Journal Section

IT IMPLEMENTATION IN BANKING - LEGAL IMPLICATIONS*

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(I) Introduction

Banks and Financial Institutions are the backbone of the economy of the country. Implementation of information technology and communication networking can bring revolution in the functioning of the banks and the financial institutions. For the sound implementation of information technology and communication networking in banks and financial institutions, necessary legal support is a must; to give legal recognition to electronic contracts, maintenance and transfer of electronicrecords,electronicsignatures,electronic transfer of funds and protection of interest of the customers, banks, systems providers and the regulator of electronic payment systems etc.

2. Initiationofbranchautomation/computerisation in the banking sector was a step towards networking and implementation of Information Technology in the financial sector of the country. Banks as well as other financial entities in India are fast adopting information technology and computer networking. The state-of-the-art information technology in the day-to-day functions of the banks and financial institutions has yet to take place which will bring a speedy, efficient, more secure, accurate, reliable and expeditious system with improved cost of efficiency.

(II) Role of Reserve Bank

3. Reserve Bank of India has played an important role in implementation of information technology in banking sector. Dr. Rangarajan Committee had drawn up in 1983-84 the first blue print for computerisation and mechanisation in banking industry and looked into modalities of drawing up a phased plan for mechanisation for the banking industry covering period 1985-89. The Committee in its report in 1984, recommended introduction of computerisation and mechanisation at Branch, Regional Office/Zonal Office and Head Office levels of banks.

4. In 1988 another committee was constituted under the Chairmanship of Dr. Rangarajan for making plans for computerisation for the next five years from 1990 to 1994 for the banking industry. It identified the purpose of computerisation as improvement in customer service, decision making, house keeping and profitability. The Committee observed that 'Banking is a service industry and improved efficiency will lead to a faster rate of growth in output and help to expand employment all around. The workforce in the banking industry must, therefore, look upon computerisation as a means to improve customer service and must welcome it in that spirit'.

5. The Governor, Reserve Bank of India had appointed a Committee on technology issues under Shri W.S.Saraf, Executive Director to look into inter alia, technological issues relating to payment system and to make recommendations for widening the use of modern technology in the banking industry. The Saraf Committee recommended institution of Electronic Funds Transfer Systems in India. It also reviewed the telecommunication system like use of

BANKNET and optimum utilisation of SWIFT by the banks in India. While dealing with BANKNET the Saraf Committee also recommended switchover from voice grade transmission to higher speed transmission facility like VSAT technology and targeting fiber optic radio frequency, etc. For this purpose, it also recommended setting up of Institute on banking technology with the objective of imparting high level technology training to the bankers and for sponsoring by the banks high level academic courses in information technology with specialization in banking technology.

(III) Electronic Funds Transfer

6. Another Committee under the Chairmanship of Smt. K.S.Shere was constituted by the Governor, Reserve Bank of India in 1995 to study all aspects relating to Electronic Funds Transfer and propose appropriate legislation. Shere Committee had examined various transactional issues relating to Electronic Funds Transfer such as:

(A) Type of Transfers:

(a) **Credit Transfer:** Payment of fixed amounts at regular intervals i.e. payment of interest, dividends by various companies and institutions etc. In this the instruction is given by person making the payment.

(b) **Debit transfer:** Payment of bills of telephone, electricity etc. In this the instruction is given by person receiving the payment. In debit transfer, banks make payment out of their customer's account to third person who instruct the bank to transfer the amount to his own account with his bank. This will be done if the customer of the paying bank gives it an appropriate mandate for the purpose. The payment is therefore initiated by the payee.

(c) **High Value and Low Value Fund Transfers:** Credit transfers are divided into two types:

4 (i) **Low Value Fund Transfer (High Volume):** Low value fund transfer instructions are executed in batches through an automatic clearing house. The settlement of obligations between banks is done on an end of the day on netting basis.

(ii) **High Value Fund Transfer :** These are executed on real time basis and settlement is normally done on gross basis in respect of each transfer.

(d) **Automated Transfer Machine(ATM) Transfer :** The ATM system is generally operated through an electronic device and is used for withdrawing of cash, depositing of cash and cheques and connected operations like transfer of funds from one account to another account.
The relationship between the bank and the customer is determined by the contract.

(e) **Electronic Funds Transfer at Point of Sale (EFTPoS) :** EFTPoS is basically an

Electronic Clearing System which can accept credit card entries and transaction cards or debit cards, ATM Cards and charge cards. In EFTPoS, the two minimum parties to a credit card transaction are the purchaser who uses the card to pay and the merchant who accepts the payment. Additional parties include the bank that issued the card to the purchaser and the bank which enrolled the merchant in the credit card system and the credit card corporation who usually process the transaction. The legal relationship between the participants are normally built by a complex chain of contracts

(e) Cheque Truncation : Cheque Truncation is a process in which the image of the relevant data of a cheque is electronically captured and transmitted to enable payment of that cheque to the payee's account and simultaneously debiting the account of the drawer without the physical movement of the cheque itself.

7. There was no statute specifically designed when EFTs were started. The services were arranged by drawing up contracts between the partiestogoverntheirmutualrightsandobligations. There was no amendment to the existing transactional laws, In the case of cards, bankers normally adopted standard terms and conditions on contractual basis. Problems, wherever arose were resolved by and large by application of analogous laws and the general principles of common law. The word's first EFT Act was made in the United States in 1978. The Electronic Fund Transfer Act, 1978 was basically a consumer protectionmeasureandinfactitiscodifiedastitle IX of the Consumer Protection Act. This Act, apart from defining certain basic concepts, lays down the disclosure norms in regard to terms, pricing, etc. It also requires the service providers to supply transaction record. This Act, however, applies mostly to consumer activated consumer payment systems and other consumer related EFTs like EFTPOS and ATMs. Inter-bank and intra-bank fund transfers are not covered by Electronic Funds Transfer Act, 1978. This Act is administered by the Board of Governors of Federal Reserve System and the Board in turn has made its administrative regulations.

(B) Legal Issues in EFT : The following are the main issues which have legal implications in the EFT :

(a) Irrevocability - Finality of Payment
(b) Liabilityforlossincaseoffraud,technical failure and errors
(c) Allocation of loss in case of insolvency
(d) Cheque truncation
(e) Evidence and burden of proof
(f) Preservation of Records
(g) Data Protection
(h) Dispute resolution
(i) Prevention of fraud
(j) Settlement of inter-bank payment obligations

8. Shere Committee has examined the aforesaid legal issues in EFT and observed as under: l Payment is made when the beneficiary's bank receives the payment order for credit to the beneficiary's account.

(a) Irrevocability - Finality of Payment :

Irrevocability

The point of time upto which payment instructions can be changed or cancelled by the issuer when the instructions is without any paper is not provided by the existing law. By analogy it could be

- A payment order becomes irrevocable once it is issued by the originator.
- Payment order becomes irrevocable when the sending bank issues it or executes it.
- Payment order becomes irrevocable when the beneficiary bank receives it.
- Payment order becomes irrevocable when the beneficiary's bank credits the beneficiary's account with the amount of the payment order.
- Payment order becomes irrevocable when the beneficiary's bank commits itself irrevocably by issue of advice of credit to the beneficiary.

But the Shere Committee has recommended that the payment order shall become irrevocable when it is executed by the sending bank. A payment order is treated as executed when the sending bank communicates the payment order to its service branch for further processing of the order.

Finality of Payment

The Negotiable instruments Act which provides for rules of finality of payment cannot be applied to EFT as EFT do not involve any paper instrument. The point of time at which payment is deemed to be made could be any of the following

- Payment is made when the beneficiary is advised of the credit from his bank (receipt of credit advice by the beneficiary).
- Payment is made when the beneficiary's bank despatches credit advice to the beneficiary.
- Payment is made when the beneficiary's bank credit the beneficiary's account.
- Payment is made when the beneficiary's bank receives the payment order for credit to the beneficiary's account.

But the Shere Committee has recommended that payment under the EFT shall be final when the receiving bank credits the funds to the account of the beneficiary whether or not the beneficiary is advised of the credit.

(b) Liability for loss in case of fraud, technical failure and errors.

Study of the systems in other countries indicate that loss arising on account of errors may be different from loss arising on account of negligence though at times negligence may lead to error. The rule for allocation of loss arising on account of errors are generally based on principles of Contracts and Torts. Generally, if the loss can be attributed to the conduct of the party to the transaction, that party becomes liable for it. Where neither party directly liable under

the principle of "party at fault", the equity rule provides that the party whose conduct lead to the fraud to take place or caused an error to take place, must bear the loss.

(c) Allocation of loss in case of insolvency

EFT is a method or means. But the incidence of insolvency of any bank involved in an EFT could be substantially different from those arising in a paper based payment. In EFT, there could be a float between the point of time a payment order is issued by a customer to the point of time when payment is complete. The issue that needs to be focussed is, if payment is suspended by any bank participating in the EFT before settling its payment obligation, on whom does the loss fall? Should the beneficiary bear the loss? Should the initiator of the payment order bear the loss? Or, should the sending bank or beneficiary's bank bear the loss?

Under the English Law, on which most of India banking law principles are based, the following position is stated:

- If a bank having given a commitment to pay becomes insolvent before discharging its obligations, the bank to whom that commitment was given has no claim to any funds. It will only have a mere claim in the insolvency in competition with other creditors, while the creditor customer for whom the commitment constituted conditional payment has a right to demand payment from the debtor customer.
- Where the receiving bank becomes insolvent after the payee's account has been credited, the creditor customer has to bear the loss.
- If a bank goes into liquidation before it has collected a cheque, it has no right to borrow the sum in question back from its customer.
- A credit transfer, once initiated, may be reversed by the paying bank up to midnight on the day of the transfer (but not later), even though the credit has not been communicated to the beneficiary. There is no reason to distinguish an in-house transfer from an external payment inthisrespect.

The Companies Act or the Banking Regulation Act, 1949 (BR Act) in India, do not provide any satisfactory solution. In practice, by operation of Clearing House Rules, netting of transactions (clearing inward and clearing outward) on the date of suspension of payment by a bank is resorted to and the surplus, if any, is treated as money held in trust in the hands of the liquidator. These provisions also do not provide a satisfactory solution.

In case of EFT, apart from the nature of legal relationship of the party, the point of time at which the customer's account is debited and the point of time at which the settlement between banks take place may have significance for considering the incidence of insolvency. The following options could be considered:

- Establishment of a contingency fund.
- Distribution of loss among the participants.
- Provisionforcollateral.
- Provision for insurance.

A predetermined fee towards the corpus of the contingency fund could be raised from the participating members. This, however, will not be possible unless the existing provisions of the Insurance Act is amended. Alternatively, sharing of loss may be pursued on some principles like the size of the participants or volume of transaction fordistributionofloss.Theotheralternativeisto require each participant to keep collateral. This would involve policy consideration as it may immobilise resources of banks. Which of these alternatives may have to be pursued, will ultimately have a bearing on a suitable clearing and settlement procedure to be adopted.

(d) Cheque truncation

There are basically three issues which need to be considered :

- Does our existing law permit cheque truncation?
- Does the advantage of cheque truncation outweigh the accompanying risk involved in the process?
- What changes are called for in law, at this stage of development of technology in India, for following cheque truncation system?

Under the Negotiable Instruments Act, 1881 (NI Act), cheques have to be presented for payment to the bank on which these are drawn. Without such presentment, no cause of action arises against the drawer. Section 64 of the Act ibid declares that in default of presentment of a cheque to the drawee for payment, other parties to the cheque are not liable to the holder. A collecting bank, by implied contract assumes an obligation to present the cheque at the drawee bank and that obligation is discharged only when the cheque is so presented. The fact that the presentment for this purpose means physical presentment is clear from the following addition made to Section 64 by an amendment in 1885

"Where authorised by agreement or usage, a presentment through the post office by means of registered letter is sufficient."

By banking practice, both in India and in England it is open to banks to agree to presentment at any place other than the branch, such as at a clearing house.

The right of the paying bank to require physical presentation and possession of the cheque is designed to provide it with an opportunity to examine the signature or other authentication of the cheque, to examine the "apparent tenor" for its accord with the formal requirement of law, to be sure that there is no material alteration and that a paid cheque is not presented for second time. In large measure the existing requirements are designed for the protection of the drawer.

If a customer claims that the payment by his bank against the cheque was without proper mandate, the paying bank can rebut his claim only by producing the paid cheque (in original), and showing that it had discharged its obligation under law by verifying the signature and apparent tenor and that the payment was in due course. In the absence of such proof, the paying banker is bound in law to recredit the amount. In the U.K., banks have tried to reduce the risk by obtaining customer consent agreements to enable them to waive physical presentment of

cheques. Section 76 of the N I Act in India, which deals with waiver of presentment, specifically recognises the drawer's right to waive the presentment.

The requirement of physical presentment is a legal requirement but this is meant for the benefit of the drawer. Courts in India have held that an individual can waive his legal right if there is no public policy behind the right conferred by law. On this basis also it should be possible for the banks in India, like the banks in U.K. to introduce the cheque truncation process on the basis of customer agreements. But in the long term, unless the law is changed, the process of truncation of cheques may not make such headway. The definition of "presentment" in Section 64 of the NI Act may have to be suitably amended to permit electronic presentment of essential data or image of the cheque. This, however, involves a greater probe into the status of technology at the branch level and the extent of dishonour of cheques for alteration/forgery etc.

An amendment to Section 64 of the NI Act is proposed as under :

> **"64 Presentment for payment -** Promissory notes, bills of exchange and cheques must be presented for payment to the maker, acceptor or drawee thereof respectively, by or on behalf of the holder as hereinafter provided. In default of such presentment, the other parties thereto are not liable thereon to such holder.

Where authorised by agreement or usage, a presentment through the post office by means of a registered letter is sufficient.

Where cheque processing is done electronically, electronic presentment of essential data or image of the cheque is sufficient.

Exception - Where a promissory note is payable on demand and is not payable at a specific place, no presentment is necessary in order to charge the maker thereof."

(The portion shown as bold above is the proposed amendment).

(e) Evidence and burden of proof

The committee had pointed out that there are basically two issues in regard to proof of EFT :

- Should there not be any legal obligation on any service provider to issue a print out of written record on completion of an electronically completed transaction?
- Whether and to what extent computer print out should be admissible evidence?

and suggested that, when EFT is introduced in India, especially EFTPoS and other card based transactions like ATMs, a provision requiring service providers to ensure furnishing of authenticated records of transactions need to be made. Rules of evidence in regard to computer based transactions have already been developed in the U.K., both in civil and criminal proceedings. It is time that we address ourselves to those problems. This is however, an issue of general nature applicable to all computer based transactions.

In India although the Evidence Act which generally governs the proof in civil and criminal proceedings, has not yet adopted itself to the computerage, some headway is made in the Customs and Excise Laws. Record kept in disc, microfilm and other electronic memory systems are made admissible. The Customs and Central Excise Laws (Amendment) Act, 1988 which introduced new Sections, 138C in the Customs Act, 1962 and 36B in the Central Excise and Salt Act, 1944, has provided a lead in this regard. Electronic Commerce Bill has, however, provided for amendments to the Evidence Act in this regard. Further, the Government of India have also prepared Banker's Books Evidence (Amendment) Bill, 1998 for recognition of print outs of data stored in a floppy, disc, tape or any other form of electromagnetic data storage device as prima facie evidence in the courts of law.

(f) Preservation of records

Books, accounts and other documents as well as instruments handled by banks, apart from their evidentiary value, have special significance from supervisory angle. Section 45Y of the BR Act, 1949 enables the Central Government to make rules for the period of preservation of records. Pursuant to this, the Banking Companies (Period of Preservation of Records) Rules, 1985 have been made by the Central Government, in consultation with the Reserve Bank of India. The Rules prescribe the period for which banking companies are required to preserve specified ledgers, registers and other records. A period of five to eight years is prescribed as a period for which specific records are to be preserved. Of the various records listed in the Rules ibid, the entries pertaining to Drafts, TTs and Mail Transfer Registers, Remittance Registers, despatch and receipt advice of remittances could be of special significance to EFT. The preservation of records may also have significance in regard to litigation. Although the Rules ibid are not driven by the considerations of period of limitation for enforcement of claims, banks may, in their own interest, have to preserve records consistent with the Law of Limitation and evidence to take care of future litigation. The question of amending the existing Rules for preservation of records in relation to EFT needs to be considered as a matter of policy by the Reserve Bank having regard to the supervisory and regulatory requirements. There is no specific entry pertaining to EFT in the existing Rules. A specific entry, therefore, would have to be considered and a suitable period and the method of preservation, after considering the supervisory policy and technological aspects of preservation of records has to be decided.

(g) Data Protection

A clear understanding of the risk involved in transmission of payment data through a communication network and keeping records of transactions in computers and other electronic devices is necessary. The possibility of unauthorised access by third parties, of the vital data, may depend on the design of network system, its dependence on general communication facility, etc. While a dedicated communication network may be less prone to unauthorised access, it may be different if the design of the system depends on general telecommunication facility. The Saraf Committee made a reference to Data Protection Act, 1984 in the U.K. This Act is aimed at protection of personal data of individuals stored or processed on electronic media against unauthorised disclosure and unauthorised use. The Act establishes a system of Registration of Data Users and Computer Bureaux and prohibits holding by any person of personal data on electronic media unless he is registered under the Act. The Act also confers specific rights on

individuals who are Data subjects. These rights include right of access to the data, compensation for accuracy in the data, compensation for loss on account of unauthorised disclosure, etc. The Act exempts holding and use of personal data by certain specific categories of data users like statutory authorities. This Act is not specifically aimed at electronic banking or EFT. As such the Act is a general legislation initiated for the purpose of dealing with potential unauthorised access or abuse of personal data by computer network providers and others. Electronic banking records of a bank's customers are personal data under the Data Protection Act, and customers are "data subjects". The Act provides for defences to the bankers. These are, that the financial institutions are not liable if access to computer information is by a person in the registered entry, or if they can prove that they have taken reasonable care to prevent unauthorised access and consequential loss. It would seem that the banker's liability will ultimately depend on the precaution taken to prevent non consensual access.

(h) Dispute Resolution

Provision for a separate investigation and dispute resolution mechanism is felt necessary especially in regard to high value funds transfers. In the U.S., in regard to EFT of all types, specific statutory provisions are made to provide for an effective mechanism for investigation and resolution of disputes. This assumes special significance in India, as EFT transactions are highly technical and need a clear understanding of the concepts and technological aspects in investigating and resolving disputes.

Under the existing framework of Indian Law, the bank customers have the following remedies :

- To approach civil courts by way suit for damages, injunction or specific performance.
- To approach Consumer Forums established under the Consumer Protection Act.
- To avail Customer Grievance Redressal Machinery provided within the banking system. (Such as complaint to Banking Ombudsman, complaint to Reserve Bank's Grievance Cell, etc.)

Resorting to civil courts for resolution of disputes could be extremely expensive and time consuming. Given the existing rules of Evidence Law and the general delay in judicial system, resolution of grievances through courts may not be suited to EFT disputes.

In U.K., for resolving customer disputes in banking services, a system of Ombudsman has been introduced. There are both voluntary and statutory models of separate Ombudsman system in U.K. In India, untill 1995, customer grievances were handled at the branch level, at the controlling office level and at the head office level of the banks. With a view to improve customer service the Reserve Bank of India had set up separate Customers Grievance Cell to co-ordinate redressal of customer grievances. The Reserve Bank of India introduced in 1995 a system of Banking Ombudsman, which was introduced as a directive issued under Section 35A of the B R Act. The existing system of Ombudsman for banking sector in India is a mixture of principles of conciliation, mediation and adjudication. The remedy through Ombudsman is an additional remedy and not exclusive. The Ombudsman award becomes enforceable only if the complainant accepts it.

The question whether a separate system of arbitration or other form of adjudication of disputes between banks and their customers, arising under the EFT would be necessary, can be better considered when a clear idea about the type of disputes commonly raised and the number of such disputes are known. Resolution of disputes between bank customers and banks may have to be treated differently. A separate mechanism for the investigation and resolution of claims between banks or between a bank and Reserve Bank, however needs to be considered on a priority basis.

(i) Prevention of Fraud

Fraud in an EFT involves an unauthorised instruction, alteration of the amount or alteration of the name of the beneficiary etc. Prevention is the elimination of the cause itself, by directing the incidence on the person who causes it. There are basically two issues involved here:

- What should be the responsibility of the service providers and users in regard to design of the system?
- Whether fraud in EFT should be made a punishable offence and if so, what elements should constitute the offence?

Misuse of computers and other electronic devices through unauthorised access is not the problem of EFT only; rather, it is common to all computer basedtransactions.Itisofspecialsignificancefor EFT due to high potential and intensity, given the sums involved, especially in high value transfers, and the ease with which it can be perpetrated. The common sources of EFT fraud inter alia, are :

- Dishonest employees of the customers.
- Fraudulent use of customer activated terminus.
- Dishonest bank employees.
- Taping telecommunication transmission.

Fraud by itself is not an offence under the Indian Penal Code (IPC) and as such, "Fraud" is not defined in criminal law in India. However, certain acts when done "fraudulently" are made offences. "Mischief", "Theft", "Cheating" are some of the offences which have elements of fraud. But these offences require some additional ingredients, like "moving a moveable property out of the possession of another" as in the case of "theft" (Section 378 of IPC), "intentionally causing wrongful loss or destruction of property" as in the case of mischief (Section 435 of IPC); and "dishonestly or fraudulently removing, concealing etc. of property" as in the case of "cheating" (Section 421 of IPC). In most of these cases the definition of offences are directed against "property". An EFT being a message in electronic media may not fall within the description of "property". It also does not fall in the definition of "document" in regard to the category of offences against documents. In the Law of Torts, fraud means deceit. It requires intention to deceive and actual deceit. Indian Contract Act, 1872, defines fraud in relation to a contract as, commission of any specified acts with intent to deceive. The acts specified are, "a suggestion which is not true, made by a person does not believed to be true; the concealment of a fact; a promise made without any intention of performing it; any other act or omission as the law specifically declares to be fraudulent".

In EFT, it is data related crimes, which are the most common. And if that is so, the existing provisions of the IPC or the definition of "fraud" in the law of Torts or Contract Act may not be helpful in fixing criminal liability as an effective way of preventing EFT frauds. In U.K. computer crimes are dealt with under two recent enactments. The U.K. Counterfeiting Act of 1981, contains a special Section defining forged, "instrument" as including "any disc, tape, sound track or other device on or in which information is recorded or stored by mechanical electronic or other means". All crimes against documents are thus extended to electronic data. Further, the U.K. Computer Misuse Act, 1990, for the first time defined three distinct computer crimes and provided for punishment varying from six months to five years imprisonment. The offenses defined under this Act are:

- Unauthorised access to computer material.
- Unauthorised access with intent to commit or facilitate commission of further offence.
- Unauthorised modification of computer material.

In all the above offences an element of "intent" is required.

(j) Settlement of Inter-bank Payment Obligations

There are different methods in banking system of each country for settlement of inter bank payment obligations arising out of clearing of collection items. Two banks may bilaterally establish a correspondent arrangement in which case normally payment obligations are settled by appropriate book-keeping entries in the account maintained by one of them. Alternatively, two or more banks may maintain account with the third bank for settlement of payment obligations between them. In such cases settlement of individual items or batches of items are made by a debit and corresponding credit entry made in the respective accounts maintained with the third bank. In most of the cases banks establish clearing houses which also serve as settlement agency. The amounts transferred to and received by each of the participating bank, at predetermined intervals, are totaled and settled by banks with a net debit position in favour of those with a net credit position. The concept of netting has several variations. In most of the systems, the Central Bank or in the absence of Central Bank, the biggest bank, functions as the settlement bank in the clearing system. The time gap between clearing and settlement is the zone of risk of failure of a bank to settle its position to which the entire banking system is exposed and which normally triggers the systematic risk. It is mainly for this reason apart from the reasons of lending moral and credit support to the settlement system by virtue of its position, that a country's Central Banking Authority is concerned with the efficient functioning of settlement mechanism. In an EFT environment, the following specific aspects need special mention

- The frequency with which the transactions are netted;
- The period of time after netting, within which settlement of net balance is made;
- Whether netting and settlement is by pairs of banks or for the clearing as a whole; and
- The means of settlement.

In an EFT credit transfer system, depending on the settlement system, the beneficiary's bank may

assume an irrevocable obligation to the beneficiary by crediting the amount to his account before it has received value (before inter bank settlement takes place). It may so happen that since the creation of the debit balance arises out of the sending and receiving payment instructions, no bank in the network may know until the end of the day, whether it will finish the day with a net debit or credit balance. In general, EFT in low values are settled in batches on a net or net-net basis, while high value EFTs are settled individually on gross basis. Exception to this are CHIPS system in U.S. and CHAPS system in the U.K.

In designing the settlement system, the need for integrity as well as efficiency of the funds transfer system as a whole may have to be given priority, especially in the initial stages of developing the EFT system.

(IV) Recommendations of Shere Committee Report

9. The Shere Committee had recommended framing of RBI (EFT System) Regulations under Section 58 of the Reserve Bank of India Act 1934 (RBI Act), amendments to the RBI Act and to the Bankers' Books Evidence Act, 1891 as short term measures and enacting of a few new Acts such as the Electronic Funds Transfer Act, the Computer Misuse and Data Protection Act etc; as long as long term measures.

(V) Narasimham Committee Report

10. The Committee on Banking Sector Reforms (Narasimham Committee - II) has in its Report dealt with, the issues in technology up-gradation and observed that the most of the technology that could be considered suitable for India in some form or the other has been introduced in some diluted form as a pilot, but the desired success has not, however, been achieved because of the reasons inter-alia **lack of clarity and certainty on legal issues.**

11. The Committee also suggested implementation of necessary legislative changes keeping in view the recommendations of Shere Committee. The need for addressing the following issues was also emphasised :

- Encryption on Public Switching Telephone Network (PSTN) lines
- Admission of electronic files as evidence
- Treating electronic funds transfers on par with crossed cheques/drafts for purposes of income tax, etc. and
- Record keeping

12. In order to address the various aforesaid legal issues, including the recommendations made by Shere Committee, Narasimham Committee -II and Dr.Vasudevan Committee on Technology Upgradation in Banking Sector, certain amendments in existing Acts and promoting certain new legislation is necessary. Legislative support is essential for protecting the interests of the customers and the banks / branches in several areas relating to the electronic banking and payment system.

13. RBI has already prepared draft EFT (RBI System) Regulations under section 58 of the RBI

Act, but the same is pending approval by the Government. RBI has also appointed Shri P.M.Bakshi, Ex-Member, Law Commission of India, as a Consultant for preparing the draft Electronic Funds Transfer Act. The Department of Electronics, Government of India has prepared draft of Information Technology Bill, 1999. **The Ministry of Commerce has prepared Electronic Commerce Bill, 1999. The proposed Information Technology Bill, 1999 and Electronic Commerce Bill, 1999 aims for making legal provisions for secure electronic records and signatures, effect of digital signatures, duties of certification authority, liability of network service providers, computer crime and data protection etc. Both the bills deal with electronic contracts and they are being promoted by the Government of India primarily to facilitate introduction of Electronic Data Interchange in the commercial sector.** However, they are equally applicable for electronic funds transfer already launched by the Reserve Bank and is going to be increasingly resorted to by the user banks of the VSAT based network, the INFINET. However, there is still a need for a separate Act for Electronic Funds Transfer because certain transactional issues like payments finality, rights and obligations of the parties involved in electronic funds transfer etc. cannot be covered in general purpose bills like the proposed Information Technology Bill, 1999 or the proposed Electronic Commerce Bill. The EFT (RBI System) Regulations prepared by the Reserve Bank would address only the specific type of EFT system that the Reserve Bank would be involved with as a service provider as also a regulator. The EFT (RBI System) Regulations would, moreover, cover only credit transfer related transactions and not Debit Clearing transactions. A separate legislation on the lines of Electronic Funds Transfer Act of USA is, therefore, required which would be consumer protection oriented and would at the same time address transactional issues like execution of payment order, settlement, finality, etc.

14. Based on the recommendations of Shere Committee, the Government has prepared the Bankers' Books Evidence (Amendment) Bill, 1998 which would meet the legal requirements of acceptance of contracts, documents etc. in electronic forms as evidence. The proposed Electronic Commerce Bill also aims for admitting electronic records / signatures as evidence. Shere Committee also felt that for according the funds transfer under the EFT system the same status of payment as one made by the A/c payee cheque, suitable technology may have to be developed for treating such transfer as A/c payee transfers. Legal provisions need to be made if such recognition has to be given . The first test would arise when paper instruments like cheques are used along with the use of EFT system. So long as both the systems are in existence at the same time, it would require either amendments to the NI Act or a separate legislation to deal with the matter.

(VI) Powers of Reserve Bank of India to regulate multiple payment systems in India

15. The existing provisions of the RBI Act and BR Act give power to RBI to regulate payment system only within the banking and financial sector. Separate legislative framework either by further empowerment of RBI or a separate Act is necessary if multiple EFT systems should be allowed to be developed.

16. EFT has wide applications. It includes credit transfer and debit transfer. The existing law does not provide any system of licensing private initiatives to organise different EFT system.

New law/rules are required for regulation of the growth of multiple EFT system.

17. In this regard various issues have arisen for consideration on policy grounds, such as:

(a) Whether RBI should function exclusively as a Regulator (Regulating Agency) or should also act as a Service Provider. If RBI should not act as Service Provider, whether the service providing function can be entrusted to a separate agency (Company) or a subsidiary of Reserve Bank of India.

(b) Whether multiple EFT system should be allowed to be developed in India.

(c) If multiple EFT systems are allowed to be developed in India, RBI Act need to be amended to empower Reserve Bank of India to regulate establishment and operation of multiple EFT systems. At present, subsection (6) of section 17 of RBI Act empower the Reserve Bank of India for the issue of demand drafts, telegraphic transfers and other kinds of remittances made payable at its own offices or agencies, the purchase of telegraphic transfers, and the making, issue and circulation of bank post bills. It does not empower the Reserve Bank to regulate establishment and operation of multiple EFT systems. A suitable amendment Section 17 of the RBI Act may be necessary. It could be by providing a new section 17(6A) as under :

"17 (6A) the regulation of establishment and operation of multiple electronic funds transfer systems".

(VII) Regulations / Legislation on Netting

18. Dr. Vasudevan Committee on Technology Upgradation in the Banking Sector has in its Report observed that :

"There is a growing debate on the legality of nettingininter-bankfundstransfertransactions. This is more so in the case of large value transactions. The position gets all the more complicated in the case of cross border netting arrangements. In fact, the issue gained critical significance while examining the proposal for setting up of a foreign exchange clearing and settlement systems in India. The basic issue in netting systems is that of the settlement risk and the systemic risks borne by the participants if one or some of the participants fail to meet theclearingliability.Incaseoffundstransfers settled on a gross basis, the parties involved are only two and principal risk if any, is only for the specific transaction. But in multilateral netting systems where claims and obligations accumulate over a period of time (called the clearing cycle), incoming and outgoing payments are set off against each other. In case of a failure of a party in meeting the clearingliability,themethodologyofidentifying the counter-parties/counterparts and determining the exposure level becomes difficult. Although netting system is in vogue in India for all inter-bank clearings by way of procedural details embodied in the Uniform Rules and Regulations for Clearing Houses, it is necessary that the provisions are made statutory. There is a need to amend Section 58 of the Reserve Bank of India Act, 1934 with a view to enabling RBI to frame specific regulations relating to netting practices and

domestic payments and settlement systems".

19. Clause (p) of sub-section (2) of Section 58 of the RBI Act empowers the Bank to frame the regulations of clearing houses for the banks (including post office savings banks) . Shere Committee has recommended an amendment to sub-section (2) of Section 58 of RBI Act by providing the following clause (pp) after the existing clause (p) :

(pp) the regulation of multiple payment systems.

20. However, Department of Electronics have suggested that sub-section (2) of Section 58 may be amended by providing following clause (pp) after the existing clause (p) :

"(pp) the regulation of fund transfer through electronic means between the scheduled banks or between the scheduled banks and other financial institutions referred to in clause (c) of Section 45-I, including the laying down of the conditions subject to which banks and other financial institutions shall participate in such funds transfers, the manner of such fund transfers and the rights and obligations of the participants in such fund transfer."

(VIII) Recommendations of Dr. Vasudevan Committee Report on Technological Upgradation in Banking Sector

21. Dr. Vasudeven Committee on Technology Upgradation in the Banking Sector had, in para 7.8 of its Report submitted in July 1999, made the following recommendations regarding legal implications of IT implementation in Banking.

1. The Reserve Bank of India Act, 1934 needs to be amended with a view to providing RBI with the desired regulatory and supervisory powers on payment and settlement systems. Simultaneously there is also a need to formulate a separate legislation on electronic funds transfer system. This will inter alia facilitate multiple payment system by banks and financial institutions.

2. The RBI and IBA should pursue with the Department of Telecommunications (DoT) / other competent Authority to permit encryption of data files / messages transmitted through communication channels. This would facilitate easier access to remotely located branches to the INFINET network. The standardized financial messages would also get necessarily encrypted irrespective of the type of network used - private or public.

3. As recommended by the Committee for Proposing Legislation on Electronic Funds Transfer and other Electronic Payments, amendments to the Bankers' Books Evidence Act, 1881 and other relevant Acts would need to be carried out. This would facilitate recognising computer print-outs and records stored on electronic media used in banking transactions as primary evidence within the definition of the Bankers' Books Evidence Act,1881.

4. The provisions made in the proposed Electronic Commerce Bill, 1999 and the Information Technology Bill, 1999 seek to clarify the legal position on several issues in electronic transactions which would equally apply to banking transactions carried out on computer and

communications networks. To firm up the responses of banking industry to the initiatives taken by the Government of India and for bringing about a new legislation on electronic funds transfer as also to examine legal issues that arise in the course of development of electronic banking, a Standing Committee to examine all legal issues on Electronic Banking with members drawn from the Legal Departments of the RBI, IBA, a few banks and Department of Eletronics may be set up by the Reserve Bank.

5. CBDT would need to take up the question of amending the relative provisions of the Direct Tax Laws like Section 40A of the Income Tax Act, 1961 to accord electronic funds transfer the status of crossed cheques / drafts for the purpose of payment of income tax and other taxes. Simultaneously, it should be ensured that the account payee transactions are put through the electronic fund messages to the stipulated account in the same manner as account payee crossed cheques are treated.

6. To facilitate the introduction of cheque truncationinIndia,thedefinitionofpresentment in the Negotiable Instruments Act, 1881 would have to be amended to permit electronic presentment of data or image of the cheque. The Reserve Bank may be empowered to frame Regulations on Cheque Truncation by suitable amendment to the Reserve Bank of India Act, 1934. Appropriate changes may accordingly be incorporated in the Clearing House Regulations and Rules as well.

7. As already recommended by the Shere Committee, there should be a clear distinction between the role of a service provider and that of a regulator and supervisor. Since low value and high volume payments require a good deal of servicing of the participating institutions, it is recommended that such payment and settlement systems may be managed by a group of banks with only the net clearing positions being settled at the Reserve Bank or the settlement bank as notified by the RBI. The Reserve Bank may restrict its electronic funds transfer services only for large value transactions and essential Government securities transactions. Suitable amendment may be carried out to the Reserve Bank of India Act, 1934 empowering the RBI to frame regulations on operating its own electronic funds transfer services as an extension of the Remittance Facilities Scheme, 1940 and to implement model regulations for electronic funds transfer, payment and settlement systems to be operated by groups of banks.

8. The proposed Standing Committee on legal issues on Electronic Banking may, among others, consider the need for appropriate regulation / legislation on netting of inter-bank payment obligations arising out of the EFT systems which would operate on deferred / discrete / netting basis. The need for a model Posting Rules which would determine the time of posting of the net position and time gap after which withdrawal would be permitted by the bank acting as the Settlement Bank, may form part of the netting regulations / legislations. The Standing Committee may examine the need for incorporating model risk management practices as part of the netting regulation/legislation.

9. The issue of confidentiality and sharing of data among the users need to be examined in view of the bank secrecy obligations. The Standing Committee may also examine the legal aspects, which would enable sharing of confidential data between the user agencies.

(IX) Dandekar Committee on Legal Issues in Electronic Banking

22. In view of the recommendations made in para 7.8.4 above, the Reserve Bank of India has constituted Standing Committee to examine all legal issues in electronic banking under the Chairmanship of Shri M.N.Dandekar, Chief Executive & Secretary, Indian Banks' Association. The suggested terms of reference for the above Standing Committee are as under :

1. To bring about new legislation on electronic funds transfer;

2. To examine legal issues that arise in the course of development of electronic banking inIndia;

3. To firm up the response of the banking industry to the initiatives taken by the Government of India, in particular the provisions made in the proposed Electronic Commerce Bill 1999 and the Information Technology Bill, 1999;

4. To examine all other related issues as may be referred to the Committee from time to time.

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Many Facets of Provisos

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Scope

Provisos play a vital role in the drafting of legislation and delegated legislation. The proper function of a proviso is to exempt and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case.[1] They are clauses of exception or qualificationintheAct[2]. The natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso[3]. The provisos are used for other purposes[4] also.

2. The Supreme Court has examined in *SundaramPillai's*[5] case, various authorities dealing with different aspects of provisos and has summed up the position as under.

> "To sum up, a proviso may serve four different purposes:
>
> (1) qualifying or excepting certain provisions from the main enactment:
>
> (2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable:
>
> (3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself: and

(4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision.

3. It is proposed to find illustrations for the above propositions by examining a few of the provisos found in Chapters IIIB, IIIC and V of the Reserve Bank of India Act 1934, (Act) as amended by Reserve Bank of India (Amendment) Act 1997.

Excepting provisos

4. Adding provisos to create exceptions is quite common. The provisos in Secs.45QB (5), 45S(1), 58C(1) and 58E of the Act may be regarded as illustrating the same.

5. Section 45QB of the Act deals with nomination by depositors. Sub section (5) of Section 45QB lays down that a non-banking institution will not be bound by any notice of the claim of any person other than the person or persons in whose name the deposit is held. The proviso added to sub section (5) requires a non-banking institution to take due note of any decree, order, certificate or other authority from a court of competent jurisdiction relating to a deposit, which may be produced before it. Thus it creates an exception to the general rule laid down in sub section (5) that a non-banking institution shall not be bound by any notice of the claim given to it by a person other than the depositor. It may also be regarded as clarifying that if the notice of the claim is accompanied by a decree, order etc., of a court of competent jurisdiction, the non-banking institution shall take due note of the same.

6. Under Section 45I (bb), money received by way of loan is also a deposit. Section 45S prohibits acceptance of deposits in certain cases[6] by an individual or a firm or an unincorporated association of individuals. The proviso added to sub section (1) of Section 45S creates an exception to the prohibition laid down therein and makes it permissible to receive money by way of loan from relatives.[7]

7. Section 58B of the Act lays down the penalties including imprisonment and fine for various offences involving contravention of the provisions of the Act and the directions issued by the Bank. Section 58C of the Act deals with who may be prosecuted and punished when companies commit the offences. The general rule laid down in sub section (1) of Section 58C is that every person who at the time the contravention or default was committed, was in charge of and was responsible to the company for the conduct of its business, shall be liable to be proceeded against and punished. This could include any person in charge of and responsible to the company for the conduct of its business even if the contravention or default was committed without his knowledge or in spite of his exercising due diligence to prevent the contravention or default. The proviso excepts such a person.

8. Under sub section (1) of Section 58E of the Act, no Court can take cognizance of any offence punishable under the Act except upon a complaint in writing made by an officer of the Bank generally or specially authorised in writing in that behalf by the Bank. The proviso added to sub section (1) of Section 58E creates an exception in respect of contravention of the provisions of Section 45S[8] and provides that an official of State Government generally or specially authorised in writing by that Government can also file the complaint.

Qualifying or limiting provisos

9. Under sub section (3) of Section 45IA, existing companies[9] having a net owned fund of less than 25 lakh rupees can carry on the business of non-banking financial institution for a period of three years from 9th January 1997[10] or for such further period as the Bank may extend. The Bank's power to extend the said period is limited to three years by the proviso.

10. Section 45IC of the Act requires Non Banking Financial Companies (NBFCs) to create a reserve fund. Sub section (3) of Section 45IC empowers the Central Government to declare in writing that the said requirement shall not be applicable to a NBFC for such period as may be specified in the order. The proviso added to sub section (3) of Section 45IC stipulates that such an order granting exemption shall not be made unless the reserve fund and the amounts in the share premium account are not less than the paid up capital of the NBFC. The proviso added to sub section (3) of Section 45IC might be regarded as limiting and qualifying the power of Central Government.

11. Under Section 45NB, the information collected by the Bank from NBFCs is regarded as confidential and is not to be disclosed except as provided therein. Sub section (2) of Section 45NB lays down the circumstances under which the Bank may publish the information in consolidated form. The proviso added to sub section (2) qualifies that the publication of the information shall be in accordance with the practice and usage customary amongst companies or as permitted or required under any other law.

Mandatory conditions

12. The illustrations of provisos, which lay down mandatory provisions, are found in sub sections (6) and (7) of Section 45IA and sub section (2) of Section 45QA. The proviso added to sub section (6) of Section 45IA puts a mandatory condition that before passing the order cancelling the certificate of registration granted to a NBFC, the Bank shall give a reasonable opportunity of being heard to the company concerned. Under sub section (7) of Section 45IA, before passing an order rejecting an appeal filed by a NBFC, the Central Government is required to give to the Company, a reasonable opportunity of being heard. Similarly, the proviso added to sub section (2) of Section 45QA makes it mandatory for the Company Law Board to give a reasonable opportunity of being heard to the NBFC, before making any order contemplated therein.

13. It may be noticed that the above provisos which lay down mandatory conditions do not change the very concept of the intendment of the enactment but only introduce into the provisions in question, the requirement to comply with the rules of natural justice. The provisos added to the above sections render the provisions of the Act reasonable. Perhaps, but for these provisos the main provisions referred to above could have been regarded as conferring arbitrary powers.

Substantive Enactment

14. Sometimes, provisos gain the character of substantive provisions. Sub section (2) of Section 45IA lays down that every NBFC shall make an application for registration to the Bank in such form as the Bank may specify. The proviso added to that sub section does not create an exception to the above general rule in the sense of excepting some companies from making the application or excepting some companies from making the application in the prescribed form.

15. Under the proviso to sub Section (2) of Section 45IA, existing NBFCs[11] are required to make an application for registration to the Bank before the expiry of a period of six months from the commencement[12] of the Reserve Bank of India (Amendment) Act, 1997. Further, it also provides that such companies may continue to carry on the business of a non-banking financial institution until their application for registration is rejected and communicated to them. This proviso lays down a mandatory requirement for existing companies to apply for registration to the Bank before 9th July 1997 if they want to carry on the business of a non-banking financial institution. Further, the said proviso confers a substantive right on the existing companies in question, the right to carry on the business of a non-banking financial institution.

16. Under sub section (2) of Section 45IC, companies are required to report to the Bank, any withdrawal from the reserve fund, within a period of 21 days from the date of such withdrawal. The proviso added to sub section (2) of Section 45IC confers upon the Bank the power to extend that period of 21 days as also confers upon the Bank the power to condone the delay in making such report.

17. The unincorporated bodies[13] which are prohibited[14] from accepting deposits are required under sub section (2) of Section 45S to repay the deposits held on 1st April 1997 within a period of three years from that date or when the deposits are due for repayment whichever is earlier. The proviso added to sub section (2) of Section 45S confers upon the Bank, the power to extend that period by a period not exceeding one year under the circumstances mentioned therein.

18. The proviso added to sub section (3) of Section 58G lays down the substantive provision regarding *locus standi* of the person who may make an application to the court. It provides that an application for levying the penalty on a NBFC may be made to the Principal Civil Court having jurisdiction, only by an officer of the Bank authorised in this behalf. In this context a reference may be made to sub section (1) of Section 58E which has enacted a substantive provision regarding taking cognizance of offences by Courts. In other words, the effect of the proviso to Sub section (3) of Section 58G is similar to that of the substantive provision contained in sub section (1) of Section 58E, though the context is different.

Removal of doubts

19. Sometimes a proviso is engrafted by an apprehensive draftsman to remove possible doubts, to make matters plain and to light up ambiguous edges.[15] The proviso added to sub section (1) of Section 45IB appears to illustrate this proposition. Under the main provision, the Bank may by notification specify the percentage of liquid assets to be maintained by NBFCs. Since the Bank has categorised NBFCs into different categories, such as, loan companies, hire purchase and equipment leasing companies, residuary non-banking companies etc., a doubt could arise as to whether the Bank may specify different percentages for different classes of NBFCs. The proviso

clarifies the said doubt and explicitly states that the Bank may specify different percentages for different classes of NBFCs.

Optional Addenda

20. Sub section (4) of Section 45QB of the Act lays down that payment by a non-banking institution to the nominee of the depositors in accordance with the provisions of that section shall constitute a full discharge to the non-banking financial institution of its liability in respect of the depositor. The proviso added to this sub section acts as an optional addenda to the section to explain the real intention of the statutory provision. The intention of the statutory provision is to facilitate speedy settlement of the claims to the deposits held in the name of the deceased and to protect the interest of the non-banking institution from the internal disputes, if any, between the various claimants to the deposits in question. The proviso clarifies that the right or claim of any person against the person to whom the non-banking institution has made the payment shall not be affected. In other words, the proviso clarifies that the intention of the statute is not to create any special interest or title in the nominee to the detriment of the other heirs of the deceased depositor or other persons.

Conclusion

21. It is possible that in different contexts the same proviso may appear to have different effect or different legislative purpose. The proviso, which may appear to be creating an exception, may also sometimes have to be regarded as laying down a substantive provision and vice versa. It is possible to look at the same proviso as an exception or as an addendum or a proviso with some other purpose. The different uses of the provisos summed by the Supreme court in *Sundaram Pillai's* case will go a long way in understanding and interpreting the provisos, provided, the draftsman does not find some other use for a proviso.

References:

1. *Madras and Southern Mahratta Rly Co. Ltd. v. Bezwada Municipality* AIR 1944 PC 71 per Lord Macmillan J.

2. Odgers, on *Construction of Deeds and statutes* (Fifth Edition) page 317, quoted with approval by Supreme Court in *Sundaram Pillai and ors V/s V.R. Pattabiraman & Ors.* (1985) 1 SCC 591, 607.

3. Craies, Statute Law (Seventh Edition) page 218, quoted with approval by the Supreme Court in *Sundaram Pillai's* case *ibid.,* at 606.

4. Ten principles collected in *Interpretation of Statutes* by Sarathi has been quoted with approval by the Supreme Court in *Sundaram Pillai's* case *ibid.,* at 607.

5. *Sundaram Pillai and ors V/s V.R. Pattabiraman & Ors.* (1985) 1 SCC 591, 610.

6. If (1) the business of such party wholly or partly includes any of the activities specified in clause (c) of section 45I or (2) the principal business of such entity is (a) receiving of

deposits under any scheme or arrangement or in any other manner, or (b) lending in any manner.

7. Please see explanation to sub section (3) of Section 45S for a list of relatives.

8. Acceptance of deposits by individuals and unincorporated bodies made punishable under Section 58B (5A) with imprisonment for a term which may extend to two years, or with fine which may extend to twice the amount of deposit received by such person in contravention section 45S or two thousand rupees, whichever is more, or both.

9. NBFC in existence on the commencement of the Reserve Bank of India (Amendment) Act 1997, i.e., 9th January 1997.

10. The date of the commencement of Reserve Bank of India (Amendment) Act 1997.

11. NBFCs in existence on the commencement of the Reserve Bank of India (Amendment) Act 1997, i.e., 9th January 1997.

12. 9th January 1997.

13. Individuals, partnership firms or other unincorporated association of individuals.

14. Under sub section (1) of Section 45S.

15. *Dwaraka Prasad v. Dwaraka Das Saraf* (1976) 1 SCC 128, 136-137 = AIR 1975 SC 1758.

Emerging Trends in Public Interest Litigation: Need for Care and Caution

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1. Public interest litigation, a concept totally alien to our judicial system has become an integral part of our judicial process and gradually, it is being institutionalised. The Supreme Court and the High Courts are preoccupied with disposing the matters of public interest. The issues are wide ranging from education to environment. In fact, with dynamic judicial activism public interest litigation has given a new dimension to the judiciary.

2. Public interest litigation has a direct bearing on the social issues of our country. It also depicts the faith reposed by the public on the judiciary. Actually there is no such area left out on which a public interest litigation has not been filed. The issues are so wide and varied that it cannot be easy to re-call them by one reference. In each of these cases, judiciary has given a verdict for removal of the hurdles and that has been applauded by the people at large. Actually, it is a step to advance the cause of social justice. As such, Prof. Upendra Baxi a renowned jurist preferred to term it as social action litigation instead of public interest litigation[1] which has been appreciated by our Hon'ble judges.[2]

3. Public interest litigation has its origin in U.S.A. where in the case Gideon vs. Wain Wright,[3] it

appeared for the first time. In that case, the Supreme Court of U.S.A acted on a letter of Gideon treating it as a petition and relaxed the procedural law by allowing the petitioner to be defended by a State Counsel, because he declared to be a pauper. Since then public interest litigation has been gaining support. A council in favour of public interest litigation has been set up by the Ford Foundation. Public Interest Law is the name that has been given to efforts to provide legal representation to previously unrepresented groups and interest. Such groups are comprised of the poor, environmentalists, consumers, racial and ethnic minorities and others.

4. Initially, there had been attempts to thwart the movement of public interest litigation by raising the question of *locus standi.* The problem of standing or *locus standi,* is inherent in all legal systems and is a very vexed question of law. However, by dynamism of the judges of the times, it has successfully come out of the thing. Even in England, supposed to be a haven of traditional judiciary, the concept is gaining support. However, the problem of *locus standi* in Indian context was settled for the first time in a case known as Dabholkar[4] case, wherein the Supreme court enabled access on matters involving public interest even to total strangers to the dispute. The matter was permanently settled in Judges Transfer Case[5]. While, disposing the Judges Transfer Case Justice Bhagwati declared the law in the following words:

".....where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right.....and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief any member of the public can maintain an application for an appropriate order, direction, or writing the High Court under Article 226 and or ..... in the Supreme Court under Article 32 of the Constitution of India."

5. So far as public interest litigation in our country is concerned, it all began with Hussainara Khatoon[6] case. In that case, an advocate of the Supreme Court filed a petition which was in the form of a letter based on the information published in a series of articles in a newspaper, "The Indian Express" exposing the plight of under trial prisoners in some jails in Bihar most of whom had served long pre-trial detention. The Supreme court immediately, took up the matter and disposed it of passing directions for release of the accused persons in custody for long periods without facing any trial. In fact, several judges of Supreme Court and High Courts did allow standing to third parties to litigate on public interest issues, Justice P.N. Bhagwati gave necessary momentum to the public interest litigation movement and it resulted in a pre-eminent position to public interest litigation in the litigation game at Supreme Court.[7] We saw famous cases like Asiad case,[8] the Bandhua Mukti Morcha[9], Agra Protective Home[9], Sunil Batra[10] and Slum Dwellers[11] and so on. All these cases gave dynamism to the judiciary and judicial activism came to forefront. The judges were eager to emanate themselves from the robes and tradition and to serve the cause of the Constitution. Through the judgements passed by the Supreme Court public interest litigation was able to institutionalise itself in the judicial process of the country. Public interest litigation is only a step to advance the cause of social justice and scope of access jurisprudence. However, the real inspiration for public interest litigation flows from the Preamble of our Constitution wherein the people of India have undertaken to secure justice, social, economic and political and the mandate of Article 39A of the Constitution which imposes a duty on the State to ensure that opportunity for securing justice is not denied to any citizen by

reason of any disability.

6. During the late eighties and early nineties PIL became more socially relevant. A number of PILs relating to rights of prisoner banning of injurious drugs, plight of widows, schools for children of prostitutes, child labour, State mental hospitals, etc. were filed. One more matter which attracted the attention of Court was environment. However, a starting point in this matter was Municipal Council Ratlam vs. Vardhi Chand[12] wherein the Supreme Court held that the public authority cannot evade their statutory duties more particularly where fundamental rights enshrined in Part-III of the Constitution are involved and are being violated. The environmental matters were further taken to height by Shri M.C. Mehta, an advocate of the Supreme Court by filing a series of public interest litigation relating to Ganga River Pollution,[13] and other matters. And again by filing a litigation he compelled the Govt. to create mass awareness of environmental issues and programmes.[14] All these are known as M.C. Mehta cases and have a bearing on the matters related to environmental jurisprudence in our country. During all these years, the Supreme Court and the High Courts have also done more good through judicial pronouncements in different litigation of public interest. Keeping this in mind, the Supreme Court was pleased to observe that, "In a public interest litigation unlike traditional dispute resolution mechanism there is no determination or adjudication of individual rights. Traditional Dispute is bipolar or between two parties while in public interest litigation it crosses the borders of society and traditional forms."[14] In fact, the transcending character of public interest litigation crossing across the border has led to wide popularity and acceptability of the litigation. But with the growing of popularity of public interest litigation, a recent trend has been seen. The society is being gradually transformed into a litigious society. People are filing PIL without any rhyme or reason. In this regard Supreme Court has remarked that, "PIL should not be misused to serve personal vendetta or vindication of personal grudge by unscrupulous litigants by invoking extraordinary jurisdiction of the Supreme Court under the garb of PIL[15.]

7. It seems that the words of caution from the Supreme Court remain unheeded. People are taking PIL very lightly and in a number of cases it is seen that it lacks the spirit of public interest or social interest. In fact, judicial process is being interfered to serve the evil designs, of the people by filing PIL thereby halting the process of development. In a recent judgement passed by Supreme Court, the Court while dismissing the PIL has been constrained to remark, "".....it is an abuse of process of the Court." The Court also put a cost of Rs. 10,000/- while dismissing the same. Politicians are also taking recourse to it to serve their own purpose. In a recent PIL the Supreme Court had to decide as to whether a sports stadium can be used for political meeting or not.

The Bombay High Court while dismissing a public interest litigation has put a cost of Rs. 1,50,000/ - with serious remarks that the matter lacks public interest and has seriously rebuked the petitioner who also happens to be a lawyer stating that the same has wasted valuable time of the Court and the advocate being an officer of the Court ought not to have indulged in such abuse of the process. All these events draw the attention to a judgement passed by Supreme Court in a public interest litigation, where Justice Khalid of Supreme Court was pleased to remark, "Today public spirited litigants rush to Courts to file cases in profusion under this attractive name. They must inspire confidence in Courts and among the public. They must be above suspicion. PIL has come to stay. But one is also led to think that it poses a threat to Courts

and public alike. Such cases are now filed without any rhyme or reason. It is therefore necessary to lay down clear guidelines and to outline the correct parameters for entertainment of such petitions. If Courts do not restrict the free flow of such cases, in the name of PIL, the traditional litigation will suffer and the Courts of law instead of dispensing justice will have to take upon themselves administrative and executive functions. It is only when Courts are apprised of gross violation of fundamental rights by a group or a class action or when basic human rights are invaded or when there are complaints of such acts as shock the judicial conscience that the Courts especially the apex Court should leave aside procedural shackles and hear such petitions and extend its jurisdiction under all available provisions for remedying the hardship and miseries of the needy, the underdog and neglected.[17]

8. Today PILs are filed in a hurry. The petitioners do not even disclose the material particulars. There are instances of unfounded allegations against the Government and its officers. The Supreme Court has observed that, "If every action taken by the political or executive functionary is transformed into a public controversy and made subject to an enquiry to soothe popular sentiments it will undoubtedly have a chilling effect on the independence of the decision-maker who may find it safer not to take any decision. It will paralyse the entire system and bring it to a grinding halt."[18] The facts stated by the litigant should reveal that he is genuinely concerned in public interest. The Apex Court in a recent judgment, observed that "a litigant must remember that as a person seeking to espouse a public cause, he owes it to the public as well as to the Court.....and the Court must be careful that the process of the Court is not abused".[19] It has once again been reiterated by Supreme Court that for a PIL the cause should be a bonafide one for public good and it should not be used to attain private ends.[20] In another case, the Hon'ble High Court of Andhra Pradesh has observed that, "To settle personal vendetta in the garb of the PIL and invoking the jurisdiction under Article 226 is totally in abuse of the process of the Court".[21]

9. Public Interest Litigation, no doubt is a significant step in the present day judicial system. It has provided the Court with much greater responsibility for rendering justice. With the profusion in PIL, the judiciary is facing a greater challenge. More care and caution has to be taken in the matters of public interest. While entertaining the matters of public interest strict scrutiny of the pleadings, verification of the credibility of the person initiating the petition etc. are to be undertaken. Today judiciary is faced with the responsibility of protecting the institution of public interest litigation; otherwise justice will remain elusive to the downtrodden and underprivileged.

References:

1. Prof. Upendra Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" - Judges and the Judicial Power at Page 290.

2. Rajinder Sanchar, "Social Action Litigation: Activist and Traditional Judges" (1987) 1SCC J 15.

3. H.K. Saharay, Constitution of India at Page 271.

4. Bar Council of Maharashtra vs. M.V. Dabholkar, (1975) 2 SCC 702.

5. S.P. Gupta vs. Union of India (1981) sup. SCC 87.

6. Hussainara Khatoon vs. Home Secretary, State of Bihar, (1980) 1 SCC.81.

7. Dr. N.R. Madhavan Menon, "The Dawn of Human Rights Juridprudence (1987) 1 SCC J 5.

8. People's Union for Democratic Right vs. Union of India (1982 3 SCC 235.

9. Bandhua Mukti Morcha vs. Union of India (1984) 3 SCC 161.

10. Sunil Batra vs. Union of India (1980).

11. Upendra Baxi vs. Union of India (1983) 2 SCC 308.

12. Olga Tellis vs. Bombay Municipal Corporation (1985) 3 SCC 545.

13. AIR 1980 SC 1622.

14. M.C. Mehta vs. Union of India (AIR 1988 SC 1115).

15. M.C. Mehta vs. Union of India (AIR 1992 SC 382).

16. Shiela Barse vs. Union of India (AIR 1988 SC 2211).

17. Subhash Kumar vs. State of Bihar (AIR 1991 SC 420).

18. Sachidanand Pandy vs. State of West Bengal AIR 1987 SC 1109.

19. Dinesh Trivedi, M.P. and others vs. Union of India and others (1997) 4 SCC.

20. S.P. Anand vs. H.D. Devegouda (1996) 6 SCC 734.

21. Raunaq International Ltd. vs. IVR Construction Ltd. AIR 1999 SC 397.

22. S. Shyamaprasad Rao vs. Union of India, (AIR, 1999 AP 39).

The end and aim of a lawyer is duplex, first, to know, and second to appear to know - the later brings in clients and the former holds them.

- NORTH, Roger, A Discourse on the Study of the Laws (London: Charles Baldwin, 1824), p. 28.

The lawyer looked at his watch and said, "And it's just about time for my next appointment. The

life of a lawyer is just one damn thing after another.

- GARDNER, Erle Stanley, The Case of the Queenly Contestant (New York: Pocket Books, 1968) p.14.

Many of our most illustrious statesmen have been lawyers; but they have been lawyers liberalized by philosophy, and a large intercourse with the wisdom of ancient and modern times. The perfect lawyer, like the perfect orator, must accomplish himself for his duties by familiarity with every study.

- STORY, Joseph, in The Miscellaneous Writings of Joseph Story, edited by William W. Story (Boston: Charles C. Little and James Brown, 1852), p. 527.

It has been said that while a physician saves life, a lawyer is responsible for the society which makes life worth saving.

- NIXON, Richard M., Message on the occasion of the centennial of the Association of the Bar, 1970.