus the bill moved from being a criminal bill to the current form of a bill with civil remedies. The NCW also created a drafting committee, which had various lawyers, activists and NGO members from across the country. The drafting committee took into consideration the alternate draft created by the women s groups and the final draft as prepared by this committee, has been submitted to the Women and Child Department, Government of India.

complying with the Visakha Guidelines. The Governments filed Affidavits which bordered on the pathetic. But what this did was to at least trigger a flurry of activities at the Central Government and the State Government level. Many of the service rules were amended to bring in sexual harassment as a specific head of misconduct. In many states the Employment Standing Orders Act which apply to private employers were similarly amended. Committees were set up in various public sector organizations. University Grants Commission sent a letter to the Universities asking them to set up committees. The Supreme Court on the other hand continued monitoring the progress and now issued notices to even professional bodies. Though things were moving the changes were essentially cosmetic. Most of the private employers had not set up any committee and those public sector organizations where committees were set up they did not function effectively.

LAW MAKING PROCESS

It was during this period that the National Commission for Women took up the task of formulating a comprehensive legislation to deal with sexual harassment at the workplace. For drafting the law it set up a group of civil society activists and finally a law came to be drafted.

This Bill in turn was submitted to the Ministry of Human Resource Development, Department of Women and Child Development, which made amendments to this Bill and invited suggestions from the public at large. When Medha Kotwal's case came up in Supreme Court in late 2004, the Solicitor General made a statement that the Government was serious in introducing a law to deal with sexual harassment at the workplace and the Court adjourned the matter so that the Petitioners and other organizations could study the Bill and make recommendations.

It was in this context that a number of organizations working on the issue of sexual harassment met in Mumbai in November, 04 to discuss and suggest amendments to this Bill. In this issue we have published both the Bill as recommended by the Government and the alternate Bill suggested by the organizations which gathered for discussion in Mumbai. The alternate Bill is more in the nature of a revised Bill as it does in many respects accepts the framework of the Government Bill. However, there are major areas where the Government Bill was found lacking either in substance or in details and such changes have been recommended.

CHANGES SUGGESTED

The major changes suggested in the alternate Bill pertain to the following.

Some of the major victims of sexual harassment are service beneficiaries (who are not employees) such as students in educational institutions, patients in hospitals, customers in banks, etc. Though the Government Bill does include students and other service beneficiaries in a peripheral manner there is no focus on these victims. The alternate Bill devotes a new Chapter for the service beneficiaries. Similarly, there is widespread sexual harassment indulged in by professionals such as doctors, lawyers and others. This may not be at any workplace but at any place where an intra professional or inter professional relationship exists. For instance a lawyer may be harassed by an entirely unrelated lawyer in the court premises. The Government's Bill does not deal with this issue. The alternate Bill brings in these relationships also into its sweep with the idea that at least statutory bodies of these professionals such as the Medical Council, Bar Council, etc. start treating such actions as professional misconduct.

One of the major lecuna of the Government Bill concerns the unorganized sector. Though there is a mention that Local Committees will be set up to deal with those employers having less that 50 employees, no details are provided about the function and jurisdiction of these committees. The alternate Bill tries to rectify this by providing detailed mechanism for dealing with complaints of sexual harassment within the unorganized sector.

The Government Bill has also not dealt extensively with protection of the victim within the domestic enquiry in terms of the manner and type of questions which would be put, etc. It is trite to say that most women who are subjected to sexual harassment or molestation have to undergo a harrowing time while being cross examined about their past sexual history and similar other questions. The alternate Bill tries to remedy this by giving adequate protection to women who are under cross examination.

The Government Bill proceeds on the footing that as soon as a complaint of sexual harassment is made a full fledged enquiry must follow. In most of the cases women may not want this and they may only want counseling services. Many cases get sorted out by the Committee just sternly talking to the man or giving him a warning. Some cases may even be sorted out by mediation. Though the Government Bill does talk about mediation, no framework for counseling is provided and again the alternate Bill takes this into account.

There are many minor changes in terms of procedure of enquiry, selection and functions of committees, etc. which are also suggested in the alternate draft. The alternate draft also focuses on providing compensation to the victim.

Hopefully, the Government will agree to the alternate draft and a comprehensive legislation will soon become a reality. Such a law will at least be a starting point for a long term battle against sexual harassment.

— January 2005

Gender in the Construction of Nations

Women are central to the project of nation-making and yet are denied a voice in it. What then, about those who fall outside of this frame of the heterosexual family?

URVASHI BUTALIA

Rada Ivekovic and Julie Mostov, two scholars who have worked extensively on issues of nation and gender, point out that the gender/sex difference, the oldest known difference inscribed into language, has long been seen as a condition of life. It is, they say, perceived to be natural, basic, unquestionable and therefore, unproblematic. In this sense, it permeates all kinds of thinking and feeds into what they call the 'global patriarchal consensus' about the submission of women to men. It helps not only to justify patriarchy, but also to naturalize and essentialize it.

Because it is seen as 'natural' it is all too easy to forget that this difference, like many others, is socially, and historically, constructed. Indeed, it bears a striking similarity to another historical construct which, over time, has been invested with such a naturalness that it seems self evident: namely the nation. Nations are, after all, constructed through political manipulation. Yet once they are in existence, we come to accept them as natural, seeking to establish characteristics that allow us to define the natural and intrinsic attributes of these, which help us to differentiate them as 'our' nation(s) which are then different from 'other' or 'their' nation(s).

Women are essential to this, to the sense of establishing 'our' nation and to differentiating ourselves from the other nation. Every nation has to have certain symbols which help to identify it. These are often imagined - for example some nations are said to be warlike, others peaceable, some friendly, others cold - and sometimes real or halfway real, such as being diverse or racially mixed or 'black' or 'white' - although none of these has anything to do with the construct of a nation. But we often believe that they do.

EMOTIVE SYMBOLS

Perhaps the most emotive symbols of a nation are its women: they are the ones who bear the burden of carrying the identity and sanctity of that nation on their backs and their bodies. Enough has been written about this for me not to go into it in detail here.

But one of the things that makes a nation, as Rada Ivekovic and Julie Mostov go on to describe, is that a nation becomes itself by producing a border for itself. Once borders are created, they almost naturally become vulnerable to violation and transgression. Men routinely transgress these borders, they fight wars over them, and they do this in the name of protecting the nation or the motherland, which is another name by which nations are often known. But it is not enough

to merely transgress physical borders for that transgression does not hit deep, it is not personal, it does not touch the core of the being who is being transgressed. For that to happen, the border has to be different.

And this is where women come in, for nations are not only about physical borders but also about moral borders, and these are the burden of that nation's women. If a nation can keep its women pure and chaste, it can preserve at least its moral borders, if not the physical ones. The 'enemy' nation, the 'other' , knows this, and it is their attempt always to violate the bodies of women, so that this profound, inner, sacrosanct border, is violated. The rape and violation of women's bodies often forms, in our day and age, the bedrock of the creation of so many nation states.

Two years ago at a discussion on Kashmir held in Delhi, a young Kashmiri woman spoke of the rape of a friend. 'I want to ask,' she said, 'how the militants' struggle for azadi, for liberation, will be advanced by the rape of this woman. I want to ask how this rape - and the countless rapes that have taken place - will help in the security and protection of the nation. Can you answer this question for me?'

This young woman's question goes straight to the heart of the matter - and she does not need to look far for answers. Our own history of the Partition of India provides the horrifying statistic of the rape, violation and abduction of nearly 100,000 women. In the game of power where Hindu and Muslim men fought each other in defense of 'their' nations, women and their bodies became the pawns. Men spoke of them as 'our' women and 'their' women. For India, 'our' women were always more chaste than their' women. They had to be because in their selves, they represented the nation, or the mother. One of the most powerful images at that time, was the image of India as mother.

The feminizing of the nation as mother also allows us to see it as a family and therefore to revere and respect it as families are revered and respected. The 'honour' of families in our daily lives is seen to be entirely dependent on women. Today, the increasing number of what are mistakenly known as 'honour' killings, take place mainly because young women choose to transgress the boundaries of the family and community and to choose their own partners. This is something that cannot be allowed for if the family and community has to stay sacrosanct then the woman's sexuality must be contained. It cannot be allowed to go out of control. If the family, community, nation break up, or are under threat of breaking up, the first element of chaos that men fear will enter the scene, is the letting loose of women's sexuality. Oddly enough, both 'sides' know this, and both work hard to therefore violate women's bodies, assuming that once a woman is exposed to the sexuality of the male of the 'other' nation, she will automatically run amuck, and this will then lead to total chaos. It is for this reason that the sexuality of women provides a potential threat to the nation. As Rada Ivekovic and Julie Mostov say, it provides a potential entry point for the enemy, an entry point that allows you to hit at the emotional core of the nation, rather than merely at its territories. This is why, during Partition, it became so important not only for Indian and Pakistani families, but also for the Indian and Pakistan: States, to 'rescue', 'recover' and 'rehabilitate' abducted and raped women, so that they could be brought back into the fold of the family and boundaries could be drawn around them again. This is also why it became so important to make women give up their children, for the children were a living symbol, proof, that these women had been exposed to the sexual aggression of the 'other'.

But there is more to the nation as mother. In this allegory, the mother's children - mainly men - are seen as her protectors. Thus individual mothers come to symbolize the nation, and are revered as the nation is revered. Then, they play another role: as reproducers, they work to reproduce the nation, that is, they give birth to its citizens. This does not endow them with the rights and privileges of citizenship in the same way it does the men they produce, because in some subliminal way, while they are mothers, and therefore symbolize the nation itself, they are also potentially its enemies, or the route by which the nation can be threatened and violated. Women's very vulnerability to sexual attack and assault makes them suspect.

Because women are imagined only as sexual beings, or indeed as sexual property of men, they can never be conceived of as complete citizens. This is why the definition of citizenship in nation-states is always only a male definition. In this, it is not only 'our' men but also 'their' men who are in tacit agreement, an agreement they don't need to discuss.

And while for men the making of nations is about proving their manliness, for women this history carries quite different meanings altogether.

The coming into nationhood of India was marred by the violence of Partition, and in the Constituent Assembly at that time, there were many debates in which the members, mostly male, discussed what this meant to them. An article in the *Organiser*, mouthpiece of the Rasthriya Swayamsevak Sangh (RSS) mirrors this. Speaking of the millions of refugees who streamed into India, it says: Their early and effective absorption into the economy and society of the regions of their adoption, is the primary duty of every national of Hindustan. The task is not easy. It bristles with difficulties. That is obvious. But no less obvious is the fact that the problem is a challenge to our manhood, no less than to our nationalism'.

MEN AS PROTECTORS

Because this is how nations, and states, see women, who form half their citizens, one might almost say they are unable to conceive of them as rights-deserving and rights-bearing citizens. Their very 'weakness' affirms the 'strength' of the men who make the nation, and the men see themselves the protectors of women. And when this protection fails, as it often does in cases of rape, a culture of silence and denial develops around the subject.

The many Muslim women who were raped by Hindu men, with the collusion of the State, in Gujarat recently, are unable to access justice because despite the rapes being public, no one is willing to give evidence, and the police, in an all too predictable consensus with the rapists, are not willing to file cases.

Thus, the 'nationalists' - i.e. those who see themselves as guardians of the Hindu nation they wish to create - have formed a consensus with the police, the executive arm of the State, and women are caught in the middle of this.

Many years ago, an army unit of the Rajputana Rifles, carried out the mass rape of women in the village of Kunan Poshpora in Kashmir. Later, an investigative team, made up only of men, went in and, after spending barely an hour or two in the village, denied that the rape had taken place.

And yet, even today, no woman in the village can get married because she is tarred with the brush of belonging to the 'raped' village.

MERELY A WOMAN, NOT CITIZEN

In India, after Partition, when families brought cases of abduction and rape to the attention of the government, there were many interesting things that came to light. In a case called *Ajaib Singh v State of Punjab*, one Ajaib Singh had filed a petition of habeas corpus with the High Court of Punjab, asking that a young woman, Sardaran (whom Ajaib Singh held to be his daughter, but who was suspected to be an abducted Muslim woman), not be sent to Pakistan until her credentials could be confirmed.

Was Sardaran a citizen of India or not ? This was the issue. As a citizen, what rights did she have ? If Sardaran was a victim of rape and abduction, what recourse did she have? To whom did she belong? These were some of the questions that preoccupied the State at the time, and the case of this young woman went all the way up to the Supreme Court, where issues of identity and citizenship were debated. Interestingly, while all this was going on, no one thought to ask Sardaran what she thought or felt, for that was immaterial.

And this is the paradox. Women, their sexuality, their bodies, lie at the heart of the project of nation-making. And because nations are being constructed and reconstructed all the time - the latest example being the Hinduising of the Indian nation - women's centrality to these projects does not decrease. And yet, women themselves are denied a voice in this, the discourse almost always takes place predominantly in the voices of men. This is not to say that women are not invested in nations and nationalism, but the nation, nationalism, the State, often look very different from the point of view of women.

In the space of a short essay such as this one, it is not possible to do justice to such a complex subject. In our analysis of the links between sexuality, gender and state and nation, we have only just begun the process of understanding the complexity of the problem. However, it is both imperative and urgent that we do understand it, for if women, who are such a large and heterogeneous group, can be so marginalized as citizens, what of those other identities who do not fit the 'norm' in any way, or who are already so marginalized ? What of the poor and weak? What of Dalits, of people of different sexualities? What of those who inhabit the spaces that we, as middle class people, never see? Indeed, nations often image themselves as familial spaces, the family being seen as the hetero-sexual family.

For women, citizenship of the nation is then mediated through the family, so that they are never autonomous subjects, and therefore cannot be full

citizens. For those then who fall outside of this frame of the heterosexual family, the nation has little to offer, let alone citizenship, and rights. Today, when nations are being made and remade in all sorts of different ways, and when the voice of the State often blurs into the voices of the self appointed nationalists, then all those who resist and oppose these voices, are under threat. Understanding this is the first step to resisting it.

—October-November 2003

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Gender Cleansing

Female foeticide or crime against humanity? Any enactment of national legislation on female foeticide must take cognizance of its occurrence in radically new terms in order to effectively combat it, but more importantly, to put an end to impunity, which is the hallmark of this practice today.

KALPANA KANNABIRAN

The Universal Declaration of Human Rights opens with an assertion of the equal inalienable rights of all members of the human family to inherent dignity and the recognition of the aspiration of the common people for a world that is free is from experiences of barbarous acts which have outraged the conscience of humankind.

Articles 1, 2, 3, 7, 16 (3), 22, and 25 (2) are specifically relevant to the present purpose, addressing questions of entitlement to dignity and freedom without distinction of race, colour, sex etc. It further asserts the right to life, liberty, security of persons and equality before the law; the entitlement of the family to protection by the state; the entitlement to the realization of social security; care and assistance towards motherhood and childhood.. All children, whether born in or out of wedlock, are stated to enjoy the same social protection. Finally everyone is entitled to a social and international order in which the rights and freedoms set out in the Declaration can be fully realized.

This view can be further supplemented by the Genocide Convention. For a crime to be defined as genocide, any of the following five acts should have been committed with intent to destroy a group in whole or in part: a) killing members of the group (b) causing serious bodily or mental harm to members of the group (c) deliberately inflicting conditions of life on the group that are calculated to bring about its physical destruction (d) imposing measures intended to prevent births within the group (e) forcibly transferring children of the particular group to another group.

Female Foeticide and female infanticide satisfy four of the five criteria set out in the Genocide Convention. Female foeticide alone already matches, even surpasses the worst episodes of genocide in scale: 50 lakh female fetuses [even the official estimate of 20 lakhs will suffice] a year are aborted after sex determination tests, leading to a sharp decline in the sex ratio. In the 0-6 age group, the 2001 census shows a decline in sex ratio from 945 girls for every thousand boys in 1991 to 927. Punjab is at an unspeakable 793. In the light of Article 21 of the Indian Constitution, female feticide, by bringing about a physical destruction of an entire class of persons by actively preventing births of members of that class, is a direct infringement on the right to life, dignity and security of person for surviving members of the class. It farther impinges upon their mental well being, through the creation of an envi-

ronment of terror and hate engendered by such mass destruction.

Further, the sheer magnitude and brutality of the practice coupled with the guarantee of impunity are masked by the terms in which feticide has been described to date: "A social evil" because "girls are viewed as a burden by society" and because "doctors are greedy," resulting in a "shortage of girls" making it difficult for young men to find brides, we are told! Girls are a commodity that can be bought and sold in the market, so why bother to give birth to them? And the solutions then typically lie in awareness raising, and educating people about the better ability of girls to look after them in their old age.

It is in the naming that the problem lies, and it is because of the naming that the problem persists. Female foeticide is not a social evil. It is gender cleansing - the extermination of an entire generation of women, and by extension, all future generations as well.

Meeting the definition of genocide on four out of five counts, but not being an act against a national, ethnic, racial or religious group, rather a class of persons, it falls within the ambit of "Crimes against Humanity". The Rome Statute of the International Criminal Court, in Article 7 defines "Crimes against Humanity" as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

According to the Rome Statute, "extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of a part of the population. "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity. Extermination through systematic murder of newborn female infants and through abortion of female fetuses [under clause (g) above] is part of the persecution of women as a class [clause (h) above]. In accordance with the Statute then, female feticide meets the definition of a Crime against Humanity strictly construed and not by analogy.

Article 25 of the Rome Statute addresses the crucial question of individual criminal responsibility. Clause (3) states that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose... (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions".

Families that seek "female feticide services," but more importantly doctors and medical practitioners (and all categories of employees in establishments with ultrasound or other diagnostic or fertility treatment facilities) who use the facilities to either commit or aid in the commission of female feticide, or, to use Satish Agnihotri's phrase "Female Feticide Service Providers" will be liable for punishment for perpetrating crimes against humanity under the provisions of the Rome Statute in far more serious ways than contemplated by the current legislation, which imposes extremely mild punishment for the first offence and then steps it up gradually. Thus the penalty structure itself defeats the purpose.

The conspiracy of silence and non- reporting, especially by the medical fraternity, even when definite information of the commission of this offence is available, is yet another dimension that must be addressed. This is because the collective responsibilities of professional

bodies like the IMA, for derogatory practices by members on a mass scale targeting an entire class of persons, practices use of the professional training and qualifications that qualify them for membership in these bodies.

Clearly therefore the question of criminal responsibility and liability must be structured on the basis of an understanding of the gravity of the offence - not a response to a "social evil".

Any enactment of national legislation on female feticide must take cognizance of its occurrence in radically new terms in order to effectively combat it, but more importantly to put an end to impunity, which is the hallmark of this practice today. While it may be argued that the state has in fact taken steps to stop this practice through the enactment of the PNDT Act, the ineffectiveness of the Act in real terms translates into state liability, not "apathy" - since we are not speaking of individual crime but of mass extermination, for which the mechanisms and the urgency of redressal cannot be a mild legislation like the PNDT Act alone. This is one more reason why India must ratify the Rome Statute.

August-September 2003

Gender Neutrality in Rape Law

Haunting questions, illusive answers. Though the move to reform rape laws is in the right direction and is long overdue, unless it is fine tuned to the specific needs of the concerned segments, its aspirations will remain at the level of rhetoric at best, or result in misery and humiliation at worst.

FLAVIA AGNES

The anti-rape campaign has been the central pivot around which the Indian women's movement has revolved for well over two decades. Its significance lies not just in focusing upon sexual violence, but also in addressing theories of dominance and subordination, and construction of gender within wider social parameters. Upon their bodies, women carry the honour of their communities and raping them is one of the surest ways of defiling the entire community. Rape, as a weapon of terror and subjugation - in situations of caste, class and communal conflicts, custodial and state sponsored rape by police, armed forces and the para-military - has been the concern both of theoretical debates and ground level interventions. Going beyond the premise that 'rape is a conscious process of intimidation by which all men keep all women in a state of fear[1],' rape has been one of the means through which the social hierarchy of power relationships is maintained and nurtured in a gendered society.

CAMPAIGNS FOR CHANGES IN THE RAPE LAW

The Supreme Court verdict in the now (in)famous Mathura Case[2] had raised a series of concerns. Since the court had held that absence of injuries implies consent, the legal indicators to determine valid consent became the focus of the public debate. The myth that when a woman says 'no' she means 'yes,' had to be challenged within legal echelons. The only way this could be achieved was by shifting the burden of proof regarding consent to the accused, once the prosecution had discharged its burden of proving sexual intercourse. This demand triggered off a heated debate between women's rights activists on one side, and human rights groups on the other. As per the established tenets of the criminal justice system, the prosecution must prove an offence 'beyond reasonable doubt' and an accused is 'innocent till proved guilty.' Human rights groups were apprehensive that this demand may pave the way for the enactment of draconian laws, curbing civil rights.

The relevance of the victim's moral character and sexual history became another important point of debate. Only through humiliating and shaming the victim in a packed courtroom through crude and vulgar cross- examination, could criminal lawyers display their legal acumen and obtain an acquittal for their clients, or so it seemed.

The campaign met with a measurable degree of success when the archaic provisions were amended in 1983, after the lapse of a century. Though the central concerns regarding the moral character and sexual history of the victim had been sidetracked, the state had acquiesced to the demand for a deterrent punishment. The demand for shifting the burden of proof regarding consent had been conceded to partially - in custodial situations. The aspirations, at this time, were that the initial reforms would pave the way for substantial changes in the years to come.

FAILURE OF THE AMENDMENTS

But the euphoria regarding the success of the campaign did not last long, as the amended law started unfolding in courtrooms in the post amendment phase. The procedures continued to be long and winding, the investigative machinery lax and corrupt, cross-examinations of the victims degrading and humiliating. The courts expressed a great concern and sympathy for 'youth offenders' and 'first offenders,' by awarding less than the minimum prescribed

punishment of seven years in general rapes, and ten years in situations of gang rapes, custodial rapes and rape of minors. This rendered the theory of deterrent punishment a mockery. Contrary to expectations, the statistics revealed an increase in reported cases and a dismal rate of convictions.

By the end of the decade, it was obvious that the amendments had failed to evoke the desired response. Simultaneously newer issues, which had remained unaddressed, began to surface. Central among these was the patriarchal presumption that vaginal penetration by the penis amounts to ultimate violation, 'a state worse than death.' A paradoxical situation prevails in criminal law where all assaults are rendered grievous if a weapon is used, as the risk of bodily injury is aggravated. Only in rape cases it is the reverse. A range of sexual violence meted out to little girls by inserting objects like bottles, sticks and iron rods into their tender and as yet not fully-formed vaginas, causing multiple injuries and risk to life, got swept away under the nomenclature of 'violating modesty,' punishable with a maximum of two years of punishment. The legal explanation was that the male sexual organ was not involved, however gruesome the sexual assaults may have been, and hence the offence could not be brought within the four corners of the offence of rape.

Having laid out strict parameters of overlapping sexual offences, which could easily spill from one category to another, the courts went into lengthy and circuitous discourse as to when a rape becomes a 'mere attempt' or when an attempt to rape can be reduced to 'a mere violation of modesty.' What then would modesty amount to? This determination was essential to assess whether modesty had, in fact, been violated. The courts went to absurd lengths to determine whether a six month old baby who has been sexually assaulted by an adult male, was possessed of 'modesty' capable of being violated and whether all females are 'born with a sense of modesty' and carry it with them at all times - whether awake or asleep, in their conscious selves as well as in the recesses of their subconscious beings, from birth to death - just so that sexual offenders could be brought to book under outdated Victorian tenets of 'female modesty.'

CHILD SEXUAL ABUSE

Around this time, two new sets of issues emerged in the horizon pressing for legitimacy and recognition. The first shattered the myth that rape occurs only in dark alleys, outside the intimate domains of a loving and nurturing home. Cases of sexual abuse by fathers, uncles, brothers and grand fathers, through a blatant and vulgar usurpation of patriarchal power, started spilling out into the public domain. Along side was the abuse of male children in custodial situations in children's home and reception centers. Sheela Barse, a child rights activist was among the first to pierce the shroud of silence and question the rigid demarcations of the gender divide. Since these offences could not be made culpable under the conventional construction of peno-vaginal violations, an archaic law formulated to regulate the moral behaviour by penalizing unconventional sexual acts under the title 'unnatural offences' (Section 377[3]), had to be invoked to punish the offenders.

SEXUAL VIOLENCE BILL

By now, it was obvious that a new and complex definition of sexual assault had to be evolved in order to impart justice upon these vulnerable segments whose concerns had remained largely unarticulated in the first phase of the campaign. In 1993, the National Commission for Women responded to this felt need through a bill titled, 'Sexual Violence Against Women and Children Bill.'

The bill advocated deletion of sections 354 (violating modesty), 375 (rape), 376 (punishment for rape) and 377 (unnatural offences) of the Indian Penal Code (IPC) and brought them under the broad banner of 'sexual assault.' In its 'Statement of Objects and Reasons,' it proclaimed that the existing definitions of rape and molestation do not adequately address the range of violations, nor do they sufficiently recognize the gender-specific nature of such crimes, and that the law had become outdated, in terms of language and intent. The unique character of the offence of sexual assault, and its effects upon the lives of women and children, and the violation of their fundamental human rights was specifically set out.

The bill defined sexual assault as 'introduction (to any extent) by a man of his penis into the vagina, the external genitalia, anus or mouth of another person' and also penalized 'the insertion of any object or a part of the body into the vagina or anus of another person'. The bill specifically made a note of incidences of child sexual abuse and incest, and prescribed measures to ensure due care and sensitivity in handling crimes of sex-

ual assaults, and the need for speedy and effective justice. The bill seemed to be introducing two important legal principles:

Repeal of Section 377, which dealt with cases of 'unnatural sex,' and for the first time, provided legitimacy to same sex relationships between consenting adults. This was done without involving groups concerned with this issue, more as a natural corollary to the process of redefining sexual assault.

Through the usage of the term 'person." an element of gender neutrality seems to have cropped in, specifically to include the violation of male children. But the overall reading of the bill seemed to suggest that an adult victim of sexual assault is primarily a woman and suggested gender-specific procedural reforms. To give one example, it stipulated that the statement of a victim should be recorded only by a woman police officer, etc.

The bill advocated a general shift in onus of proof in all cases of sexual assault, and specifically barred the reliance upon the previous sexual history of the victim in a rape trial. It also contained suggestions to prevent the traumatization of the minor witnesses during cross-examinations.

Although the bill invoked some debate, nothing further came out of it and it lay dormant for almost a decade.

The 1990s witnessed a conflict of interest between two marginalized and vulnerable groups both situated across the conventional gender divide, within the scope of the controversial Section 377.

SEXUALITY MINORITIES

Groups concerned with the rights of sexual minorities addressed the issue of violation of human rights and enforcement of conventional norms of sexual morality, by invoking the provisions of Section 377. The issue of homosexuality had reached the public domain, when prevention of the spread of AIDS became a concern of public health, and homosexuals and prostitutes were marked as 'high risk' groups, needing interventions to spread the message of safe sex among them. The groups working with sexual minorities also started questioning their marginalized existence, lack of public space and visibility, and the social stigma enforced through the application of outmoded social norms.

The broad term 'sexuality minority' includes groups working for the rights of and providing support to gay men, lesbian women, bisexuals and transgender groups (LGBT). Significant in the transgender category were communities of eunuchs who were finally raising their voices against regular police harassment, humiliation and rape. Staking their claim to public spaces, they questioned the role of a secular and democratic state to defend the principles evolved by the ecclesiastical traditions and Victorian morality, and campaigned for the deletion of Section 377. This would provide the groups freedom from constant police vigilance in public places and the space to build support networks.

This demand was in direct conflict with the concerns of child right groups who, in recent times, had been entering the criminal law through the portals of Section 377, by naming sexual assaults on children as 'unnatural offence.' Hence the deletion of this section would leave a gaping void in the realm of protection of male children against adult sexual abuse. A particularly significant litigation in this area had been the prosecution of Freddy Peat, a European settled in Goa followed to logical end by Sheela Barse, which had resulted in a conviction under the provision of Section 377. The case brought into limelight the internationally instigated and commercialized sex rackets involving abuse of male children on the beaches of Goa.

The concern over the legal lacunae in cases of incest and child abuse also surfaced before the Delhi High Court[4]. A high-ranking government official was charged with sexually abusing his six- year-old daughter. The acts included finger penetration and oral sex. The police refused to charge the father with the offence of rape and instead registered the complaint under Section 377. A Writ Petition was filed by the mother before the Delhi High Court to bring the offence under the scope of Section 376. The present law minister, Aran Jaitey who appeared for the mother and pleaded for a realistic interpretation of the rape law (Sections 375 and 376), urged that when a male penetrates a female with any part of his body or with any foreign object such as a stick or a bottle without her consent, it would amount to rape within the meaning of Section 376.

The court rejected these arguments and held that insertion of a bottle into the vagina would amount only to 'violation of modesty,' which stipulates a maximum sentence of only two years! Dismissing the Petition, the court held, 'Penal statutes must be construed strictly. The court must' ensure that the thing charged is an offence within the plain meaning of the words used and

must not strain words.' Only the legislature could expand the provisions of these sections, the court concluded.

Nothing much came out of the judgement but it paved the way for advancing the argument of gender neutrality, a concept devoid of all social reality of sexual abuse in our country. While suggesting changes in the law, the judge commented in a casual manner: 'And if they really decide to look into it, what about defining the offence in gender-neutral terms? I think the law reform community will have no objection to it.' He quoted a passage from an article in a law journal of a Western university in support of his contentions of gender neutrality: 'Men who are sexually assaulted shall have the same protection as female victims and women who sexually assault men or other women should be liable for conviction as conventional rapists.' This judgment marks a shift in the discourse on rape law amendment in India with its plea of complete gender neutrality both for victim and violator. There seems to be a presumption here that if women can be framed as violators, then the trauma of rape for women as victims would be reduced and the stigma attached to the offence would peel off. A strange logic indeed.

LAW COMMISSION RECOMMENDATIONS

Ironically this judgement is known less for its views on gender neutrality and more for paving the way to an onward journey to the Supreme Court, by the Delhi based group Sakshi, who had supported the wife in the KCJ case. The NGO sought the intervention of the Supreme Court for a direction to the Law Commission (LC) to frame a law on sexual assault. After much persuasion, in the year 2000, in its 172 report, the Law Commission (LC) recommended changes to the rape law on the lines of some 'Western countries' and made the law gender neutral. It seemed that the discourse in the intervening period had moved from partial to complete gender neutrality, inclusive of both, victim and violator.

The LC report applauded the efforts by Sheela Barse regarding custodial child sexual abuse of both male and female children in tourist centers like Goa by foreign tourists. While defending its stand of gender neutrality, the Law Commission relied upon the recommendations made by Sakshi, Ifsha (an offshoot of Sakshi) and AIDWA (the women's wing of the CPM) in this regard.

Two comments of the LC warrant special mention. While suggesting deletion of Section 377, the only content left out of its purview was carnal intercourse with an animal. 'We say leave these persons to their just deserts' is the recommendation. The only arena where they found it necessary to retain gender specificity, hold your breath, is marital rape. The reasoning here is, 'this may amount to excessive interference with marital relationship.' This, despite a long struggle by women's groups to give recognition to the offence of rape within marriage.

THE PROBLEMS WITH GENDER NEUTRALITY

Alarmed with the implications of the LC recommendations upon vulnerable sections, i.e., women, children and sexual minorities, a national level meeting was called in December 2001 to arrive at a consensus on this issue. It was attended by around 30 groups with diverse concerns, from across the country. The debate culminated in a letter to the Law Minister opposing the principal of gender neutrality. While the response of the law minister is awaited, the issue today is whether the overlapping and conflicting interests of the concerned segments could best be served by a comprehensive law, or would it be more prudent to address these concerns severally, and introduce reforms for specific segments after wider consultations.

As far as the women's situation is concerned, throughout the two decades of struggle, neither had a single case of a reversal of gender roles in the realm of sexual offence ever surfaced in the Indian context, nor had it at any time formed part of the discourse. In this entire history, no one has ever advanced the plea of sexual violation by women. On the contrary what have surfaced are sexual violations by men not only of women, but children - both male and female - and other men. And yet, while addressing this concern, women have now been posed as offenders, and have been made culpable for an offence that is far removed from the ground reality of their social existence.

The premise of gender neutrality has been supported by the three women's rights groups who had been consulted, perhaps by adopting a Western model where laws have been rendered gender neutral through active intervention of feminists. Subsequently, this model has been criticized by feminist legal scholars who have felt that the equality model has had a detrimental

impact on women and children. For instance, Martha Fineman[5] has commented that reformers can and often do create new and even more complex difficulties through ill-considered strategies which they inevitably seem to employ when using the law to attempt to construct a more ideal society. The rhetoric of equality defines and confines the reforms. She suggests that in order to do equity one must move away from 'equality' as the grand principle of reform. This would be even more applicable to Indian settings where the status of women has declined during the last two decades, and where there is a marked increase in domestic and public violence against women. A gender-neutral rape law would open up avenues for inflicting even greater trauma and humiliation to an already marginalized section, and hence defeat the very purpose of reform. This premise cannot be introduced on the pretext of safeguarding the rights of other marginalized segments.

Mindlessly aping the mistakes committed by Western feminists may not be the ideal solution to the issue at hand. The concern of women's groups today is to widen the definition of rape and to take the offence beyond the patriarchal parameters of penovaginal assaults, which can be brought about without invoking the principle of gender neutrality.

CHANGES NEEDED

The engagement of child right groups is not only with the substantive law, but also with the procedural aspects. In order to protect children, the present adversarial system needs to be replaced with an inquisitorial one, where, to impart justice, judges will have to play a greater role than the present one of a neutral arbiter. Children need safety and reassurance, and a congenial atmosphere in order to be able to depose before a court of law. A separate law on child sexual abuse may best serve the interest of children. What needs to be contextualized even here is that the implications of sexual abuse for minor girls and boys are not the same, as they are not similarly situated.

The concerns of LGBT groups are pitched at yet another level. Compared to women's rights and child rights groups, they are more recent entrants to this discourse. Their existence has been viewed as a moral threat to the society, and they carry with them notions of shame, stigma, delinquency and mental illness. Giving a backhanded recognition to same sex relationships as a concession in the process of reformulation of rape laws may not be the best way of raising public consciousness. What is needed is the application of principles of equality, equal protection under the law and an assurance of non-discrimination - the fundamental rights enshrined in our Constitution. The debate must also address archaic notions of 'natural' and 'unnatural' sexual behaviour, which then translates into violation of several fundamental rights, including that of life and liberty.

In conclusion, though the move to reform rape laws is in the right direction and is long overdue, unless it is fine tuned to the specific needs of the concerned segments, its aspirations will remain at the level of rhetoric at best, or result in misery and humiliation at worst.

— April-May 2002

Endnotes

1. Section 377 (IPC) Unnatural Offences - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
   Explanation. - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.
2. S.J. v K.C.J, and Others 62 (1996) Delhi Law Times 563.
3. Martha Albertson Fineman, The Illusion of Equality, The University of Chicago Press (1999)

WORLD TRADE ORGANISATION

WT

SECTION 20

Submitting to the WTO involved removing internal subsidies, privatising public utilities, removing every barrier to unequal trade and generally aligning national legislation and policy with the requirements of western dominated international trade. This ambitious organisation sought to set itself up over national governments and subordinated national sovereignty to multinational corporate profit.

World Bank Unmasked

An Independent People's Tribunal on the World Bank Group in India held in New Delhi gave the first ever opportunity to affected people, experts and academics from about 60 grassroots civil society groups to be heard by a jury of eminent and distinguished retired judges, social workers and public leaders.

IPT ON WORLD BANK

We, the twelve jury members, have listened to four days of testimony and depositions from September 21 to 24, 2007 by affected people, experts and academics from some 60 grassroots, civil society groups and communities from all over India. The presentations covered 26 different sectors of economic and social development, ranging in scope from the macro-economic impact of wide ranging economic policies to testimonies from representatives of communities said to have been harmed and impoverished by specific World Bank financed projects. Our members include former justices of the Indian Supreme Court and High Courts, lawyers, writers, scientists, economists, religious leaders, and former Indian government officials. We note that the World Bank Delhi office received an invitation to attend the Tribunal two weeks in advance, but did not wish to participate in the proceedings.

"First and foremost, the evidence and depositions we have witnessed presents a disturbing and shocking picture of increased and needless human suffering since 1991 among hundreds of millions of India's poorest and most disadvantaged in rural areas and in the cities. It is clear to us that a significant number of Indian government policies and projects financed and influenced by the World Bank have contributed directly and/or indirectly to this increased impoverishment and suffering. All this has taken place while a minority of India's population that constitutes the middle class and rich has enjoyed the fruits of an economic boom.

"The most disturbing leading indicator for this suffering is the alarming increase in farmer suicides since the 1990s. From 2001 to 2007 alone, according to the Indian minister of agriculture, 1,37,000 poor farmers have killed themselves. These deaths are not random events; the evidence we heard points to increasing financial pressures on farmers all over India as a result of some or all of the following policies, such as: reduced subsidies from the centre and states, higher prices for poor farmers for irrigation water, electric power, and seeds; reduced subsidies for agricultural inputs, reduced access to low interest loans for the poor, and opening up of the Indian economy to an uneven playing field in international trade in agricultural commodities. India's farmers must now compete with imports from the heavily

Highlights of the IPT

- Vice Chairman of the Kerala State Planning Board Professor Prabhat Patnaik in his deposition cited the example of the Jawaharlal Nehru National Urban Renewal Mission (JNURM), which is a World Bank designed project. In the Kerala JNURM project, the state government, he said, was being forced to accept a conditionality to reduce stamp duties to 5 percent from the earlier 15-17 percent. To avail a loan of about Rs.1000 crores, Kerala would lose up to Rs.7000 crores of government revenue.
- Vinay Baindur of the Bangalore-based Collaborative for the Advancement of Studies in Urbanism (CASUMM) showed evidence of how the Karnataka Economic Restructuring Loan (KERL) resulted in the conversion of a state government and its economy into a corporatised entity meant to generate funds for "private sector and enterprise development". 'The $250 million loan resulted in far reaching changes; the closure/privatisation of the public sector, nearly two lakh permanent employees were forced to take Voluntary Retirement Scheme (VRS) payments. The World Bank ordained restructuring process led to a steep rise in farmer suicides, many of those who committed suicide did so because they were unable to pay the arrears in power costs that were suddenly slapped on them on account of power tariff hikes. "The withdrawal of subsidies for agriculture led to a sharp rise in the costs of cultivation", argued Baindur in his deposition.
- Jury member and scientist Meher Engineer said that the World Bank forced inappropriate technology on India such as incinerators especially damning. "Given the well researched evidence that I have heard, it is hard to imagine any role for the World Bank in the environment sector, he said. "The Bank is pro-rich, pro-urban and anti-environment", he concluded.
- In the 1990s, 20-30 percent of World Bank loans in India went to the energy sector. Orissa had the dubious distinction of being the first state to receive World Bank loans for restructuring the sector. Sreekumar N, from the Pune-based Prayas Energy Group argued that based on World Bank advice, Orissa spent upto Rs.306 crores for foreign consultants, ignoring local expertise. The consultants recommended the privatisation of distribution and the American firm AES that took over distribution in the central zone and behaved in a high handed manner and ultimately left the state in 2001.
- Nityanand Jayaraman of the Chennai-based Corporate Accountability Desk in his desposition before the jury said, "The Bank is perpetrating toxic colonialism by funding discredited and polluting technology interventions". As evidence he presented cases where the Bank has promoted the setting up of more than 88 Common Effluent Treatment Plants, more than 90 percent of which were shown to have failed to meet environmental norms by the Central Pollution Control Board.
- Wilfred D' Costa, general secretary of the Indian Social Action Forum (INSAF) — one of the convening groups of the IPT — said, The tribunal has been useful since it has seen a convergence of social movements, unions, academicians, researchers and struggle groups from across the country. "Our next steps would be to use this platform to create a broad-based political struggle against neo-liberalism and work towards an India without institutions such as the World Bank and the Asian Development Bank."

subsidised farms of the European Union and North America, at the same time when even the most meagre state assistance for the poorest farmers is reduced. India was once self-sufficient in food production; its food security is now dependent on imports. It is clear to us that major World Bank Economic Restructuring, Structural Adjustment, and Sector Loans have directly promoted and helped to finance these economic policy changes which are a disaster for much of India's more than 700 million rural inhabitants, and most disastrous of all for poor farmers.

"Other World Bank loans have promoted the institution of user fees in the health and education sectors, as well as partial privatisation in these sectors. Whatever the justification for these policies, we heard how in practice, they have further disadvantaged the poor. The Bank is promoting legal and regulatory changes the main focus of which appears to lessen the social and environmental compliance burdens for industry and investors, rather than protect the vulnerable livelihoods and environments of India's poor majority. The net effect of many Bank prescribed policy "reforms" appears to be the reorientation of the Indian State priorities from striving to secure a safety net for the poor and vulnerable to providing a safety

net for large domestic and international corporations and investors.

"We heard witnesses from the poorest Dalit and Adivasi communities describe the deterioration for their communities from poverty to destitution because of forced displacement caused by World Bank financed projects. A number of these projects are notorious and communities have sought redress for years: the Bank's massive loans for thermal power development in Singrauli in the 1980s displaced many tens of thousands of poor, who have sought economic rehabilitation and improvement of toxic environmental conditions, with no redress from the Bank or its Indian government borrower, NTPC. We heard of the plight of hundreds of families impoverished by displacement in the Bank financed Coal Sector Rehabilitation Project, despite the claims of a separate Bank Coal Sector Environmental and Social Mitigation Project. Although the Bank's own Independent Inspection Panel found in 2002 that Bank management violated its own environmental and resettlement policies on 37 counts, the Bank management has taken no effective measures to ameliorate the condition of these families. These examples are only a small sample of a massive pattern of forcible displacement of India's poorest and most vulnerable populations for large-scale natural resources extraction, infrastructure and urban projects, a number of which have been directly financed by the Bank. The Bank has announced its intention to increase its financing of large-scale projects while at the same time there is disturbing evidence of its widespread failure to implement its environmental and social safeguards, as well as indications of intentions to even dilute the effective rigour of these safeguards.

"One of the disturbing impressions we gathered from the presentations is that the bank seems to have developed the art of making policies whose safeguards are only on paper. It has developed a language game in which words like empowerment actually means disempowerment, sustainable means unsustainable, public-private partnesrship means using the public to promote the interests of the private.

"It is impossible to do justice in our short preliminary statement to the volume, scope and intensity of the scores of depositions, expert presentations, and eye witness accounts we have heard over the past four days. The Tribunal will be publishing more detailed accounts, and we will submit a more detailed set of findings and recommendations in a few weeks' time. What emerges is a picture of an institution whose influence on the economic and social policies of the Indian government is much greater than the amount of its lending might indicate. The Indian government, of course, shares at the very least equal responsibility for all of the abuses we have witnessed, indeed a significant number of officials in key ministries such as finance and planning have either worked at the Bank or IMF, or share their assumptions and biases. Together all bear considerable responsibility for wide reaching policies and specific investments which in the name of growth and development have had the cruelest impact on the most vulnerable groups in our society.

"We hold the Indian government accountable and call for changes in these policies. India and the international community must join to hold the World Bank accountable for policies and projects that in practice directly contradict its mandate of alleviating poverty for the poorest."

— The jury members included: Amit Bhaduri, Meher Engineer, Ramaswamy Iyer, Alejandro Nadal, Bruce Rich, Aruna Roy, Arundhati Roy, Justice PB Sawant, SP Shukla, Sulak Sivaraksa, Justice H Suresh and Justice Usha.

— November-December 2007

GATT It? Got It

Bureaucrats who are supposed to guard India's interest at international negotiations have repeatedly let the country down. The senior officials have compromised on national interests at international forums and got rewarded by the powers-that-be.

KRISHNA BIR CHAUDHARY

"India could cooperate with developed countries on agriculture if they cooperate with India on Non Agriculture Market Access (NAMA) and services."

— Union Commerce minister Kamal Nath on 2nd May 2005 at the OECD and G-20 meet in Paris.

From Doha 1995 to Geneva 2004, the 10-year-long treacherous journey for India as a founder-member of WTO has proved all enduring and elusive, specially for its agro-rural sector. The Uruguay round of negotiations preceding Doha declaration has been a sordid saga of bureaucratic muddle by the Indian negotiators. The government was misled into signing the Doha Declaration on the dotted lines, compromising national interest that landed India inextricably trapped into the sinister machination of WTO, having the back up of super economic giants. Counterpositioning India's strategy and economic interest must be termed as the worst form of bureaucratic impropriety which can never be condoned.

It is not a strange coincidence but a reality that the more they compromised the national interest, the more they were awarded. Otherwise, how can one explain that Mr Anwar Hoda, who was special secretary in the ministry of commerce in 1998, and chief negotiator for India during the Uruguay round, got the plum post of deputy director general, GATT and right now is serving as member of Planning Commission. Mr A N Verma, secretary in the ministry of commerce led the delegation to Geneva in April 1989. Taking advantage of the then prevailing political situation, Mr Verma told Mr Montek Singh Ahluwalia, economic advisor to the Prime Minister, that since dispute settlement mechanism in the new agenda for the Uruguay had been strengthened, therefore, it should be accepted. Accordingly, as advised by Mr Ahluwalia, the Prime Minister agreed to accept the new agenda which included IPR, services, investment and domestic policy related to agriculture. Mr Verma was later promoted to the rank of principal secretary to the Prime Minister. Mr A V Ganeshan who was secretary, commerce, in December 1993 during the final act of Uruguay round, toe-toed the line of his predecessor and after retirement he was rewarded as the panel member of the dispute settlement body. Mr Narendra Sawarwal was joint secretary (patent) in the industry department in the early 1990. A bureaucrat belonging to the same bunch of thought, he was rewarded

with the position of director of Asia Pacific Bureau of World Intellectual Property Organisation (WIPO). At the moment, he is enjoying as its senior director.

Mr Pushpendra Rai, now working as the director of WIPO, was a joint secretary (patent) in the industry department in the mid 1990. Likewise, Dr Jaiyia served as director in the ministry of industries dealing with patent matters. Now he is enjoying his stint in WIPO. Mrs Jaishree Watal was a deputy secretary with the ministry of commerce during the Uruguay round negotiations. Now she is enjoying her assignation in the WTO. Media exposure of Mr A E Ahmed, joint secretary industry department (patent) who did a U turn and compromised government's actual position to support the WIPO director general's patent agenda during the WIPO assembly last year and his questionable role in the patent amendment bill - 2nd and 3rd amendment failed him from being rewarded like others.

Before the Uruguay round, only two issues - trades and goods - were in the agenda for bilateral or multilateral negotiations. But it was the collaborative venture of these gentlemen which brought various other non-conventional matters in the Uruguay round agenda. India and Brazil led the third world in Uruguay round negotiations during 1986-96. We have seen the angry outcry and protest against the outrageous and unequal globalisation through the machination of the WTO. The stiff resistance put against the Doha declaration in Montreal by people from across the world will go down in the annals of our times as the largest human globalisation of the sort. We call upon the government to table a while paper in Parliament pertaining to WTO negotiations. The government should also put stringent moratorium for at least five years banning all bureaucrats from joining any pecuniary position anywhere who are involved in the WTO negotiations.

— June-July 2005

PWC
DJB
World BANK

Treading a Dubious Path

Developing countries are in a vulnerable position. Food security and livelihoods of millions of farm families are being mortgaged at the altar of international trade and development.

DEVINDER SHARMA

The US Trade Representative Rob Portman has assured the Senate Agriculture Committee that he would insist any new world trade deal provide substantial new export opportunities to compensate US farmers for federal subsidy cuts. He was responding to wary members' query about the future of American agriculture if the huge farm subsidies were to be cut.

This statement comes at a time when the G-20 countries have reiterated their unwillingness to 'go beyond a certain point to open up its agriculture market in the ongoing negotiations under the WTO'. Rhetoric apart, the fact remains that developing countries have already allowed the richest trading block-Organisation for Economic Cooperation and Development (OECD) countries -- enough leverage to dump their highly subsidised agricultural commodities thereby threatening the livelihood security of farmers.

India and Brazil are not only members of the G-20 group but also the key players in formulating the July Framework 2004, which has now become the basis for further negotiations in the Doha Development Round. The devil is in the detail. If you read the July Framework draft carefully, it becomes obvious that the first instalment of a cut in subsidies by 20 percent is not based on the present level of subsidies but on a much higher level. Paragraph seven of the Framework for Establishing Modalities in Agriculture (July 31st final draft) says: "As the first instalment of the overall cut, in the first year and throughout the implementation period, the sum of all trade-distorting support will not exceed 80 percent of the sum of Final Bound Total AMS (Aggregate Measurement of Support) plus permitted de minimis plus the Blue Box at the level determined in paragraph 15. Let me explain. Under the new formula that July Framework spells out, EU can increase its maximum permitted support level from the existing Euro 67.16 billion to Euro 103.66 billion. After the 20 percent cut the EU subsidies will come down to 82.93 billion - much higher than what they were initially supposed to cut back from. Similarly, the July Framework allows the US subsidies to be raised from the existing US $ 19.10 billion to US $ 48.8 billion. Even after the 20 percent cut in the first year of implementation, these trade-distorting subsidies would still be 100 percent higher - at US $ 39.10 billion.

This also means that all the efforts made by developing countries to see that trade-distorting Blue Box is removed not only had been nullified but strengthened. This allows the developed countries to shift a large chunk of its agricultural subsidies (under Amber Box) to the Blue Box and then subsequently to the 'Green box'. In other words, the advantage that the developing countries had gained with the termination of the Peace Clause on Dec 31, 2003 (under which the developing countries could not challenge agricultural subsidies in the rich countries) has been negated. They will now be confronted by an equally detrimental Blue Box.

The EU for instance has Blue Box subsidies to the tune of Euro 22.3 billion. This is a huge amount, and therefore the framework states: "In cases where a member has placed an exceptionally large percentage of its trade-distorting support in the Blue Box, some flexibility will be provided on a basis to be agreed to ensure that such a member is not called upon to make a wholly disproportionate cut." EU, therefore, has nothing to worry about cutting the Blue Box subsidies.

United States on the other hand is wanting to shift the US $ 180 billion for ten years that it has provided to farmers under the notorious Farm Bill 2002 (70 percent of this amount

is to be spent in the first three years, before George Bush goes to elections) to the Blue Box. Since the WTO will now specify the historical period from which the Blue Box implementation will begin, it means that the US can now protect the yearly instalment of its counter-cyclic payments to farmers.

If the impact the developing countries have felt from the free trade liberalisation imposed under the WTO agreements since Jan 1995 is any indication, farmers in developing countries have suffered to the tune of US $ 24 billion a year from agricultural subsidies and protectionism that the rich countries have. Millions of farmers have lost their livelihoods as a result of cheaper imports.

The UN Human Development Report 2005 states that the developed country support to its agricultural production now stands at a staggering $ 350 billion or $ one billion a day. The winners of the annual cycle of multi-billion dollar subsidies are large-scale farmers, corporate agri-business interests and landowners.

As if the massive subsidies are not enough, developed countries have used high tariffs to successfully block imports from developing countries. They have used special safeguards measures (SSG), used only by 38 rich countries so far, to restrict imports from developing countries. Developed countries took advantage of this flexibility by reserving the right to use the SSG for a large number of products: Canada reserves the right to use SSG for 150 tariff lines, the EU for 539 tariff lines, Japan for 121 tariff lines, the US for 189 tariff lines, and Switzerland for 961 tariff lines. On the other hand, only 22 developing countries can use SSG. These SSG measures remain under negotiations, which means, these will continue for quite some time.

The question of market access assumes importance in the light of the special and differential treatment, special safeguard measures and the domestic support (including Green Box subsidies) remaining intact in the developed countries. Using a tiered formula, the developed countries have managed to seek overall tariff reductions from bound rates and aims at "substantial improvements in market access will be achieved for all

Subsidy Cut An Eyewash

In mid-October, the US and EU had made offers for reducing their agricultural subsidies. At the face of it, the proposals look very promising. After all, the US had offered to cut its ceiling on trade-distorting subsidies by 60 per cent prompting the EU to reciprocate the gesture with an assurance of 70 per cent reduction in the same category. To remove confusion, let me clarify here that the US and EU proposal does not mean reduction in farm subsidies by 60 to 70 per cent but a reduction in the 'ceiling' on trade-distorting subsidies. As far as the overall reduction is concerned, it does not translate into more than two per cent of the domestic support being provided. These promised cuts however are based on an expectation that developing countries will open up their markets still further.

In reality, what the US Trade Representative Robert Portman and the EU Trade Commissioner Peter Mandelson have proposed is a merely an eye wash. It is perhaps the biggest hoax that the two countries have played before the 148-country theatre. The 'Five-Interested Parties (FIP) countries, of which India is a member, have rejected these proposals and the deadlock of agricultural negotiations continues.

The US proposal, for instance, will only bring down the level of support by a figure that is less than a statistical error - down from $ 74.7 billion it spent last year to $ 73.1 billion. For the EU, it does not mean any reduction in the existing farm support to its farmers.

The clever manipulation is the outcome of an economic jugglery that hides more than what it reveals. It is all the handiwork of trade negotiators who continue to befool the world with faulty images of projected growth outcomes. All that has been done is to move the subsidies from one box to another - from the trade-distorting 'amber box' to 'blue box' and subsequently to the 'green box' - where all the direct payments to farmers are locked. The huge counter-cyclic payments under the Farm Bill 2002, equalling $ 180 billion, have for instance been shifted from the 'amber box' and placed under the 'blue box'. With the definition of the 'blue box' now revised under the July Framework 2004, the US farmers (read agribusiness corporations) have nothing to fear.

products." The only defence that the developing countries have been allowed is to bring some of these products under 'special product' category. This 'benevolence' is no justification for the developing countries to rejoice.

The fact is that the developed countries have also been allowed the same provisions, which means that they can term some crucial commodities as sensitive and thereby deny market access. For instance, the US, EU, Japan and Canada maintain tariff peaks of 350 to 900 percent on food products such as sugar, rice, dairy products, meat, fruits, vegetables and fish, which can be easily brought under the category of 'sensitive' and some 25-40 of the sensitive tariff lines under the tariff rate quota can be easily protected under this category.

In any case, let us not forget that a country like India cultivates some 250 different crops a year whereas Europe does not grow more than 25. For India, therefore to say that areca nut is not a sensitive product would mean destroying the livelihood of thousands of farmers cultivating areca nut, from cheaper imports. For Europe getting a score of crops protected under 'sensitive' and 'special products' will be justified. But to expect WTO to accord 'special product' status to over 200 crops from India would be asking for the impossible.

India Reaps a Bitter Harvest

With the massive farm subsidies in the OECD countries remaining intact, in one form or the other, India was forced to lower its tariffs and remove all quantitative restriction by April 2001. The result is that imports of agricultural commodities have multiplied over the years. In the post-globalisation period, between 1996-97 and 2003-04, imports have increased 270 percent by volume and 300 per cent in value terms. For an agrarian economy, importing food is like importing unemployment.

Coconut prices had crashed, rubber prices have plummeted and coffee prices have declined. Even spices have not been spared, with pepper prices falling steeply. The travails of plantation sector in Kerala alone in the era of globalisation symbolize the tragedy of an unjust trade regime. Over a million people depend on tea plantations for their living. Out of 32 tea factories functioning in one of the popular tea growing regions -- Peermade taluk -- 18 have pulled down the shutters. Another 13 tea estates have been abandoned by their owners, leaving some 30,000 workersjobless in High Ranges alone.

Kerala is not alone. The destructive fallout from the emerging global trade paradigm is being felt all over the country, though not in the same magnitude. Not only tea, coffee plantations have laid off over 25 per cent of the workers in the southern provinces of Karnataka and Tamil Nadu. More than 63 per cent of edible oils worth US $ 3.2 billion a year are now imported. Ten years back, India was almost self-sufficient in oilseeds production. Lowering of tariffs has forced farmers to abandon oilseeds cultivation.

In 1999-2000, India imported over 130,000 tonnes of European Union's highly subsidized skimmed milk powder. This was the result of Euro 5 million export subsidies that were provided, approximately 10,000 times the annual income of a small-scale milk producer. Butter export subsidy paid by the EU, for instance, is currently at a five-year high and butter export refunds have risen to an equivalent of 60 per cent of the EU market price. Consequently, butter oil import into India has grown at an average rate of 7.7 per cent annually. This trend has already had a dampening effect on prices of ghee in the domestic market. Ironically, India is the biggest producer of milk in the world, and does not provide any subsidy for the dairy sector.

India is also one of the biggest producers of vegetables in the world. While nearly 40 per cent of the vegetables produced in the country rot because of post-harvest mismanagement, the import of vegetables has almost doubled in just one year - from Rs 92.8 million in 2001-02 to Rs 171 million in 2002-03. The imports had crossed 2.7 million tonnes valued at Rs 480 million in 2003-04. Ironically what is being imported - peas, potato, garlic, cashew, dates, and gherkins – are crops in which the country is surplus and has a comparative advantage. But while the Indian exports are rejected on account on non-tariff barriers, the imports of vegetables continue to flood the market.

Subsidising the Richest of the Rich

Britain's Queen Elizabeth II is not a farmer, but she is amongst the highest recipient of agricultural subsidies. In 2003-04, she received nearly Rs six crore in farm payments. Her son and heir apparent to the British throne, Prince Charles, received more than Rs 2.2 crore as agricultural support for his personal estate, the Duchy of Cornwall, and the Duchy's Home Farm.

The Royal Family in Britain is not the only beneficiary of state farm support. In 2003, Prince Joakim of Denmark received subsidies worth Rs one crore for his Schackenborg estate in South Jutland. Prince Albert, the ruler of Monaco, received Rs 1.5 crore as agriculture subsidies last year.

At a time when the WTO is grappling with the contentious issue of mammoth agricultural subsidies being provided to farmers and agri-business corporations in the rich and developed countries, it becomes apparent why these countries are unable to do away with agricultural subsidies. Not only royalty, but a long list of who's who has been the beneficiary of agricultural subsidies and therefore the growing resistance to any significant reduction measures.

The richest man in the United Kingdom, the Duke of Westminster, who owns about 55,000 hectares of farm estates, received a subsidy of Rs 2.2 crore as direct payments in 2003-04, and in addition gets Rs 2.5 crore a year for the 1,200 dairy cows he keeps. Under the Common Agricultural Policy (CAP) reforms. His subsidy entitlement will remain intact except that the subsidy he receives for the cows will now be shifted to the grasslands that he maintains. In the United States, the recipients of the 2001 federal agricultural support included Ted Turner and David Rockefeller.

If royalty topped the list how could the politicians lag behind. Marita Wiggerthale, a German researcher and activist, in a paper titled What's wrong with EU agricultural subsidies?' revealed that in Denmark alone, four of the 18 ministers (or their spouses) received agricultural subsidy from the European Union. Among the recipients for 2003 were the minister for food, agriculture and fisheries, Mariann Fischer Boel, who received a total of Rs 2.2 crore; minister for education, Ulla Tornes (Rs 3 crore); and the minister for finance, Thor Petersen (Rs 80 lakh). In the Netherlands, minister for agriculture, Cees Veerman, received in 2004 equal to Rs 90 lakh in subsidies.

Among the Danish parliamentarians, a sizeable number, mostly from the Danish Liberal-Democratic Party, received farm subsidy payments. The list includes: Jens Kirk (Rs 1.25 crore) and Jens Vibjerg (Rs 50 lakh). More significantly, Niels Busk Simonsen, a veteran liberal-democratic member of the European Parliament, received a generous subsidy of Rs 1.75 crore, in addition to his annual salary. There are in total 109 people and institutes/organisations in Denmark, who continue to receive more than Rs 75 lakh in annual agricultural payments.

Agricultural subsidies are also being shelled out for research and development. Much of this research funding is of course helping countries like Denmark in exporting education to the developing countries as part of the bilateral trade agreements. The Danish Institute of Agricultural Sciences, for instance, receives an annual subsidy of Rs 730-crore. In 2003, the Danish Agricultural Centre for Advisory Services received Rs 22-crore. Interestingly, its Board members (including Peter Gaeelke, Henrik Hoegh and Chairman of the Board Gert Karkov) collectively received Rs seven crore as subsidy the same year.

In Spain, 300 families pocket bulk of the farm support, each getting more than Rs 1.62 crore. Of these, just seven big players manage to grab a subsidy of Rs 3.07 lakh every day.

It certainly is an unequal world, and perhaps the most glaring of all the world's inequalities is the manner in which the cattle in the rich countries are pampered at the cost of several hundred million farmers in the developing world. When I first compared the life of the western cow with that of the developing country farmer, I didn't realise that this would hit the sensibilities of at least some of the economists and policy makers. It has now been worked out that the Europe provides a daily subsidy of Rs 120 per cow, and Japan provides three times more at Rs 345, whereas half of India's 60-crore farming families survive on less than Rs 80 a day.

It is essentially because of these subsidies that in many of the high-income developed countries, part of the richest trading block – Organisation for Economic Cooperation and Development (OECD) – the average farm household income is higher than the average household incomes. In the Netherlands, for instance, the average farm family income is almost 275 per cent of average household income, 175 per cent in Denmark, 160 per cent in France, and 110 per cent in the United States and Japan. In India, agriculture continues to be negatively taxed and therefore more than 40 per cent of the farming population appears keen to abandon agriculture in search of menial jobs in the urban centres. Farmers occupy the lowest rung in national income chart, only to be outdone

by the landless agricultural workers. There are only 25,000 cotton growers in America, who collectively get a subsidy of Rs 48.2 crore every day. US provide a total subsidy equivalent of Rs 234,564 crores under the 'green box' every year.

Like in India, where bulk of the farm subsidies (all in the form of cheaper inputs) are cornered by big farmers', small farmers do not benefit from the huge agricultural support -- equivalent to Rs 5000-crores a day (or Rs 1825,000 crores every year) -- the industrialised countries provide. In Europe, only 2000 big farmers receive a subsidy amount that exceeds Rs 27.5 lakh a year. These big farmers only constitute 0.4 per cent of the farming population. And yet, when the European Commission proposed to cap the maximum limit of direct payments at a figure that is still six times higher -- Rs 1.65 crore a year -- in what is called as single farm payments, it was met with such a stiff resistance that the proposal had to be withdrawn.

Nearly 65 per cent of the European farmers receive an annual subsidy of less than Rs 2.75 lakh. These are the small farmers who are unable to sustain themselves. These are the farmers who are gradually leaving agriculture. In Europe it has been estimated that one farmer quits agriculture every minute.

The real beneficiaries of the agricultural subsidies in the developed countries are therefore not the small farmers. Approximately 80 per cent of the entire subsidy for agriculture goes to the agri-business companies (or big farmers). The sugar giant, Tate& Lyle, received a subsidy of Rs 1849 crore in 2003-04. Arla Foods of Denmark received a subsidy of Rs 940-crore in 2003, In UK alone, multinational Nestle receives an annual subsidy of Rs 92-crore. Danish Crown of Denmark received Rs 86.82 crore, 136 dairy companies in Germany receive an export subsidy of Rs 358 crore. The list is endless.

Despite such huge state support going into the hands of the bold and beautiful, and the agribusiness corporations and that too in the name of farmers, the fact remains that the developed countries are making no sincere effort to cut down such a wasteful expenditure that harms farming in the Third World. Still worse, it treats these subsidies (much of it goes as direct payments and into the 'green box') as non trade-distorting and therefore excluded from any reduction commitments. But since these subsidies do not go to small farmers, the developing countries need to seek complete removal of these subsidies before providing any more market access. Developing countries should ask for:

- agricultural subsidies to be classified under two categories: one which benefits small farmers and the remaining which goes to agri-business companies and the big farmers/landowners.

- Since 20 per cent of the Rs 5,000-crore farm subsidy being doled out every day only benefit genuine small farmers, the remaining 80 per cent subsidies need to be outrightly scrapped before proceeding any further on agriculture negotiations.

It was, therefore, obvious that both EU and US were not going to make any substantial cuts in domestic support. Nor have they agreed to frontload the export subsidies. The framework agreement is ambiguous on the reduction commitments in export subsidies. All it says is that the export subsidies should go but does not specify any period. Even though the G-20 has asked for a five-year period, all indications point to the export subsidies not being removed before 2015 or 2017. In simple words, developing countries allowed the developed countries to go on with export subsidies for another ten to 12 years.

With both the domestic support and the export subsidies remaining intact, what benefit will the developing countries derive from the July Framework? Why was G-20 and G-33, therefore, in a great hurry to agree to the July Framework when there was no desperation to sign on the dotted line?

Developing countries are clearly in a vulnerable position. They have no one to blame but themselves. Food security and livelihoods of millions of farm families are being mortgaged at the altar of international trade and development. Any further movement in the ongoing negotiations of the Doha Development Agenda should be targeted only at disciplining the agricultural subsidies. To make a meaningful cut in domestic support, and thereby putting agricultural negotiations back on the track, developing countries must insist on:

Agricultural subsidies to be classified under two categories: one which benefits small farmers and the remaining which goes to agri-business companies and the big farmers/landowners. Since 20 percent of the US $ 1billion farm subsidy being doled out every day only benefits genuine small farmers, the remaining 80 per cent subsidies need to be out rightly scrapped before proceeding any further on agriculture negotiations.

Unless the July Framework is reopened and renegotiated, developing country agriculture and food security cannot be safeguarded. Developing countries, therefore, must demand for renegotiating or ignoring the July Framework as a pre-condition for any movement forward.

On top of it, developing countries need to introduce a new issue - insist on a Multi-lateral agreement against hunger. At present, WTO treats hunger and poverty as non-trade concerns. However, free trade has had tremendous impact on acerbating hunger by destroying livelihoods with cheaper imports. With right to food as the underlying principle, there is an immediate need to ensure that trade does not add to poverty, hunger and malnutrition.

The developing countries must keep the fundamental issue of food security, livelihood security and the acerbating hunger in the developing countries in focus before agreeing on any commitment on opening up their markets. Failure to do so will only result in a political backlash, the outcome of which would be detrimental to the multilateral trade regime.

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DEMOCRACY
WTO

Talks in Trouble?

Ten years of WTO have made it amply clear that developed countries have not honoured their own stated commitments while predicted gains to the developing countries have proved to be empty promises. A consensus being forced is not only biased, but also threatening lives and livelihoods of millions in the third world. As the negotiations enter the most dangerous phase in Hong Kong, civil socieity groups across the globe should join hands to derail the Ministerial and cripple the WTO.

WALDEN BELLO

Civil society groups that regard the coming WTO Ministerial in Hong Kong as condemned to producing a deal that can only be detrimental to the interests of developing countries were cheered by the failure of the World Trade Organisation (WTO) General Council meeting in late July to arrive at substantive agreements on any of the critical areas of negotiations: agriculture, non-agricultural products, and services.

Indeed, most observers, including the media, have largely characterised the inability to produce the "July Approximations" as a significant setback to securing a successful ministerial in Hong Kong in December. The statements of key WTO players appear to lend weight to this. Outgoing Director General Supachai Panitchpakdi's remark that the state of the talks was "disappointing but not disastrous" was taken by some to be, in fact, a rather euphemistic assessment to mask a really gloomy state of affairs. So was the statement of General Council Chairperson Ambassador Amina Mohamad of Kenya that "there is not a 'crisis' in the negotiations - we need not press the panic button."

One has the strong suspicion, however, that these statements are less descriptions of the actual state of play of the negotiations than rhetorical exhortations to spur delegates to hurry up in what is, in fact, a process that has gone beyond stalemate.

It is certainly a relief that the July Approximations could not be put together. But how much of a setback was it? Are the delegations, in fact, really that far apart at this point?

Certainly, in the areas of interest to developing countries, such as Special and Differential Treatment (SDT) and implementation, there has been hardly any movement. Special and differential treatment, for instance, can't move because of the European Union's intransigent position that any progress in the talks is contingent on agreement from the developing country bloc that the more advanced developing economies such as India and China must be graduated from the ranks of those qualified for SDT treatment. Most developing countries see this as mainly a feint to divide them against one another in order to eliminate SDT as an operative principle in WTO.

MODE 4: A DEALMAKER

But there is worrisome movement in the other areas, those in which developed countries have a lot of interest. Take services. Much has been made recently about developing country resistance to the European Union's proposal of "benchmarking" - that is, to create quantitative and qualitative criteria of genuine and significant market opening that services requests would have to meet to be valid offers. Yet the numbers seem to be telling a different story about developing country positions. There are now some 70 initial offers representing 95 member countries and around 30 revised offers on the table-certainly a big leap from the 47 countries that had made offers at the beginning of this year. Developed country governments have been dismissive, saying that a substantial number of these offers were not significant in terms of significant market openings, but that is largely a negotiating ploy. What is more likely is that some of the developing countries making offers are saying they want to deal, but they won't really show their cards until the developed countries make serious gestures, such as on the so-called Mode 4 of the General Agreement on Trade in Services (GATS), which pertains to the movement of natural persons.

For instance, India, a significant exporter of labour to northern countries, apparently sees Mode 4 as the centrepiece of its overall negotiating strategy, and Mode 4 concessions by the EU and United States in the form of more liberal entry and stay of skilled labour are likely to make the government more pliable in the negotiations in agriculture and industrial tariffs. As Focus on the Global South analyst Benny Kuruvilla notes, "India's demands on Mode 4 are actually quite tame - it's happy if US binds its existing commitments in the H-1 B working visa category. There is a real danger that US might hold on for a while, then give in, at which point India will only be to happy to compromise on other issues."

But India is not the only country with an inordinate interest in Mode 4 liberalisation. Other significant labour exporting countries such as the Philippines and Bangladesh see Mode 4 concessions by US and EU as important and with likely implications on their positions on other issues.

The US official line at this point is that it does not have much flexibility when it comes to Mode 4, a statement that is partly meant for domestic consumption owing to strong anti-immigrant sentiment in the country. But this is largely a negotiating position since, as services expert Tony Clarke of Polaris Institute puts it, "...there's no question that the US and EU want to operationalise Mode 4 because of the interest of their client corporations to maximise cheap labour opportunities. Indeed, the US Coalition of Service Industries is lobbying Washington hard to liberalise the entry of skilled labour. For all these reasons, warns Clarke, "Mode 4 could turn out to be either the 'dealmaker' or the 'dealbreaker."

NO MOVEMENT IN NAMA?

Is there really no movement in the area of Non-Agricultural Market Access (NAMA)? Again, as in services, on the surface the negotiations appear to have been marked by loud disagreements over formulas for tariff cuts, the issue of binding tariffs, and the application of the principles of less than full reciprocity and special and differential treatment. However, if we look more closely, there are disturbing signs of a convergence occurring:

- despite much initial grumbling after the 2004 July Framework deal, the developing countries have accepted the "Derbez text", which they rejected in Cancun, as the basis of negotiations, as proposed by the Framework;
- there is now consensus on a non-linear Swiss or Swiss-like formula for tariff reduction, which would apply to all products and subject higher tariffs to greater proportional cuts than lower tariffs, thus disadvantaging many developing countries, which maintain relatively higher tariffs on many key industrial goods than developed countries. A Uruguay Round formula, which would stipulate an average tariff cut across industry but leave it up to national authorities to determine the rate for particular products, is not even in discussion, although developing countries, confronted with a choice, would see it as less objectionable than the Swiss formula.

The developed countries have been notably unsympathetic to developing country positions that would preserve a significant degree of industrial protection by appealing to the principles of "less than full reciprocity" and "special and differential treatment" owing to different stages of economic development. Thus the developing countries have been forced to increasingly narrow their defensive tactics mainly to proposing the best non-linear formula that would reduce, rather than substantially avoid, the impact of a comprehensive liberalisation of industry. The latest formula to emerge is the so-called Pakistani "compromise" which would factor into the formula the average bound tariff rate, then run a co-efficient of six for developed countries and 30 for developing countries. This would, according to the Pakistani proponents, significantly bring down product tariffs for everybody (a developed country concern), harmonise tariffs within each grouping (a WTO objective), and still preserve at least some of the difference in average tariff levels between the developed and developing country groupings (a developing country concern).

Some developing countries, of course, continue to hold that, aside from the tariff cutting formula, the less than full reciprocity and SDT principles should also determine the rate of tariff liberalisation for developing countries, but it seems that the momentum now is towards coming to a consensus on the coefficients of a formula. It is likely that the Pakistani proposal,which nobody rejected outright, though some industrialised countries like US complained that the gap between the co-efficients for developed and developing countries

were too wide-or something like it the very basis of NAMA talks. As an analyst who has followed the NAMA negotiations closely reports, "According to some people in Geneva, the Pakistani proposal has made it more likely that the negotiations will now be only about different coefficients within a simple Swiss formula, not other types of formula or broader alternatives. This would bring everyone closer to an agreement, but still there would be much to negotiate, since developing countries would be calling for much greater difference between co-efficients than the US and EU would like to allow." In any event, it was more than just spin when US Deputy Trade Representative Peter Allgeier issued the following upbeat statement on July 28: "The path ahead on NAMA is much clearer, given the work that has been done in the past several weeks...several constructive ideas are on the table. There have been signals of flexibility from all sides about finding the right formula and the use of co-efficients to realise real market access opportunities. We need quickly in September to turn these signals of convergence into compromises that work for all."

DISQUIETING DEVELOPMENTS

Agriculture, however, is the key to either progress or unravelling. Without movement in the agricultural negotiations, movement in the other areas won't translate into a successful liberalisation package in Hong Kong.

On domestic subsidies - one of the Agreement of Agriculture's three "pillars," along with export competition and market access there is hardly any movement. Efforts to reform the "Blue Box" "and "Green Box," which refer to categories of production subsidies exempted from cuts under AoA, have failed owing to opposition from EU and US. The US is, in fact, seeking to expand the "Blue Box" to accommodate a considerable portion of the $190 billion in subsidies legislated under the US Farm Bill of 2002. This has given EU Trade Commissioner Peter Mandelson an opportunity to seize the high ground with his position that the US should take the initiative in cutting subsidies since although the level of farm support is currently higher in the EU, it is falling while that of the US is "unreformed" and "rising as a result of President Bush's farm bill and of course unreformed." But this is case of the pot calling the kettle black since the EU has no intention of reducing its own subsidies channelled though either the Blue Box or the Green Box.

Other troublesome issues remain unresolved, among them the Group of 33's demand for a positive list of "Special Products" (SPs) or commodities that would be exempted from significant tariff reduction and its proposal for "Special Safeguard Mechanisms" (SSMs) that would allow developing countries to raise tariffs to protect themselves from dumping. Unfortunately, however, there is movement in the two other pillars of the negotiations: export competition and market access.

On the export competition "pillar" of the negotiations, the key outstanding issue for many countries is the date and schedule of the EU's promised phase out of its export subsidies - an item with ominous possibilities, as we shall show below.

Moreover, at the WTO "mini-ministerial" meeting in Dalian, China, on July 12-13, the Group of 20 developing countries tabled a proposal that has struck some as providing the basis for a breakthrough in the market access area of agricultural liberalisation. The G-20 proposal would divide the countries of the world into five bands, with each band assigned different rates of tariff liberalisation. All products in every band would be subjected to uniform rates of reduction, but products in the higher bands, meaning products with higher initial tariffs, would be subjected to higher rates than those in the lower bands. In addition, tariffs would be capped at 150 percent for developing countries and at 100 per cent for developed countries.

Coming out of the Dalian meeting, the new US Trade Representative Robert Portman said, "We have a framework." This was echoed by EU Agriculture Commissioner Mariann Fischer Boll who called the proposal a "good basis for further work," though she added that the EU would favour only three bands. The framework is now likely to be adopted once the negotiations resume in early September, with the debate shifting from modalities to who belongs to which band and the rates of tariff reduction for each band.

In short, despite the stalemate on domestic subsidies, there is worrisome movement on two of the three pillars of the agricultural negotiations, and this could give momentum not only to the unresolved issues in the agriculture negotiations but it could also open up the path to agreement in the other negotiating areas of NAMA and services.

THE LAMY FACTOR

What could make the difference in accelerating the negotiations is the "Lamy factor." The incoming Director General is known as a consummate negotiator. He is also a very skilled politician who, on his way to the WTO's top post, forged a North-South alliance that split the Southern camp and left his three rivals, all from the developing world, in the dust. Indeed, the sense is widespread in Geneva, even among developing country delegations, that Lamy, formerly the EU's Trade Commissioner, is the rightful heir to the throne. His backers extend from Brussels to Washington to the Least Developed Countries (LDCs). He has good rapport with influential NGOs, with Oxfam GB's Barbara Stocking praising him as the key person in the EU's "Everything but Arms" (EBA) initiative, which accorded duty free entry to agricultural products from the LDCs. For others, Lamy is really a skilled manipulator ultimately responding to the interests of the EU and the developed North while projecting sympathy for developing countries. The EBA illustrates this: It has a long phase-in period, up till 2009, for key exports such as rice, bananas, and sugar; it is subject to permanent review; it applies only to agricultural products, thereby limiting incentives and capacity for diversification/industrialisation. It is testimony to Lamy's negotiating and public relations skills that he has been able to sell a dodgy deal to many LDC governments as a substantive victory and to get some northern NGO's to blame the European farm lobbies instead of him for its restrictive elements.

In any case, Lamy knows the fissures among the developing country bloc, for instance among the G-20, G-33, and the LDCs, and he will not hesitate to exploit these to push through a comprehensive agreement. And he also knows the NGO world, and how to split what the WTO Secretariat has marked off as the "reformists" from those it regards as the "radicals." What's more, he's a man with a mission: Cancun for him was a failure and a humiliation: He will be seeking to reverse the outcome in Hong Kong.

NIGHTMARE SCENARIO

What could be the scenario leading up to a successful ministerial?

How about this: In the lead up to the October General Council meeting, EU Trade Commissioner Mandelson announces one day a schedule for the phase out of the EU's export subsidies. The announcement is not unrelated to a notice by USTR Portman's statement at a press conference that it is "open" to placing still unspecified disciplines on its food aid and export credits, two channels of export subsidisation of great concern to the EU. This "October Surprise" is not at all far-fetched in the view of some analysts. According to Geneva-based activist Jacques Chai Chomthongdi of Focus on the Global South, "I think they [the Europeans] already have a date, and it's only a question of choosing the time when the statement has the biggest effect."

Indeed, the announcement--though it is a date far into the future like 2015 that is accompanied by some fine print conditions has a dramatic impact, creating tremendous pressure on the developing countries to come to a compromise in the market access negotiations. It makes Brazil happy since its bottom line in the talks is the elimination of the EU's export subsidies. Moreover, mired in a corruption scandal at home, the Lula government clutches at this development to trumpet what is really a concession to Brazilian agribusiness as a triumph for the people of Brazil. In any case, the impact of the announcement is to discourage Brazil from aggressively bargaining in other negotiating areas.

Hardly is the impact of this move absorbed, when Lamy announces that the EU and US have decided to make some slight concessions liberalising entry and stay for skilled labour from the developing world. Desperate for a victory it can brandish at home, the Indian government convinces itself its central concern is met and this affects its posture in the other areas of negotiations. Deprived of aggressive activity-though not rhetorical posturing - on the part of their two key leaders, developing countries retreat to a more acquiescent attitude in the negotiations.

A critical mass of countries come up with "better quality" offers in the services negotiations, NAMA negotiations speed up, based on the Pakistani proposal, and the agriculture market access discussions near completion. The US-EU wrangle on Blue Box and Green Box subsidies continues for some time, but the two sides are reminded by Lamy that they would not want a repeat of Seattle, where the EU-US divide on the same issue was one of the factors that unravelled the third ministerial in 1999. The two sides agree on a face-saving formula consisting of placing weak caps on some minor subsidy payments channelled through the Blue Box and Amber Box. In other words, there is no change

in the status quo in the domestic subsidy pillar. This means massive dumping on developing country markets continues.

At the General Council meeting on 19-20 October, Lamy announces that substantial agreement has been reached in agriculture, NAMA, and services. The General Council comes up with a consensus statement affirming the key points of agreement in these areas that would serve as the draft of the Ministerial Declaration for Hong Kong. Lamy says it's only mopping up operations that remain - that is, sewing up agreements on the less controversial items, such as sensitive products, special products, special safeguard mechanism, state trading enterprises, food aid, special and differential treatment, and implementation.

By early December, developing countries have been herded into unfair agreements on the so-called residual issues, with Lamy telling the G-33 and NGOs that a toothless agreement on SPs and SSMs, which also allows the EU and the US to maintain "sensitive products" exempt from significant tariff cuts, is the best they can get given the circumstances, and the big trading powers orchestrating a campaign to paint developing country holdouts as obstructing efforts to achieve a prosperous world economy, like they did in the lead-up to the Doha Ministerial in November 2001.

A virtually unbracketed statement goes to the Hong Kong ministerial, and Lamy triumphantly announces that while a number of matters need to be tidied up, the Doha Round is practically concluded, and asserts that the world must embark on a new round of even deeper and more comprehensive liberalisation.

THE CHALLENGE TO CIVIL SOCIETY

This scenario or something similar to it is not far-fetched, in our view, since the pressures on everyone to come to deal are enormous and no one wants to be blamed for another Seattle or Cancun-type collapse. As the representative of a key Geneva-based NGO puts it: "My overall sense is...we are probably not so far away from a deal, but not necessarily because all is solved yet, but because key countries want to make a deal, end the round as quickly as possible, knowing it will be very "low ambition"...No member, no group seems ready to go for a total opposition, a halting-the-round type of approach."

As this statement implies, the only real block to a raw deal for developing countries is civil society. Instead of lamenting, as some international NGO's have, the "lack of progress in the talks," global civil society in the next few weeks should step up the pressure on developing country governments not to cave in to pressures or to sign up to processes that will drastically reduce their policy space.

CITIZEN PRESSURE IS DECISIVE AT THIS POINT

The period beginning mid-August then must be a period of intense lobbying that continually hammers home the point that the negotiating frameworks set by the July 24 Framework Agreement are so narrow that they cannot but produce proposals such as the G-20 Proposal on agricultural market access and the Pakistani proposal in NAMA, both of which essentially foreclose development under the guise of achieving compromises.Developing country governments should be brought back to the basics: that the July Framework eliminated practically all developmental space in all the areas being negotiated. Government representatives must be constantly reminded that no deal is better than a bad deal, and that all that confronts them in all the negotiating areas are deals that range from bad to worst. The G-33 countries must be pushed to act more aggressively and demand that getting a fair deal on SPs and SSMs must be front and centre in the agriculture negotiations, not treated as a secondary concern, and that they must oppose all efforts to tie this demand to the EU's counter-demand for some of its commodities to be listed as "sensitive products" exempt from significant tariff reduction.

Governments must be convinced that, at a minimum, they should seek the freezing of the talks on NAMA because any agreement at this point would have destructive deindustrialisation impacts. It should be pointed out that they have a good basis to argue this: the current round's agenda a agreed upon in Doha did not put as a priority an agreement on NAMA.

Governments must be lobbied against accepting Mode 4 concessions that liberalise only skilled labour and be made to realise that that liberalisation of services in return for Mode 4 concessions is a very bad exchange indeed. They must be shorn of the illusion that Mode 4 promises some relief for their unemployment problems since the EU and US will likely liberalize entry only for the most highly skilled professional workers, and this will only worsen their brain drain. They must

already be warned that a strategically timed announcement of a schedule for the phase-out of export subsidies will be made by the EU, but this should not serve as a cause for them to stampede towards a bad consensus in agriculture and elsewhere.

The more pressure from below is brought to bear on governments, the more complex the negotiations become, the more difficult it is to achieve consensus, and the greater the possibility of derailing the process. We are entering the most dangerous period of the negotiations, when a deal will either be struck or killed. The coming month will determine whether the WTO gets consolidated as the engine of global trade liberalisation and we enter a Brave New World of even greater liberalisation, or the process of reversing trade liberalisation gains momentum and the WTO is crippled as a mechanism of globalisation.

— Special Issue 2005

Neoliberalism and Parliamentary Left

Instead of resisting forces of globalisation, the official Left in India is effectively compromising public good and pushing global trade interests in the country.

ARINDAM SEN

As on almost all occasions, the four-party Left Front has submitted a detailed note to the Government of India on the forthcoming WTO Ministerial at Hong Kong. As on many other issues (for example the patents law amendment controversy), they have decided to launch a nation-wide anti-WTO campaign. Commerce Minister Kamalnath in an official communiqué has stated that the suggestions received from the Left parties are a valuable input in the ongoing Doha round of multilateral trade negotiations. "The government shares many of the concerns expressed by the Left parties and these concerns are being met".

The people of this country have a right to know who stands where.

The note as such addresses usual concerns expressed by all patriotic and democratic forces. But will the Left (the parliamentary or official Left) press the issue to the point of decisive action if the government chooses not to heed the advice? And to look beyond a single event – the Hong Kong Ministerial, which in any case seems poised to prove a non-event - and take a wider view of the whole state of affairs; what is the Left Front's overall approach to the neoliberal economic policies being peddled by the triumvirate of WTO-IMF-WB and implemented by the UPA government?

Judge a party not by what it says, but by its political conduct – said Vladimir Ilich Ulianov about 100 years back. Comrades in the Communist Party of India (Marxist) and the Left Front should not mind if this yardstick is applied in finding an answer to the above question.

To begin with, take a look at the programmatic basis of the ruling coalition: the Common Minimum Programme or CMP. When it was issued, the Left Front in a press statement informed the world that they had been consulted and their views were taken into consideration while drafting the document. They welcomed and broadly endorsed it. Prabhat Patnaik, a leading member of the CPI (M) think tank, thoroughly scrutinised CMP and declared that "the programme does represent a shift of direction away from neoliberalism..." (India: A Setback for NeoLiberalism, www. macroscan.com June 10, 2004). In the subsequent euphoria what was ignored was the fact that the document provided enough leeway for privatisation. It was declared that profit making PSUs were "generally" not to be privatised

(which meant this could be allowed in particular cases); and the Navaratna companies, the public sector banks and other units "will be encouraged" to raise resources in the capital market, (i.e., issue shares to private entities, thus diluting state ownership and control). Thus, Chidambaram was at least technically correct when he asserted during the controversy over the proposed 10% disinvestment of BHEL shares that the proposal (currently put in abeyance) was well within the agreed framework of CMP. And now after the eighth meeting of the revived UPA-Left coordination committee, the Left parties have agreed to favourably consider a proposal for disinvesting small equity stakes in profit-making non-Navratna public sector companies.

Whatever might be there in CMP, the government's actual priorities became clear with its first major policy decision: to lease out the highly profitable Delhi and Mumbai airports to joint ventures. The Left protested loudly, almost vehemently, on the streets and in Parliament, but soon fell in line. They acquiesced to a broader plan of modernisation of ports, docks and airports that grants up to 49 percent foreign stake, with another 25 percent earmarked for the Indian private sector; in other words, 74 percent privatisation with controlling stakes in foreign hands.

But this was just the beginning. In the months that followed, the people of India have been witness to one after another of those mock fights that resemble the gorgeously telecast WWF wrestling bouts. Probably the most striking of these took place in May this year when at the end of a prolonged campaign against changes in the patents law, the Left Front offered decisive support to the government to pass the third Patents (Amendment) Act. This ushered in a Product Patent regime that would result in highly enhanced drug prices. Of course, the Left has its own logic. They buy the official argument that the Indian government was bound by the TRIPS obligations to pass the bill and ask us to believe that no outright opposition to the bill was possible, so the only real option was to make the best of a bad bargain and use whatever flexibility was permitted within TRIPS to slip in some 'pro-people' amendments and safeguards.

Now it is beyond the scope of this commentary to go into the technical details on this subject but the Left failed to extract any significant measure of concessions from the government, barring the exclusion of software patenting. The CPI (M) says that if the Left had not supported the bill, UPA might have passed a worse one with the BJP's support, or devise some other way for passing the bill away from public scrutiny. Well, the first scenario would only have demonstrated how the UPA and NDA, as birds of a feather, flocked together in the service of international finance capital, leaving the Left free to mobilise the masses against both, and thus develop its own constituency and credentials. The Left effectively allowed the BJP-NDA to pose as defenders of our national interests vis-à-vis the western powers. As for the other possibility, that would have further exposed the real worth of CMP and the true colours of the UPA, thereby immensely helping the political education of the masses. But these are no longer the concerns of the parliamentary Left. Prisoners of a queer relationship of "mutual dependence" (as veteran leader Jyoti Basu correctly defined it) with the Congress-led government, they will blow hot and cold, but rarely act. They will boycott the coordination committee only to come back after a while with an enhanced urge for cooperation (see The Business Line, November 22: 'UPA-Left Meet Helps Iron Out Differences on Pension Bill').

But surely the safest way to judge the Left Front's (mainly the CPI-M's) economic programme is to see what policies they themselves follow in their base states. West Bengal is most important in this context because that is the R&D laboratory where the CPI (M) has been developing for nearly three decades with iits political brand for the all India market. The old 'Kerala line versus Bengal line' scenario belongs to the closed chapters of history; now it is the Bengal line that propels the evolution of the party's national line. For that party, what Bengal does today India theorises tomorrow.

The party's Political Organisational Report Part Two (POR-II), an extra-ordinary document adopted after its 18th all India Congress held early this year, amply proves this. It presents an entirely new policy perspective on issues like globalisation, foreign capital and NGOs to explain and endorse the economic conduct of the West Bengal government and, in the process, to update the party's all India line in tune with the Bengal praxis. Let us illustrate.

POR-II draws attention to changed international conditions and speaks of the need for "engagement… with existing world realities". West Bengal leaders have a more straightforward way of saying this: we must

utilise the "opportunities opened up by globalisation". And how do they do that? For one, they are promoting commercialisation, diversification and corporatisation of agriculture with an eye on export promotion and to facilitate all these, they do not hesitate to go back on their land reform programme and amend land ceiling laws (an amendment bill was passed recently to this effect). High finance lands only on shining cities, so gigantic efforts are on to make Kolkata into a paradise of amusement for the yuppies at the cost of the city's poor and lower middle classes. Globalisation moves on IT, so the state government is taking steps to keep call centres and certain other areas of IT sector out of the ambit of industrial strikes (this was conveyed to the press in kolkata on 15 November by Politburo member Sitaram Yechuri, who added that the party centre had delegated full authority to the state unit on this question).

West Bengal today tops the list of successful suitors of FDI and it goes without saying that this has been made possible by overtaking other states in the matter of offering concessions to big capital. Recently the government agreed to hand over a whooping 5,100 acres of land -including large tracts of fertile agricultural land - to Indonesia's Salim group, inviting tremendous opposition from different quarters including the Left Front's peasant base. POR-II legitimises all such backtrackings from the Left's previously held positions by announcing that FDI should now be allowed (read encouraged) when it augments the country's productive capacity, helps technology upgradation, and generates employment. CPI (M) leaders are knowledgeable enough to be aware that foreign capital hardly ever caters to these needs of a developing country, but they just have to invent some justification for the rather uncouth love for foreign capital. It is also well known that the particular types of FDI that is now being invited to 'Destination Bengal' - on amusement parks, food plazas, tourist complexes, high-end real estate developments, call centres etc. - are in most cases patently unsuitable for the aforesaid purposes. But all this has not prevented the CPI(M) Central committee from tendering full support to the West Bengal Chief Minister's controversial "Operation Salim" and similar other projects.

POR II also describes the conditions under which privatisation may be allowed (West Bengal government has already privatised many PSUs, with another 29 units now awaiting their turns), which type of NGOs (once regarded as "an arm of imperialist penetration" - see Prakash Karat's 1988 article in The Marxist - and now very important allies of the Left Front government) are welcome, and so on. Especially important is the question of loans and aids from international agencies. Here too West Bengal is now a front running state, and the policy document projects a clear shift from CPI (M)'s earlier stance of opposition to such loans to one of accepting these provided no conditions are attached.

In an article in People's democracy (June 13-19, 2005) explaining this document, Comrade Sitaram Yechuri tells us that the West Bengal government always takes loans without any conditions. Is this true? Says the World Bank: "All donors use conditionality in one form or another. Whether they do so implicitly or as part of an explicit binding agreement, they share a similar reasoning …" (Review of World Bank Conditionality, World Bank, January 24, 2005 ; www.worldbank.org) The fact of the matter is the basic eligibility criterion - call it condition or not - for any government to get a loan is its positive, consistent and pro-active attitude in implementing the economic restructuring programme prescribed by the lending agencies. The Left Front government fits the bill better than state governments run by UPA and NDA partners, and that is why it enjoys a sort of 'most favoured state' ("focus state" in the words of DFID) status in the agencies' books. The West Bengal Chief Minister's constant harping on his new mantra "reform or perish" is well known, and everybody knows he means business.

It is thus easy to see the emergence of a historic convergence of interests, outlooks and priorities. Thoroughly assimilated into what Istvan Meszaros calls the capital system in course of running State governments for nearly three decades, the Left Front cannot go beyond the logic of neoliberal globalisation. To say this is to state a simple, obvious fact of life and people like World Bank President James D Wolfensohn appreciate this well enough. According to a PTI report, the "World Bank has praised the Left parties for their 'broad-based vision' on social sector and infrastructure development and said the UPA government's common minimum programme was in tune with the Bank's objectives. …it does not seem to be a red flag at all, he (Wolfensohn) said referring to the Left parties. …" (Times News Network, 23.11.2004; cited in Update 11 July 2005).

Understandably, Washington does not mind when to conceal the almost complete collaboration in the economic domain, the Left Front takes up political opposition to imperialism as a safe way to maintain the Left image and keep up the bargaining posture. It does not mind when there are protests on the Iran issue, on the joint Indo-US air force extravaganza this November, and so on. It is another matter though that here too the dualism cannot always be concealed. When, for example, the West Bengal government makes elaborate administrative and police arrangements to ensure that the joint exercises at Kalaikunda airstrip passes off smoothly even as the CPI (M) stages calm and peaceful demonstrations against those exercises a little distance away from the airstrip and in Kolkata!

Of course, India's ruling elite itself, for its own class interests, does entertain a degree of opposition to certain selfish policies sought to be imposed by the US and EU through WTO. This was seen during the NDA regime too. The Left Front, while having no radical alternative framework, does constitute the most visible wing of that partial and pliant opposition: nothing more, nothing less. They have a "watchdog" role to play, and the 'watchdog' will keep barking. But, as the old adage goes, a barking dog seldom bites.

— Special Issue 2005

NAMA: Downplaying the Danger

Two decades of globalisation have made it clear that foreign investors are no substitute for domestic firms, a lesson that developing countries don't seem to have imbibed. Instead, they seem to be accepting the intensification and institutionalisation of deindustrialisation, which the developed countries are seeking to achieve. The NAMA negotiations are essentially a way of institutionalising through an international agreement the process of deindustrialisation in the developing world.

C P CHANDRASEKHAR

As the countdown to the Hong Kong WTO Ministerial begins, the attention is on the deadlock over liberalisation of agriculture. This is not surprising, given the unwillingness of European Union (EU) members, especially France, to agree to "adequate" concessions on agricultural tariffs and subsidies has stalled negotiations on further liberalisation of trade in areas outside of agriculture. What is disturbing, however, is the perception purveyed by the negotiators, government spokespersons and the media that once the agriculture deadlock is resolved, the task of taking the Doha Round forward is rendered easy: that is, the prospect of getting the developing countries to agree to substantial liberalisation of the trade in industrial goods and services is seen as extremely bright.

This is disconcerting because the walls of protection built by developing countries since the Great Depression and during the years of decolonisation to overcome the debilitating effects of international inequality, were predominantly in these areas. Protection was seen in the first instance as the means to build an indigenous industrial base, thereby ensuring the structural diversification needed in predominantly agricultural economies to garner productivity gains and obtain a sustainable position within the unequal international division of labour. More importantly it was recognised as the means to carve out the necessary domestic policy space within which national governments could pursue their own economic and social objectives.

It is indeed true that in the wave of liberalisation and globalisation, which saw domestic elites in the third world scrambling to attract international capital in a desperate attempt to overcome the constraints to their own expansion set by the failure to introduce the institutional reforms needed to expand domestic markets and trigger domestic investment, much

of this protection has been dismantled. However, instead of learning from the lessons delivered by deindustrialisation that this process of liberalisation spurred, the effort seems to be to accept the intensification and institutionalisation of such liberalisation that the developed countries are seeking to achieve through the WTO and the Doha Round.

THE DERBEZ TEXT

A typical example is the negotiations on Non- Agricultural Market Access (NAMA). These negotiations, mandated under the Doha ministerial declaration November 2001, are aimed at reducing border restrictions to trade such as tariffs and other barriers to market access for industrial exports. It covers all goods not covered under the Agreement on Agriculture. Since 2002, NAMA negotiators have sought to establish modalities or rules specifying how and to what extent a country should reduce its trade barriers. At the 2003 Cancun ministerial conference, conference chairman and Mexican trade minister Luis Ernesto Derbez submitted a text, commonly known as the "Derbez Text," proposing a framework for modalities in NAMA. It reflects the objectives of the developed countries with regard to increasing non-agricultural market access.

Yilmaz Akyuz, former Director Globalisation and Development Strategies division, United Nations Conference on Trade and Development (UNCTAD), has categorised them into four objectives.

The first is to ensure that ultimately tariffs on all product lines should be bound or subject to a maximum ceiling, constraining across-the-board the ability of developing countries to exercise the tariff protection option to foster or expand particular industries. This is significant because unlike the developed countries where almost all industrial products are subject to a ceiling, a large number of products, particularly in the case of the African countries, are still not covered by tariff binds. In fact, coverage in the case of as many as 30 countries is less than 35 percent. Binding tariffs obviously reduces policy flexibility substantially, inasmuch as these maximum levels set a ceiling on what developing countries can do to protect an industry they choose to develop at some point in the future.The second objective is a continuous process of trade liberalisation culminating in a situation where trade is near-completely free. This requires that liberalisation and tariff reduction achieved during the Uruguay Round be advanced further through tariff reduction in the Doha Round. In fact, Annexure B even proposes a sectoral initiative where WTO members select several products for complete tariff elimination, also called "zero-for-zero" reductions.

The third and related objective is to reduce tariff dispersion across countries. The intention is to reduce the current 11-percentage point difference in average weighted bound tariffs between developed (three percent) and developing (14 percent) countries, initially to around four percent and finally to zero. The absurdity of believing that in an obviously unequal global industrial environment the extent of protection must be homogenised should be obvious. That belief is even more absurd when judged in the context of evidence that all developed countries used protection as the means to industrialise in their early stage of development and continue to do so even now.

Finally, the intention is to reduce tariff dispersion across tariff lines by forcing a greater proportionate reduction in tariffs in the case of products currently protected with higher tariffs. Since it is known that in an increasingly diversified economic world complete insularity is not an option open to any country, this measure undermines the ability of countries to adopt strategies that focus on fostering and developing individual industries.

Given these objectives embedded in the Derbez text and the strength of the developed countries, it is not surprising that the NAMA negotiations are centred on the extent of binding coverage and the formula to be used for tariff reduction. The text seeks to combine increased binding with a single "non-linear" tariff-reduction formula. The latter is designed to ensure larger proportionate reductions in tariffs in countries and sectors with higher tariffs in order to realise the homogenisation agenda. The intent of the exercise was clear from the fact that this "Swiss formula" is often referred to as "the harmonising formula" inasmuch as it is a move towards uniform tariff structures across different sectors and countries.

IMPLICATIONS OF HARMONISATION

The real implication of this process of harmonisation emerges once we consider the following facts:

(i) Developing countries have seen in recent years a process of "tariffication" or the replacement of import quotas on industrial imports with tariffs, making the latter the principal protectionist de-

vice;

(ii) Developed countries are known to rely on non-tariff barriers and special safeguards in the case of sensitive products (such as textiles) rather than tariffs to protect their industries and therefore are not too concerned with pure tariff protection; and

(iii) As expected, developing countries are characterised in most areas by much higher tariffs rates than the developed countries, so that the effective increase in market access associated with any particular proportionate reduction in tariffs would be far greater in developing countries than in the developed a 50 percent reduction of a 20 percent tariff rate would bring it down by 10 percentage points, whereas it would imply a mere two percentage point reduction in the case of a four percent tariff.

Following the failure at Cancun and the subsequent opposition from developing countries, including India, which supported the African group, the Derbez text was rejected. However, in an enforced compromise, it was included as Annexure-B in the July Framework of 2004 with the caveat that "additional negotiations ... on the specifics of some of these elements" were required. These 'specifics', though inadequately specified, were to "relate to the formula, the issues concerning treatment of unbound tariffs…the flexibilities for developing country participants, (and) the issue of participation in the sectoral tariff component preferences." This kept the Derbez text as the base for negotiations, while providing a window of opportunity to the developing countries to minimise the concessions they would have to offer in this area.

DANCING WITH THE WOLVES

However, the more developed among the developing nations it now appears, are not averse to making significant concessions. In a proposal submitted in April this year, Argentina, Brazil and India (ABI) advanced and therefore signalled acceptance of a non-linear Swiss-type formula for line-by-line tariff reduction for all bound tariff rates. They have also accepted in differing degrees, the demand to bind unbound tariff lines. This move has been defended on the grounds that average tariffs are in any case low in the developed countries and declining in the developing countries, and what really matters is the problem of tariff peaks (excessively high tariffs) and tariff escalation (higher tariffs on end products rather than inputs) in the developed countries that militate against developing country exports. Thus a Swiss-type formula is expected to deliver substantial benefits to developing country exporters, in areas of interest to them, by dealing with the problem of tariff peaks and tariff escalation in the developed countries. What is ignored is the possibility that anti-dumping measures, non-tariff barriers especially technical barriers to trade can be used to neutralise these supposed benefits. Meanwhile, developing countries would be opening up their own markets to competition from imports.

This move by the ABI group, besides being a unilateral gesture advanced with the hope, but no guarantee, of obtaining concessions in areas such as agriculture and services that are seen as promising substantial benefits to them, completely undermines the ostensible 'development-oriented' mandate of the Doha Round. Since Doha was intended to advance a development agenda, the focus of the NAMA negotiations was to be on the elimination of tariff peaks and tariff escalation on products of export interest to developing countries, without reciprocal offers in their own markets. In fact, governments had on paper agreed that they would take into account the special needs and interests of developing countries. By making their offer, the ABI group has paved the way for a retreat of the developed countries on the question of Special and Differential Treatment (SDT) and "less than full reciprocity" and also paved the way for a degree of erosion of trade preferences, excepting perhaps for the Least Developed Countries.

THE CONSEQUENCES

There are a number of consequences that can be expected to follow from these developments.

First, the nonlinear formula approach denies developing countries from the instruments used by developed countries at similar stages of development. Those countries used tariffs as an important instrument to protect certain products and allow access for others.

Second, as argued earlier, by increasing their tariff bindings, developing countries would be forced to forgo some flexibility in their economic policy. As Martin Khor and Goh Chien Yen have argued, "a developing country needs to be able to modulate the tariffs on various types of products on a dynamic basis to support its upgradation of industrial production. It may need

to have lower tariffs on certain products, for example machines, for some time to encourage their use in the production of downstream products. But after some time, these tariffs may need to be raised when the country embarks on producing the former product, e.g., the machines in this example, in order to protect its newly emerging machine-building industry. If a commitment for binding of tariffs on machines has already been made, such raising of tariffs will not be possible without compensation."

Third, the total elimination of tariffs negotiated under the sectoral initiative will make it virtually impossible to set up industries in those sectors in the future.

Fourth, reducing tariffs leads to a loss of public revenue for governments in developing countries. Tariff revenue contributed 32 percent of total government revenue in least developed countries in 2001.

All of this is of significance, not only because the process of tariffication has made tariffs the most important protective device, but also because the Uruguay Round has ensured that through clauses in the Trade Related Intellectual Property Rights (TRIPs) agreement and the Trade Related Investment Measures (TRIMs) agreed upon, developing countries have lost the right to use measures such as denial of product patents and insistence on indigenous content requirements as a means of fostering and developing an indigenous industrial base. Since the evidence from close to two decades of globalisation makes clear that foreign investors are no substitute for domestic firms when it comes to ensuring diversification of output and employment in favour of industry, this tendency in the NAMA negotiations is essentially a way of institutionalising through an international agreement the process of deindustrialisation in the developing world.

— Special Issue 2005

GLOBALIZATION
COMMUNALISM

From Havana to Hong Kong

As the countdown to the Hong Kong Ministerial begins, all eyes are trained at its outcome. To be able to comprehend the issues and their intricacies, it is essential to understand the twists and turns marking the evolution of the GATT-WTO system and the forces that shaped it through the last six decades.

S P SHUKLA

The origin of multilateralism in the trade policy context is traced to the concern in the international community about the disorderly state of affairs that prevailed in the two decades spanning the period between the two world wars. These decades were characterised by repeated failures of international initiatives to bring some orderliness to international trade and monetary relations; competitive resort to unilateral exchange rate and trade and tariff policies leading to mutual impoverishment and general instability; and finally the traumatic experience of the Great Depression. The outbreak of the Second World War provided the immediate trigger for the negotiations about the post-war international order. However, these negotiations for most part were bilateral. The changing equation of power between the two main allied powers across the Atlantic and their respective concerns and experiences in trade policy area left their indelible mark on the blueprint for the post-war order.

The fourth paragraph of the Atlantic Charter unveiled by Roosevelt and Churchill in August 1941, which has been hailed as the first enunciation of multilateralism as the basis of international economic order, said: "With due respect for their existing obligations, to further the enjoyment by all states, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity."[1] The qualifying initial phrase and the absence of the phrase "without discrimination", which the United States (US) had been insisting upon, meant that the British Imperial Preference was not in danger. On the other hand, the emphasis was unmistakably on furtherance of the mutual interest of the two signatories in access to raw materials and mar-kets of the rest of the colonial world. The mention of all states, great or small, victor or vanquished, did not quite succeed in camouflaging this stark reality. The reference was to the warring nations of Europe and primarily it sought to assure the public opinion in the enemy camp that eventually the "vanquished" too would be accommodated. Of course, it totally overlooked the implication that the principle of "equal access" would continue to operate unequally in respect of those who were subjugated in the process of colonisation.

THE DUALITY IN THE MULTILATERAL PRINCIPLE

Formally, the multilateral principle that emerged stood for equality of treatment or equity in international commercial relations; it promised a democratic post-war international order. In reality, it was hardly universal in its ambit; it had the limited operational context of negotiations between the two major allied powers. This duality is its birthmark. It is also the root of the tensions and contradictions that have persisted in the system, as we shall see in what follows. The exercise of working out mutually acceptable objectives and principles which should guide the shape of the post-war economic order were continued by UK and US in the negotiations on the Lend-Lease Agreement. The Americans pursued their theme of unilateral dismantling of the Imperial Preferences by the British, much to the annoyance of the latter. The British were concerned over the possible balance of payments problems that Britain would most likely face in the post-war period. They were also keen to maintain autonomy to follow full employment policies. They were, therefore, opposed to the American formulations

of unqualified multilateralism and liberal trade, which seemed to pass on the burden of adjustment to Britain disproportionately. The American negotiators were hoping to impress their legislative masters by insisting on adequate "price" from the British for the war-time supplies. The compromise upshot of these negotiations emerged in the form of Article VII of the Mutual Aid Agreement, which, in the words of Jay Culbert, "became the cornerstone of post-war trade policy." The operative portion of the Article reads:…"shall include provision for agreed action by the United States of America and the United Kingdom, open to participation by all other countries of like mind, directed to the expansion, by appropriate international and domestic measures, of production, employment, and the exchange and consumption of goods,…; to the elimination of all forms of discriminatory treatment in international commerce, and to the reduction of tariffs and other trade barriers;…conversations shall begin between the two governments with a view to determining, in the light of governing conditions, the best means of attaining the above-stated objectives by their own agreed action and of seeking agreed action of other like-minded governments."[2]

Clearly, the British concerns were taken on board to a great extent. No doubt, the American objective of elimination of the Imperial Preference was now explicitly recognised; but it was linked to reduction of high US tariffs. While the language was multilateral inasmuch as the openness of the system to all like-minded governments was proclaimed the whole process of negotiations and the formulation of objectives and principles remained strictly bilateral. The entire exercise of working out a full-fledged scheme of the world trade order, that followed in pursuance of the Article VII negotiations, would retain this bilateral characteristic right until the end of 1945 when the outcome of the negotiations came to be published.

FIRST DEFINITIVE PROPOSALS FOR A POST-WAR TRADING SYSTEM

The American side was developing, as part of the post war planning exercise, "A Multilateral Convention on Commercial Policy" under the leadership of Harry Hawkins. In UK, James Meade developed "A Proposal for an International Commercial Union." While the underlying approach of the two exercises was broadly similar, it was the latter which is acknowledged to be "the first definitive proposals for the post-war trading system."[3] The bilateral negotiations which commenced in 1943 in pursuance of Article VII ended in 1945 and the results were incorporated in a more inclusive document titled "Proposals for Expansion of World Trade and Employment" published by the US Department of State in December 1945. A further elaboration of the American proposals titled "Suggested Charter for an International Trade Organisation" was prepared in early 1946. In February 1946, the Economic and Social Council (ECOSOC) of the newly formed United Nations set up a Preparatory Committee to draft a Convention for the consideration of an International Conference on trade and employment. It was at this stage that the subject matter was brought up, for the first time, for a wider, multilateral consideration in the form of the agenda of the Preparatory Committee. Interestingly, the membership in the preparatory process, although initially only 19 in number, represented all the three main tendencies (the developed capitalist world, the planned economies of the socialist world, and the emerging new third world of the ex-colonies and the periphery of the first world) that were to dominate the trade and development debate in the three decades that followed.[4]

THE HAVANA CHARTER

The debates and negotiations in the preparatory process as well as at the extended Conference (which deliberated from November 1947 to March 1948) provide an insight into the inherent tensions and conflicts of interests that characterised it and the Final Act of the Conference, namely, the Havana Charter, represented the balance of power among the major tendencies of the participants. Nevertheless, the Havana Charter was informed by the substance of the multilateral principle, that is to say, it attempted to take on board the diverging interests of different sets of participants, vastly differing not only in terms of power and wealth, their respective histories, and the nature of problems confronting them, but also in terms of their vision of the future. It was no doubt characterised by the major concerns of the two powers that initiated the whole exercise of conceptualising and formulating the post-war economic order. But it also dwelt upon the concerns of the other tendencies. And the compromise that it struck had some discernible flavour of equity.

But the history was proceeding at a faster pace than

the negotiations. The collocation of forces that gave the Havana Charter its flavour had meanwhile undergone a major change. The Cold War was already afoot and the leading capitalist powers were more interested in the consolidation of the Western Europe as the bulwark against the "danger" of communism. The USSR had exited from the process. The multilateral principle was eclipsed by real politick. The Havana Charter and the way it sought to embody the multilateral principle had little relevance for the major capitalist powers in the changed situation. The Charter was relegated to languish in the limbo. All that survived was its weak and truncated proxy brought into existence strictly for the interim: the General Agreement on Tariffs and Trade (GATT) of October 1947. Western Europe witnessed a massive boost in its bilateral economic relations with US. Then followed the Treaty of Rome and the formation of the European Economic Communities. The reality of "regionalism" and "bilateralism" was asserting itself, while the legal shell of multilateralism persisted in GATT.

THE GATT ERA

EQUALITY, prosperity, and stability were the three basic ideas that had inspired the planners of the post-war order, although the ambit of their conception was narrow and exclusive. The process that led to the formation of the Charter tried to extend that ambit and made it more inclusive. But with the premature demise of the Charter and its weak proxy now ruling the roost, the basic principles assumed a formal character, a narrow, technical and legal aspect, of relevance only for the inter-se commercial relations of the industrialised members of the system. The non-discrimination principle embodied in the MFN clause continued to be treated as GATT's essence. But it lost its soul. The system itself had become exclusionary and, therefore, discriminatory, leaving out the major part of the Socialist World. More important for the burgeoning membership of the ex-colonial and the peripheral world, formal application of the principle of non-discrimination actually implied further discrimination, because "treating the unequal equally," in the absence of substantive provisions to tackle their major trade problems, is a travesty of the equality principle. As for Prosperity, the emerging third world countries needed assured provision of preferential opportunity and access in regard to markets, technology and capital, not just successive "rounds" of tariff-cutting which was taken as its main task by GATT. The GATT also meant for them a negative, uncaring and unjust system because it paid little attention to fluctuating and un remunerative prices for their commodity exports; it did little to resist and eliminate the virtual closure of the rich markets for their agricultural exports; and it condoned a highly restrictive and discriminatory regime in regard to their competitive exports of textiles and garments. The GATT interface for inter se disputes among the members was essentially consultative and its preoccupation was largely the disputes between the trade majors. In the result, the idea of Stability - based on positive and just principles governing inter se commercial relations of all the members - seemed to be, from the developing country perspective, absent in GATT.

RESTRICTIVE PRACTICES ADOPTED BY DEVELOPED COUNTRIES

The entry of Japan into GATT in the nineteen fifties was also illustrative of the dual character of the system. While US sponsored the entry, a large majority of the developed countries in GATT virtually boycotted Japan through the use of non-application clause provided in GATT. The rationale given by the industrialised countries for such restrictive and exclusionary attitude was that their industry could not face the threat of competition from "low-wage" countries. This was as blatant as it was self-serving, for it cut at the very root of the principle of comparative advantage which is supposed to provide the intellectual foundation of GATT.

For developing countries, a provision permitting restrictive trade measures, which was necessary to secure their external financial positions, was a positive feature. But this was essentially a counterpart of the similar provision found necessary by the developed members in the initial decade of GATT's existence, and its extension with some amplification could not have been denied to developing countries. The relatively major move in GATT to address the problem inherent in "treating the unequal equally" came in response to the debate on trade and development that was going on in the United Nations forum and in the emerging coalition of developing countries. It was embodied in the addition of Part IV to GATT, which was long on rhetoric but short on effective mechanism. Later, again reactively, in the context of the formation of United Nations Conference on Trade and Development (UNCTAD) in 1964, and

the initiatives taken in that forum to work out an agreement providing the Generalised System of Preferences in the markets of developed countries for the exports of manufactures of developing countries, GATT first provided waivers, and later incorporated the more formal agreement on the so-called Enabling Clause, both of which permitted departures from the principle of non-discrimination in favour of developing countries.

But by that time, i.e. as the nineteen seventies progressed, the international environment for the global capitalism was already undergoing a vast change. The expansionist phase was coming to an end. The oil crisis had altered the underlying assumptions of that phase. It appeared, for a while, as if the power equations of the post-war era were undergoing a change. The hegemonic role of US in providing the anchor to the post-war economic order was weakening. Japan had already emerged as an industrial and trade major. The inter se competitive pressures between EEC, Japan and the US were growing severe. Incipient challenges were being perceived from the newly industrialising developing countries. GATT witnessed contradictory tendencies in these years. As stated earlier, on the one hand, the formalisation of the agreement on the Enabling Clause, a positive feature bringing in an element of equity into the system, took place. On the other hand, there was also the emergence of the "codes" on various aspects of international trade, i.e. agreements whose benefits were to be confined only to the signatories, (who happened to be developed country members), which implied fragmentation of GATT, a fundamental structural departure from the multilateral and non-discriminatory architecture. Expansion of the scope and further accentuation of the restrictive regime regarding exports of textiles and garments also came into being in these years. Anxiety began to grow and was being articulated in developed country circles about the "tyranny of the numbers" in the functioning of GATT, as the developing countries came to acquire an overwhelming numerical majority and formally, every country had only one vote. All in all, the beginnings of the great regression that was witnessed in the nineteen eighties and nineties were already noticeable.

THE TROUBLE WITH GATT

The eighties witnessed accentuation of the crisis of global capital and consequent sharpening of the inter se conflicts in the developed world. It also saw a concerted offensive on the part of the developed world to explore new frontiers for their expansion. The former resulted in repeated trade conflicts between the three trade majors in GATT: The US, EEC, and Japan. The latter led to an eventually well co-ordinated move on the part of the three to bring about a paradigm shift in the trading system embodied in GATT.

The story of the relapse of the trade majors, particularly US, into GATT-inconsistent and GATT-illegal trade measures, during those years is now too well known to bear repetition here. The deep concern it caused in the developed world largely centred round the inter se trade conflicts of the three majors. Lester Thurow's remark that "GATT is dead in the water" pointed dramatically to this state of affairs. The point being stressed was that the principles of open trade, comparative advantage, multilateral system operating with its rules to provide stability to the economic order, were being renounced in favour of protectionism, managed trade, bilateral deals of expediency and even "aggressive unilateralism." No doubt there was a qualitative change being experienced by the developed world in comparison with the working of the trading system for two and a half decades following the coming into existence of GATT. But this feeling of concern and even outrage rarely stressed the systemic inadequacies and inequities of GATT that developing countries had experienced since the very beginning. Nor the fact that the relapse also affected some developing countries, particularly those who were considered as promising economic spaces for expanding the frontiers of the operations of the multi-national corporations of the developed world. On the contrary, developing countries were being dubbed as "free riders," and were being eyed as potential targets not only for collecting the overdue "payments" for the "benefits" of the system that they had been enjoying, but also for launching offensives in new areas of economic activities. And the trade majors strategically used the instruments of "aggressive unilateralism" and bilateral pressures, particularly US, to compel the opponents of these moves to eventually fall in line.

THE URUGUAY ROUND

The story of the Uruguay Round, during which GATT gave way to the World Trade Organisation (WTO) at Marrakesh in 1995, has been variously told and this is not the place to repeat or even summarise it.5 What is

pertinent to our present theme is that the systemic crisis of the 1980s was used deftly by the trade majors to bring about a paradigm shift in the trading system represented by GATT. The Uruguay Round was not merely some refinement, some institutional strengthening, and some accentuation of tariff-cutting exercise. It introduced for the first time new areas like intellectual property rights, alien to GATT's trade mandate, within the system. It also put paid to the "cross-border trade in goods" character of GATT by bringing within its purview an all-embracing and loosely defined area of services. It moved GATT beyond its role of a watchdog for trade, based on the comparative advantage principle, to the establishment and enforcement of international norms and standards on subjects hitherto squarely within national jurisdictions. And it introduced into the dispute settlement process and mechanism the cross-retaliation possibility, enabling members to secure compensation for impairment and nullification of their rights in one area, from another area within the system - a development that would, more often than not, only add strength to the elbow of the relatively stronger members of the system. On the whole, the outcome of the Uruguay Round is now widely perceived as having enhanced the inequity of the system.

The inequity and lack of legitimacy of the process of concluding the Uruguay Round negotiations and bringing WTO into being could not be obfuscated either by the pretence of consensus decision-making or the opacity of the negotiations in the last phase. The essence of the multilateral system is considered to be the principle of "unconditional application of non-discrimination," that is to say, every member of the system being equally and unconditionally entitled to equal treatment. Leaving aside for the moment the paradox of "treating the unequal equally," as discussed above, it should be obvious that introducing new or additional conditionalities for continued enjoyment of the existing privilege of the multilateral principle, without explicit and willing consent of every member of the system, would amount to withdrawal of the privilege from those members who do not see the benefit of the new conditionality and, therefore, are unwilling to accept the same. Moreover, if the new conditionality were nevertheless incorporated into the system, it would amount to the collapse of the multilateral principle. If the members so affected are precisely those who even otherwise are in a disadvantageous position because they are living in an unequal environment in the system, then the implications of the collapse are even more damaging for them. It is precisely by organizing such a collapse of the multilateral principle of GATT that the developed countries, particularly the three majors, accomplished the paradigm shift of the system from GATT to WTO. More serious, the condition of unanimity laid down by GATT for any modification of the multilateral principle through imposition of new conditionality or otherwise, has now been substituted in WTO by the rule of prescribed majorities, thereby opening up a continuing possibility of expanding the frontiers of WTO to any new area whatsoever and thus adding even newer conditionalities.[6]

THE WTO

Since the agreement at Marrakesh, many attempts have been made by the apologists of the WTO system- the embodiment of the changed paradigm - to present it as a universally desirable development, largely a "win-win" situation. To press the point, the gains on the front of textiles and agriculture were highlighted, sometimes with a good deal of exaggeration as subsequent trends have shown, particularly in regard to agriculture. Some conceded some downside, but it did not affect their generally positive assessment. The more enthusiastic supporters were quick to build further on the triumph of Marrakesh. Indeed, the 1995 OECD Ministerial Report sought to replace the narrow principle of comparative advantage by the logic of "deeper integration"[7] and "internationally contestable markets"[8] to provide an intellectual foundation for the ever-expanding thrust of WTO, to rationalise the compelling functional requirement of the transnational corporations arising out of their strategies and calculus of global operations. Within a short space of a couple of years after Marrakesh, a clutch of new issues again emerged as the possible agenda for the fresh Round of negotiations, sought to be christened as "The Millennium Round." Predictably, issues of labour standards and the environment norms, the question of laying down international norms and standards for investment and other capital flows, and bringing government procurement within the ambit of WTO system[9] formed the multi-prong offensive to push the theme of deeper integration. The offensive produced a strong reaction among the developing country members, who were by now acutely experiencing the lopsided nature of the multilateralism

being practised in the GATT/WTO system. A strong opposition also developed among significant sections of the first world peoples who were alienated by the on-going process of "corporate globalisation" and who identified the offensive launched in WTO as part of that process, although their perceptions did not always coincide with the stance of developing countries on some issues such as labour standards and environment and trade. The continued exclusion of a vast majority of developing country members from the decision making process of WTO provided the last straw and the WTO ministerial meeting held at Seattle in 1999 to launch the "Millennium Round" ended in an unprecedented fiasco.

The efforts to resurrect the process were launched by the majors soon afterwards. The general atmosphere of uncertainty and outrage at the events of 9/11 were adroitly exploited to push the themes of "multilateralism" and the launch of the new Round of negotiations. In some articles appearing in the western print media, subtle and not-so-subtle hints were thrown in to suggest that the opposition to the new round in WTO could be perceived as a kind of economic version of the irrational forces of terror and anarchy challenging the global security and order. The Round was ultimately launched in Doha in 2001 but could bring the important new issues on the agenda only obliquely because of the continuing reservations and fears of the majority of developing countries. The showdown, however, came at the mid-term ministerial meeting at Cancun in 2003 when in the face of the resolute opposition of an overwhelming majority of small developing countries to the commencement of negotiations on these issues; the offensive was called off temporarily. The impasse on the issue of agriculture created by the confrontation between the US-EU combine and the G-20 (Group of 20) countries which included the influential developing countries of the three continents (Argentina, Brazil, China, India, Indonesia, South Africa, and Egypt) contributed considerably to the derailment of the meeting.

The developed countries succeeded in bringing the process of negotiations of the Doha Round back on rails at the Geneva meeting of WTO in July 2004. The US-EU combine was apparently able to extract a framework for conducting negotiations on agriculture and the non-agriculture market access to their satisfaction through what appears to be a studied ambiguity built into the framework on agriculture, the ambiguity which could also provide, for the time being, a sort of consolation for the main players of G-20. The US-EU combine also bought peace with a large number of small developing countries by offering to take the new issues of investment, government procurement and competition policy off the agenda of the multilateral negotiations. Notwithstanding the apparent success on the question of new issues, developing countries seem to consider the July Framework outcome as some loss of ground compared to the promise of Cancun.[10]

THE CHALLENGE OF THE DEVELOPING WORLD

The tactical move of the developed countries to take the new issues of investment etc. off the agenda of multilateral negotiations has a positive connotation from a political standpoint of developing countries. The emerging solidarity in their ranks has obviously raised concerns in the developed world. Even if we discount the on-the-spot petulant outbursts of the US and EU representatives at Cancun after the derailment of the Doha process, their underlying deep concern should not be underestimated, particularly in the light of their growing resort to bilateral/regional trading arrangements.

As we have seen, the crisis in the trading system in the eighties was overcome by the forces of global capital by transforming the paradigm of the trading system and imposing additional conditionalities to suit its requirement for further penetration into the new economic spaces (services) and strengthening its monopolistic hold on the knowledge and technology to maximise its returns, including rentier income, from that source (TRIPs). The design of the new "multilateral" system was bent to serve the requirements of the few. But the formal democratic structure was allowed to remain: Perhaps because outright demolition of the structure would not have been easy, or because it was strictly not necessary, considering the success that they had achieved in forcing down their decisions through the opaque and self-serving procedures of decision-making by consensus, a consensus garnished by bilateral arm-twisting (remember "aggressive unilateralism?") where necessary. The results appeared to them quite satisfactory, that is, until they witnessed the fiasco at Seattle. Their anxiety about the functioning of the WTO system deepened when in quick succession to Seattle, they faced the derailment of the process at

Cancun. Again the numbers seemed to create the difficulties. So the obvious remedy would lay in avoiding the large collectives of numbers. The easier and more efficient way of achieving the objective would appear to be to bypass and pre-empt such collectives through the bilateral and regional route. And this is what we are witnessing in the spurt of preferential trade arrangements: a tactical retreat from the formal "multilateralism" of the post-war era, a more direct and undisguised pursuit of expanding spheres of regional influence, with a view to neutralizing the potential resistance of the formal majority in the WTO and eventually, transforming and further bending the multilateral instrument once again to their requirements.

Of late, some opposition to the USA's initiative for regional and bilateral trade agreements seems to be emerging in Latin America. The disillusionment with the whole process of globalisation is setting in. The enthusiasm shown in the nineties by the governments of various Latin American and Caribbean countries for the USA's initiative of Free Trade Area for the Americas (FTAA) is not visible now. Instead, there is a vociferous opposition at the people's level and the major Latin American countries have clearly stalled the move.

THE STEP FORWARD

What elements do we gather from the historical analysis so far? In other words, what conditions can we discern, in the immediate context that would help propel the functioning of the system in the desired direction of the equality of treatment or at least hold the line and prevent further deterioration?

In the short run, a few strategic initiatives may be identified. First and foremost, the emerging solidarity of the south in WTO needs to be nurtured. The emergence of G-20 and other larger formations of Groups of smaller African, Caribbean and Pacific countries and Groups of even larger number of other developing countries on clusters of issues, is a positive development. However, the movement from the issue-based Groups of the South to the revival of the joint negotiating capacity of South on the lines of G-77[11] in the past, but inclusive of China, is essential. As WTO is launched on the course of "deeper integration," the trade weightage is not relevant. The stakes of small and big countries are of equal weight now. And since the "deeper integration" is in response to the forces of global capital whose home is in the North, the adversarial confrontation between the nation- states of the South and those forces of global capital is unavoidable. And in order to prevent further aggravation of the inequity of the system, this organisational initiative has a strategic significance. It should lead to strategic use of the numerical majority of the south in WTO.

The paradigm of corporate, capital-intensive, export-oriented, agribusiness-centered, peasant-insensitive and mass livelihood-endangering agriculture which informs the US-EU approach to the international discipline on agriculture has posed unprecedented challenge to the three-billion-strong third world peasantry. Unlike the issue of intellectual property rights which initially touched only a relatively small section (until the implications for the healthcare via the HIV-AIDS crisis made it a people's issue not only in the affected South but also in the North, which development eventually did lead to some dilution of the inequity of the TRIPs agreement), was abstruse and remote, the agriculture issue touches all developing countries and their large masses of people directly and acutely. The possibilities of the mobilisation of the south on this issue in the WTO are considerable. This is, therefore, a likely terrain that can yield successful results in preventing further aggravation of the inequity of the system. One important condition for such mobilisation is that G-20 must explore with the rest of developing countries an alternative paradigm for international discipline on agriculture.

Considering the outflanking moves of the North via preferential trade agreements (PTA) route, it is of importance for the solidarity of the South to initiate two counter-moves in this context. First, a revival of the idea of a code for transnational corporations operating in the south. This should be looked at as a possible balancing move in response to the recent spurt in the one-sided bilateral arrangements granting privileges to transnational corporations in regard to investment regimes and other matters. Second, an initiative from the South to call for re-examination of the GATT Article XXIV which is providing a license to the hegemonic powers for all kinds of departures from the multilateral principle to the detriment of the developing countries. The immediate objective should be to plug the free trade area loophole, which provides such license.

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3. See Jay Culbert: “War time Anglo American Talks and The Making of GATT” World Economy Vol.10 , No.4 Dec. 1987pp400-407.
4. The Committee had a membership of 19 which included, besides US and U.K., USSR, France, Canada, Belgium, Netherlands, Norway, Luxembourg, Czechoslovakia, Australia, New Zealand, China, Brazil, India, South Africa, Chile, Cuba and Lebanon. See also Clair Wilcox: “A Charter for World Trade”, The Macmillan Company: New York, 1949, pp. 26-27: “In their approach toward the problems of trade policy, the countries participating in negotiations now fall into four major groups. In the first group, which includes the United States, Canada, Belgium, Holland, and the Scandinavian countries, there is a strong desire to re-establish a world trading system based on multilateralism and non-discrimination. In the second group, which includes Great Britain and France, recognition of eventual desirability of multilateralism is overshadowed by preoccupation with the immediate necessities of reconstruction. In the third group, which includes most of the countries of Latin America, Asia, and the Middle East, the predominant concern is with the promotion of industrial development. The fourth group, which includes the countries of Eastern Europe, is committed to collectivism;..”.
5. See S. P.Shukla “From GATT to WTO and Beyond”: The United Nations University: World Institute for Development Economics Research, Helsinki, Finland 2000.
6. See ibid. pp 43-45 “Annex : The Law Embodying Paradigm Shift”.
7. “Deeper integration” refers to the incorporation of non-trade issues, such as environmental or labor standards, into the mandate of the WTO. The concept of “internationally contestable markets” seeks to ensure provision of market access and opportunities for foreign firms, equivalent to domestic firms, and make those markets open to global competition.
8. See Zampetti and Sauve: “Onwards to Singapore: The International Contestability of Markets and the New Agenda”: The World Economy, 19(3) May 1996.
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10. See Martin Khor “Developing Countries Lose Ground in WTO July Package “pp23-28 “Third World Economics” 16 August-15 September, 2004, Penang , Malysia.
11. The Group of 77 (G-77) was established at the end of the first UNCTAD session in 1964, with the mandate of providing “the means for the developing world to articulate and promote its collective economic interests and enhance its joint negotiating capacity on all major international economic issues in the United Nations system, and promote economic and technical coopeation among developing countries.” It currently encompasses 132 nations, but retains its original name.

SECTION 21

Economic policies formulated by the Indian government are tilted in favour of the advanced capitalist countries, often to appease the financial markets. Thus, the very concept of the nation is being eliminated by the market as a handful of global business conglomerates call the shots. With the economic definitions of nation, nationalism and nationhood rendered redundant, right-wing fundamentalism is filling the vacuum. Fundamental rights of people stand trampled upon like never before.

US Holds a System of Neo-colonial Regime to Rule West and South Asia

David Barsamian is an Armenian-American radio broadcaster, writer, and the founder director of Alternative Radio, Colorado-based syndicated weekly talk programme heard on some 125 radio stations in various countries. As a writer, Barsamian is best known for his series of interview based books with Noam Chomsky, Howard Zinn, Edward Said, Eqbal Ahmad, Arundhati Roy and others. The dynamic witty speaker in him doubles as a distinguished thinker and incisive commentator on developmental issues, global economic conflicts and international politics. A vocal critic of America's economic and international policies, Barsamian is also deeply critical of neo-liberal economic policies being pursued by countries like India, which he believes, will only lead to widening of economic chasm and conflict in the society.

DAVID BARSAMIAN IN CONVERSATION WITH
HARSH DOBHAL & PARUL

Tell us a bit about yourself?
I was born in New York in 1945. My parents were refugees from the genocide the Turkish government carried out in 1915 against the Armenian people. That history cast a shadow over my early life and remains an influence until today. The very first interviews I did were with my mother and other survivors of the genocide. I wanted to understand what happened. My abiding interest in history and politics comes from that. Why are people targeted, oppressed and persecuted? How does imperialism work? What role does propaganda play? I wanted to know those things. That background informs my work. I am an independent journalist and I have a radio programme that is broadcast all over the United States, Canada, Australia and other countries.

I attended one year of college in San Francisco before quitting. I got a job on a Norwegian freighter as an assistant cook and went to Japan in 1965. I travelled to Cambodia, Thailand, Malaysia and Indonesia before arriving in India in 1966. In the following year, in Delhi, by pure chance I met sitar maestro Pandit Debu Chaudhuri, who at that time was not so well known. He invited me to learn from him. So I decided to study Indian classical music and Sitar. That was my real education. I was exposed to great music and musicians.

I learned so much while I was in India from 1967-1969. Since then I've retained an interest in South Asia. I visit Pakistan, Nepal, Afghanistan and Sri Lanka. And I keep returning to India for personal as well as professional reasons. I have featured on my radio programme Arundhati Roy, Vandana Shiva, environmentalist Sunita Narain, documentary filmmaker Sanjay Kak, economist Amit Bhaduri, writer Fatima Bhutto in Karachi, Pervez Hoodbhoy of Quaid-e-Azam University in Islamabad and others. So Alternative Radio, this programme that I do, tends to address the imbalance in the US media which is heavily tilted in the direction of corporations and Washington's policies. And it introduces listeners to voices they would otherwise not hear.

The story behind launching Alternative Radio.
Well, very much like my learning Sitar and living in India, it was a combination of luck and synchronicity. I moved from New York to Boulder, Colorado in 1978 and I began doing radio there. There was a new station, KGNU, and they needed volunteers. I joined and slowly I learned how to do radio – recording, editing, writing, narrating, and producing. I got better and better at it and I liked it too. And after a few years I decided to distribute my programme to other radio stations in the United States. AR has grown substantially since then. The one-hour programme tries to focus on one particular topic or issue, such as water, food, US foreign policy in South Asia, the environment in Pakistan, the wars in Afghanistan and Iraq, Iran, Palestine – different types of national as well as international issues. Those interested can even visit my website at www.alternativeradio.org

What is the audience for alternative media in the United States? Do you think you have been able to make some kind of a solid impact in a world where, as you said, media is completely controlled and tilted in favour of powerful corporations?
Well, if we don't do anything then we can be certain of the outcome: the corporations will win and dominate. So just by doing something, you create the possibility, the space, to have an alternative to challenge and confront hegemonic thinking. And so in the US, with its predatory economic system and its violent, imperialistic foreign policy, there is some space for dissent, for opposition voices to be heard. And that space is gradually growing. Millions of people do not trust the corporate-controlled media, but they do not have access to other sources. So it's our job to expand the range of opinion, to push the parameters of debate, to raise uncomfortable questions, to bring those independent and progressive voices and ideas to citizens who are not exposed to them.

What is the status of the Peace Movement in the United States? Even as the Obama administration is imposing its foreign policy in South Asia and elsewhere, what is the situation of human rights within the country?

Actually, the Peace Movement is very weak at present. It was much stronger during the Bush period because Bush presented a very clear target by his arrogant and violent rhetoric, his invasions of Iraq and Afghanistan, his threatening war with Iran, his auguring of Venezuela and Bolivia. Thus it was easier to mobilise people to oppose Bush. Then Obama was elected and many in the Peace Movement felt: "Okay, here we have a new President. He is articulate and eloquent. Because he is black, he must be sensitive to the oppression and vulnerability of the poor. Many in the Peace Movement were seduced by Obama's style and were anxious to be rid of the legacy and policies of Bush. So they wilfully ignored certain things about Obama. All this has taken the teeth out of the Peace Movement at the moment.

Human rights in the US are a problematic issue because of economic disparity. And economic inequality is the incubator for human rights violations. And when you have a disproportionate amount of wealth concentrated in the hands of a few people and a few corporations, you have societal imbalances and injustice. Indigent people do not have access to wealth and privilege. Wealth brings with it access to the best colleges and universities, and the best jobs.

You cannot compare poverty in India to poverty in United States. The scale is vastly different. But on the issues of human rights and injustice, there are some similarities. Bush, Cheney, Rumsfeld, Wolfowitz are major war criminals and are not being prosecuted by Obama. And now Obama is committing war crimes. Hence the patterns of war and intervention continue -- that international law and human rights are to be applied to other nations and not to the United States.

So you are saying that Bush at least presented some kind of an object for the Peace Movement to unite in a positive and forceful manner. Do you see areas where Obama has actually departed from the policies of George Bush in a major way?

The points of departure are mainly cosmetic. They are not substantive or deep. On the surface they seem to be quite different. It's like an onion. It has many layers; you have to peel off the outer layer. And when you do, what do you find? You find basically the same onion with maybe a slight difference in taste. Obama has completely embraced capitalism as the organising economic system for the United States and the rest of the world. He will not even consider any alternative economic system. Except when it comes to helping the banks and the corporations. Then he believes that the taxpayers should give their money to support them, public money to bailout private banks and corporations. He has greatly expanded the war in Afghanistan, as I predicted here in December. It was very clear that he was going to diminish to some extent the war in Iraq and increase the war in Afghanistan and expand the one in Pakistan. He has now signed a secret order to have US Special Forces operating in Somalia and Yemen, where they are bombing too. All of this is done in the name of fighting terrorism. Now, has anyone noticed that since September 11, 2001 and the subsequent US invasions and occupations of Iraq and Afghanistan –there has been a vast increase in this phenomenon called terrorism? That vast increase is directly connected to US foreign policy. Because it is this policy that has poured gasoline on top of the fires instead of water. The US has inflamed world opinion from Palestine to Pakistan.

Obama's Cairo speech was hyped quite a bit. Your comment on this.

Obama's June 4, 2009 speech in Cairo was a triumph of propaganda. It did not represent any substantive change in US policy in West Asia or South Asia. It was a change of tone, mostly cosmetic. He made some Muslims feel good by saying Salaam Aleikum, he talked about the Holy Prophet and the Holy Quran, he recited Sura. That made people say he understands us because he is sympathetic. But beyond that it has been the same policy – military bases, subjugation, and neo-colonial relationships.

Take for example, Hosni Mubarak in Egypt, he is an American puppet. The last election in October was completely rigged. He got 99 percent of the vote. After the farcical election he extended emergency rule, which has been in effect since 1981. Mubarak is now the longest running ruler of Egypt since the pharaoh Ramses the Second. He is considered a treasured ally of Washington. He is a dictator but in the US media and political discourse he is described as a "moderate." The misogynist, homophobic, fundamentalist regime in Saudi Arabia is also described as "moderate." Karzai in

Afghanistan is another example. In August 2009 he rigged the elections. His regime, like Mubarak's, is deeply unpopular. Corruption in Afghanistan is of epic proportions. Same thing with Pakistan. It's a feudal state that does little for its impoverished people. Its elites live in villas and mansions and shop in London and New York. Much of the country's wealth goes straight to the military and spy agencies and banks in the Gulf.

Washington has created a system of neo-colonial collaborative regimes to allow it to continue its domination in West and South Asia.

How do you look at the US reaction to this crisis in Gaza where, in international waters, Israelis attacked a ship full of peace activists carrying humanitarian aid?

There's a technical word for what Israel did. It's piracy. It's a clear example of piracy and should be totally condemned by Washington. In addition to extra-judicial assassinations, Israel's action also involved the kidnapping and deportation of some 700 passengers on the six ships carrying aid. The mobiles, cameras and computers of the activists were seized. The US issued a timid statement calling it a tragedy; it's too bad that lives were lost, etc. The US then prevented the UN from launching an inquiry. Instead of taking an unequivocal, strong stance against this violent act of piracy, the US once again demonstrated to the world that Israel is privileged over all other countries. It has diplomatic and political protection from Washington. It receives more military and economic aid than any other state. It's not a poor country – it's not Niger or Burma. It's a very prosperous country. The per capita income of an Israeli exceeds that of at least three member states of the European Union -- Greece, Spain and Portugal. Yet, this country gets enormous military and economic aid from the United States. Why is that? Imagine for a second if Iran had done something similar to what Israel did on May 31, what do you think the US response would have been? I should add that Israel has been carrying out, with impunity, assassinations and kidnappings for decades in many countries of West Asia. Its blockade of Gaza and control of its borders, sea and airspace is illegal under international law as are its colonisation policies on Syrian and Palestinian land. But as long as the US protects Israel it will not be held to account.

You said that the departure points are just cosmetic and not really deep but is there any change somewhere, because Obama did get support from peace activists, from a lot of progressive sections, cutting across the political spectrum. Internationally too, he got that kind of a support. Do you think that there is still time and we should wait and watch?

This is a very interesting question because the apologists for Obama on the Left and in the Peace Movement say the structures are such that he has very little room to manoeuvre, that he would like to do good things but the system won't allow him to do it. Of course they don't know that. This is pure speculation about what he is really thinking or feels so this is not an empirical statement that can be measured in any way. It's people's hopes. The structures are in place that is true. A President who has progressive or leftist ideas has very little room to operate in. It's narrow. But I say that even within that narrow space he could do a lot. I'll just give you a small example relating to the Armenian genocide. When Obama was a state senator and then a senator from Illinois, he said that the Turkish government committed genocide against the Armenians. He was unequivocal, absolutely clear, unambiguous. And then he promised if he were elected President, he would say it. All the Armenians in the United States voted for him. An American President will utter the word genocide. Finally the messiah has arrived. So what happened? He becomes President. Then he finds that the political structure is such that it doesn't allow him to say what he had said before. Turkey is a valuable ally in the Middle East, it's a member of NATO, it could become a member of the European Union. Washington cannot offend Turkey. We need Turkish military bases because of Iraq and on and on. That's just one of the many examples. Another is climate change. When he was a candidate, his position was unequivocal: that climate change is a fact, there is an urgent need for action. Time was short. The situation was urgent. Polar ice caps and glaciers are melting. Temperatures are rising. Sea levels are going up. So what happens at Copenhagen? Compromise after compromise until nothing happened. Business as usual. The corporations are allowed to continue to pollute and emit greenhouse gases which are warming the earth's temperature.

Another example is healthcare. People on the Left in the United States wanted single-payer universal healthcare, that is, all citizens are covered by the same

system. Such a system has uniformity of paperwork and procedures which produces enormous savings and efficiencies. So if you live in Texas and travel to California, and you get sick in California, you receive treatment because it's all the same system, and the costs are contained. The US has the highest cost per capita for its medical care than any country in the world. Almost 50 million Americans have no healthcare at all. Many others have a minimal healthcare insurance. So if anything serious happens to them, they'd be financially wiped out. Obama compromised again and again until he gave up his stand on healthcare -- which is like a complex, like a military industrial complex. There is also a private healthcare insurance pharmaceutical complex which has tremendous amounts of money to lobby, pay politicians, to put advertisements on television scaring people that single-payer universal healthcare is socialism, we are going to turn into a Soviet State, we are going to lose our freedom, the government is going to force you to go to this doctor, you will have no choice. Just scaring people like this – pure propaganda – but it was very effective and Obama completely collapsed and he gave the insurance and pharmaceutical corporations what they wanted and not what the American people needed. Against this backdrop I should mention the US spends more money on its military then all the countries in the world combined. And it is the number one weapons seller.

Coming back to India, under the US leadership, where is the war on terror headed for? Secondly, how far do you see the US role in the discontent in this subcontinent as some experts argue the south Asia policy of the US is responsible for fuelling this discontent and conflict in the region.

I wouldn't say that. I think that it's easy to blame the outside force. There are internal reasons for the problems of the Indian state. One-third of its 600 districts are in some kind of revolt against the Centre. So there are internal explanations. But as a rule any weaker power should be careful and suspicious about the intentions of a stronger power. Just as a rule, this has nothing to do with the United States, this is how imperialism operates, it's looking for its advantage. But it will never say that to you directly. It will say I'm helping you. But they're always looking for their advantage and strategic position. What is the US interest in the war on terror? Firstly, it fuels the military industrial complex. War is good for the military sector of the US economy, for the huge corporations that build weapons – Boeing, Lockheed Martin, Northup Grumman, Raytheon, Honeywell, General Dynamics, and others. What happens if there's peace in the world? It's a disaster for them. So war is great for their profits, their economic bottom line. That is one factor. War also allows the US cultural, political and economic penetration in other countries under the guise of saying I'm doing this to protect you. Washington's always altruistic. All intentions of imperialist countries are benign; they're always good, not negative. And you have the media then, which propagates this lie. The US wants India for certain of its own geo-strategic reasons, mainly in dealing with China. It doesn't really care about India. India is just a pawn in this game. What they're doing now in Central Asia and Afghanistan is to build a network, a necklace of bases around China because they see China as their greatest long-term threat. This war on terror doesn't occupy the attention of the Pentagon planners very much. If you look at their documents, Al-Qaida takes up very little space. Al-Qaida is a small group of people. Yes, they can do some damage, but it is limited. US strategists all see China as the major threat. So India plays a role in that, as does Pakistan. China has major investments in Pakistan, it's investing in Afghanistan. One-seventh of the US debt is owned by China. China has increasing leverage of the US because of this.

But, the US is walking a tight rope between India and Pakistan on the issue of terrorism. What do you have to say on this?

What is terrorism? What do you call these bombings, these drone attacks on Pakistan, when they hit a wedding party, a madarsa, a Masjid or people's homes, a school, what is that? That's State terror. But when the State does it becomes defence. But if you have a small group of people who blow up a bus, that's terrorism. Maoists in Dantewada, that's terrorism. What the Indian Government has been doing for 63 years there in the Northeast and Kashmir is not considered terrorism. But it is a form of terrorism: economic terrorism, stealing people's land and natural resources, displacing them, not providing them with water, health clinics, and schools. People are deprived of the basic amenities of life. That's rarely discussed in the screaming debates led by the appalling anchors on Indian Television screen. So terrorism as I say is always in the eye of the

beholder. And from the US point of view, they never commit terrorism. They are its victim. They are innocent. There are these horrible Iraqis, Palestinians, Afghans, Pakistanis who want to blow up Times Square and crash planes into the World Trade Centre. The US is innocent. They never make any connection between its economic and military policy and the growth of what is called terrorism. The corporate media play a significant role in obscuring reality from the American people. Who created, funded, armed and trained the Mujahideen? The US did, along with its great "democratic" allies, Saudi Arabia and Pakistan.

You've been travelling in India, quite a bit. Given our tremendous desire to be a US ally, nuclear deal and so on, on the one hand, and neo-liberal economic policies on the other hand, what are the major challenges human rights activists face today?
Well, you'd know better than I. As an outsider, I cannot give the kind of detailed answer that someone who has studied it carefully can give. But to me, the issues of water and land are paramount. Because in water and land, you have the whole division of the advantaged sectors of the population and the disadvantaged, between the haves and the have-nots. And there is a war on the poor in this country because the poor just happen to be living in areas which have abundant amounts of iron ore, bauxite and water and other resources that are in great demand by not just Indian corporations but international ones too. So there is a kind of war on the poor that has led to tens of millions of people losing their homes, being forced into kind of strategic hamlets like in Chhattisgarh. In a way, you have to have this vigilante group created by the State called Salwa Judum on the rampage, killing people, abusing them and then forcing them from their villages and putting them into camps. All of the crimes they commit are done with legal impunity. It is similar to Vietnam. Just like what the Americans did, strategic hamlets, put barbed wire around people, and prevented them from returning to their land and villages. This is your new home, be happy. How can I be happy? My house is there, my land is there, my culture, my traditions, everything. All my family and cultural memories are in that land. So cutting people off from that, you make them desperate. What would desperate people do? They would do desperate things, to fight back. To me it's surprising that there isn't even more unrest in the country. More disadvantaged districts, like those I have just visited in Uttarakhand and saw the desperate situation with water there, the creation of the Tehri-Garhwal dam which has caused social and economic dislocation. Why? So that people in Kanpur, Allahabad and Delhi could have water. And there the people do not have water even to drink, to bathe, to wash their clothes. Is that justice? So the question is about justice. Who defines justice? In India we have seen, time and again, for example, the Bhopal case, the massacre of Sikhs in Delhi and in Punjab, the Babri Masjid, Bombay killings, Gujarat carnage. How many times has justice been delayed or completely denied? It's a very serious issue and it tells you a lot about where power rests in this country. It is with the elite who dominate the business sector, the financial sector, and the State. There are interlocking networks. They attend the same top universities, they come out of corporations like Chidambaram who comes from Enron and Vedanta and then he becomes first finance minister then home minister and when he retires, maybe he will go to America and teach at Harvard a course about India and Operation Green Hunt. How he heroically devised clever strategies to defeat the Maoists. He will appear on TV and write a book and make millions of dollars. So there is a sinister intersection between the State and the private sector that arrests justice. So no justice for Bhopal victims, nothing for Sikh massacres, no justice for Gujarat massacres, Babri Masjid, Bombay massacre and so many others which have gone down Orwell's memory hole. And in the instances where there is some sort of justice it's perverted. Take the case of Punjab's ex-DGP SPS Rathore and Ruchika Girhotra. When I was here in December, everyday it was in the news. Now he has been given an 18-month sentence, which is basically nothing. We would call it, in American lingo, a tap on the wrist. He abused his position of power and drove this girl to suicide. Eighteen months for that?

— May-August 2010

Bargaining Lives

POSCO brings Orissa government to its knees as an MOU signed between the two is not only going to rob thousands of villagers of their tenuous preserves in far off hamlets but also ties state's hands from doing anything except to support, assist, protect and pave the way for investors' interests in all eventuality.

SAURABH BHATTACHARYA, MADHUMITA DUTTA & USHA RAMANATHAN

None other than Prime Minister Manmohan Singh announced in June this year that the work at the POSCO project site in Jagatsinghpur district of Orissa will begin on April 1, 2008. However, he failed to acknowledge the fact that there is intense opposition from people who stand to get affected by the project. Naveen Patnaik-led Orissa government has assured the company about the transfer of 4004 acres of land by April for the integrated steel plant. On its part, the company is arm-twisting the state and central government to expedite the process or else shift the project somewhere else.

Given the mood of the people of Nuagaon, Dinkia, Kujang and other affected villages, none of the above propositions will be easy unless the state decides to use armed force. In the past, the Orissa government has not hesitated to unleash police and paramilitary forces against the people of Kashipur, Lanjhigarh, Kalinganagar, who had opposed similar industrial or mining projects.

The state in its bid to attract private capital has abdicated its role as a regulator. In the face of stiff popular resistance, it has resorted to every means to subvert legal and constitutional safeguards. POSCO is no exception to this. A close scrutiny of the POSCO MoU reveals state's nefarious intentions.

INSIDIOUS CONTRACT

On 22 June 2005, a memorandum of understanding (MoU) was drawn up between the Governor of Orissa (representing the state) and POSCO, a South Korean steel major, for the establishment of a 12 million tonne per annum integrated steel plant at Paradip in Jagatsinghpur district of Orissa. The total investment in the project is estimated to be US $12 billion after completion, one of the largest foreign direct investments in the country. MoU also includes other components-mining facilities, road, rail and port infrastructure for the project, integrated township, water supply, and captive power plant.

STATE AS A REALTOR

The Orissa government has promised the company expeditious transfer of all non-forest land and acquisition of private land. As per the MoU, the Company will need more than 6,000 acres of land in the following manner:

- 20-25 acres in Bhubaneswar for their registered office and headquarters
- 4,000 acres for the steel plant and associated facilities

- 2,000 acres for township development
- Additional pockets for transport and water projects etc.

The Orissa government has committed to acquire and transfer such large chunks of land free of encumbrances through the Orissa Industrial Infrastructure Development Corporation. The cost for the land will be determined under the Land Acquisition Act for private lands and for government land on the basis of the prevailing Industrial Policy Resolution on concessional rates.

A question that deserves to be asked is when the land is to be acquired for a private company from private land owners, why must the state act as an agent and acquire land, more so under an archaic and colonial Land Acquisition Act (LAA). The LAA should not be used to dispossess people, but be a means of protecting people in their negotiations with industry. The state should not abdicate its role in protecting against the exploitation of the people from whom land is being taken over. The state should ensure that the people from whom land is being acquired have full information so that their agreement to sell is informed. They are not led into making decisions that would be to their detriment.

As has often been the cases, the state identifies the land for location of industry. Then it lets the corporations negotiate or coerce people into selling their land. This is done to show that the state is leaving things to market. As we can see, this is not about leaving it to the terms of the market. In the matter of selling of land, industry should not be allowed to prey on the weaknesses whether arising out of lack of information or whatsoever other reasons from the point of view of the people from whom land is intended to be taken away.

One critical issue that the MOU has not factored in is the impact of such large scale diversion of land against the interests of petty land holders, labourers and landless farmhands. The last of them would be completely dispossessed of their livelihood and would not be entitled to any compensation. The Land Acquisition Act does not include landless agricultural labourers within its definition of 'interested person'. The Orissa Resettlement and Rehabilitation Policy 2006 also fails to provide any protection to landless peasants and labourers. While the policy speaks of the need to 'address the specific needs of the women, vulnerable groups and indigenous communities', its provisions are vague and do not spell out the entitlement of the landless labourers.

In Jagatsinghpur district, where POSCO steel plant is proposed to come up, almost 300 families are yet to be allotted legal titles. In the absence of pattas or titles, the villagers have virtually no bargaining power and will get displaced without adequate or any compensation. Rehabilitation in such cases is not even considered by the government.

R & R PACKAGES

The MOU notes that Resettlement and Rehabilitation (R&R) for POSCO oustees will be in accordance with the Orissa Resettlement and Rehabilitation Policy 2006, which was drafted and approved by the cabinet in April 2006, in the aftermath of the Kalinganagar agitation. The provisions of this R & R Policy fall short of acceptable standards and are nothing more than an eyewash. It fails to ensure any employment guarantee to the displaced; it carries just a stipulation that the industries give job "preference" at least to one nominated member of each affected family. Further, it remains silent about the government's role in cases where people don't want to be displaced by the industrial projects.

More critically, while mouthing an array of platitudes, it is non-committal on ensuring land for land rehabilitation for the displaced families. This makes the entire R & R policy mere eyewash as no amount of cash can compensate for the loss of source of permanent livelihood. Cash compensation by itself does not enable generational farmers with lack of alternate technical skills to find other sources of livelihood. This aspect was recognised even by the Supreme Court before it sadly remained short of implementing its own verdict in the Narmada Bachao Andolan case. R & R Policy ignores the fact that cash compensation amounts to neither rehabilitation nor resettlement. It is not and cannot ever be an adequate replacement for a source of livelihood coming down and secured through generations.

One of the most fundamental limitations of the R & R Policy is that it does not speak in terms of commitment from the state or entitlements for the affected persons. It just mouths homilies on what the state government should do but does not set out specific commitments. Further, it places no onus on the state government to consult the displaced families while designing and implementing the rehabilitation and resettlement plan.

PERMISSION FOR MINING

The MoU envisages allotment of coal mine and iron mine blocks for captive mining for the project, either directly or through a PSU. In this regard, the Orissa government has promised to recommend and 'to use its best efforts' to ensure that the central government grants its approval for prospecting licenses and captive mining leases. It is to be noted that the conditions governing the grant of such licenses are provided by the Mines and Minerals (Development and Regulation Act, 1957) and the Mines Act, 1952, together with the rules and regulations framed under them, which constitute the basic laws governing the mining sector in India. Further several regulatory powers have been vested in the state government. The state government has to exercise those regulatory powers independently and in accordance with statutory mandate and administrative law principles guiding exercise of discretion.

The state government promises the company or POSCO its best efforts to ensure grant of all relevant licenses and lease, there is a patent conflict of interest between the responsibilities of the state government under the mining laws and its obligations under the instant MoU. The independence of the state government to act as a neutral regulator, according to the statutory principles and compelling public interest, is severely compromised by its assurances under the MoU.

STATE GOVT'S ROLE IN LITIGATION

Clause 6 (5) of the MoU states that the government shall recommend such areas as are free from litigation and encumbrances and that in case of any litigation 'at any stage', the government shall diligently defend its recommendation. Such a clause should ordinarily be unexceptionable. However, the scope of diligent defence should only extend to past encumbrances and litigation. But the instant clause provides that the state government will defend at 'any stage', its recommendations. This phrase, 'at any stage' takes this clause beyond the ordinary realm. This raises the question as to should the state government obligate itself to defend its recommendations in a litigation at a subsequent or distant time when the grounds for challenge to such recommendations may include any dereliction or misdeed of the company.

CONTRACT OVERRIDES STATUTES

The MoU contains a series of promises from the state government in the nature of assuring its best efforts in facilitating all necessary consents and clearances for all the components of the proposed steel project and all ancillary ventures outlined in the MoU. For instance, it promises assisting the company in securing clearance under the Forest Conservation Act and Environment Protection Act, clearance for creation of water bodies and pipelines, using its best efforts to enable the company secure no objection certificate through the state Pollution Control Board, facilitating grant of Coastal Regulation Zone (CRZ) clearance.

These tall promises by the state completely displaces the statutory mandate vested in the state government and bodies like the State Pollution Control Board by the whole gamut of environmental statutes and regulations. Indian environmental laws, as enunciated by the Forest Conservation Act, Water Act, Air Act and the numerous rules framed under the Environment Protection Act, including the Environment Impact Assessment (EIA) Notification and the CRZ Notification vest a tremendous amount of regulatory powers on the state government.

The MoU, by committing the state government to enabling grant of consent to the company, prejudices and predetermines the regulatory functions of the government. Thus, the MoU interferes with future exercise of statutory powers and, therefore, displaces the statutory mandates vested in the government.

This contravenes the widely accepted rule of administrative law which states that a public authority cannot, by contract, restrict the future exercise of its statutory powers. This was acknowledged by the Supreme Court in Indian Aluminum Company v. Kerala State Electricity Board where the Court also referred to several English precedents.

UNLAWFUL OBJECT

The undertakings made by the state government prejudice the issues of grant of necessary license, consent orders and permits to the company. These decisions will be made on the basis of the contractual mandate of the MoU. In fact, the grant of such permits has been rendered a fait accompli by this MoU. As such, the MoU stands in contravention to the established principles of administrative law. More problematically, there is a real danger of the state government finding itself bound to the promises made in the MoU, particularly if the company acts upon the promises made therein. As such, the

state government may be completely bound by the promises held out in the MoU and the contractual obligations will completely displace the statutory mandate vested in it.

It must be noted in this context that one of the general principles of contract as postulated in Section 23 of the Indian Contract Act says that the consideration or object of an agreement is unlawful if it is forbidden by law; or is of such nature that, if permitted it would defeat the provisions of any law. Every agreement of which the object or consideration is unlawful is void. Admittedly, a MoU is not strictly speaking a contract and nor are the promises made by the state governments in the nature consideration in true sense of the term. At the same time, an MoU is indeed an agreement that would shape the contours of the final contracts on each specific issue discussed in the MoU and consequently, the fundamental principles of contractual laws must still very much be applicable to it.

Therefore, it may be argued that the current MoU contains clauses that contravene the legal principles guiding the exercise of administrative discretion and, thus, the objects of this agreement are unlawful. Consequently, such an agreement can be said to be a void agreement in so far as they fetter and displace administrative discretion vested by statutes by creating a conflict of interest.

JUDGE IN ITS OWN CAUSE

These clauses also create a scenario where the state government, being an interested party due to its part in the MoU, judges its own cause while granting necessary permits under the different environmental laws. This is a complete inversion of the fundamental principle of natural justice which affirms that no one shall be a judge in his or her own cause.

It is an unexceptionable rule of law that justice must not only be done but also must be seen to have done. The MoU and the promises of the State Government made therein completely shatter the objectivity of the state government and create a very strong apprehension of bias.

CLASH OF INTEREST

MoU also avers that the state government shall recommend to the central government setting up of SEZ as required by POSCO. Ideologically, setting up of SEZ and its appurtenant privileging of corporate interests over basic rights of the people, creation of anti-people and anti-labour enclaves that are bereft of any form of democratic control is unconscionable and must be resisted at all costs.

But the specific clause in this MoU even falls foul of the limited norms of the SEZ Act. As already argued earlier, it is well established in law that the state government must apply its mind objectively and with reference to the objectives and provisions of the Act and make its recommendations. However, this MoU clearly fetters the state government's power to make independent recommendations and substitutes its discretion with contractual obligation towards POSCO and thus deprives the provision of state government's approval of its entire substance and meaning.

SPECIAL TREATMENT

The MoU states that Orissa government will assist POSCO in establishing suitable contacts and interfaces with the Indian government for POSCO's requirement for 400 MT of iron for its steel plants in Korea. This being a market transaction, there is no reason why the state government must interfere in it by providing special assistance to POSCO when the company can purchase its requirements from the open market.

MILITARISATION OF THE REGION

Clause 17 of the MoU states that the state government shall be responsible for the security of the project and take all steps including setting up of new police stations. This insidious provision highlights the state-corporate nexus that has acquired a lethal shape in this neo-liberal era. The state is increasingly becoming just a sentinel guarding the penetration of the mineral rich regions of the country by the global capital and is abdicating its functions of honouring and protecting the fundamental, political and socio-economic rights of the indigenous people and other citizens. This is an acknowledgement of the role of the state in repressing popular movements and resistance against mega projects as being witnessed in Kashipur and in Kalinganagar.

— November-December 2007

Globalisation and Indian Economic Development

Economic policies formulated by the Indian government are tilted in favour of the advanced capitalist countries, often to appease the financial markets. That's why our governments get showered with accolades from the Bretton Woods institutions – the IMF and the World Bank.

AMIT BHADURI

A dilemma faces the developing countries today. In the current phase, the emerging rules of globalisation are increasingly occupying the policy space of the nation-state. And yet, the global rules of the game are flawed, and biased in favour of the richer countries, especially the Untied States. The dilemma arises because the developing countries tend to feel that there is no alternative to accepting globalisation in its present form, the so-called TINA syndrome of a unipolar world dominated by the United States (US). They do not realise that they can hardly rely on the national interests of this super power to further their own developmental objectives. A couple of well-known examples illustrate this point.

The issue of a fairer global trade in agricultural commodities, without subsidy to farmers in richer countries, is required not merely for a freer trade regime; it affects also the poorest one billion people in the world, as most of them are connected directly or indirectly to agricultural activities in the rural areas of developing countries. There is hardly any other trade-related example with greater compatibility between a more efficient international price mechanism operating through freer trade, and greater global equality. And yet, international negotiations governed by the national interests of the richer nations reduced global rule making recently to a "tit-for-tat" strategy that led to a breakdown in negotiations, and the tendency to impose solutions by the richer and more powerful nations.

There are other examples of imposed rather than negotiated solutions. Both the Bretton Woods institutions, namely the International Monetary Fund (IMF) and the World Bank, make policy recommendations to the developing countries through their standard pro-market 'conditionalities'. In defence of imposing pro-market conditionalities on developing countries, both these institutions place a great deal of emphasis on the principle of accountability to the market. Ironically, however, they themselves remain totally unaccountable for their performances and recommendations, no matter whether an economic collapse occurs in Argentina under their guidance, or an acute financial crisis erupts in east Asia (the only country to escape largely its adverse consequences was Malaysia, which went openly against the IMF prescriptions), or years of stagnation continues despite their recommended large-scale IMF-World Bank sponsored liberalisation in sub-

Saharan Africa. More blatantly, the presidents of the World Bank are chosen from the US, by the US, for the US, in the name of global development.

The power of imposing rules, which the rich nations have over the poor nations, arises to a large extent from several structural asymmetries inherent in the current process of globalisation. Without identifying them clearly, it would appear that this process of globalisation led by the interests of the rich is a natural phenomenon, somewhat like an earthquake or a drought, consequences that have to be accepted because they cannot be controlled. We would be in a better position to integrate strategically with the global economy to our advantage, instead of meekly submitting to it when we understand these asymmetries that make the current rules of the global game so flawed.

Perhaps the most fundamental asymmetry in the world economy arises today from the freedom of movement of capital, especially financial capital on one hand, and the restrictions on the movement of labour on the other, especially unskilled labour from developing countries. Despite vast improvements in travel and communications technology, available estimates suggest that labour migration as a proportion of the total world population has been lower in the current phase (approximately 1973-to date) compared to the earlier phase of globalisation (approximately, 1870-1913).

On a rough reckoning, about one in six persons crossed national borders for employment or livelihood between 1860 and 1900. They went as indentured labour from China and India, as colonial settlers from Europe to North, Central and South America, and to Australia. Over a comparable period of nearly five decades of the current phase of globalisation, not more than one in seven persons migrated. Contrast this relatively sluggish movement of labour with the movements of capital, especially financial capital during the current phase of globalisation. Rough estimates available from the Bank of International Settlements suggest that the daily volume of private trade in foreign exchange is over 1.2 trillion dollars. Of this, less than two percent is accounted for by trade in goods and services, and even if one adds all direct foreign investment it would still be well below four percent.

A few days of hostile private trade in the foreign exchange market can wipe out the entire foreign reserve of all the central banks in the world. The defining characteristic of the current phase of globalisation has become this overwhelming dominance of private trade in finance. The world has not seen anything like this before. The rise to ascendancy of international finance started with successive waves of liberalisation of the major capital markets of the advanced capitalist countries starting around mid-1970s, and assumed irresistible momentum by early 1980s. Although little explicit note is taken of its implications in public discussions and government pronouncements, its imprint has been deep on the pace and pattern of world development in general, and Indian development in particular.

Economic policies are increasingly formulated by the Indian government with a view to appease the sentiments of the financial markets. The English language media, especially the electronic media that shape Indian middle class opinion, tend to behave as if the daily fluctuations of the stock market provide a barometer of the health of the real economy. However, the Indian stock market is minuscule in relation to the vast size of global private trade in foreign exchange mentioned earlier. The rupee and Indian stocks can easily be set into an uncontrollable downward spiral by a few large international players speculating against some Indian stocks or the Rupee. This is not at all fanciful. Recall how the Dalal Street nosedived immediately after the 2004 general elections results, because a few large, mostly foreign institutional investors began to withdraw from the Indian capital market fearing that a coalition government supported by the Left will be unfriendly towards private businesses. However, as soon as the United Progressive Alliance government named its top economic team, a trio of the prime minister, the finance minister and the deputy chairman of the planning commission, all known for their extreme pro-market and corporate friendly outlook, the stock markets began to stabilise in no time.

Nothing had changed about ground realities of the Indian economy in those few weeks, except that international finance capital needed assuring political signals. In the process, the future course of economic policies of the country was set, and the Left sufficiently tamed as its subsequent economic policies are showing.

This story would remain incomplete for India, besides many other developing countries without mentioning the critical role of the IMF and the World Bank. Since those two institutions are in a pivotal position to influence the perception of private foreign investors like multinational corporations, banks and other financial

institutions about a country's investment climate, they exert a significant influence on the sentiments of the financial markets. If the economic policies of a government are favourable to the corporations, it generally gets a good chit from the IMF and the World Bank, encouraging capital to flow in to stimulate the stock market. With an unfavourable signal from those institutions, the government runs the risk of capital flying out in a destabilising manner.

This, not merely free trade, is the name of the financial game under globalisation. The IMF, the World Bank and all those suffering from the TINA syndrome would like us to believe this is indeed the only game in the town! Under the influence of the Bretton Woods institutions, India has passed a Fiscal Responsibility and Budget Management Act (FRBM) in 2003, which prevents the government from spending more in areas like elementary education, expanding rural employment guarantee or making it effective by strengthening decentralisation of the panchayat system through adequate fiscal autonomy. Tribals and peasants are evicted from lands with little compensation and their livelihood destroyed to improve the 'investment climate'.

It is becoming increasingly apparent that, in the name of development, policies of developmental terrorism on the poor are being pursued. It might deliver high growth, but it is growth without a democratic content. It does not reach the poor citizens of India who need to benefit most from the process of growth. This is why each and every government that has been following this sort of policy gets showered with the approval of the corporate sector, of the IMF and the World Bank, and even of the upper middle class, but loses the general election. The Congress government under the then prime minister, Narasimha Rao, with Dr. Manmohan Singh as its finance minister spearheading economic reforms lost the general election. Dr. Singh personally failed to win a seat. The BJP-led coalition crashed in the 2004 general election with its 'shining India' slogan; and it did especially badly in Andhra which was shining under the glow of IT industries. There is no reason to believe that things would be any different next time. However, this would require going against the hidden script of globalisation by upsetting the alliance between large domestic industrial houses, multinational corporations and banks including the IMF and the WB, and a pliable domestic government irrespective of its political label.

The second important asymmetry in the current phase of globalisation arises from the increasingly freer flow of trade in goods and services on the one hand, and the growing restriction on the transfer of knowledge and technology embodied in the production of those goods and services on the other. In the emerging regime of Trade Related Intellectual Property Rights (TRIPS), all developing countries, including India, find it increasingly difficult to learn and adopt the production technology involved in the goods and services they import. The asymmetry of the emerging trade regime has been characterised by freer trade in goods and services coupled with greater restrictions on the flow of productive knowledge. Thus, the more liberalised trade regime of the World Trade Organisation (WTO) puts India under increasing pressure to import goods and services rather than produce them at home. It is conveniently forgotten that international trade has been the vehicle for learning the technology embodied in the traded goods and new products throughout history. This learning process involved through international trade may well be the most important dynamic gains from freer trade, far outweighing the static gains of existing comparative advantage. By treating knowledge more and more as simply a privately tradable commodity, the current trade regime shows its bias towards corporations as the generator of knowledge who should be handsomely rewarded, but forgets the importance of other sources of knowledge like traditional community-based knowledge to the detriment of many indigenous communities.

It is in this context of freer trade in goods and services that the economic consequence of globalisation in terms of the increased relative importance of the external vis-à-vis the internal or domestic market needs to be examined. It has influenced thinking on macro-economic policy in a way, which is seldom highlighted. It emphasises the importance of reducing the costs of production through more efficient supply side policies for increasing the international competitiveness of the national economy; but ignores the problem of creating adequate purchasing power and aggregate demand through relative neglect of the domestic market. This shift of emphasis from the domestic demand to international cost competitiveness raises concerns about labour market 'flexibility' and various forms of wage restraint. Lower wages (or wage growth) tend to depress the unit cost of production, but also the consumption demand from wage in-

come. Consequently, unless either higher investment or increased export surplus makes up for that reduction in consumption demand in a regime of investment or export-led growth, insufficient aggregate demand at home would become the binding constraint on development.

Similarly, the emphasis on increasing output (value added) per worker or labour productivity to reduce labour cost of business, and use this as a tool for enhancing international competitiveness has its downside. Attention focused only on labour productivity separates it from the level of employment in the economy. Thus total output would decrease despite an increase in productivity, if the percentage decrease in the level of employment exceeds the increase in labour productivity. Consequently, the corporate strategy of 'down-sizing' the labour force to create a "lean and efficient corporation" for increasing market share might turn out to be good for a particular corporation, but macro-economically counter-productive if many corporations do it simultaneously with shrinking of total supply, and of the size of the domestic market. Such policies of reducing unit cost in search of greater efficiency are effective on the micro-economic scale of a single corporation, but counter-productive on the macroeconomic scale due to their effect of depressing aggregate demand. This blurring of this distinction between micro-level and macro-level efficiency, typical of the corporate ideology, gives rise to many 'fallacies of composition' in macro-economic policy by assuming that the individual micro-economic 'parts' have the same properties as the 'whole' macro-economic system. The third asymmetry arises in the current phase of globalisation from the role assigned to the State in monitoring and regulating economic activities.

The market-oriented neo-liberal philosophy intends to curb the role of the state as an economic actor, but gives rise to an almost schizophrenic view of the capabilities of the State. It is usually claimed that the State cannot be trusted with expansionary monetary and fiscal policies (e.g. FRBM Act of 2003 mentioned earlier) because the State has an in-built tendency to be financially irresponsible. At the same time however, the same State is relied upon to undertake far more complex financial tasks like extending the scope of the market though privatisation without corruption, regulating the stock exchange, etc. This schizophrenic view about the capabilities of the State is rooted in denying the state its developmental and distributive role, but using it to promote the reach of the multinational corporations through measures like privatisation.

This leads in the case of India to the most fundamental asymmetry in the relation between our political democracy and the market mechanism. In neo-liberal philosophy the free market and democracy are considered mutually reinforcing, as both extend the scope of individual choice. And yet, the types of freedom granted by the market economy and political democracy are often in conflict in developing countries. The democratic principle of 'one-adult-one-vote' coexists rather uneasily with the free market philosophy that the rich, with greater purchasing power, would have more 'votes' than the poor in the market place. This asymmetry becomes even more acute when with greater inequality in the distribution of income a larger proportion of the poor have political voting rights, but are economically without a 'voice' in the market. In these circumstances, the democratic form of government comes under increasing strain if too much freedom is granted to the market. Yet, the process of globalisation relentlessly points to a situation in which national governments have little control over the free play of global market forces.

As a matter of fact the history of the relation between economic development and democracy has been far more complex than the currently fashionable 'political correctness' would have us believe. Historically, the per capita income of the western countries had to reach a minimum of 2000 dollar per capita per year. This was a high level compared to India's 200-250 dollar around the time of our first general election in 1952 (measured in 1999 at Purchasing Power Parity or PPP calculation). It is an unparalleled achievement in the recorded political history that political democracy in India has been sustained at that level of poverty despite the tremendous diversity of the country. This also poses the most serious challenge to our democratic form of government. It must control the excesses of globalisation and domination by corporations of our economy. Our democracy has to ensure that the process of growth is not corporate driven, but is decentralised and rural employment driven to allow for the widest participation of our citizens. Only then will the wealth created by growth be fairly shared, and growth itself will have a democratic content. It will be growth of wealth created by the people, for the people. This compulsion of our time can neither be met by globalisation, nor by cor-

porate-led growth supported by the government. Unfortunately neither the Right nor the Left seem to have woken up to this challenge for a pattern of development that gives dignity to all citizens.

— *May-June 2007*

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Axis of Evil

The very concept of the nation is being eliminated by the market as a handful of global business conglomerates call the shots. With the economic definitions of nation, nationalism and nationhood rendered redundant, right-wing fundamentalism is filling the vacuum.

ANIL CHAUDHARY

The concept of a nation-state evolved in an attempt to meet the requirements of the market. It thrived through history by being the 'most omnipotent protective shell' for capitalism to grow. Nationhood, as it is defined, understood and perceived, has a brawny undercurrent of economic interests of the capitalist conglomerates. In the period preceding the second world war, the economic basis of nationhood became more and more pronounced and got entrenched in statecraft.

CAPITALISM'S NEW FACE

In the present phase of capitalism referred to as globalisation, such economic basis of defining, understanding and/or perceiving the 'nation-state' has become not only insignificant for the market but also an obstacle in the way of legitimately capturing the resources all over the globe to satisfy the greed of few capitalist conglomerates. One of the fallouts of this trend has resulted in making the economic definition of nation, nationhood and nationalism redundant. The vacuum that is created amid weakening foundations of nation, nationhood and nationalism, has been successfully filled by rightwing fundamentalist forces all across the world. The rise of right-wing fundamentalism parallel to the process of thrusting the 'neo-liberal' agenda came quite handy in terms of meeting the goals without damaging the significance of the time-tested instrument of the nation-state. Today, the nation-states are vociferously playing their role as 'the most omnipotent protective shell' for all kinds of capital to uninterruptedly flow and flourish. The complementarities between 'neo-liberalism and right-wing fundamentalism has made the sailing of the current project of capitalist conglomerates' greed relatively smooth.

FAILURE OF SECULAR FORCES

The unfolding 'neo-liberal' agenda with the rise of Hindutva can be understood in this backdrop in India. Ever since 1990, both the processes of neo-liberalism and Hindutva went hand in hand and complimented the growth of each other. All this while at the level of ideas, a vacuum persisted, lending a feeling of discomfort among those who advocated no barriers, no tariffs and free flow of capital. The question they were faced with was how to keep nationalism going?

None of the progressive secular sections have attempted to find alternate ways of defining India as a nation, whereas fronts led by the RSS have been harping on about the Hindutva definition of nationhood for the past 40 to 50 years. The changing scenario and the shifts in the goalposts of the national discourse have created conditions in which the long discarded and decaying basis for defining nationhood in terms of Hindutva began to attract the attention of sections of the ruling elite and the middle classes. These parallel processes, in turn, put things to the second level where fundamentalism

provides a smokescreen for the adverse effects of globalisation. A look at the parliamentary debates from the 1990s to the present day reflects no significant debate on policy shifts that took away the essence of the spirit of the Constitution of India promulgated in the name of 'We the People'. The parliamentary debates all these years were often about non-issues raked up by right-wing Hindu fundamentalists from time to time. Secondly, the political process of the parliamentary system, that was until 1990 guided by the mobilisation of votes primarily on economic slogans, is not very conducive to pursuing a neo-liberal agenda because it is inherently anti-people. The rise of right-wing fundamentalist forces brings the emotive and metaphysical issues to the centrestage of competitive politics and saves the competitors from the embarrassment of promising concrete economic benefits to the people, which, in any case, they cannot fulfil within the neo-liberal framework.

DECEPTIVE DECEIT

For pursuing the neo-liberal agenda under the conditions of 'parliamentary democracy' (contrary to dictatorship) it becomes necessary to take the public eye away from the negative impact of globalisation and finding alternate ways of explaining the scarcity of jobs, poverty, exploitation and degrading livelihoods. Religious fundamentalism provides a good alternative.

A party is voted to power to bring back the pride of Hindus. And this pride does not create any problems for neo-liberalism. This is the second level of synergy that is observed between fundamentalism and globalisation. The third level is even more interesting. Religious fundamentalism is evolving and helping the markets to sell their wares. *Akshaya Tritiya, Diwali, Navratras, Karva Chauth* and *Chhat*, etc. are promoted as they help market economics. Theologically speaking, Easter is the most important festival for the Christians. But the market forces endorse Christmas as it provides more profits. Thus, this tradition of selective revival and endorsement of festivals gives the rank and file of the fundamentalist organisations adequate engagement and provides the market an opportunity to extend its wings. Hence, the new trend of reviving market-friendly festivals has set in India more recently, in the past 15 years or so. Ideologically, while globalisation is intolerant of decentralisation, democracy and diversity in the economic sphere, the right-wing religious fundamentalists have similar positions in the socio-political sphere.

MASTERS OF THE UNIVERSE

After the debacle at Seattle in 1999, the leadership of the WTO and the World Bank expressed their concern about the levels of democracy which are not conducive for the project of liberalisation and had to be contained somehow. The right-wing fundamentalists obliged the 'masters of the universe' in no time and the tragedy of 'twin towers' took place to change things drastically thereafter. Post September 2001, every government in the world has got the licence to curtail democracy and legitimise State violence on the pretext of countering terrorism in order to pursue the neo-liberal agenda, relentlessly.

The world has changed post 9/11 in a manner that has strengthened fundamentalists the world over. It has provided a kind of a legitimisation of fundamentalism. How do we explain that the 'benefits of crime' of 9/11 accrued only to the nation-states subservient to the neo-liberal project and rightwing fundamentalists of all shades? Otherwise, how can it be explained that a non-state actor like Osama bin Laden is still not traceable while a legitimate head of state, Saddam Hussein, was executed on the pretext of bringing the international villains to justice? Fundamentalist forces are set to become stronger in the future. Today, we are passing through the decisive phase in the struggle between the rich and the poor. Political scientist Prof Randhir Singh has pointed out that there is nothing new with the concept of globalisation, it was capitalism and imperialism and it continues to be the same. The only new attribute in this phase of capitalism is 'secession of the successful'.

The successful in the race of capitalism don't want anything to do with the less successful or the unsuccessful. It is this phenomenon that contributed to the withering of the welfare aspects of the nation-state and 'end of any possibility' of adjustment between the rich and the poor. Peace and prosperity as promised by globalisation have proved elusive. This is a scenario which will marginalise more and more people and, therefore, will create a situation where very few will survive. The poor will have to choose in which way they should die, whether by drinking pesticides or by taking to guns. The degradation of national economic sovereignty and economic and political exclusion are making many youngsters to take to terrorism and violence as a way to achieve their goals. Naxalism is just a synonym for the retaliation the poor have resorted to in the struggle for survival.

— May-June 2007

The Justice of Injustice

Afzal Guru's hanging will reinforce the perception of two sets of legal norms prevalent in a society polarising fast on communal lines.

RAM PUNIYANI

The death penalty given by Supreme Court to hang Mohammad Afzal Guru on October 20, 2006, has been deferred by the President. There are currently two petitions with the President, one demanding Afzal's immediate hanging and the other asking for clemency and reducing his punishment to a life sentence. Guru was one of the accused in the case of assault on Parliament on December 13, 2001, in which, eight security personnel and one gardener were killed. Guru was not found to be part of any terrorist outfit, nor did he play any direct role in the same. In the trial that took place the provisions of International Covenant on Civil and Political Rights, had not been respected. Supreme Court noted that there is no direct evidence of his involvement. The evidence was mainly circumstantial. All three courts including the apex court have acquitted him of the charges under POTA of belonging to either a terrorist organisation or a terrorist gang. Court also noted that the evidence was fabricated. Most importantly, he was not given any worthwhile legal assistance to defend him during interrogation.

When Ram Jethmalani offered to be the lawyer for SAR Geelani, the *Hindutva* goons attacked his office. One also recalls here that the lawyers offering to hold the brief of accused in July 11, 2006 Mumbai blasts were also threatened by *Hindutva* outfit, a real case of cowardly display of pseudo-patriotism. At best, Guru was facilitator in the crime and not a part of directly perpetrating the crime, and the evidence against him is mere circumstantial and that the police lied about the time and place of arrest, fabricated evidence including arrest memos and extracted false confessions. Court noted that he was not a member of any banned organisation, "The conviction under section 3 (2) of POTA is set aside. The conviction under section 3 (5) of POTA is also set aside because there is no evidence that he is a member of a terrorist organisation, once the confessional statement is excluded. Incidentally, we may mention that even going by confessional statement, it is doubtful whether the membership of a terrorist gang or organisation is established." Further that since "The incident, which resulted in heavy casualties, had shaken the entire nation and the collective conscience of the society will only be satisfied if capital punishment is awarded to the offender." So does it mean that the punishment is being given to assuage the collective national conscience? One must add what is presented as this conscience is the consciousness of the section of dominant middle classes.

Many a human rights activist of repute sat on a *dharna* demanding the commutation of the death sentence, to life imprisonment. They issued appeals to the same effect and also have floated

the petitions for clemency. Not to be left behind another section of activists have floated counter petitions demanding nothing short of death penalty for this "terrorist". In various talk shows, the angry audience is hooting down those talking of the facts of the case and asking for leniency in the light of the holes in the story built by the police authorities. There are two major questions involved in the case. One, that death penalty should be given in the rarest of rare cases, and two when world over the brutal capital punishment is being done away with, should we stick to it? The other peripheral issues which are trying to undermine the basic issues are the hysterical nationalism of Hindu right and sections of society who cannot think that the crime of those accused of acts of terror also needs to be proved before they are punished, and that the punishment has to commensurate with the crime. For them once Supreme Court has ruled the doors for clemency are closed.

The base on which Supreme Court has given the judgment has been built by the police with methods which are questionable, which have also been reprimanded by the court in this case. The argument on the other side is that if Guru is not hanged it will be an insult to those who have laid their lives for defending Parliament. And that other terrorist acts a la Kandahar may be undertaken to bargain for his release. The other question, which has got mixed up with this, is the fate of peace process, which is going on in Kashmir and South Asia as a whole. In the visual media debates, one can see the hysterical nationalism oozing from every pore of Hindu right wing and some others.

Some Muslim spokespersons of this or the other party are finding this as the best opportunity to wear their patriotism on their sleeves by taking blinded firm positions against any consideration of clemency. This became most obvious when Mukhtar Abbas Naqvi of BJP went to the extent of denying that Bhagat Singh's kin can ever make a clemency petition in this case, to the loud applause of the studio audience. As matter of fact Bhagat Singh's kin Prof Jagmohan Singh and Anand Patwardhan, the noted documentary filmmaker and rights activist, had issued the appeal carried by the media. It is unlikely that the BJP spokesperson would have missed it; any way some times even feigned ignorance is bliss to pursue one's political assertions! The response of letter writers in the newspaper columns is no different. Most of them demanding the blood of this 'terrorist'! Nothing else can reflect the state of social common sense in the society. By now communal violence has become passé in the society. It is justified to the extent that those involved in this are neither punished nor even looked down upon. On the other hand anybody remotely linked to acts of terror can be hanged without any pangs of conscience, communal patriotism at its worst on display. While Supreme Court deserves all the respect, one has to see that the primary investigation done by the police, whatever its flaws forms the base of the judgment. When that investigation has holes, should it be accepted as it is presented? When the primary culprits are either dead or absconding, can the whole truth be out'? Or is it that somebody has anyway to be punished to quench the thirst for revenge, and who better than the one who has a Muslim name and happens to be from Kashmir.

The whole trial of Afzal needs to be looked at again; the flaws of the investigation, the weakness of and deliberate violation of norms by police authorities and the absence of competent legal assistance to Afzal should alert us to the fact that something is seriously amiss in the whole story. The worst fallout of hanging of Afzal will be that the real truth will remain buried in the shoddy investigation and the real culprits may not be apprehended at all, who so ever they are.

Mere being guided by Islamophobia is no guarantee for the correctness of the story of prosecution. Afzal's letters and the appeal of his wife have a lot to tell which has been ignored. Even the role of media in reaching Afzal to hangman's noose should be looked at carefully; we need to question that 'trail by media' should not become the base of our legal system. The quality of the judgments is the backbone of the strength of democracy. State is all-powerful to hang someone on the shoddy ground but at the same time it will be hanging the very concept of a just legal system. Lets have a look at the vulnerability of Afzal Guru, a Kashmiri, a poor man and an ex-militant not being able to afford the legal cover. Is that not ground enough to re-look at the case? Even the latest verdict of apex court, that presidential pardon is subject to review by the same system, which has given punishment, nullifies the very basic of the provision of presidential pardon. It needs to be debated whether the President will have this power or from now on there will be no appeal once the apex court has given its verdict even if that be based on the investigation full of gaping holes.

Kashmir has been reduced to 'our' real estate, where we are posting lakhs of our soldiers to deal with couple of thousand of militants! Surely if there is one Indian soldier for every seventh Kashmiri, no wonder Kashmiris will see it as an occupation army. After having said that, the punishment being meted out to Guru is not commensurate with the crime done by him, one will also endorse that the very notion of capital punishment is nothing but barbarism, and it does not become dignified if it is given to a suspected terrorist. Many of those otherwise swearing by non-violence are so communalised at core that they are at the forefront of some or other moves demanding the hanging of Guru.

One can understand that for the RSS and its affiliates this is the golden opportunity to display their patriotism, partly also to wash the sin of accompanying the terrorists to Kandahar by one of their ministers. One can also understand the success of RSS in communalising the social thinking to the extent that now truth and humane values have ceased to matter in the face of communal thinking. Justice is being converted into revenge and punishment is meant to further communalise the society rather than a means of reform, rather than being an occasion to introspect as to why such crimes are going on. Surely, no one is born a terrorist and no one likes to resort to these means by choice. What are the deeper circumstances due to which these acts of violence are taking place needs to be given a thought. One understands that terrorism is a mere symptom of the underlying disease, which has roots in injustices somewhere. One understands killing the terrorists cannot finish the terrorism. For that the underlying causes have to be addressed.

The double standards of our society and legal system are becoming glaringly apparent. The perpetrators of communal violence not only get away with their crimes but also sometimes they get promotions, as in the case of Ramdeo Tyagi of Maharashtra, the one who led the attack on Suleiman Bakery in Mumbai during 92-93 riots. Hundreds of police officials who have been named in the inquiry commission reports are enjoying the 'fruits' of their crimes of omission and commission. The long arm of law could not even touch Bal Thackeray and Narendra Modi, who have been the main architects of Mumbai and Gujarat riots respectively. On the contrary they landed up increasing their political clout after presiding over these genocides. While the perpetrators of Mumbai riots are having a gala time, the culprits of subsequent bomb blasts are being meted out the punishments due to them. The general impression is gaining ground in the society that by now there are two legal systems in the society. One for the followers of Hindu communalism, where killer of Pastor Graham Staines, Dara Singh, is spared the noose and is hailed as *Hindu dharma rakshak* (protector of Hindu faith), the perpetrators of communal violence who get away with ease. The other one is for those who belong to minorities. In their case even the remotest association with the terror attacks is ground enough for hanging or the severest possible punishment.

In Kashmir, Indian army is seen as the occupation army, thousands of innocents have been tortured by this army, and Chittisinghpura is just a tip of iceberg. The hanging of Maqbool Butt in 1984 did give a feeling of alienation and later a boost to militancy. Who do we blame for that? Those calling for a hangman for Guru surely are bent upon repeating the process. Nation can watch the hanging of those who have not committed the crime of such a severe proportion, but while hanging them what processes will be unleashed need to be seen overcoming the communal myopia. We must distinguish between the hysterical nationalism of the likes of those demanding the hanging and the humane nationalism wanting to call for reconsideration of the punishment meted out, to quench the feverish pitch of communalised sections of society. This hanging will surely reinforce the perception of two sets of legal norms, which are prevalent in the country.

— *November-December 2006*

In Defence of Afzal

The record of the trial court shows that Afzal Guru did not receive a fair trial. His case needs no embellishment, no falsehoods. The president should proceed on the basis of the evidence on record.

COLIN GONSALVES

When I was brought in to defend Afzal Guru in the high court and I studied the trial court proceedings, it was clear that apart from the appreciation of evidence, his case rested on two gross infirmities. The first was trial by media, which rendered the doing of justice to Afzal impossible, and the second was that the trial court denied him a lawyer. Afzal was handcuffed in the office of the special cell and before his trial could begin the police called in the media to broadcast a nationwide 'confession' on primetime television. Such a 'confession', though inadmissible in evidence had a huge impact in the country and a fair trial thereafter became nigh impossible.

MEDIA TRIAL

Prior to making such statements, Afzal was not informed that he could consult a lawyer nor was he permitted to do so. He had a right to a lawyer from the moment of his arrest. Any lawyer would have advised his client not to speak to the media. As a result of this trial by media, I argued that both the trial court and the amicus had been biased. Bias is insidious. The subconscious is affected. Trial by media is the anti-thesis of the rule of law and makes a fair trial impossible. ACP Rajbir Singh in the testimony stated, "I allowed media to interview accused Afzal in my office under the consent of my senior officer, namely DCP."

The high court dealt with these arguments in detail setting out not only the Indian decisions cited by me but also the judgments of the European Court of Human Rights and also the US Supreme Court.

Though my arguments for a retrial were rejected, the high court observed, "It has indeed become a disturbing feature that the accused persons are brazenly paraded before the press and are exposed to public glare in cases where test identification parade arise, weakening the impact of identification. What is fundamentally disturbing is the fact that custody is given by the court. This custody is not to be misused."

LEGAL AID

Afzal was not given a lawyer in the trial court. He wrote to the judge saying that he needed a competent senior advocate and suggested four names. The judge enquired from two of the advocates present in the court, who declined, and did not pursue the enquiry any further. He then appointed a lawyer for Afzal. When Afzal empathically said that he did not want this lawyer to represent him and the lawyer himself informed the court that he wished to withdraw, the court appointed the lawyer to assist the court. Assisting the court is one matter. A defence lawyer for

the accused is another. Afzal's trial then proceeded without a defence lawyer.

Since he had no defence lawyer, many prosecution witnesses testifying directly against Afzal were discharged without effective and competent cross-examination. No cross-examination was conducted of many witnesses regarding recoveries, including of the mobile phones and sim cards said to be implicating Afzal. No cross-examination was done of prosecution testimony showing Afzal allegedly identifying the dead terrorists. No cross-examination was done on seizure memos and alleged renting of rooms in Delhi. No cross-examination was done on the manner of the identification of the accused, alleged purchases of chemicals or the pointing out memos. The cross examination in respect of Afzal's arrest at Srinagar was done contrary to Afzal's case. On several dates presence of the advocate is not recorded. On some dates opportunity to examine the witness is not recorded. Critical questions regarding the media interview and the recording of the confession were not put to the investigating officer.

As a result, counsel did not consult with defendant Afzal on critical aspects of the trial, made no objections as to inadmissible evidence, made cursory closing arguments, did not make written submissions, presented no case law and often did only a formal cross examination.

It is inexplicable why the trial court insisted on the advocate continuing with the case once the accused had emphatically said that he did not want to be represented by him. It is unfair both to the accused as well as to the lawyer. No lawyer should be compelled to proceed with a trial, especially in a capital case, against his wishes.

The final arguments on behalf of Afzal in the high court covers the illegality of the written confession, the illegal way in which the accused was identified by the prosecution witnesses, the non-sealing of crucial evidence, the failure of the prosecution to call material witnesses, that testimony about the mobile phones and sim cards was fabricated and unreliable, that Afzal's fingerprints do not appear on a computer said to be recovered from him and so on.

DEATH PENALTY

The Constitution permits the sentence of death provided there is a law to that effect. This law is to be found in 354 (5) of the CrPC which permits life to be taken but only by hanging. If this section is struck down by any court as constituting 'cruel, inhuman or degrading treatment', then there will be no law by which life can be taken and consequently the sentence of death cannot be imposed. The argument that 354 (5) CrPC was unconstitutional was made several years ago in Bachan Singh's case and rejected on the basis that there was no medical evidence then to show that death by hanging was cruel, inhuman and degrading.

The challenge to this section was again pleaded in Afzal's case with a view to having the section declared null and void so that if there is no law allowing for the death sentence, the sentence of death cannot be executed. The striking down of death by hanging and the consequent result of commutation to life has happened in several US states and in other countries as well. No argument was made that a new section ought to be introduced. As long as a statute enabling the taking of life does not exist subsequent to a court pronouncement declaring it void, the result is that even a person sentenced to death cannot be executed.

CLEMENCY

Afzal's case before the President, invoking the presidential powers under Article 72 of the Constitution of India, must be made on the basis of truth. It needs no embellishments. It certainly needs no falsehoods. The record of the trial court shows undoubtedly that he did not receive a fair trial. The arguments before the President should proceed on the basis of the evidence on record that would shock anyone's conscience.

— *November-December 2006*

Dealing with "Pornography of Power"

Failure to recognise the right to vote as fundamental right has led to the debate whether politicians with criminal record are eligible to represent the people or not. The right to vote should be treated as a fundamental right.

K.G.KANNABIRAN

To make the Thief disgorge his booty
To free the spirit from its cell
We must ourselves decide our duty
We must decide and do it well
Eugene Pottier: The Internationale

Ensconced in unimpeachable security of tenure, Supreme Court Judges decided to debar People's Representatives with a criminal record from contesting elections. Though the right to vote is the expression of a citizen's political choice and would qualify to be covered by freedom of expression, all over the world this right is not accorded the status of a fundamental right.

Failure to recognize the right to vote as fundamental has led to this debate whether politicians with criminal record are eligible to represent the people. The right to vote as a fundamental right might have put an end to various malpractices in electioneering; the election trails would not have been the farce they had become; the courts would not have accorded the privileges enjoyed by the person accused of a crime; the pattern of exercise of choice by voters would have compelled the courts to recognize the party system and not ignore it as they have been doing all these years; the courts would have been compelled to recognize the existence of a category called political offences with the principle of constructive liability fastened on to the candidate and the political party they represent. Its procedure and practice would have produced a jurisprudence of election regulations and disqualifications.

Instead, the courts by their interpretive methods have been largely responsible in introducing escape hatches for scoundrels, as was done by the Supreme Court by permitting "Hindutva" as campaign material during elections. The disastrous consequences of the judgment are there for all to see. Recognition of the voting right perhaps would have heightened the understanding of politics by the people. Vote as a fundamental right can lead to what Upendra Baxi was arguing for, namely, a fundamental right to clean and incorruptible administration.

When this proposal to debar criminals from contesting the elections came from the court and the Election Commission, the People's Representatives were not prepared to take it from the non-elected heads of these Institutions. All the political parties, who have been in government some

"The Representation of the People (Amendment) Bill, 2002" Versus Supreme Court

- S.C.:- Information to be given whether the candidate is convicted/acquitted /discharged of any criminal offence in the past-if any, whether he is punished with imprisonment or fine?
- Details to be furnished whether prior to six months of filing of nomination, the candidate is accused in any pending case, of any offence punishable with imprisonment of two years or more, and in which charge has been framed and cognizance has been taken by court of law.
- S.C. :- Details regarding the assets (immovable, movable, bank balances etc.) of a candidate and of his / her spouse and that of dependants.
- Liabilities, if any, particularly whether there are any over dues of any public financial institution or Government dues.
- The Educational qualification of the candidates.
  Bill :- A person against whom charges have been framed in two separate criminal cases concerning heinous offences, at least six months prior to the date on which his nomination paper has been delivered, shall be disqualified till his acquittal or discharge in any proceeding, as the case may be.

The above provision will not apply if the criminal proceedings concerning heinous offence has been stayed by an order of a court of competent jurisdiction.

Bill :- (The bill has been silent on these directives and has countered the above guidelines very efficiently.) A candidate has to furnish information only under the Act and the rules and not per as any Judgement, decree or order of any court or any direction, order or any other instruction issued by the Election Commission.

time or other, are fully aware of the practice of all governments to falsely implicate their political rivals and dissenting members in crimes which they have not committed and bending institutions for political settling of scores. It is also equally a fact that corruption is rampant as several reports and judgments of the court will inform us, that quite a few distinguished political leaders were arraigned for white collar crimes and if preponderance of probabilities were to have been the test many of them would have suffered imprisonment.

Politicians have all along been managing the criminal law, and they cannot after half a century of this activity, now allow themselves to be managed by criminal law, not by some vague institution called the subordinate judiciary. Corruption and mayhem are the two major divisions of criminal law. To this the class of crime of Genocide will have to be added after Gujarat. Corruption, which Upendra Baxi called "pornography of power" was always heatedly debated by the corrupt inside the parliament. It is like the Madras pick pocket of the olden days, who when apprehended in the act will wrench himself free and raise the cry "catch thief'. That is why a charge of corruption doesn't disqualify a politician from standing for election. Corruption may be pornography at other times, but it sustains the electoral processes in our Indian Democracy and we always have it washed clean by calling in a retired judge (whether of the Supreme Court or the High Court) to perform the duties of the politician dhobi, whenever it raises a stench and becomes embarrassing.

ECONOMIC TERRORISM

The Indian Penal Code did not make any provision against the plunder of the country's exchequer, the financial institutions and resources for the obvious reason that the British were here for this very activity. Judges interpreting Article 14 scoff at such confusion. The modern scams, which run into thousands of crores invariably gain a banner headline in the press and electronic media and that is about all. We are told that our country' prestigious investigation agency is looking into it and by this very disingenuous method it is put beyond our memory's reach. But we will never see any member of the political government or its loyal opposition suggest that these scams are nothing short of economic terrorism and as such large scale appropriation of public wealth leads to large scale deprivation and therefore calls for a law which is harsher than the TADA or the POTA and that such a statute should refuse bail with a mandatory death sentence at the end.

Every government wanted the court to affirm their repressive policies enacted in the form of statutes but they never wanted the courts to regulate their political conduct. Recall the Special Courts Act. Because it dealt with their conduct there was a Presidential Reference to the Supreme Court. Weighty arguments were ad-

vanced against the creation of special courts for the trial of offences of political corruption. The Central Government began its brief by citing Special Courts jurisprudence from the Rowlatt Act onwards - a surest way of getting the Act struck down. The Court admonished the central government for placing reliance on these anti-freedom struggle legislation for justifying the constitution of special courts. It was intended to be a permanent statute to discipline political conduct.

AN AMUSING BILL

The ruling alliance came forward with an amusing Bill proposing amendments to the Representation of Peoples Act aimed at disqualifying members against whom First Information Reports/Charge Sheets have been filed for the commission of certain stated crimes. Along with heinous crimes were included treason and terrorism as defined by POTA. The proposed amendments were brought about to supersede the directions of the SC and the stipulations of the Election Commission and not to placate public opinion on these aspects. Every amendment suggested had an enhanced litigious content and without any intention either to enhance the competence of the representative or the quality of governance. The prospective candidate has to be accused of two heinous or other crimes referred to in the Bill, within six months before the date of nomination for suffering the disqualification. Supposing the candidate is accused of multiple murders in only one FIR/ Charge Sheet, he is qualified to contest. It is not the freshness of the crime that matters but the gravity of the offence that criminal law takes into account. In respect of earlier crimes, does it mean that the older the crime gets the less heinous it becomes? Will it not foreclose the debate on the sentence the accused (candidate) should be subjected to at the end of the trail. The heinousness of the murder is a criterion for adjudicating on the sentence. But all of them seem to be agreed that appropriating public resources in a big way for self or party aggrandizement should not lead to disqualification from contest. There is this other possibility. A provision relating to treason may blossom into Un-Indian activities leading to the constitution of a committee to inquire into Un-Indian activities, American style. No terrorist would ever contest an election and no elected member will ever become a terrorist after living in that pleasure dome called Parliament. All these members are suffering from a phobia that terrorists target them. The bill itself does not make any sense.

The commencement and closure of this very sensitive debate was so swift that public participation in it was not possible. This was not an unintended move. The opposition's response was as usual a non-starter. In the context of Gujarat elections it provided an opportunity to open up a debate on making genocide a crime. At any rate, the Left in Parliament could have used this occasion for a detailed debate on a severe law to contain the plunder of wealth and avenues of making illegitimate wealth, as in the case of licensing petrol pumps by the representatives of the people and thus could have laid the foundation stone for claiming a fundamental right to clean and incorruptible government, whether it is to emanate from Article 14 or Article 21 it really does not matter. An insurgent response was called for.

Upendra Baxi who propounded this fundamental "right to clean and incorruptible government" in his excellent work on the six invasions of Antulay on the Rule of Law in the Supreme Court, points out:

"In terms of constitutional logic, and its democratic and liberal ends, the recognition of such a fundamental right as originally proclaimed, and every single fundamental right produced by the discourse of judicial power, depends for its efficacy on immunity from corruption in public and political life." The unstated consequences of denying this fundamental right is likely to be exercise of the associational freedom to rebel and the exercise of that right will not be by moving a special leave petition in the Supreme Court.

— October-November 2002

Plugging the Mauritius Route

India has lost thousands of crores of rupees in taxes due to the diabolical ingenuity of several Foreign Institutional Investors.

PRASHANT BHUSHAN

Amidst the fear and tension created by the Genocide in Gujarat and the threat of war between India and Pakistan, a landmark judgement of the Delhi High Court with enormous implications for tax revenue in India, has gone virtually unnoticed. On 29th March 2000, an intrepid Income Tax officer of Mumbai issued a remarkably bold assessment order in respect of several Foreign Institutional Investors which were playing the stock market in India and making huge profits, mainly capital gains, and yet not paying any taxes in India.

Though the Indian Income Tax Act obliges even a non resident to pay taxes on incomes earned in India, these FII's were avoiding paying those taxes by claiming the benefit of the Double Taxation Avoidance Treaty with Mauritius. This treaty signed in 1983 which applies to residents of India or Mauritius essentially provides that a company would be taxed only in the country where it is domiciled. All these FII's, though based in other countries and operating exclusively in India, claimed to be domiciled in Mauritius by virtue of being registered there under the Mauritius Offshore Business Activities Act (MOBA). Companies registered under this Act, are not allowed to acquire any property in, deal with any resident in, raise any funds in, make any investment in or conduct any business in Mauritius. Yet these 'Post Box Companies', had been claiming to be domiciled in Mauritius and therefore claiming the benefit of the treaty. The IT department allowed them to get away with it for many years. And there was no capital gains tax and virtually no tax at all on these companies in Mauritius. So all that a Foreign company had to do, in order to do business in India without paying any tax, was to register itself or a subsidiary as an Offshore Company under MOBA in Mauritius. Naturally, seeing the benign attitude of the Indian Tax authorities, by year 2000, most of the FII's and most of the Foreign investment in India (in the Stock market or otherwise) came to be routed through Mauritius.

Then this proactive ITO tried to put a stop to this blatant tax evasion. He cited Supreme Court judgments to say that the Tax authorities must frown upon tax evasion and lifted the corporate veil of these companies to see their actual place of residence or domicile. This happened to be in different countries in Europe or USA. Thus the relevant Double Tax avoidance treaty would be the one between India and that country. All these treaties provided that Capital gains tax would be levied in the Country where the gains had accrued. Since the gains had accrued in India, he levied Capital Gains tax and also issued penalty notices to these FII's.

All hell broke loose with this order of the ITO. Panicky FII's having gotten used to tax free lunches in India approached the then Finance Minister Yashwant Sinha. He immediately promised them that he would get the order of the ITO reversed and even announced it the next day. And

he delivered on that promise. On 13th April 2000, the Central Board of Direct Taxes (directly under the FM, and directly above the Income Tax authorities) issued a circular to all Tax authorities in India that once a company had obtained a Tax residence certificate from Mauritius, it would not be taxed in India. Of course Sinha's decision, as he claimed, was motivated entirely by fears of foreign investment drying up in India. It obviously had nothing to do with the fact that his daughter in Law, Puneeta Sinha, was the portfolio manager of one of the largest such Foreign Funds operating in the Indian Stock Market, through Mauritius (The India Fund) and her company had earned 5.3 million dollars as 'fees' on the NAV achieved by her fund during the previous year.

The CBDT's circular was challenged in the Delhi High Court in PILs filed by the Azaadi Bachao Andolan and a retired Chief Commissioner of Income Tax, S.K. Jha. It was argued that the Circular violated the Income Tax Act in as much as it mandated the ITO to accept the certificate issued by the Mauritius authorities and prohibited the Indian authorities from examining the real domicile of these companies. It thus effectively subordinated the Indian Tax authorities to the Mauritius authorities which was not permitted by Indian Law. It also encouraged the 'treaty shopping' and tax evasion by these companies which had nothing to do with Mauritius. It had been estimated that the tax thus evaded by these foreign companies in 1999-2000 alone ran into several thousands of crores. It was also pleaded by Mr. Jha that the Indian government be directed to amend the treaty with Mauritius, especially after it had become a Tax haven with characteristic opaqueness about the nature of the companies registered there.

A Division bench of Chief Justice S.B. Sinha and Justice A.K. Sikri allowed the writ petitions on 31st May 2002 and quashed the CBDT circular holding that it was violative of the Income Tax Act and would encourage treaty shopping and tax avoidance by companies which had nothing to do with Mauritius. A double taxation avoidance treaty can only be for avoiding double taxation and not for political expediency or for tax avoidance altogether. The court also said that "the Central government would be well advised to consider the question raised by Shri Shiv Kant Jha who has done a noble job in bringing to focus as to how the Govt. of India has been losing crores and crores of rupees by allowing an opaque system to operate."

This judgement is a landmark because it is for the first time that a court has interfered with the government's decision taken in the name of liberalization and economic policy. Otherwise the Courts have refused to interfere even in blatant cases like Enron which Advani had characterized as 'loot through liberalisation'. Enron was a classic case where the court refused to interfere even when it was clearly shown that the government had prevented the Central Electricity Authority from doing its statutory duty of examining the financial viability of the project.

The complicity of the Indian government in the give away of thousands of Crores of Tax revenue to these foreign companies is only one symptom of the total prostration of the Indian government to private corporate interests, usually foreign multinational interests, that has characterized the New Economic Policy.

The same Arun Shourie who as Editor of the Indian Express had carried out a sustained campaign against Reliance for their various misdemeanors, thinks nothing wrong as Disinvestment minister to hand over IPCL to Reliance even though it violates the Disinvestment Commission's recommendations against creation of monopolies, and even though Reliance had only recently been chargesheeted for serious and substantive (not technical) offences under the Official Secrets Act.

The stated purpose of Disinvestment was to get rid of loss making companies which the government couldn't handle. But in actual fact the main companies handed over to the private sector are precisely those companies which were highly profitable companies in infrastructure sectors (such as VSNL, Balco and IPCL) where monopolies and oligopolies operate and proper competition is not possible. In its enthusiasm to raise money by disinvestment, the Govt. conveniently forgets that the Disinvestment Commission had specifically recommended against covering the budget deficit by the sale of PSU's.

And while the government says that it is optimistic about meeting its target from disinvestment this year, what is conveniently glossed over is the fact that the free reserves (cash in the bank) of many of these companies like VSNL or IPCL were considerably more than the money the government has realized through disinvestment. Thus, they could have realized considerably more by just appropriating the free reserves of these companies!

Assets built up by the government over decades are

being handed over to private companies for a fraction of their replacement cost on the basis that the government is corrupt and inefficient in managing the PSUs. But are these private companies any cleaner? Sterlite who was given Balco has been shown to have siphoned out Crores from the Company to Mauritius based companies of its promoters.

And no one is better placed than Shourie to know about the sharp corporate practices of Reliance. Even the comparatively clean Tatas transferred the free reserves of VSNL to other group companies soon after getting control of it.

Clearly then, Enron is only one case in the systematic plunder of public resources for private benefit that is taking place under the cover of the new economic policy for the last decade or more. What is alarming is the alacrity with which those who criticize these policies when out of power, come to endorse and continue them as soon as they are in saddle.

— August-September 2002

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Harsh Dobhal serves as director with Human Rights Law Network and has been working with *Combat Law* since January 2005, first as its Managing Editor and later as Editor.

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WRITINGS ON HUMAN RIGHTS, LAW AND SOCIETY IN INDIA

A COMBAT LAW ANTHOLOGY

THE PURPOSE OF THIS READER IS TO BRING TOGETHER A COMPILATION OF THEMATICALLY GROUPED ARTICLES FROM COMBAT LAW. THERE ARE THEMES TO WHICH, BECAUSE OF THEIR VERY NATURE AS MATTERS VITAL TO THE INSTITUTIONS OF STATE AND SOCIETY, COMBAT LAW HAS RETURNED FROM TIME TO TIME. BECAUSE OF THE PERSISTENCE OF THESE PROBLEMS AND THE STURDY QUALITY OF THE WRITING IT IS POSSIBLE, BY REVISITING THESE ARTICLES, TO OBSERVE LONG TERM TRENDS AND PATTERNS. THIS READER CONSISTS OF ARTICLES THAT COVER CERTAIN SETS OF PROBLEMS OVER SEVERAL YEARS SO AS TO PRESENT THEM IN THEIR HISTORICAL COHERENCE. THIS COLLECTION OF REPORTS AND ESSAYS PROVIDE BOTH CONTEMPORARY AND HISTORICAL PERSPECTIVES ON A RANGE OF ISSUES THAT ARE VITAL FOR THE FORMULATION AND IMPLEMENTATION OF LAWS, POLICIES AND PROGRAMMES THAT ARE ORIENTED TOWARDS SOCIAL JUSTICE.

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