Compulsory Licenses & Access to Affordable Medicines

Lessons in despair in Gujarat

Urban Planning under the judiciary

FROM THE LAWYERS COLLECTIVE

VICTIMS' RIGHTS
is a monthly magazine that uses law as an instrument of social change. It provides legal information for use by lawyers and activists on issues of socio-legal concern.

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The Fine Arts Faculty of M.S. University, Vadodara has nurtured some of India's most acclaimed artists. Today, the Faculty is under siege by obscurantist forces that claim to work in the name of religion. Since May 9 2007, the students and teachers of the Fine Arts Faculty, Vadodara have been the target of the wrath of religious fundamentalists.

We, the undersigned, condemn the recent attempts by religious fundamentalist forces to gag the freedom of expression and the blatant violation of democratic rights at this prestigious Faculty. We further condemn the collusion of the University authorities with these forces. It is clear that the authorities have acted at the behest of these political forces, rather than in the interests of the students and teachers of the Faculty.

As has been reported in the media, BJP leader Neeraj Jain and his group illegally entered the campus on 9th May 2007 and vitiated the atmosphere in the Faculty, where students had put up their works on display, as a part of their examination procedure. These works were to be assessed by external examiners.

Neeraj Jain and his accomplices barged into the campus on the pretext that some graphic prints and paintings by a student named Chandra Mohan were offensive to their religious sentiments. They mouthed abuse and threatened the students and teachers with dire consequences.

At their behest, the police entered the campus illegally, without seeking permission from the Dean or from other University officials, as is the rule. Chandra Mohan, the student-artist was arrested without a warrant, or due procedure. This is in flagrant disregard of the 'Mr. D. K. Basu guidelines' laid down by the Supreme Court, which stipulate that the arrestee has to be informed about both the complainant and the nature of the complaint.

It is unconscionable that the University authorities asked the acting Dean of the Fine Arts Faculty, Dr. Shivji Panikkar, to issue a statement that was tantamount to an apology for displaying such works. The suspension orders against the Acting Dean, Dr. Shivji Panikkar translate into handing over the autonomy of the University to external elements whose main aim is to terrorize the students and the staff.

We strongly uphold the right of every citizen to express his or her opinions on any matter. However, this cannot take the form of coercion, intimidation, and interference in the functioning of autonomous democratic institutions.

We demand:

- Unconditional and immediate release of the student Chandra Mohan
- A complaint be registered against Neeraj Jain by the University authorities
- Immediate withdrawal of the suspension orders against Dr. Shivji Panikkar

Dr. J. S. Bandukwala, Bina Srinivasan, Maya Valecha, Chinu Srinivasan, TapanDasgupta, Ashok Gupta, Renu Khanna, Rohit Prajapati (PUCL, Vadodara)

Nimisha Desai (Olakh - feminist group)

Maya Sharma (Vikalp - women's group)

Trupti Shah, Deepali Ghalani (Sahiyar, Stree Sangathan)
What exactly is the legal meaning that we can ascribe to the word "encounter"? Were it not in the context of death that we were talking about it, it could be a pleasant experience, a friendly one. But add the word "death" to it, and you wonder why the word "encounter" is used at all. Can one encounter death around the corner? And if you did, would you call it an accidental death or an encounter?

"Encounter" then is the word coined by our police and security forces to explain away extra judicial killings, here the assumption is that the only legal killing is by the execution of a death sentence after a trial. That is the guarantee of life in the Constitution that we seem to have forgotten as a nation: "No person shall be deprived of life or liberty except by procedure established by law".

Encounter then is a term coined by the police to describe a hot chase of a criminal trying to escape from the law or from custody, an inability to apprehend by lawful means, a danger to retaliatory by the escaping criminal and then the final act of killing as the only way to prevent the escape or an attack. Why this should be described as "encounter" I do not know except if it be to describe the fact that it is an unexpected and sudden meeting with a criminal, who is attacking and the need to counter attack and kill arises. This is beginning to sound almost like a chase of a beast of prey in the wild for a hungry lion. And that is exactly how an "encounter"is carried out. Bollywood has perfected this scenario in several celebrated movies.

There is no sanction in law for such "encounters' but they have been with us for a long time now. They are better described as murder by men in uniform. Even that is debatable, one wonders if they are in uniform when pulling the trigger finally.

They have come to be legitimized partly, as we know, by acceptance by the middle class of the killings of so called terrorists, partly by the elimination of "gangsters" who cannot otherwise be brought to trial, partly for the elimination of political rivals (remember the killing of Hiran Pandya, a Minister in Gujarat, for whose killing there is yet no explanation? Such middle class acceptance cannot justify legal acceptance of these killings?Yet in a recent interview to the press, K.P.S.Gill said that encounter killings are sometimes necessary!Encounter deaths have gone unaddressed partly because the Supreme Court of India has not taken the issue seriously in the past. Those responsible for the cremations of thousands of unidentified persons in Punjab after operation Blue Star in "encounter" deaths have not been made accountable for the killings and the human rights lawyer who brought the case to court has been murdered.

However, we do see winds of change now. In Kashmir, high ranking officers in the Army are being prosecuted for the killings in the valley in false "encounters". In Gujarat, thanks to the intervention of the Supreme Court of India, police officers are being prosecuted. Unless the impunity enjoyed by our Chief Ministers and all other ministers is ended, the encounters will not end.
SC: Govt has no data, quota stayed

The Supreme Court stayed the 27 per cent reservation for Other Backward Classes (OBCs) in elite educational institutions like IIMs and IITs. It ruled that the 1931 census could not be relied upon for identifying the OBCs for the purpose of providing reservation. A batch of petitions were filed by various organisations challenging the decision as being ultra vires (unconstitutional). They claimed that there was no relevant data on the number of OBCs in the country.

SC held that Article 6 of the Constitution was not applicable since no data on who constitutes OBCs in India was collected in the last 76 years. The bench held that if the Government can provide the court with authentic data on who constitute the OBCs in India, then reservation may be implemented in favour of people who genuinely need it.

The Indian Express, March 30, 2007

Rape victim a complainant, not a defendant: Pak Islamic body

A government-backed constitutional body on Islamic ideology in Pakistan has said that a rape victim should not be required to produce four witnesses to file a complaint as stipulated by 'Hudood' laws brought in by former military ruler Ziaul Haq.

The Council of Islamic Ideology (CII) unanimously ruled that rape ('zina-bil-zabr') and adultery - consensual sex other than with spouse ('zina-bil-raza') - are two separate crimes, endorsing the women protection law enacted last year. The law for the first time has done away with the stipulation that a rape victim has to produce four Muslim witnesses to back her charges, failing which she herself would be prosecuted for adultery.

Once acquitted, the accused could not be punished under any other law unless he or she refused to give a statement under oath or confessed to the crime, the CII said.

The Times of India, April 2, 2007

Court urged to review order on police reforms

The Centre has sought a comprehensive modification of the Supreme Court order on police reforms, expressing its inability to implement the directions in the present form.

The Centre has sought changes in the court's direction to set up a National Security Council and to include the heads of the central paramilitary forces as permanent members in it, fix a minimum tenure for Director Generals of Central Paramilitary forces besides certain other points of the September 22, 2006 order.

The court fixed April 9 to take up the matter.

In an affidavit filed in the court, Cabinet Secretary B.K. Chaturvedi said that the Home Ministry was examining in consultation with other concerned central ministries, the Model Police Act prepared by the Sorabjee Committee. He said a Bill would be introduced in Parliament in the current year for enacting a New Police Act applicable to the Union Territories.

The Hindustan Times, April 3, 2007

HC: Muslims in UP not minority

The Allahabad High Court ruled that Muslims will not be treated as a religious minority in the state of UP any more on consideration of materials on record including various census reports.

The judge gave the ruling after considering various criteria. According to the 2001 Census, Muslims are 18.5 per cent of UP's total population.

The order was passed in the Anjuman Madrasa Noorul Islam Dehra Kalan versus State of Uttar Pradesh case. The madrasa of Ghazipur district had challenged out of turn grant-in-aid to certain other minority institutions and alleged corruption.

Justice Srivastava also issued a notice to the Centre and the UP government to take appropriate steps to modify an October 23, 1993 notification issued by the Central government on the grant of minority status.

The Times of India, April 6, 2007
More teeth to anti-sati law

The Centre is close to finalizing changes in the anti-sati laws that include treating women attempting to commit sati as a victim and not as an offender.

The proposed amendments aim at making the community more answerable for any incident of sati. It has been suggested by the ministry that a collective fine should be imposed on the entire community when a sati incident takes place and that the panchayat functionaries should be held responsible for implementation of the Act.

The Times of India, April 9, 2007

HC rules in favour of inter-religious marriage

The Bombay High Court and the MP High Court came to the rescue of a Muslim-Hindu couple, Mohammed Umer and Priyanka Wadhwani, facing death threats from Bajrang Dal after their marriage.

Umer converted to Hinduism and got married in a traditional Hindu ceremony. The couple's petition filed in the Bombay High Court alleged that his brother in Bhopal was detained illegally.

The Bombay High Court ordered the Mumbai police to provide protection to them.

The judges also restrained the Bhopal police from arresting Umer against whom a case of kidnapping was registered at the behest of the girl's parents.

The Bombay HC judges interviewed Priyanka in their chamber where she reiterated that she was an adult and had left her parents' house of her own will. The judges also asked the Bhopal SP to file a reply to the couple's petition by April 18.

Madiya Pradesh High Court in Jabalpur directed the state government to provide security to the newly-wed. The ruling was given on a writ filed by Mohammed Samin, one of the brothers of Umer.

The Times of India, April 13, 2007

Steps to stop sexual harassment in courts

A committee has been constituted by the District Judge Veena Birbal to look into complaints of sexual harassment. "All women employees can feel free to approach any of the members of the committee directly to air any of their grievances or can send their complaints to any of the members in a sealed cover," the judge said.

The District Judge has conveyed that all complaints of women employees would be looked into "in confidence" as part of the measure to not to disclose their identity.

The Times of India, April 16, 2007

Gram Nyayalayas Bill gets cabinet's approval

The Union cabinet approved the law ministry's proposal to introduce a Bill seeking to provide judicial service at the doorsteps of villagers through the concept of "gram nyayalayas" in the Budget Session of the Parliament.

The Bill provides for the establishment of village courts for every panchayat or for a group of contiguous panchayats throughout the country except in Jammu and Kashmir.

The "gram nyayalayas" would be the lowest court of subordinate judiciary in a state and would be in addition to regular civil and criminal courts. These courts would exercise both civil and criminal cases of "simple nature as specified in the schedule of the proposed legislation."

The Times of India, April 13, 2007

FROM THE LAWYERS COLLECTIVE 0!
Apex court order on Legal Services Authority

The Supreme Court has held that only a sitting Judge of the High Court concerned can be appointed Chairman of the State Legal Services Authority (SLSA). A writ petition was filed by the Supreme Court Bar Association alleging that appointment of a retired Judge of the High Court as Chairman of the SLSA concerned in different States “falls foul of the desired legislative effect.”

The Bench said: “In the affidavit filed by the National Legal Service Authority, it has been accepted that the functioning of the SLSAs, where retired judges have been appointed as Chairman, is not satisfactory. There is ample scope for favouritism in appointment of a retired judge.”

Only when unusual difficulties exist, a retired judge may be appointed.

Doctors to be told to certify medical waste

In an attempt to check the skewed sex ratio — Gujarat has the fourth lowest sex ratio in the country — soon, doctors across the State will have to certify that the medical waste they dispose doesn’t contain remnants of the female foetus. According to State Minister of Law and Health Ashok Bhatt, the department will ask doctors to follow the norm.

The government has brought out a General Regulation (GR) on Friday — under which doctors prescribing medicines such as Misoprotosol (used to treat colitis and ulcer), which also causes abortion, will have to certify why and to which patient this medicine is being prescribed, so as to check the abuse of such medicines.

The state government may also ask gynaecologists from the cities to provide the sex ratio of the children born in their clinics.

Wrong judgment no ground for punishment: SC

The Supreme Court has held that a wrong judgment or wrong interpretation of law by a judicial officer in a case cannot be a ground for initiating disciplinary proceedings or awarding punishment to the judicial officer. Appellant Ramesh Chander Singh, a judicial officer in Uttar Pradesh, was charged with accepting a bribe for granting bail in a case. An inquiry was held and it came to light that the respective courts rejected the bail applications twice on merits. It was alleged that he granted bail on the third application in utter disregard of judicial norms and on insufficient grounds and it appeared to be based on extraneous consideration. The Full Court of the Allahabad High Court imposed a major punishment of withholding two annual increments of the appellant with cumulative effect and subsequently he was reduced to a lower rank.

The High Court dismissed his writ petition. The Supreme Court held that the higher courts after hearing the appeal may modify or set aside erroneous judgments of the lower courts. The Bench set aside the impugned judgment and directed that the appellant be immediately posted to the cadre of District Judge and paid all monetary benefits due to him.

Court orders probe into “ominous pattern” charge leveled in anonymous letter

Reacting with alacrity to an anonymous letter indicating an ominous pattern in acquittal of accused persons belonging to rich families in three murder cases here, the Delhi High Court directed the Special Investigation Team of the Delhi police investigating witnesses turning hostile in the Jessica Lal murder case to probe the fresh charges.

The anonymous letter referred to three murder cases involving people belonging to well-off families who were
acquitted due to purported contradictions between the evidence of eyewitnesses in the cases and forensic opinion on the use of firearms.

In all the three cases the ballistic expert was the same person – Roop Singh of the Rajasthan Forensic Laboratory – who had expressed his inability to give any opinion on the cartridges used in the murder of ramp model Jessica Lal in the absence of the firearm used.

The Bench asked the Special Investigation Team of the Delhi police to investigate whether there was any nexus between Roop Singh and the investigators, the advocates and the courts connected with the three cases and to file a report about the progress of investigation on April 27.

The Hindu, April 24, 2007

‘Arrests made to protect Modi’

H M

Gujarat Police arrested three IPS officials on a charge of murder for their alleged role in the death of one Sohrrubudin Sheikh, who was allegedly killed in a gun battle on November 26, 2005 during a joint operation by Gujarat's Anti-Terrorist Squad (ATS) and Rajasthan Police in a fake encounter in 2005.

Those arrested are Inspector General (border range) D G Vanzara, Rajkumar Pandayan, a superintendent of police with the Intelligence Bureau, and an IPS officer from Rajasthan whose name was not released.

Police falsely claimed that he was an Lashkar-e-Toiba (LeT) operative on a mission to kill the chief minister Narendra Modi. He also had his wife Kausar Bi with him. She is still missing.

Sheikh was traveling from Hyderabad to Sangli in Maharashtra with his wife Kausar Bi when the Gujarat ATS and the Rajasthan STF picked them along with a third unidentified man from an inter-state bus.

Sohrrabuddin's brother filed a plea in the Supreme Court that his brother was killed by the ATS squad while traveling from Hyderabad to Sangli in Maharashtra. Following a CID probe, the Gujarat government admitted in the court that it was a fake encounter.

Haryana judge indicted for sexually harassment and promoted

A senior judicial officer of Haryana, Rajinder Kumar Bishnoi was indicted for alleged sexual harassment by a High Court judge has been promoted as a District and Sessions Judge by the Punjab and Haryana High Court.

This despite the fact that the High Court judge found evidence against him “prima facie” proved, passed severe strictures for undermining “the faith of the people” in the judiciary and recommended legal action.

In his 23-page report dated December 18, 2006, which was submitted to the Chief Justice of the High Court, Justice Pal recommended action against Bishnoi. Justice Pal said that Bishnoi's acts of sexual harassment which include, verbal assaults, writing anonymous letters, trespassing into the house of a lady judge and “trying to outrage her modesty in an inebriated condition” constituted criminal offences under the Indian Penal Code.

However, on April 5, when the full court of the Punjab and Haryana High Court met to finalise postings of senior judicial officers of Punjab and Haryana, it cleared Bishnoi's promotion.

In one of the cases, according to Justice Pal's report, Bishnoi allegedly harassed a woman judicial officer, a widow, when she was posted as a judicial magistrate when Bishnoi was Additional District and Sessions Judge, Sonipat. Bishnoi allegedly started making phone calls to her, sometimes as many as five times a day. On one occasion, he allegedly told her that she resembled actor Aishwarya Rai, the report says.

One evening, according to the report, Bishnoi allegedly barged into her house in an inebriated condition and tried to molest her and followed her to her parents' house at Bathinda and to Delhi, where she had gone for a training programme, the report says.

The Indian Express, May 2, 2007

SC admits PIL on Islamic and Shariat courts

The Supreme Court admitted a PIL filed by Delhi-based advocate Vishwa Lochan Madan in 2005 seeking dissolution of such courts on the ground that they were acting like a parallel judicial system.

The Centre has maintained that the decision of these courts are advisory in nature and cannot be imposed or enforced on anyone. This does not amount to interference with the country's judicial system.

The Hindu, April 6, 2007
High Court finds CBI report inconclusive

The Central Bureau of Investigation report on the March 14 police firing at Nandigram was inconclusive, a Calcutta High Court Division Bench said. On March 15, acting partly on a PIL, the Bench had ordered the CBI to visit Nandigram and submit a report. Today, the Bench asked Advocate General Balai Roy about the prevailing situation in Nandigram. Roy said he was not told about the situation since March 24. The Bench directed him to place a report on the present situation before it on Thursday. The Bench read out a paragraph of the CBI report, which it had kept in a sealed cover after the agency filed it on March 22, and said the government's report and the report prepared by the CBI should be compared.

The Indian Express, May 2, 2007

Hearing on suspended Pak CJ stayed

Pakistan's Supreme Court suspended on Monday a judicial panel's hearing into accusations against the country's suspended top judge, pending a decision on a challenge to the panel, the judge's lawyer said.

"The Supreme Court has stayed the proceedings of the Supreme Judicial Council (SJC) and has recommended the setting up of a full bench to hear the chief justice's petition," Tariq Mehmood, a lawyer for suspended chief justice Ifitikhar Chaudhry, said. Chaudhry, suspended by the government on March 9, had challenged the competency of the SJC and had asked the Supreme Court to take up his case.

A five-judge bench headed by Javed Butter hearing Chaudhry's petition challenging the reference of allegations of misconduct and misuse of power against him stayed the proceedings of the five-judge SJC headed by Acting Chief Justice Rana Bhagwandas. Pakistan President Pervez Musharraf had referred the allegations of misconduct and misuse of power against Chaudhry in March after suspending him.

Meanwhile, Pakistan Prime Minister Shaukat Aziz said, the government has the option of imposing an emergency as it confronts a judicial crisis following President Musharraf's attempt to sack the top judge.

The Times of India, May 4, 2007

FIR against minister for crib deaths

In a major embarrassment to the ruling Left Democratic Front, an FIR was registered on Friday against Kerala health minister P K Sreemati and six others for the crib deaths at the government-run Sri Avittam Thirunal Hospital.

On a complaint by a local BJP leader, a court had on Wednesday asked the police to book the minister and others following the deaths of at least 38 newborns in the hospital since January due to bacterial infections caused by unhygienic conditions. The others named in the FIR include hospital superintendent Rajmohan, two doctors, nursing superintendent and labour room assistants.

The Hindu, April 19, 2007

Court presses for Dawood sister arrest

On Monday, acting principal judge A V Nirgude asked if the crime branch of Mumbai police was "serious" about the case of extortion involving Parkar while ordering her arrest. He gave the police until May 16 to carry out his orders.

The matter came up during the hearing of an anticipatory bail plea filed by estate agent Chandresh Shah, who had played a mediator in a real estate deal between builders and Parkar and her associates. The deal subsequently
collapsed but an amount of about Rs 30 lakh remains in dispute.

Police officers present in the session's court assured the judge that all possible measures were being taken to trace Parkar.

Parkar was named as a wanted person in the case when an FIR was registered on April 21. But in subsequent days, she could not be traced.

The Times of India, May 8, 2007

Manjunath case: HC to hear bail plea

The Manjunath Shanmugham murder case came up before the Lucknow bench of the Allahabad High Court. Four of the eight accused, sentenced by the Lakhimpur district court, have approached the high court with bail appeals. The hearing is scheduled to be held on May 9. Prime accused Pawan Mittal was given capital punishment in the case involving the murder of IIM alumni and Indian Oil Corporation official, Manjunath.

The Times of India, May 8, 2007

Court asks Delhi hospital to explain boy's amputation

The shocking story of medical negligence that led to a one-year-old child having his foot amputated has moved the Delhi High Court to ask the concerned hospital for an explanation.

In January, a fractured leg brought Jai to the government-run Safdarjung Hospital in the Capital where his limb was plastered below the waist. However, the skin festered under the cast and the foot started to detach, necessitating its surgical separation on March 5.

A division Bench asked the Safdarjung Hospital and the central government to file their replies by Aug 3 on alleged medical negligence meted out to Jai. The court also appointed Jubeda Begum, an advocate, to assist the court in the matter. According to a preliminary report submitted to the court, the child's leg was plastered so tightly that a sensitive nerve got pressed, leading to insufficient blood supply in the limb.

Despite lodging a complaint against the concerned doctors, the poor tailor said the police were yet to initiate any action.

The Times of India, May 8, 2007

Centre wants Constitution Bench to hear OBC row

The Centre made a fresh plea before the Supreme Court for referring to a Constitution Bench the issue of 27 percent OBC quota in elite educational institutions contending that the two-member bench cannot adjudicate the matter.

The Bench resumed hearing in the matter, Solicitor General G Vahanvati pleaded that the two Judge Bench cannot adjudicate the matter as it involved substantive question of Constitutional law.

The Bench made it clear that it was not averse to referring the matter to a Constitution bench. However the courts pointed out, that many statutory laws were challenged for their Constitutional validity but were not necessarily referred to the Constitution Bench.

The Times of India, May 8, 2007

SC stays death of tandoor murder accused

The Supreme Court on Monday stayed the death sentence on former Congress leader Sushil Sharma, who was convicted in the sensational tandoor murder case.

A Bench of Justices S B Sinha and Markandey Katju, while admitting the appeal filed by Sharma, who killed his wife Naina Sahni in 1995, referred the matter to a three-judge Bench for further hearing.

The former Youth Congress leader was sentenced to death by the Delhi High Court.

The Times of India, May 8, 2007
‘Stop recovering fine’: HC to MSEDCL

The Nagpur bench of the Bombay High Court directed the Maharashtra State Electricity Distribution Company Limited (MSEDCL) not to charge compensation from the consumers found indulging in power thefts.

The MSEDCL moved a writ petition asking to recover fine from such erroneous consumers under Section 31 (E) of the old Electricity Act. The MSEDCL plea was rejected as the old Electricity Act has ceased to exist and has been replaced by Electricity Act, 2003.

The court also observed that there can be no interlocution or interim provisional assessment in the matter of power theft as neither section 135 nor section 138 of the Electricity Act, 2003 provide for it.

While partly allowing the writ petition, without issuing directives as regards costs, the court quashed and set aside the demand notices issued by the MSEDCL to the consumer-petitioners—who hail from Akola, Nagpur, Gondia and other parts of Vidarbha.

The court further clarified that the MSEDCL has to appropriate the amount if already recovered by them as fine from the consumers-petitioners and they are free to adjust such excess payment if any, towards electricity charges in current future bills.

The consumer also approached the appellate authority which provided some relief to them. The bench made it categorically clear that the MSEDCL should not take any coercive action against the consumers or charge them exorbitantly, unless the offence of power theft was amply proved.

It is also worth noting that the Lok Sabha made stealing electricity a cognizable offence and cleared the electricity (amendment) bill 2005 envisaging setting up special courts to prosecute those indulging in power theft.

Supreme Court admits SLPs against Cauvery Tribunal award

The Supreme Court on Monday admitted three special leave petitions filed by Karnataka, Tamil Nadu and Kerala challenging the final award passed by the Cauvery Water Disputes Tribunal on February 5. The Union Territory of Puducherry, also a party to the dispute, has not filed an SLP.

Observing that important questions of law were involved in the matter, the Bench referred the petitions to the Chief Justice of India for posting them before a larger Bench.

In its SLP, Tamil Nadu said that the Tribunal had held valid the agreements of 1892 and 1924 (between Tamil Nadu and Karnataka). But it did not protect the existing irrigation area in the Cauvery basin of Tamil Nadu. The Tribunal reduced the area from 29.27 lakh acres to 24.70 lakh acres. It erred in granting new irrigation areas in Karnataka. It said that this determination of the areas by reducing the existing irrigated area in Tamil Nadu and allowing the proposed area to be brought under irrigation by Karnataka were contrary to the principle of equitable allotment of water of the inter-State river.

Karnataka in its SLP questioned the methodology adopted by the Tribunal in apportioning water to the three States and to Puducherry.

Questioning the methodology adopted by the tribunal in apportionment of available water, Kerala said that an arbitrary system of gauging had been worked out which was discriminatory and unfair.

He indicated that the basic question involved was the basis for determining who belongs to the OBC and the modalities for the implementation of the policy.

Prisoners to get transparent plastic tiffin boxes

Following the order of the Bombay High Court, the director General of Prisons (DGP) Srikant Savarkar has issued circulars to superintendents of all prisons in Maharashtra asking them to provide transparent tiffin boxes to the inmates while they are leaving the jail premise for court hearings.

The DGP was called to HC pursuant to a public interest litigation (PIL) filed by People's Union for Civil Liberties (PUCL) complaining that since prisoners leave for the court about ten in the morning, they miss lunch, and if they return late, they do not get the last meal of the day too.

On return, they must be given the evening-time meal too, the directive states. A board informing about these directives should be put up inside every jail, and the prisoners must be informed about the directive, it further says.

The Indian Express, May 8, 2007
Pak SC forms full bench for ex-CJ case

The Supreme Court constituted a 13-judge bench to hear ex-Chief Justice Chaudhary's petition challenging the reference of allegations against him by President Pervez Musharraf.

Acting Chief Justice Rana Bhagwan Das directed the bench, headed by Khalilur Rehman Ramday, to hear petitions filed by Chaudhry on a day-to-day basis from May 14. The News reported an unnamed minister as saying that references would also be filed against the judges who had participated in protests against Musharraf. The bench formed today will decide on the merit of Chaudhry's petition questioning the legality of Musharraf's allegations and his suspension, and the competence of the Supreme Judicial Council (SJC) headed by Das.

Das, the only Hindu judge in Pakistan to have risen to the top post in the apex court, has left himself and judges Javed Iqbal and Hamid Dogar out of this bench. Chaudhry's lawyers had objected to the inclusion of two judges saying they were a part of the SJC, whose legality had been challenged.

CET abolition case in Supreme Court

The Tamil Nadu Admission in Professional Educational Institutions Act 2006, which received Presidential assent on March 3, envisages admission to all the professional courses such as medicine and engineering for 2007-08 on the basis of marks obtained by the students in the higher secondary examination. The High Court dismissed a batch of petitions challenging this law. A special leave petition was filed by Minor A.S. Prabhu against this judgment. The Supreme Court was moved questioning the Madras High Court judgment upholding the abolition of Common Entrance Test for admission to professional courses in Tamil Nadu.

The petitioner contended that the impugned legislation was violative of Articles 14 (right to equality) and 21 (right to life and liberty) of the Constitution as the methods of 'normalisation' for finding the 'relative marks' of the students in different streams of study would create more inequality. He said the Supreme Court had conclusively decided that to determine uniform standards in education, admission through the CET was the best method, which had been approved by the Medical Council of India and the All India Council for Technical Education.

The SLP said that the High Court while upholding the law had exceeded its authority by considering irrelevant, extraneous and extravagant factors such as social justice instead of relying on constitutional principles.

Produce file on Cabinet advice to President on BJP plea: court

The Supreme Court on Tuesday asked the Centre to produce records on the advice/opinion given by the Cabinet to President A.P.J. Abdul Kalam on the BJP writ petition seeking the removal of Election Commissioner Navin Chawla.

The Bench said, "We would like to see the file. After the Right to Information Act, what privilege can you claim? If you claim any privilege, there is a possibility of drawing adverse inference. Keep the records with you as we want to see them."

The petitioner said 205 MPs had submitted a memorandum to the President seeking the removal of Mr. Chawla. The former Attorney-General Soli Sorabjee, appearing for the petitioner, said the matter ought to have been referred to the CEC as envisaged under Article 324 (5) of the Constitution (according to which an Election Commissioner shall not be removed except on the CEC's recommendation) instead of the Union Government. Mr. Sorabjee said this was one instance in which the President could act independently. The actual adjudication on the complaint had to be done only by the CEC, whose decision would be binding on the President. In the instant case, the President was not at the mercy of the Executive and he need not go by Cabinet advice.
FIR not must for all complaints: HC

The Bombay High Court has ruled the police are not required to register a first information report (FIR) every time a citizen files a complaint.

The police may conduct a preliminary inquiry before registering the FIR, said the relevant division Bench. “When the information is of doubtful character, preliminary inquiry is permissible (before registering the FIR),” said the judges, dismissing the petition filed by two Thane residents calling upon the High Court to decide on the issue.

Public prosecutor Satish Borulkar told TOI the judgment would end unnecessary harassment of persons against whom complaints are filed with an ulterior motive.

Man gets bail in rape case

A Mumbai Sessions court granted bail to a rape accused after the Oshiwara police filed a chargesheet a day later than the stipulated 90-day period.

The additional sessions judge granted bail to the accused father for the alleged rape of his minor daughter on the ground that when a chargesheet is not filed within the stipulated 90-day period, an accused could make use of the benefits of provisions under the Criminal Procedure Code, which allows him to get bail. Then the prosecution had opposed the bail on the ground that the crime committed against the minor girl was heinous.

HC relies on child's testimony

Paving the way for the child's testimony to be treated as evidence without corroboration in murder cases, the Mumbai High Court reversed an acquittal order and sentenced two persons to life imprisonment on the basis of a child's statement in a 1989 case.

Solanki who according to the prosecution had an affair with Vegada's wife Nanubai murdered Dhanajibhai. Kisan got into Vegada's house and killed Dhanji. Dhanji's eight-year-old daughter, Savita witnessed the incident. However the wife told the police that he committed suicide due to financial worries. The police suspected foul play and charged the duo for murder. However the trial court did not rely upon Savita's testimony without corroboration and acquitted the duo.

Power not a fundamental right: Govt. to SC

The Delhi government told the Supreme Court that people do not have a fundamental right to electricity and it was not the courts job to decide what steps needed to be taken to improve the power situation.

“This court cannot act as a super planning commission. It is not a justiciable issue. There is no legal right involved under Article 21 (Fundamental Right) for a citizen to move the court on power crisis,” Additional Solicitor General Amarender Saran told a Bench of Justice P K Balasubramanayan and D K Jain.

The Bench, which till then was indulgent towards the government on the power crisis, rebuffed the ASG by stating that it was not exceeding its limit and knew its proper jurisdiction.

Mumbai Intl Airport offers 'deal' to clear slums

Mumbai International Airport (MIAL) promised a 'golden handshake' for the estimated 60,000 families living in slums around the international airport, before the Supreme Court bench headed by Chief Justice K G Balakrishnan so that the proposed Rs 5,200 crore expansion plan can go ahead.

The company had appealed to the Supreme Court against the order of the Bombay High Court, which had fixed the cut-off date for rehabilitation of the displaced persons as 1995. The Maharashtra government had earlier changed the date from 1995 to 2000. However, in the High Court order, the date was set as 1995, which the Supreme Court changed to 2000.

The petition was originally filed by Janhit Manch. They alleged that though the World Bank had laid a condition to the Mumbai Metropolitan Region Development Authority (MMRDA) to shift the project-affected people within two-three km of their existing homes, the authorities have not been willing to make the commitment. Most of the slum dwellers work in the airport. They are afraid that they would be shifted to far-away places where they have to find new work. Janhit Manch allege that the state government provided ample land for big developers but none for the poorer sections of society. The promised 'golden shake' comes in the wake of these fears expressed on behalf of the slum dwellers.

The SC said it would be up to the Maharashtra Government and other authorities to consider MIAL's request to extend the cut-off date for the purpose of rehabilitation of airport slums.

Disability can't alter salary

The Bombay High Court ruled that if an employee has acquired disability during service and is found not suitable for the post he was holding then he should be shifted to some other post with the same pay scale. The judgment was passed while hearing a petition filed by B.C. Picnicker, a constable in the Railway Protection force challenging his decategorization after 19 years of service after a medical report found him unfit to use fire arms.

The High court directed the RPF to appoint him at appropriate pay scale.

The Indian Express, May 04 2007

The Times of India, May 02 2007

The Indian Express, May 07 2007

The Times of India, May 07 2007

The Hindustan Times, May 10 2007

Compiled by Sijo Merry George and Dipti Kharude
Traditionally, the criminal justice system has been geared towards protecting the rights of the accused. The victim barely has a voice in this system. The need for victim's representation and the recognition of their rights in criminal cases has been brought to focus in the context of state inaction in the aftermath of the Gujarat carnage. In this article Mehak G Sethi revisits the legal framework within which such rights can be realized.

Need for recognizing victim’s rights

Criminal proceedings are initiated at the behest of the victim and it is the State's prerogative to prosecute offenders on behalf of the victim. The State assumes the role of the offended and takes necessary actions to achieve the ends of justice and to bring to book those who have violated the law. This does not mean that protection of the rights of victims can be ignored by the criminal justice system.

The derogation of the state from its assigned constitutional mandate is nowhere as evident as the events that followed in the aftermath of the Gujarat carnage in 2002. The victims are left at the mercy of a dysfunctional system, in turn defeating the intrinsic values of the concept of justice.

Backdrop

The fire that consumed the Sabarmati Express not only took the lives of the karsevaks returning from Ayodhya but also consumed the entire State of Gujarat. The outcome was a statewide communal upheaval in which the Muslim minority community was exclusively targeted. There was unparalleled loss of life and property, bringing back memories of the communal violence which targeted the Sikh community in 1984 and other incidents of genocide against identifiable religious and ethnic communities.

Thousands of Muslims across the state of Gujarat have survived the murderous mobs and gruesome brutalities meted out to them. However, despite the passage of five years, most of these victims find themselves at the wrong end of the criminal justice system, grasping in the dark, trying to hold on to whatever hope they have left in a system which ought to punish those who have violated their rights.

The police, the investigative agency and the prosecution have been found wanting at various levels. The police, right from the outset, have been reluctant to hear the voices of the victims and have refused to register FIR's. In cases where FIR's have been registered, they are generally perfunctory and are in the form of Omnibus FIR's - which amount to a large number of crimes and cases being clubbed under one complaint/instrument which inter alia undermines the gravity of every individual offence. The investigative wing/agency has failed to fulfill its mandate of carrying out a judicious investigation; this is visible from the fact that a large number of cases were summarily closed, mainly due to lack of evidence. The situation has worsened after examination of the role of the prosecution as part of the Criminal Justice System. The prosecution whose sole aim is to prove the guilt of the accused has in the wake of the riots done little to justify its duties and functions.

In a shocking development, of at least 4000 cases of communal violence reported and registered in the whole of Gujarat, 2000 cases were summarily closed and a large number of accused were acquitted or granted bail without any opposition. The procedure followed in the closure of the cases involved a mere report being made to the Magistrate, stating the lack of evidence. The magistrate, on receipt of such reports, closed the case without any further investigation or consultation with the victim or the witnesses.

The Supreme Court when approached with this grievance passed specific orders for the constitution of a Cell comprising Deputy Inspector Generals...
and Range Inspector Generals to look into the material available in the 2000 cases and to take decisions on whether any further investigations were needed. The Apex Court also instructed this Cell to post the reasons for not reopening the cases on a website. In pursuance of such orders, 1772 cases were reviewed and 1242 were provided for under Indian law, victims' rights can be inferred from and realized through the provisions of the Code of Criminal Procedure, (“CrPC”) and precedents set by various High Courts and the Supreme Court.

These specific rights range from a copy of the FIR and charge sheet being provided to the victims, to their recognizing their right to oppose bail and file protest petitions when cases are closed and bail is granted indiscriminately. This ambit of rights also extends to seeking accountability of State agencies in conducting proper investigations and judicious prosecutions. These are discussed at length in the following section.

I. Victims' right to witness protection

It is a common phenomenon in Gujarat that the police on occasions, have refused to register FIR's on behalf of the victims who have been threatened to withdraw their statements made to the police. The threats arise from the fact that these very victims are witnesses to crimes that engulfed the State of Gujarat during the riots. There are at least 600 such families languishing in relief camps set up after the riots and they are living under threats, in need of immediate protection. In light of the existing situation in Gujarat it is imperative that a Witness Protection Program is set up in consonance with the recommendations contained in the Law Commission Report.

II. Separation of the Investigation Wing from the Law

There are at least 600 such families languishing in relief camps set up after the riots and they are living under threats, in need of immediate protection.

The Supreme Court in Prakash Singh v. Union of India⁴ had observed that in the interests of justice it is of paramount importance that the investigative wing of the police is separated from the law and order police. This would ensure speedier investigation, better expertise and improved rapport with the people. In the wake of the faulty and biased investigation evident from the Gujarat incidents, the separation of the two wings of the police would go a long way in ensuring that judicious investigations are carried out and the rights of the victims are respected.

Ambit of Victims’ Rights

Though not specifically mentioned, victims' rights can also be inferred from the provisions of the CrPC and precedents set by various High Courts and the Supreme Court. These specific rights range from a copy of the FIR and charge sheet being provided to the victims, to their recognizing their right to oppose bail and file protest petitions when cases are closed and bail is granted indiscriminately. This ambit of rights also extends to seeking accountability of State agencies in conducting proper investigations and judicious prosecutions. These are discussed at length in the following section.

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victims are upheld.

III. Filing of Individual Chargesheets in Cases where Omnibus F.I.R.s have been registered.

As mentioned at the very outset, in Gujarat a large number of omnibus F.I.R.'s have been registered, the matter at hand is further compounded when the police submits an omnibus charge-sheet to the prosecution. The situation stands corrected at least in Borsad Taluka in Gujarat, where on the 2nd-3rd of March 2002, different incidents of communal violence resulting in the death of innocent Muslims had been reported. An omnibus F.I.R. was registered on the complaints received which was followed by prejudice. The High Court went on to instruct the Inspector of Borsad Police Station to submit a separate supplementary fresh charge sheet for each criminal wrong committed. Hence, in consonance with the position of law developed by the High Court of Gujarat, instances of omnibus F.I.R's being submitted by the police should be vehemently opposed and the State should make a conscious effort of separating each charge for each individual offence. However this is an isolated improvement and there is need for similar rectifications effected across the whole State. This is a significant lesson to be learnt for upholding victims’ rights.

IV. Victims' Rights to a copy of the F.I.R.

Section 154 of the Cr.Pc. lays out the requirement to reduce any information specifying circumstances of a particular crime to a distinct F.I.R. Section 154 (2) expressly requires that a copy of the F.I.R. is provided free of cost to the complainant.

However from the facts available in Gujarat, victims have been deprived of this right. It is imperative that such a copy is provided to the complainant as he/she has a right to know whether the complaint has been filed correctly and reflects statements made by the victims/witnesses. Considering that the FIR is the foundation stone for all ensuing investigations, it becomes paramount that the State should take concrete measures towards ensuring that the copy of the F.I.R. is supplied to the complainant/victim without any further ado.

V. Victim/witness be given a copy of their recorded statement

Section 161 (3) of the Cr.Pc. provides that every statement made by the witness to a police officer during the course of an investigation be reduced to writing and a separate record is to be maintained for the same. Such statements are imperative to the whole investigation process. These statements are generally eye witness
accounts of events for which justice is being sought. It, therefore, becomes vital that the statements recorded are based on the accounts provided by the victim/witness which can only be assured if a copy is provided to the victim/witness to cross check its content. However, the problem that arises is that Section 161 (3) does not categorically provide for making such statements available to the witness/victim who stands to be prejudiced in case of erroneous recording. This lacuna has been filled in by the Supreme Court’s decision in Ram Jethmalani v Director, where it was laid down that a copy of the statement ought to be furnished to the witness, as a failure causes prejudice to the stating party. It was further held that statements recorded by the police officer or record of acts of such public officers are public documents, within the meaning of Section 74 of the Indian Evidence Act and have to be open to public scrutiny.

VI. Document of Indictment

Under the Cr.P.C. charges are framed by the Magistrate on completion of police investigations. The chargesheet is prepared by the Magistrate empowered to take cognizance of the offence and is based on the investigation report submitted, in the prescribed manner by the officer in-charge of the Police Station. On consideration of the report the magistrate can discharge the accused person, if the charge is deemed groundless or commence trial proceedings. The chargesheet thus pin-points the lapses of the accused and the violations of the provisions of the law. It is a document of indictment. Issuing a chargesheet therefore calls upon the inherent obligation to prove the facts complained of. It is easier to make allegations, but not so to substantiate the same, unless sufficient investigation is carried out and proper care is taken reducing the same to writing. It is possible to prove the charges, if the facts are correctly mentioned and supporting material by way of proof is made readily available. The charges should be specific and should not be expressed in generic or vague terms. This can only be achieved if the complainant/victim is provided with a copy of the charge sheet so that such a copy can be used to corroborate and substantiate the contents of the charge. However there is no distinct provision under the Cr.P.C. which lays down that a copy of the chargesheet is to be provided to the complainant/victim. Here again the decision in the Jethmalani case comes to aid as statements recorded by the police officer are deemed to be public documents hence are to be made available to the aggrieved person/victim of the crime.

VII. Opportunity to file protest petition when closure reports are filed

Victims and witnesses all across the world have an inherent right to voice their views opinions during the various stages of the criminal proceedings. Article 6 (b) of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides “The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: ...(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system. The Supreme Court had, in U.P.S.C. v. S. Papiah held that a closure report by the Prosecution cannot be accepted by the court without hearing the informant. It was opined that there can be no doubt that when, on a consideration of the report made by the officer-in-charge of a police station under Section 173(2) (l), the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the magistrate otherwise. The Supreme Court further stated that, where the Magistrate decides not to take cognizance of the offence on the Section 173 report and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the F.I.R., the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of the consideration of this report.

On examining the case law of the Supreme Court, Section 173 can be viewed to include within its ambit a provision for furnishing a closure report to the victim/informant/witness and hearing his/her objections on the same.

VII. Notice of discharge/ acquittal
Cover Story

Bail of the Accused

In the aftermath of the Gujarat riots, mass acquittals, indiscriminate and unopposed bail have been a common phenomenon. Victims and witnesses have not been consulted or served notices informing them of such developments. Considering the complexity and magnitude of the horrendous acts committed during the communal riots, a provision whereby the victims/witnesses are informed about such acquittals and bail takes high precedence. On most occasions, the victims, on receipt of the notice can approach the courts and provide them with the missing evidence. This would thus justifiably prevent the acquittals and bail of the accused. Similar provisions have been legislated in other countries.

In India, Sections 227 and 232 of the Cr.PC states that upon consideration of the record of the case and hearing the evidence, the Magistrate feels that an order of discharge or acquittal has to be passed respectively; he may do so only after recording reasons for doing so. Even though these provisions do not categorically provide for the delivery of a notice of acquittal to the victim, an inference can be drawn from a reading of the Jethmalani judgment that these recordings are public documents and hence should be made available to the victims and witnesses.

Further Section 439 of the Cr. Pc. confers Special Powers on the High Court or the Court of Session on matters of bail. It does not categorically provide for a right of the victim / complainant to object to the bail granted. This can be inferred from the judgment of the Supreme Court in the case of Puran v. Ramblas4; where it was held that Section 439 recognizes the right of the complainant or any aggrieved party to move to the High Court or Sessions Court for cancellation of a bail granted to the accused.

VIII. Victims' Right to a Counsel

As pointed out earlier, under the existing legal system in India, it is the duty and the prerogative of the State to prosecute offenders on behalf of the victim. But the pertinent question is - what concrete rights does the victim have if the prosecution fails to perform his duties? The only solution to this problem is the appointment of victims' counsel. This can be done under Section 301 (2) of the CrPC which allows a private person to appoint a pleader to assist the Public Prosecutor. Such a pleader can also file written submissions with prior permission of the Court. In addition, reliance may be placed on the Delhi High Court decision in the case of Ajay Kumar v. State and Another5, which stated that "A fair trial does not necessarily mean that it must be fair only to the accused. It must be fair for all. It must be fair to the victim also."

IX. Establishing a Directorate of Prosecution

Canada Victims of Crimes Act 1996

Section 6 (1)(c) states that information must be given to the victim on request regarding:

- The reasons why a decision was made respecting charges
- The date, location and reasons for each court appearance that is likely to affect the final disposition, sentence or bail status of the accused

United States of America Title 42 Section 10606 (b) (7) of the Constitution provides that it is a victim's right to have information "about the conviction, sentencing, imprisonment and release of offender".

United Kingdom - Section 5.25 of the Code of Practice from the Victims of Crime states "The police must inform all victims if a suspect in respect of relevant criminal conduct is given bail by the court in circumstances where the police have made an application to remand the suspect in custody."
The victims' locus standi in the courts is more often than not not acknowledged. This leaves the victims entirely at the mercy of the Public Prosecutor who in several instances have been found to be acting in a biased manner and in some cases bearing affiliations to organizations or persons implicated in the proceedings as is evident from the events in Gujarat. Even where the public prosecutors are not biased they face tremendous pressure due to state's complicity and influences of powerful defendants. The issue can be resolved by creating a Directorate of Prosecution, under the control of the Ministry of Law and Justice. This entails that there is a separate cadre for the functioning of the Prosecutors which would in turn demarcate the working of the police and the prosecutors.

The idea for a Director of Prosecution was born in Law Commissions Report in 1958 wherein it was recommended that an office of a "Director of Prosecutions" be set up with its own cadre. Subsequently, the 154th Law Commission Report of 1996 also recommended the setting up of state level Directorates of Prosecution with statutory status accorded through amendments effected to the CrPC. Neither of these suggestions have been taken on board.

The Supreme Court has also opined along the same lines in the case of S.B Shahane and Others V. State of Maharashtra and Another10, whereby it stressed that there is a need for the separation of prosecution agencies from investigation agencies. It also held that the Public Prosecutors could not be allowed to continue as personnel of the Police Department and should be allowed to function under the control of the head of the Police Department. Finally it directed the various state governments to constitute a separate cadre of Assistant Public Prosecutors by creating a separate prosecution department that is directly responsible to the State Government. A number of states namely, Delhi, Andhra Pradesh, Bihar, Goa, Himachal Pradesh, Karnataka, Kerala, Madhya Pradesh, Orissa, Tamil Nadu and Uttaranchal have established Directorates of Prosecution. An amendment in 2006, Section 25 (A) was inserted in the Cr.Pc. which categorically provides for the creation of a Directorate of Prosecution in every state.

The Andhra Pradesh model is worth a mention. The Directorate of Prosecution ("DOP") in Andhra Pradesh is headed by a Judicial Officer and is under the control of the Home Ministry. This prevents any interference from the Police and assures direct control over public prosecutors at all levels. The public prosecutors are accountable to the DOP and are barred from withdrawing cases without the permission of the Directorate.

Coming back to the situation in Gujarat, despite the filing of chargesheets in 30 cases alone in Anand District alone trails have not ensued. The creation of the Directorate of Prosecution, along the lines of the Andhra Pradesh model, could be the only solution towards solving the problems of a dysfunctional prosecution.

Conclusion

The State of Gujarat has gone through a complete metamorphosis since the riots in 2002, the rapid economic development in certain sectors has erased the memories of the crimes that unfolded five years ago. However, the victims that survived the carnage still languish in the hope of seeking justice. The path towards achieving what is desired has been identified, though not treaded upon. The Supreme Court has ordered for the reopening of the cases. Despite these orders and a perusal of the website which carries the information for not re-opening the cases, it can be conclusively deduced that no concerted efforts were made by the investigative agencies to look into the matters. The reasons advanced are objective and repetitive and in no way point to the needs or even bring to book all those responsible for the heinous crimes.

It is imperative that the State understand that every individual complaint and case is important in its own nature and formation, and hence the criticality for the State to provide detailed reasons for those cases in which decisions not to reopen them have been taken. With regard to the review of the cases by the Learned Advocate General of the State of Gujarat, no reasons were furthered as to why a decision was taken not to reopen the cases. The Learned Advocate General failed to show whether any of the acquittals were a result of deficient evidence at hand, or biased and unfair investigation and prosecution, thus leaving the justice system in a limbo. All these issues stand in isolation, only to be corrected.

What is then needed, is a complete revamp of the existing system and the realization and implementation of the rights, as discussed at length, along with the creation of a mechanism whereby all the issues discussed are put into force and taken to their just finale.

About the Author: Mr. Mehak G Sethi is a Legal Officer with the Civil Rights Unit of the Lawyers Collective in Delhi.
Footnotes:

1. The Hindu, 1st September 2006, Law Commission for witness protection program J.Venkatesan
2. (2006) 8 SCC 1
3. Special Criminal Application no. 329 of 2005
4. 1987 Cr LJ 570 (Del)
5. Adopted by the General Assembly through a resolution 40/34 of 29 November 1985
6. (1997) 7 SCC 614
7. (2001) 6 SCC 338
8. 1986 CRL L.J. 932
9. 1986 CRL L.J. 932
10. 1995 Supp (3) SCC 37

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PIL in Disproportionate Assets Case only in special circumstances

Facts
A writ petition under Article 32 was filed by an advocate with the intention of bringing to light the cases of corruption in the Uttar Pradesh Administration. The petitioner prayed that an appropriate writ in the nature of mandamus be issued directing the state to take action against the sitting Chief Minister of Uttar Pradesh and his relatives for misuse of power and authority to have acquired more assets than the known source of their income. It was further alleged that the Home Minister failed to take action against the respondents under the provisions of the Prevention of Corruption Act, 1988.

The respondents prayed for the dismissal of the petition on the ground that it was politically motivated as the petitioner belonged to a rival political group.

Issues before the Supreme Court were:
1) Is a PIL maintainable in a disproportionate assets case where no right of the Petitioner is violated?
2) Should an enquiry into the matter be disallowed simply on the ground that the petitioner belongs to a rival party?

Judgment
The Supreme Court Observed:

- One of the Respondents holds the important public post of Chief Minister of a very big state in India and the allegations made in the petition have raised questions about his integrity. It is therefore, in his own interest that the allegations be determined by a competent forum.
- PIL is not maintainable to probe or enquire into the returns of another taxpayer except in special circumstances.
- The ultimate test in the case of a PIL should be whether the allegations have any substance. An enquiry should not be shut out at the threshold because a political opponent of a person with political differences raises the allegation of commission of offence.

Referring the matter to the CBI with directions to conduct a preliminary enquiry into the assets of the respondents and to take appropriate action, the Supreme Court held:

a) The court is not in a position to verify each and every entry, the sale deed, the extent of the property, the location and description of the property, the name of the purchaser, the name of the vendee, consideration alleged to be paid and the market value on the date of the purchase etc.

b) An inquiry into the alleged irregularities should not be disallowed merely because the one raising such an allegation is a political opponent or a person with political differences.

c) The Petitioner's personal interest in a proceeding is not to be judged by the Court without going into the details of the subject matter.

Vishwanath Chaturvedi versus Union of India & Others; MANU/SC/1058/2007

Appointment of Sitting Judge as Chairman of State Legal Services Authority: Rule not Exception

Facts
The Supreme Court Bar Association filed a writ petition stating that the appointment of a retired judge as Chairman of the State Legal Services Authority in different states adversely affected the functioning of the State Legal Services Authority. Under Section 6(2) of the Legal services Authorities Act, 1987 the serving or retired judge of the High Court can be nominated by the Governor in consultation with the Chief Justice of the High Court. The petition states that several difficulties arise in states where a retired judge is appointed as a Chairman and that a sitting judge is better able to exercise his powers and deal effectively with the judicial officers, government officials and departments to improve the functioning of the State Legal Services Authority. The petition states that a provision in the Act also suggests that the first choice for the position should be a sitting judge and only when it is not possible to appoint a sitting judge, a retired judge may be appointed in the alternative. All states and union territories were in agreement with the statements made in the petition with the exception of the States of West Bengal, Uttar Pradesh, Uttarakhand and Manipur.

As against the contentions of the petition, the State Of West Bengal argued that the sitting judges of the High Court are heavily burdened with judicial work and are therefore unable to afford sufficient time for implementation of the legal aid programme in the
state. It was also stated that the sitting judge may not want to 'mix with' the general public who may require legal aid.

**Judgment**

The Supreme Court finding no merit in the counter contention opined that the advantage of having a sitting judge as the Chairman far outweighs the disadvantages.

Allowing the Writ Petitions the Supreme Court held:

a) The normal rule should be that the sitting judge of the High Court should be appointed as Chairman and only when unusual difficulties exist, a retired judge may be appointed. This should be the rule and not the exception.

b) In the states where retired judges have functioned for some time, the concerned state governments are directed to re-consider the matter with the consultation of the Chief Justice of the state and do the needful within a period of four months.

_Supreme Court Bar Association versus Union of India and Ors; Manu SC 2007 433._

**Irretrievable Breakdown of Marriage**

**Facts**

In a matrimonial dispute the parties, both senior IAS Officers had been married for twenty two years. They had, however been living separately for over 16 years. The husband filed for divorce on the grounds of cruelty. His main allegations were that the wife had refused to cohabit with him soon after the marriage and had also taken a unilateral decision to not have a child. Further she had humiliated him on various occasions and had refused to care for him during a prolonged illness. Decree of divorce was passed by the trial Court. On an appeal filed by the wife in the High Court the decree of divorce was reversed on the ground that the allegations of mental cruelty had been proved. The High Court arrived at the finding that it was within the right of the wife who held a high status in life to decide when she wanted to have a child. The High Court also took the view that the wife's decision to sleep in a separate room from the husband's did not lead to the conclusion that they did not cohabit. The High Court also stated that since the husband started living with the wife, this amounted to condoning the act of cruelty.

The Supreme Court observed:

1. That the High Court was unnecessarily obsessed with the status of the wife as an IAS officer. Status of the wife should be irrelevant with regard to normal human emotions and feelings.
2. There cannot be any comprehensive definition of the concept of mental cruelty within which all cases of mental cruelty may be covered.
3. The concept of mental cruelty cannot remain static and there can never be any straight jacket formula or fixed parameters for determining mental cruelty in matrimonial matters.
4. When there has been a long continuous period of separation, it may be fairly concluded that the matrimonial bond is beyond repair. The marriage in such a case becomes a fiction though supported by a legal tie. In such cases, by refusing to sever that tie, the court does not preserve the sanctity of marriage, on the contrary, it shows disregard for the feelings and emotions of parties.

**Judgment**

The Supreme Court held:

a) Since the parties were living separately for more than sixteen years, this is a clear case of irretrievable breakdown of marriage. Any efforts to keep the marriage alive would be totally counterproductive.

b) The High Court has seriously erred in reversing the decree of divorce on the grounds of mental cruelty.

c) The judgment of the High Court is set aside and the trial court decree of divorce is restored.

**Disregard of contract by Arbitrator, a misconduct**

**Facts**

The Food Corporation of India (FCI) issued a notice inviting tenders for construction of godowns along with certain ancillary work and services. Chandu Constructions submitted a tender, which was accepted by the FCI and a formal contract was executed between the parties. As per the terms of the contract, the work was to be completely within ten months and time was deemed to be the essence of the contract. The constructors could not complete the work within the stipulated time, which had been extended once, the FCI issued a show cause notice to them seeking to terminate the contract. The constructors filed a suit in the High Court for appointment of an arbitrator. An arbitrator was appointed who gave an award. As payment in terms of the award was not made, the constructors again moved the High Court. FCI in turn filed a petition in the High Court for setting aside the award.
MONTHLY UPDATES

With the consent of the parties the award was set aside and the matter was remitted to the arbitrator for fresh adjudication. In the fresh proceedings the constructors claimed that the rates in the contract provided only for labour and did not cover providing sand for the purpose of construction, they were therefore entitled to be paid extra for the sand supplied by them. The arbitrator gave his award accepting the claim made by the constructors and directed FCI to pay the additional amount to the constructors. The FCI applied for setting aside of the award under Section 30 of the Indian Arbitration Act, 1940. The High Court affirmed the view taken by the arbitrator that the rate quoted by the constructors did not include the cost of material.

In its appeal to the Supreme Court FCI pleaded that the arbitrator committed misconduct in awarding the claim to the constructors as the said claim was opposed to the terms of the contract between the parties. The issue before the Supreme Court was:

Whether the arbitrator's award disregarded the agreement between the parties and in doing so did he exceed his jurisdiction and thus commit legal misconduct?

Judgment
The Supreme Court observed:

1. Since there was no stipulation in the tender or the contract for splitting of the quotation for labour and materials the claim awarded by the arbitrator is contrary to the terms of the contract.
2. The arbitrator was not justified in ignoring the express terms of the contract, since it is not open to the arbitrator to travel beyond the terms of the contract.

Allowing the appeal, the Supreme Court held:

a) In disregarding the contract the arbitrator has committed misconduct.
b) The award made by him in respect of the payment for material supplied is therefore beyond jurisdiction and is accordingly, set aside.

Food Corporation of India versus Chandu Construction and Anr; Manu SC 2007-417

US Supreme Court: Frivolous patents retard progress
Facts

Teleflex, an automobile parts manufacturer, had exclusive rights to a patent that combined previously known technologies to produce an adjustable accelerator pedal assembly that was controlled by electronic sensors. When rival company KSR attempted to manufacture and sell its own version of the same part, Teleflex sued for patent infringement. KSR claimed that Teleflex's patent was invalid as the technology embodied in their patent was merely the combination of previously known technologies that were obvious to a person skilled in the art. After the trial court granted summary judgment of invalidity, the US Federal Court of Appeals reversed, holding that the trial court erroneously applied the operative "teaching, suggestion, or motivation" (TSM) test. KSR appealed, challenging the continued validity of the TSM test.

1. Is the TSM test valid?
2. What is the proper standard for obviousness?
3. Is Teleflex's patent invalid for obviousness?

Judgment
The Federal Court's rigid application of the TSM test was invalid. The TSM test, as applied by the Federal Court, overlooks the fact that there need not be an explicit teaching for a person of ordinary skill in the art to combine elements that were previously known for the end result to be obvious. Such a rigid test, the Court observed, results in patent protection "without real innovation" that would retard, rather than encourage, progress. Thus, the Court held that "when there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense." Under this analysis, the claim of the patent upon which Teleflex relied was obvious, as it was merely the combination of the well-known technologies of adjustable pedals and electronic sensors.


PICTURE CREDITS:
The graphics in this issue have been sourced from, the daily The Hindu, the blog at http://resistanceindia.blogspot.com, and the BBC website.

PLEASE NOTE:
The Section Adalat Antics will Reappear soon.
The ‘Working Group on Delhi Land Laws’ presents a legal analysis of recent court proceedings and the Master Plan 2021 (Delhi) and its implications on the housing rights of urban poor.

Urban planning under the judiciary- judicial encroachment?

In the last decade and a half, judicial pronouncements in the field of housing for the urban poor have been particularly illustrative of a trend that Dr Upendra Baxi has with typical felicity called “The Structural Adjustment of Judicial Activism.” Delhi has been at the epicenter of the courts’ missionary zeal in this regard, and having attracted such spectacular media publicity in recent months, has set the benchmark for such intervention in other Indian cities. This judicial trend has of course been most infamously articulated by Justice Kirpal in Almitra Patel v. Union of India: “Rewarding an encroacher on public land with free alternate site is like giving a reward to a pickpocket.” And the nadir was perhaps the most astonishing judgment by the Delhi High Court in Okhla Factory Owners’ Association v. Government of NCT of Delhi, which after having raised a statistical specter by spelling out the amount required for providing minimum housing to the estimated 30 lakh Jhuggi-dwellers of Delhi: about 6000 crore rupees subtly enunciated in all its numerical splendor with zeroes’ galore, promptly decided any such exercise by the government under its slum policy will itself be illegal! This to a state government which is going to spend 7000 crore for the Commonwealth Games, a show that few had cared much for before it deigned to arrive in Delhi. What is to be done for these 30 lakh people was indicated as well:

“(7) No alternative sites are to be provided in future for removal of persons who are squatting on public land.
(8) Encroachers and squatters on public land should be removed expeditiously without any pre-requisite requirement of providing them alternative sites before such encroachment is removed or cleared.”

Where these 30 lakh people would go once de-housed and why they were there in the first place was of no concern to the Division Bench.

Appointment of the Monitoring Committee and its workings

The next giant move in this logical progression was a PIL writ currently pending as a ‘continuing mandamus’ in the Delhi High Court, called Kalyan Sanstha Social Welfare Organisation Versus Union of India & Ors. (CWP 4582/2003). This is a case where the Court has appointed a Monitoring Committee regarding unauthorized construction, misuse of properties & encroachment on public land. The Monitoring Committee is composed of three ex-police officers, each of whom has been allotted a monthly salary of Rs 50,000. Also, court commissioners have been appointed for each of the 12 MCD zones of the city. These Court Commissioners are all practicing advocates in the Delhi High Court and have been allotted monthly salaries of Rs. 45,000 each by the Court, by an order dated 18.5.06. Since then, the Monitoring Committee submits reports periodically to the Court (nine so far), on which basis the Court passes orders to implement them. It gets listed every Wednesday afternoon. Much of the time goes in the sparring between the Court-appointed authorities and the governmental authorities. Besides, crucially there is no ‘right to information’ applicable to the committee regarding its proceedings and recommendations, even if one is directly affected. Instead the approach seems to look at “public land” as real estate, as is evident from the following order dated 25.08.2006 in this case when the Monitoring Committee was still in its early days:

“The report of the Monitoring Committee has been placed before us. It has been stated in the report that because of the relentless efforts of the Court Commissioners, encroachment on public land measuring more than 7,96,200 square yards having market value of more than Rs.500 crores on the basis of a very conservative estimate have been retrieved by the MCD/DDA from the encroachers and unauthorized occupants. The Monitoring Committee has advised the Commissioner, MCD and the Vice Chairman DDA to get the cases of criminal trespass registered under the IPC against those individuals.”

The media of course has joined in the celebratory chorus. The Hindustan Times carried a full page story on March 22, 2007 to celebrate the first anniversary of the appointments of the first four court commissioners and quoted a figure from a Monitoring Committee report: “In a joint effort under the guidance of the court-appointed Monitoring Committee, the commissioners have helped the government reclaim public land worth around Rs 7,000 crore from the encroachers over the past one year.” The Monitoring Committee members are quoted as saying in a status report “The commissioners have done a wonderful job. ....The MCD and the DDA are, ....
therefore, richer by thousands of crores..."

"Encroachment" on public land?

In the midst of this hardening of position on "encroachments on public lands", let us find out what the stakes are. A survey conducted in the jhuggi jhompri ("JJ") clusters of Delhi in 1994 by the Slum & JJ Wing, MCD revealed the extent of the problem of land/housing scarcity facing the urban poor in Delhi. The survey found approximately 22 lakh squatters or JJ dwellers living on 2390 acres of public land, i.e., about 20% of the city's population living in less than 1% of the land area of the National Capital Territory.

The report of the Committee on 'Problems of Slums in Delhi, June 2002' constituted by the Planning Commission of India, observed that the working population and the urban poor in Delhi had not been provided shelter as per the Master Plan provisions due to large scale failures by state institutions to meet the planned targets of EWS/LIG housing, which benefit slum dwellers. The report stated “Urban housing shortage at the beginning of the 10th Plan has been assessed to be 8.89 million units. As much as 90 per cent of the shortfall pertains to the urban poor, and is attributable (among other reasons) ...to (non) provision of housing to slum dwellers.” It further stated that “Between 1960-61 and 1970-71...Prima facie, the allocation of land for the housing of the urban poor has been insufficient to meet the requirements ... In the new Master Plan the provision for housing for the urban poor should be made more specific and measures should be taken to make such housing actually available. As the most deprived sections in shelter are the slum dwellers, and with the objective of achieving a slum free city, the Plans should make all-out efforts to meet needs of EWS housing”.

**Master Plan 2021 - regularisation of unplanned settlements and in situ upgradation**

The Master Plan 2021 sets out the background of colossal institutional failure to provide adequate housing stock especially for the poor. The Sub-Group on Shelter, constituted under the Master Plan 2021 noted: "[U]p to the year 1991, the contribution to housing stock through institutional agencies was only 53% (excluding squatter housing). Therefore, the component of housing through non-institutional sources, viz., unauthorized colonies, squatter /JJ clusters, etc., is quite significant. This trend has continued in the current decade as well and has to be kept in view while determining the plan and strategy for housing."

Recognizing a backlog of 4 lakh LIG/EWS units for the urban poor, and an estimated increase in their population by 20 Lakhs, the Master Plan 2021 assesses that around 40% of the emergent housing need can potentially be satisfied through redevelopment/upgradation of existing areas of Delhi. With specific reference to JJ clusters it states: In-situ up-gradation of the land pockets of slum and JJ Clusters, which are not required for public/priority use is the first option for provision of affordable housing for rehabilitation of squatters." The Master Plan 2021 thus signals a new approach which emphasizes regularization / in situ upgradation of unplanned settlements as a means to ensure that the housing needs of the urban poor are adequately met.

Between 1999 and 2001 the Union Ministry of Urban Development was engaged in drafting of a National Level Policy on Housing for the Urban Poor. The Draft National Slum Policy, prepared by Union Ministry of Urban Development and Poverty Alleviation, dated October 2001 stated: "It is to be emphasized in keeping with the principles of this Policy that this document primarily endorses and promotes an upgrading and improvement approach to deal with slums and informal settlements as opposed to resettlement."

An independent study by the 'Hazards Centre', Delhi, a professional support group and resource centre based in Delhi focusing largely on urban issues, titled 'The People's Housing Policy', (October, 2003) estimated the additional land and capital requirements for the different housing strategies. Under the existing MCD policy, for 6 lakh slum households (based on MCD estimate of slum population, 2000) revealed that the Cost of in situ up-gradation was less than half the estimated cost of total relocation. Extracted below is the Table showing these figures:

<table>
<thead>
<tr>
<th>Comparison of different Strategies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strategy</td>
</tr>
<tr>
<td>------------------------------------</td>
</tr>
<tr>
<td>Environmental Improvement1</td>
</tr>
<tr>
<td>In Situ Upgradation2</td>
</tr>
<tr>
<td>Total Relocation3</td>
</tr>
</tbody>
</table>

1. At Rs 4,000 per jhuggi
2. At Rs 20,000 per jhuggi
3. At 18 sq.m. plot size with 50% built-up area and Rs 46,000 per jhuggi (Rs 7,000 from jhuggi dweller)

In-situ up-gradation is a strategy that envisages
relaying of squatter families at the same site after equally 
distributing the encroached land amongst 
them. This is only after the provision of the prescribed minimum basic civic amenities. This can be done in 
the near future. Such agencies give an NOC to that effect.
In Delhi there have been four such experiments of 
in-situ rehabilitation, namely Prayog Vihar in West Delhi, 
Ekta Vihar in R.K Puram, Shanti Vihar and Shahbad 
Daulatpur.

The 'Master Plan for Delhi 2021' (a binding statutory 
document under Section 7 of the Delhi Development Act, 1957) notified on 07.02.07 and published in the 
Gazetter of India, laid down a legally enforceable regime of 
interim continuance of existing slum /JJ clusters 
pending their in situ up-gradation / relocation. In 
keeping with its Policy Objectives and the requirements 
of the Delhi Development Authority Act, 1957, the 
Master Plan 2021 specifically provides:

"4.2.3.1. Rehabilitation/Relocation of Slum & JJ 
Clusters

In so far as the existing squatter settlements are 
concerned, the present three-fold strategy of relocation 
from areas required for public purpose, in-situ up-
gradation at other sites to be selected on the basis of 
specific parameters, and environmental up-gradation 
to basic minimum standards shall be allowed as an 
interim measure. Rest of the clusters, till they are 
covered by either of the first two components of the 
strategy, should be continued."

Emphasis supplied

The Master Plan declares and mandates that all existing 
slum /JJ cluster dwellers must be provided with built 
apartment of 25 Sq metres per dwelling unit, 
with common areas and facilities, either in situ up-
gradation, or relocation (in cases where the land 
is required for a public purpose). Other mandatory 
requirements laid out in the Master Plan include 
provision of temporary transit accommodation near 
the site in case of in situ up-gradation, and availability 
of employment avenues in case of relocation. The 
provisions of the 'Slum Policy of the Municipal 
Corporation of Delhi of 1992, as amended in 2000' 
are thus expanded by the statutory obligations laid 
down by the Master Plan 2021. The three pronged 
strategy of the Slum Policy (in situ up-gradation where 
the Land Owning Agency does not need the land in 
the near future, relocation where land is urgently 
required by the Land Owning Agency for execution 
of public purpose project and provision of basic 
civic amenities to JJ clusters that are neither In situ 
upgraded or relocated) is adopted by the Master Plan 
2021. But the policy of 'cut-off' dates, for determining 
eligibility for in situ up-gradation / relocation, of the 
Slum Policy is explicitly and implicitly superseded. 
The Master Plan 2021 therefore, in acknowledgement 
of the Constitutional and legal obligation of State to 
provide housing for all, provides that the three pronged 
approach be uniformly implemented with respect to 
all Slum / JJ cluster dwellers. In addition, pending the 
implementation of the first two strategies, the Master 
Plan 2021 specifically and explicitly declares that 
existing slums /JJ clusters "should be continued'.

The Delhi Master Plan is a binding statutory instrument 
and is enforceable as has been law laid down in several 
judgments of the Supreme Court and the Delhi High 
Court and is settled law. In Bangalore Medical Trust Vs. 
B.S.Muddappa, the Supreme Court pointed out that the 
manner of preparation of a planning scheme under the 
Bangalore Development Authority Act, 1976 indicated 
that it was a statutory instrument. In M.C. Mehta v. 
Union of India, the Supreme Court held that "[the DDA] 
has to perform its functions in accord with the provisions 
of the Delhi Development Act, 1957 which was enacted 
to provide for the development of Delhi according to 
plan and for matters ancillary thereto." Delhi Science 
Forum vs DDA reiterated the need to strictly adhere 
to the Master Plan provisions. The irony is that the 
Master Plan has been repeatedly seen as sacrosanct by 
the courts, (e.g. in closing of industries in the late 90s 
which had been declared 'nonconforming', etc) but all 
the provisions and targets of the Master Plan related to 
the housing for the urban poor which have been grossly 
violated seem to get no response from the judiciary. 
The Judiciary thus turns a blind eye to these failures of 
the authorities to fulfill their legal responsibilities, 
while taking a narrow legal view of "encroachments on 
public land," seeing it blandly just as land owned by 
government bodies. It sees no reason to examine what 
makes this land "public," why was it acquired in the 
name of the "public" and did the "public" authorities on 
whom this land was vested, principally the DDA, live up 
to its declared objectives in the field of low-cost housing. 
On the other hand, the Executive and Legislature has 
had to respond to the historical failure of the Indian 
state to provide even minimal shelter to the vast majority 
of urban poor, even if in half-hearted, piecemeal and ad 
hoc measures like the Delhi Laws (Special Provisions) 
Act, 2006 and periodic regularizations of unauthorized 
colonies. The PIL jurisdiction in its initial years led to 
construal of 'Fundamental Rights' provisions in broad 
terms to provide for basic rights to the poor. All that 
one can hope is that the bare minimum statutory rights 
provided to the urban poor under the Master Plan and 
The Delhi Laws (Special Provisions) Act, 2006 will at 
least be allowed by the Courts. Perhaps the "Public" in 
terms of "Public Interest Litigation" itself has changed.
India's International Law obligations with regard to the Right to Adequate Housing

(a) International law norms which are not contrary to Indian law are recognized as legally enforceable
(b) Treaty obligations which are rights-enhancing are to be read as part of the life, liberty and due process guaranteed by the Constitution of India. Both these principles are applicable while transposing the rights recognized by international conventions into the municipal law. (Gramophone Company of India vs B.B. Pandey, (1984) 2 SCC 534, CERC V. Union of India, (1995) 3 SCC 42 and PUCL Vs. UOI, (1997) 3 SCC 433).

(c) Section 2(d) and (f) of the Protection of Human Rights Act, 1993 reads:

2 (d) "human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India

Thus by virtue of Section 2 (d) and 2 (f) of the Protection of Human Rights Act, 1993 the Right to Adequate Housing guaranteed by Article 11 (1) of the (ICESCR) is part of the law of the land in India, and creates a binding obligation on the Indian State. Article 11 (1) recognizing the Right to Housing reads:

"The State parties to the present Covenant recognize the right of every one 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 State parties will take appropriate steps, to ensure the realizations of this right....."

The Delhi Laws (Special Provisions) Act, 2006

The 'Delhi Laws (Special Provisions) Act, 2006', mandates that status quo be maintained vis-a-vis "encroachments by slum and JJ dwellers and hawkers and street vendors" till 18.05.07. The preamble to the Delhi Laws (Special Provision Act, 2006 specifically mentions its enactment is in consideration of the proposed revision of the policy of relocation and rehabilitation of slum dwellers in Delhi. The Act, whilst enjoining the Central Government, under Section 3(1), to finalize policy guidelines, norms and strategies to deal with instances of unauthorized development provides under Clauses (2) and (3) that status quo shall be maintained and no "punitive action" taken for a period of one year against certain enumerated instances of such unauthorized development including "encroachment by slum and JJ dwellers and hawkers and street vendors". Section 1 (g) defines "punitive action" as action taken by a local authority including demolition, sealing of premises and displacement of persons or their business establishment from their existing location, whether in pursuance of Court orders or otherwise. Further encroachment has been defined broadly under section 2 (1) (c) of the act as "unauthorized occupation of government land or public land by way of putting temporary, semi-permanent or permanent structure for residential use or commercial use or any other use." Section 4 (d) provides for an exception in that the relief provided by the Act will not be available to instances of removal in accordance with Government policy, where the land is required for "specific public projects".

4. The Supreme Court subsequently stayed this High Court Order on 3.3.2003 "subject to the result of the petition."
7. 2004 (112) DLT 944

Author description: The 'Working Group on Delhi Land Laws' is a group of lawyers and legal activists based in Delhi.

2. 2000 2 SCC 679. Also see 2000 8 SCC 19.
3. (2003) 106 DLT 517
COMMENT

The country has witnessed wide scale protests against the implementation of the Special Economic Zones Act 2005 which was brought into effect in February 2006. Asmita Basu presents the ongoing debates on the issue in the context of an order of a Group of Ministers set in place to review the SEZ policy.

It is said that it all started in 2000 when on a visit to China, Murasoli Maran, the then Minister (Commerce and Industry) was highly impressed with the SEZs in China. On his return he proposed that this model be replicated to make India irresistible to foreign investment thus paving the way for the establishment of the 28 SEZs in the country. Even if he hadn’t made this trip, SEZs were inevitable in keeping with the milieu we find ourselves in. In the pre-90’s era, any industrial activity that did not follow legal norms relating to tax obligations and labour rights protection was considered illegal. Then came the 90’s when socialist ideals were jettisoned to embrace a market economy. In the new millennium we take pride in legalizing “free” enclaves that operate beyond the wake of revenue laws and pose a threat to labor rights. The purported goal of this enterprise is increased foreign investments which, we are told will lead to increased foreign earnings and employment generation much needed for the overall development of the country. In light of these tall claims the question that begs answers are- has there been any assessment of the global experience with SEZs or even an assessment of the 28 SEZ functioning before the enactment of the 2005 legislation? Do SEZs actually result in economic growth? If so, who is this growth going to benefit?

Going by the recent spate of farmer protests and State killings in Nandigram it seems unlikely that the locals being displaced due to these ‘development initiatives’ shall benefit. On the 22nd of January this year, the state called for a freeze on SEZ approvals pending before the Central Government. A group of ministers (GoM) was identified under the leadership of External Affairs Minister Mr Pranab Mukherjee, to examine the SEZ Act and Rules and formulate an SEZ policy. In a meeting held on the 5th of April (ironically within a month of the Nandigram killings) the GoM gave its list of recommendations/orders and lifted the freeze under pressure from industrial houses and state governments. The approvals post 5th of April have been subject to the decisions taken at the meeting. Following the de-freeze 100 SEZs have been notified up till the 1st of May.

The key GoM orders and their implications are:

**Ceiling on land to be acquired**
A ceiling of 5000 hectares has been fixed for all multi-product SEZs, the minimum ceiling of 1000 hectare remains intact. The State Governments have been given the discretion to further lower the ceiling limit to a maximum of 1000 hectares and a minimum of 400 hectares. However, there is no clarity on whether developers shall be allowed to build 2 SEZ’s in 2 contiguous areas. If that is allowed then the ceiling makes little difference. Dividing SEZ’s over two states is also proving to be complicated in the absence of any clear guidelines.

It was hoped that setting a limit on the land to be acquired would set at rest issues that arose with the protests against the SEZs. However, this has not been the case. In recent press reports, the CPI (M) has expressed their disappointment with the decision of the GoM and has asked for a review of the SEZ Act/Rules to set the maximum ceiling at 2000 hectares and minimum ceiling at 400 hectares. It is not only the CPI (M) that is asking for a review of the.
COMMENT

ceilin1 limit evn Reliance, whose two applications for setting up SEZs shall be impacted by this decision, is asking for a review albeit on completely divergent grounds as their concern is the issue of maintaining contiguity of the land acquired for developing the SEZ’s. The Minister of Commerce and Industry, Mr Kamal Nath, responding swiftly to the objections raised by Reliance, has come to the aid by stating that the GoM’s decisions were “not the Gita or the Bible” and hence there can be no cap on further review (!).

Bar on state governments to acquire land on behalf of private developers
Significantly, the decision bars state governments from acquiring lands on behalf of private developers even in cases where in-principle approvals for setting up the SEZs has been acquired. This decision is clearly in response to the Nandigram protests. All formal approvals and notifications for pending approvals are subject to the proviso that state governments will not undertake compulsory acquisition of land. It specifies that state governments shall not be allowed to transfer lands, acquired for the purposes of setting up SEZs, to private entities. The state governments have also been debarred from entering into joint ventures with private developers if they do not already have land in their possession to offer the project. This means that private developers shall have to acquire their own lands from willing sellers and negotiate their own prices. This has upset many of the applicants who were relying on state power to acquire lands to meet with conditions of contiguity. Though government officials have stated that most of the applicants have acquired land prior to the applications being approved, this stand is not reflected in ground realities.

This decision, however, does not place any bar on State Governments acquiring lands to set up their own SEZs, though it does stipulate that such acquisition should meet the requirements of relief and rehabilitation packages to be announced. This raises the question of the use of the Land Acquisition Act 1894. Under Section 4 of this Act, the State Government can notify any land for acquisition and acquire such lands by following the procedure laid down in this law. Part VII of this law, inserted by an amendment in 1984, allows State Governments to acquire land for companies. In this regard, a distinction between land acquired for government companies and private companies has been provided for in Section 44B. Hence while the state can acquire lands for government companies for broad reasons spelt out in Section 40, it can acquire lands for private companies only for the purposes of providing dwelling for workers employed by them. The broad grounds provided in Section 40 has had the effect of deeming all land to be acquired by government companies as being for a public purpose. The Maharashtra State Government has already invoked this law for acquiring land for the Maha Mumbai SEZ. The validity of the state’s action is uncertain in view of the GoM order. Going by the experience in Nandigram, the State Government's role in acquiring land in absence of legally enforceable rehabilitation policies is highly problematic.

Amendments to the Land Acquisition Act and formulating rehabilitation packages
This brings us to the third significant aspect of the GoM order which requires the formulation of relief and rehabilitation packages for those dispossessed by the land acquisitions. The GoM order has stated the need for effecting amendments to Land Acquisition Act and a legally enforceable rehabilitation policy. The Ministry of Rural Development has responded to this challenge by proposing a new Relief and Rehabilitation Act and amendments to the Land Acquisition Act that shall override the SEZ Act. The proposal for amending the Land Acquisition Act include- omitting Part VII of the Act, providing parameters guiding land transactions including benchmark prices and compensation to be paid to oustees. The definition of “public purpose” contained in the law is to be narrowed down by the amendments. The proposal also makes it mandatory for all industries to rehabilitate displaced people for lands acquired for all developing projects. These proposals, to protect the interest of farmers and dispossessed, are pending with the Ministry of Law and Justice. Unfortunately, delays are expected on the tabling of these proposals as they have been referred to the GoM for review. There is, however, no embargo on state acquisition of land pending the GoM review.

The GoM is also expected to look at proposals for independent arrangements to deal with out of court settlements of small issues arising out of land...
acquisition and the setting up of an independent tribunal to deal with such issues. The courts may then be barred from taking up cases on compensation disputes for SEZ's and other industrial and public purposes as the matters will get referred to a "Land Acquisition and Compensation Disputes Settlement Authority".

**Increase in proportion of processing zones within SEZ**

The fourth aspect of the GoM order is that at least 50% of the total SEZ area has to be earmarked for processing units instead of 35% as stipulated earlier. It has also been proposed that states levy taxes on good consumed in the non-processing areas in the SEZ's. This would mean that all supplies to schools, residential areas, entertainment centers, shopping complexes within SEZ’s shall attract VAT, sales tax, service tax, entertainment tax and octroi. Whether or not this proposal will be accepted will be seen in the days to come.

**Tougher export obligations**

The fifth stipulation of the GoM order is imposition of tougher export obligations to be met by developers in SEZ’s. Instead of merely being net foreign exchange earners, the SEZ’s shall have to have import earnings that are more or at least equivalent to their purchases from the Domestic Tariff Area ("DTA"). This issue is emerging as a bone of contention between the Ministry of Finance and the Ministry of Commerce.

The Finance Ministry has called for a review of the net foreign exchange criterion to make it more stringent. Currently, supplies from the DTA to an SEZ are deemed to be foreign exchange earning. The Finance Ministry's proposal is to bring this criterion in line with actual exports and more than what is being sourced from the DTA. The Commerce Ministry, on the other hand, contends that net foreign exchange is an adequate criterion.

**Tax Concessions for SEZ’s**

The GoM order does not make any changes in tax concession to the SEZ’s. On the contrary there has been talks of according infrastructure status to SEZ’s instead of the RBI classification of treating them akin to commercial real estate. This will make loans to SEZ’s cheaper. As it the tax exemptions are not enough!

**Labor disputes**

Provision of separate mechanisms for settling labor disputes in SEZ’s is also being considered. The Central Industrial Trade Union has stated that it shall oppose any moves on the part of the Central Government to delegate power to Development Commissioners of SEZ’s to manage labor issues.

**Employment generation**

There has been no consideration of the criterion of assessing employment generation in the GoM proceedings. Recently, V Krishnamurthy of the National Manufacturing Competitiveness, has observed that 60% of the lands allotted for SEZ’s are being used by IT companies which are unable to employ local people. (Economic Times; 27.04.07). It is also unlikely that local people and farmers displaced will be able to perform functions in the specialized SEZ’s that are being set up. This aspect requires urgent consideration. If the government is truly committed to its goal of employment generation, then training programs and employment options for local persons must be made obligatory on developers of SEZ’s.

**In conclusion**

It is difficult to predict the ultimate outcomes of the ongoing debates. One can only hope that decisions shall be taken in public interest and that there shall be no further marginalization of poor farmers. The SEZ Act, in Section 5, mentions the following guidelines to be kept in mind by authorities appointed under it while discharging their functions:

(a) Generation of additional economic activity.
(b) Promotion of export of goods and services.
(c) Promotion of investment from domestic and foreign sources.
(d) Creation of employment opportunities.
(e) Development of infrastructure facilities; and
(f) Maintenance of sovereignty and integrity of India, the security of the State and friendly relations with foreign States.

The State's role in Nandigram cannot be wished away. Will the state succeed in upholding the rights of the poor? Or, in view of the staggering rate of SEZ approvals, are we entering an era where Indian citizens shall take pride in being the largest SEZ in the world instead of being the largest functioning democracy? Perhaps the answer lies only in peoples resistance to unfair state policies.

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About the author: Asmita Basu is the Assistant Editor of this magazine.

**SEZ**

THE GRAVEYARDS OF DEMOCRACY

MAY 2007

FROM THE LAWYERS COLLECTIVE 29
On the 29th of December 2006, the Noida police uncovered skeletal remains of at least 22 children and women from a drain behind the bungalow of businessman Moninder Singh Pandher. It appears that, 38 children have been missing from Nithari village, just 100 meters away from Pandher’s house, in the past 2 years. Most of those missing were children of migrant workers mainly from West Bengal. This incident revealed criminal apathy on part of the police who refused to entertain complaints on the missing children. At the moment, this case has been taken out of the hands of the local police and is being investigated by the CBI. We shall be presenting an analysis of the case as the events unfold. In the first of these series, Professor B. B. Pandey examines the vulnerability of children in context of the crime. The subsequent articles shall examine the response of the Criminal Justice System, issues pertaining to the access to justice, the nature of the trial and sentencing.

“No, Father. I’ve a very different idea of love. And until my dying day I shall refuse to love a scheme of things in which children are put to torture.”

Albert Camus, The Plague, P-178

In Philippe Aries’s analysis, children were acknowledged as being central to the family only in the mid-18th century. From then on, children have been identified on the basis of age, gender, socio-economic factors etc. Children have been regarded, in history and in law, as dependents, falling within the benevolent jurisdiction of patria-potestas (under the care of the father, who is regarded as being the head of the family) and parens patrie (under the care of the State that guarantees rights).

Status of children in India

India today has the world’s largest child population in the world with 400 million below the age of 18 in a national population of over one billion. It also contributes to 25% of the world’s child deaths and 20% of the world’s maternal deaths. Statistics reveal that only 15-20% of children grow to their full potential. Of the ones alive, 60 million, under the age of 6, live below the poverty line and more than half of India’s children are malnourished. This indicates that there is a vast majority of India’s children in difficult circumstances.

In addition, children face disadvantage due to natural and social factors. There is an estimated 15 to 20 million orphan children in India. 11,434 of the new-born children die due to HIV/AIDS. In fact 65 million children between ages of 6-14 years are not attending any educational institutions. On the other hand, the Census 2001 report records an estimated 12.06 million working children in the Indian population. The number of out-of-school workers has been estimated at around 120 million which can be considered a proxy indication of child labor. It has also been estimated that 300,000 children in India are engaged in commercial sex. Six metropolitan cities account for 420,000 of the homeless children.

Categories of victimized children

Victimized children can be divided over 3 broad categories based on forms of victimization that they have been faced with. The first category is that of ‘abused children’. In an editorial on child abuse that appeared in
India Today, it has been observed that “CSA (Child Sexual Abuse) is not rare. It results from the complex interplay of individual, familial and social factors that require sensitive handling since in a majority of cases the perpetrator is a family member...It is not just sexual abuse. The recent case of a 10 year old boy, a talented tennis player, who committed suicide because of his father’s punishing regime of 10 hours of practice a day, shows that emotional and psychological abuse is an equally serious problem.”

The second category is of those victimized by crimes. The NCRB, Crimes in India Report of 2005 shows that crimes against children rose from 14,423 in 2004 to 14,975 in 2005. In this, the number of child abduction cases rose from 2322 in 2002 to 3518 in 2005. Child rape cases reported show an increase from 3542 in 2004 to 4026 in 2005.

The third category of victimized children is the 'missing children'. According to NCRB sources, an estimated 45,000 children go missing every year. 11,000 remain untraced.

On the basis of an affidavit filed before the Delhi High Court on 24/1/2007 in the matter of Abdul Shakeel Basha v NCT of Delhi (Writ Petition (Civil) No. 24006 of 2005), there are 400,000 children on the streets of Delhi who make a living by picking rags, shoe shining, begging and working in hotels and dhabas. In addition, there are 50,000 children on the streets, who are without families and are drawn from different states of the country.

In an Indian Express investigative study, entitled “Find me” conducted in January-March 2007 in various states and UT's, harrowing statistics of the 'missing child' phenomena have been reported in every state, including major and minor towns. However, the motivations and the profile of missing children varies from state to state ranging between runaways, to those ending up as child labor or in the flesh trade, as beggars, victims of ransom demands and transnational trafficking, child pornography and even organ trade. The fate of these missing children cannot be predicted with certainty. The predominant view has been that most missing children end up either in prostitution or as child labor in hazardous industries. The Nithari killings have called for rethinking on this aspect. Informal sources have revealed that the residents of DFS Noida, who are accused of the murders used to throw lavish parties requiring 20-30 kilograms of mutton. It is believed that the children were slaughtered and served at these parties. In light of these appalling testimonies, it may be considered that increasing number of missing children, rendered vulnerable by the fact of their invisibility as they are mostly never traced, are victims of untold violence, murder and other such heinous crimes.

The factors that make children a special category of victims may be enlisted as:

- Immaturity in understanding the contextual reality.
- Inadequate mental capacity of taking decisions concerning their interest.
- Physical incapacity of defending themselves.
- Limited ability to complain.
- Poor children's incapacity to invoke the support of the formal system.

The Nithari episode:

It is in this context that the Nithari episode, that shocked the nation's consciousness, needs to be reviewed. Situated in Uttar Pradesh, immediately on the outskirts of Delhi, Nithari appears to be a cluster of neighborhood slums, rather than a village with community support. It is populated mostly by migrants from Bihar, Orissa, Uttarakhand, Bangladesh, Nepal, etc. Most of the male and female population of this area is employed in domestic help in upper and middle class households in Noida. Significant female employment leaves children unattended for long hours. In this background, children's leaving home out of desperation and ultimately going missing is not an unusual phenomenon.
Generally the families are too poor to pursue search for their children in a serious manner. Afluent Noida neighbors are too unconcerned to take any note of the criminal happenings in the neighborhood or the plight of their employees. As is the case in most situations of need, police are insensitive to the complaints of the poor and the requirements of the rule of law. This situation is ideal for unnoticed operations of influential and well-connected criminals.

### Details of Nithari Victimization

For over 2 years preceding December 2006, children, both girls and boys, have gone missing from the Nithari settlements. The parents of these children made all possible efforts to search for them but without any success. Efforts were also made to lodge reports with the police, who reluctantly agreed to lodge ‘disappearance’ reports in only half the cases complained of. On May 7, 2006, one Nandlal went to P.S. Noida to lodge a report about his missing daughter Payal’s kidnapping and suspected murder by the owner of D-5, Sector 31, Noida. On the police refusing to register an F.I.R. Nandlal filed a complaint with the Chief Judicial Magistrate Noida, who directed the S.H.O. to register an F.I.R. as per the law. An appeal against this order was filed in the Sessions Court. But the Sessions Court refused to set aside the CJM’s order. Subsequently, the Allahabad High Court also dismissed the appeal of the principal accused and directed that necessary action be initiated with regard to all missing children. The search for Payal’s dead body led to the recovery of many other dead bodies, body parts, clothes, shoes, etc of many other children. According to a fact finding report of the Ministry of Women and Child Development (“MWCD”) following the discovery of the bodies, the number of missing persons from Nithari region was 9 in 2005 and 20 in 2006. Out of the total missing 29 are reported killed and 7 are still untraced. CBI investigations have led to the recovery of 40 more packets of human body parts which is likely to increase the number of missing persons to beyond 50 persons. The biographical details of 14 missing persons appended to the MWCD Report shows that 11 are minor children and out of these only 3 are male minor children.

The facts that have been brought to light so far are that female and male children of diverse ages were subjected to multiple crimes such as kidnapping/abduction, rape/sexual abuse, murder, etc. The parents of such children were denied access to justice by police refusal to lodge F.I.R.’s or undertake any form of investigation. Police inaction, complicity of state officials kept the incident in the dark. This facilitated the accused and discouraged parents from taking any preventive steps. Thus, the victims were subjected to multiple victimizations and the accused were unduly shielded. This led not only to the loss of life but resulted in secondary

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**Untraced Missing Children**

- Total Number of untraced children in 6 years add up to 66,024.
- On an average every year 11,008 children remain untraced.
- The percentage of untraced missing children was highest in Adaman & Nicobar, followed by Arunachal Pradesh, Tripura, Tamil Nadu, Haryana, Gujarat and Assam, etc.

“In many state, there has been a gradual and consistent decline in this ‘efficiency index’ as seen from the increasing trend of percentage of persons who remain untraced”

Ref: pp 169-170 of Joint Study on Trafficking of Women and Children; Sen, Nair; 2005

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<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
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<tbody>
<tr>
<td>2005-2006</td>
<td>Children reported missing in Nithari. 19 F.I.Rs lodged but no action taken.</td>
</tr>
<tr>
<td>07.05.2006</td>
<td>Nandlal, a resident of Nithari, approaches the PS. Noida to lodge a report about his missing daughter Payal's kidnapping and suspected manner against the resident of D5 Noida, Maninder Singh Pandher. Pursuant to a private complaint and the Allahabad High Court's intervention, the case was registered and investigations commenced.</td>
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<td>Sept. 2006</td>
<td>The National Commission for Women investigated the case of missing children and asked the Uttar Pradesh government to take immediate action in the matter. No reply was rendered to this report and ensuing correspondence.</td>
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<tr>
<td>29.12.2006</td>
<td>The Noida police unearth skeletal remains of 22 women and children from a drain behind Moninder Singh Pandher's residence. Pandher and his domestic help Surendra Koli were arrested and remanded to police custody with orders to undergo narco-analysis tests.</td>
</tr>
<tr>
<td>02.01.2007</td>
<td>The Uttar Pradesh government suspended 2 Superintendents of Police and 6 policemen for alleged dereliction of duty.</td>
</tr>
<tr>
<td>03.01.2007</td>
<td>Supreme Court declined to entertain a plea seeking a CBI inquiry into the events on grounds that it was already being looked into by various agencies including the Uttar Pradesh police.</td>
</tr>
<tr>
<td>03.01.2007</td>
<td>High level MWCD committee headed by Ms Manjula Krishnan formed to probe into the killings and sexual assault of children. The Uttar Pradesh government also puts in place a high level committee comprised of the Home Secretary and the Additional Director General of Police to probe into the complaints of missing children.</td>
</tr>
<tr>
<td>05.01.2007</td>
<td>Surendra confesses to his interrogators that he not only killed 17 children but also ate parts of their bodies. This probably explains why none of the torsos were found.</td>
</tr>
<tr>
<td>05.01.2007</td>
<td>The Uttar Pradesh Chief minister Mulayam Singh Yadav concedes to a CBI probe being conducted on the Nithari killing following nationwide outrage.</td>
</tr>
<tr>
<td>07.01.2007</td>
<td>Inquiries reveal that Pandher was well acquainted with several ministers and a doctor who had been previously accused of organ trading. Investigations show that Pandher has been arrested on a previous occasion. Incriminating evidence recovered from Pandher's house.</td>
</tr>
<tr>
<td>22.03.2007</td>
<td>Following investigations, and the conduct of forensic tests, the CBI gives a clean chit to Pandher and places the blame entirely on Surendra. Allegations of organ trade have been ruled out.</td>
</tr>
</tbody>
</table>
Child Rights

victimization like loss of job/earning, survival in trauma/fear on part of the parents, near and dear ones and neighbors.

Closely following the discovery of the bodies, a committee was set up by the MWCD to focus on the problems of the children and their families. The report has made 14 recommendations regarding the problems of children and has concluded by stating: "the incidents at Nithari reflect the general national apathy and malaise in the administrative system, especially the police in tackling the problems of children and ensuring their safety and protection - one reason for growing incidence of crimes against children. This is more in the case of the poor and downtrodden whose voice is not heard". The MWCD has committed itself to developing the following to address the issue of child abuse:

- Integrated child protection scheme
- Offences against Children (Prevention) Bill, 2005
- Commissions for the Protection of Child Rights, 2005
- Implementation of the Juvenile Justice Act, 2005
- Measures to combat child trafficking
- A missing children website
- Creating awareness and advocacy.

The concluding comment of this committee is most meaningful in this regard; where it has been stated that "Child abuse and violence against children have emerged as one of the most crucial and alarming problems in this country. Factors such as growing industrialization, liberalization, urban bias, interstate and rural-urban migration, economic poverty, breakdown of family and community values, support systems, etc have resulted in children being most marginalized and vulnerable victims. Unless the subject "Child Protection" is accorded, the highest priority in both, the Center's and States' policies, programmes and schemes, the violence against these innocent children is likely to continue."

A number of lessons are gained from the Nithari episode, particularly on the role of policing. The first being, that the task of policing is not limited to tackling terrorism or Naxalites, but also creating a safe and secure society for the ordinary hapless common man. In order to prevent the victimization of people due to the vagaries of urbanization, the police has to assume a proactive role of empowering the marginalized in our metros. It is essential that all incidents of victimization of children be taken up with greater seriousness, both at the formal and informal levels. In this regard, all cases of missing children should be registered as serious crimes and monitored on a daily basis.

At the policy level, efforts must be taken to appoint "Child Protection Officers" or set up "Child Protection Units" as required under Section 62 A of the Juvenile Justice Act. These authorities should be attached to every police station to ensure that immediate action is taken in respect of offences against children. Commissions for the Protection of Child Rights at the national and state levels should also be constituted as per the requirements under the Protection of Child Rights Act, 2005.

Efforts at the local level can also go a long way in preventing the victimization of children. This could be done by constituting community based child protection mechanisms to provide an interface between the community and formal mechanisms. Schools, panchayat and neighborhood bodies should also be constituted to keep a watch on child neglect, exploitation, abuse and victimization.

The Nithari episode involving the sexual exploitation followed by cold blooded murder of over three dozen women and children can be described as the most shocking crime incident of the century. The enormity of the crime and the diversity of its nature calls for the deployment of large man power and resources to unravel the whole magnitude of the crime leading to guilt determination and ultimate punishment of the culprits.

Professor B.B. Pandey is Consultant, National Human Rights Commission.

FROM THE LAWYERS COLLECTIVE
The members of ‘Affordable Medicines and Treatment Campaign’ unfurl how, the stringent growth of patent regimes across the globe have brought people’s access to affordable life-saving medicines under grave threat and how amid this Thailand has shown a zealous commitment to achieving universal access to essential medicines for all its citizens.

Exorbitant prices, the fallout of monopolies, are the biggest hurdle people in developing and least developed countries face in accessing medicines. Take for example the case of HIV/AIDS – although most of the 40 million people living with HIV/AIDS in the world today come from the poorer countries, only 2 million of them receive life-saving Anti-retroviral (ARV) therapy, simply because the medicines are unaffordable.

Given the inequities in accessing treatment, a highly polarized debate is emerging about the ways in which the World Trade Organisation (WTO) patent rules restrict access to medicines. The ever increasing prices and restrictions imposed by patent monopolies are forcing governments of developing countries to consider all available means to get around the barriers caused by strict new patents. A case in point is Thailand, whose government recently issued compulsory licenses on three critical patented drugs, to fulfill its obligation to provide universal access to essential medicines to all its citizens. Although compulsory licenses issued for the procurement of affordable generic drugs are a legally recognised means to overcome barriers in accessing affordable medicines, Thailand has been under immense political and economic pressure to withdraw the compulsory licenses. The Thai experience, which will be discussed in more detail later on in this article, raises concerns about the way that multinational pharmaceutical companies backed by their governments continue to dictate the terms by which medicines will be made available throughout the world.

Trips Flexibilities and the Doha Declaration

The WTO’s Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) requires member countries to provide a 20-year minimum patent for all new innovations, including medicines. This effectively creates global patent monopolies that last a very long time, with far reaching, potentially disastrous consequences for public health. In mitigation however, the Agreement on TRIPS also allows for certain flexibilities in implementation, specifically in order to protect public health. In mitigation, whenever the Agreement on TRIPS specifically recognizes the right of a government to issue compulsory licenses without the authorization of the patent holder in the “case of national emergency or other circumstances of extreme urgency or in cases of public non-commercial use.”

Compulsory licenses are the means by which a government can license the use of a patented innovation to itself or a third party, without the consent of the patent holder, in exchange for a reasonable royalty. In the public health context, issuing a compulsory license becomes necessary when essential medicines, which are patented, are unavailable or unaffordable. A compulsory license enables either local production or generic importation of a patented drug, thereby increasing local availability of the drug and saving on costs for both patients and the national health budget. Under a product patent regime, governments are increasingly feeling the need to issue compulsory licenses, particularly where they are directly involved in providing treatment to their citizens.

In November 2001, the Doha Declaration on the TRIPS Agreement and Public Health re-affirmed the right of a WTO member country to grant compulsory licenses on public health grounds. All member countries in the WTO, including the United States, agreed to the terms of the declaration which provided unambiguous support to any government that uses TRIPS flexibilities in order to protect the health of its
people: "Each Member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted." The Doha Declaration further states that, "Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency." Thus, based on the agreement and understanding in Doha, countries can incorporate appropriate measures into their national laws to protect public health and ensure access to affordable medicines.

The Use of Compulsory Licenses by Developing Countries
Since Doha, several developing countries have made use of their own patent laws, supported by the TRIPS flexibilities, and issued compulsory licenses. The first compulsory license to be issued after the Doha Declaration was in May 2002, when Zimbabwe issued a notice declaring a period of national emergency on HIV/AIDS. This enabled the government to produce or import any patented drug used to treat people suffering from HIV/AIDS and its related conditions. Malaysia and Indonesia are other examples of developing countries who have issued compulsory licenses for public non-commercial use.

Thailand issues compulsory licenses
Thailand has a commitment to achieve universal access to essential medicines for all its citizens. The Thai government spends USD 7 billion on healthcare and provides 62 million Thai citizens full access to all medicines on the Thai essential drugs list. The country has an estimated 500,000 people living with HIV/AIDS, and the government provides first line ARVs to more than 100,000 of them. In the near future, the government estimates that at least 50,000 will require second line ARVs. At the January 2007 price of US $ 2200 per patient per year for second line ARVs, the government would need to spend approximately US $ 110 million per year to treat those patients, which exceeds the entire Thai budget for ARVs in 2007. Thus it was that Thailand faced the crisis of not being able to afford to provide essential lifesaving medicines to its people.

With the health of its citizens in mind, and after two years of failed attempts to negotiate affordable prices on patented drugs with pharmaceutical companies, the Thai government has in the last few months issued compulsory licenses on three drugs. This allows Thailand to import affordable, safe and effective generic versions of the patented drugs from other countries - such as India - or produce them on their own through their Government Pharmaceutical Company (GPO).

The first license was issued on 29 November 2006 for the HIV/AIDS medicine, efavirenz (patented by Merck and sold by the brand name of Stocrin). Efavirenz is a WHO recommended drug because it has fewer side effects than nevirapine (another ARV which is part of the fixed-dose combination produced by the GPO.) Efavirenz can also be used to treat people co-infected with HIV and tuberculosis (TB), while nevirapine negatively interacts with TB drugs. Prior to issuing the compulsory license on efavirenz only those suffering from the most severe side effects to nevirapine received the medicine. According to a white paper issued by the Thai Government in February 2007 entitled "Facts and Evidences on the 10 Burning Issues Related to the Government Use of Patents on Three Patented Essential Drugs in Thailand," (available at http://www.moph.go.th/hot/White%20Paper%20CL-EN.pdf), after the issuance of the compulsory license and due to the significant decline in prices (the government started purchasing the generic form from Ranbaxy for US $ 20 per month compared to the previous price of US $ 43 per month), access to this critical first-line drug has increased. The Thai health authorities are now able to treat, at the same cost, at least 20,000 more patients with efavirenz.

Then, on 26 January 2007, Thailand issued additional compulsory licenses for the heart disease drug clopidogrel (the patent holder is Sanofi-Aventis who sells it by the brand name of Plavix) and the HIV/AIDS drug, lopinavir/ritonavir (the patent holder is Abbott who sells it by the brand name Kaletra).

In issuing these compulsory licenses, the Thai Government exercised its sovereign right to determine how to achieve its public health goals such as ensuring ARV treatment to its people. However, Thailand's actions have resulted in a maelstrom of actions and opinions (some laudatory, some vitriolic) that underscore clearly, both how effective compulsory licenses are in bringing down prices, as well as how far patent holding companies and the governments that support them will go in protecting their own interests.

Retribution
Abbott Laboratories (the patent holder for lopinavir/ritonavir) responded to Thailand's actions by taking the unprecedented, and indeed shocking, step of withdrawing...
registration applications for seven of its medicines in Thailand. Effectively this means that Abbott is withholding those medicines from the Thai market. Among these is the vital second line drug - heat stable lopinavir/ritonavir - that does not require refrigeration, making it invaluable in tropical countries such as Thailand. With this punitive act, Abbott has not only punished the Thai government for daring to adopt legal measures to access affordable drugs for its people, it has also shown scant regard for the lives of millions of Thai people desperate for life-saving drugs. Most significantly, Abbott has sent out an unequivocal message to developing countries that it will use all of its might to prevent the entry of generics into developing country markets.

Since issuing a compulsory license for lopinavir/ritonavir, price reductions have already been announced. Cipla announced on March 1, 2007, that a generic heat-stable lopinavir/ritonavir was available at a cost of US $1,560 per patient per year. At the time for the same medicine the Abbott price for middle income countries like Thailand was US $ 2250. Then on April 10, with increasing international outrage at its actions of denying an entire population access to new medicines, and the pressure brought on by Cipla’s announcement, Abbott announced some face-saving price cuts - a reduced price of US $1,000 for heat-stable lopinavir/ritonavir in low-middle income countries.

Abbott has, however, not withdrawn its actions against the Thai people. It is also unfortunate that the price reduction only came in response to the issuance of a compulsory license and not because of patient needs. It is obvious, though, that the compulsory license could encourage competition among multiple sources of production and help further drive down the price of this critical medicine, thus benefiting millions of people across the world.

As if Abbott’s actions are not pressure enough, the office of the United States Trade Representative (USTR) has recently put Thailand on the “Priority Watch” list in its “Special 301” report for 2007. “Special 301,” under U.S. law, annually identifies countries that, in the USTR’s view, deny adequate and effective protection for intellectual property rights, and subjects these countries to retaliatory trade sanctions by the United States. The “Special 301” does not identify any specific breach of TRIPS obligations by Thailand, and in fact implicitly admits that Thailand’s actions were perfectly legal: “while the United States acknowledges a country’s ability to issue compulsory licenses in accordance with WTO rules, the lack of transparency and due process exhibited in Thailand exhibits a serious problem.”

Given the history of the USTR (the threat of imposing trade sanctions for perfectly legal actions is not a new strategy for them), India has been on this list for some time, in part due to its refusal to introduce data exclusivity, which is not a requirement under TRIPS) activists and analysts are reluctant to believe that the issuing of compulsory licenses by Thailand has not heavily weighted the USTR’s decision.

Compulsory licensing provisions in the Indian Patents (Amendment) Act, 2005

Section 84 permits the issuing of a compulsory license three years after the date of the grant of the patent on the grounds that the reasonable requirements of the public with respect to the patented innovation have not been satisfied; the patented innovation is not available to the public at a reasonably affordable price; or that the patented innovation has not worked in the territory of India.

Section 92 pertains to special provisions for compulsory licenses on notification by the central government, if it is satisfied that in circumstances of national emergency or extreme urgency, or in case of public non-commercial use, it is necessary that a compulsory license should be granted.

Section 100 gives powers to the central government to use innovations for government use.

Conclusion

With the dust not yet settled from the impact of Thailand’s decision, on May 4, the Brazilian government issued a compulsory license allowing importation of cheaper versions of the HIV/AIDS drug, efavirenz, after price negotiations failed with

Thailand

While the Thai government’s commitment to the health of its people in the face of strong opposition has led to its isolation in many ways, it has also garnered support in many parts of the world, where people’s movements are grappling with similar issues. April 26, World Intellectual Property Day was observed as the ‘Global Day of Action’, when civil society and health activists around the world held demonstrations and rallies in solidarity with the Thai struggle. In India, on that day, rights groups and positive people’s networks across the country held mass actions in support of the Thai government’s decision to issue compulsory licenses, and to condemn Abbott Laboratories for their retaliatory measures against Thailand. [See Box 2]

The Day of Action - global support for
India Joins Worldwide Protests Condemning Abbott - from Bangalore to Bangkok:

A hundred people marched outside the Abbott Laboratories' distribution outlet in Bomanhall, Bangalore, carrying banners that proclaimed 'Abbott's Greed Overrides Patient's Needs' and 'Abbott - Concerned With Money Not Lives'. Protestors represented groups from across the city - People's Health Movement, ARAKU, SPAD, Janat Shakti, Lawyers Collective HIV/AIDS Unit, the positive networks, such as Karnataka Network of Positive People, as well as other NGOs working with PLHAs like Milana, Samraksha, Arunodhaya, Sangama and Action Aid. They denounced the company for its callous actions against the Thai people and shouted slogans in support of the Thai government and the Thai Positive People's Network. The groups formed a human chain and observed a minute-long silent prayer in memory of all those who have died because of the unavailability of ARVs. About 85 people signed a Memorandum of Demands which was submitted to Abbott officials.

"Thai Government You are a Hero" - Solidarity rally in Delhi:

At Jantar Mantar, in the heart of the capital, 200 people representing different groups in the city including the Delhi Network of Positive People, Lawyers Collective HIV/AIDS Unit, Sahara, Sharan, PXS, Prayana and CENTAD - rallied in support of Thailand. Dressed in stark white t-shirts with the words 'HIV Positive' emblazoned in black across the front and 'Treatment for All' on the back, the ralliers marched to the accompaniment of drums and whistles. Some members held aloft a photograph of the Thai Health Minister, Mongkol Na Songkhla, while others carried an effigy of Miles White, CEO of Abbott Laboratories, which they burnt amidst loud clapping and cheering. The groups called on the Indian government to support Thailand and to consider similar actions in order to provide second line treatment and other essential drugs in India. At the police barricade, protestors joined together to sing "Hum Honge Kaamyaab" (We Shall Overcome). A group of about 60 people then went to the Thai embassy to personally congratulate representatives of the Thai government.

"Greedy Abbott Shame Shame" - Mumbai denounces Abbott:

About 85 people from Udaan Trust, Maharashtra Network of Positive People, PPP, Sangamitra Trust, Humaya, Humsaaf Trust, Lawyers Collective HIV/AIDS Unit, supported by MSF (Belgium), protested outside Abbott Laboratories' Corporate Office in Corporate Park, Sion-Trombay, Mumbai. Protestors distributed bilingual fliers explaining their issues and demands to office-goers in the vicinity who were coming in to work, to people in cars waiting at the traffic signal, to people at the bus stop, and to other commuters. Holding banners and placards, protestors marched up and down the road, shouting slogans against Abbott, and in support of Thailand. A black T-shirt with the words 'Greedy Abbott' painted on one side and 'Shame Shame' on the other was stuffed with balloons and tied between two poles on the central median to attract the attention of passersby. A charter of the groups' demands was circulated and signed. The groups had gathered to condemn Abbott's actions against Thailand, and to demand that they re-register their drugs and make medicines available at affordable prices to people throughout the developing world. A six member delegation met with company officials and submitted the memorandum. They expressed their deep concern about Abbott's decision to withdraw drugs from the market, and stated their opposition to pharmaceutical companies like Abbott threatening countries and holding patients to ransom.
Arrest and subsequent torture of Arun Ferreira

Dated 12th May 2007

To,
Shri R R Patil,
Home Minister and Deputy Chief Minister,
Government of Maharashtra.

Dear Sir,

We the undersigned, having known Arun Ferriera in his days as a student at St. Xavier's College, and now working professionals in various fields, wish to state:

That we are deeply shocked and hurt by what we have read in various newspaper reports.

That we remember him as a fine student and a boy of high integrity and character. We also cannot admit that he would engage in any activity which would hurt the interest of people. Nor believe that he would engage in any undemocratic activity.

That he should be tortured and dealt with in such a manner at the hands of the police is entirely unacceptable, and we would like to lodge our unequivocal condemnation of such barbaric treatment.

Sections of the media report that he has been 'discovered' with literature pertaining to issues such as farmers' suicides, the Khairlanji killings, SEZs and the Ramabai Ambedkar Nagar firing on Dalits. We would like to state that these are all issues of immense importance and require urgent and continued attention. Engaging with these issues in a democratic manner cannot be construed as evidence of criminal activity. Such a view will only indicate a deep and pervasive decay of ordinary democratic rights. And we, working professionals, are equally seized of these issues and extend our support not just to him, but any person working to stand up to such injustices.

In the recent past there have been innumerable reports on the issue of 'fake encounters'. We too view this practice with deep concern. Such extra-judicial killings are, in our view, unacceptable in any society. It has also been reported that there is an attempt to transfer his custody to the Andhra Pradesh police. In the said context, our fear of Arun being treated 'conveniently' with extra-judicial practices, can only be well founded.

Having stated the above we strongly urge you to expedite the following:

1. Give Arun Ferreira immediate medical examination by an independent team of doctors at a government facility
2. Effect his immediate transfer to judicial custody
3. Facilitate his access to a lawyer
4. Ensure that he is treated with all dignity and rights on par with any political prisoner.

Signed by:

Surabhi Sharma - Documentary Filmmaker
St. Xavier's 1986-91

Sameera Khan - Journalist & Writer
St. Xavier's 1984-89

Rochelle Pinto - Research Fellow
St. Xavier's 1987-92

Kavita Fai - Documentary Filmmaker
St. Xavier's 1991-94

Neha Madhiwala - Secretary, Forum for Medical Ethics Society
St. Xavier's 1988-93

Neeraj Sahay - Cinematographer, Documentary filmmaker
St. Xavier's 1987-94

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The first-ever ruling came recently under the new Domestic Violence Act asking the man to pay a Rs 1.5 lakh compensation to his live-in partner for walking out on her after holding out hopes of marriage.

This ruling, delivered by city magistrate Jagdish Kumar last week, is on grounds of emotional violence, not physical abuse. It also marks the legal recognition of a certain responsibility in relationships too as it deals with a live-in arrangement between two adults.

The new Act provides for civil liabilities for the man and relief to the woman abused — physically or emotionally — during the time they lived together. While this is aimed at guarding the woman against gender vulnerability, some legal experts also believe that it may tilt the balance unfairly against the man as it could open him up to prosecution if he walks out of a soured live-in relationship.

The case relating to magistrate Jagdish Kumar's ruling is this. The lady stated in her complaint that she came in contact with Amitava Mukherjee in 1999 when he was working as the country director of Action Aid India. In January-February 2003, Mukherjee offered her an assignment with UNESCAP while making her believe that he was no longer living with his wife and had already sought to annul his marriage.

Towards the end of April 2003, she was asked to move to Bangkok and work for UNESCAP. Around May 2003, Mukherjee invited her to stay with him. Believing that he has separated from his wife, she started living with him, the woman said in her complaint filed through counsel Aparna Bhat. She also talked about her pregnancy and the "deceitful manner" in which he made her drink some medicine for abortion, which led to first signs of strain in their relationship.

Mukherjee, on one pretext or the other, avoided marrying her and after three years into the live-in relationship walked out of it. The complainant alleged that on October 26 last year, when she was visiting Delhi, she got a call from him, saying that he has vacated the Bangkok house and shifted their belongings to another house but did not divulge its address.

Mukherjee, defending himself, denied every allegation and termed the complaint as a tactic to blackmail him and extort money.

As appeared in a leading daily on May 23, 2007
Indira Jaising revisits the Kiranjit Ahluwalia case after viewing the film “Provoked”

The film ‘Provoked’ left me cold, not because the beautiful Aishwarya Rai did not do her job, she came across as a battered woman, fearful, ridden by self guilt, self-esteem and shame for being battered, but the law seems to have failed the real life Kiranjit Ahluwalia. I looked forward to the film with great expectations: it was the first case of this kind and the first film of its kind on domestic violence. After all, we have just acquired our own domestic violence law.

A battered woman kills her husband, in a response to violence she has faced over the years. Domestic violence is a “pattern of abuse” extending over a period of time between intimates and alternated with affection, apology, pleading for forgiveness by the abuser. Can the woman then be faulted for living in hope, until the proverbial “last straw” breaks her back, her mind, her emotions and her soul? The first point to make is that abused women in domestic relationships the world over have killed their husbands. Indian women are no exception. In Bombay currently, at least two women are being prosecuted for precisely this offence, each with a history of domestic violence. The tragedy is that these women in the criminal justice system, are compelled to keep silent, as, to admit to the killing is to suffer certain life imprisonment. For any lawyer representing such women, it is a difficult choice to make, to put the woman on the witness stand and allow her to tell her story, or to exercise the right to remain silent. Most lawyers opt for the latter. They then depend on technicalities to get acquittals, if at all they do. Kiranjit Ahluwalia’s lawyers requested her to take the witness stand and remain silent, she was ashamed to admit to domestic violence, even when facing certain life imprisonment.

“Grave and Sudden provocation”

The woman’s immediate response after the killing is relevant to prove intention. In her case, the police constable who was the first on the scene said she was coherent, this lead the jury to conclude that the murder was premeditated. In appeal the Southhall Black Sisters mobilized public opinion and the constable, ridden with guilt made a statement, that she was actually shattered after the event. The Court sent the case back for a retrial on the ground that the jury had been misdirected. This was on the ground that an important report of a psychoanalyst had not been taken into consideration which indicated endogenous depression. Women’s groups argued that the “grave and sudden provocation” defense be accepted, that victims of domestic violence do not react suddenly, but after a period of time and that it is provocation never the less. There was no retrial, the plea of “diminished responsibility” was accepted and she spent three and a half years in prison.

The way forward

Kiranjit became a nation hero, a representative of all battered women. This is not to argue that all battered women must kill, but that the issue of domestic violence in the UK was put on the national agenda by this case, just as the killing of Nicole Brown Simpson by O.J. Simpson led to the passing of the new domestic violence law in the USA. O.J. Simpson was acquitted but a civil court granted compensation for wrongful death to her family. The case has no legal relevance to India as we do not have a jury system. However, all judges who talk of women “misusing” the law need to see the film to educate themselves on what is domestic violence and what to expect if early warnings are not heeded by injunctive relief. The way forward in India is also, hefty compensation for wrongful injury as the newly enacted Protection of Women from Domestic Violence Act allows. Use it, all you women out there.
Battered Women Syndrome

Compiled by Tenzing Choesang

"Battered woman syndrome describes a pattern of psychological and behavioral symptoms found in women living in battering relationships."

The term "battered woman syndrome" (BWS) was coined by American feminist and psychologist Lenore Walker. In 1978-1981 she interviewed 435 female victims of domestic violence. She concluded that the violence goes in cycles. Each cycle consists of 3 stages:

- Tension building stage.
- Acute battering incident.
- Loving contrition.

Initially BWS was conceptualized as "learned helplessness," a condition used to explain a victim's inability to protect herself against the batterer's violence, this was followed by the battered woman syndrome being referred to the cycle of violence. However most recently, battered woman syndrome has been defined as post-traumatic stress disorder (PTSD), a psychological condition that results from exposure to severe trauma.

The landmark decision on "battered woman syndrome" in the Supreme Court of Canada is R v Lavallee. In this case, the woman shot her husband in the back during a violent incident, and her plea of self-defence was accepted on appeal. The court took into account the influences, background, and circumstances of the accused to determine whether she actually believed that she was at risk of serious bodily harm or death, whether she had to use force to preserve herself, and whether those beliefs were reasonable.

In the case of R v Howell where the wife's husband the Court of Appeal reduced the sentence on the basis that the court cannot overlook the history of provocation and violence of the type that is so clearly shown in this case. Similarly in R v Murray following years of violence and abuse to himself and his mother, the young defendant killed the stepfather. In reducing the sentence the Court of Appeal said that the trial judge had not given proper weight to the long period of abuse and the cumulative provocation experienced by the defendant. The Law Commission Report on Partial Defences to Murder in 2004 accepted that the "all or nothing" effect of self-defence can produce unsatisfactory results in the case of murder. The Commission thus recommended a redefinition of provocation to cover situations where a person acts lethally out of fear which would thus cover battered woman's syndrome.

Battered Woman's Syndrome however has been most utilized and reported in the USA. To date 31 states and the District of Columbia have allowed use of expert testimony on the syndrome and five have acknowledged its validity. In Bechtel, two experts acknowledged that battered woman's syndrome is considered a sub-category of Post-traumatic Stress Disorder. In the case of State v. Kelly it was held that BWS is admissible to aid juries in assessing a defendant's perception of danger posed by the abuser. "Evidence of BWS not only explains how a battered woman might think, react or behave, it also places the behavior in an understandable light."

However in most domestic violence cases the courts have focused on a syndrome model to the exclusion of other research that, though less legally convenient, more accurately depicts the social and psychological consequences of domestic violence. Thus the critique that follows BWS is that it is inadequate to the task of describing battered women's experience. "Battered woman syndrome" signals a particular area of and leads to a stereotype which may not fit the current state of knowledge concerning battering. Further since there is no clearly defined set of criteria to define "battered woman syndrome," relevant information crucial for expert testimony cannot be adequately defined by a single construct or diagnosis.

1. People v. Romero, 13 Cal Rptr 2d 332, 336 (Cal App 2d Dist. 1992);
3. (1990)1 SCR 852 (SCC)
5. (2001) 2 Cr. App. R. (S) 5;
6. Bechtel v. State, 840 P2d 1 (Okl Cr 1992);
7. 478 A2d 364 (1985);

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MAY 2007
Following are among the findings of the report titled "Legal and Policy concerns related to IDU Harm Reduction in SAARC Countries", released on the 10th of April 2007 in Kolkata, India by the Honourable Shri Oscar Fernandes, Convenor of the Parliamentary Forum on AIDS, in Collaboration with the United Nations Office on Drugs and Crime (UNODC), the Ministry of Social Justice and Empowerment, India (MSJE) and the National AIDS Control Organization, India (NACO).

Injecting Drug Users Harm reduction in SAARC countries

- Over the last two decades, South Asia has witnessed a significant increase in HIV prevalence among drug using populations, particularly those who inject drugs. To stem the twin epidemics of HIV and drug injecting, several countries in the region have introduced needle-syringe and oral substitution programmes for injecting drug users (IDUs). Besides reducing HIV transmission, these interventions bring IDUs in contact with drug treatment and recovery with the aim of eventually overcoming dependence.
- The positive outcomes of such 'harm reduction' measures have been endorsed by the World Health Organisation (WHO) and the Joint United Nations Programme on HIV i.e. UNAIDS, of which the UNODC is a co-sponsor. However, these interventions are sometimes challenged as not falling within the bounds of narcotics and/or penal laws.
- South Asian governments can exercise several legal and policy options to initiate and scale up IDU harm reduction to reduce individual risk and promote public health.

Commissioned by UNODC to the Lawyers Collective HIV/AIDS Unit, a non-government organization (NGO) working on Public Heath, HIV and Law in India, the report examines the interface between law, policy and IDU harm reduction practices in Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. It also suggests potential measures to harmonize IDU harm reduction with law.

The report relies on primary and secondary sources of information. It combines a review of international and regional drug conventions and country specific laws, policies and programmes on drug use and HIV with site visits and stakeholder interviews including with health and narcotics law officials, NGOs, lawyers and representatives from concerned ministries, UN and international agencies. Preliminary findings from the report were peer-reviewed individually by country experts and jointly at a Regional Tripartite Review Meeting organized by UNODC from 30-31 March 2006 at Colombo, Sri Lanka.

Across South Asia, narcotics laws proscribe inter alia possession, use/consumption and supply of prohibited drugs. Notwithstanding stringent penalties, no country has seen a diminution in drug use. On the contrary, drug consumption is reportedly on the rise. In some countries, legislative and enforcement action have coincided with a shift towards riskier use, particularly injecting pharmaceuticals with the attendant threat of HIV and blood borne infections. The report cites studies that attribute the phenomenon of injecting pharmaceuticals to non-availability of heroin.

According to the report, interventions to reduce risk of HIV transmission among drug injecting populations through provision of sterile needle and syringes, Methadone and/or Buprenorphine oral substitution, treatment for drug dependence, outreach and peer support, drug safety education and condoms have been initiated by NGOs in Bangladesh, India, Nepal and Pakistan. Though critical to prevent HIV among IDUs and their sexual partners, these programmes have not been implemented at scale and have found only partial acceptance in national drug policies.

The report documents statutory hurdles to IDU harm reduction in all countries. Provision of sterile syringes to IDUs is open to prosecution under penal and/or narcotics law as abetment of drug consumption. Though punishable, most country laws allow consumption of prohibited drugs strictly for medical reasons. Oral substitution is, however, not considered as in most jurisdictions since treatment is often seen as 'giving up drugs'. The report finds varying legal controls on Methadone and Buprenorphine that impact availability and access. Furthermore, absence of protocols for prescription and supervision has hindered policy on oral Methadone and Buprenorphine therapy. Across South Asia, treatment for drug dependence is offered through complex penal
and civil arrangements leaving a vast majority of drug users without medical and/or social assistance. Information on safe injecting and drug use is scant, and, if offered, would be in contravention of law. Though available, condoms are not supplied in prisons and, if offered, would be in contravention of law.

The report outlines types of legal interventions that national governments may adopt to bring IDU harm reduction in conformity with law. One such way is to read harm reduction within the rubric of medical treatment. Another option is to offer immunity to health and harm reduction staff under the good faith exception, ordinarily available to the prosecution. Protecting harm reduction interventionists from penal and civil liability by an overriding 'innocent act' clause is yet another strategy. The report recognizes that the choice to make amendments vests with individual countries given their particular legal regimes and interpretations of laws by judicial bodies.

**Sankalp**

A Writ Petition was filed under Articles 14, 21, 32, 41, 42 and 47 of the Constitution of India, as a large number of HIV positive persons were denied medical treatment in public hospitals on the ground that the person is infected or is suspected to be infected with HIV/AIDS. People Living With HIV/AIDS (PLHAs) were being denied basic access to health care and treatment particularly by public and state run hospitals and medical institutions. Closely associated with discrimination in health care is the issue of Health Care Workers (HCWs) denying treatment on account of fear of occupational exposure to HIV while treating HIV-positive patients. Further, the petition also raised the issue that certain provisions of the Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002 were violative of the right to self-autonomy and confidentiality of PLHAs.

The petition sought the following directions from the Supreme Court:

1. Declaration that the denial to treat or discrimination in treating a person on the ground that s/he is or is suspected to be HIV-positive is violative of Articles 14 and 21 read with Articles 37, 41, 42 and 47 of the Constitution of India.

2. An appropriate writ, order or direction to the Respondent to frame. Adopt and follow a formal protocol to ensure non-discriminatory treatment to PLHAs and for providing Universal Precaution (UP) and Post Exposure Prophylaxis (PEP) to all its medical staff.

3. For a declaration that certain provisions of the Regulations of 2002 are violative of Articles 14 and 21 of the Constitution and for a writ/direction/order directing the Respondents to amend the Regulations.

Pursuant to filing the Petition, the Government of India started the ARV Rollout Programme from 1st April 2004. Consequently, the petition was amended to address the shortcomings in the ARV Rollout Programme and the right to affordable treatment. The Petitioners submitted the directions that they seek from the Court to guarantee the right to universal access to health care of PLHAs.

Among other things, the Petitioners sought:

- Revision of 1st line drugs to include WHO revised guidelines;
- ART Rollout programme to include second line and third line drugs;
- The PPTCT programme to be up-scaled;
- Voluntary Counselling and Testing Operational Guidelines (VCTC) to be up-scaled in a non-discriminatory manner, counseling guidelines to be revised and revived;
- Informed consent, confidentiality and non-discrimination protocols to be strengthened;
- A safe working environment and Post-Exposure Prophylaxis (PEP) to all health care workers to be made available throughout the country;
- Free Opportunistic Infection (OI) programme to be strengthened;
- Co-trimoxazole to be part of the OI programme;
- All drugs and tests to be made free;
- ART Rollout programme needs to be planned better;
- Government to take immediate steps to remove taxes on ARVs;
- Proper implementation of Country Coordinating Mechanism (CCM) and accessing the Global Health Fund;
- Source ARVs from Public Sector Companies.

The Government of India then filed a reply to the said directions. Details are available on our website www.lawyerscollective.org
The inter-religious marriage between a Sindhi girl, Priyanka Wadhwanani (21 years) and a Muslim boy, Mohammed Umar (22 years), gave the saffron brigade of the Bajrang Dal-VHP-RSS its latest excuse to hoot its virtuous mantra. Aditi Sharma explores the imbroglio and the moral hypocrisy....

Love knows no bounds. That we heard. Love must know its bounds. So we saw.

Between 11th and 14th April 2007, the city of Bhopal, from where the lovers hail, was under the 'Hindutva mobocracy' when a near riotous situation developed with chakka jaams and protests against this marriage. So much were the Hindu sentiments hurt that a Bhopal Bandh was proposed in objection of the marriage.

Several aspects come under consideration here. Ideally, who marries whom should be none of our concern. Marriages are a private affair between the couple and their respective families. As a matter of right, no one has the authority to stop two consenting adults from contracting a marriage irrespective of religion. It's a happy ending when the entire family supports an inter-religious/inter-caste marriage in unison. Hence the excitement, the deep involvement in whatever details the media fed to the common man on the latest Big Bachchan wedding. But it's a scandal when, much against the wishes of the parents, the couple elope and marry. The unwritten code of civil conduct has been violated – the couple must be pressurized and threatened so much that the thought of staying together scares them. Families of girls are usually seen filing false complaints with the police of kidnappings and abductions when the girl leaves her house of her own accord. Family members on the boy's side are brought to the police station on the pretext of investigation and interrogation and tortured. This appears to the established norm in most cases of mixed marriages; for purposes of speeding up the solemnization of marriage and cutting across the red tape in this country, either partner converts to the others religion. Or for convenience sake, the couple converts to a third religion. The intentional propagation of such conversions lead people to believe that one religion is asserting supremacy over the other, religious passions are stirred and in an instant an apparent personal matter takes a dangerous political colour.

However, this is not to say that parents must, as a matter of rule, give in to the demands or indulgences of their children. They undisputedly reserve the right to disapprove, dissent, not support such a marriage of their child for reasons and concerns best known to them. They also are entitled to disown their non-abiding child and sever all relations with him/her. After all, parents want only the best for their children. What is not befitting and worthy of parents is to go on a rampage and indulge in sword clashing.

But of course, the saffron brigade or the Sangh Parivaar is the extended family that takes its role quite seriously. Apparently, the Bajrang Dal has circulated a list of 341 such marriages conducted during 1997-2004 within the state. Incensed at the instant affair, the right-wingers have formed the Hindu Kanya Suraksha Committee to protect and save unsuspecting Hindu maidens from prying Muslim boys. The idea behind the establishment of the Committee is to break the diabolical designs of the minority community; prevent Muslim boys from taking advantage of the Hindu girls and then abandoning them because they are entitled
Bhopal was convened to recognize.
The Sindhi Panchayat roam around with the phones to the children Wadhwani and Umer are from handing out cell majority. Because both the nature of an edict faith lovers are sealed a farman that is in partner. The fate intermixed marriages. The - that of the freedom to prevent further such the iarger issue here and settle on a strategy hate propaganda clouds this disturbing incident Communal politics and deliberate and act over to marry four times over. E cover their faces up and roam around with the boys without fear of being recognized.

Communal politics and hate propaganda clouds the larger issue here - that of the freedom of choosing one's life partner. The fate interfaith lovers are sealed by the law if they have attained the age of majority. Because both Wadhwani and Umer are consenting adults, the Court was quick to grant them protection while the matter was subjudice and uphold their marriage as valid under the law. Umer had converted to Hinduism just before marrying Wadhwani on the same day. But conversion is not the only available option in mixed marriages.

The Special Marriages Act, 1954 was enacted to provide for a special form of marriage by any person in India and all Indian nationals in foreign countries irrespective of the religion either party to the marriage may profess. To get permission to marry under the Act, the couple is required to work within a time frame - Sec. 5 lays down that a notice of the intended marriage must be put up for public display at least 30 days before the registration of the marriage is to take place. This is done so that any objection to the intended marriage may be recorded under Sec. 7. The accepted grounds of objection are only those that are laid down in relevant Sec. 4 of the Act. No where under Sec. 4 or any other provision of the Act is an objection pertaining to a perceived threat to public peace or a potential danger of communal disharmony mentioned. One wonders then who gives the Bajrangis the mandate to indulge in moral policing and take it upon themselves to engage in vandalism and other inconceivable acts to prevent inter-faith unions. This 30 day notice display provides ample opportunity to prevent inter-faith unions. This 30 day notice display provides ample opportunity to prevent inter-faith unions. This 30 day notice display provides ample opportunity to prevent inter-faith unions. This 30 day notice display provides ample opportunity to prevent inter-faith unions.

Too much public speculation, communally political action and media indulgence is unhealthy for a secular democracy and unwanted for an intensely personal matter like marriage. Let people be the talkers of their own decision and responsibilities. Hail the freedom of choice for democracy's sake.

Footnotes:
2. See Saba Naqvi Bhaumik, "Hindu-Muslim marriages give Saffronites in MP an excuse for 'righteous' upheaval", Outlook, April 30, 2007.

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