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From the Desk of Professor-In-Charge

I am very pleased to present the third volume of *JCLC* before the esteemed readers. I am delighted that the regularity of its publication is being maintained, which indeed is a big challenge here, as we are primarily a teaching institute with no facilities for research. We, the teachers who take full teaching load as per UGC norms, following the BCI's academic standards, involved in various indispensable administrative responsibilities are the ones who work for the publication of the Journal, without any secretarial assistance and infrastructural facilities. Since we earnestly believe that teaching and research are inextricably linked with each other and research is, thus, a fundamental part of the law school teaching, the lack of research facilities could not deter CLC to provide a platform to scholars to present their views, ideas and research undertaken by them.

When things emanate from self- motivation and passion, the results are marvelous too. I take great pride in stating that in the journey of its three years, *JCLC* has acquired the status of international journal of repute. *JCLC* has been successful to attract its readers and contributors from the world over. The *JCLC* was able to achieve this academic height under the expert advice of the Editorial Advisory Board consisting of eminent Judges, Academicians and Advocates drawn from India as well as abroad.

The selected articles in the third Volume of *JCLC* contain a wide spectrum of law. The topics covered in this Volume range from contemporary issues in constitutional law, environmental law to the company law and right to information. We have as many as four articles on constitutional law. Stephen Clear, Aled Griffiths &Huw Pritchard 's article examine whether the UK is now moving, or has already partly moved, towards a model which is more akin to federalism. The authors

argue that the constitutional change in UK has traditionally been incremental in nature, but current tensions in Scotland and England in particular, suggest that a fundamental rethink of the traditional jurisprudence, in terms of parliamentary sovereignty is necessary. Their research analyse that following a rejection of independence in Scotland in 2014 and proposals for further devolution in the Scotland Bill 2015, there are very strong federal elements entering the UK Constitution. They opine, however that, though separate devolution plans are moving at pace for different parts of the UK there are currently no plans for a federal United Kingdom.

Professor M.P Singh, a well known authority on constitutional law elaborates on the separation of judiciary from the legislature and executive. He argues that the independence of the judiciary from the executive and the legislature has been fully recognized in India and held to be one of the basic features of the Constitution which cannot be undermined even by an amendment of the Constitution. With the arrival of written constitutions as the fundamental law of a country expressing and incorporating such concepts as equality and liberty, the courts have to shape and reshape them constantly. Therefore, the debate is not on the point of whether judges make the law or simply declare it but on the point of the limits to which judges can make law. He quotes Justice Bhagwati to emphasize that " It is necessary for every Judge to remember constantly and continually that our Constitution is not a non-aligned rational charter".

Dr. Bharat writes that one Person Company under the Companies Act, 2013, has opened the doors of the corporate sector in the form of a company limited by shares, by guarantee, or an unlimited company. He examines that in just nine months timeline starting April 2014 more than 1,400 such companies have been chronicled and concludes that opening boulevard for more heartening entrepreneurial prospects, One Person Companies are indomitable not only to boost the confidence of small entrepreneurs but also to boost India's global economy. Varun Chachar reviews the rulings of Central Information Commission in the last decade, while The Whistle Blowers Protection Act, 2011 is analysed by Dr. Poonam Verma.

The Campus Law Centre organized an International Conference in February, 2015, on "Combating Human Trafficking: With Special Reference to Women and Children" attracting global participation from USA, U.K., Australia, South Korea, Egypt, Austria, Bolivia, Indonesia, Nigeria, Nepal, Fiji, Iran, Afghanistan, Bangladesh and Sri Lanka. This Volume contains some of the prestigious Addresses from the Conference viz. the Inaugural Address by Hon'ble Mr. Justice K.G. Balakrishnan, Valedictory Address by Hon'ble Mr. Justice Arjan Kumar Sikri and Special Addresses by Hon'ble Mr. Justice Pradeep Nandrajog, Mr. Mohan Parasanan, Ms Kim Haing and Professor Donald K Anton.

The Volume contains a commemorative section in the memory of Professor B.P. Srivastva who left for heavenly abode in February, 2015. I am grateful to Professor B.B. Pande, the great teacher and inspirer, who graciously agreed to write a column on this.

Legal research is a necessary concomitant not only for the growth of a law school and law teachers but also to create and disseminate better understandings of the world around us. Professors don't get paid huge bags of money for the books they write, and get paid nothing for journal articles. We write to share the knowledge we have acquired through our research, with the idea that a better understanding is better than ignorance. I am grateful to all the authors whose writings are published in this Volume.

I am thankful to the Editorial committee for their sincere and arduous efforts in editing this volume. I also thank the proprietor of New Images Printers, the university printers for publication of this Volume in time.

Usha Tandon

25th June, 2015

EDITORIAL

"Communication is the essence of every society. Unless its members can communicate with one another, a society cannot exist as a social community.... We talk, we listen, we read and we write for much of the time we are awake".

G.C. Thornton, Legislative Drafting, 3, 1970, Butterworths.

With great pride I present the third volume of the Campus Law Centre Journal, 2015 to the readers. We appreciate critical writings and evaluation of societal issues. The articles are selected keeping this perspective in mind. We have included articles from reputed Indian Law Colleges and Institutes; a fact that deserves special mention is the inclusion of an article from senior faculty Bangor University United Kingdom. As an editor I honestly feel that each article is an academic accomplishment by itself, backed in through research and sound legal analysis.

The idea is to present a collection of articles concerning legal issues of contemporary relevance that reflect in a well-researched manner, the emerging trends in judicial discourse pertaining to those issues. There are certain articles that debate morality and the contradictions of law, while others dwell upon basic concepts of law concerning human rights, freedom of expression and maintenance of public order. The articles are an enlightening amalgam of well-informed intellect and diligent research. The journal has articles on judicial and legislative trends that apprise us with the latest in legal world.

I take inspiration from Honourable orators Justice Arjan Kumar Sikhri, Justice KG Balakrishnan, Justice Pradeep Nandrajog, Mr. Mohan Parasaran who have guided us on the contemporary legal matters through their deliberations. An eminent legal luminary like Prof M.P Singh is the guiding spirit with his scholarly contribution entitled "Separation of Powers between the Courts and the Legislature". It`s an intellectual exposition on the extent to which the doctrine of separation of powers serves its purpose of protecting the individual against the oppression and injustice of the state. I thank the editorial team and the contributors for their hard work and cooperation in bringing this volume of the journal out well in time. I anticipate the same support and diligence in future publications. Suggestions and advise towards a qualitative improvement in the journal are welcome.

Prof (DR.) Prem Singh Lathwal

ADDRESSES

INTERNATIONAL CONFERENCE ON "COMBATING HUMAN TRAFFICKING WITH SPECIAL REFERENCE TO WOMEN AND CHILDREN" 13TH – 15TH FEBRUARY, 2015

INAUGURAL ADDRESS

Hon'ble Mr. Justice K.G. Balakrishnan
Former Chief Justice of India
Chairperson, National Human Rights Commission

Human trafficking is the trade in humans, most commonly for the purpose of sexual slavery, forced labour or commercial sexual exploitation for the trafficking or others. Human trafficking, no doubt, is one of the gravest forms of deprivation of Human Rights and dignity. The Constitution of India, vide Article 23 has mandated that trafficking in every form is prohibited. Therefore, every person in India has a fundamental right not to be trafficked and accordingly it is business of everybody to ensure that no person is trafficked. However, this modern day slavery is growing in dimension, intensity and spread.

Today, trafficking is known to take place not only for Commercial Sexual Exploitation (CSE) and Forced labour but also for organ trade and other new forms and derivatives including sex tourism, trafficking for militancy, trafficking for surrogacy and so on. The organized crime of human trafficking, in self, enroots several types of exploitation and human rights violations including physical and emotional deprivation, sexual exploitation, servitude, criminal confinement, sale and purchase of human being like an animal, commoditization of human being etc.

According to the Ministry of Women and Child Development (MWCD), Government of India, around 2.8 million persons are subjected to trafficking for commercial sexual exploitation in India and there are 3 million prostitutes existing in the country. It has found that an estimated 1.2 million children are trafficked worldwide every year (ILO 2002:32). India also has the highest number of child labour in the world with an estimate of 12.66 million children involved in hazardous work in several industries that comes under the scanner of human trafficking (Census of India, 2011).

Trafficking across state border inside India continues to rise due to increased mobility and growth in industries that use forced labour, such as construction, textiles, wire manufacturing for underground cables, biscuit factories and floriculture. Boys from Nepal and Bangladesh continue to be subjected to forced

labour in coal mines in the state of Meghalaya. Burmese Rohingya and Sri Lankan Tamil refugees continue to be vulnerable to forced labour in India. Boys from Bihar are subjected to forced labour in embroidery factories in Nepal. A large number of Nepali, Afghan, and Bangladeshi females, the majority of whom are children aged nine to 14 years old and women and girls from China, Russia, Uzbekistan, Azerbaijan, the Philippines, and Uganda, are also subjected to sex trafficking in India.

Despite such alarming dimensions of intensity and spread, the prevalence of Human Trafficking has not been documented through research. The Commission in 2002 had undertaken an Action Research on Trafficking in Women and Children in India. The NHRC Study (2005) pointed out the methods through which human trafficking goes on. These include: offering jobs as domestic servants, promising jobs in the film world, promising jobs in the film world, promising jobs in factories, offering money, luring them with "pleasure trips", making false promises of marriage, befriending them by giving goodies, offering shelter to girls who have run away from home or street children, offering them to make on pilgrimages, coercion including kidnapping and drugging, luring for adoption etc.

Several international conventions, laws and protocols have been adopted by the international and state agencies and departments. However, the legal framework within the ambit of India territory has a strong foundation, as the issue has been brought under the Fundamental Rights as per the Constitution of India. Article 23 (1) of the Constitution prohibits trafficking in human beings and forced labour. The Immoral Traffic (Prevention) Act, 1956 (ITPA) is a special legislation that deals exclusively with trafficking. The ITPA is the main legislative tool for prevention and combating sex trafficking in India.

However, till date, its prime objective has been to inhibit/abolish traffic in women and girls for the purpose of prostitution as an organized means of living. The act criminalizes the procurers, traffickers and profiteers of the trade but in no way does it define 'trafficking' per se in human being. The other relevant acts which address the issue of trafficking in India are the Karnataka Devadasi (Prohibition of Dedication) Act, 1982; Child Labour (Prohibition and Regulation) Act, 1986; Andhra Pradesh Devadasi (Prohibiting Dedication) Act, 1989; Information Technology Act, 2000; the Goa Children's Act, 2003; and the Juvenile Justice (Care and Protection of Children) Act, 2006.

Besides these, there are also certain other collateral laws having relevance to trafficking. These are the Indian Evidence Act, 1872; Child Marriage Restraint Act, 1929; Young Persons (Harmful Publications) Act, 1956; Prohibition of

Offenders Act, 1958; Criminal Procedure Code, 1973; Bonded Labour System (Abolition), Act, 1976; Indecent Representation of Women (Prohibition) Act, 1986; and the Transplantation of Human Organs Act, 1994 (National Judicial Academy, 2001). Further, Article 24 of the Constitution of India prohibits employment of children below 14 years of age in factories, mines or other hazardous employment. The Criminal Law Amendment Act, 2013has made a paradigm shift in the legal regime on trafficking in India. Section 370 IPC has brought in a comprehensive definition, at par with the mandate of Article 23 of the Constitution and in consonance with UN convention and Protocol 2000. Special provisions have been incorporated under Section 370 (A) to deal with the issue of child trafficking.

The Judiciary in India has played a stellar role in activating the executive and promoting policy and law changed towards the prevention of trafficking as well as rescue and rehabilitation of women and minors forced into the flesh trade. In the *Upendra Baxi* v. *State of U.P. and others*, the SC expressed its deep anguish over the condition of protective homes in the country and set up a mechanism through the NHRC to monitor the same (National Judicial Academy, 2001). The decision of the Supreme Court in several landmark judgment including Gaurav Jain Case, Vishal Jeet Case, Shakshi Case, Budhdev Karmasker, Prabhul Desai Case, Bachpan Bachao Andholan (BBA) Case etc. are indeed far reaching, making tremendous transportation in the responds to human trafficking in India.

Numbers of initiatives have been taken throughout the country in the area of rehabilitation. As a result, central and the state governments have been forced to re-examine the machinery and resources allocated to deal with rescue and rehabilitation. There is a growing realization of the need for an action plan to deal with trafficking and prevention work. The Ministry of Women and Child Development, GOI and Departments of Women and Child Development of the state governments have been taking a series of measures in the recent past to address the issue at hand. The MWCD, GOI, following the Vishaljeet and Gaurav Jain judgments, initiated a National Plan of Action to Combat Trafficking of Women and Children. A Central Advisory Committee has also been functioning since then to address the various issues relating to trafficking of women and children in India and take steps towards the rescue and rehabilitation of trafficked victims.

The MWCD, National Commission for Women, National Commission for Protection of Child Rights, several State Governments and State Commissions have initiated different programmes and projects to address and redress human

trafficking. The 'SWADHAR', 'UJJWALA', 'ICPS' etc of Government of India is pertinent in this context.

I am sure that the event being organized by Campus Law Centre, University of Delhi will also focus on the different kind of challenges to prevent the human trafficking in India. The outcomes of this International Conference will help frame a strategic plan of action aimed at a comprehensive policy on prevention of human trafficking that finally translates into sensitive and progressive law rooted in an individual rights discourse.

It is my privilege to inaugurate this International Conference and wish you all the best in the ensuing deliberations that would take place during the course of the day.

Thank you.

VALEDICTORY ADDRESS

Justice Arjan Kumar Sikri
Judge, Supreme Court of India

The most important lesson which was learnt as a result of Second World War was the realization by the Governments of various countries about the human dignity which needed to be cherished and protected. It is for this reason that in the U.N. Charter, 1945, adopted immediately after the Second World War, dignity of the individuals was mentioned as of core value. The almost contemporaneous Universal Declaration of Human Rights (1948) echoed same sentiments.

Article 3 of the Geneva Conventions explicitly prohibits "outrages upon personal dignity". There are provisions to this effect in International Covenant on Civil and Political Rights (Article 7) and the European Convention of Human Rights (Article 3) though implicitly. At the same time, one can easily infer the said implicit message in these documents about human dignity. Within two years of the adoption of the aforesaid Universal Declaration of Human Rights that all human beings are born free and equal in dignity and rights, India attained independence and immediately thereafter Members of the Constituent Assembly took up the task of framing the Constitution of this Country. It was but natural to include a Bill of Rights in the Indian Constitution and the Constitution Makers did so by incorporating a Chapter on Fundamental Rights in Part III of the Constitution. However, it would be significant to point out that there is no mention of "dignity" specifically in this Chapter on F.R. So was the position in the American Constitution. In America, human dignity as a part of human rights was brought in as a Judge-made doctrine. Same course of action followed as the Indian Supreme Court read human dignity into Article 21 of the Constitution.

Professor Upendra Baxi in his first Justice H.R. Khanna Memorial Lecture on the topic *'Protection of Dignity of Individual under the Constitution of India'* dispelled the belief that *'dignity notions are gifts of the West to the Rest'*. At the same time, he explained Eurocentric view of human dignity by pointing out that it views dignity in terms of personhood (moral agency) and autonomy (freedom of choice). Dignity here is to be treated as 'empowerment' which makes a triple demand in the name of respect for human dignity, namely: (I) respect for one's capacity as an agent to make one's own free choices; (ii) respect for the choices so made; and (iii) respect for one's need to have a context and conditions in which one can operate as a source of free and informed choice.

Thereafter, he elucidated the notion of dignity as prevalent in this part of the world by adding: "I still need to say that the idea of dignity is a meta-ethical one, that is it marks and maps a difficult terrain of what it may mean to say being 'human' and remaining 'human', or put another way the relationship between 'self', 'others', and 'society'. In this formulation the word 'respect' is the keyword: dignity is respect for an individual person based on the principle of freedom and capacity to make choices and a good or just social order is one which respects dignity via assuring 'contexts' and 'conditions' as the 'source of free and informed choice'. Respect for dignity thus conceived is empowering overall and not just because it, even if importantly, sets constraints state, law, and regulations."

Jeremy Waldron in his article *"How Law Protects Dignity"* opines that dignity is a sort of status-concept.

Kant, on the other hand, has initially used dignity as a *'value idea'*, though in his later work he also talks of respect which a person needs to accord to other person, thereby speaking of it more as a matter of status.

It is not the occasion to deliberate on as to what should be the exact definition to 'dignity'. Nor I am attempting to do the same. The only purpose for which I have referred to the concept of dignity, as accepted worldwide, is that it is the basic human right that all individuals are to be respected. They have to be given proper status. Looked from this angle, human trafficking is the most serious human rights violation that impinges upon and violates the human dignity. Alas, notwithstanding UN Charter of 1945 and Universal Declaration of Human Rights in 1948, according such a guarantee in almost all the Constitutions of the democratic nations, human trafficking is, and still remains, a serious international crime of clandestine nature, which, as stated above, directly violates human rights and undermines the very core of human dignity. Overall, the industry is estimated to amount US$ 38 billion (according to Department of Justice, United States) and is accepted as third largest organized crime next only to drugs and ammunition. To elaborate on the term and internationally recognized definition as captured in the Palermo Protocol:

"Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Till a couple of years ago, the situation of the victims was much worse as they were also treated as offenders along with the traffickers and both were treated as accused persons in a case. But, since the trafficker was more resourceful, he would manage to get away, as it were, leaving the victims to their fate. Fortunately, the victims are now being given the human touch but the question is where does one go from here.

It is estimated that an astounding 20 million men, women, and children are victims of trafficking or modern day slavery having been coerced or deceived into forced labor worldwide. This can be broken down to an average of three out of every thousand people are currently in a forced labor situation. Out of all victims, 5.5 million (26%) are under 18 years of age. As point of reference, it is estimated that in the U.S. alone, close to 100,000 children are subjected to sex trafficking each year. The largest concentration of all victims of forced labor are found in the Asia-Pacific region with 11.7 million (56%), trailed by Africa, which accounts for 3.7 million (18%) and Latin America with 1.8 million (9%) of all victims from around the world. According to the 2009 and 2010 TIP reports, the United States had placed India on a Tier-2 watch list of countries involved in human smuggling.

Referring to it as modern-day slavery, the TIP report stated "India is a source, destination, and transit country for men, women and children subjected to trafficking in persons, specifically forced labor and commercial sexual exploitation". Those from India's most disadvantaged socio-economic sector are vulnerable to labor and sex trafficking. Some of them are trafficked to the Middle East, Europe, and the United States to work as domestic servants and laborers.

A 2013 BBC report mentioned tens of thousands of young girls disappear in India every year. They are sold into prostitution, domestic slavery, and even into marriage in the northern states of India where the sex ratio is skewed because of widespread female foeticide. In India, there are 33,000 missing children each year and only one-third are found.

Children are considered to be one of the most vulnerable members of our society. Trafficking among children is the worst kind of human right violation which can be committed against them because the children of indigenous people and ethnic minorities are especially vulnerable to trafficking. Children from poor families don't go to school and are employed in low skilled occupations. Migration from rural to urban areas leaves children to end up on the streets and makes them highly vulnerable to sexual exploitation. Child Labour being so prevalent- children end up as porters, in domestic servitude, carpet weaving, shoe shiners

and in other cases are trafficked for organ transplants. It is not only the trafficked children who are in danger. Children on the streets, at schools, and at homes are also at risk. On February 07, 2013, the Human Rights Watch (HRW) published an 82 page report titled *Breaking the Silence: Child Sexual Abuse in India.* "India is home to 430 million children", said the report. "From the moment they are born, the challenges many of them face are staggering. The government estimates that 40 per cent of India's children are vulnerable to threats such as trafficking, homelessness, forced labour, drug abuse, and crime, and are in need of protection".

Many strange and innovate methods are used for trafficking women and children in this country. One is through the misuse of placement agencies.

The BBC team visited five villages in the Sunderbans community, in the South Parganas district of West Bengal and found all the villages had missing children, mostly girls. The reporter talked to a man in the Calcutta (Kolkata) slums, who sold girls for a living. He sold about 200 girls a year from ages ten and up and made ₹ 55,000 ($1000) per girl. He said there was a big demand for them and with the money he had made he had bought three houses in Delhi. "I have men working for me. We tell parents that we will get them jobs in Delhi, and then we transport them to placement agencies. What happens to them after that is not my concern", the man said. "Police are well aware of what we do. I have to tell police when I am transporting a girl and I bribe police in every state – in Calcutta, in Delhi, in Haryana".

I had the occasion to deal with this kind of trafficking in a Public Interest Litigation filed by *Bachpan Bachao Andolan*, which is an NGO run by Nobel Laureate Shri Kailash Satyarthi.

Other methodology used is to exploit the old age practice of *Devadasis*, which is still prevalent in South India. For centuries young girls in India were also offered to the temples, where they learned the performing arts and were devoted to the Gods and temples. They were called the *Devadasis*. Over time, after invasions took place and temples fell, these women fell into poverty and were abused by the village men. Today, women who have fallen on hard times, who have been widowed or deserted by their husbands, or who have developed AIDS, still offer their daughters as *Devadasis*. At puberty, most girls are auctioned off to urban brothels, where the men prey upon them. These young girls are involved in sex trade, have multiple sex partners, and develop sexually transmitted diseases. Children born to them are also likely to be infected. They grow up without ever knowing their fathers. Visthar, a Bangalore-based NGO, runs a school to rehabilitate them. Set in a natural environment, it offers

them spacious campus grounds as a place for healing. It also trains peace activists and organizations involved in social justice.

Sex trafficking is a ten million dollar industry in India. Sunitha Krishnan, founder of Prajwala runs seventeen schools in Andhra Pradesh for 6,000 children she and her team have rescued from forced prostitution. Krishnan, who was gang-raped by eight men when she was a young teen, now works with the Indian Government to define an anti-trafficking policy. She also works with the State Governments to rehabilitate sex victims, and with corporations to help find employment opportunities for these victims.

Crimes commonly concurrent with child trafficking are: Domestic violence; Child abuse or neglect; Child sexual abuse; Child pornography; Child labour violations.

The causes of trafficking include:

1. *Poverty and globalization* – Poverty and lack of opportunity are major foundations of trafficking. Poverty is a common thread that runs through the stories of many victims. People living in extreme poverty are given the promise of a well paid job and a better life in another country, perhaps with lodgings and educational opportunities included. They have no idea that the person making the extravagant promises is a trafficker. And they do not find out until it is too late. Trafficking shows phenomenal increase with globalization. Increasing profit with little or no risk, organized activities, low priority in law enforcement etc., aggravate the situation.

2. *Lack of Education* – When there is lack of educational opportunities, future prospects are limited which increases vulnerability to traffickers, especially among girls. Educational programs must enable them to learn relevant, practical skills, including basic and reproductive health, nutrition, hygiene, and HIV/AIDS prevention, as well as reading, writing, critical thinking, and problem-solving skills.

3. *Social attitude, culture and practices* – Gender- based social practices lead parents to be persuaded by traffickers under false pretext of marriage without dowry- women being an economic burden on family.

4. *Castes/Tribes* – Age-old customs and traditions- in India ***Devadasi*** tradition in Karnataka, Andhra Pradesh and Maharashtra in which parents of scheduled tribes marry their daughters before puberty to a deity or temple and then force them to provide sexual services to upper caste community members.

5. *Forced marriage/ Bride Trafficking* – girls and women are trafficked not only for prostitution but are bought and sold like commodities in many regions of India where female ration is less as compared to male due to female infanticide and these are then forced to marry. Bride trafficking is forced sale, purchase and resale of women and girls in the name of pious relationship i.e. marriage. Girls and women are kidnapped or forced into bride trafficking and raped, sold and/or married off without their willingness only to end up as a permanent slaves and bonded labourers at the sympathy of the men and their families. According to Global Voices approximately 90% of the 200,000 humans trafficked in India every year are victims of inter-state trafficking and are sold within the country. The states of Haryana, Punjab and Rajasthan are major destinations of trafficked 'brides'. The Haryana province alone has a great gender difference and is hence known as the destination for bride trafficking.

6. *Bonded labor* – Victims of this equally widespread form of trafficking come primarily from developing countries. They are recruited and trafficked using deception and coercion and find themselves held in conditions of slavery in a variety of jobs. Men, women and children are engaged in agricultural and construction work, domestic servitude and other labour-intensive jobs. June 1st 2012 sees the launch of a new ILO global estimate of forced labour – a shocking 20.9 million women, men and children are trapped in jobs into which they were coerced or deceived and which they cannot leave. The figure means that, at any given point in time, around three out of every 1,000 persons worldwide are suffering in forced labour.

7. *Conflicts/ Natural disasters* – Areas undergoing post conflict/disaster period become transit points for trafficking due to infrastructure devastation, crumbling law and order, and increasing numbers of vulnerable and destitute populations- lack of access to comprehensive information or legitimate and affordable migration programs. Chaos, mass migration and the separation of family units make people vulnerable to kidnap for the purposes of trafficking. These situations can equally encourage potential victims to agree to themselves or family members being taken elsewhere on the promise of safety and a life with more stability.

8. *Governance* – Poor governance and scarce government services, absence of an effective legal framework, unequipped to support vulnerable groups.

9. *Placement agencies* – Some of placement agencies apart from other placement work carried on by them engage themselves in placement of children in various establishments including as domestic help. There is no

statutory control over the functioning of these agencies due to which the children who are either picked up from the streets or brought from various other states to Delhi are first placed as domestic help and later shifted to other more hazardous work including some who are pushed into prostitution.

10) Another reason is that of Family dysfunction and violence and abuse in the home is the hidden cause, as the child wants to run away from such situation of disturbance and torture and needs a peaceful environment, thereby making them approachable for trafficking for various purposes.

Sex Trafficking : also known as flesh trade, is a clandestine industry. Hardly any percentage of the total problem is visible. Most often victims are sold as children but they only become visible to the world years later, when they are adults and pose no risk to the traffickers. The social attitude and perception regarding sexual violence across the world and associated stigma and ostracization pushes the problem of sex trafficking further into oblivion.

Sex trafficking is most visible in red light areas. Every country has certain areas that are identified as red light areas. Sometimes it is openly talked about, as in the case of Thailand or Netherlands, but most of the times it remains as an open secret. In India, practically every state has such an identified area.

While the visible portion of sex trafficking is largely limited to these areas, a far greater number of women and children are traded in houses, apartments, hotels, lodges, resorts, etc. A significant part of sex trafficking also happens in guise of tourism and this is very difficult to identify. Even more clandestine is the instance of trafficking for pornography which van happen anywhere, Sex trafficking happens in guise of friendship clubs, massage parlors, beauty parlors, record dance, tourism and even through social networking sites.

Means adopted by traffickers include Deception & Fraud; Coercion through blackmail; Exploitation of position of vulnerability and abuse of a position of power

Over 93% of the sex trafficked victims never get rescued. Among the millions of victims across the globe, a mere 7% or less, get a chance to come out of the exploitive world. Of these meagre numbers, a still smaller number actually get rescued on time i.e., wither before inducted or after being freshly inducted. Most victims get rescued much later when they have already gone through the different stages of innumerable tortures and trauma and have started surviving in the world of exploitation.

The journey of sex trafficking destroys the body, mind and soul of a victim,

and fundamentally takes away a human being's capacity to trust oneself or anybody around her. The victim has to live with the damage caused to her psyche by prostitution and this makes her aggressive and hostile to any support.

Understanding Indian Legal Provisions

In the existing scenario, trafficking is usually confused with prostitution and therefore, there is no proper understanding of the seriousness of trafficking. It would be appropriate here to list out the wrongs, violations, harms and crimes that are committed by various persons on a trafficked victim.

These violations can be realized only during a careful interview of a trafficked person. Once the victim is allowed, facilitated and promoted to speak, the unheard story will reveal a long list of violating acts perpetrated on her. As a typical example, under the Indian Penal Code, a trafficked girl child has been subjected to a multitude of violations. She has been displaced from her community, which tantamounts to kidnapping/ abduction (Sections 361, 362, 365, 366 IPC may apply). Procured illegally (S.366A IPC). Sold by somebody (S.372 IPC). Bought by somebody (S.373 IPC). Imported from a foreign country (if she hails from a foreign country, or even from J & K State, and is under 21 years of age – S.366 B IPC). Wrongfully restrained (S.339 IPC). Wrongfully confined (S 340 IPC). Physically tortured/injured (S.327, 329 IPC). Subjected to criminal force (S. 350 IPC). Mentally tortured/harassed/assaulted (S. 351 IPC). Criminally intimidated (S.506 IPC). Outraged of her modesty (S 354 IPC). Raped/gang raped/repeatedly raped (S 375 IPC). Subjected to perverse sexual exploitation ('unnatural offences') (S.377 IPC). Defamed (S 499 IPC). Subjected to unlawful compulsory labor (S.374 IPC). Victim of criminal conspiracy (S 120 B IPC).

The above provisons are only illustrative and not exhaustive. Undoubtedly, in every case, the trafficked person is a victim of at least one or more of the violations listed above.

Oftentimes victims become pregnant as they are subjected to non-protective sex. If the victim has been subjected to miscarriage then the liability of the offender falls under the Sections 312 to 318 IPC.

In some cases, the process of exploitation has proven fatal wherein the victim succumbs to the direct effects of the harm or to the consequential problems arising thereof. This means that the offence of homicide/murder is also attracted.

The offences under ITPA:

- S.3 ITPA: Keeping or managing (or assisting in keeping or managing) a brothel or allowing premises including vehicles to be used as a brothel.

- S .4 ITPA: Living on the earnings of prostitution (even partly).
- S. 5 ITPA: Procuring, inducing, trafficking or taking persons for the sake of prostitution. Even attempt to procure or take would constitute this offence.
- S.6 ITPA: Detaining a person in any premises (brothel or any other) where prostitution is carried out.
- S.7 ITPA: Anybody who carries on prostitution, or anybody with whom such prostitution is carried on, in the vicinity of public places (which includes hotel, vehicles, etc).
- S.8 ITPA: Seducing or soliciting for the purpose of prostitution in any public place or within sight of a public place.
- S.9 ITPA: Seduction of a person in custody (including causing or abetting seduction for prostitution of a person in custody).

The Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act 2000) also has penal provisions. Anybody in control of a child who assaults, abandons, exposes or willfully neglects the child or procures him to be assaulted, abandoned or exposed causing the child unnecessary mental or physical suffering, is liable under S. 23 JJ Act.

There are so many Human Rights violations that take place on trafficked person. The list includes the following deprivation of the right to life (slave–like conditions). Deprivation of the right to security. Deprivation of dignity. Deprivation of the right to access to justice and redressal of grievances. Denial of access to health services. Denial of right to self determination (e.g. when the victim is retrafficked). Denial of right to return to own community. Double jeopardy (e.g., a person trafficked across a border is sometimes convicted for non-possession of passport/visa, etc. and is simultaneously punished for 'soliciting'). Denial of right to representation. Denial of right to be heard before decision making.

The list of rights violations is long and several such violations can be listed out depending on the provisions of the Constitution/ Protocols/Conventions etc.

In my concluding remarks I would say that there is no dearth in legal provisions to prevent, check and remedy the human trafficking of women or children. Problem lies with the enforcement of these laws. These laws remain only on paper. In fact, those who violate these laws and indulge in this trade are generally powerful people and by flexing money or political power they are able to win over those who are supposed to enforce the law and protect this vulnerable section of the society. Probably, this is the reason that human trafficking has

not only survived but thrived over the years. There are good NGOs who are doing their best in this field. Even in the police force there may be some good Samaritans doing the job to the best of their ability. Wherever causes come to the Court, judiciary tries to do its best in the given situation. However, all these efforts simply amount to taking out some buckets from the ocean. Problem with huge magnitude remains and the future is as bleak as the present or what it was in the past. At the same time, I should not be sounding very pessimistic. All like-minded people should come together and try to find solutions to this menace and take steps to at least reduce its volume significantly if the eradication is impossible.

In this scenario, I admire the spirit of the organizers of this International Conference and the participants in this Conference playing the role of Starfish Saviour and wish them all the best.

Thank you!

SPECIAL ADDRESS

Hon'ble Mr. Justice Pradeep Nandrajog
Judge, High Court of Delhi

1. I'm given to understand that the deliberations at the three day's conference on issues concerning Human Trafficking were fruitful, since the spectrum of the deliberations covered all aspects of the most sinful of the sins: Objectification of human beings.

2. I propose to speak on an issue, which apparently seems to be different but at base, is the other side of the same coin. Social strife!

3. The sufferers being the same, as in trafficking; the marginalized poor, women and children.

4. The euphoria of independence was short-lived. As time passed by, cultural disequilibrium has grown. The gruesome violence in Bhiwandi in 1970, the riots in the Hindi heartland in 1984, Gujarat riots in 2002, the riots in Muzaffarnagar in the year 2014 and the riots in Assam this year are a sad reminder that the society is sick.

5. Who suffers the most when there is communal or social strife: the poor, the women and the children. Whatever may be the cause, it is clear that the true and lasting welfare of the country, and of its constituent parts, can lie only in the *national integration* of the diverse cultural forces.

6. Social scientists recognize that the four key concepts of the study of societal development and transformation are: (i) Civilization, (ii) Culture, (iii) Nation and (iv) State.

7. Conceived as circles, one visualizes the four concepts graphically as either *interwoven* and *overlapping* or as *intersecting* and *fragmenting*. These concepts are collateral but not coeval, because culture and civilization have long time sequence. Nation formation and the creation of a State have shorter time sequences.

8. Civilization emerges when technology is married to human values, culture as distinct from civilization, but as part of it, is the result of intellectual or spiritual aspects of collective life, covering beliefs, religion, philosophy, ideas, laws, customs, morals, arts, architecture, drama, dance, music and such aspects of individual's life which have personal and inter-personal values,

ethical norms, etiquettes and behaviour patterns. Thus, culture is a socio-anthropological and a humanistic term.

9. Whereas civilization and culture co-relate as a pair; and sometimes are used even as synonyms, because they jointly cover two vital dimensions of the humans collective life. Nation and State, in juxtaposition to civilization and culture, are about socio-political and politico-legal dimensions of group life.

10. A nation would be a historically evolved community, coalesced by a political identity and thus, would be an aggregate of several sub-identities of group life; like language, culture, religion and ethnicity. The State would be a political concept and a legal personality.

11. India, a determinate territorial state, with the second largest population and the sixth largest territory in the world is a defined civilization belt. It represents a fascinating coalescence of cultures, embodied in a distinct unified civilization – part dead and part dying, but most significantly vibrant, regenerative, adaptive and innovative in its large part.

12. The greatest confluence of cultural strands, racial intermixing, cross-fertilization of religious ideas and secular thoughts has taken place in India. India comprises myriad streams of culture, about 16 major languages, 2000 dialects, a dozen ethnic groups, 7 religious communities fragmented into sub-sects and sub-castes that inhabit 68 socio-cultural sub-regions, which fit into the frame of 7 natural geographic regions and therefore, India exhibits a distinct internal homogeneity and external identity.

13. The continental dimension of India, having 3000 years of recorded history and possibly about 2000 years of pre-history, had cultural and social shifts, when in the dim twilight of history primordial hoards of ethnic groups, mostly from Central, South-Central and North-Eastern parts of Asia descended into the fertile Indo-Gangetic plains moving Southward to the Alluvial Deccan Plateau, inhabited by the earliest known indigenous people. It provided the first inter-ethnic mixture pattern. The Dravidians, the Aryans, the Semitics and Mangoloids, in varied patterns of permutation and combination provided the ethnic sub-stratum of Indian civilization. The Aryan tribes followed by the Sakas, the Yue-chi, the Kushans, the Bactrians, the Scythians and the Hans made inroads into India, followed by the migratory clans of Uzbeks, Turkomans, Tajiks, Iranians, Turanians, Afghans and the Pathans. With each tribe and clan came dialects, belief patterns, social systems and value

structures. All boiling in the cauldron to create cultural diversity, which was composite.

14. It is therefore not surprising that the composite culture in India originated in an environment of reconciliation rather than refutation; co-operation rather than confrontation; co-existence rather than annihilation. This explains the politically dominant Islamic strands, represented by Turko-Afghan and Central Asian tribes from Khwarizm, Khorasan, Balkh and Bukhara culturally mixing with the socio-culturally ramified Hindu transitional sub-stratum, particularly covering the Kshatriya and the Vaishya *jatis;* and as a result constituting the middle sub-castes like Rajputs, Thakurs, Jats, Ahirs, Yadav, Khurmis and Gujjars, in the wide expands of the Indo-Gangetic belt.

15. Three geographically cultural belts: Arabian, Iranian-Turanian and Indian, fused by way of composition of their cultures.

16. Etymologically, the term '*composite*' was used in architectural sense and got extended to mathematics (we refer to composite number); to botany (to identify flowers consisting essentially of small flowers: Florets); and of late, to photography (for a photo that combines several separate pictures). In common terms it refers to anything made up of various parts of elements.

17. It acquired a philosophical meaning in conjunction with culture : '*composite culture*', meaning a particular brand of culture that represents the rejection of uni-cultural regimentation or mono-cultural domination and positively re-affirms the value of pluralism and syncreticism, as the viable, stable and desirable base for cultural efflorescence in a mixed society and plural polity. It is a product of borrowing, sharing and fusing through processes of interaction.

18. We talk of the '*Ganga-Jamuni tehzib*' (culture born out of the confluence of Ganga and Jamuna) and it includes 7 streams of influence: (i) *The Vedic vision*, imbued with a sense of tolerance and respect for the many paths of truth, and the essence of the philosophy of the *Bhagavad Gita*, that salvation is through action and duty well done without expectation of reward. (ii) *The traditions of Bhakti Marga*, with the emphasis being on love, as the exile principle of life and the love of God and the love of man as the means of a mystic vision and the unitive state for the attainment of peace, harmony and liberation in the present life and life thereafter. (iii) *The humanistic concepts of Islam,* which include fraternity of human beings and charity towards the have-nots: The beneficent *Rahman* and the merciful *Rahim*

attributes of God. (iv) *The message of 'sulhe-kul' (peace for all) of the Muslim Sufi 'silsilhas (mystic orders)*, with the focus on charity, fraternization of different communities. (v) *The elegance and ethos of the syncretic Indo-Muslim cultural values*, as manifested in social relations, etiquettes in daily life marked by gentility, restraint and deference towards elders; refinement in tastes, aesthetic and physical – in poetry, crafts, culinary, household and lifestyle. (vi) *The cosmopolitanism of modern urban development*, to provide an incipient cultural form for the migrants of the rural hinterland into the cities during the period the western influence in India under the British was creating urban cities with different lifestyles, evincing a rise of the Indian urban professional. (vii) T*he heritage of the Indian National movement,* for the liberation and re-construction of the Indian polity, free from the imperial rule.

19. What is the essence of a new national identity in India, in which the heritage of the composite culture plays a cementing and a catalytic role?

20. It has to be the essence of the seven streams of influence to which I have alluded to. The seven major segments of our continental plural society have to be coalesced in a pattern of unity in diversity. The pattern has to use the colour of religion, caste, tribe, language, region, culture, economy and social stratification which may be called the class.

21. National integration is the sine qua non of modernization. Intrinsic in the process would be a radical shift in the focus, and consequential the re-adjustment of the loyalties of the people. For unless fragmented groups, whose existence which is based on particularistic loyalties, do not break down with simultaneous superimposition of generalist loyalties to the total aggregation of the political community – The Nation; with a new national identity cannot be created.

22. The problem is that we focus on fusion, uniformity, merger, assimilation and regimentation. If you read texts on the subject and even judicial opinions, and with an apology to the highest court of the land, these words find repeated mention whenever courts deal with social issues : such as Khap Panchayats, Unified Marriage and Civil Laws etc., ignoring that National Integration means and ought only to mean :

    (a) Cohesion which is different than fusion; and thus not fusion.

    (b) Unity which is different than uniformity; and thus not uniformity.

(c) Reconciliation which is different than merger; and thus no merger.

(d) Agglomeration which is different than assimilation; and thus not assimilation.

(e) Solidarity which is different than regimentation; and hence no regimentation.

23. National integration presumes the existence of both unity and of diversity: for if there is only unity then integration is not necessary and if there is only diversity then integration is not possible. Obviously, integration cannot be a process of conversion of diversities into uniformity. It has to be a congruence of diversities leading to a unity in which both the variations and similarities are maintained.

24. In the quest for building a new identity and promoting cohesive mutual unity we need to draw sustenance from the heritage of the composite culture of the past which provided a platform for the enrichment of the relevant values of collective life, enwombing the finest elements of humanism, human fraternity and pluralism.

25. The spirit in which thousands of people moved from one place to another in India, in search of greener pastures or to fulfil their other worldly desire seeking salvation (*moksha*) through pilgrimage; the spirit of there being no legal hindrance to movement of population on pilgrimage or trade and commerce during the past several centuries, requiring no passports to enter a neighbourhood in any part of India; the spirit of the convertible legal document : the *hundi* (a kind of promissory note) issued by *Seths* of Lahore which could be encashed in Madras has to be imbued. We must remember that: *United we stand and divided we fall,* is an old adage which should not be forgotten. The Indian idea of the world as a family *'vasudhaiva kutumbakam'* must guide us through. We must remember that the goal of the revolution: the freedom movement has not been achieved. The religious and social riots, where the poor, women and the children suffer the most, is a grim reminder that the Integration of the Composite Culture in the New National Identity is yet not complete. We have to reach out beyond the confines of our inscriptive beliefs and value orientations to search and find out elements that contribute to a plural society. In order to reach out to all sections of the society, with equal love and loyalty, we have to overcome the prejudices of inherited caste, class and creed. Indeed, it is this composite culture which remains a valuable input into the flowering of a new India, with creative diversity which is unified by the larger humanistic concern for

only on it can we build a new civilization, based on justice, equality, dignity and universal prosperity.

26. In 1947 the country threw off its shackles of bondage and attained freedom, but for only a few. *Sare jahan se achchha hindostan hamara* is a popular and patriotic lyric sung by millions with pride, but regretfully, to a vast majority these words are a mockery and represent falsehood. You, the youth of this country are the torch bearers to guide the nation into the much awaited *'dawn of awakening'. Be plural. Respect choice. Respect freedom.*

Thank You.

SPECIAL ADDRESS

Mr. Mohan Parasaran

Senior Advocate, Supreme Court of India
Former Solicitor General of India

It is most appreciated that Campus Law Centre has organized this international conference on the theme "Combating human trafficking: with special reference to women and children". I congratulate Campus Law Centre for taking up this burning issue.

The plague of human trafficking is a real and serious threat to the stability and well-being of any civilized society that holds dear the freedom of its members. For centuries, in every imaginable part of the world, people of various races, castes and creeds have fought to their death to ensure fundamental human freedoms i.e. liberty and basic human dignity for their future generations. These battles have been hugely instrumental in shaping the social and political set-up as we see it today. Our fundamental rights, so fervently revered as supreme, are rooted in liberty and dignity. It was what our forefathers have strived to achieve; it is how our Constitution came into being.

According to the Protocol[1] to the United Nations Convention against Transnational Organized Crime, human trafficking is defined as "the recruitment, transport, transfer, harbouring or receipt of a person by such means as threat or use of force or other forms of coercion, of abduction, of fraud or deception for the purpose of exploitation." In other words, it means enslavement of human beings for exploiting them, which results in the grossest of abuse of their basic human rights. It is most alarming that far from being isolated incidents, this enslavement has become a booming industry; a well-engineered and organized racket. It is a crying shame that human trafficking, something that thrives on the death of free will and dignity, is allowed to grow and prosper only to enure to the advantage of some individuals who are devoid of any conscience whatsoever.

A Report of the United Nations on human trafficking i.e. "A Global Report on Trafficking in Persons" reveals some shocking statistics. The most common form of human trafficking is sexual exploitation (79%). Therefore, unsurprisingly, victims of human trafficking are predominantly women and girls. The second most common form of human trafficking is forced labour (18%). Other forms of trafficking include trafficking for begging, ritual killings or mystic practices, organ removal and forced marriage. While all trafficking is not transnational,

[1] Specifically, Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

that does not make the problem any simpler to tackle. On the domestic front too, there is a vast and intricate network of trafficking and one of its commonest hubs happens to be something that we tend to largely ignore. Thousands of women, and even children, are sold into sexual slavery at brothels, condemned to a life of hopelessness and misery. And yet, these illegal / immoral institutions have been thriving from the inception of civilization. Similarly, large factories that manufacture fireworks or involve danger or hazardous work ruthlessly employ children, often under the age of 14.

Why is this happening? We have the requisite laws in place to combat trafficking. Several Articles of the Constitution (Articles 14, 21, 23), provisions of the Indian Penal Code [Sections 366(A) and 372] the Immoral Trafficking Prevention Act, Bonded Labour Abolition Act, the Child Labour Act, etc – they are all aimed at prohibiting this menace. Our judiciary has also taken cognizance of this menace in several decisions and issued directions to the Government to eradicate it. In the case of *Vishal Jeet v. Union of India* (1990) 3 SCC 318, the Supreme Court ordered for an objective multi-dimensional study and a searching investigation into the matter relating to the causes and effects of this evil and requiring most rational measures to weed out the vices of illicit trafficking, while expressing the view that this malady is not only a social but also a socio-economic problem and therefore, the measures to be taken should be more preventive rather than punitive. In *Childline India Foundation v. Allan John Waters* (2011) 6 SCC 261, the Supreme Court expressed concern for the vulnerability of street children, who having no home, no proper food and no proper clothing, used to accept the invitation to come to shelter homes and became the prey of paedophiles. It also expressed the hope that the several legislations and directions of the Court will be properly implemented and monitored for the better future of these children. In *Neerja Chaudhury v. State of Madhya Pradesh* AIR 1984 SC 1099, the Supreme Court gave directions on the rehabilitation of Bonded Labours, stating that rehabilitation must follow in the quick footsteps of identification and release.

Though unpleasant to state, the fact remains that such a large scale and systematic endeavour of enslaving so many individuals cannot take place without the involvement of law enforcing agencies. It is no secret that a few morally corrupt law enforcement officers act in concert with these traffickers, veiling them from law and covertly encouraging their activities. The need of the hour therefore, is to take steps for effective enforcement of laws, ensure proper investigation and prosecution, along with introduction of stringent accountability measures and promoting public awareness. A coordinated effort with NGOs and international organizations to identify and target these illicit activities will

also prove helpful on both national and international levels. Equally important are measures for counselling and rehabilitation of trafficking victims.

The International Conference on Combating Human Trafficking will enable academia, Bench, Bar, researchers, diplomats, NGOs, professional bodies, policy makers and law makers to gather and proffer solutions for combating this heinous crime. This is a most welcome step for we all need to bring this problem in the open and address it strategically. As conscious members of this society, it is also our responsibility to ensure the well-being of our brothers and sisters so that they live a happy and free life. We must not let the deaths of all those who have sacrificed their lives to bring us free will and dignity, be in vain.

Thank you!

Ms. Kim Haing

President, Korean Institute for Gender Equality, Promotion and Education

Dear honourable distinguished representatives, delegates, and colleagues.

I express my greatest appreciation to Hon'ble Hon'ble Mr. Justice K.G. Balakrishnan, Hon'ble Mr. Justice Jayant Nath and Professor Usha Tandon for inviting me to such an honorable conference.It is my honour to be invited to this 'International Conference on Combating Human Trafficking with Special Reference to Women and Children'.

Before I start, let me introduce myself. I am currently working as a president of KIGEPE, which stands for Korean Institution for Gender Equality Promotion and Education since February of 2014. KIGEPE is a public institution, which is under Ministry of Gender Equality and Family of Korea. KIGEPE is an institution which is in charge of educating public officials about gender equality education, sexual assault, sexual harassment, prostitution, and domestic violence. We also educate high officials of underdeveloped countries as an ODA (Official Development Assistance) program with KOICA (Korea International Cooperation Agency). Starting from this year, we are providing various violence-prevention education programs through mobile phone (smart phone), targeting the general public. I was the first spokesperson for president madam Geun-hye Park in 2013. As we all know, human trafficking and slavery is the fastest growing delinquency international wide. We also know by the statistics that 80 percent of human trafficking victims are women and girls. And 50 percent of the victims are minors. This is such an infelicitous fact. First, this problem can't be seen as unimportant crime in certain region or countries.

The imbalance of power and structural inequality between male and female is the root cause of female violence. With this being said, human trafficking is cruel terrorism against female, children, and socially weak. This can be seen as human rights problem, which we all need to face, living in this period. Therefore, all the nations need to unite in order to eradicate human trafficking. There have been many treaties and agreements throughout communities of nations and international organizations, such as UN, to eradicate violence against female.

This international solidarity act showed much visible success. And nevertheless, there is a reason for emphasizing the need for solidarity of community of nations through this conference. Currently, the statistics of human trafficking that are taking place in Asia is very high. And it is a fact that providing an institutional strategy for carrying a legal binding force in Asia is quite behind compared to other continents.

Rashida Manjoo, a special rapporteur of the United Nations, states in her report that continents of America, Africa, and Europe has come to an agreement where institutional strategy with legal binding force will be placed based on regional level. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women is one of the example. Also, Protocol to the African Charter on Human and People's Rights on the Right of Women in Africa (2003) is not exclusively dedicated to violence against women, but it aims to protect women's rights in a comprehensive manner, and includes provisions on abortion, female genital mutilation, and the abuse of women in advertising and pornography.

Finally, the Council of Europe Convention on preventing and combating violence against Women which entered into force on Aug. 1st, 2014, is a European legal framework to protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence. On the other hand, non-legally binding instruments in the South East Asia region, the Charter of the Association of Southeast Asian Nations (ASEAN), undertakes to respect fundamental freedoms, and to advance the promotion and protection of human rights, and the promotion of social justice. Further to the establishment of the ASEAN Intergovernmental Commission on Human Rights in 2009 and based on the 2004 Declaration on the Elimination of Violence Against Women in the ASEAN Region, as well as relevant international human rights instruments, ASEAN member states established the Commission on the Promotion and Protection of the Rights of Women and Children, in an effort to foster cooperation in the protection of women's rights in the region.

There has been a significant progress, but still the status of non-legally binding seems limited. I personally believe that this particular happening is from the relation of political dynamics in Asia region. But, the rights of women and children to fight against violence and providing of protection are human rights problems, which surpass local politics and international interest. Legal limitation system based on strong solidarity is in need. It is my belief that human rights are above all, even individual country's benefit. I strongly hope that everyone who is here at this moment can play their parts.

Second, we need to share the philosophy that without the national level of eradicating measures for eliminating violence against women and girls, sustainable economic development is impossible. Of course, this is not the new idea. The Conference on the Environment and Development (Rio 1992) already stated that "the achievement of development goals is impossible without the elimination of violence against women."

In addition, the Beijing Declaration also links gender-based violence with the achievement of development goals. It states that "violence against women is an obstacle to the achievement of the objectives of equality, development and peace. The low social and economic status of women can be both a cause and a consequence of violence against women." Currently, Asian countries, especially China and India, are showing magnificent economical growth. Economical growth is priority agenda of other Asian countries as well. But many Asian countries are experiencing a war with inequality and corruption within their nation. The community of nations is evaluating China's success for their national growth objective, based on their war against corruption.

Inequality problem is equally important as corruption problem. And gender inequality is placed deep in the roots within inequality problem. Besides, gender inequality inevitably connects with poverty, and criminal activity. Therefore, eradication of gender inequality is a fundamental prescription for the end of patrimonial poverty, and also an eradication of various forms of violence.

I have a firm belief that the fastest way to subdue poverty is to offer a protection to the maternity of poor household, prevention of poor girls being sold in prostitution and human trafficking so they can be educated in school, and women to be independent and work.

The various sexual harassment, prostitution, sexual violence, and domestic violence against women and weak are the starting points of crime and a form of the never-ending vicious circle. So the State needs to realize providing a protection for women and weak is not only protecting their human rights, but also a necessary strategy for nation's sustainable economic development.

If women and socially weak are excluded and alienated, some degree of economic growth can maybe promised, but it can't be sustained because a nation which only focuses on particular part of social system can't exist. I prefer using a term 'human rights of economy' over a term 'democratization of economy'. This term is basically an economic development model which human rights are a priority over everything else. It is a similar strategy from China, which China placed the war against corruption as a priority objective. This is a coexisting national growth model, which a socialiy strong co-prosper with socially weak who are not protected by the law and socially behind. If we neglect the socially weak, and if we neglect the various forms of violence, such as human trafficking and prostitution, the nation can't achieve the economic prosperity and pay a tremendous cost to sustain their social system. Therefore, the enforcement of legal bindings and legal system is needed, and due-diligence of nation needs to be sincerely executed.

I believe that due-diligence, which is a legal term with a definition of private transaction, should now be pulled over to public sphere and this concept needs to be used to emphasize the State's obligation duty. This is a very important time, and I have discussed deeply with Rashida Manjoo, a UN special reporter, about this matter. This, I believe, needs to be the very first priority of nation's development strategy. This is not a cost. It's an investment. A fundamental investment for nation's sustainable development like a SOC infra-structure. It also is a path to co-prosperity. It is a strategical development model, which can be cooperated with international associations, such as UN or World Bank. I believe that everyone here today will share vast amount of discussion and come to a mutual consent, which will lead us to the same objective. International solidarity to eradicate various forms of violence, including human trafficking, and sharing the point that this is the most definite investment of economical development, I will be greatly blessed.

My deepest respect to all of your scholarly achievements, and I would like to propose a solidarity for all of us to achieve the same objective.

Thank you all.

Professor (Dr.) Donald K. Anton

Professor of International Law Griffith University Law School, Australia

Good afternoon to everyone. It is a privilege and an honour to speak to you at this Valedictory Session. I am grateful for this opportunity and I want to thank Professor Tandon again for inviting me. I also want to thank all the many wonderful organisers, including the dedicated students who have been so helpful. All of them have worked so hard to bring off such a spectacularly successful event. My hat is off to all of you.

Now all of us here know that it is shocking; and even more shocking when one really thinks about it. How can it be that the ancient and inhumane practice of slavery – bound up with the control and dominion by one human being over another human being – still exist in the 21st Century in modern forms like human trafficking. This shock stems, in large part, from the fact that slavery is and has long been universally condemned and many thousands have struggled for centuries to end all forms of this vile practice. As such, one might reasonably expect that it might be close to eradication by now. Distressingly, this is far from the case as we have heard from many speakers over the course of the last three days.

This important conference will now assume its place in the long, unbroken, and continuing fight to change the status quo for the better. Its contributions, I hope, are only at the beginning stages. Happily, a large number of brilliant and insightful presentations will find their way into publication and wider circulations. This will help push our deliberations further, but in a moment I would like to make a suggestion to keep the research started here moving forward into the future.

Before this, however, in the brief time I have today I want to address two fallacies that came up several times during our sessions. First of all, during our deliberations the value of our words; our presentations – as opposed to worldly action – was challenged at certain points. Some felt it more important to be out there doing, than merely thinking about and suggesting action. Surely, though, both words (and the ideas they represent) and action are important. Philip Allott makes the point well in his book, Eunomia. Allott rightly highlights that words make our world. To change our words is to change our world. Words have that sort of power. We heard an example of an attempt to change words this morning from Professor Buske – her attempt to change the customary word in Vanuatu for child-swapping as restitution to what it really is today, child-trafficking. It may take a long time, but repetition, legal reinforcement, and education will eventually change the tide.

The long march of the law also shows that words can and do change our world. As lawyers, we are engaged in the never ending normative process of trying to persuade decision-makers, through words, which values in society, by virtue of law, must be preserved, which reformed, and which must be discarded. So, slavery itself, once lawful everywhere, through the combination of words followed by action, is now universally recognised as a crime over which every nation has jurisdiction to punish and is prohibited in international law as a norm jus cogens from which there can be no derogation. That, in large measure, is down to the power of words and the ideas behind them. So, it is clear that our time spent with words at the Campus Law Centre has been time very well spent.

The second fallacy I want to mention is related to idealism. During our deliberations there was also concern expressed about some of the suggestions and possible solutions put forward as being too utopian and impossible of accomplishment. Here it is well to remember Sir Wilfred Jenks' defence of International Law against charges of idealism. Jenks admonished, invoking Proverbs 29:18 from the old testament of the Bible:

> Practical men [and women] ... know from life that people live by their visions and that, while an imperfect vision may lead astray, where there is no vision, people perish.

If the law, lawyers, the bench and scholars of all disciplines are concerned with ending human trafficking it matters greatly; it becomes a vital, driving force in the shaping of our global future. If the law, the bar, the bench, and the academe regard ending human trafficking as an impossible task and beyond their purview; then something self-defeating is put in motion. If we view the situation this way I think the choice becomes simple, especially for those who have not lost faith in human destiny.

So, in order to turn our words in to action; to make our vision and research agendas become reality; I have a proposal. I believe that we, as a group, take a lead in fighting human trafficking. My proposal is this. In order to take the excellent work of this conference into the future, and build on it, we establish an online virtual human trafficking research network. My idea is that this new network could combine scholarship and campaign work (based on sound scholarship) in the way similar networks for the environment and human rights more broadly already do.

I propose that the network be led by our conference Director, Professor Tandon and based here at the University of Delhi — with such support as we (and our institutions) can contribute. I propose also that every one here be initial

members, but that the network also be open to like-minded scholars, lawyers, judges, and civil society actors. The fine details, of course, would need to be worked out, but by establishing such a network we can be both thinkers and practical men and women doing our part to end the abhorrent practice of trafficking.

Thank you.

ARTICLES

SEPARATION OF POWERS BETWEEN THE COURTS AND THE LEGISLATURE

Mahendra P. Singh*

Abstract

Explaining the doctrine of Separation of Powers as it operates in modern times, this paper argues that the Constitution of India incorporates the doctrine only to the extent of keeping the judiciary separate from and independent of the executive and the legislature. Such separation does not permit transfer to or exercise of judicial power either by the executive or the legislature while in the exercise of its legitimate judicial powers the judiciary may state the legal position under the Constitution and direct the legislature and the executive to take appropriate steps as required or expected by the Constitution. Only in that sense and to that extent the doctrine of separation of powers serves its purpose of protecting the individual against the oppression and injustice of the state.

I

Introduction

The classical doctrine of separation of powers propounded by Montesquieu and meticulously incorporated in the Constitution of the United States with strong support from Madison was conceived as a shield against state despotism against the liberty of the individual. Recognising three powers of the state – executive, legislative and judicial – it was argued that each of them must vest in a different organ composed of different persons uncommon to more than one organ exercising their powers and functions uncontrolled by the other subject to certain checks and balances necessary for the working of the constitution. While in course of time quite a few constitutions followed the example of United States, not all of them have produced the desired results. In Montesquieu's land – France – it has never been incorporated in any of its several constitutions

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adopted since his time. Today it does not have many supporters in its classical form as the protector of liberties of the individual. Even in countries such as the United States in which it has reasonably operated serious doubts are expressed on its effectiveness and suitability in the current structure of the state in which the powers and persons cannot be as neatly separated as they could be conceived at some point of time in the past.[1] Doubts are expressed even on the tripartite division of powers of the state in which administration has emerged an additional centre of power exercising all the other three powers and functions. The oldest unwritten constitution of the United Kingdom from which Montesquieu drew his doctrine did never incorporate separation of powers as he conceived. Modern constitutions like that of India, which follows the United Kingdom model in its constitution, besides conceiving three traditional powers also creates independent institutions such as the Comptroller and Auditor General[2], Election Commission[3], Public Service Commissions[4] and several other commissions[5] for ensuring fairness in the exercise of political power and controlling its misuse as well as use for the protection of the interests of the vulnerable sections of the society. Such constitutions are commended for ensuring better protection against state despotism and for the promotion of democratic values.[6]

The classical application of the doctrine of separation of powers incorporated in the Constitution of the United States is possible only in a presidential form of government in which the members of the executive are different from the members of the legislature and not in the parliamentary form of government in which members of the executive are also the members of the legislature and in practice monitor and control the legislature, even though in theory they are expected to hold their office only during the pleasure of the legislature. The Constitution of India also establishes Parliamentary form of government in which all the members of the executive are also members of the legislature.[7] Even the heads of the state, who are also the heads of the executive, are one of the components of the legislature.[8] Naturally, therefore, the separation between the

1 See, e.g., B. Ackerman, The New Separation of Powers, 113 Harvard L. Rev. 633 (2000) & A. Tomkins, Public Law, 44, M. Laughlin, Foundations of Public Law, 452 (OUP, 2010).

2 Article 148 – 151.

3 Article 324.

4 See Part XIV, "Services under the Union and the States" Chapter II--"Public Service Commissions" in the Constitution of India.

5 For example, National Commissions for Scheduled Castes, Scheduled Tribes and Backward Classes, Arts. 338, 338-A and 340.

6 *Supra* note 1.

7 The Constitution of India, 1950. Article 75 & 164. The Constitution of Australia is an exception to this rule which expressly provides for separation of powers on the lines of US Constitution while it provides for parliamentary form of government.

8 The Constitution of India 1950. Article 79 & 168.

legislature and the executive does not exist in India the way it exists in the Constitution of the United States or in other constitutions having the presidential form of government.[9] Acknowledging this position of the legislature and the executive in our Constitution the Supreme Court has from the very beginning taken the stand that the Constitution does not incorporate the doctrine of separation of powers in the sense in which it has been incorporated in some other constitutions.

In the very first opinion relating to the delegation of legislative powers to the executive the Court observed:

There is not the least indication that the framers of the Indian Constitution made the American doctrine of separation of powers, namely, that in their absolute separation and vesting in different hands lay the basis of liberty, an integral and basic feature of the Indian Constitution.[10]

Again a few years later the Court observed:

In the Indian Constitution ... we have the same system of parliamentary executive as in England and the council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, "a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part." The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them.[11]

Even though the Constitution does not expressly incorporate the doctrine of separation of powers in its classical form, the functions of different parts or branches of government have been adequately delineated. Consequently, it may very well be said that Indian Constitution does not contemplate assumption by one organ or part of the state of functions that essentially belong to another. The executive may indeed exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It may also, if so empowered, exercise judicial functions in a limited way to be noted below. But essentially, as discussed below, the judicial powers and functions are exercised only by the judiciary.[12]

Thus, even though the Constitution does not have separation of powers like in the Constitution of the United States, it provides for an independent judiciary

9 See also H.M. Seervai, *Constitutional Law of India*, vol I, 159 (Fourth ed. reprinted, 2008).
10 AIR 1951 SC 332 para 163.
11 See, *Rai Sahib Ram Jawaya Kapur and Ors. v. The State of Punjab*, AIR 1955 SC 549.
12 *Ibid.*

with extensive jurisdiction over the acts of the legislature and the executive.[13] Therefore, as regards judiciary on the one hand and the executive and legislature on the other hand, the separation of powers is one of the basic features of the Constitution.[14]

II

Separation of Judiciary from Executive and the Legislature

Separation of the judiciary from the executive is also expressed in one of the Directive Principles of State Policy in the Constitution as follows:

50. Separation of judiciary from executive.—The State shall take steps to separate the judiciary from the executive in the public services of the State.

The desire to keep the judiciary separate from and independent of the executive and the legislature is adequately supported in the process of Constitution making as well as in the text of the Constitution. Closely examining the process of Constitution making and the final outcome in its provisions Granville Austin, a keen observer of the making and working of the Constitution, observes:

> The subject that loomed largest in the minds of [Constituent] Assembly members when framing the Judicial provisions were the independence of the courts and two closely related issues, the powers of the Supreme Court and judicial review. The Assembly went to great lengths to ensure that the courts would be independent, devoting more hours of debate to this subject than to almost any other aspect of the provisions. If the beacon of the judiciary was to remain bright, the courts must be above reproach free from coercion and from political influence.[15]

Accordingly, neither the members of the judiciary are simultaneously members of either the executive or the legislature, nor do they perform any executive or legislative functions except the ones relating to their internal management and working of the courts. Further, neither the judiciary controls the executive or the legislature nor does either of the latter two controls the former. Thus all the three conditions for separation of powers – separation of persons and functions and freedom from control of one by another – are satisfied between the judiciary

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[13] *Chandra Mohan v. State of U.P.*, AIR 1966 SC 1987, 1993.

[14] *State of Bihar v. Balmukund Sah*, AIR 2000 SC 1296. Also see, *State of Tamilnadu v. State of Kerala*, (2014) 12 SCC 696.

[15] G. Austin, The Indian Constitution, 164-65 (OUP, 1966, Paperbacks 1999). Also note Bruce Ackerman's observation that the makers of the Constitution of India have committed the Constitution to the principles proclaimed during their previous struggle. See, B. Ackerman, Three Paths to Constitutionalism – and the Crisis of the European Union, *British Journal of Political Science* (May 2015).

on the one hand and the executive and the legislature on the other. The independence of the judiciary from the executive and the legislature has been fully recognised and held to be one of the basic features of the Constitution which cannot be undermined even by an amendment of the Constitution.[16] As a matter of fact the doctrine of basic structure was recognised and applied with reference to the position of the judiciary in the Constitution. In *Kesavananda Bharti* v. *State of Kerala*,[17] the case in which the doctrine was first recognised and applied, an amendment which denied the power of judicial review to the courts in some specific matters was for the first time declared unconstitutional. The last part of Article 31C which read:

"and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy"

was declared unconstitutional because it violated the basic structure of the Constitution by denying the courts the power of judicial review.

In subsequent instances of invalidity of constitutional amendments, the ones, which have either taken away or curtailed the power of judicial review have been invalidated. Thus, for example, in *Indira Gandhi* v. *Raj Narain*[18] clauses (4) & (5) of Article 329A introduced by Thirty Ninth Amendment Act, 1975, which respectively made the decision of the High Court ineffective and disposed of any appeal pending before the Supreme Court were declared unconstitutional. In *P. Sambamurthy* v. *State of AP*[19] the Court invalidated cl. (5) along with the proviso of Article 371-D which made an order of the administrative tribunal dependent on the approval of the State Government. Similarly, in *Kihoto Hollohan*[20] para seven which barred the jurisdiction of the courts in respect of any matter connected with the disqualification of a member of a house under schedule ten of the Constitution introduced by Fifty-Second Amendment Act, 1985 was declared unconstitutional. Again in *Minerva Mills* v. *Union of India*,[21] clauses (4) and (5) of Article 368 which respectively overruled earlier decisions invalidating amendments and removed all limitations on the power of future amendments were invalidated. And similarly in *L. Chandra Kumar* v. *Union of India*[22] clause (2) (d) of Article 323-A and clause (3) (d) of Article 323-B,

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16 For details see, M.P. Singh, Securing the Independence of the Judiciary – the Indian Experience, 10, Ind. Int'l & Comp L Rev 245 (2000).

17 AIR 1973 SC 1461.

18 AIR 1975 SC 2299.

19 AIR 1987 SC 663.

20 *Kihoto Hollohan v. Zachillhu and Ors.*, AIR 1993 SC 412.

21 (1980) 3 SCC 625.

22 (1997) 3 SCC 261.

which respectively authorised Parliament and both Parliament and state legislatures to exclude the jurisdiction of all courts except the jurisdiction of the Supreme Court under Article 136 providing for appeal by special leave of the Court, were declared unconstitutional.

Relying upon the doctrine of separation of powers the Court has also denied final say to the executive in the matter of the appointment of judges of the Supreme Court and High Courts as well as in the matter of the transfer of High Court judges from one High Court to another. It has further denied the primacy of the executive in this regard and vested it in the judiciary.[23] The foregoing principles have also been extended to the appointment and transfer as well as service conditions of the judicial officers of the district courts.[24] A recent amendment to the Constitution as well as the supportive law of Parliament vesting this power in a judicial commission is currently under challenge in the Supreme Court.[25]

Another important development affecting the separation of powers between the judiciary and the other two branches of the state relates to the vesting of judicial power in bodies other than the Courts. Forty-second amendment to the Constitution during the 1975-77 emergency introduced Part XIV-A titled "Tribunals" comprising Articles 323-A and 323-B. While the former of these articles provides for the establishment of tribunals for deciding matters concerning civil servants the latter provides for the establishment of tribunals for several other matters between the state and the individual. They also empower Parliament and State Legislatures to exclude the jurisdiction of all courts including the High Courts and the Supreme Court, except the Supreme Court's jurisdiction under Article 136, in all matters assigned to the tribunals. Soon after the establishment of tribunals under Article 323-A, the law was challenged in *S.P. Sampath Kumar* v. *Union of India*[26] on the ground among others that the tribunals which exclude the jurisdiction of the High Courts could not generate the same confidence and faith as the High Courts do and, therefore, the Court directed that unless the Administrative Tribunals Act, 1985 was amended in several respects, it could not be upheld. It is only after the Attorney General

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[23] *Supreme Court Advocates-on-Record Association and another v. Union of India,* (1993) 4 SCC 441; Under Article 143(1) of the Constitution of India 1950, 1998 (7) SCC 739.

[24] *Chandra Mohan v. State of U.P.,* AIR 1966 SC 1987; *All India Judges Association v. Union of India,* AIR 1992 SC 165; *All India Judges Association v. Union of India AIR* 1993 SC 2493; *All India Judges Association v. Union of India,* AIR 2002 SC 1752.

[25] The legislation being the National Judicial Appointments Commission Act, 2014 and amendment being the Constitution (Ninty-ninth Amendment) Act, 2014. *Supreme Court Advocates-on-Record Association and another v. Union of India* W.P. (C) 13/2015 in the Supreme Court of India.

[26] (1987) 2 SCC 124.

gave an undertaking on behalf of the Union of India that the government will do everything possible to ensure that the tribunals generated the same kind of confidence and respect among the people as the High Courts do, the law was sustained. Specifically the Court held that the chairman of the tribunal should be a former or retired Chief Justice or a Senior Judge of a High Court though a person with the qualification of a High Court Judge with two years' experience as Vice Chairman of the tribunal could also be appointed as Chairman. The Court recommended that all the appointments must be made by a high powered committee with a sitting judge of the Supreme Court as its Chairman. It also directed the government to carry out these modifications within the specified time failing which the Act could be declared unconstitutional. Accordingly the Act was amended. Later in *RK Jain* v. *Union of India*[27] the Supreme Court also gave similar directions in respect of tribunals established under Article 323-B ensuring that tribunals are headed by persons who are as qualified as the judges of the High Courts because the tribunals were substitute for the High Courts and an appeal lay against their decisions only to the Supreme Court under Article 136 or under the law establishing the tribunal.

But even this arrangement was not found satisfactory and therefore a little later in *L. Chandra Kumar* v. *Union of India*[28] the Supreme Court decisively held that judicial review is part of the basic structure of the Constitution and Clause 2(*d*) of Article 323-A and Clause 3(*d*) of Article 323-B to the extent they excluded the jurisdiction of the High Courts under Articles 226 and 227 and of the Supreme Court under Article 32, were unconstitutional. Therefore, the judicial remedies under Articles 32, 226 and 227 are now available against the decisions of all tribunals constituted under Articles 323-A and 323-B. The remaining provisions of Articles 323-A and 323-B were upheld subject to the clarification that so long as the tribunals were subject to the jurisdiction of the High Courts under Article 226 and 227 and of the Supreme Court under Article 32 they could be allowed to function subject to the conditions already laid down in earlier cases regarding the qualifications and service conditions of the Chairman and the members of the tribunals. Therefore, a tribunal or special court consisting of judicial and revenue members constituted for the purpose of disposing of land grabbing matters is not unconstitutional if the Chairman of the tribunal is appointed in consultation with or on nomination by the Chief justice of a High Court from amongst the former judges of that High Court.[29] Applying similar principles the court has upheld the constitution of the National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) subject to drastic changes suggested by the concerned High Court and by itself

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[27] AIR 1993 SC 1769.

[28] (1997) 3 SCC 261.

[29] *State of A.P. v. K. Mohanlal*, (1998) 5 SCC 468.

ensuring their independence from the executive as well as by ensuing incorporation of judicial element.[30] As the amended law failed to incorporate all directions of the Court, the Court has invalidated it with the direction that the foregoing tribunals can function only after incorporating the changes suggested by it.[31] All these changes relate to ensuring that the judicial power is vested only in bodies that are independent and separate of the executive and the legislature as well as competent to decide legal issues like the courts.

Another and more significant development has taken place in relation to establishment of tax tribunals at national level namely the National Tax Tribunals and National Appellate Tax Tribunal under the National Tax Tribunal Act, 2005 assigning exclusive jurisdiction to these tribunals in income tax, customs and excise matters subject only to an appeal before the Supreme Court. Citing the provisions of the Constitution, national and international precedents and evolving constitutional developments in democracies around the world, the Court has invalidated the Act.[32] Special reliance has been placed on separation of powers, for example, in the following words:

If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution; it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary and it is by exercising this power which constitutes one of the most potent weapons in armoury of the law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the State or its officers. The judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse or abuse of power by the executive and therefore it is absolutely essential that the judiciary must be free from executive pressure or influence and this has been secured by the Constitution-makers by making elaborate provisions in the Constitution.[33]

Clarifying further the Court observed that "when transferring the jurisdiction exercised by courts to tribunals, which does not involve any specialised knowledge or expertise in any field and expediting the disposal and relaxing the procedure is the only object, a provision for technical members in addition to or in substitution of judicial members would clearly be a case of dilution of and

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[30] *Union of India v. R. Gandhi*, (2007) 4 SCC 341; *Madras Bar Assn. v. Union of India*, (2010) 11 SCC 67; *Namita Sharma v. Union of India*, (2013) 1 SCC 745.

[31] *Madras Bar Assn. v. Union of India*, 2015 (6) SCALE 331.

[32] *Madras Bar Assn. v. Union of India*, (2014) 10 SCC 1.

[33] (2014) 10 SCC 1, 137.

encroachment upon the independence of the judiciary and the rule of law and would be unconstitutional."[34]

And again after recording "the determination rendered by this Court to the effect that 'separation of powers', 'rule of law' and 'judicial review' at the hands of an independent judiciary, constitute the 'basic structure' of the Constitution"[35] the Court finally invalidated the National Tax Tribunals Act, 2005.[36]

The Court has also carved out an exception to the non-application of basic structure doctrine to legislation other than constitutional amendments[37] in the following words:

The "basic structure" of the Constitution will stand violated, if while enacting legislation pertaining to transfer of judicial power, Parliament does not ensure, that the newly created court/tribunal, conforms with the salient characteristics and standards, of the court sought to be substituted.[38]

Following the foregoing precedents the Madras High court has also invalidated the Intellectual Property Appellate Board (IPAB) which had the power to decide disputes relating to Intellectual Property.[39] Thus the High Courts and the Supreme Court are ensuring observance of a basic feature of the Constitution that the judiciary or any institution that performs judicial functions must remain insulated from the executive and the legislature. Even before some of the foregoing precedents were laid down I had argued that world over in the established democracies that care for efficient and effective administration of laws specialised tribunals are being established but they are either being made part of the judiciary or placed in similar position as the judiciary.[40]

III

Legislature not to Exercise Judicial Power

Although the Constitution vests the executive power of the Union in the

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34 *Supra Note 33,* page 171.

35 *Id.* at 184.

36 *Id.* at 218.

37 Earlier in *Indira Nehru Gandhi v. Raj Narain,* AIR 1975 SC 2299 and *Kuldeep Nayar and Ors. v. Union of India and Ors.,* (2006) 7 SCC 1, the court declined the application of the doctrine of basic structure to legislation other than the amendment to the Constitution.

38 (2014) 10 SCC 1, 218.

39 *Shamnad Basheer v. Union of India and Others,* 2015 (62) PTC 1 (Mad). Also see, A.P. Datar, Tribunals: a tragic obsession, 642 India-Seminar, Feb. 2013. Available at http://india-seminar.com/2013/642/642_arvind_p_datar.htm. (Visited on 10th Feb. 2015).

40 See, M. P. Singh, "Administrative Justice in India: The Urgency of Reforms" (2013) 1 SCC J-65.

President[41] and of a State in the Governor of that State[42], no corresponding provision is found in respect of the legislative powers of Parliament or State legislatures. However, just as the Constitution recognises division of executive power between the Union and the States,[43] it also provides for distribution of legislative powers between them. Chapter I of Part XI of the Constitution read with three lists in Schedule VII deals with the distribution of legislative power between the Union and the States. However, the chapter is not exhaustive of all legislative powers between the Union and the States and provisions in that respect may be found scattered in other parts of the Constitution too.[44] Main provision for our current purpose is Article 246 read with the three lists in Schedule VII. It confers exclusive legislative power on Parliament to make laws on any subject included in List I of Schedule VII designated as Union List. Similarly State legislatures have exclusive power to make laws on subjects included in List II called the State List. Both Parliament and State legislatures have the power to make laws on List III i.e. the Concurrent List. In case of any conflict between the powers of Parliament and State legislatures the latter has to give way to the former and laws of Parliament on any item in the concurrent list override the laws of the states in case of conflict. An exception is also made to this general rule.[45]

(i) Delegation of legislative power and validating laws:

In the foregoing arrangement of legislative powers two issues are relevant for our present purpose: first, whether the legislature can delegate its legislative power to the executive or the judiciary. While wide and frequent delegation of legislative powers to the executive is wide spread and considered inevitable, the Constitution requires the essential legislative powers to be exercised by the legislature. Therefore, the legislature cannot make the executive a substitute for itself. As regards the judiciary, only legislative powers that are or may be delegated to it relate to rule making within prescribed limits for effective exercise of judicial power and not for any other purpose.

Second, which is important for our current purpose, is: whether under the guise of exercise of legislative power the legislature can exercise judicial powers or do something which the judiciary is expected to do? The legislative power includes the power to make laws prospectively as well as retrospectively.[46] Although as a rule laws are made only prospectively, but unless the Constitution

[41] Art. 53.
[42] Art. 154.
[43] See, Arts. 73 & 162.
[44] See, M.P. Singh, "Legislative Power in India: Some Clarifications", 4 & 5 Delhi L. Rev. 73 (1975-76).
[45] See, Art. 254 (2).
[46] *Rai Ramakrishna v. State of Bihar,* AIR 1963 SC 1667.

provides otherwise they may also be made retrospectively.[47] Accordingly Parliament and State legislatures may and do make laws prospectively as well as retrospectively. They may and do make validating laws for removing the causes for ineffectiveness or invalidity of executive actions or of other proceedings which were not valid at the time they were taken.[48] Generally the validating laws are passed after the courts have declared such actions or proceedings invalid. But a court's decision is not a condition precedent for making a validating law. Under the pretext of enacting validating laws the legislature cannot, however, exercise judicial power and plainly overrule a decision of the court. If the courts invalidate a law for one infirmity or another it would be competent for the appropriate legislature to cure the said infirmity and pass a validating law so as to make the said provision of the law effective from the date of enactment of that law. But the legislature has no power to enact a law the effect of which is to overrule an individual decision *inter partes* and affect their rights and liabilities alone. Such an act on the part of the legislature amounts to exercise of the judicial power of the State and also amounts to functioning as an appellate court or tribunal.[49] "A court's decision must always bind", held the Court "unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances."[50] Relying upon several earlier decisions and the law laid down in them the Supreme Court recently invalidated a validating provision of law which simply had the effect of overruling a court decision. In support it cited the law laid down previously in a reference case in the following words:

> The principle which emerges from these authorities is that the legislature can change the basis on which a decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large. It cannot, however, set aside an individual decision inter parties and affect their rights and liabilities alone. Such an act on the part of the legislature amounts to exercising the judicial power of the State and to functioning as an appellate court or tribunal.[51]

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47 See,e.g., Art. 20 (1) which prohibits creation of crimes or enhancement of punishment retrospectively.

48 *Hari Singh v. Military Estate,* AIR 1972 SC 2205; See also, *Krishnamurthi & Co. v. State of Madras,* AIR 1972 SC 2455.

49 Cauvery water disputes tribunal, Re, 1993, 1993 Supp (1) SCC 96, AIR 1992 SC 522; *State of Haryana v. Karnal Cooperative Farmers Society Limited,* (1993) 2 SCC 363, 380; *State of TN v. M Royappa Gounder,* (1971) 3 SCC 1, 3; *Madan Mohan Pathak v. Union of India,* (1978) 2 SCC 50.

50 *GC Kanungo v. State of Orissa,* (1995) 5 SCC 96.

51 *S.T. Sadiq v. State of Kerala and Ors.,* (2015) 4 SCC 400 (The Court here cited from Re Cauvery Water Disputes Tribunal 1993 Supp (1) SCC 96).

Again the Court held:

> The legislature cannot declare any decision of a court of law to be void or of no effect. ... In other words, a court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.[52]

Finally, as noted above:

> The "basic structure" of the Constitution will stand violated, if while enacting legislation pertaining to transfer of judicial power, Parliament does not ensure, that the newly created court/tribunal, conforms with the salient characteristics and standards, of the court sought to be substituted.[53]

(ii) Single person laws:

Unlike some other constitutions,[54] the Constitution of India, does not expressly prohibit enacting of single person laws or Bill of Attainder. Such laws may, however, be attacked on the ground of violation of the right to equality under Article 14. Soon after the commencement of the Constitution the Court upheld a law applicable only to one company on the ground that on account of some special circumstances or reasons applicable to that company and not applicable to others that company could be treated as a separate class.[55] But a little later in another case disposal of a succession issue to property of two Muslim ladies by a special law applicable only to their matter leaving others to be governed by Muslim law was declared unconstitutional in *Ammerunisa Begum* v. *Mehbub Begum.*[56] Similarly, in *Ram Prasad Narayan Sahi* v. *State of Bihar*[57] the court invalidated a Bihar State legislation that deprived the petitioner of his land while there were numerous others in the same category who were not in any way affected by the law. Invalidating the law the court observed:

> Legislation such as we have now before us is calculated to drain the vitality from the rule of law which our constitution so unmistakably proclaims, and it is to be hoped that the democratic process in this country will not function along these lines.[58]

On similar grounds an amendment in a law targeted at the cutting short of tenure and removal of the incumbent Vice Chancellor of a university was

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[52] *State of Tamilnadu v. State of Kerala*, (2014) 12 SCC 696.
[53] *Madras Bar Association v. Union of India* (2014) 10 SCC 1, 218.
[54] See, e.g., Article 1, Section 9 of the Constitution of USA.
[55] *Charanjit Lal Choudhary v. Union of India*, AIR 1951 SC 41.
[56] AIR 1953 SC 91.
[57] AIR 1953 SC 215.
[58] *Ram Prasad Narayan Sahai v. State of Bihar*, AIR 1953 SC 215 at 217.

invalidated.[59] Again, in *P. Venugopal* v. *Union of India,*[60] the court invalidated an amendment of the All India Institute of Medical Sciences Act, 1966 which was found to be aimed at the removal of the incumbent Director by curtailing his tenure by lowering the age limit for holding that office. As a matter of course single person laws *prima facie* violate the constitutional right to equality because they do not make a classification on the basis of some general or particular characteristics which may be found in any individual or class of individuals now or in future; rather they make one individual their target excluding every possibility of bringing any other person within their reach, even if that other person also depicts those characteristics.[61] From the various decisions relating to one person legislation conclusion may be drawn that while such laws could be and have in practice been justified in matters of juristic persons they have been invariably invalidated in cases of natural persons.[62] Thus, the right to equality guaranteed in the Constitution excludes the possibility of enacting a Bill of Attainder.

IV

Exercise of Legislative Powers by the Judiciary

It is too late in the day to argue that the judiciary simply declares the existing law and does not make it. To some extent it could be said of civil law countries where the tradition of written law exists since Roman times that the legislature makes the law and judges apply it in individual cases. But this could not be the case in common law where for long time law was for the first time written in the judicial decisions. Even until this day much of common law remains uncodified and has to be known for the first time from the judicial decisions. With the arrival of written constitutions as the fundamental law of a country laconically expressing and incorporating such concepts as equality and liberty in the form of fundamental rights and values such as republicanism, democracy, human dignity etc. the courts have to shape and reshape them constantly. Therefore, the debate is not on the point of whether judges make the law or simply declare it but on the point of the limits to which judges can make law. The doctrine of separation of powers requires that law making is the job of the legislature and not of the judiciary and just as the legislature is not expected to perform judicial functions the judiciary should also not be expected to perform legislative functions. Our Constitution makes an exception to this rule by conferring advisory jurisdiction

[59] Vice Chancellor, *Osmania University* v. *Chancellor Osmania University,* AIR 1967 SC 1305.

[60] (2008) 5 SCC 1.

[61] See PK Tripathi, *Some Insights into Fundamental Rights*, 107, 1972.

[62] For some other examples of cases relating to juristic persons see, *R.C. Cooper* v. *Union of India,* AIR 1970 SC 564; *S.P. Mittal* v. *Union of India,* AIR 1983 SC 564; *LNM Institute of Economic Development & Social Change* v. *State of Bihar,* AIR 1988 SC 1136 & *Dharm Dutt* v. *Union of India,* AIR 2004 SC 1295.

in the Supreme Court.[63] The Court has, however, in effect converted its advisory jurisdiction into adjudicatory function by taking each time an undertaking from the state that it will abide by the opinion given by the Court in its advisory jurisdiction. An intensive debate is, however, gaining momentum that during the last several years the courts have engaged in the activist role by claiming that if the legislature fails to perform its role as required by the Constitution the courts must fill in the gap in order to realise the goals of the Constitution. The courts, it is argued, cannot turn a blind eye when they are approached with the plea of enforcing a constitutional mandate which the courts are obliged to enforce. Therefore, on one side the argument is that honouring the doctrine of separation of powers each of the three branches of the state must perform their respective functions, on the other it is argued that the courts should not and cannot refuse to enforce a constitutional mandate even if it is given to the legislature or the executive when they are approached in appropriate proceedings.[64] In pursuance of this debate instances are cited where the courts have clearly entered into the domain of the legislature.[65] Out of several of such instances illustratively a few may be noted.

One of such examples is *Vishaka* v. *State of Rajasthan*[66] which related to issue of sexual harassment of women at workplace. The Supreme Court issued directions to Central Government based on the provisions of 'Convention on the Elimination of All Forms of Discrimination Against Women' (CEDAW) and for constitution of complaint committees, grievance redress mechanism and disciplinary action mechanism in cases of sexual harassment at workplace. It held it to be the law declared under Article 141 of the constitution until Parliament made the law on the subject. Although much after the decision of the Court Parliament has made a law[67] on the lines suggested by the Court, initially the Court performed the legislative role in laying down the law. Even two of the judges of the Court in a subsequent case doubted the exercise of power by the Court and asked a larger bench to decide whether the Court could do what it did in *Vishaka*.[68]

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63 See, Article 143.

64 R. Pal, *Judicial Oversight or Overreach: The Role of the Judiciary in Contemporary India*, in 'Distinguished Lecture Series' delivered at the Center for the Advanced Study of India, University of Pennsylvania (2008) 7 SCC J-9.

65 Somnath Chatterjee, "Separation of Powers and Judicial Activism in India, page 38 *The Indian Advocate* 1 (2007).

66 (1997) 6 SCC 241.

67 The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

68 *University of Kerala* v. *Council, Principals', Colleges, Kerala and Ors.*, (2009) 15 SCC 301 (The matter seems still pending before the Court).

Some of the other illustrative cases on the point are *Vellore Citizens Welfare Forum* v. *Union of India and others*[69] in which on the issue of clean and fresh air and water and the pollution caused by the tanneries the Court issued directions to Central Government for the constitution of an authority specifically for the State of Tamil Nadu under the Environment Protection Act, 1986 for the purpose of providing opportunity to polluters to defend their action, implementing "precautionary principle" and the "polluter pays" principle, for deciding compensation to be paid by the polluters to the individuals and for ecological restoration, installation of pollution control devices in industries and closure of industries for non-compliance or non payment of compensation.

Again in *State of Himachal Pradesh* v. *Umed Ram Sharma* [70] a special leave petition asking the Court whether in view of the provisions of Articles 202 to 207 of the Constitution, the High Court had power to issue prerogative writs under Article 226 of the Constitution to direct the State Government either to allot any particular sum for expenditure on account of particular project or to allot amounts in addition to which had already been allotted under the current financial budget of the State Government and thus to regulate even the procedure in financial matters of State which, according to the Government, were the exclusive domain of the legislature as contained in Articles 202 to 207 of the Constitution, the Court held:

Affirmative action in the form of some remedial measure, in public interest, in the background of the constitutional aspirations as enshrined in Article 38 read with Articles 19 and 21 of the Constitution by means of judicial directions in cases of executive inaction or slow action is permissible within the limits. The way we read the High Court's order with the clarification indicated does not transgress that limit.[71]

In *D.K. Basu* v. *State of West Bengal*[72] the Court mandated certain requirements in all cases of arrest and detention to be followed apart from other constitutional and statutory safeguards by the arresting or detaining authority.

In *T.N.Godavarman Thirumulkpad* v. *Union of India*[73] the Court issued directions in general and also specifically for the States of Jammu and Kashmir, Himachal Pradesh, Uttar Pradesh, West Bengal, Tamilnadu regarding the steps to be taken against deforestation and regulating commercial activities in forests.

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69 (1996) 5 SCC 647.
70 (1986) 2 SCC 68.
71 *Id.*
72 (1997) 1 SCC 416.
73 (1997) 2 SCC 267.

In *Vishwa Jagriti Mission* v. *Central Government*[74] the Court dealing with the issue of ragging in educational institutions issued certain illustrative guidelines by making it clear that the guidelines issued were just directive and government was left free to take its own steps in curbing the menace of ragging.

In *M.C. Mehta* v. *Union of India*[75] the Court issued directions for Delhi Government that practically forced public transport buses running on diesel as prime fuel to shift to CNG with the directions to the State government to increase the supply of CNG for the city.

In *Avishek Goenka* v. *Union of India*[76] the Court prohibited the use of "black films of any VLT percentage or any other material upon the safety glasses, windscreens (front and rear) and side glasses of all vehicles throughout the country" by giving the following reasoning:

Besides aiding in commission of crimes, black films on the vehicles are also at times positively correlated with motor accidents on the roads. It is for the reason that the comparative visibility to that through normal/tinted glasses which are manufactured as such is much lesser and the persons driving at high speed, especially on highways, meet with accidents because of use of black filmed glasses.

Recently in *Common Cause* v. *Union of India*[77] the Supreme Court of India issued certain directions for publication of advertisements by the governments including Centre as well as State Governments. The Court *inter alia* allowed photos of only three constitutional functionaries namely, the President of India, the Prime Minister of India and the Chief Justice of India to be published only with their prior approval. The Court also required government to appoint an expert as ombudsperson so as to ensure compliance and redress grievances against the non-compliance of its orders. Commenting upon the judgment Professor Baxi observes:

"Democratic wisdom" is the essence of (what I call) demosprudence, the power of courts and justices to enhance the democratic potential of the Constitution. In demosprudence, justices not only interpret and make law, but they also articulate public policies and act as co-governors of the nation under the Constitution. But demosprudence does not mean judicial despotism; even

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[74] (2001) 6 SCC 577.
[75] AIR 2002 SC 1696.
[76] (2012) 5 SCC 275.
[77] W.P.(C) 13 *of* 2003 in Supreme Court of India, judgment delivered on 13 May 2015, per Rajan Gogoi and P.C. Ghose, JJ.

the most vigilant public interest must conform to this limit and be open to some interrogation.[78]

In *Manoj Narula* v. *Union of India*[79] the Court has, however, spoken of self restraint in exercising legislative powers and has specifically held that legislative powers cannot be exercised by the judiciary.

V

Conclusion

As expressed in the introduction the doctrine of separation of powers which was initially conceived as the sine qua non for the protection of the individual from an oppressive state has either never been practiced or even where it has been incorporated in the constitution of a country such as the United States or Australia it has always been subject to exceptions. In course of time, however, it has been recognised and established that ultimate hope of protecting the individual from an oppressive state lies in the separation and independence of the judiciary from the executive and the legislature and therefore the judicial power must exclusively vest in and be exercised by the judiciary. This principle finds support in the provisions of our Constitution and the process of their making. Efforts to change this situation have so far been thwarted by the judiciary with a promise that it will continue to do so in future too.

As regards allegations against the judiciary that it is grabbing the role of the executive and the legislature, there is not enough justification or even if some justification exists there is no danger to the purpose of separation of powers, namely, the protection of the individual from the state. The legislature can always make a law consistent with the Constitution and change the impact of a judicial decision subject of course to some limitations noted above. Besides that there is enough justification in the Constitution for the exercise of those powers which the judiciary has exercised so far. Our Constitution is not simply a legal document delineating various organs of the state, their powers and functions and interrelations. It is, as Granville Austin has so clearly brought out, an instrument of social revolution in the country and is counted among the foremost transformative constitutions in the modern world. This is what its makers intended it to be and their intentions are unmistakably expressed in it from the beginning to the end.[80] This fact has time and again been brought to the notice of the

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[78] See, Upendra Baxi, Snap judgment: Were the Court's Restrictions on Government Advertisements Really Dictated by 'Democratic Wisdom'?, *The Indian Express*, May 19, 2015, available at http://indianexpress.com/article/opinion/columns/snap-judgment (Visited on May 25, 2015).

[79] (2014) 9 SCC 1.

[80] I have developed this theme in details in a paper presented in an international seminar in Nairobi in June 2014. The seminar papers are expected to be out in near future.

legislature and the executive by the Court for their failure to do what the Constitution requires or expects them to do. It has also charted out its own role in the following words of Justice Bhagwati:

> It is necessary for every Judge to remember constantly and continually that our Constitution is not a non-aligned rational charter. It is a document of social revolution which casts an obligation on every instrumentality including the judiciary, which is a separate but equal branch of the State, to transform the status quo ante into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be equality of status and opportunity for all..... Where the contest is between those who are socially or economically unequal, the judicial process may prove disastrous from the point of view of social justice, if the Judge adopts a merely passive or negative role and does not adopt a positive and creative approach. The judiciary cannot remain a mere bystander or spectator but it must become an active participant in the judicial process ready to use law in the service of social justice through a proactive goal-oriented approach.[81]

In doing so the courts may have occasionally exceeded their mandate, but in view of total inaction and lethargy on the part of the legislature and the executive to do what they are mandated by the Constitution to do, such excesses could be justified. The courts need not take the responsibility of making the laws and executing them, but they must continue to tell the legislature and the executive that "JUSTICE, social, economic and political" is the first foremost goal which the Constitution promises to secure to every citizen of this land. If the legislature and the executive are failing to move towards the realisation of this goal even after more than sixty-five years of the making of the Constitution, as part of the state machinery and an instrument of social change the judiciary is well within its domain in reminding the legislature and the executive of their responsibilities under the Constitution. Had it not done so whatever little progress has taken place in the realisation of social and economic rights since the beginning of the current millennium would have remained a mirage for the innumerable downtrodden and deprived people of this land.[82]

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[81] In *S.P. Gupta v. Union of India* AIR 1982 SC 149 cited in *Madras Bar Assn. v. Union of India* (2014) 10 SCC 1, 136. For an extensive discussion on this point see, M.P. Singh, Interpreting and Shaping a Transformative Constitution – India, accepted for publication in the Chinese Yearbook of Constitutional Law (2014).

[82] For the progress in that direction see, M.P. Singh, *"Socio-Economic Rights in India: A Comparative Perspective"*, 63 *Jahrbuch des Oeffentlishen Rechts der Geganwart*, 643, *Mohr Siebeck Tuebingen*, 2015.

CARBON TRADING AND CLIMATE CHANGE: AN OVERVIEW OF LEGAL AND POLICY FRAMEWORK

*Usha Tandon**

Abstract

It is a well known fact that carbon dioxide is the most important greenhouse gas produced by combustion of fuels. It's rising concentration in the Earth's atmosphere has become a cause of global concern at the international platform. Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC) provides measures to control greenhouse gas emissions from the various industries and commercial units by evolving the mechanisms of Joint Implementation, Emission Trading and Clean Development Mechanism. This has created a global carbon market , with an opportunity for the trade of carbon credits .The paper discusses the international legal regime on carbon trading, starting from the first legally binding treaty known as UNFCCC , detailing the Kyoto Protocol containing the mechanisms to earn carbon credits including the Post-Kyoto developments-from Bali to Lima. The paper then proceeds to analyze the obligation of India under the Kyoto Protocol and then provides the legal and policy measures adopted by India to facilitate CDM and carbon trading in India. It outlines various policy measures like National Action Plan and State Action Plans on Climate Change, Climate Change Action Programme, National Mission on Enhanced Energy Efficiency (NMEEE), 2010, Perform Achieve And Trade (PAT), Renewable Energy Credit Trading System (REC), PILOT ETS in some Indian States. The relevant provisions of Energy Conservation Act, 2001 and The Environmental Protection Act, 1986, Air (Prevention and Control of Pollution) Act, 1981are also discussed. The last part, identifies and examines some legal issues in carbon trading in the field of taxation and contract and concludes that to encourage and regulate the upcoming market of carbon trading in India, a specific legislation covering all aspects of the issues involved in carbon trading should be enacted.

I

Introduction

The Relation of "C" with "C"- CARBON & CLIMATE

With the rapid industrialisation in the developed world, the first "C" i.e. Carbon came to be known as the most important source of energy for development.

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With the rapid industrialisation, in the developing world, the second "C" i.e. Climate came to be known as the most important factor in sustaining life particularly of human beings. Then the scientific discoveries led to the conclusion that it is mainly the "C"arbon which is affecting the "C"limate[1]. While there is much controversy over global climate politics, developed and developing nations are largely in agreement on adverse causes of climate change[2]. The Intergovernmental Panel on Climate Change (IPCC), established in 1988 by the World Meteorological Organization and the United Nations Environment Programme, has worked extensively on evaluating past trends and the future prospects of climate change. The IPCC reports present a grim picture stating that the warming of 0.85 0C increased during 1882-2012 and sea level rose by 0.19 m during 1901-2010.[3] Climate change is responsible for bringing natural disasters such as drought and floods; adversely affecting agricultural production, fisheries and marine life, human health etc.[4] Warming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and ocean have warmed, the amounts of snow and ice have diminished, and sea level has risen. Oceanic uptake of carbon dioxide (CO2) resulted in acidification of oceans. The concern over climate change and the impact to people, ecosystems, agriculture, society, and the economy have generated the need for regulation of Greenhouse Gas (GHG) including CO2. Controlling GHG emissions involves, amongst other things, understanding the science and its limits, addressing the psychological and ethical motives for human motivation and regulating powerful vested interest groups[5] . Much of the controversy over GHG regulation centres on the economic impact of climate change and GHG legislation.

II

International Legal Regime

(i) UNFCCC

In the 1980s the General Assembly of the United Nations (UN) adopted a

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1 See e.g. R. S. Haszeldine, "Carbon Capture and Storage: How Green Can Black Be?" *Science*, Vol 325, 1647 (25 September 2009)

2 Jan Bebbington & C. L. González, "Carbon Trading: Accounting and Reporting Issues", *European Accounting Review*, 17:4, 697 at 698-701 (2008)

3 IPCCC, *Fifth Assessment Report* (AR5), Oct, 2014 in GOI, Ministry of Environment, Forests and Climate Change, *Annual Report*, 234 (2014-15)

4 Claire McGuigan *et. al.* "Poverty and Climate Change: Assessing Impacts in Developing Countries and the Initiatives of the International Community" 3, (May 2002)

5 C.L. Spash, "The Brave New World of Carbon Trading", *MPRA Paper No 19114*", 4 (December 2009).

resolution entitled, Protection of the Global Climate for Present and future Generations of Mankind[6]. In June 1992, in Rio de Janeiro, Brazil, international negotiations led to the first climate change legally binding treaty. The countries of the United Nations entered into the UN Framework Convention on Climate Change (UNFCCC). This treaty stands as the basis for all other climate change negotiations since then.

While acknowledging that human activities are increasing the concentrations of greenhouse gases (GHGs) in the atmosphere and that this would lead to increasing warming of the Earth and to climate change, UNFCCC's objective is stated to be "to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner[7].

In terms of actual commitments, Article 4 of the Convention discusses what the nations of the UN are supposed to accomplish. One of the most important is that developed countries are to adopt national polices and take measures to mitigate climate change through the limitations of GHG emissions and protecting GHG sinks and reservoirs[8]. The Convention is premised on the principle of "common but differentiated responsibilities and respective capabilities" and recognizes the responsibilities of developed countries in reducing the global emissions of greenhouse gases. The UNFCCC established a Conference of the Parties to the Convention to carry out is work and to adopt and make the decisions necessary to promote the effective implementation of the Convention[9]. The first meeting of the Conference of the Parties (COP) was held in Berlin, Germany. At this meeting, the parties reached agreement on developing a schedule for developed countries to reduce their GHG emissions. From Berlin mandate, the parties began work that led to the negotiation of the Kyoto Protocol, so named as the COP 3 meeting was held in Kyoto, Japan.

(ii) The Kyoto Protocol (KP)

The Kyoto Protocol was actually issued on December 11, 1997. The actual

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6 UN General Assembly, *Protection of Global Climate for Present and Future Generations of Mankind* (New York: United Nations) (A/RES?43/53), 70th plenary meeting, Dec. 6, 1988.

7 UN Framework Conventions on Climate Change (adopted May 9, 1992, entered into force March 21, 1994) 1771 UNTS 107, Art. 2.

8 *Ibid.* Articlel 4(2) (a).

9 *Ibid.* Article 7(2) (a).

effectiveness of the Protocol did not occur until February 16, 2005, when a sufficient number of nations ratified the agreement. The protocol for the first time, in the evolving climate change regime, provided for legally binding emission commitments by parties. The Kyoto Protocol defines the responsibility of industrialized countries to reduce their greenhouse gases (GHG) emissions by 5% compared to 1990 levels. The Kyoto protocol paved the way for the creation of emission trading schemes and new commodity markets in order to achieve these targets. The so-called 'carbon markets' allow participants (countries or companies) to buy/sell allowances in order to comply with the emissions cap[10]. The rules for implementing the Protocol occurred in 2001 at the COP 7 known as the "Marrakesh Accords." The general principles of the Kyoto Protocol address GHG reductions by developed countries and the ability to develop credits for emissions reductions and the trading of allowance and off sets internationally. These provisions led to the emergence of the international "carbon market," named after the trading of credits that are measured in carbon dioxide equivalents, thus the term *carbon* credits.

In the document, goals were set for developed countries, listed in Annex I of the UNFCCC and Annex B of the Kyoto Protocol. United States of America, United Kingdom, Japan, New Zealand, Canada, Australia, Austria, Spain, France, and Germany etc. of Annexure-I countries agree to reduce their emissions. A total of 41 industrialized countries are currently listed in the Convention's Annex-1 including the relatively wealthy industrialized countries that were members of the Organization for Economic Co-operation and Development (OECD) in 1992, plus countries with economies in transition (EITs), including the Russian Federation, the Baltic States, and several Central and Eastern European States. These "Annex I" countries that ratified the treaty were supposed to meet specified targets for GHG emissions from a 1990 baseline of the estimate emissions for that country for that year. The goal was to reach these targets by 2012. Many of the nations did not reach these goals.

Annex II countries of UNFCCC are a sub-group of the Annex I countries. Developed countries which pay for costs of developing countries if they cannot reduce their emissions, they must buy emission credits from developing countries or invest in conservation are included in this category. Countries like United States of America, United Kingdom, Japan, New Zealand, Canada, Australia, Austria, Spain, etc are also included in Annex-II.

Non Annex I parties to UNFCCC include developing countries such as India, Sri Lanka, Afghanistan, China, Brazil, Iran, Kenya, Kuwait, Malaysia, Pakistan,

[10] Julien Chevallier, *Econometric Analysis of Carbon Markets*, 4 (2012)

Philippines, Saudi Arabia, Singapore, South Africa, UAE etc. Developing countries have no immediate restrictions under the UNFCCC.

(iii) Mechanisms to Earn Carbon Credits

Kyoto Protocol provides three mechanisms for this:

(a) The Clean Development Mechanism.

The mechanism of the Protocol that has resulted in the greatest growth in the international carbon market is the Clean Development Mechanism (CDM). This mechanism was established by Article 12 of the Protocol, and provides for a market mechanism to allow developed countries to obtain GHG off sets that help them meet their compliance obligations in their own country and the goals set out in the Protocol, and, at the same time, result in GHG reductions in developing countries and clean technology transfer to those countries with developed country finance[11]. The CDM is administered through an Executive Board established under the Protocol[12].

The Protocol calls for third-party verifiers, known as "Designated Operational Entities" (DOEs), to validate the emissions reductions projects to be reviewed and approved by the Executive Board under the CDM[13]. Subsequent to Executive Board approval of the project, DOEs also verify the actual GHG emission reductions from a project once it is installed or otherwise becomes operational. Two critical issues that evolved in more detail with the policies adopted by the Executive Board were set forth in Article 12: first, the reductions must provide "real, measurable, and long-term benefits;" and, second, that the reductions must be "additional to any that would occur in the absence of the certified project activity." [14] One of the critical issues is proving additionality. The concept is fundamental that the reduction is beyond business as usual[15].

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[11] Kyoto Protocol to UNFCCC adopted in Kyoto, Japan, on 11 December 1997 and entered into force on 16 February 2005, Artical 12(3).

[12] *Ibid.* Article12(4).

[13] *Ibid.* Article 12(5).

[14] *Ibid.* Article 12(5) (b), (c).

[15] The Executive Board has issued a document that provides a guide to how additionality may be proven, called "Tool for the demonstration and assessment of additionality." The process provided in this Executive Board document to prove additionality involves the following steps:

- Identification of alternatives to the project activity — identification of alternatives to the project activity consistent with mandatory laws and regulations;
- Investment analysis to determine that the proposed project activity is not the most economically or financially attractive — whether sensitivity analysis concludes that the proposed CDM project activity is unlikely to be the most financially attractive or is unlikely to be financially attractive; or

The reductions in GHG emissions were not required by law and would not have occurred even without the issuance of carbon credits. A developer must be able to demonstrate additionality to obtain the offset credits from the CDM.

Parties to the Protocol may transfer carbon credits that are known as Certified Emission Reductions (CERs). One credit is equivalent to one tonne of CO2 emission reduced. With permission of the party countries, private entities may transfer CERs as well[16]. The CDM provides a mechanism for projects to be implemented in developing countries and the reductions in GHG emissions to be incorporated into a kind of currency of carbon credits and CERs, and then monetized through the transfer process of the Kyoto Protocol from developing country to developed country, where they can be used as a percentage of the off sets needed to meet compliance obligations in that country. The CDM has thus become the international trading mechanism for carbon credits in the form of off sets.

(b) *Joint Implementation*

Article 6 of the Protocol allows trading of a certain type of carbon credit among the countries listed in Annex I of the Convention. This program is referred to as "Joint Implementation" (JI). Again, these credits, known as Emission Reduction Units (ERUs), may be traded among Annex I countries for projects that have achieved GHG reductions[17]. The countries involved in a transfer must be in compliance with their obligations under the Protocol, and must be implementing an active program to reduce their emissions to meet their Kyoto obligations to reduce GHG emissions[18]. Private parties may engage in the trading of ERUs as well[19].

(c) *Emissions Trading (ET)*

Parties with commitments under the Kyoto Protocol (Annex B Parties) have accepted targets for limiting or reducing emissions. These targets were expressed as levels of allowed emissions, or "assigned amounts," over the 2008-2012 commitment periods. The allowed emissions were divided into "assigned amount

- Barrier analysis to determine what barriers would prevent the implementation of the type of project activity — whether at least one alternative scenario, other than the proposed CDM project activity, is not prevented by any of the identified barriers; and
- Common practice analysis— no similar activities can be observed, but essential distinctions between the proposed CDM project activity and similar activities can reasonably be explained.

16 *Supra note* 11, Article 12(9).
17 *Ibid.* Article 6(1).
18 *Ibid.* Article 5 and 7.
19 *Ibid.* Article 6(4).

units" (AAUs). Emissions trading, as set out in Article 17 of the Kyoto Protocol, allows countries that have emission units to spare – emissions permitted them but not "used" - to sell this excess capacity to countries that are over their targets. Thus, a new commodity was created in the form of emission reductions or removals. Since carbon dioxide is the principal greenhouse gas, it is known simply as trading in carbon.

It is clear from the above that Joint Implementation and Emission Trading, are co-operative mechanisms applicable to Developed Countries only. Clean Development Mechanism (CDM) provides for co-operation between the developed countries and developing countries.

(iv) Post Kyoto: From Bali to Lima

Kyoto Protocol was adopted in 1997, with legal bindings for developed countries to emission reduction targets. The first commitment period started in 2008 and ended in 2012. The second commitment period began on January 1, 2013 and will end in December 31, 2020[20]. UNFCCC has specified that mechanism to register an emission reduction project and issuance of carbon credits would continue post 2012 under the CDM. However, in the absence of Kyoto Protocol's binding GHG emission reduction targets, there would be no or very few buyers of CERs post 2012. CDM project can be registered post 2012 but uncertainty over buyers of carbon credits would linger on[21]. The Conference of Parties (COP) to the UNFCCC has also proposed to develop a protocol, and the agreement or agreed outcome with legal force applicable to all parties by 2015 which will come into force from 2020.The Conference of meetings of the countries of the United Nations are now in the process to negotiate a post-Kyoto treaty, or to extend the Kyoto Protocol. In 2007, the Bali Roadmap prepares the Conferences of the Parties (COP) 15/Meetings of the Parties (MOP) 5 of the Kyoto Protocol, held in Copenhagen (Denmark) on December 2009. This roadmap includes four blocks of negotiations (mitigation, adaptation, technologies and finance) in order to establish a post-2012 international climate agreement. However, nothing from Bali, Indonesia, in December 2007 to Lima, Peru, in 2014 has resulted in a treaty, though some progress was made in each toward what may follow Kyoto.

UNFCCC meetings are focusing on what will come next. In particular, emphasis rests with engaging the United States as well as rapidly developing

[20] GOI, Ministry of Environment and Forest, *Annual Report*, 382 (2013-14).

[21] Green Clean Guide, "Want to Earn Carbon Credits But Confused about the Future of Carbon Credits? August, 6, 2012 Available at http://greencleanguide.com/2012/08/06/the-future-of-carbon-markets/ (Visited on May 5, 2015).

countries like India and China in a more meaningful way. The United States does not want to commit to binding emission reductions until developing countries also face binding targets. The developing world, however, is looking for the United States to join the rest of the developed world and take leadership on this issue before they agree to binding targets. In November, 2015, the COP will gather again in Paris, France. Paris is widely regarded as the make or break meeting for agreeing upon a binding commitment, to stave off the most severe of anticipated climate change impacts[22].

(v) Alternatives to the UNFCCC

The CDM has been criticized by some NGOs for purportedly being too lax and letting projects slip through the review process without much oversight and that do not produce real GHG emission reductions. In reality, those involved in the process, including project developers, investors, and buyers of carbon credits seeking approval through the CDM, often see the process as being bureaucratic, slow, and overly concerned with matters that make little difference in the verification of real GHG reductions. As the negotiations for a treaty to replace or extend Kyoto appear are proving to be difficult, countries are beginning to consider alternatives. For instance Japan and Russia are moving forward with a bilateral approach to GHG off sets[23]

III

Indian Legal Regime

(i) India's Obligation under Kyoto Protocol

India signed and ratified the Kyoto Protocol in August, 2002. Being a Non-Annex-I country to UNFCCC, India under no binding obligation to cut carbon emissions is bound by the obligations applicable to all developing countries which

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[22] Brandi Robinson, *Kyoto and Post Kyoto International Agreements,* Available at www.e-eduaction.psu.edu/geog432/node/145 (Visited on May 29, 2015).

[23] The International Emissions Trading Association (IETA) has issued a report with fairly strong criticisms of the CDM process . IETA listed four structural inadequacies that prevent effective management:

- part-time governing bodies;
- inappropriate division of responsibilities;
- inadequate standardization; and
- neglect of due process[23].

The report identified five "enduring challenges"that are "nearly strangling the CDM today":

- unrelenting time constraints;
- ineffective communication practices;
- lack of transparency;
- slow policy development and inadequate resolution of issues; and

include preparing national inventories of anthropogenic emissions[24], implementing national and regional programmes to reduce global warming[25], promoting and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of GHGs not controlled by the Montreal Protocol in all relevant sectors.[26] The obligation also include considering climate change wherever possible, in their relevant social, economic and environmental policies and actions, and employing appropriate methods that will minimize its adverse effects on the economy and environment, promoting scientific research to counter the effect of climate change[27], communicating information on their implementation of the Convention to the COP[28] and promoting and cooperating in every other manner[29] that will ensure the attainment of the overall objectives of the Convention.

In 2011, India has announced a domestic mitigation goal of reducing emissions intensity of GDP by 20-25% by 2020 in comparison with 2005 level. This is in line with the projections of the energy intensity of India's output that has shown a declining trend owing to improvements in energy efficiency, autonomous technological changes and economical use of energy[30].

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5. inadequate number and expertise of Secretariat staff..

The problems of the UN's CDM process may not have an easy solution. So, countries may continue to pursue alternatives. The G20 and the + 5 countries

—China, Brazil, India, Mexico, and South Africa

— could form their own carbon credit standards board and protocol, borrowing the protocols of the CDM, and creating their own. This would be an opportunity to make reforms, including those advocated by IETA. See IETA, *State of the CDM Reforming for the Present and Preparing for the Future* (2009)

[24] *Supra note* 11, Article 4(1) (a)

[25] *Ibid.*, Article 4(1)(b)

[26] *Ibid*, Article 4 (1) (c)

[27] *Ibid*, Article 4(1) (g)

[28] *Ibid.*, Article 4(1)(j)The core elements of the national communications for both Annex I and non-Annex I Parties are information on emissions and removals of greenhouse gases (GHGs) and details of the activities a Party has undertaken to implement the Convention. National communications usually contain information on all aspects of implementation including, national circumstances, education, financial resources and transfer of technology, training and public awareness, and vulnerability assessment. Unlike Annex 1 parties, there are no fixed dates for the submission of national communications of non-Annex I Parties, but, documents should be submitted within four years of the initial disbursement of financial resources to assist them in preparing their national communications. The deadline for the sixth national communication was agreed upon in Cancún (decisions 9/CP.16 and 10/CMP.6) on 1 January 2014. 1 January 2010 was the deadline for submission of fifth national communications of Annex I Parties.

[29] See generally the provisions of Article 4 of UNFCCC.

[30] GOI, Ministry of Environment & Forests, *Annual Report*, 288, (2011-12)

In 2013, the 19th Conference of Parties (COP) at Warsaw, Poland, decided to intensify domestic preparation for 'intended nationally determined contributions' towards the agreement that will come into force from 2020. All Parties are required to plan for the same by first quarter of 2015. As a result, India needs to get an assessment of its 'intended nationally determined contributions' by the first quarter of 2015. Developing countries including India ensured that the attempt by developed countries to bring the developing countries within the ambit of 'commitments' was successfully thwarted. The Parties have now agreed to undertake domestic preparations for their intended nationally determined contributions, without prejudice to the legal nature of the contributions, in the context of the 2015 agreement, which would be under the Convention. Developing countries ensured that there was no attempt by developed countries to re-open the UNFCCC framework agreement of 1992 and the COP decision in Warsaw did not prejudge the ongoing negotiations for the 2015 agreement[31].

India has also been closely coordinating with members of G77, China, BASIC (Brazil, South Africa, India and China) and Like Minded Developing Countries (LMDCs), put forth the argument that developed countries should implement their commitments and take actions to reduce emissions in accordance with the principle of 'common but differentiated responsibilities and respective capabilities' as enshrined in the UNFCCC. The year 2013 was also marked by several parallel international initiatives on climate change[32].

(ii) Legal and Policy Measures

India has been a significant gainer from the Clean Development Mechanism (CDM). Considering the potential of CDM projects in India, the Government and industries have been proactive in the international carbon market since the beginning of CDM in 2003. By end of 2014, 1541 out of total 7,589 projects registered by the CDM Executive Board are from India, which so far is the second highest in the world[33]. The Certified Emission Reductions (CERs) issued to Indian projects is 191 million (13.27%). The National CDM Authority (NCDMA) in the Ministry has accorded Host Country Approval to 2941 projects facilitating possible investment of about ' 579,306 crores[34]. These projects are in the sectors of energy efficiency, fuel switching, industrial processes, municipal solid waste, renewable energy and forestry which spread across the country (covering all states in India). In the second commitment period number of CDM projects has come down drastically. In 2012, there were 3227 projects registered

[31] GOI, Ministry of Environment & Forests, *Annual Report*, 387, (2013-14)
[32] *Id.* at 388
[33] GOI, Ministry of Environment Forests and Climate Change, *Annual Report*, 237, (2014-15)
[34] *Ibid*

with UNFCCC and in 2013 only 307 projects registered under CDM. Interestingly, in 2013, India has registered 115 projects which are highest by any country. In 2014, the NCDMA has accorded Host Country Approval to 76 projects and India registered 56 projects with UNFCCC in 2014[35]. In pursuance of the obligations cast on parties to the United Nations Framework Convention on Climate Change (UNFCCC), India has undertaken to communicate information about the implementation of the Convention, taking into account the common but differentiated responsibilities and respective capabilities and their specific regional and national development priorities, objectives and circumstances.[36] India has submitted Second National Communication to the UNFCCC in 2012 which provides information of the emissions of Green House Gas (GHG) for the years 2000 and 2007; information of impacts and vulnerability of key sectors such as Water, Agriculture, Natural Ecosystems and Biodiversity, Infrastructure etc.[37]

(a) *The National Environmental Policy, 2006 (NEP)*

The National Environmental Policy is one of the first initiatives that establishes the broad national framework for protecting the environment. It outlines essential elements of India's response to climate change which inter-alia, include adherence to principle of "common but differentiated responsibility and respective capabilities" of different countries, identification of key vulnerabilities of India to climate change, in particular impacts on water resources, forests, coastal areas, agriculture and health, assessment of the need for adaptation to Climate Change and encouragement to the Indian Industry to participate in the Clean Development Mechanism (CDM)[38].

(b) National Action Plan and State Action Plans on Climate Change

The National Action Plan on Climate Change (NAPCC) is the basic policy framework for India's climate change. Although the NAPCC is not codified in legislation, it is India's flagship climate change program and provides a framework and guiding principles for sectors adopting low-carbon growth strategies. It is coordinated by the Ministry of Environment & Forests, (renamed as Ministry of Environment, Forests and Climate Change in May, 2014) and is being implemented through the Nodal Ministries in specific sectors/ areas. Eight national missions in the area of solar energy, enhanced energy efficiency, sustainable agriculture, sustainable habitat, water, Himalayan eco-system, increasing the

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[35] *Supra note* 33.
[36] Lok Sabha Secretariat, (LARRDIS), *Climate Change- India's Perspective*, 8 (August, 2013)
[37] GOI, Ministry of Environment and Forest, *Annual Report*, 350, (2012-13)
[38] GOI, Ministry of Environment and Forest, *National Environment Policy*, 42-43, (2006)

forest cover and strategic knowledge for climate change form the core of NAPCC[39].

The Ministry has also motivated State Governments to prepare State Action Plan on Climate Change (SAPCC). These SAPCCs aim to create institutional capacities and implement sectoral activities to address climate change. So far, 24 States namely Andaman and Nicobar, Andhra Pradesh, Arunachal Pradesh, Assam, Delhi, Jammu & Kashmir, Kerala, Karnataka, Haryana, Himachal Pradesh, Lakshadweep, Madhya Pradesh, Manipur, Meghalaya, Mizoram, Nagaland, Odisha, Punjab, Puducherry, Rajasthan, Sikkim, Tripura, Uttarakhand and West Bengal have prepared and submitted document on SAPCC to the MoEF. As of now, nine SAPCCs documents namely Arunachal Pradesh, Rajasthan, Madhya Pradesh, Sikkim, Tripura, Manipur, Mizoram, West Bengal and Andhra Pradesh have been endorsed by the NSCCC in May 2012 and April 2013[40].

(c) Climate Change Action Programme

The 'Climate Change Action Programme (CCAP)' - a new thematic umbrella Scheme has been approved by the Planning Commission (now Niti Aayog) for implementation during the 12th Five year Plan[41]. The scheme aims at advancing scientific research information and assessment of the phenomenon of climate change, building an institutional and analytical capacity for research and studies in the area of climate change, and supporting domestic actions to address climate change through specific programmes and actions at the national and state level.

The scheme comprises of eight activities, of which, three relate to scientific studies on climate change, two to institutional and capacity building and three relate to domestic and international actions on climate change. Various other science initiatives are planned by the Ministry as part of the Climate Change Action Programme [42].

(d) National Mission on Enhanced Energy Efficiency (NMEEE), 2010

India's emissions trading progress originates from the NAPCC energy efficiency mission. The National Action Plan on Climate Change mandates, a

[39] Government of India, Prime Minister's Council on Climate Change, *National Action Plan on Climate Change*, 2008 chapter 4.

[40] *Supra note* 31 at 384

[41] *Supra note* 37 at 351

[42] For details see *ibid.* In this initiative, Ministry of Environment and Forests will collaborate with the Ministry of Earth Sciences, the Indian Space Research Organization, the Ministry of Science and Technology and other associated agencies to enhance the understanding of the role of Black Carbon in climatic change through monitoring and assess the impacts of black carbon through various modeling techniques.

market based mechanism to enhance cost effectiveness of improvements in energy efficiency, in energy-intensive large industries and facilities, through certification of energy savings that could be traded. (Perform Achieve and Trade). It also provides for accelerating the shift to energy efficient appliances in designated sectors through innovative measures to make the products more affordable, (Market Transformation for Energy Efficiency); creation of mechanisms that would help finance demand side management programmes in all sectors by capturing future energy savings. (Energy Efficiency Financing Platform) and developing fiscal instruments to promote energy efficiency (Framework for Energy Efficient Economic Development). The NMEEE functions under the Bureau of Energy Efficiency (BEE) – a statutory body under the Ministry of Power, Government of India. India's 'Perform Achieve and Trade' (PAT) initiative, which resembles an ETS, is currently undergoing its first phase (2012-2015), which is considered a test phase[43].

(e) *Perform Achieve and Trade (PAT)*

At present 'Perform Achieve and Trade' (PAT), are established market-based climate programs which promote energy intensity improvement, and the Renewable Energy Credit (REC) trading system. What distinguishes India's PAT from traditional cap-and-trade systems is that cap-and-trade usually entails absolute caps, whereas PAT specifies energy targets that are intensity-based. Under PAT, India has a Renewable Energy Certificate (REC) trading system, which is a non-ETS market-based mechanism aimed to fight climate change[44]. PAT has been likened to a 'tradable white certificate' (TWC) system. TWC systems are designed to trade energy savings certificates in order to achieve energy intensity targets. This is in contrast to an ETS where emissions reductions certificates are traded in order to achieve absolute emissions reductions[45]. Facilities covered by PAT are called "Designated Consumers," and the list of these facilities is published annually by Bureau of Energy Efficiency (BEE).

Installations must achieve their plant-specific targets within three-year compliance periods. An installation that fulfills and exceeds its target is able to sell Energy Saving Certificates (ESCerts) for the amount of its surplus energy

[43] Climate and Development Knowledge Network, "Creating Market Support for Energy Efficiency: India's Perform Achieve and Trade scheme." (January 2013). Available at http://r4d.dfid.gov.uk/PDF/Outputs/CDKN/India-PAT_InsideStory.pdf (visited on May 7, 2015).

[44] IETA, India, The World's Carbon Markets: A Case Study Guide to Emissions Trading, 2 (May, 2013).

[45] Upadhyaya, Prabbat. "Is Emission Trading a Possible Option for India?" *Climate Policy*. Vol. 5, Issue 10, 560 (2010) Available at http://www.tandfonline.com/doi/pdf/10.3763/cpol.2010.0105 (Visited on May 25, 2015).

improvements to installations that are unable to meet mandatory targets. Trading occurs via regulated exchanges. Platforms for trading ESCerts have been designated in the two power exchanges Indian Energy Exchange (IEX) and Power Exchange India Limited (PXIL), and Bureau of Energy Efficiency (BEE) has also set up a registry and exchanges for the trading of ESCerts. BEE hopes to enable cross-sectoral use of ESCerts. Companies that purchase ESCerts would do so in order to achieve compliance obligations and avoid noncompliance penalties. BEE issued guidelines and regulations in March 2012, and the issuance and trading of ESCerts was to begin after April 2013[46]. The Energy Security Act, 2001[47], provides the legal basis for the sale and purchase of ESCerts. To create market liquidity and price discovery before the market is launched, some ESCerts are auctioned ex-ante, other ESCerts allocated freely to companies, and individual facility targets are set.

(f) Renewable Energy Credit Trading System (REC)

India's REC trading system was launched in November 2010, and the system's primary purpose is to promote renewable energy even in regions that have low potential for renewable power generation. The Indian Government plans for this mechanism to contribute significantly to renewable energy generation goals outlined by the NAPCC and the Electricity Act, 2003[48].

The Ministry of Power regulates the REC mechanism. Under the Electricity Act, the country's State Regulatory Commissions set targets for power companies to purchase a certain percentage of their total power from renewable sources. These targets are called Renewable Purchase Obligations Standards (RPOs)[49].

To comply with their RPOs or profit from a surplus of RECs, covered entities may trade RECs either within or across states. Each REC represents one MWh of a covered type of renewable energy—solar, wind, small-scale hydro (capacity below 25 MW), biomass-based power, biofuels, and municipal waste based power—and the purchase of RECs are treated as the consumption of the corresponding quantity of renewable power. As a result, facilities are able to meet their renewable energy targets even if the local climate is not well-suited for renewable energy generation[50]. The REC system enables renewable energy

46 Rajesh Kumar *et al*, "Renewable Energy Certificate and Perform, Achieve, Trade Mechanism to Enhance the Energy Security for India." *Energy Policy*, 669 (April 2013).

47 Act No 52 of 2001.

48 Act No 36 of 2003.

49 Green Clean Guide, Renewable *Energy Certificates: India* (December 2010). Available at http://greencleanguide.com/2010/12/25/renewable-energy-certificates-india/(visited on May 25, 2015).

50 Supra note 44 at 4.

generators to weigh the costs and benefits of achieving their renewable energy commitments by selling electricity from renewable sources or by purchasing RECs.

(g) Pilot ETS

India's pilot ETS mechanism was launched on February 1, 2011, in three states of Gujarat, Tamil Nadu and Maharashtra. While the pilot ETS mechanism focuses on particulates, such as SO2, NOx, and SPM, which are detrimental to human health, these State pilot programs could function as a foundation for a future CO2 trading program that could conceivably link up to a global system.

The pilot ETS mechanism was launched by India's MOEF together with the country's Central Pollution Control Board (CPCB) and relevant State Pollution Control Boards (SPCBs). Regulatory framework and technical capacity to implement ETS in India has existed since the passage of the Environment (Protection) Act, 1986, and the accompanying Rules to limit net adverse environmental impact from industrial activity.[51] According to the system's design, the SPCBs determine which pollutants to include and set caps for industry facilities based on desired overall pollutant concentrations. State regulators then distribute emissions permits to capped facilities, which have the option of either complying to their caps and selling extra permits or buying from the market they have the option of either complying to their caps and selling extra permits or buying from the market the amount of permits by which they exceed their caps.[52]

(h) Energy Conservation Act, 2001

The genesis of the PAT mechanism flows out of the provisions of the Energy Conservation Act, 2001[53]. The Act empowers the Central Government to notify energy intensive industries, as listed out in the Schedule to the Act, as Designated Consumers (DCs)[54]. The Ministry of Power (MoP) has notified industrial units and other establishments consuming energy more than the threshold in nine sectors namely Thermal Power Plants, Fertilizer, Cement, Pulp and Paper, Textiles, Chlor-Alkali, Iron & Steel, Aluminium and Railways in March, 2007 as DCs. The Act requires the DCs to furnish report of energy consumption to the

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[51] GOI, Ministry of Environment and Forest, "Detailed Project Report: Pilot Emissions Trading Schemes in Gujarat, Maharashtra and Tamil Nadu." 17, (February 2011). Available at http://www.indiaenvironmentportal.org.in/files/file/Detailed%20Project%20Report-mfes.pdf (visited on May 25, 2015).

[52] *Ibid.*

[53] Act No 52 of 2001.

[54] *Ibid.* Section 14 (e).

Designated Authority of the State as well as to Bureau of Energy Efficiency (BEE)[55]; designate or appoint an Energy Manager who will be in-charge of submission of annual energy consumption returns of the Designated Agencies and BEE[56]; comply with the energy conservation norms and standards prescribed under the Act[57]; and purchase Energy Saving Certificates (ESCerts) for compliance in the event of default. The Act has been amended with the addition of new provision to enable this and it allows such trading[58].

1. The Environmental Protection Act and The Air (Prevention and Control of Pollution) Act

General environmental legislations provide the legal framework for regulating carbon emissions from their sources. The Environment (Protection) Act, 1986[59](EP Act) and The Air (Prevention and Control of Pollution) Act1981[60], (Air Act) though do not specifically establish emissions trading as a regulatory instrument, but the broad powers of the Central Government, Central Pollution Control Board and State Pollution Control Boards under these laws support the establishment of an ETS at the regulatory, as opposed to the legislative, level[61]. Under the Air Act, one of the functions to be performed by the Central Pollution Control Board (CPCB) is to lay down standards for air quality[62]. The CPCB has also been given powers to do "such other things" and "such other acts" as it may think necessary for the purpose of carrying into effect the purposes of the Air Act[63]. The purpose of the Air Act is very broad since it includes 'prevention, control and abatement' of air pollution. In the case of ETS power may be derived from Section 17(4) of the Air Act to impose a cap on particulate matter emissions[64]. State Pollution Control Boards are empowered by the Air Act to set terms of establishment or operation for industrial plants. It specifically allows States Governments, in consultation with the SPCB, to establish air pollution control areas with special restrictions on establishment or operation[65]. The SPCBs can stipulate conditions in the consents they issue and these conditions can be varied subsequently for any technological or other reason

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55 Energy Conservation Act, 2001, Section 14K.
56 *Ibid* Section 14 I.
57 *Ibid* Section 14 G.
58 *Ibid* Section 2 (ma).
59 Act No 29 of 1986.
60 Act No 14 of 1981.
61 *Supra* note 51at 17.
62 Air (Prevention and Control of Pollution) Act, 1981, Section 16(2)(h).
63 *Ibid*, Section 17(4).
64 *Supra* note 51.
65 *Supra* note 62, Section 21 (1).

after giving an opportunity to the person holding the consent[66]. The availability and mandated adoption of Continuous Emissions Monitoring Systems[67] (CEMS) technology may be viewed as such a reason, else the SPCB can invoke the 'other reason,' in order to suitably modify the consent to allow flexibility in emissions and require the holding of emissions permits.

The EP Act provides a legal framework to support an ETS. The EP Act gives the Centre the power to lay down standards for the quality of environment[68]. It also grants power to the Central Government to give direction in exercise of its powers and performance of its functions under the EP Act. This includes the power to close, prohibit or regulate any industry, operation or process[69]. The word 'regulate' implies a broad power and may include in its scope the power to stipulate emission caps for industrial clusters. The EP Rules[70] are also relevant. Rules provide for prohibition and restriction on the locations of industries and the carrying of processes and operations in difference areas, and Rule 5 explicitly states that such restriction may take into account the net adverse environment impact likely to be caused by an industry or operation[71]. Given that the goal of an ETS is precisely to limit the net adverse environment impact of emissions over a certain area, the EP Act and the EP Rules is especially appropriate framework under which to introduce an ETS[72].

(j) Other Legislations

The key regulations with possible implications for GHG mitigation include the Indian Forests Act, 1927; the Forest (Conservation) Act, 1980; the Motor Vehicles Act of 1988; and the Electricity Act of 2003, Tariff Policy Act, 2003, and Petroleum and Natural Gas Regulatory Board Act, 2006 etc. These laws authorize Central and State Governments to take actions that could reduce GHG emissions. The National Green Tribunal Act 2010 has established National

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66 *Supra note* 62 Section 21 (5) and (6).

67 The term CEMS refers to the instrumentation and software required to measure emissions from a stationary source on a practically continuous basis. Unlike for carbon dioxide or energy consumption, input-based methods of measurement are not reliable for particulates, since particulate emissions are a complex function of combustion conditions and abatement technology. Therefore, the role of CEMS is to measure the total load of particulate matter (PM) coming from each source. Total emissions can then be reconciled against permit holdings in the trading scheme.

68 The Environment (Protection) Act, 1986, Section 3.

69 *Ibid.* Section 5.

70 The Environment (Protection) Rules, 1986. The Principal rules were published in the Gazette of India vide number S.O. 844(E), dated 19.11.1986.

71 *Ibid.* Rule 5 (vii).

72 *Supra note* 51.

Green Tribunal in October 2010, a specialized body equipped with the necessary expertise to handle environmental disputes.

(iii) Some Legal Issues

(a) Taxation Issues

1. Are CERs "goods" for the purpose of VAT?

For the purpose of knowing the exact legal position in respect of taxability of the item CER, Shri B.L. Sharma, then Joint Commissioner (L&J), Department of Trade and Taxes filed an application, in 2009, under Section 85 of the Delhi VAT Act, 2004[73], in the Court of Commissioner, Department of Trade and Taxes seeking clarification/ruling on the two points namely- Whether CERs (carbon credits) are taxable under the DVAT Act, 2004? If yes, then what is the rate of tax on the sale of CERs (carbon credits)?

After explaining the nature of transactions of carbon trading and its historical aspects and referring to the definition of 'goods'[74],'dealer'[75], 'sale'[76], and Entry No. 3 of IIIrd Schedule[77] as contained in the DVAT Act and also mentioning some of important Supreme Court judgments, the Commissioner of Trade and Taxes ruled[78] that " (a) the items/product known as Certified Emission Reductions

[73] Delhi Value Added Tax Act, 2004, Act No.3 of 2005.

[74] *Ibid.* Section 2 (1) (m) , states - "goods" means every kind of moveable property (other than newspapers, actionable claims, stocks, shares and securities) and includes – (i) livestock, all material, commodities, grass or things attached to or forming part of the earth which are agreed to be served before sale or under a contract of sale; and (ii) property in goods (whether as goods or in some other form) involved in the execution of a works contract, lease or hire-purchase or those to be used in the fitting out, improvement or repair of movable property".

[75] *Ibid.*, Section 2 (1) (j) ,states :- "dealer" means any person who, for the purposes of or consequential to his engagement in are in connection with or incidental to or in the course of his business, buys or sells goods in Delhi directly or otherwise, whether for cash or for deferred payment or for commission, remuneration or other valuable consideration and includes – (i) a factor, commission agent, broker, del credere agent or any other mercantile agent by whatever name called, for the purposes of or consequential to his engagement in or in connection with or incidental to or in the course of the business, buys or sells or supplies or distributes any goods on behalf of any principal or principals whether disclosed or not——

[76] *Ibid.* Section 2 (1) (zc) of states : "sale" with its grammatical variations and cognate expression means any transfer of property in goods by one person to another for cash or for deferred payment or for other valuable consideration (not including a grant or subvention payment made by one government agency or department, whether of the Central Government or of any State Government, to another) and includes –

[77] *Ibid.*; Entry No. 3 of IIIrd Schedule "All intangible goods like copyright, patent, rep license, goodwill etc."

[78] Notification No. 256/CDVAT/2009/43 dated 13.01.2010, para 15.

(carbon credits) is taxable under the DVAT Act, 2004 and (b) the rate of tax in respect of the abovesaid item/product is 4% as the said item is covered by Entry No. 3 of IIIrd Schedule appended to DVAT Act, 2004. The Notification declared that the product known as Certified Emission Reductions (CERs) has got utility/market value, is capable of being bought and sold and capable of being transmitted, transferred, delivered, stored and possessed. CERs (carbon credits) by virtue of its intrinsic nature, its financial/monetary value has acquired the status of a commodity. The Multi-Commodity Exchange of India (MCX), the country's leading commodity exchange is also trading in the CERs or carbon credits along with other commodities like precious, semi-precious metals, petroleum, kirana items etc[79].

The Notification *inter alia* states that "carbon trading is a transaction of sale of carbon credits by an entity/unit which has earned/obtained Certified Emission Reductions (CERs) to an entity which is committed to reduction for emission greenhouse gases, but is not able to achieve the prescribed reduction in emission of greenhouse gases on its own. The CERs is certified by appropriate authority (Executive Board of CDM). The CERs, in essence, is a certificate having market value and is a tradable item/commodity. ..."[80]

The operational mechanism of CDMs involves an investment by a legal entity from a developed country in a project in developing country, which results in emission reductions. The investment decision would include an agreement between the two parties and their respective countries on the dispensation and transfer of the emission reductions resulting from the project. These emission reductions have to be certified by an appropriate authority (the CDM Executive Board, provided for under the protocol) and then these certified Emission reductions (CERs) commonly known as carbon credits can be used to meet commitments under Kyoto Protocol. ...[81]

The Notification categorically states that a careful examination of the product called Certified Emission Reductions (CERs) commonly known as carbon credits shows that it is a certificate having market value. There are people/entities who are willing to sell and others who are willing to purchase such certificates. The intrinsic nature and value of carbon credits coupled with their free transferability makes the said product a marketable commodity. The said product is therefore covered under the definition of the term "goods" as it figures in subsection (1) of Section 2 of DVAT Act, 2004[82].

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[79] *Supra note* 78 para 14.
[80] *Id at* para 2.
[81] *Ibid.*
[82] *Id* at para 11.

2. Whether Income from sale of CERs is taxable?

In *My Home Power Ltd vs. DCIT*[83], income from sale of 'carbon credits' received by the assessee on account of switching from fossil fuel (naptha and diesel) to biomass was held to be a non-taxable capital receipt by Income Tax Appellate Tribunal (Hyderabad), which was upheld by Andhra Pradesh High Court[84]. Referring to the Kyoto Protocol, which permits transfer of carbon credits, the Tribunal observed that "carbon credit is in the nature of "an entitlement" received to improve world atmosphere and environment reducing carbon, heat and gas emissions. The entitlement earned for carbon credits can, at best, be regarded as a capital receipt and cannot be taxed as a revenue receipt. It is not generated or created due to carrying on business but it is accrued due to "world concern". It has been made available assuming character of transferable right or entitlement only due to world concern. The source of carbon credit is world concern and environment. Due to that the assessee gets a privilege in the nature of transfer of carbon credits. Thus, the amount received for carbon credits has no element of profit or gain and it cannot be subjected to tax in any manner under any head of income. It is not liable for tax for the assessment year under consideration in terms of sections 2(24), 28, 45 and 56 of the Income-tax Act, 1961. Carbon credits are made available to the assessee on account of saving of energy consumption and not because of its business. Further, in our opinion, carbon credits cannot be considered as a bi-product. It is a credit given to the assessee under the Kyoto Protocol and because of international understanding. Thus, the assessees who have surplus carbon credits can sell them to other assessees to have capped emission commitment under the Kyoto Protocol. Transferable carbon credit is not a result or incidence of one's business and it is a credit for reducing emissions. The persons having carbon credits get benefit by selling the same to a person who needs carbon credits to overcome one's negative point carbon credit. The amount received is not received for producing and/or selling any product, bi-product or for rendering any service for carrying on the business. In our opinion, carbon credit is entitlement or accretion of capital and hence income earned on sale of these credits is capital receipt[85].

This order has been followed by the ITAT Chennai in the cases of *Ambica Cotton Mills Ltd* vs. *DCIT*[86] *Velayudhaswamy Spinning Mills (P) Ltd* vs.

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[83] (2013), 151 TTJ 616 (Hyd.)

[84] CIT v. My home power Ltd. (2014) 365 ITR 82 (AP)

[85] *Supra note* 83

[86] (2013), 27 ITR 44.

DCIT[87] and *Sreepathy Paper & Boards (P) Ltd.* vs *DCIT*[88]. Further the order have been followed in the case of *Shree Cement Ltd* vs. *ACIT* (ITAT Jaipur)[89] dealing with appeals filed by six assesses.

In *Subhash Kabini Power Corpn Ltd* v *CIT, Bangalore*[90], decided by Income Tax Appellate Tribunal, Bangalore, the assessee was in the line of power generation business. It had undertaken project during the year under consideration for a hydel power project at Kabini Dam, Heggadadevanakote, Mysore district allotted by the Govt. of Karnataka. The assessee claimed deduction under section 80-IA of the Income Tax Act (IT Act) at Rs.7,66,87,094/. The Commissioner observed that the assessee has received a sum of Rs.4,88,61,721/- on sale of carbon credits. According to the CIT, this income was not derived from the eligible business, therefore, it does not qualify for grant of deduction 80-IA of the Income Tax Act. The Counsel for the assessee while impugning the order of the Commissioner relying on the case of In *My Home Power*, assessee contended that receipts received on sale of carbon credit is a capital receipt and being capital in nature would not form part of the total income, therefore, there is no prejudice to the Revenue. The dispute was, whether it had been derived from the eligible industrial undertaking for qualifying the grant of deduction under section 80-IA. The Commissioner felt that this receipt had not been derived from the industrial undertaking which will be eligible for grant of deduction under section 80-IA. The Tribunal observed that "It is to be seen, whether the receipt is of capital nature or of a revenue nature. Even in case the order of the CIT is upheld, then, in law, it will affect the computation of income, ultimately because the receipt will not be taxable, it will not come under the ambit of computation of income. Simultaneously it will be excluded from the deduction u/s 80IA as well as of the total income. The result will remain as it is. It is a revenue neutral case".[91]

(b) Contractual Issues: Future Trading in CERs

Carbon credit in India is traded only as a future contract[92]. Futures contract is a standardized contract between two parties to buy or sell a specified asset of standardized quantity and quality at a specified future date at a price agreed

[87] (2013) 27 ITR 106.

[88] Pronounced on 4th March, 2015. Available at: http://indiankanoon.org/doc/104248823

[89] Pronounced on 27 January, 2014. Available at: www.itatonline.org

[90] Date of Pronouncement 28/11/2014 *Available* at http://www.itatonline.in:8080/itat/upload/-4935171165964076259l3$5%5E1REFNOITA_No_258_of_2014_Subhash_Kabini_Power_Corporation_Ltd_Bangalore.pdf (Visited on May 27, 2015).

[91] *Id.* at para 11.

[92] Vivek Birla et al, "Carbon Trading-The Future Money Venture for India", IJSRET, Volume 1 Issue1, 19 at 26 (March 2012).

today (the futures price). The contracts are traded on a future exchange. These types of contracts are only applicable to goods which are in the form of movable property other than actionable claims, money and securities.

1. Forward Contracts (Regulation) Act, 1952

In 1952, an Act to provide for the regulation of certain matters relating to forward contracts, the prohibition of options in goods and for matters connected therewith was enacted known as Forward Contracts (Regulation) Act, 1952 (FCRA). This Act makes provision that Central Government may, by notification in the official Gazette, establish a Commission to be called the Forward Markets Commission (FMC) for the purpose of exercising such functions and discharging such duties as may be assigned to the Commission by or under this Act. However, the Commission was basically an advisory body whose main work was to advise the Central Government in respect of the recognition of or the withdrawal of recognition from any association or in respect of any other matter arising out of the administration of this Act. FMC as an advisory, statutory body was set up in 1953 under the provisions of the FCRA. Form 1953 till 2008, FMC had no regulatory powers like those of SEBI. It also did not have the financial autonomy as it depended on budgetary allocation and its administrative autonomy was also restricted. Under the present provision of the FCRA, the trading of forward contracts is considered as void as no physical delivery is issued against these contracts. In view of the rapid acceleration of growth in commodity futures market in the past years there has been an imperative and urgent need for putting in place an updated and effective regulatory system. The Forward Markets Commission, market regulator, however did not have the requisite legislative framework to properly manage the rapid growth in this sector. Administrative autonomy and financial autonomy needed to be given to the Forward Markets Commission urgently. This necessitated changes in the organisational structure and institutional capacity of the Forward Markets Commission. The Central Government, therefore, decided to restructure and strengthen the Forward Markets Commission broadly on the lines of the Securities and Exchange Board of India.

2. The Forward Contracts (Regulation) Amendment Bill 2010

To give effect above proposals, a Bill to amend the Forward Contracts (Regulation) Act, 1952 was introduced in Lok Sabha on the 21st March, 2006 and the same was referred to the Standing Committee on Food, Consumer Affairs and Public Distribution for examination and report. The Standing Committee gave its Report on 19th December, 2006. The Government considered the recommendations of the Committee. Furthermore, wider consultations were

held with the stake-holders. Keeping in view the fact that the issue related to financial and market integrity, there was urgency to bring the proposed legislation[93]. Therefore, an Ordinance namely, the Forward Contracts (Regulation) Amendment Ordinance, 2008 was promulgated by the President on 31st January, 2008. The Government has also decided to withdraw the Forward Contracts (Regulation) Amendment Bill, 2006 pending before Lok Sabha. The Forward Contracts (Regulation) Amendment Ordinance, 2008, inter alia, provided for— (a) amendment to the definition of the expression "forward contract" so as to include therein "commodity derivative" and also insert new expressions such as "commodity derivative", "corporatisation", "demutualisation" and "intermediary", etc.[94] In order to replace the said Ordinance, a fresh Bill-the Forward Contracts (Regulation) Amendment Bill 2008 was introduced in Lok Sabha on 13.03.2008. The earlier FCR Bill 2006 which was pending in the Lok Sabha was withdrawn simultaneously. The Union Cabinet on January 25, 2008 approved the ordinance for amending the Forward Contracts (Regulation) Act, 1952. The Ordinance passed in January 2008, however lapsed since the bill could not be taken up by Parliament. Now The Forward Contracts (Regulation) Amendment Bill, 2010 is pending on the Parliament.[95] This Bill also amends the definition of 'forward contract' to include 'commodity derivatives'. Currently the definition only covers 'goods' that are physically deliverable.

3. Central Government Notification dated January 4th, 2008

However, the Central Government notification on January 4th paved the way for future trading in CER by bringing carbon credit under the tradable commodities.

In exercise of powers conferred by sub section (1) of Section 15[96] of Forward Contracts (Regulation) Act, the Central Government in the public interest and in the interest of trade on 4th 2008, declared that the provisions of the said section shall apply to 'carbon credit' in the whole of the territory to which this Act extends and in exercise of the power conferred by clause (a) of Section 16 of the said Act fixes the rate prevailing at the time at which the forward markets in the said good closed on the date of the Notification as the rate at which any

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[93] Statement of Objects and Reasons, The Forward Contracts (Regulation) Amendment Bill , 2008, Bill No. 28 of 2008.

[94] *Ibid.*

[95] Bill No. 146 of 2010.

[96] Section 15 of the Forward Contracts (Regulation) Act, 1952 deals with forward contracts in notified goods illegal or void in certain circumstances.

such forward contracts entered into on or before the said date shall be deemed to be closed.[97]

4. The Multi Commodity Exchange (MCX)

Multi Commodity Exchange (MCX), India's largest commodity exchange, has taken initiative to become Asia's first-ever commodity exchange along with the Chicago Climate Exchange (CCE) and the European Climate Exchange to offer trades in carbon credits. National Commodity and Derivatives Exchange (NCDEX) also has initiated futures contracts in carbon trading for delivery in December 2008. There are 866 CDM projects have been registered with UNFCCC and over 143 million carbon credits have been issued to them. As stated above, The Government of India recognized carbon credit as commodities on 4th January, 2008[98]. The Multi Commodity exchange started future trading from January 2008. The National Commodity and Derivative Exchange (NCDEX) by a notification and with due approval from Forward Market Commission (FMC) launched Carbon Credit future contact whose aim was to provide transparency to markets and help the producers to earn remuneration out of the environmental projects.

IV

Conclusion

It can be concluded that, in the first commitment period of Kyoto Protocol, India has emerged, along with China, as a leader in carbon trading. However, in the absence of Kyoto Protocol's legally binding GHG emission reduction targets, there were few buyers of CERs post 2012. Though the ongoing developments at the international scenario will actually decide the future of carbon trading, India is optimistic for good booming carbon market in future. Hence the India has a large potential to earn carbon credits.[99]Though India is the largest beneficiary of carbon trading and carbon credits are traded on the MCX, it lacks policy and legislative framework for trading of carbons in the market. There are several issues in dealing with trading in CERs that are yet to be addressed. For instance, most of these carbon credits are sold to foreign buyers from Europe and elsewhere, so whether the transfer of the credits to offshore units would amount to exports is not clear. Similarly, whether CERs would be

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[97] Ministry of Consumer Food and Public Distribution (Department of Consumer Affairs), Notification, New Delhi, the 4th January, 2008, SO 25(E).

[98] *Supra note* 92

[99] Sumita Nair et al, "Environmental Carbon Trading Scenario in India: A Global Issue of 21 st Century: A Review", *IJOART,* Volume 2, Issue 9, 110 at 117 (September-2013).

considered to be goods residing in India as they are issued by offshore entity is also not clear and so on[100].

To increase the market for carbon trading Forward Contracts (Regulation) Amendment Bill has been introduced and is pending for decades in the Parliament. Although the Bill has a plaid history, optimism is, however, high as unlike some other Bills, it is among the few non-controversial legislations. If the FCRA Bill is passed one could see bumper volumes on commodity exchanges and MCX could be one stock that could benefit from this, with the introduction of options and index trading. This amendment would also help the traders to utilize NCDEX as a platform for trading of carbon credits. However, to encourage and regulate the upcoming market of carbon trading in India, a specific legislation covering all aspects of the issues involved in carbon trading should be enacted.

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[100] Nidhi Bothra et al, *Carbon Credits – Unraveling Regulatory, Taxation & Accounting Issues*, p 4 Available at www.india financing.com/Carbon_Credits-Regulatory_,_Taxation_&_Accounting%20issues.pdf (Visited on May 27, 2015).

FRAGMENTED AND INCREMENTAL DEVOLUTION IN THE UNITED KINGDOM: FROM DEVOLUTION TO FEDERALISM?

Stephen Clear*, Aled Griffiths** & Huw Pritchard***

Abstract

Formal devolution was introduced in the UK as part of a sea change of constitutional reform following the Labour government general election win in 1997. Devolution was established in Scotland and Wales and re-established in Northern Ireland on an asymmetrical basis with different executive and legislative powers devolved to each. Since then several reforms and amendments have seen devolution strengthened in all three devolved areas of the UK. Proposed reforms following the 2015 general election will see another wave of devolution to nations and regions in the UK beyond that seen in 1997.

Even though separate devolution plans are moving at pace for different parts of the UK there are currently no plans for a federal United Kingdom. However, following a rejection of independence in Scotland in 2014 and proposals for further devolution in the Scotland Bill 2015 there are very strong federal elements entering the UK Constitution. In particular, statutory provisions in the Scotland Bill, such as recognising the Scottish Parliament 'as a permanent' part of UK constitutional arrangements, are alien to the traditional concept of Parliamentary Sovereignty and imply a move towards a much more federal and permanent constitutional relationship. This article will discuss the essential characteristics of a federal state and consider whether these are emerging, or are indeed already present, in the UK. It will focus in particular on Scotland and emerging issues in England but will also consider the reforms to date in the other nations and regions of the UK.

I

Introduction

The Royal Commission on the Constitution, Kilbrandon Commission, which was reported in 1973 briefly considered federalism as a potential model for redistributing powers within the United Kingdom. This option was, however, quickly dismissed as a suitable model for the United Kingdom at the time.

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> "At all events we have concluded that if government in the United Kingdom is to meet the present-day needs of the people it is necessary for the undivided sovereignty of Parliament to be maintained. We believe that only within the general ambit of one supreme elected authority is it likely that there will emerge the degree of unity, co-operation and flexibility which common sense suggests is desirable....It [federalism] would probably be regarded by the British people as a strange and artificial system not suited to their present stage of constitutional development than might be achieved within a unitary system. In short, the United Kingdom is not an appropriate place for federalism and now is not an appropriate time."[1]

This rejection of federalism was partly due to the practical challenges and also the significance given to parliamentary sovereignty within the UK academic discourse.[2] However, much has changed since the publication of the Royal Commission Report, and it is now questionable whether such an outright rejection could be justified or sustained. In particular, the independence referendum in Scotland has been a catalyst to consider not only the place and relationship of Scotland within the Union but also the place of all nations and regions.[3] This article will consider whether the UK is now moving, or has already partly moved, towards a model which is more akin to federalism.

II

Constitutional and Political Background

As part of the Labour party manifesto in 1997 there were commitments to devolve and decentralise power to Scotland and Wales as a means to strengthen the union while retaining Westminster sovereignty.[4] As a result, referenda were held in Scotland and Wales where the majority of their respective populations voted in favour of devolution.

In short, according to Bogdanor, devolution is the 'transfer of powers from a superior to an inferior political authority'.[5] In the context of the United Kingdom Bogdanor suggests that this transfer involves three elements:

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1 Royal Commission on the Constitution 1969-1973 ,Volume I, Cmnd.5460(October 1973) 160-161.

2 See discussion on Dicey below.

3 D. Cameron MP, 'Scottish Independence Referendum: statement by the Prime Minister' (19 September 2014) Also Available at: https://www.gov.uk/government/news/scottish-independence-referendum-statement-by-the-prime-minister (Visited on 10th April, 2015)

4 New Labour Manifesto, 'New Labour: Because Britain Deserves Better' (1997) Available at: www.politicsresources.net/area/uk/man/lab97.html. (Visited on 11th April, 2015.)

5 V.Bogdanor, *Devolution in the United Kingdom* (OUP, 2001) 2.

> "*...the transfer to a subordinate elected body, on a geographical basis, of functions at present exercised by ministers and Parliament.* These functions may be either legislative, the power to make laws, or executive, the power to make secondary laws – statutory instruments, orders, and the like – within a primary legal framework still determined at Westminster."[6]

The terms 'regionalized' or 'decentralization', and even 'quasi-federal', may also refer to similar processes.[7] As Swenden notes, finding 'the cut-off point between what is a quasi-federal, 'regionalized' or a devolved state on the one hand and a (unitary) 'decentralized' state on the other is more difficult.'[8] Bogdanor similarly, in later work, states that devolution has 'transformed Britain from a unitary state to a quasi-federal state.'[9] Therefore, defining a strict difference between devolved and federal systems may prove challenging. As Rawlings notes:

> "Devolution is, like federalism, a slippery concept. The one is correctly distinguished from the other in terms of legal theory and constitutional principle. Strictly speaking, devolution involved no divided sovereignty or constitutional guarantee of the division of legislative competence. In practice, however, the distinction may be blurred, even to the extent that de facto there is no great difference. Notably, the terminology of 'quasi-federalism' with its connotations of a 'halfway house' and 'no going back', has been applied to at least some aspects of the UK devolutionary development."[10]

The traditional unitary nature of the UK constitution posed a challenge in reconciling 'two seemingly conflicting principles' of Parliamentary sovereignty and granting self-government to Scotland, Wales and Northern Ireland.[11] Further challenges to devolving powers were the political, social, historical and cultural differences between the nations of the UK. As a result, the UK has developed individual devolution settlements which vary significantly between different nations. Consequently the UK has adopted a form of asymmetrical devolution, with different powers and models of devolution for Scotland, Wales, Northern Ireland, and, more recently for some regions of England.[12]

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6 *Supra note* 6, 2-3 [emphasis in original].
7 W.Swenden, *Federalism and Regionalism in Western Europe* (Palgrave Macmillan, 2006) 3.
8 *Id.* at 3.
9 V.Bogdanor, *The New British Constitution* (Hart, 2009) 89.
10 R.Rawlings, *Delineating Wales* (UWP 2003) 2.
11 *Supra* note 5, 1.
12 *Supra* note 9, 92.

(i) Scotland

Scottish national identity was a strong driving force in the claim for self-government during the twentieth century.[13]

> "The demand for self-government was based on the fact that Scotland, perhaps more than any other region in the UK, had an historic status of nationhood predating the Union of 1707 and not questioned afterwards. The distinct set of legal, educational and religious institutions which Scotland had retained had served to reinforce a distinct Scottish identity."[14]

A Scottish Constitutional Convention was established and published a plan for Scottish devolution in their 1995 paper *Scotland's Parliament, Scotland's Right,* which became the basis for the commitment to devolution following the 1997 general election. The people of Scotland voted in support of devolution for Scotland in the 1997 referendum.[15]

The Scotland Act 1998 established a unicameral Scottish Parliament and a Scottish Government accountable to the Scottish Parliament. It received wide legislative powers under a reserved powers model of devolution. This allowed the Parliament to legislate on any matter other than what was retained by the Westminster Parliament under Schedule 5 of the Act. Crucially, in terms of parliamentary sovereignty, section 28(7) of the 1998 Act retains the power of the Westminster Parliament to legislate for Scotland.[16] However, convention states that it would not do so without the consent of the Scottish Parliament.[17]

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[13] The Treaty of Union 1707 enacted that England and Scotland would become one country known as the United Kingdom of Great Britain. Scotland maintained its own legal system, education system and church as part of the agreement. Some Scottish commentators argue that the sovereignty of the English Parliament, regarding Scotland, has been limited since 1707 by the Treaty of Union. See, Ann Lyon, *Constitutional History of the United Kingdom* (Cavendish Publishing, 2003) 269-271.

[14] A.Aughey, *et.al.*, *Unique Paths to Devolution* (Institute of Welsh Affairs, 2011) 12.

[15] An earlier referendum on devolution to Scotland was held in 1979. Although there was a majority in favour of devolution among those who voted there was a requirement that at least 40% of the whole Scottish electorate had to be in favour of devolution and, therefore, establishing devolution in 1979 failed in Scotland. See, R.Deacon *et.al.*, *Devolution in the United Kingdom* (Edinburgh University Press, 2007) 55.

[16] Reserved matters under Schedule 5 include constitutional matters (such as the Crown and the Union between Scotland and England), Foreign Affairs, Political Parties, Public Service, Defence and Treason.

[17] Known as the Sewel Convention. See further, B.K Winetrobe, 'A Partnership of the Parliaments? Scottish Law Making Under the Sewel Convention in Westminster and Holyrood' in R.Hazell *et.al* (eds.) *Devolution, Law Making and the Constitution* (Imprint Academic, 2005) 39.

Even though Scotland initially received substantial legislative and executive powers, the devolution settlement has not remained static. Scotland received further powers and fiscal autonomy through the Scotland Act 2012. In 2011 a majority Scottish National Party government was elected in Scotland which initiated a debate on holding a referendum on Scottish independence within that parliamentary term. Following an initial disagreement as to whether the Scottish Parliament had the competence to legislate on holding an independence referendum the Scottish and UK Governments, through the Edinburgh Agreement 2012, agreed to devolve this power to the Scottish Parliament, thus enabling a referendum.

The Scottish independence referendum was held on 18 September 2014 with 55.3% of the Scottish electorate voting against independence. However, due to the close predictions in some pre-referendum polls the UK Government, and the Labour party, the official opposition, announced that, even with a rejection of independence, further powers would be devolved to Scotland. Their claim was that a no vote would lead to 'faster, fairer, safer and better change.'[18] This pledge proposed to confirm the Scottish Parliament as a 'permanent and irreversible part of the British constitution', guarantee consideration of fairness in terms of welfare, and safeguard the continuation of the Barnett formula which determines the amount of the Scottish budget.[19] Following the referendum, the Smith Commission was established to consider how to implement those commitments by November 2014.[21] The UK Government announced its response in January 2015 and laid the Scotland Bill in Parliament in spring 2015.[21] Significantly, the Bill includes provisions which could be interpreted as being of a federal nature.

(ii) Northern Ireland

Northern Ireland had a constitutional and political history which is significantly different to other parts of the United Kingdom. Northern Ireland saw the first attempts at devolution in the UK, or for Home Rule, as it was known at the time, with the enactment of the Government of Ireland Act 1920.[22] Due to

[18] "David Cameron, Ed Miliband and Nick Clegg sign joint historic promise which guarantees more devolved powers for Scotland and protection of NHS if we vote No" *The Daily Record,* (15 September 2014) Also available at:http://www.dailyrecord.co.uk/news/politics/david-cameron-ed-miliband-nick-4265992(Visited on 11th March 2015)

[19] *Ibid.*

[20] The Smith Commission, 'Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament' (27 November 2014).

[21] HM Government 'Scotland in the United Kingdom: An Enduring Settlement' ,Cm.8990(January 2015).

[22] *Supra* note 5, 55.

political and sectarian violence in Northern Ireland, devolution had to be suspended in 1972 and powers returned to Westminster. Devolution was not restored until the Belfast Agreement of 1998.[23]

Therefore, rather than establishing devolution, the Northern Ireland Act 1998 resurrects devolution and establishes a Northern Ireland Assembly and executive. The Act provides a model of reserved powers similar to that devolved to Scotland. However, although the Northern Ireland Assembly may make Acts in the same way as Scotland its competence to do so is more limited. Under this settlement there is a list of reserved matters retained by Westminster, known as 'excepted matters' under Schedule 2.[24] There is also a further list of matters which may be devolved in the future, confusingly also known as 'reserved matters' under Schedule 3. All other matters are transferred to Northern Ireland.

The political and sectarian divisions of Northern Ireland have given rise to particular challenges in the context of devolution. Periods of disagreement and unrest have meant that the development of devolution has been staggered. The St Andrews Agreement in 2006, the Northern Ireland (Miscellaneous Provisions) Act 2014, and the Stormont House Agreement 2014 have not only provided for constitutional developments but also importantly have addressed cultural and historical issues. In terms of the reserved powers model, Northern Ireland, like Scotland, has characteristics of a federal system, and is recognised as having its own jurisdiction. Further, Section 1 of the Northern Ireland Act 1998 gives some guarantee to the existing arrangement of Northern Ireland, in that it provides that it will remain as part of the UK subject only to the views of the Northern Ireland population. As a result, it is arguable that this introduces an element of political entrenchment into UK constitutional arrangements.[25]

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[23] Commonly known as the 'Good Friday Agreement', it was the culmination of long talks and discussion which were interrupted by acts of terrorism. The three strands agreed on in the Belfast Agreement establish democratic institutions in Northern Ireland, such as a Northern Ireland Assembly, and intergovernmental institutions such as the North/South Ministerial Council and the British-Irish Council. Rather than a clear re-establishment of devolution in Northern Ireland the new settlement and statute is based on the 1998 Agreement rather than keeping what existed under the Government of Ireland Act 1921. See Ann Lyon, *Constitutional History of the United Kingdom* (Cavendish Publishing, 2003) 436-442.

[24] The excepted matters include matters such as constitutional matters such as the Crown and Parliament, International Relations, Treason, and Control of Weapons. Although these are similar to those reserved under the Scottish devolution settlement both should be looked at separately as individual differences apply to both. In a similar way, the 'reserved' matters, in the Northern Ireland settlement, are unique to Northern Ireland and should not be confused with the Scottish 'reserved' matters.

[25] Northern Ireland Act 1998, s. (if section then to be "Section 1")1 Status of Northern Ireland.(1)It is hereby declared that Northern Ireland in its entirety remains part of the

(iii) Wales

Wales narrowly voted in favour of devolution in 1997 which resulted in the enactment of the Government of Wales Act 1998.[26] This introduced a novel devolution settlement to the UK as it was a form of executive devolution which only devolved secondary law-making powers to the newly established National Assembly for Wales.[27] Therefore, legislative competence to legislate for Wales remained with the Westminster Parliament. The Richard Commission, which reported in 2004, highlighted the inadequacies of this model of devolution and recommended a form of legislative devolution similar to Scotland.[28]

It was agreed by the UK Government to introduce a model of legislative devolution to Wales under the Government of Wales Act 2006 but this was to be achieved on a stage-by-stage basis, with a model of conferred powers rather than reserved powers. Therefore, under Part 3 of the 2006 Act the National Assembly for Wales would be able to legislate through Measures on 20 devolved fields listed under Schedule 5 of the Act.[29] However, the Assembly could not legislate for a particular field until a specific matter was inserted gradually by the UK Parliament, on the request of the Assembly, through a Legislative Competence Order.[30]

This resulted in a protracted and difficult constitutional settlement. Consequently early calls were made to move from the settlement, under Part 3, to the provisions under Part 4 of the 2006 Act, that would give the National Assembly 'primary legislative powers' within the devolved fields without

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United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1. (2)But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.

[26] Despite the narrowness of the vote devolution in Wales has always been seen as a journey of devolution, or as Ron Davies MP said 'a process not an event'. See, *Supra* n 11 at 10.

[27] *Supra* note 10, 5

[28] The Report of the Richard Commission (Spring 2004) 255.

[29] Part 3 of the 2006 Act was particularly considered a difficult stage for devolution in Wales. The mechanisms used for devolving powers to Wales, the Legislative Competence Orders in particular, were criticised for being too complex and not providing a workable settlement. However, others found the gradual increase of powers for the Assembly suitable to allow capacity and experience to develop. For a fuller account of this stage see, The All Wales Convention Report (2009) Also available at http://gov.wales/docs/awc/publications/091118thereporten.pdf (Visited on 12th March, 2015)

[30] UK Government (Welsh Office) 'Better Governance for Wales', Cm 6582 (June 2005) 22-24.

requiring individual consent from the UK Parliament.[31] This came into force following a referendum of the Welsh electorate in 2011.[32] However, this remains a conferred powers model of devolution.

The current debate in Wales revolves around moving towards a reserved powers model similar to Scottish devolution. The Commission on Devolution in Wales in 2014 recommended a move towards this new model of devolution for Wales to allow better certainty and clarity in the devolution settlement.[33] Following the Scottish Referendum the UK Government confirmed their intention to consider and implement a form of reserved legislative powers in Wales.[34]

(iv) England

The need for devolution in England has always been a controversial issue. The Kilbrandon Commission was clear that legislative devolution should not be applied to England, or its regions, on the basis that the English public would find a separate English legislature to be 'inappropriate'.[35] However, the Commission could not agree on an alternative form of regionalization with some favouring regional executive assemblies while others favoured enhancing devolution to local authorities.[36]

There has been very little consensus on how best to decentralize powers in England. Several different models of devolution have, however, been suggested. For example, in 1994 Government Offices for the Regions were established as a form of administrative devolution to implement policy from several government departments at a local level.[37] Further, in 1998 Regional Development Agencies were established to promote economic development. On a more formal level, the Government proposed directly elected regional assemblies with powers over 'economic development and regeneration, spatial development, housing, transport, skills and culture.'[38] However, following the overwhelming rejection of such an assembly in the North East of England in 2004 the plans for regional devolution outside London were not taken any further. London remains the only region of England with a form of executive devolution through the London

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[31] *Id.* at 25-26; *Supra* note 29 at 6-7.
[32] R.W.Jones *et.al*, *Wales says Yes: Devolution and the 2011 Welsh Referendum* (UWP, 2012).
[33] The Commission on Devolution in Wales 'Empowerment and Responsibility: Legislative Powers to Strengthen Wales' (March 2014) 44.
[34] HM Government, 'Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales' ,Cm.9020(February 2015).
[35] *Supra* note 1, 1188.
[36] *Id.* at 1189.
[37] House of Commons Library, 'Government Offices for the Regions', SN/EP/2126(9 November 2010) 2.
[38] Cabinet Office, 'Your Region, Your Choice: Revitalising the English Regions', Cm5511(2002).

Assembly and Mayor.[39] Other local authorities, however, have enhanced powers through the Localism Act 2011, the Local Government Finance Act 2012 and Local Enterprise Partnerships.[40] It is therefore arguable that forms of asymmetrical regionalization already exist in England.

The Scottish Referendum proved a catalyst to revitalize the debate about further devolution in England.[41] A Cabinet Committee under the leadership of William Hague considered possible models of reform for England on a local and national level.[42] One of the main concerns is how to respond to, what is commonly referred to as the West Lothian[43] or English Question, where Members of Parliament in Scotland can vote on English matters in the UK Parliament while English Members cannot vote on corresponding Scottish legislation going through the Scottish Parliament.[44] The absence of an English Parliament is a significant challenge to this issue.

Furthermore, traditionally the campaign for an English Parliament has struggled to attract support from either the political elite or the public at large.[45] Between 1999 and 2003, backing for England, as a whole, to have its own new Parliament with law-making powers remained flat, with the British Social Attitudes (BSA) surveys indicating between 16 and 19 percent of support.[46]

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[39] Greater London Authority Act 1997.

[40] HM Government, 'The Implications of Devolution for England' (Cm.8969, December 2014) 7-8. "The Government has adopted the principle that power should be decentralised to the lowest appropriate level, down to councils, neighbourhoods and individuals, and services must be responsive to the people they serve – held to account by citizens and their elected representatives."

[41] However, a greater sense of English identity and feeling that England was getting a 'raw-deal' from the devolved settlement was already developing prior to this although there was no agreement on what alternative would be suitable for England. See, Richard Wyn Jones, Guy Lodge, Alisa Henderson & Dan Wincott, 'The Dog that Finally Barked: England as an Emerging Political Community' (IPPR, 2012). Considerations had also been given to how to arrange the Westminster Parliament in a way that balanced the different constitutional settlements in the UK and to respond to the West Lothian Question. See, The McKay Commission, 'Report of the Commission on the Consequences of Devolution for the House of Commons' (March 2013).

[42] HM Government, 'The Implications of Devolution for England' , Cm 8969 (December 2014).

[43] It is commonly referred to as the West Lothian question as it was raised by the Member of Parliament for the West Lothian constituency Tam Dalyell MP. See T.Dalyell, *Devolution: The End of Britain?* (1977).

[44] The McKay Commission, 'Report of the Commission on the Consequences of Devolution for the House of Commons' (March 2013) 12.

[45] See further R Hazell, 'The English Question: Can Westminster be a proxy for an English Parliament?' (2001) PL(??) 268.

[46] See further NatCen Social Research, 'British Social Attitudes' (1999-2003) Also available at: http://www.natcen.ac.uk/our-research/research/british-social-attitudes/(Visited on 12th March, 2015)

On the other hand, support for regional assemblies has gradually grown from 15 to 24 percent within the same period. Such figures may be indicative reasons for Hazell concluding in 2006 that 'an English Parliament is not seriously on the political agenda unless serious politicians begin to espouse it.'[47] The more recent evidence is contradictory as to the support for an English Parliament among the English electorate. The latest BSA surveys (in 2014) continues to state that there is little appetite for an English Parliament, and that very little has changed in the way of English public opinion since 1999, when the Scottish Parliament was first established.[48] In contrast, The Future of England Survey indicated that the most favoured devolutionary model among the English electorate was a separate Parliament, a surprising conclusion given that none of the three main political parties had offered this option as part of their election manifesto.[49] No further surveys have been published subsequent to the proposals for enhanced devolution in Scotland, and it may well be the case that support for an English Parliament may have grown further in the light of these developments.

There has also been a political response following the result of the Scottish Independence Referendum, the Prime Minister David Cameron released a statement:

> "Just as the people of Scotland will have more power over their affairs, so it follows that the people of England, Wales and Northern Ireland must have a bigger say over theirs... I have long believed that a crucial part missing from this national discussion is England. We have heard the voice of Scotland - and now the millions of voices of England must also be heard."[50]

On a more local level regionalization in England has developed at a substantial pace in the last year. For example, the Greater Manchester Agreement proposes to establish a directly elected Mayor and the Greater Manchester Combined Authority to take responsibility over the budget for transport, planning and

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[47] R Hazell (ed), *The English Question: The Devolution Series* (Manchester University Press 2006) 224.

[48] See further A Park, C Bryson and J Curtice (ed), 'British Social Attitudes 31' (NatCen Social Research 2014) available online at: http://www.bsa.natcen.ac.uk/media/38893/bsa31_full_report.pdf and J Curtice, 'Future Identities: Changing Identities in the UK – the next 10 years' (Foresight Project on Future Identities, Government Office for Science, 2013) Also available at: www.gov.uk/government/publications/national-identity-and-constitutionalchange (Visted on 10th March, 2015)

[49] C.Jeffery, *et.al*, 'Taking England Seriously: The New English Politics' (2014)

[50] D Cameron, 'Scottish Independence Referendum: statement by the Prime Minister' (Gov UK 19 September 2014) Also Available at: https://www.gov.uk/government/news/scottish-independence-referendum-statement-by-the-prime-minister(Visited on 3 March, 2015)

housing and is the first of what has become to be known as 'devolution deals'.[51] Although initially a fiscal agreement, subsequent agreements between the Government and Manchester give wider powers over areas such as health and social care, children's services, and employment and skills.[52] Further, the Cities and Local Government Devolution Bill will allow further 'Mayoral Combined Authorities' to make devolution deals to transfer budget responsibilities to elected mayors in their areas.[53]

England, therefore, faces challenges from two perspectives. Firstly, the UK Government is already working on developing regionalization within England. Secondly, responding to the West Lothian Question will take further time. This is an important issue for all members of the UK as the potential to move into a recognised federal model, or not, could depend on the solution provided for England. Whatever the solution, history suggests that the provision will lead to further incremental change and the key question, highlighted by Bogdanor, is how sustainable asymmetrical devolution will prove to be?[54]

III

What is a Federation?

In a similar vain to devolution, providing a categorical definition of federalism is challenging due to its flexible form in different circumstances, places and eras.[55] The Kilbrandon Commission admitted that the evidence submitted to them suggested that formal definitions of federalism had become 'meaningless' and so they attempted to highlight how the 'general characteristics' of a federal system differed from other systems.[56]

One of the main elements highlighted by that report was that 'sovereignty is divided between two levels of government'.[57] Bogdanor also highlights sovereignty as a key difference between devolved and federal systems because devolution, as the Labour government intended, would 'preserve' the supremacy of Parliament as the central feature of the British Constitution.[58] On the other hand, Bogdanor notes that federalism 'would divide, not devolve, supreme power between Westminster and various regional or provincial parliaments.'[59]

[51] HM Treasury, 'Greater Manchester Agreement' (2014)
[52] HM Treasury, 'Further Devolution to the Greater Manchester Combines Authority and Directly-Elected Mayor' (July 2015)
[53] Further areas may include Sheffield, Leeds, and Cornwall.
[54] *Supra* note 9, 98
[55] M.Burgess, *Comparative Federalism: Theory and Practice* (Routledge, 2006) 4.
[56] *Supra* note 10, 152.
[57] *Id.* at 152.
[58] *Supra* note 5,3.
[59] *Id.* at 3.

Further to the formal distribution of powers between state and region Hopkins, following the work of Watts, highlights other characteristics shared by federal systems. These include representation of the regional tier within federal decision making, a formal process of intergovernmental relations, and a supreme constitution with a constitutional adjudication system.[60] Hopkins admits that this is a narrow definition which has little comparative use as it 'fails to address the normative concept of federalism itself.'[61] In light of this, Swenden qualifies these characteristics in three respects; the regional level should be territorial in character, both tiers should have a democratic structure, and federal states should not normally allow unilateral secession.[62] This is consistent with the definition preferred by Swenden that 'federal' refers to 'a set of institutional characteristics'.[63] As highlighted by Burgess:

> "A federation is a particular kind of state. It is a distinctive organisational form of institutional fact the main purpose of which is to accommodate the constituent units of a union in the decision-making procedure of the central government by means of constitutional entrenchment."[64]

The UK constitution arrangements fall short of this definition at the moment, as constituent units are not formally included in the decision making procedure. Most notable are, a lack of guaranteed input in amending parliamentary acts, the fact that the devolution settlement are implemented through ordinary Acts of Parliament, rather than enshrined and given constitutional status, and the lack of a genuine constitutional court.[65]

According to Burgess, the primary explanation as to why the UK resisted federal elements was the 'damaging' effect of Dicey's interpretation of federal systems which has had a profound effect on constitutional thinking and jurisprudence in the UK.[66]

> "Certainly Dicey's impact and influence upon the British tradition of federalism proved especially damaging. In intellectual terms it effectively excluded an important option for British constitutional reform up until quite recently and it continues to hinder clarity of thought about British national interests."[67]

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[60] J.Hopkins, *Devolution in Context* (Cavendish Publishing Ltd, 2002), 23.
[61] *Id.* at 23.
[62] *Supra* note 7, 10.
[63] *Id.* at 20.
[64] *Supra* note 55, 2.
[65] *Supra* note 7, 11-12.
[66] Burgess (n 56) 21, "It is hardly surprising therefore that misunderstanding and confusion – not to mention barely concealed hostility – about federalism produced the phobia that has been a characteristic hallmark of British political culture."
[67] *Id.* at 21

Dicey attacked federal systems for producing what he described as weak and conservative governments.[68] This he attributed to the rigidity of the constitutional arrangements, and the prevalence of the judiciary and the courts in interpreting the constitution.[69]

> "A federal state is a political contrivance intended to reconcile national unity and power with the maintenance of 'state rights'."[70]

However, Swenden highlights that although the UK lacks some key characteristics, it does possess 'several attributes of a federation'.[71] For example, due to the substantial devolution of legislative and executive powers to Scotland in particular, it could be argued that there is justification to consider the existing UK arrangements as an example of a federal model.[72]

IV

Tiers of Autonomous Government in the United Kingdom

One of the main characteristics of a federal model, as seen above, is that powers are divided between two levels of government. This brings two contemporary challenges to the UK. The first is the extent to which sovereignty is divided between a federal and regional level. The second is how to respond to the West Lothian/English Question.

(i) Dividing Powers in the UK

The traditional concept of sovereignty, as defined by Dicey, continues to raise substantial challenges to developing the UK constitution.[73] If dividing sovereignty is a vital element for defining a federal system there remains a constitutional dilemma for the UK.

(a) Entrenchment of Scottish Institutions

One of the most significant clauses in the 2015 Scotland Bill is the fulfilment of the commitment promised by the UK Government during the independence referendum, and confirmed by the Smith Commission, that 'UK legislation will state that the Scottish Parliament and Scottish Government are permanent institutions'.[74] Clause 1 of the Bill provides these amendments to the Scotland

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[68] A.V.Dicey, *Introduction to the Study of the Law of the Constitution* (6th Ed, 1902, Reproduced by Elibron Classics, 2005) 167-170.
[69] *Id.* at 167-176.
[70] *Id.* at 139.
[71] *Supra* n 7, 11.
[72] *Id.* at 21.
[73] *Supra* note 55, 21.
[74] *Supra* note 20, 13.

Act 1998. Also, clause 2 places the constitutional convention, the Sewel Convention, on a statutory footing by noting that although Section 28(7) of the Scotland Act 1998 retains Westminster's power to legislate for Scotland it 'will not normally legislate in regard to devolved matters without the consent of the Scottish Parliament'.

On the face of it both clauses directly contradict the legal definition of Parliamentary sovereignty understood as an unrestricted law-making body which cannot bind its successors. In defence of this notion, Parliamentary committees have interpreted these clauses as politically significant but having no legal effect. This interpretation may be no more than a political and legal fiction. It keeps the classic definition of parliamentary sovereignty intact and the word 'normally' qualifies the provision and suggests that Westminster will still be able to legislate regardless of the new statutory clause.[75] Therefore, it recognises the Sewel Convention rather than making it a legally binding concept.[76]

However, the House of Lords Committee on the Constitution warned that the courts may decide on a different interpretation of clause 1, and if called to interpret the provision may confirm that the wording provides for legal entrenchment.[77]

> "It is a fundamental principle of the UK constitution that Parliament is sovereign and that no Parliament may bind its successors. It is clear that Draft Clause 1 is designed to be a political and symbolic affirmation of the permanence of the Scottish Parliament and Government. While we do not consider that it imposes any legal or constitutional restriction on the power of the UK Parliament, it does create the potential for misunderstanding or conflict over the legal status of the Scottish Parliament which may result in legal friction in the future."[78]

Similar proposals have been suggested for Wales to 'formally recognise' the National Assembly for Wales and Welsh Government as a permanent parts of the UK constitutional arrangements.[79] It remains to be seen whether similar clauses for different devolved settlements will necessarily have the same constitutional interpretation in favour of the legal definition of parliamentary sovereignty.

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[75] House of Lords Select Committee on the Constitution, 'Proposals for the Devolution of Further Powers to Scotland' (10th Report of Session 2014-15, HL145) 72.

[76] *Id.* at 72.

[77] *Id.* at 62-63.

[78] *Id.* at 64.

[79] HM Government, 'Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales' (February 2015) 2.2.4.

It is significant that the House of Lords Committee have directly raised the connection between these clauses and federal systems and raised the concern that the Government may be moving towards a federal model.

> "Nonetheless, we note that both these draft clauses appear to be moving the United Kingdom in a federal direction, attempting to crystallise by way of statute, if not a written constitution, the status and powers of the devolved institutions in a way that has hitherto not been the case. We would welcome a clarification from the Government as to whether this was their intention. This is a matter that we trust will receive further scrutiny by the House when a Scotland Bill is introduced in the next Parliament."[80]

(b) A Constitutional Court

The House of Commons Political and Constitutional Reform Committee noted that the discussion regarding the entrenchment of Scottish institutions also required a consideration of establishing a written, or codified, constitution and a constitutional court for the UK.[81] As indicated above, Dicey suggested that federal systems would lead to more legalism and a bigger constitutional role for the judiciary and courts. The UK Supreme court is not formally a constitutional court. However, in light of statutes with a territorial constitutional significance, the Supreme Court and its predecessor has been on hand to adjudicate on disputes between devolved governments and the UK Government and in this respect there may be no essential difference between the impact of devolution and federalism. Indeed, the cumulative uncertainties associated with incremental devolution may aggravate the legalism.

According to Lord Neuberger devolution has had a significant effect on the constitutional role of the Supreme Court

> "The notion that the UK Supreme Court is almost drifting into being a constitutional court is reinforced by two further recent factors. The first is the UK's membership of the EU which, revolutionarily means that judges have to disregard statutes if they conflict with EU law; secondly, with the existence of Scottish, Welsh and Northern Irish parliaments, the Supreme Court has duties which are hard to characterise as anything other than constitutional, not least because they are super-parliamentary. Having said that, it should be added that

[80] *Supra* note 75, 77.

[81] House of Commons, Political and Constitutional Reform Committee, 'Constitutional Implications of the Government's Draft Scotland Clauses' (9th Report of Session 2014-15, 16 March 2015, HC 1022) 40.

these powers have been conferred on the courts by statute."[82]

The main difference which should be highlighted from Lord Neuberger's comments is that the role of the court has been conferred through ordinary statute and not, as in the case of federal arrangements by a superior constitutional arrangement. Therefore, parliamentary sovereignty is retained. However, Lady Hale seems to make no distinction between devolution and federalism in this context and stated that the UK has 'indeed become a federal state, with a Constitution regulating the relationships between the federal centre and the component parts.'[83]

(ii) England

Normally in a federal system the regional level would encompass the entire area of the state.[84] Therefore, the current constitutional settlement points towards a true devolved model in the UK due to its wide asymmetrical character. According to Hopkins, non-federal systems are mainly structured on an asymmetrical model with regional governments often in only some parts of the wider state.[85]

> "...such asymmetry was a response to demands by peripheral regions with high micro-nationalist or regionalist identities demanding increased autonomy. By definition, these regions will have individual relationships with the central tier, in contrast with the common institutions of a federal state."[86]

This resonates clearly with the development of individual settlements between the UK and Wales, Scotland and Northern Ireland respectively. Swenden also shows that this can influence other regions in their claims for devolved powers and can 'spill over' into regions without necessarily the same claim over an unique identity as has happened in Spain.[87] According to Swenden, top-down regionalization is usually a characteristic of 'unitary decentralized states'.[88] However, in some circumstances elements of both top down reorganization and bottom up regionalization can be witnessed within the same state.

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[82] Lord Neuberger, 'The role of judges in human rights jurisprudence: a comparison of the Australian and UK experience', Supreme Court of Victoria, Melbourne (8 August 2014) 18.
[83] Lady Hale, 'The Supreme Court in the UK Constitution' (Legal Wales Conference, Llandudno, 2012).
[84] *Supra* note 60, 24.
[85] *Id.* at 24.
[86] *Ibid.*
[87] *Supra* note 7, 21.
[88] *Id.* at 21.

> "In some cases, regionalism and 'top-down' decentralization may be combined within the framework of a single state. For instance, Scotland, Wales (and Northern Ireland) have turned the UK into a regionalized state. However, the proposed (and so far failed) 'regionalization' of England is the result of top-down planning."[89]

Although English devolution is commonly seen as a bottom down approach the UK Government has been keen to emphasize that its new approach, since 2011, has been for 'ending top down bureaucracy'.[90] Removing Regional Development Agencies and the Government Offices for the Regions and implementing Local Enterprise Partnerships and the Localism Act 2011 were key to implementing this change in approach in favour of what the Government believed to be more of subsidiarity and local control.[91]

However, even if English devolution is developing a regional identity there remains a significant issue on how to reconcile the Westminster Parliament as an English legislature. As Bogdanor suggests:

> "Thus, Westminster is no longer a Parliament for the domestic and non-domestic affairs of the whole of the United Kingdom. It has been transformed into a parliament for England, a federal parliament for Scotland and Northern Ireland, and a parliament for primary legislation for Wales. Westminster has become, it might be suggested, a quasi-federal parliament."[92]

At first glance an English Parliament may be perceived as being a logical solution to the fundamental asymmetry in the devolution arrangements. Such a step would essentially create a federation of the four historic nations of the UK, each with their own parliament enjoying significant devolved power. However, whilst such a federation may carry symbolic idealism, particularly in evidencing a strong voice for each of the four territories, there are fundamental difficulties with such in practice. In 2006 Robert Hazell stated that:

> "The...difficulty is the sheer size of England in comparison to the rest of the United Kingdom. England, with 80 percent of the population, would be hugely dominant. On most domestic matters this English Parliament would be more important than the Westminster Parliament...although all federations have some units much larger

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[89] *Supra note* 8.

[90] HM Government, 'The Implications of Devolution for England' (Cm 8969 December 2014) 7.

[91] *Id.* at 7-8.

[92] *Supra* note 9, 114.

than others, as a general rule no unit is greater than around 30 or so percent of the whole, to avoid dominating the rest."[93]

Such a view is supported by Bogdanor who argues that a federation consisting of all four units would be so unbalanced as to be unworkable. In essence, the argument that such a federal arrangement would be impractical given the imbalance of power and wealth across the regions, and the dominance of the South of England in this context.[94]

In critiquing the possibility of an English Parliament, Hazell draws comparisons with the post-war German Constitution of 1949 and how Prussia was deliberately broken into 5-6 distinct states so as to prevent the unit being disproportionately large and dominating the new Germany. If this logic is to be accepted, England would have to be divided into smaller units for a federal solution to work - something which Hazell accepted in 2006 as an 'anathema to the campaign for an English Parliament.'[95]

In support of this new position, a Cabinet Committee was formed, chaired by the then Leader of the House of Commons, William Hague.[96] This was with the objective of reviewing devolved powers across the United Kingdom. In May 2015, a new Bill was proposed by this committee, the Cities and Local Government Devolution Bill 2015-16, which is set to put in place the legal framework to elect a Manchester City Mayor, so as to have oversight of decisions and developments within the area in the North of England. The Bill also proposes a transfer of decision making for local priorities to the regional territories, including in areas of local development, transport, housing and skills. This Bill entered its third reading in the House of Lords on the 21st July 2015.

More recently, on the 16th July 2015, the Secretary of State for Communities and Local Government, Greg Clark, announced a historic devolution proposal for Cornwall, in the South West of England, whereby the county will be the first to gain significant new powers.[97] The proposal will see Cornwall gain control of

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93 R Hazel (ed), *The English Question: The Devolution Series* (Manchester University Press 2006) 224.

94 *Supra* note 5, 267-268.

95 *Supra* note 93, 224; This is arguably something which is already taking place, in relation to Cornwall and the perceived 'Northern powerhouses.'

96 W Hague, 'Cabinet Committee for devolved powers: statement on first meeting' (Gov UK 25 September 2014) Also Available at: https://www.gov.uk/government/news/cabinet-committee-for-devolved-powers-statement-on-first-meeting(Visited on 12th March, 2015)

97 See further G Clark, 'Cornwall to be first county to gain historic new powers' (Gov UK 16 July 2015) Also Available at: https://www.gov.uk/government/news/cornwall-to-be-first-county-to-gain-historic-new-powers (Visited on 10th March, 2015)

bus services, adult skills and regional investment, and health and social services. Such represents a significant commitment to decentralise decision making and give the local accountable body more control to set its own course to grow the economy.

English Votes for English Law Debate: The Fox Hunting Paradigm

Today the question of English votes for English laws- the so-called West Lothian question- has become more prevalent, and in the words of the Prime Minister, now needs a "decisive answer."[98] Polling data consistently evidences that 55 to 65 percent of people in England believe that Scottish Members of Parliament should no longer be allowed to vote on English laws that exclusively affect English people.[99] As Curtice highlights, this proposed restriction as to the voting rights of Scottish MPs has even traditionally been supported by the Scottish people themselves.[100] The prevalence of the need for reform in this area was apparent in Prime Minister Cameron's Scottish Independence Referendum statement where he stressed:

> "as Scotland will vote separately in the Scottish Parliament on their issues of tax, spending and welfare, so too England...should be able to vote on these issues...this must take place in tandem with, and at the same pace as, the settlement for Scotland."

In light of this, the current Conservative Administration has introduced new proposals to change the way legislation is considered in the House of Commons, to give English and Welsh MPs a fairer say over laws that only affect their constituencies.[101] The new proposed process will apply to Government bills introduced in this Parliamentary Session that have a Second Reading in the Commons, after the new rules are agreed. It will then apply to all parts of Government bills which are certified by the Speaker as containing English, or English and Welsh, provisions. It will not apply to routine bills that implement the House's spending decisions. It will also apply to secondary legislation. When

[98] D Cameron, 'Scottish Independence Referendum: statement by the Prime Minister' (Gov UK 19 September 2014) Also available at: https://www.gov.uk/government/news/scottish-independence-referendum-statement-by-the-prime-minister(Visited on 10th March, 2015)

[99] See further NatCen Social Research, 'British Social Attitudes' (1999-2003) Also Available at: http://www.natcen.ac.uk/our-research/research/british-social-attitudes/(Visited on 10th March, 2015)

[100] J Curtice, 'Hopes dashed and fears assuaged? What the public makes of it so far' in A Trench (ed), *The State of the Nations 2001: The Second Year of Devolution in the UK* (Exeter Imprint Academic 2001).

[101] Cabinet Office, 'English Votes for English Laws: An Explanatory Guide to Proposals' (July 2015) Also Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/441848/English_votes_for_English_laws_explanatory_guide.pdf(Visited on 20th March, 2015)

a bill has been introduced in the Commons, the Speaker will certify whether the bill, or parts of it, should be subject to this new proposed process.

In assessing the feasibility of implementing English votes on English laws, Hazell identifies several barriers, which in his opinion, present formidable technical and political challenges.[102] Firstly he perceives there to be technical difficulties in identifying those English laws which only English MPs would be permitted to vote on. He states that "strictly speaking there is no such thing as an English law, in the sense of a Westminster statue which applies only to England."[103] In doing so he states how the territorial extent clauses in Westminster statutes typically cover the UK, or Great Britain, or England and Wales. Furthermore many statutes vary in their territorial application in different parts of the same Act. The complexity of excluding non-English MPs from some votes but not others in the same Bill would be immense, and the current legislative voting system for passing a Bill to an Act of Parliament would be at least chaotic, or as Hazell puts it "too confusing to be regarded as feasible."[104]

Whilst this article accepts the immense challenge of Hazell's concerns, such should not be viewed as a reason to deny English MPs the exclusive right to determine the laws that affect their constituents. Whilst inevitably changes will be needed to remedy the current voting systems, in theory Hazell's concerns could be resolved by the Speaker of the House giving advanced consideration as to the clauses or amendments which apply to England only. With foresight and carefully considered scheduling of debate and voting, such could offer a solution to Hazell's perceived practical barrier.

Whilst some may seek to argue that this is an over-simplification of such an issue, this approach does already exist, with relative success, in relation to Scottish issues being heard in the Westminster Parliament. Here one may instead turn to the thoughts of Bogdanor:

> "Just as it has long been recognized that Scotland is a separate unit for executive purposes, so also special arrangements have been made for the conduct of Scottish business in the House of Commons. The committee stage of bills certified by the Speaker as relating exclusively to Scotland is taken by one of two Scottish standing committees. These committees comprise of between sixteen and fifty MPs and must include at least sixteen Scottish MPs."[105]

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[102] *Supra* note 93, 225.
[103] *Id.* at 225.
[104] *Id.* at 225.
[105] *Supra* note 7, 115.

In addition to the above, there is also a Scottish Grand Committee, comprised exclusively of Scotland's MPs. In contrast to the other two committees, the Grant Committee often meets in Scotland, and has power to take the second and third reading debates and the report stage of non-controversial Scottish Bills. If such Scottish committees can exist and debate Scottish only issues, there appears to be no apparent reason why English only committees could not do the same in relation to English only issues. Such a view goes someway to rebutting Hazell's practical arguments as to the feasibility of introducing English only votes.

As well as the practical and technical challenges, Hazell alleges that there would also be greater political difficulties.

> "Proponents of English votes on English law tend to underestimate just what a huge change would be involved. It would create two classes of MP, ending the traditional reciprocity whereby all members can vote on all matters. It would effectively create a parliament within a parliament. And after close-fought elections, the UK Government might not be able to command a majority for its English business leading to great political instability. These political difficulties cast serious doubt on the likelihood of English votes on English laws ever becoming a political reality."[106]

Nevertheless, while a new approach of English votes for English laws is currently being debated by Westminster, there are already existing customs amongst some political groups. For example, there has been a longstanding tradition amongst the Scottish National Party (SNP) that they abstain from voting on issues affecting England only. However this stance by the SNP, who now hold 56 of the 59 Scottish seats in the House of Commons, has most recently been broken, when, in July 2015, they decided to break from tradition and vote against the Conservative party proposals to amend the Hunting Act 2004 in England. The Act, which bans certain aspects of fox hunting, has been in force, in its Scottish version since 2002. Commenting on the reasons as to why the Scottish MPs would be voting against a repeal affecting England only, the SNPs Leader in Westminster, Angus Robertson MP said:

> "We totally oppose fox hunting, and when there are moves in the Scottish Parliament to review whether the existing Scottish ban is strong enough, it is in the Scottish interest to maintain the existing ban in England and Wales... We are in a situation where the Tory

[106] *Supra* note 93, 225.

> government are refusing to agree to any amendments to improve the Scotland Bill - which are supported by 58 of Scotland's 59 MPs - and imposing English Votes for English Laws to make Scotland's representation at Westminster second class. In these circumstances, it is right and proper that we assert the Scottish interest on fox hunting by voting with Labour against the Tories' proposals to relax the ban."[107]

The margin between the Conservative Party majority and the SNP and Labour opposition to relaxing the ban has led to the Prime Minister now stating that he will hold off the fox hunting vote until after the English votes for English laws rules are in place, thus giving his party the majority they need to relax the fox hunting ban.

The political gamesmanship played by the political parties in this context displays the unsatisfactory nature of the existing constitutional arrangements and unless addressed may lead to further public disillusion with Parliament and politics.

VI

Conclusion

The dividing line between devolution and federalism is thin and may well have already been crossed in the United Kingdom. With separate incremental developments for each territory, the UK arrangements are more fragmented and complex. Constitutional change has traditionally been incremental in nature, but current tensions, in Scotland and England in particular, suggest that a fundamental rethink of the traditional jurisprudence, in terms of parliamentary sovereignty is necessary.

One major brick in the eschatological solution would be an English Parliament and, given recent events, the dynamic might be in that direction. During the most recent English votes for English law debate in the House of Lords, the Leader of the House, Lady Stowell, summarises the existing position as:

> "After 30 years of trying to find a solution to the problem of English only laws it is time to act…there does come a point where we need to stop talking and get on with taking some action."[108]

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[107] A Robertson, 'SNP on fox hunting vote' (Scottish National Party, 13th July 2015) Also Available at: http://www.snp.org/media-centre/news/2015/jul/snp-fox-hunting-vote(Visited on 10th March, 2015)

[108] Lady Stowell, 'English Votes for English Law Debate: Third Reading', House of Lords Hansard (21st July 2015) Also Available at: http://www.parliament.uk/business/publications/hansard/lords/(Visited on 11th March, 2015)

Whilst, for the time being, it is hard to refute Hazell and Bogdanor's criticisms of a United Kingdom federation of nations model in all four territories, there is evidence to support the proposition that the tide is turning. At the very least, the UK is incrementally moving towards a model of federal government. Adopting the views of Hazell, insofar as he states that for there to be an English Parliament, England would first need to be divided into smaller units, it appears that the wheels are at least in motion. The new Devolution Bill now provides an opportune moment to revisit the question of whether an English Parliament is now appropriate and necessary.

FEDERALISM IN INDIA-EMERGING ISSUES AND CHALLENGES

*Dr. Mahavir Singh Kalon**

Abstract

The paper has broadly discussed the federal structure of the Indian Constitution. The adoption of the Government of India Act, 1935 as the basis of the new Constitution had the great advantage of making the transition from British rule to the new Republic of India without any break with the past; the old laws and constitutional provisions continued without a break; and thus secured for India the advantage which an evolutionary change has over a revolutionary break with the past. Besides, the Government of India Act, 1935 had great merits as an instrument of federal government.

The special feature of a Federal Constitutions, which is relevant in the present context is that since it has to enumerate and limit the respective power of two governments- Federal and State, it must be written Constitution.

According to Wheare, the Constitution of India is not federal, it is quasi-federal. He said that any Constitution will be federal if it is similar to USA Constitution. But I would like to say that the American Constitution in itself is not federal. The basic feature of federalism is not satisfied by the USA Constitution. In the light of the present changing scenario in federal structure of India, the new trend in form of co-operative federalism is the need of the hour.

I

Introduction

"*Federalism..... means legalism- the predominance of the judiciary in Constitution*"

-A.V.Dicey.

There can be a variety of motivations for various units to come together to constitute a federation. The political and economic theories of federalism attempt to understand the rationale for the "coming together" to form federations and once they are formed, analyze the conditions for "holding together". The political

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impulse for the smaller units to federate has to be found in issues of freedom, security, political stability and strength while keeping a separate group identity. Similarly, access to a larger common market, reaping economies of scale in the provision of national level public goods and availability of wider choice in the bundle of services to meet diverse preferences are some of the economic reasons for the smaller units to come together to form a federation.[1] Each federating unit will try to bargain terms advantageous to it to join the federation while the federation will try to attract entry and control exit. In this situation, symmetry in intergovernmental relationships may not be possible.

Every Constitution has only one design. It will be either Federal or Unitary. Before defining the design of Indian Constitution, the researcher would like to explain the difference between Federal and Unitary Constitution. A Unitary State is a State governed by on single unit in which the Central Government is supreme and executive division work out only those powers that the Central Government chooses to delegate. In a Federal State, there is constitutional division of power between one General Government (that is to have authority over the entire national territory) and a series of Sub National Governments individually having their own independent authority over their own territories, whose sum represents, almost the whole nationality.

The adoption of the Government of India Act, 1935 as the basis of the new Constitution had the great advantage of making the transition from British rule to the new Republic of India without any break with the past; the old laws and constitutional provisions continued without a break; and thus secured for India the advantage which an evolutionary change has over a revolutionary break with the past. Besides, the Government of India Act, 1935 had great merits as an instrument of Federal Government. [2]

India takes great pride in describing itself as the world's largest democracy. However, this democracy is meaningful significantly because it is encapsulated in a federal structure. While democracy represents the majority's opinion, federalism accommodates and links it to the voice of the minority, lending a flavour of social justice. This ensures harmonious functioning of the entire system.

Federalism and cultural and ethnic pluralism have provided great flexibility to the country's political system and therefore the capacity to withstand stress through accommodation. However, continuation of the same requires not simply

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1 M. Govinda Rao and Nirvikar Singh,"Asymmetric Federalism in India". Available at http://people.ucsc.edu/~boxjenk/wp/Asymmetric_Federalism.pdf, (Visited on 19.04.2015).

2 H.M. Seervai, *Constitution of India*, 286, 2008.

federalism, but cooperative and constructive federalism.

In *State of Rajasthan v Union of India* [3], it was quoted that according to Granville Austin, the Constitution of India was perhaps the first constituent body to embrace from the start what A.H. Birch and others have called "cooperative federalism". Chief Justice Beg called the Constitution 'amphibian'," *If then our Constitution creates a Central Government which is 'amphibian', in the sense that it can move either on the federal or on the unitary plane, according to the needs of the situation and circumstances of a case...*".

In *S.R. Bommai v Union of India* [4], the phrase "pragmatic federalism" was used. In the words of Justice Ahmadi, "It would thus seem that the Indian Constitution has, in it, not only features of a pragmatic federalism which, while distributing legislative powers and indicating the spheres of governmental powers of State and Central Governments, is overlaid by strong unitary features..."In *State of Haryana v State of Punjab*[5], "semi federal" was used and in *Shamsher Singh v State of Punjab*[6] , the Constitution was called 'more unitary than federal'.

II

Progression of Cooperative Federalism after Independence

The changing dynamics and the varied experiences that the Indian State has had on one party rule, coalition and not so united forms, have led to the shift from Centralist to Federalist and than to Centre- Federalist forms of federal governance. The rise of regional parties, the formation of coalition Governments, active role of the Judiciary, the shift from the Right to the Left and to the current trough of the Left, have shaped the trajectory of federalism by swinging the pendulum from cooperative to confrontationist and vice versa.

In the words of Chief Justice Beg in *State of Rajasthan v Union of India*[7], A conspectus of the provisions of our Constitution will indicate that, whatever appearance of a federal structure our Constitution may have, its operations are certainly, judged both by the contents of power which a number of provisions carry with them and the use that has been made of them.

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3 AIR 1361, 1978 SCR (1).
4 1994 SCC (3) 1.
5 2004 Supp(2) SCR 849.
6 1975 SCR (1) 814.
7 *Supra* note *3*.

III

Federalism in 1950s

The first fifteen years after independence under Nehru were marked by a democratically elected regime with a comfortable majority coupled with idealism and freshness of hope having just gained independence.

The States Reorganization Act, 1956 under Nehru, creating linguistic States, fulfilled a demand that was being made vociferously and was a victory of popular will. Five Zonal Councils were set up vide Part-III of the States Re-organization Act, 1956 with the object, in Nehru's own words, to "develop the habit of cooperative working". The Zonal Councils have so far met 105 times since their inception but have not been adequately developed.

Nehru's period also saw the creation of other significant institutions of inter-governmental cooperation. The Planning Commission was set up by a Resolution of the Government of India in March 1950 to promote a rapid rise in the standard of living of the people by efficient exploitation of the resources of the country. It is not a constitutional body. It works under the overall guidance of the National Development Council. With the emergence of severe constraints on available budgetary resources, the resource allocation system between the States and Ministries of the Central Government is under strain. This requires the Planning Commission to play a mediatory and facilitating role, keeping in view the best interest of all concerned. The central grants recommended by the Planning Commission are discretionary and this amounts to nearly 70% of the grants received by the States Governments, the rest 30% being from the Finance Commission which is a constitutional body created under Article 280. [8]

The National Development Council was created in 1952 by an executive order with the aim to impart national character to the entire process of planning. Its first substantive meeting was held in 1967 after that almost half the larger States passed into the hands of the opposition.

In 1966, the Santhanam Committee on Prevention of Corruption was the first to bring possession of unexplained disproportionate assets within the ambit of corruption and to enunciate that the abuse and misuse of power for self-aggrandizement by the political executive was to be blamed for the prevalence of corruption at all other levels. The setting up of vigilance departments presided over by a Chief Vigilance Officer in every Ministry and Public Sector Undertaking, and the constitution of the Chief Vigilance Commission in 1964 as

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[8] Constitution of India, 1950.

a pivotal authority to monitor the progress of vigilance cases, are the direct outcome of its recommendations. The latter was accorded statutory status in 2003, consequent upon the judgment of the Hon'ble Supreme Court in *Vineet Narain v. Union of India*[9], through the Central Vigilance Commission Act, 2003.

In 1967, a Study Team on Centre-State relations, appointed by the First Administrative Reforms Commission (ARC), gave the first model for an active Inter State Council (ISC). It viewed the ISC as a single administrative apparatus that would replace the then existing adhoc inter-governmental bodies permanently. Thereafter, the First ARC on Centre State relations submitted its report in 1969 recommending the same that an ISC should be constituted, but unlike its study team, it wanted the ISC to operate alongside the other adhoc bodies. It noted that the phrase "common interest" occurring in Article 263[10] was a comprehensive one which might be construed to cover problems relating to or arriving out of the Constitution, legislative enactments, administration and finance.

IV

Battle from 1960s To 1980s

Mrs Indira Gandhi humbled the Congress machine, re-established the supremacy of the parliamentary party over the party organization, broke the power of state Chief Ministers, and established a new balance or rather, imbalance between the Centre and the States. And her personality cult slowly converted Congress into a coterie party.

The Congress Government at the Centre further increased its powers vis-a-vis the States by allotting large funds mainly for centrally sponsored development projects. These were the projects that were to be implemented in the States but administered by the Centre.

All this however, could not stop the formation of new parties which were born outside the Parliament, based on ideology, like the DMK in Tamil Nadu, Telgu Desam in Andhra Pradesh and Communist Party in Bengal. Playing with the country's inherent federal spirit can be a double edged weapon. The very policies of centralization, politicization and dictatorship that damaged the federal and democratic structure of the Country, led to the rise of a strongly ideological party on the right i.e. the BJP and a mildly ideological combine on the Left.

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[9] (1996) 2 SCC 199.

[10] *Supra* note 8.

In 1969, Chief Ministers of Andhra Pradesh, Orissa and Kerala met at the Chief Ministers' Conference as they were dissatisfied with the issue of Centre State relations. In the 1970 Conference, the then Chief Ministers of Maharashtra challenged the very competence of Planning Commission to set norms for giving special assistance to certain States forming their non-plan commitments. The States were totally opposed to handing over the administration of agricultural income tax to the Centre.[11]

In 1971, the North Eastern Council was set up by the North Eastern Council Act, 1971. Comprising 8 States i.e. the Seven Sisters and Sikkim, it was to serve as the nodal agency for socio-economic development of North Eastern region. Unlike the Zonal Councils, it has to its credit, a lot of achievements in the electricity and education sectors. The Second Administrative Reforms Commission in its 15th Report on 'State and District Administration' suggested that the North Eastern Council (NEC) should establish an apex Regional Academy for Human Resource Development as an autonomous body with academic and executive flexibility.

In the meanwhile, the Rajmannar Committee Report came out in 1971 comprehensively reviewing Centre-State relations. It recognized the urgent need to constitute a non-political advisory body, under Article 263[12], to keep inter-governmental relations under constant review. Since such a body would be free of politics, hence it would command greater respect and its advices would be more acceptable. The ISC should not be merely advisory but be "ordinarily binding" on both the Centre and the States. No decision of national importance or which may affect one or more States should be taken by the Union Government except after consultation with the ISC. Every bill of national importance or which is likely to affect the State interests should, before its introduction in the Parliament, be referred to the ISC, and its views thereon should be submitted to Parliament at the time of introduction of the Bill. It is apparent that the Rajmannar Committee gave the most pro active recommendations.

It was due to Mrs Indira Gandhi's misadventures that in *Kesavananda Bharti v State of Kerala,*[13] 1973, the Courts evolved the 'basic structure' doctrine. Chief Justice Sikri clearly stated that the federal character of the Constitution was a feature of the basic structure of the Constitution which was, hence, not open to whimsical amendments. And the Doctrine of Supremacy of

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[11] Available at http://www.legalserviceindia.com/article/l441-Cooperative-Federalsim-In-India.html,(Visited on 12.12.2015).

[12] *Supra* note *8.*

[13] AIR 1973 SC1461.

the Constitution is part of basic structure i.e. neither of the three constitutionally separate organs of the State can leap outside the boundaries of its own constitutionally assigned sphere or orbit of authority into that of the other.

Federalism came heavily under pressure with the declaration of emergency on 26th June 1975 under ominous conditions. Apart from damaging the federal structure, it also sowed the seeds of secessionist militant movement among the Sikhs in Punjab. However, it must be kept in mind that declaration of emergency in itself is not an attack on federalism. But if the same is done under questionable circumstances not in sync with the spirit with which the provision for it was enacted, then federalism is surely under attack.

The amendments introduced in Article 356[14] by the 44th Amendment Act helped to mitigate the abuse of emergency provisions. By deleting the clauses which made the declaration and continuance of emergency by the President conclusive, it provided an opportunity for judicial review, i.e., the Courts can now take a more active part in preventing a malafide exercise of power to impose President's rule. Quoting Justice P.B. Sawant in *S.R. Bommai v Union of India*,[15] "*The courts should not lightly decline to exercise judicial review when as a matter of common knowledge, the emergency has ceased to exist.....This amendment has been prompted not only by the abuse of the Proclamation of emergency arising out of war or external aggression, but even more, by the wholly unjustified Proclamation of emergency issued in 1975 to protect the personal position of the Prime Minister*"

This declaration of emergency had another significant impact. It gave an opportunity to the nascent opposition, struggling for its birth, a burning political cause and a strongly shared grievance that enabled the leaders to sink their differences and to plan for the future. This led to the rise of the Janata Party, India's first alternative to the Congress, which won in 1977 elections, marking a watershed in Indian politics. It is to be noted that the break up from single party rule across the country and the rise of regional parties happened simultaneously with the existing virtually single party rule of Congress. It was because of the federal structure that people could aspire for share in power.

The National Development Council continued to meet once a year, on an average, throughout the Seventies, but in the Eighties, as the relations between the Congress and the opposition grew more and more strained, the frequency of the meetings declined. In the eighties, it met not more than seven times, and the meetings were marked by acrimony and tension.

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[14] *Supra note 8*

[15] *Supra* note *4*.

The West Bengal Government Memorandum on Centre State relations, prepared by the Left Front Government of West Bengal in 1977, reflected the increasing disagreement with the Centre and portrayed the Constitution as essentially unitary in character.

In *State of Rajasthan v Union of India* ,[16] States of Rajasthan, Madhya Pradesh, Punjab, Bihar, Himachal Pradesh and Orissa challenged the sufficiency of grounds of action by the Governor under Article 356(1)[17]. Chief Justice Beg held that sufficiency or inadequacy of the grounds for declaration of emergency could not be gone into by the Court. If the grounds are disclosed to the public by the Union Government which revealed that a constitutionally or legally prohibited or extraneous or collateral purpose was sought to be achieved, only then the Court would look into it. Dissent was been expressed against this judgement in S.R. Bommai case which expanded the scope of judicial review.

Mrs Indira Gandhi returned to power in 1979. Her highhandedness further invigorated movements for autonomy within the existing States and movements for separation from the Union as in Andhra, Assam and Punjab.

In 1983, the Conference of non-Congress ruled States was held. It paved the way for the formation of Council of Chief Ministers for Southern Region. They expressed that States should discuss mutual problems at their own level amongst themselves. Centre should be approached only if they fail in solving the issues ate their own level. They also felt dwarfed at the meetings of the NDC in which the Centre and the Planning Commission dominated. The Council of Chief Ministers for the Southern Region was the precursor to the Council of Chief Ministers of all States. It was in favor of cooperative federalism in true spirit of the Constitution.

Opposition Conclaves took place in different parts of the Country to express views on Centre-State relations. In response to the call of Chief Minister of Andhra Pradesh, N. T. Rama Rao, the first Opposition Conclave was held in Vijaywada in 1983. Fourteen non-Congress parties gathered to criticize the Centre for encroaching upon the powers of the States and the Centre was held responsible for all economic problems of the Country. In 1984, Delhi Conclave was held. It was opined that the Union was only a mother organization to coordinate the activities of various States, helping them to develop. It could not operate as an institution or treat the State Governments as its branch offices. The States would soon become just puppets dancing to the Centre's tune and unable to exist as viable territorial units. In the Srinagar Opposition Conclave,

[16] *Supra* note *3.*
[17] *Supra note 8.*

10 non-Congress parties gathered. It was suggested that Governors must be appointed by the President on the basis of a panel forwarded by the State Governments concerned and Articles 200[18] and 201[19] should either be suitably amended or else deleted. It also said that it must be mandatory for the President to constitute Inter State Council. And that the National Development Council and the Planning Commission should be given constitutional and statutory status with proper representation of States on these bodies. The last was the Calcutta Conclave participated by 18 non-Congress parties accusing Indira Gandhi of engaging in a conspiracy against the Opposition.

Opposition Conclaves should be made a regular feature of our dynamic system. They symbolize a healthy and responsible federalism. They are a useful forum for getting to know the other side of the picture. Such Conclaves must be held and thereafter be covered well by the media for the knowledge of the public. But the same requires a mature Opposition too. If the same is ensured, Opposition Conclaves can serve as a fantastic form of institutionalized criticism and pro activeness. It may even transform into a pseudo shadow cabinet system found in the UK.

In this background of simmering discontent among opposition ruled states, Mrs Gandhi constituted the Commission on Centre State Relations headed by Justice R. S. Sarkaria, a retired judge of the Supreme Court, in 1984, which submitted its voluminous report in 1988 to the Rajiv Gandhi Government recommending inter alia, a permanent Inter State Council as an independent forum for consultation with a mandate defined according to Article 263[20] . It should deal with subjects other than socio-economic planning and development and have an advisory role only. Administratively, it should be called Inter Governmental Council.[21]

Mrs Gandhi was assassinated in 1984. But Congress came to power again due to sympathy vote for her son Rajiv Gandhi. Steady deterioration of Centre-State relations had come head to head under Rajiv Gandhi. Meetings of the National Development Council became acrimonious.

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18 *Supra* note 8.

19 *Ibid.*

20 *Supra* note 8.

21 Sarkaria Commission was set up in June 1983 by the Central Government of India. The Sarkaria Commission's Charter was to examine the relationship and balance of power between State and Central Governments in the Country and suggest changes within the framework of Constitution of India. The Commission was so named as it was headed by Justice Rajinder Singh Sarkaria, a retired judge of the Supreme Court of India. The other two members of the Committee were Shri B. Sivaraman and Dr S.R. Sen.

Tensions were most acute over financial matters. Rajiv Gandhi further increased the control of the Centre over plan funds to be spent in the States by bringing majority of the programs under centrally sponsored schemes to include everything like drinking water and supply of oil seeds. The State Governments were slowly sidelined from all areas of development generating resentment among the latter. Such a tendency is found even today (Rural Health Mission, Sarva Shiksha Abhiyan etc.) and it shows lack of confidence in the States and discourages initiative from the States making them dependent on the Centre for basics. It does not augur well for progressive federalism. It is also an instance of the misuse of the grants under Article 275[22].

In *D.C. Wadhwa v State of Bihar* ,[23] the Court upheld the writ petitions challenging the constitutional validity of the practice of the Governor of Bihar of repeatedly promulgating the same ordinances without caring to get the Ordinances replaced by Acts of the legislature. To quote Justice Bhagwati, "*The power to promulgate an ordinance is essentially power to be used to meet an extraordinary situation and it cannot be allowed to be 'perverted to serve political ends*' "

To control unprincipled defections induced by allurements of office, money and pressure, the Tenth Schedule was added by the Constitution (52nd Amendment) Act, 1985. But since the desired goal could not be achieved, law was further strengthened by the Constitution (Ninety First Amendment) Act; 2003.It deleted the provision which did not treat mass shifting of loyalty by one-third as defection.[24]

With the economic liberalization in the 1990s, State leaders came to demand partnership in the federal policy making processes that concerned multilateral agreements with international organizations. This brought out into the open the economic and regional disparities making the same a matter of significant concern all the more for the federal Government. Hence, economic liberalization prompted a change in federal relations from Inter Governmental cooperation to inter jurisdictional competition among the States.

After the assassination of Rajiv Gandhi on May 21, 1991, there was serious concern as to whether India really was a viable entity and whether it could hold together in the face of fissiparous tendencies springing all over the Country.

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[22] *Supra note 8.*

[23] AIR 1987 SC 579.

[24] Anti Defection Law para 2 of the 10th schedule.

V

Federalism in the 1980s

In 1989, Congress was replaced by a Minority Government called the National Front led by V. P. Singh. This marked the beginning of multi party system in India. In its election manifesto, the National Front argued for a serious commitment to, what it termed, "true federalism" by reversing the over centralization brought about by the ruling party. A Government by consensus was evolved. Two meetings of National Development Council were held. One was held on June 16, 1989 to endorse the approach to the 8th Five Year Plan. The other meeting was held on October 9, 1989, at which the Government asked the members of the Planning Commission to make a presentation to the assembled Chief Ministers explaining the rationale for the allocations that had been made to each sector of the economy, and how the principal goals of the plan would be met.

In addition to revival of the National Development Council[25], the Inter State Council[26] was set up as an apostle of federal comity on a permanent basis. It was created under Article 263[27], a general Article under which any number of such bodies can be appointed to deal with various matters. Its genesis is Section 135 of Government of India Act, 1935.

The Council met on August 10, 1990 on its creation. Thereafter, the first meeting was held after a gap of 6 years on October 15th, 1996. Since then, it has met sporadically. In these meetings, it has taken view of all 247 recommendations of Sarkaria Commission, 65 of which have not been accepted by the Council, or by the administrative ministries of the departments concerned, while 179 recommendations have been implemented.Basically advisory and recommendatory, its main function is to inquire and advice upon Inter State disputes of non-legal nature. Hence it complements the Supreme Court's jurisdiction under Article 131[28].

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[25] The National Development Council (NDC) or the Rashtriya Vikas Parishad is the apex body for decision making and deliberations on development matters in India, presided over by the Prime Minister. It was set up on 6 August 1952 to strengthen and mobilize the effort and resources of the Nation in support of the Plan, to promote common economic policies in all vital spheres, and to ensure the balanced and rapid development of all parts of the Country.

[26] The Inter-State Council was established under Article 263 of the Constitution of India through a Presidential Order dated 28 May 1990.

[27] *Supra* note *8*.

[28] *Ibid.*

The Council is fully dominated by the executives of the two levels of Government. There is no representation from, or role for, the legislature in deciding the agenda and issues to be discussed. Furthermore, the meetings of the Council are held in camera and while the questions discussed by the Council are decided by consensus, the decision of the Prime Minister is final.

Constitutionality of a policy is determined only by Articles 245[29] and 246[30]. It does not make any difference if the matter is not taken to the Council. It is also to be noted that whereas Article 263[31] contemplates inquiry into, and advice upon, disputes between States, it does not bring within the scope of the Article disputes between the Union and a State.

The fact remains that in spite of the Council being a constitutional body and the Prime Minister being its Chairman, yet, the Council has been a non-factor in India's federal relations. It is neither an analytical unit that provides short term or long term strategy nor is it a public policy making institution. It has met sporadically according to the changing political scenario. Moreover, it has no decision making authority.

In *Dabur India Ltd v State of UP*,[32] the Supreme Court recommended that the Government should consider the feasibility of setting up a Council under Article 263[33] which would adjudicate and adjust the dues of the respective Governments. Chief Justice Sabyachi Mukherjee stated the if a dispute is under two different central legislations, and under one, the State authorities can realize and impose the taxes on finding certain basis, and under the other, the same transaction may be open to imposition by Central Government authorities on a particular view, in such a situation, how and when the refund should be made of duty in respect of a transaction to one of the authorities, the State or the Centre to be adjusted, should be a subject matter of settlement by the Council to be set up under Article 263[34].

VI

Federalism in 1990s

The National Front coalition Government of V.P. Singh fell. Chandrashekhar of Samajwadi Janta Party followed from 1990-91. And in the 1991 elections, P.

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29 *Supra note 8.*
30 *Ibid.*
31 *Ibid.*
32 1990 SCR (3) 294.
33 *Supra note 8.*
34 *Ibid.*

V. Narsimha Rao was elected. The return of Congress and the five years rule from 1991 to 1995 under one party signified a desire among the people for stability, and the fact that federalism can survive only if the Centre itself is strong and competent. A Centre that is formed of parties that are incoherent in their plan of action will be a weak centre that cannot sustain a healthy cooperative structure. Hence simply having a multi- party Centre is not a guarantee that the same would strengthen federalism or that it would be better than single party rule at the Centre.

Narsimha Rao followed an appeasing style of politics. He held all party meetings and used the National Integration Council to forge a consensus on communal issues and meetings of the Chief Ministers under the aegis of National Development Council (NDC) and Inter State Council to discuss specific thorny problems like urgent need to stop providing electricity virtually free of cost to agriculture. The National Development Council has immense untapped potential. Bringing the Chief Ministers together in national decision making will be extremely useful as it not only helps in strengthening cooperative federalism, but also makes the States understand the limitations and compulsions of the Centre as well as the limitations of other States.

In 1992, the *73rd and 74th Amendment Acts*[35] were passed making India the first statutorily defined three tier system of democracy. It was envisaged as a way to destroy paternalism of the Centre. A brainchild of Ramakrishna Hegde, it was first implemented in Karnataka in June 1987. This measure in many ways formed the core of the federalist, decentralized form of democracy.

In 1996, the BJP Coalition was formed that lasted only two weeks as its vision was flawed. It was followed by the United Front Government under Deve Gowda from 1996-97 and then IK Gujral from 1997-98 of the Janata Dal.

In the landmark Nine Judge Bench decision *S.R. Bommai v Union of India* ,[36] it was held that "satisfaction" of the President is not his personal whim or opinion but a legitimate inference drawn from the material placed before him, and the same is relevant for the Courts. The validity of the Proclamation under Article 356(1)[37] was judicially reviewable to the extent of examining whether it was issued on the basis of any material at all or whether the material was relevant or whether the Proclamation was issued in the mala fide exercise of the power. And that although Article 74(2)[38] bars judicial review so far as the

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35 73rd and 74th Amendment Act of 1992.
36 *Supra* note *4*.
37 *Supra* note *8*.
38 *Ibid.*

advice given by Ministers is concerned, it does not bar the scrutiny of the material on the basis of which advice was given. Quoting Justice Sidhwa in *Khaja Ahmed Tariq Rahim v Federation of Pakistan*,[39] "Unless a violation of a provision of the Constitution was so grave that the Court could come to no other conclusion but that it alone directly led to the breakdown of the functional working of the Government, it would not constitute a valid ground". Noting the observations in Sarkaria Commission Report, Article 356[40] provides the remedy when there has been actual breakdown of the constitutional machinery of the State. Hence, exercise of power under 356[41] must be limited to rectifying such a failure only. A wide literal construction of the Article will damage the fabric of the Constitution.

Inclusion of languages has been another mechanism of cooperative federalism. In 2003, Bodo, Dogri, Maithili and Santhali were included in the Eighth Schedule of the Constitution.[42] The inclusion allows privileges like simultaneous translation facilities in Parliamentary proceedings, allocation of Central Government funding for development of the language and its literature and is an effective tool to include the periphery into the mainstream.

The National Commission to Review the Working of the Constitution (NCRWC) submitted its report in two volumes to the Government on 31st March, 2002. It recommended that there was a need to institutionalize the consultation process between the Centre and the States. It considered Article 263[43] as being in tune with the spirit of cooperative federalism and suggested that the ISC Order, 1990 may clearly specify in 4(b) of the order the subjects that would form part of the consultation in the ISC. Article 139A[44] should be amended so as to provide that it can withdraw to itself cases even if they are pending in one Court where such questions as to legislative competence of Parliament or State Legislature are involved. Further, an Inter State Trade and Commerce Commission should be established.

VII

Current Trends in Federalism in India

The current trends emphasize cooperation and coordination, rather than demarcation of powers between different levels of Government. The basic theme today is interdependence.

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39 PLD 1992 Supreme Court 646.
40 *Supra* note 8.
41 *Ibid.*
42 Ninety Second Amendment Act 2003, of the Constitution of India.
43 *Supra* note 8.
44 *Ibid.*

BJP lost heavily in the elections of 2003 due to its "Shining India Campaign" resulting in victory of the Congress with support from outside of the Left. It was a testing period for the Central Government as it had to play the balancing act very carefully. Soon after the Government was formed, it faced the threat of withdrawal from the DMK for not getting plum posts. And it had to face the wrath of the Left over the Indo-US Nuclear Deal, though successfully, when it had to prove its majority on the floor of the House. In 2008, the Congress came to power without outside support.

On 31st August, 2005, the President set up a Commission of Inquiry called the Second Administrative Reforms Commission (ARC) to prepare a detailed blueprint for revamping the public administration system under the Chairmanship of Shri Veerappa Moily .

On 22nd September 2006, the Supreme Court of India delivered a historic judgment, *in Prakash Singh and Others v Union of India*,[45] laying down six practical directives to kick-start the police reform process. The most important directives of the Supreme Court are Directives 1 and 6 on setting up State Security Commissions and Police Complaints Authorities. The Manmohan Singh Government had set up a Police Act Drafting Committee (PADC) to draft a new Model Police Act, commonly known as the Soli Sorabjee Committee in 2005-06 . The Committee's work and its model Act also provides a sound legislative guide for State Governments to follow in forming their own Acts.

In *Rameshwar Prasad v Union of India* ,[46] Chief Justice Sabharwal held that, "Undisputedly, the Governor is charged with the duty to preserve, protect and defend the Constitution and the laws, and has a concomitant duty and obligation not to permit the 'canker' of political defections to tear into the vitals of the Indian democracy..... After elections, every genuine attempt is to be made which helps in installation of a popular Government, whichever be the political party".

On April 27, 2007, the Second Commission on Centre State Relations was set up with Chairperson Justice M. M. Punchhi , to look into the sea changes that have taken place in the polity and economy ever since the Sarkaria Commission looked into the issue of Centre-State relations two decades ago. Its report is due. The Commission has been criticized for non inclusion of the major points in the Centre State relations such as the needed increase in the share of Central taxes for the States, transfer of centrally sponsored schemes

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[45] *AIR* 1975 SC 1096.
[46] *AIR* 1965 Kerala 229.

in the State subjects to the States and the alleviation of the problem of debt burden on the State. There has been an intrusion into the jurisdiction of the States as items (j) and (k) of the terms of reference have been mentioned along with the idea of setting up of a Central law enforcing agency. These go against the basic issue viz. the law and order being a State subject.

Though the dominant party today effectively is the Bhartiye Janta Party alone, yet there is hardly any possibility of an Indira Gandhi like confrontationist federalism to take shape because cooperative federalism today is the result of a complex interlay of multiple factors. It is no longer the old 2-tier kind of set up. Rather it has become not just 3 tiered but also multi layered within the 3 tiers, along with the interplay of independent external players envisaging newer opportunities for shared action. All this has added to the beauty and strength of our federal structure.

VIII

Tasks For 21st Century Federalism

The new challenges facing 21st Century federalism have further necessitated the pre-existing need for cooperative federalism, thereby making its practice as a form of governance all the more indispensable. Technological advances have led to tremendous improvement in connectivity and accessibility, both, physical as well as electronic.

Environmental challenges of global nature like climate change do not recognize State frontiers. Pollution and conservation issues reflect the uncomfortable tension between decision making process of the Governments at the Centre-State and local levels. Public Trust Doctrine is a new doctrine of federalism evolved by the Supreme Court in *MC Mehta v Kamal Nath* [47]. It has established a direct link between the State and the public. To quote Justice Kuldip Singh, "The State is the trustee of all natural resources which are by nature meant for public use and enjoyment...and is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership". Disaster Management transcends inter-state boundaries.

Globalization has reinforced the need for concurrence between the geographical, climatic, environmental and technological diversities inter as well as intra states so that they may link with global processes for viable and sustainable development and growth. What is being experienced at the global level is also being felt at the local level. India is making strides in the global

[47] (1997) 1 SCC 388.

sphere and the local Governments that promote shared partnership in development have come to be noticed today. Hence, whenever development programs or any other interests of States in matters relating to IT or investment by way of export, trade, exchange of projects etc. are touched by international agreements, well conceived demands of the States should be met in order to promote truly cooperative, coordinative and multi dimensional Centre State relations. This requires mutual trust and confidence.

Since the World has become a global village, the Country's internal security and political problems are open to external influence verging on intervention. For instance, the United States Ambassador to India, Mulford, in 2006, overstepped his diplomatic role by writing directly to the Chief Minister of Assam offering assistance from the Federal Bureau of Investigation to investigate a bomb attack in the State. Hence, under the garb of protecting human rights and on the plea that minorities are being tortured, big powers can intervene militarily which is against India's interest.[48]

The States today have acquired sufficient political weight of their own through a pluralized party system enabling individual States to embark onto bilateral negotiations with the union bypassing the institutionalized bodies of collective policy framing that have proved to be ineffective, thus lending a negotiatory character to our federalism.

However, the same must be taken with a pinch of salt because power sharing by States at the Central level has not contributed towards reducing localism, parochialism and chauvinism of regionalists and sub-regional parties. Increase in bargaining capacity will serve to strengthen cooperative federalism only if the supposed drawbacks of centralism are mitigated through it.

The increasing voices of autonomy and separatism have vitiated the political and social fabric of the federal structure. States are increasingly harboring feelings of deprivation and alienation and have begun viewing all problems from a narrow parochial outlook. Moreover, their approach is becoming violent confrontationist.

The Indian Union has united its rich diversity of its humungous population serving as an example to the rest of the World. This is an asset to be built upon for the future. To override the fissiparous tendencies, only the legitimate grievances of the regions or States should be addressed as far as possible within the framework of the federal Constitution. More importantly, a strong sense of

[48] Available at http://editorialsamarth.blogspot.in/2010/12/editorial-171210.html,(Visited on 24.04.2015).

nationhood is necessary to maintain our territorial integrity and internal security, and this cannot be accomplished without cooperative federalism.

Terrorism, militancy, organised crimes, problem of internally displaced persons, refugees – all these require that the Country as a whole comes together and the institutional bodies under State Governments help the Centre by collectively making available the necessary information and resources.

The need to come together today is not only the consequence of the new challenges facing the nation but that the same will serve as an antidote to prevent such challenges from recurring in future. Cooperative federalism alone strengthens the nation from within by enabling it to withstand adversities and challenges, due to its inherent resilience and malleability.

VIII

Conclusion

The relation between the Centre, the States and the Local Tiers lies at the heart of India's sense of nationhood and is the pre requisite for India's progress. However, a strong political undercurrent runs through it. Every Centre-State and every Inter-State dispute is at its heart, a political dispute. This is the root cause of the problematic nature of Centre State relations. Such a dispute slowly ripens into an economic one. Bad politics leads to bad economics. Unless stagnation in the economic field and unbalanced regional development are not addressed, integration and solidarity in the federal set up will not be complete. Both Centre and State Governments must attend to the task of preserving our nationhood through constructive cooperative federalism which requires a great deal of commitment. The decision to divide Andhra Pradesh raises important questions about federalism and the nation's future. This is the first time in India that a State is sought to be divided without the consent of the State legislature, and without a negotiated settlement among stakeholders and regions, and in the face of public opposition.[49]India is a beautiful melting pot of diversity. The same needs to be valued and cherished. And there isn't a better way to do so than by cooperative federalism.

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[49] "A Challenge to Indian Federalism", an article published in *The Hindu*, October 28, 2013.

DOCTRINE OF REVERSE BURDEN OF PROOF WITH RESPECT TO CONSIDERATION U/S 138 OF NEGOTIABLE INSTRUMENT ACT: A CRITICAL ANALYSIS

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Abstract

Division Bench decision of the Supreme Court comprising of two Judges in Krishan Janardhan Bhatt Case[1] while interpreting the provision of Section 139 of the Negotiable Instrument Act 1881 pertaining to the law of presumptions with respect to "debt or liability" in cases of dishonor of cheques held that though a presumption is available to the favour of holder of the cheque that the same has been issued for "discharge of any debt or other liability"; the presumption is not available with respect to "existence of such debt". However in a recent larger bench decision comprising of three Judges in re Rangappa v Mohan[2], the Supreme Court propounded "the doctrine of Reverse Burden of Proof" when it observed that "sec 139 of the Act does indeed include the existence of a legally enforceable debt or liability also" and to that extent overruled the above referred observations of Krishna Janardhan Bhatt's Case.

The present author to the afore quoted larger Bench decision of the Supreme Court in Rangappa case is of the considered opinion that all those complaints that make a bald and mechanical averments to the effect that the cheque in question was issued in discharge of debt or liability, without however disclosing the nature of such debt, viz. that the cheque in question was issued against repayment of loan or sale of goods etc., such complaints deserve outright dismissal in limini, whereas in all other complaints the burden of rebuttal should straightaway be shifted on to the accused. After all, presumption of facts can be rebutted not in air but with respect to specific case of complaint.

I

Introduction

The first cardinal rule of evidence is that the burden of proof with respect to a fact will be on the one who contends so. In other words, the one who makes an averment shall alone be obliged to prove the said averment first and thereafter

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1 2008(1) crimes 227(SC)

2 AIR 2010 SC 1898.

the burden will shift on to the opposite party to rebut the said averment.

This rule is, however subject to an exception that is to say that by virtue of a special provision of law, the obligation of the first contenders of the averment shall be discharged of his obligation to prove the said averment. On the basis of a statutory presumption the contender shall not be obliged to prove his contention first, the same will be presumed to be primarily proved and the burden shall lie on the opposite party to prove.

It is this presumption that is envisaged under Section 118 and 139 of the Negotiable Instrument Act, 1881[3], which makes it a presumption that whenever a cheque is issued, the same is issued in discharge of an existing liability, thereby shifting the burden of proof on the opposite party, i.e. the drawer of cheque, to straightaway disprove in reverse that the cheque was not issued in discharge of an existing liability.This is what we call "doctrine of reverse burden proof."

However the difficulty does not end with the inculcation and articulation of the above stated doctrine of reverse burden of proof alone. Some minimal details are still required to be alleged and proved by the beneficiary of a dishonored cheque while lodging a complaint under Section 138 of NI, Act.This way some mentioned information would be available to the opposite party, i.e. the drawer of this cheque regarding the existence of debt or liability at the time of issuance of the impugned cheque so as to make it sensible for him to have a basis to discharge his "*reverse burden of proof.*" Thus, to put it in simple words, we seek an answer by virtue of this article as to whether it is sufficient for complainant under Section 138 of Negotiable Instrument Act to mechanically say that the cheque was issued for existing consideration without at all specifying any basis, nature and kind of such consideration making it almost impossible for the opposite party to discharge its reverse burden of proof.

If an accused is having some minimum details with respect to the alleged discharge of liability then alone the accused would be in some state to discharge his reverse burden of proof to the contrary. Otherwise the accused is asked to disprove the existence of debt or liability without there being sufficient minimum details mentioned in the complaint, the same would be an absurdity.

Now the question that arises for the consideration is that what are the presumptions which the Court must make under Section 139 of the Negotiable Instruments Act? In other words, what are the facts which the prosecution must prove beyond a reasonable doubt and what are the facts which the Court will statutorily presume to be correct under Section 139 of the Negotiable

[3] Negotiable Instrument Act, 1881 (hereinafter refered to as N.I. Act).

Instruments Act, unless the contrary is proved. Regarding the applicability of Sections 118 and 139 of the Act two possible views are there:

i. in favour of the prosecution;
ii. in favour of the accused.

(i) Pro-accused Postulates

As regards the interpretation which goes infavour of the accused, it can be said that this being the offence punishable with sentence of imprisonment, the interpretation which should be given must be the one which would not lay on the accused a very strict and impossible burden. The presumption under section 118 of the Negotiable Instruments Act would also not apply to other criminal trials.[4] On a plain reading of Section 139 of the Negotiable Instruments Act the only presumption which the Court can make is that the cheque was received for consideration. Even before this presumption is made, it must first be established that the cheque was of a nature specified in Section 138 of the Act. Therefore, the prosecution must first prove, before any presumption can arise that all the ingredients of Section 138 are fulfilled. Thus under this section it must be shown that:

1) that a cheque was drawn on a person;
2) it was on an account maintained by him with a banker;
3) it was for payment of any money to another person from out of that account;
4) it was in discharge, in whole or in part, of any debt or any otherliability;
5) it was returned unpaid because of the amount of money standing to the credit of that account being insufficient to honour the cheque or because it exceeded the amount arranged to be paid for from that account;
6) that the cheque has been presented within a period of six months from the date on which it was drawn or within the period of its validity, whichever is earlier;
7) that the payee or the holder in due course had made a demand for the payment of the said amount by notice in writing;
8) that within 15 days of the receipt of information regarding return of the cheque the drawer of the cheque failed to make the payment of amount to the payee.

It is only after the prosecution proves all the above ingredients under Section 138 the presumption under Section 139 will arise. This is clear from the use of

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[4] For this, reliance can be placed on (1921) Criminal Law Reports 54 as has been referred to in *Bratindranath Banerjee* v *Hitesn P.Dalal* IV (1993) CCR 2785 (Bom).

the words "*of the nature referred to in Section 138*" in Section 139. Thus only after those ingredients are proved that the presumption will arise that the cheque was received in discharge of the debt or any other liability.

(ii) Anti-accused Postulates

On the other hand, the interpretation which goes in favour of the prosecution is that the prosecution has to establish the following only:

(1) that the accused had given cheques;
(2) that they were presented and dishonoured for the reason of insufficiency of funds;
(3) that even after the receipt of the written notice, the accused failed to pay the amount within 15 days. There is no obligation to identify the debt or any other liability, much less to prove the same. The Court shall statutorily presume that the cheque was received in discharge of any debt or other liability.

As regards the onus of proof, the issuance of the cheque itself gives the presumption that there was the liability of the drawer of the cheque in favour of the payee and to controvert the same, it is for the drawer of the cheque to prove otherwise. When a cheque is issued in favour of the payee, whatever he alleges in his complaint about the dishonour of the cheque is presumed to be correct unless the contrary is proved by the accused. Therefore once it is admitted that accused issued cheques to the complainant then the burden is very heavy on him to prove that the cheques were not issued in connection with the transaction as alleged by the complainant.[5] There is no requirement that complainant specifically allege in the complaint that there was a subsisting liability. The burden to disprove the same will be on the drawer of cheque.[6] That there was no debt or liability is to be seen only at trial.[7] For the rebuttal of presumption of debt or liability, mere "*explanation would not do*", but proof would be required.[8]

II

Security and Consideration

A distinction is to be drawn between a cheque given as security which is not liable to be encashed in presenti, but on the happening of an event in future,

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[5] *Adapa Bhogi Raju* v *Ramayya* (S.G.) 1994 (2) Civil Court Cases 646 (AP): III (1994) CCR 1497: 1994 (3) RCR 366; *BanarasiDass* v *Mahinder Kumar* 1994 (l) RCR 220 (P&H)

[6] *M.M.TC. Ltd.* v *Medchll Chemicals & Pharma (P) Ltd,* 2001 IX AD SC 457

[7] *Nityanand* v *Jamuna Prakash* 2002 (1) Crimes 415 (Kar).

[8] *Sreelatha (Y.)* v *Mukandchand 2002 (2) Crimes 19 (Mad).*

whereas in another case, the liability is existing at the time of issuance of cheque. In view of definition of Section 2(1) (d) of the Contract Act, 1872, the consideration can be past, present or even future. Jural concept ofconsideration is in the sense that it may consist of some right, interest or profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken. Whereas the words used under Section 118 of the Act presumption is with regard to 'consideration', the same presumption under Section 139 of the Act is with regard to 'legally enforceable debt or liability'; and the latter is of much wider scope.[9]

The jural concept of consideration requires that something of value must be given, in past or in present or in future, and this benefit may pass on to the promisor or his nominee and some detriment to the promisee. In *ChidambaraIyer* v *RengaIyer*[10] and *Sonia Bhatia* v *State of UP,*[11] it was held that it means something 'valuable', which for one party is positive and for the other party is in negative. Thus, consideration is very wide in its amplitude, which is not restricted to monetary benefit alone.[12] Thus, mere use of the word 'security', will not oust the jurisdiction of the Court under Section 138 of the Act, if the cheque was issued at the time of taking of loan for its repayment. For the said purposes, complaint is required to be read as a whole.[13]

However, on the contrary, Supreme Court in *M.S. Narayana Menon* v *State of Kerala,*[14] held that when the cheque is issued only as a security, the same would not attract rigours of Section 138 of the Act for the want of existing consideration. In *Jyoti Build-Tech Pvt. Ltd.* v *Mideast Pipeline Products,*[15] the cheque in question was issued in advance which was adjustable to the final value of the work carried out, was held to be outside the scope of these provisions. The Court drew a distinction between two types of 'post dated cheques, namely, the one which is issued towards an existing liability, whereas the other one is issued in advance as a security towards the liability that may

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9 *K.S, Bakshi* v *State,* 1 (2008) CCR 34 (Del.), For contrary decisions, reference may be made to "Consideration - Illustrative Cases", iryia. However,, it may kindly be noted that the theory propounded by the court in this matter seems to be correct theory in the respectful submissions of the present authors. Followed by *Four Seasons Energy Ventures Pvt. Ltd* v *State of NC T of Delhi*, 2013 (3) Crimes 595 (Del.) (Short Notes): 2013 (2) RCR (Civil) 391: 2013 (2) RCR (Criminal) 393

10 AIR 1966 SC 193

11 AIR 1981 SC 1271

12 *Supra* note 9.

13 *Neeta Mukesh Jain* v *State of Maharashtra IV* (2010) CCR 54 (Bom.).

14 AIR 2006 (6) SCC 39. Also see *Exports India* v *State, 137 (2007) DLT 193; Balaji Sea Foods Exports (India) Ltd.* v *Mac Industries Ltd., II* (1999) CCR 424 (Mad.)

15 183 (2011) DLT 680 (Del.)

arise in future.

However, where it was doubtful as to whether it was a case of filling up of a blank cheque in terms of its 'amount' also as the amount of the cheque was more than a Crore of rupees, and admittedly it was alleged in the complaint that it was issued against the projected salary till superannuation of the complainant and also towards the projected future profits that the complainant might have earned in future, the court held that the case was not relating to existing debt or liability.[16] The present author agree with this view inasmuch as projected profits on the basis of conjectures and surmises cannot be termed as existing debt or liability for the purposes of this offence and appropriate remedy, if any, would be by way of a civil suit only.

In the opinion of the present author, the view taken by the Delhi High Court in *Bakshi's*[17] Case, seems to be more logical, both, in law and also in equity. Even otherwise, in the cheques issued towards security, on the happening of the contingency, one is bound to honour the commitment and the court should see the merits of the case during the trial. Cheque is a negotiable instrument, and for the sake of arguments, if such cheque may have changed its hands, then, how can the holder be expected to explain the debt or liability. The real test should be, as to whether the sum therein is filled at the time of handing over of such cheque or not. [Emphasis.] and in the opinion of the present author, it also would be relevant to see as to whether at the time of launching of prosecution and issuance of legal notice there was a debt or liability existing or not. It has also been held in some cases that the presumption of 'debt or liability' u/s 139 is much wider in its scope than the presumption of 'consideration' as provided for in Section 118 of the Act, and when the consideration can be past, present and futures, there is no question of restricting it to existing debt or liability alone. Phraseology of Section 138 of the Act nowhere requires that the debt should be existing in liquidated form at the time of issuance of the cheque itself.

Saying that consideration is not restricted to monetary benefit alone, but is of much wider amplitude, one illustration would be great importance. Restricting one's property till construction is a good consideration and the cheque given in the form of, so called, 'security', would on its dishonour be said to have been issued for good consideration.[18] Once signatures are admitted on the cheque, the only question would remain would be to see as to whether the presumption is rebutted by the accused or not.[19]

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[16] *IFK Technologies Ltd.* v *SasiBhusan Raju*, II (2013) BC 564: 2013 (2) DCR 230 (Del.)

[17] *Supra note* 9.

[18] *Ibid.*

[19] *Sadique Hussain* v *Shrishti Fabrics, III* (2013) BC 669 (Del.): 2013 (2) JCC (NI) 129.

In a similar case, where a contractor, admittedly issued a cheque as a security, on its dishonour, he was held not liable to be prosecuted for the offence u/s 138 of the Act in *Joseph Vilangadan* v *Phenomenal Health Care Services*.[20] This judgment also does not find accord with the view of the Delhi High Court Decision in *Bakshi's*[21] Case. The present author also is not in agreement with this Bombay High Court decision. The correct approach would have been to see on facts as to whether the presentation of the cheque was equitable on facts of the case or was only a means to blackmail the drawer, which could have been seen only during the trial.

In another case, where it was alleged that the amount of consideration of Rs. 1.4 lakhs was paid to the husband of the accused, and independent witness was also not examined who was present at such time, the cheque was held to have been issued without consideration and therefore it was held that summons ought not to have been issued.[22] I do not agree with the reasoning of the Court for the reason that the onus shouldhave been left to disprove the consideration on the accused, which could only have been discharged by the accused during the trial. In the same tune is the decision in another case where the prosecution under Section 138 of the Act has been quashed on the ground that the cheque was given 'either blank or as a post-dated' cheque towards security against loan taken by the drawer from a bank and such cheque cannot be said to have been issued for in discharge of debt or liability, and even otherwise the same is against a time barred debt.[23] I bound to record my disapproval from this dictum also, as I fail to understand as to how a 'post-dated cheque' would be outside the purview of the Act. Even if, it was a blank cheque, that can only be a defence, for which trial was necessary. I fail to understand as to how it will be against the time barred debt', when the installments were continued to be paid till lastly when the cheque in question was presented. If this is a case of inequality or blackmail type, the same of course can be appropriately dealt with by the trial Court, but during trial only. Even otherwise, Section 25(3) of the Contract Act, 1872 permits recovery of money on the basis of an agreement in writing with respect to a time barred debt. And in the opinion of the present author, 'cheque' is nothing less than an 'agreement in writing' and would rather stand on a better footing than an 'agreement in writing' simplicitor.

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[20] 2010 (3) Crimes 727 (Bom.).Where the cheque in question was dishonoured for the reason of 'stop payment' and also 'signatures differ' and the drawer stated that the cheque was issued only 'as a security, the matter was relegated by Orissa High Court in *Maheshwar Mishra* v *State of Orissa*, 2010 (4) Crimes 591 (Ori.) to the trial court to go in to trial.

[21] *Supra* Note 9.

[22] *GhanshyamKisan Ukirade* v *Sou. Suman Krishna Pawar*, 2010 (3) Crimes 751 (Bom.).

[23] *Ramakrishna Urban Co-operative Credit Society Ltd.* v *Rajendra Bhagchand Warma*, III (2010) CCR 191 (Bom.).

III

Debt or Liability- Reverse Burden of Proof on the Accused

In a suit to enforce a simple contract, the plaintiff has to aver in his pleading that it was made for good consideration and must substantiate it by evidence. But to this rule, the negotiable instruments are an exception. In a significant departure from the general rule applicable to contracts, Section 118 of the Act provides certain presumptions to be raised. This Section lays down some special rules of evidence relating to presumptions. The reason for these presumptions is that, negotiable instrument passes from hand to hand on endorsement and it would make trading very difficult and negotiability of the instrument impossible, unless certain presumptions are made. The presumption, therefore, is a matter of principle to facilitate negotiability as well as trade. Section 118 of the Act provides presumptions to be raised until the contrary is proved (i) as to consideration, (ii) as to date of instrument, (iii) as to time of acceptance, (iv) as to time of transfer, (v) as to order of endorsements, (vi) as to appropriate stamp and (vii) as to holder being a holder in due course. Section 139 of the Act provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability. Presumptions are devices by use of which the Courts are enabled and entitled to pronounce on an issue notwithstanding that there is no evidence or insufficient evidence. Under the Indian Evidence Act all presumptions must come under one or the other class of the three classes mentioned in the Act, namely, (1) "may presume" (rebuttable), (2) "shall presume" (rebuttable) and (3) "conclusive presumptions" (irrebuttable). The term `presumption' is used to designate an inference, affirmative or dis-affirmative of the existence of a fact, conveniently called the presumed fact" drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed or admitted or established by legal evidence to the satisfaction of the tribunal.

Presumption literally means "taking as true without examination or proof". Section 4 of the Evidence Act inter-alia defines the words `may presume' and `shall presume as follows: -

"(a) 'may presume' - Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved or may call for proof of it.

(b) 'shall presume' - Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved."

In the former case the Court has an option to raise the presumption or not, but in the latter case, the Court must necessarily raise the presumption. If in a case the Court has an option to raise the presumption and raises the presumption, the distinction between the two categories of presumptions ceases and the fact is presumed, unless and until it is disproved.[24]

Section 118 of the Act *inter alia* directs that it shall be presumed, until the contrary is proved, that every negotiable instrument was made or drawn for consideration. Section 139 of the Act stipulates that unless the contrary is proved, it shall be presumed, that the holder of the cheque received the cheque, for the discharge of, whole or part of any debt or liability. Applying the definition of the word 'proved' in Section 3 of the Evidence Act to the provisions of Sections 118 and 139 of the Act, it becomes evident that in a trial under Section 138 of the Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge of debt or liability once the execution of negotiable instrument is either proved or admitted. As soon as the complainant discharges the burden to prove that the instrument, say a note, was executed by the accused, the rules of presumptions under Sections 118 and 139 of the Act help him shift the burden on the accused. The presumptions will live, exist and survive and shall end only when the contrary is proved by the accused, that is, the cheque was not issued for consideration and in discharge of any debt or liability, A presumption is not in itself evidence, but only makes a prima facie case for a party for whose benefit it exists.[25]

The use of the phrase "*until the contrary is proved*" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act, makes it clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when the party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is

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[24] *Kumar Exports* v *Sharma Carpets* I (2009) CCR 100 (SC): (2009) 2 SCC 513: 2009(1) JCC (NI) 34

[25] *Ibid.*

expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the Court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the Court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, ie., the averments in the complaint, the case setout in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the Court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, thereafter, the presumptions under Sections 118 and 139 of the Act will not again come to the complainant's rescue.[26]

However in *Krishna Janardhan Bhat* v *Dattatraya G Hegde,*[27] the Division Bench of the Apex Court held that initial burden of proof is required to be discharged by the complainant before shifting the onus of disproof on the accused with respect to the fact as to whether the cheque in question was issued towards discharge of debt or liability or not. Thus in the above judgment, a distinction between two connotations was carved out by the Division Bench comprising of two judges of the Apex Court, namely, firstly, "existence of a legally recoverable debt" and secondly, "cheque is issued in discharge of any debt or liability". Though the latter one is a subject matter of presumptions

[26] *Ibid.*

[27] 2008 (1) Crimes 227 (SC): I (20085) CCR 199 (SC)

under Section 139 of the Act, no such presumption is available for the former. [Emphasis.]. Support on this proposition may also be taken from another basic judgement of the Supreme Court in *Hiten P. Dalal* v *Bratindrandth Banerjee*.[28] Thus, it was held that initial burden to allege and prove the existence of debt or liability shall be on the prosecution and once that burden is discharged by the complainant, the burden shall shift on to the accused to disprove.

To quote in extensor from *Krishna Janardhan Bhat*[29] case:

"The proviso appended to the said Section provides for compliance with legal requirements before a complaint petition can be acted upon by a Court of law. Section 139 of the Act merely raises a presumption in regard to the second aspect of the matter. Existence of legally recoverable debt is not a matter of presumption under Section 139 of the Act. It merely raises a presumption in favour of a holder of the cheque that the same has been issued for discharge of any debt or other liability.

Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of the accused is preponderance of probabilities'. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which he relies."[Emphasis supplied].

In a recent article, "The Presumption of Innocence and Reverse Burden: A Balancing Duty"[30]

"In determining whether a reverse burden is compatible with the presumption of innocence regard should also be had to the pragmatics of proof. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden? But Courts will not allow these pragmatic considerations to override the legitimate rights of the defendant. Pragmatism will have greater sway where the reverse burden would not pose the risk of great injustice where the offence is not too serious or the reverse burden only concerns a matter incidental to guilt. And greater weight will be given to prosecutorial efficiency in the regulatory environment.

Therefore the rebuttal does not have to be conclusively established but

[28] (2001) 6 SCC 16: AIR 2001 SC 3897
[29] *Supra* note 27.
[30] (2007) C.I.J. (March Part) 142

such evidence must be adduced before the Court in support of the defence that the Court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the prudent man." [Emphasis supplied]

Thus, emphasis for the quotation from the above two judgments would make special sense when the underlined words are read carefully from the judgment in *KrishanaJanardhan Bhat*[31] case.

In these cases, therefore, it has been held that the rebuttal does not have to be conclusively established but such evidence must be adduced before the Court in support of the defence that the Court must either believe the defense to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the '*prudent man*'.[32] Standard of proof for the discharge of such burden by the accused being only based on 'preponderance of probabilities', and also in view of the fact that when two views are possible, the one which favours the accused is to be adopted, it was held by the Supreme Court that the acquittal would be proper.[33] It is not necessary for the accused to discharge his burden of rebuttal only by way of direct evidence, and therefore, for such purpose, inference may also be drawn from the circumstantial evidence on record.[34] When the defense is that the payment was made by the accused, without however, any documentary support, burden of disproof cannot be said to have been discharged by the accused,[35] or when no reply was given to the notice and when only bald averment was made to have made the payment without any further evidence, the accused cannot be allowed to escape.[36] Thus, once execution of a promissory note is admitted, the presumption under section 118(a) arise that it is supported by a consideration. Such a presumptionis rebuttable. The accused can prove the non-existence of consideration by raising a probable defense.[37] Thus, though the accused is not expected to disprove the debt or liability beyond reasonable doubt and preponderance of probabilities alone would

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31 *Supra* note 27.

32 *M.S. Narayana Menon* v *State of Kerala* (2006) 6 SCC 39: 2006 (2) JCC (NI) |98 (SC); *S.K.(Jain* v *Tom Verghese*, 2007 (4) Civil Court Cases 690 (SC); *Hiten P. Dayal* v *Brathindranath Banerjee* (2001) 6 SCC 16: 2001 (2) JCC 51; *Kumar Exports* v *Sharma Carpets*, (2009) 2 SCC 513; *Investor Plaza* v *Vijay Sachdeva*, 2012 (I) DCR 393: 18| (2011) DLT 675

33 *K. Prakashan* v *P.K. Surenderan*, 2007 (4) Crimes 217 (SC)

34 *Rev. Mother Markutty* v *Reni C. Kanaram*, (201 2) IV CCR 370 (SC)-*The Maharashtra State Seeds Corporation Ltd* v *Nagrao Raghunath Jibhkate*, 2013 (2) Crimes 32 (Bom.); *Vinay Parulekar* v *Pramod Meshram*, 2009 (l) DCR 327 (Bom.).

35 S.K. *Jain* v *Vijay Kalra* 2014 (2) JCC (NI) 54; *Sneh Jain* v *Vijay Kalra* 2014 (2) JCC (NI) 54

36 *Yavatmal District Mahesh Urban Credit Co-op. Society Ltd.* v *Narayanrao Ukandrao Paikrao*, 2011 (4) Crimes 182 (Bom.)

37 *Shobha* v *Gajanan*, 2013(1) Crimes 497 (Bom.)

be sufficient for the accused to discharge his reverse burden, bare denial of debt or liability would not be sufficient.[38] If the accused is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the complainant himself.[39] Saying that the signature of the accused on the cheque in question was forged without at all adducing any evidence further, would not absolve him from liability[40]Admission of signatures on a blank cheque is admission of 'execution of a cheque' to attract the presumptions.[41] When the defense is of 'cheque stolen' without there 'being issued any stop payment advise to the banker and police complaint, reverse burden cannot shift back to the complainant.[42] The defense has to be specific, otherwise conviction is inevitable.[43] Merely because stop payment advise was issued by the drawer would not tantamount to discharge of reverse burden by the accused, something more is required.[44] When the complainant stated that he had lent the money by cheque, non-production of pass-book by him would betaken as complainant failed to have discharged his reverse burden[45]. Thus, bare denial of liability by the accused without anything further is not sufficient to absolve him of his liability under the said provisions.[46]

In nutshell, in view of the recent larger Bench decision in *Rangappa* case[47] there is a presumption for both, namely, that the there existed liability at the time of issuance of cheque and also to the effect that the cheque was issued in discharge of such debt or liability. Thus, in view of this dictum, initial reverse burden shall be on the accused to prove that there was no debt or liability at least by preponderance of probabilities' whereas once this burden is discharged by the accused, then the onus will shift back on to the complainant to prove debt or liability 'beyond reasonable doubt'.[48]

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[38] *Mohammad Murtuza Mohammad Yusuf* v *GulamNabi Abdul Rehman*, 2011 (4) Crimes 362 (Bom.).

[39] *RegiIsac* v *Philomina Pious*, 2012 (2) DCR 766 (DB)(Ker.)

[40] *Barnard Gracias* v *TrinidadeD'Silva*, I (2009) CCR 436 (Bom.) *P.V. Constructions* v *K.J. Augusty*, 2007 Crl. L.J. 154 (Bom.)

[41] *Joseph* v *Gladis Sari*, 1V (201 1) CCR 326 (Ker.). The facts of the case were that the amount was filled by the drawer himself in this view of the matter, in the in the opinion of the present authors, when the amo unt is filled by the drawer himself; such cheque should not be termed as 'blank cheque' to oust jurisdiction under section 138 of the Act.

[42] *Ashok Kumar* v *Gulshan Kumar* 2010 (3) Crimes 111 (Del.).

[43] *Adarsh Gramin Sahakari Pat Sanstha Maryadit* v *Shri Dattu Ramdasji Paithankar*, 2010 (1) Crimes 714 (Bom.)

[44] *L.P. Electronics Pvt. Ltd.* v *Tirupathi Electro Marketing Pvt. Ltd.*, III (2010) CCR 134 (Ori.)

[45] *K. Narayan Nayak* v *M. Shiv Arama Shetty*, IV (2009) CCR 151 (Kar.).

[46] *Jay Prakash Singh* v *Rashmi Aggarwal*, 2013 (3) DCR 164 (Del.).

[47] *Supra* note 2.

[48] *Enpee Earthmovers* v *Resources International*, III (2013) BC 616 (Bom.) 2013 (1) Bom.C.R.(Cri.)602: 2013 (1) DCR 526.

The judgment in *Krishna Janardhan Bhat,*[49] case has now been overruled by a three Judges' Apex Court Decision in *Rangappa* v *Mohan,*[50] where though the basic philosophy carved out in the above judgment has been approved, but not the part that says that initial burden shall lay on the prosecution to prove 'existence of liability' to the favour of the complainant. To quote from *Rangappa*:

"In light of these extracts, we are in agreement with the respondent-claimant that the presumption mandated by Section 139 of the Act does indeed include the "existence of a legally enforceable debt or liability; To that extent, the impugned observations in Krishna Janardhan Bhat may not be correct. [Emphasis supplied by author.] However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstances therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant."

Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard of proof, In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to

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[49] *Supra* note 27.

[50] 2010 (3) Crimes 40 (SC): IV (2010) SLT 56: II (2010) DLT (Crl.) 699 (SC) (2010): II (2010) CCR 433 (SC): AIR 2010 SC 1898; Also see *M. Arun Ahluwalia* v *Arun Oreroz*, 2011 VI AD (Delhi) 176 : 182 (2011) DLT 39: 2012 (1) DCR 445 (del.)

raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/ her own.[51]

Delhi High Court in *Sukhdata Chits Pvt. Ltd.* v*Rajender Prasad Gupta*,[52] though without referring to Rangappa case, but adopted the very same ration which placing reliance upon K.N. *Beenav* v *Mniyappan*,[53] and *Shailesh Kumar Aggarwal* v *State of UP*,[54] held that under Section 139 of the Act the Court has to presume in a complaint under Section 138 of the Act that the cheque has been issued for a debt or liability. Presumption in favour of the complainant that the cheque issued towards the discharge of the debt or liability and it is for prove to the contrary or to rebut this presumption. This can be rebutted by the accused only by leading evidence during trial. Similarly, simply saying that the cheque was issued blank without disclosing as to why such cheque was so issued in blank and without there being any proof in support thereof, would make the accused liable for the offence for the reasons of presumptions available u/s 139 of the Act on the basis of ratio in *Rangappa*[55] case. Thus, when issuance of cheque was admitted, it will be presumed that there was 'existence of debt or liability'.[56] Presumption under Section 118 and 139 of the Act, therefore, can be drawn only when the execution of the cheque was admitted or proved.[57] Thus, when the complainant admitted to be dependant on the earnings of his son, and the defense casted a dent in the prosecution theory that the cheque was issued towards repayment of loan, complaint was liable to fail. Complainant in her cross examination stated that she got the amount from her sister's son and that sister's son was not examined, was held sufficient to create doubt in the prosecution case.[58]

IV

Conclusion

In view of the present author, the technical interpretation should be avoided to incorporate and read the intention of the Legislature in the provision sought

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[51] The above view of *Rangappa* case has been accepted in *C. Keshavamurthy* v *H.K. Abdul Zabbar*, 2013 (4) Crimes 393 (SC): IV (2013) BC 183 (SC): III (2013) CCR 540 (SC): *Krishna P. Morajkar* v *Joe Ferrao and Anr.*, 2014(1) Crimes 600 (Bom.): *Krishna P. Morajkar* v *Joe Ferrao* 2014 (1) Crimes 600 (Bom.)

[52] 187 (2012) DLT 229 (Del.)

[53] VI (2001) SLT 387: IV (2001) CCR 196 (SC)

[54] 2000 Crl. L.J. 2921 (All): I (2001) BC 531

[55] *Supra* note 2.

[56] *Santosh Mittal* v *SudhaDayal*, 2014 (4) JCC (NI) 201 (Del.)

[57] 2010 (3) Crimes 870 (Ker.).

[58] *Rosa Maria Fesrnandes* v *Nauso N. Kepkar*, 2011 (1) Crimes 479 (Bom.).

to be interpreted. Bald averments in the complaint without any minimal details with respect to details of consideration cannot, in my view, be allowed to prosecute the accused under Section 138 of the Negotiable Instruments Act, 1881. For availing the benefit of presumptions inculcated under Section 139 of the Act, the complainant need to mention minimal material particulars on the basis of which the cheque in question was issued or with respect to the nature of 'debt or liability', because seeking repayment by means of launching proceedings under Section 138 of the Act with respect to because unaccounted money' is not warranted.[59] No doubt, every amount of loan transaction may not be reflected in Income Tax Returns but bare averment without sufficient minimum details with respect to the nature of transaction cannot be encouraged.[60] Even otherwise, if the case of the complainant is not specific, how the presumption with respect to debt or liability shall be rebutted by the accused! Thus, if no details are averred or proved by the complainant as to the nature of the debt in lieu of which the cheque was issued, how the accused shall be expected to rebut presumption. Presumptions of facts can be rebutted, not in air, but with respect to specific case of the complainant. If the facts pertaining to debt or liability are not specifically averred in the complaint or the affidavit saying, the accused is having the right to rebuttal of presumption, would be futile. [Emphasis.]. There are umpteen number of cases where while exercising powers under Section 482 of the Code of Criminal Procedure, 1973 have been used for quashing of summoning orders on the ground that specific details are not prescribed pertaining to debt or liability.[61]

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[59] *Sanjay Mishra* v *Kanishka Kapoor*, 2009 (2) DCR 244 (Bom.).

[60] *Ibid.*

[61] For Example, see *Vijay* v *Laxman*, 2013 V AD SC 243; (2010) 3 SCC 86: 2013 (2) JCC 103: 2013 (1) DCR 625; *John K. Abraham* v *Simon C. Abraham*, 2014 (1) JCC (NI) 31; *Shriniwas Ramdas Siwerwat* v *Shantaram PandurangDeotale. 2011 (3) Crimes 158 (Bom.).*

CENTRAL INFORMATION COMMISSION- A MEANS TO ADMINISTRATION OF JUSTICE IN INDIA

*Varun Chhachhar**

Abstract

The Right to Information (RTI) Act, 2005 is designed to set up a practical regime for citizens to access information available with public authorities, in order to promote transparency and accountability in their working. The Act provides for the constitution of the Central Information Commission (CIC) to be responsible for the implementation of the Act, exercising powers conferred on it under Section 18 of the Act. The CIC, under this Section, consists of one Chief Information Commissioner, who will head the Commission, and such number of Central Information Commissioners, as may be deemed necessary, but not exceeding ten. Central Information Commission is such a statutory body which creates a system by which access to justice becomes accessible to people of this country. Access to justice is pre-requisite to administration of justice; hence Central Information Commission is a means to attain administration of justice in India.

I.

Introduction

It is a well-known that India is the largest democracy in the world having a population which equals to the aggregate population of the next five democracies, including United States and Brazil.[1] Much credit goes to founding fathers of the Indian Constitution who introduced a democratic model of governance for independent India, which they considered to be most suited to a big country like ours with diversity of people in terms of race, religion, language, culture heritage, regional imbalances etc.

The first two decades of the post-Indian independence era witnessed relatively clean, smooth and foresighted governance, mainly because of the fact that those who were at the helm of the government were the top leaders and the persons who had actively participated in the Indian freedom movement and sacrificed their lives for the cause of the nations. They were genuinely concerned with the welfare of the people and upliftment of the downtrodden and margined sections of the society. The socio-economic, industrial and

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[1] It is biggest than the population of U.S, Indonesia, Brazil, Russia, and Bangladesh put together, which adds upto 74.9 Crores.

agricultural development during 1950's and 1960's and the socio-welfare legislations that evolved during this era amply testify this trend in the realm of the governance of the country.

The path set by the framers of the Indian Constitution and followed by their illustrious successors such as Dr. Ambedkar, Moraraji Desai, Lal Bahadur Shastri and Dr. Zakir Hussain to name a few, gradually started drowning in cynicism and hopelessness which touched its climax during the Emergency period from 25 June 1975 to 21 March, 1979 under the Late Prime Minister Smt. Indira Gandhi's regime.[2] Gradually, political maneuvering of power, corrupt practices, use of muscleman, violence and criminalization of politics threw the ideals of democracy to the winds and people participation remain utopian to the society in the absence of fair and transparent election process. The concentration of political and administrative power in the management of the country's economic and social resources led to wide spread corruption jeopardizing the universally acknowledged principle of good governance namely democracy, liberty and rule of law. Democracy in turn requires Accountability, and transparency through devolution of information and effective participation citizens in decision making. The ideals of democracy and of political participation remain utopian to the society in the absence of fair, transparent and regular elections. The voters have the elementary right to know the full details of the candidates who represents them in the Parliament or Assemblies, as the case may be. The right know about the candidate is natural right flowing from the concept of democracy and is an integral part of Article 19(1) (a) of the Constitution of India. The candidate must ensure that they provide maximum information about themselves, on the basis of which the electorate may select worthy and public spirited persons representing them in the governance of the country.[3]

While taking over the reign of the Union Government of India, Hon'ble Prime Minster Shri Narender Modi on 27 May, 2014 addressing the nation observed that it is time to move from politics to perform and therefore, it is necessary to break barriers within the system. The Ministries of the Union Government should send a message of clarity, transparency and accountability in the system of governance. He exhorted bureaucrats to work with vision and follow seven Cs-commitment, compassion, confidence, communication, competitiveness, consistency and creativity as key principles to prosperity and innovation in the governance of the country. The need of the time is to move

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[2] All fundamental Rights of the citizens were suspended. See *ADM Jabalpur v. Shrikant Shukla* AIR 1976 SC 1207.

[3] *Resurgence India v. Election Commission of India*, 2013 (11) SCALE 348.

beyond officialdom and be a part of movement for nation building.[4] This truly reflects on the commitment of the new Government to transparency and good governance.

The Right to Information law which was implemented in India nine years ago remains a potent weapon to fight opacity in public offices and politicians continue to fear its unwarranted brake on their freedom of arbitrary decisions or actions. Central Information Commission time and again played an important role in realizing the dream of right to know through its Judgments. Let us understand the role and position of Central Information Commission as tool of administration of justice in India.

II

Central Information Commission

The Central Information Commission (CIC) is responsible for general supervision, direction and management of the Central Information Commission.[5] There shall be Central Information Commission.[6] There shall be a Chief Information Commissioner and 10 members as Information Commissioner's in Central Information Commission.[7] The Chief Information Commissioner & other Information Commissioner's shall be appointed by the President of India.[8] The Chief Information Commissioner or an Information Commissioner shall not be a Member of Parliament or Member of the Legislature of any State or Union territory, as the case may be, or hold any other office of profit or connected with any political party or carrying on any business or pursing any profession.[9] The Chief Information Commissioner shall hold office for a term of five years from the date on which he enters upon his office and shall not be eligible for reappointment, Provided that no Chief Information Commissioner shall hold office as such after he has attained the age of sixty-five years.[10] The Chief Information Commissioner or an Information Commissioner may, at any time, by writing under his hand addressed to the President, resign from his office, Provided that the Chief Information Commissioner or an Information Commissioner may be removed in the manner specified under Section 14.[11]

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[4] '*Sampark*', *Samanvaya and samvad* were the essential attribute of good governance. Times of India (Delhi) 2 June, 2014.

[5] *The Right to Information Act 2005*, Section 12 (4).

[6] *Ibid*, Section 12(1).

[7] *Ibid*, Section 12(2).

[8] *Ibid*, Section 12(3).

[9] *Ibid*, Section 12(6).

[10] *Ibid*, Section 13 (1).

[11] *Ibid*, Section 13(4).

The Chief Information Commissioner or any Information Commissioner shall be removed from his office only by order of the President on the ground of proved misbehavior or incapacity after the Supreme Court, on a reference made to it by the President, has, on inquiry, reported that the Chief Information Commissioner or any Information Commissioner, as the case may be sought on such ground be removed.[12]

The President may by order remove from office the Chief Information Commissioner or any Information Commissioner if the Chief Information Commissioner or an Information Commissioner, as the case may be, —

(a) is adjudged an insolvent; or
(b) has been convicted of an offence which, in the opinion of the President, involves moral turpitude; or
(c) engages during his term of office in any paid employment outside the duties of his office; or
(d) is, in the opinion of the President, unfit to continue in office by reason of infirmity of mind or body; or
(e) has acquired such financial or other interest as is likely to affect prejudicially his functions as the Chief Information Commissioner or an Information Commissioner.[13]

There shall be a State Information Commission.[14] The State Chief Information Commissioner and Other State Information Commissioner shall be appointed by the Governor of the State.[15] The State Chief Information Commissioner and the State Information Commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance.[16] The State Chief Information Commissioner or a State Information Commissioner shall not be a Member of Parliament or Member of the Legislature of any State or Union territory, as the case may be, or hold any other office of profit connected with any political party or carrying on any business or pursing any profession.[17] Every State Information Commissioner shall hold office for a term of five years from the date on which he enters upon his office or till he attains the age of sixty-five years, whichever is earlier, and shall not be eligible for reappointment as such State Information Commissioner, provided that every

[12] *Supra note* 6, Section 14(1)
[13] *Ibid*, Section 14(3).
[14] *Ibid*, Section 15 (1).
[15] *Ibid*, Section 15(3).
[16] *Ibid*, Section 15 (5).
[17] *Ibid*, Section 15 (6).

State Information Commissioner shall, on vacating his office under this sub-section, be eligible for appointment as the State Chief Information Commissioner in the manner specified in Sub-Section (3) of Section 15.[18]

The State Chief Information Commissioner or a State Information Commissioner may, at any time, by writing under his hand addressed to the Governor, resign from his office, provided that the State Chief Information Commissioner or a State Information Commissioner may be removed in the manner specified under Section 17.[19] The State Chief Information Commissioner or a State Information Commissioner shall be removed from his office only by order of the Governor on the ground of proved misbehaviour or incapacity after the Supreme Court, on a reference made to it by the Governor, has on inquiry, reported that the State Chief information Commissioner or a State Information Commissioner, as the case may be, ought on such ground be removed.[20]

III

Powers and Function of Information Commissions, Appeal and Penalty

It shall be the duty of the Central Information Commission or State Information Commission as the case may be, to receive and inquire into a complaint from any person, Who has been unable to submit a request to a Central Public Information Officer, or State Public Information Officer, as the case may be, either by reason that no such officer has been appointed under this Act, or because the Central Assistant Public Information Officer or State Assistant Public Information Officer, as the case may be, has refused to accept his or her application for information or appeal under this Act for forwarding the same to the Central Public Information Officer or State Public Information Officer or Senior Officer specified in Sub-Section (1) of Section 19 or the Central Information Commission or the State Information Commission.[21] The Central Information Commission and State Information Commission are vested with powers of Civil Court under Code of Civil Procedure, 1908.[22] For example, It is summoning and enforcing the attendance of persons and compel them to give oral or written evidence on oath and to produce the documents or things, requiring the discovery and inspection of documents, receiving evidence on affidavit, requisitioning any public record or copies thereof from any Court or office, issuing summons for examination of witnesses or documents.

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[18] *Supra note* 6, Section 16(2)
[19] *Ibid*, Section 16 (4).
[20] *Ibid*, Section 17 (3).
[21] *Ibid*, Section 18(1) (a).
[22] *Ibid*, Section 18(3).

A person, if does not receive information from the Central Public Information Officer or State Public Information Officer, as the case may be, may within thirty days from the expiry of such period or from the receipt of such a decision prefer an appeal to such officer, who is senior in rank to the Central Public Information Officer or State Public Information Officer.[23] A second appeal against the decision under sub-section (1) shall lie within ninety days from the date on which the decision should have been made or was actually received, with the Central Information Commission or the State Information Commission.[24] The decision of the Central Information Commission or State Information Commission, as the case may be, shall be binding.[25]

Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time specified under Sub-Section (1) of Section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty-five thousand rupees.[26]

Where the Central information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause and persistently, failed to receive an application for information or has not furnished information within the time specified under Sub-Section (1) of Section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall recommend for disciplinary action against the Central Public Information Officer or the State Public Information Officer, as the case may be, under the service rules, applicable to him.[27]

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[23] *Supra note* 6, Section 19(1)
[24] *Ibid*, Section 19 (3).
[25] *Ibid*, Section 19 (7).
[26] *Ibid*, Section 20(1).
[27] *Ibid*, Section 20(2).

IV

Administration of Justice by Central Information Commission:

Concern of Central Information Commission on Delay in Supplying Information

In *Shri Amit Ghosh v. Department of Pension & Pensioners Welfare (DoP & PW), New Delhi*,[28] a perusal of the comments submitted by both the CPIO and Appellate Authority, it is apparent that there is a comprehensive delay in responding to the request of the complainant. The Commission observed default in registering the application received under the RTI Act on the part of the CPIO, Ms. Geetha Nair, Under Secretary, DOP & PW. The Commission views this seriously. Nevertheless there is a reasonable cause for the delay resulting from an office lapse, and in the light of the implied acquiesce of complainant detailed in the 3 paragraph below, no penalty will lie. However, as assured by the CPIO and the appellate Authority, the Commission directed DOP&PW, to exercise greater care in processing such cases in future. On the other hand, the complainant has not filed any rebuttal to the plea taken by the CPIO and appellate authority, which may be presumed as an indication of the satisfaction. In light of the above nothing remains for this Commission to decide in the present case, which is hereby closed.

(i) Remand of Complaint by Central Information Commission to First Appellate Authority

In *Mr. Suresh Kumar v. Public Information Officer, Assistant Commission, Municipal Corporation of Delhi, Deptt. Of Education , West Zone, School Building,, Vishal Enclave,*[29] the Complainant had filed an application had filed an application with the PIO on 12-10-2009 asking for certain information .He received a reply from the PIO on 27-10-2009, which he found unsatisfactory. The Complainant has therefore filed a complaint with the commission under Section 18 of the RTI Act, 2005. The Complainant has not used the alternate and efficacious remedy of First Appeal available under Section 19(1) of the RTI Act. Consequently, the First Appellate Authority has not had the chance to review the PIO's decision as envisaged under RTI Act 2005. Therefore, the matter is remanded to the First Appellate Authority with a direction to decide the matter in accordance with the provision of the RTI Act, after giving all concerned parties an opportunity to be heard. The Complaint is disposed of. Notice of this decision be given free of cost to the parties.

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[28] CIC/WB/C/2009/000133 Dated March 31, 2010.

[29] Complaint No. CIC/SG/C/2010/000475/7500 Decided on 19 April, 2010.

(ii) Non Furnishing of Information by PIO

In *Mr. Dhruv K. Sharma v. Mr. S.P.Sharma PIO & Assistant Director, Vigilance Department, Municipal Corporation of Delhi,*[30] the appellate asked two questions with respect to the action taken report of unauthorized construction on plot bearing No. 1598, Madras Road, K. Gate Delhi-110006. The Commission directed the Director (Vigilance) to enquire into the matter and send a report identifying the officer responsible for the delay in replying the RTI application before 30 September, 2011.

As per the provisions of Sections 20(1) of the RTI Act 2005, the Commission finds this a case for levying penalty on Mr. B.S.Yadav, EE (BII) & Deemed PIO. Since the delay in providing the correct information has been over 100 days, the Commission is passing an order penalizing Mr. B.S.Yadav 25000 from Commissioner, Municipal Corporation of Delhi is directed to recover the amount of Rs. 25000/- from the salary of Mr. B.S.Yadav and remit the same by Demand Draft or Banker's Cheque in the name of Pay & Account Officer, CAT, Payable at New Delhi and send the same to Join Registrar and Deputy Secretary of the Central Information Commission. The amount may be deducted at the rate of 5000 per month from the salary of Mr. B.S.Yadav and remitted by the 10th of every month stating from October 2011. The amount of 25000/- will be remitted by 10th February 2012.Any information in compliance of this order will be provided free of cost as per section 7(6) of the RTI Act.

(iii) Non-Disclosure of Information by High Court CPIO

In *Sh. B Bharathi v. Public Information Officer, Madras High Court*[31], during the hearing, the complainant submitted that the CPIO of the Madras High Court had systematically ignored his RTI requests and never provided any information in time. Therefore, he demanded that action should be taken against the CPIO concerned and appropriate penalty imposed. On the other hand, the advocate appearing for the CPIO submitted that the complaints filed by the complainant should not be entertained at all as he had not approached the Appellate Authority first. According to him, the complainant should have filed appeals before the Appellate Authority of the Madras High Court before choosing to complain to the CIC. He informed us that the CPIO had indeed responded to the complainant in most of these cases although after several months of receiving the RTI application. We have carefully considered the contentions of both the sides. We do not agree with the contention of the respondent in this case. Section 18(1) (c) of the Right to Information (RTI) Act mandates that the CIC may

[30] Appeal No. CIC/SG/A/2011/001176.

[31] File No.CIC/SM/C/2013/000075 to 82 (Eight Cases) dated 05.07.2013.

receive and inquire into a complaint from any person who has not been given a response to a request for information or access to information within the time limits specified under this Act. This clearly implies that if any citizen does not get any response or information from the CPIO concerned within the time limit of 30 days from the date his application reaches the CPIO, he can complain to the CIC and, in that case, it would be the duty of the CIC to enquire into the complaint. As far as the desired information is concerned, we do not intend to give any direction to the CPIO to disclose it in terms of the decision of the Supreme Court in the *CIC v. State of Manipur*[32] case in which it held that while enquiring into a complaint under Section 18 of the RTI Act, the CIC or the SIC, as the case may be, could only enquire into the alleged failure of the CPIO in not giving information and impose penalty, if necessary, but could not direct the disclosure of any information.

(iv) Whether Political Parties comes under the purview of RTI Act 2005

In *Shri Subhash Chandra Aggarwal v. Indian National Congress/ All India Congress Committee (AICC), Bhartiya Janata Party (BJP), Communist Party of India (Marxist) (CPM), Communist Party of India (CPI), Nationalist Congress Party (NCP), Bahujan Samaj Party (BSP),*[33] the petitioner contended that all Six Political Parties should disclose their Accounts and Finance as they are Public Authority under RTI Act 2005.In Reply all Six Political Parties contented that they are not Public Authority and hence do not come under RTI Act. More importantly, the complainant has contended that Political Parties have constitutional and statutory status. It is his contention that incorporation of Articles 102(2) and 191(2) through the 42nd Amendment and the 10th Schedule to the Constitution has given constitutional status to the Political Parties. According to him, it is a fallacy to say that any individual can form a political party. A body or entity does not become a political party in the legal sense until it is registered by the Election Commission of India under Section 29A of the Representation of the People Act, 1951, and this registration lends it the colour of Public Authority.

Lastly, the complainant has also contended that in exercise of its powers, the Election Commission of India under Elections Symbols (Reservation and Allotment) Order, 1968, promulgated under Article 324 of the Constitution and Rules 5 & 10 of the Conduct of Election Rules, 1961, grants symbols to various Political Parties for election purposes for the recognition of Political Parties and can suspend or withdraw recognition of recognized Political Parties on their

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[32] (2011) 15 SCC 1.

[33] File No. CIC/SM/C/2011/001386, File No. CIC/SM/C/2011/000838 decided on 03.06.2013.

failure to observe model code of conduct or not following the lawful directions and instructions of the Commission. It is indicative of the public character of the Political Parties.

The Political Parties are the life blood of our polity. As observed by Laski "The life of the democratic state is built upon the party system". Elections are contested on party basis. The Political Parties select some problems as more urgent than others and present solutions to them which may be acceptable to the citizens. The ruling party draws its development programs on the basis of its political agenda. It is responsible for the growth and development of the society and the nation. Political Parties affect the lives of citizens, directly or indirectly, in every conceivable way and are continuously engaged in performing public duty. It is, therefore, important that they became accountable to the public.

Political Parties are the unique institution of the modern constitutional State. These are essentially political institutions and are non-governmental. Their uniqueness lies in the fact that in spite of being non-governmental, they come to wield or directly or indirectly influence exercise of governmental power. It would be odd to argue that transparency is good for all State organs but not so good for Political Parties, which, in reality, control all the vital organs of the State.

In the case *of Bangalore International Airport Limited v Karnataka Information Commission*,[34] the Karnataka High Court has held that:-

"A public authority may be described as a person or administrative body entrusted with functions to perform for the benefit of the public and not for private profit. Not every such person or body is expressly defined as a public authority or body, and the meaning of a public authority or body may vary according to the statutory context; one of the distinguishing features of an authority not being a public authority, is profit making. It is not incumbent that a body in order to be a public body must always be constituted by a statute; for an authority to be a 'public authority' it must be an authority exercised or capable of being exercised for the benefit of the public"

In view of the nature of public functions performed by Political Parties and the dicta of the High Court extracted above, we conclude that Political Parties in question are Public Authorities under section 2(h) of the RTI Act.

(v) Information from Supreme Court CPIO

In *Shri Dipak J. Gandhi v. CPIO, Supreme Court of India*[35], the appellant

[34] W.P. No.12076 of 2008 dated 9.2.2010.
[35] Appeal No. CIC/SM/A/2013/001020/SS, Dated 24.04.2014.

filed RTI application dated 19.1.2013 seeking information with regard to review and curative petitions filed in Hon'ble Supreme Court from 1.7.2007 to 30.6.2008. The appellant sought to know the total no. of review petitions filed in the Supreme Court for therefore said period and the no. of such petitions disposed off after hearing advocates in the open court. With regard to the curative petitions the appellant sought to know the total no. of curative petitions filed in the Supreme Court for the aforementioned period and the no. of such petitions admitted or dismissed and no. of such petitions disposed off after hearing the advocates in the open Court and the no. of such petitions dismissed by circulation in chambers. The CPIO replied vide letter dated 6.2.2013 and stated that the information sought is not maintained by the registry in the manner sought for by the appellant. However, the CPIO provided the information in the form it is maintained. The CPIO has provided the no. of registered and disposed review & curative petitions for the year 2007 and 2008. The appellant filed first appeal dated 9.3.2013 mainly on the grounds that if the record is not maintained in the manner sought, the Registry has to prepare the record in the format desired by the appellant. The first appellate authority disposed of the first appeal vide order dated 2.4.2013 upholding the CPIO's reply while relying on Judgment of the Hon'ble Supreme Court in the case of *CBSE v. Aditya Bandhopadhyay*,[36] where it has been held that it is beyond the jurisdiction of the authority of CPIO to collate and collect non-existent information and to furnish it. The CPIO has specifically mentioned that the data is not maintained in the manner sought by the appellant. The appellant submits vide his written submissions that the information sought should be provided to him and has also relied on various CIC decisions. The Commission has perused the said orders in file no. CIC/SM/A/2011/001791/SG/17637 & Appeal No. CIC/SM/A/2008/00347 and other decisions referred by the appellant. The Commission is of the view that the said decisions relied upon by the appellant do not support the contention of the appellant that if the information is not held on record, the public authority is bound to compile it as per the format of the applicant. The Commission is of the view that under the RTI Act the public authority is bound to provide information which is held on record. The respondent submits during the hearing that compiling this information would require opening every file and then compiling information. In view of these submissions Section 7 (9) of the RTI Act is also applicable in the present case.

(vi) Direction to Supply Information

In *UP Bhartiya v. University of Allahabad*,[37] the appellant had filed three

[36] *AIR* 2011 SCW 4888.

[37] Appeal No. CIC/OK/C/2007/00184 dt. January 25, 2008.

RTI applications with the Public Information of the University of Allahabad on 15 and 17 February, 2007 seeking information regarding recruitment for the post of Assistant Registrar in the University. Since no reply was received within the stipulated period of 30 days, he approached CIC on 11 April, 2007.The CIC *vide* its decision dated 16 October, 2007 directed the Public Information Officer of the University to supply the requisite information to appellant within 15 days but there was no compliance. When the matter came before the Bench of two Information Commissioners, the CIC on 22 November, 2007, Shri R.L. Khanna, Deputy Registrar and Sanjay Tiwari represented the respondent University. Since the University's PIO was absent in the hearing, the CIC expressed anguish and adjournment the hearing for 12 December, 2007 with direction that the PIO of the University must be present on that day. Allowing the appeal, the University was directed to provide the information to the appellant within a fortnight.

V

Conclusion

A review of the decisions and rulings of the Central Information Commission (CIC) over the past nine years would reveal that right to information means more opportunities for citizens to access to knowledge. The RTI application is often seen by the citizens to access knowledge. The RTI applications are often seen by the official as attempts to expose corruption, poor governance, mal-practices, and human right violations among others. It hardly needs to be stated that conferment of right to information by itself does not bring about growth and development of knowledge unless the process of dissemination of information is managed and monitored effectively. The Central Information Commission is handling this task with a unified approach to addressing concerns about the use and potential abuse of information dissemination.

The major thrust of the right to information law in India has been on two basis objectives, viz, liberalization of the process of information dissemination and a shift in trend from secrecy regime to a more transparent and accountable system of governance. The modification in the title of the RTI Act from "Freedom of Information" to "Right to Information" itself suggested that the law is intended to impose an obligation or duty upon the State and Public Bodies to disclose and provide access to information about their actions, policies, plan, schemes *etc*.to the citizens so as to usher an era of truly participatory democracy in the country. It has not only facilitating trade, commerce and economy but has also promoted a culture of clean and responsible system of governance.

Before concluding, it must be stated that the Right to Information Act, 2005 has proved to be an effective legislation for free flow of information based on the internationally acknowledged policy of "*maximum disclosure and minimum secrecy* "in order to promote openness and accountability in the administration. The factors such as change in social-economic milieu, expansion of education, public awareness about their rights judicial and RTI activism and above all Central Information Commission's vigil and promptness in handling RTI cases and their speedy disposal have substantially contributed to the development of information law in India but lack of political will on the part of political leaders , who are at the helm of affairs and running the Government is a major in road in effective implementation of RTI Law. The unprecedented increase in number of scam, scandals, frauds, and even criminals activities during the past few years and the manner they are handled and maneuvered bears testimony to the fact that fact that unless there is political will to wipe out corruption and malpractices in the governance, enactment of right to information will remain only a toothless paper-tiger.

THE WHISTLE BLOWERS PROTECTION ACT, 2011 – A BOON OR BLIGHT

Dr. Poonam Verma & Manish Kumar***

Abstract

The poison of corruption is prevalent in the mind of wrong people of the society, community and country. It has affected the growth and development of the individual as we well as the nation in all aspects like socially, economically and politically and reduces income. It is concerned with wrong use of power and position whether in the government or non-government sector. It is a big reason of inequalities in the society and community. Just to get some unfair advantage to fulfil the wish, they misuse the public resources. Corruption has nailed its teeth in every sphere of life namely business, politics, administration and services. There is hardly any sector which is not affected with the evil of corruption. It is rampant in every segment and section of society. But there are certain people who raise their voice against corruption termed as 'whistleblower'. It has been observed that proper protection was not provided to these whistleblowers by the government due to which they were attacked and in some cases these whistleblowers were murdered. For the first time, the murder of Satyendra Dubey came into light (he had raised his voice against corruption in the Nation Highway Authority of India.)Some more cases of such nature also came into light thereafter and the issue was raised with regard to protection of whistleblowers. In 2010, The Public Interest Disclosure and Protection to Persons Making the Disclosure Bill, 2010 was introduced in the Lok Sabha by the then Union Minister of State for Personnel, Public Grievances and Pensions Shri Prithviraj Chavan. The same was passed by Lok Sabha on 27th December, 2011 and was passed by Rajya Sabha on 21st February, 2014. The same received the President's assent on 09th May, 2014. The aim of this paper is to study whether this Act has been drafted considering all the aspects for the protection of whistleblowers or not. The same will highlight the lacunas which fails the very purpose of the Act.

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I

Introduction

"It is time to clear the air, punish the guilty and protect the whistle blowers."

- Tony Leon

Corruption is a social evil. It prevents social growth and economic development of any country. One of the major hurdles in eradicating the corruption in the Government and the public sector undertakings is lack of adequate protection to the persons who made complaints and reports against the corruption.

Corruption is not a new phenomenon in India. Since ancient times, it has been prevalent in the society. History reveals that it was present even in the Mauryan period. Great scholar Kautilya[1], the sagacious minister in the Kingdom of Chandragupta Maurya (324/321 297 Before the Common Era), mentions the presence of forty types of corruption in his contemporary society. Kautilya was a sagacious minister in the Kingdom of Chandragupta Maurya (324/321 297 Before the Common Era). He expressed his views on a range of issues including state, war, social structures, diplomacy, ethics, and politics. He believed that "men are naturally fickle minded" and are comparable to "horses at work [who] exhibit constant change in their temper".[2] This means that honesty would not remain consistent lifelong and the temptation to make easy money through corrupt means can override the feature of honesty any time.

It was practiced even in Mughal and Sultanate period. When the East India Company took control of the country, corruption reached new height. Corruption in India has become so common that people now cannot think of public life without it.

Corruption has been well defined by many scholars. The simple meaning of corruption is undue favour for some monetary or other gains. It deprives the deserving from their right or privilege. Corruption also includes shinking from one's duty or dereliction of duty. Dishonesty, exploitation, malpractices, scams and scandals are various symptoms of corruption.

Corruption is not only an Indian phenomenon but is prevalent all over the world in developing as well as developed countries. It has nailed its teeth in

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1 Kautilya is also known as Chanakya or Vishnugupta.

2 R. Shamasastry, *Kautilya Arthasastra*, 127 (2005).

every sphere of life, namely business administration, politics, officialdom, and services. In fact, there is hardly any sector which can be characterized for not being infected with the evil of corruption. Corruption is rampant in every segment and every section of society, barring the social status attached to it. Nobody can be considered free from corruption from a high ranking officer to a low level employee. But there are certain people who raise their voice against corruption and they are termed as 'whistleblowers.

(i) Who is Whistleblower?

One who reveals wrong doing within an organization to the public or to those in positions of authority?[3] In other words, any person who blows a whistle and informs the public or concerned person of any inappropriate activity going on inside the organization. He could be an employee or any person inside or outside of an organization. Anyone can raise a voice if any illegal or inappropriate activity going on inside the organization. If the person is an inside whistleblower than he has to report directly to Chief Executive officer or any of concerned authority or if he is an outsider, then he must report to the media, enforcement agencies or public interest groups.[4]

It has been evident that the whistleblowers were never provided proper protection by the Government due to which they became easy targets which resulted into attacks on them causing grevious hurt and sometimes their murder. Some of such cases are mentioned as under:

1. *Satyendra Dubey* (1973-2003) was a project director at the National Highways Authority of India (NHAI). He raised voice against huge financial irregularities in handling of GQ project. He sent an anonymous letter to the PMO with a separate *curricular vitae* (CV) attached telling the Prime Minister (PM). In the said letter, he revealed the number of contractors who had "submitted forged documents to justify their technical and financial capabilities" to win bids for the contract. He further made request to the PM not to reveal his identity. Said letter was forwarded along with the CV to the Ministry of Road, Transport and Highways resulting into his death. On Nov 27, 2002, Mr. Dubey was shot dead in Gaya and the case was registered as that of robbery by CBI.[5]

2. *Shanmugam Manjunath* (1978–2005) was a Marketing Manager ('Grade A' officer) for the Indian Oil Corporation (IOC) who was murdered for

[3] Available at: http://www.thefreedictionary.com/whistleblower (Visited on February 11, 2015).
[4] Available at: http://researchdirection.org/UploadArticle/90.pdf (Visited on February 11, 2015).
[5] Available at: http://www.quora.com/Who-are-some-of-the-famous-whistleblowers-in-India (Visited on February 12, 2015).

sealing a corrupt petrol pump which was selling adulterated petrol in Lakhimpur Kheri, Uttar Pradesh.[6]

3. *Lalit Mehta* (1972–2008) was an Indian Right to Information (RTI) activist, who was killed brutally near Palamau on May 14, 2008. A civil engineer by qualification, Lalit, 36, blew the lid off widespread corruption in National Rural Employment Guarantee Act (NREGA) in Palamu. He became a threat to the contractor lobby and corrupt government officials. Social audit of NREGA he undertook under economist Jean Dreze's supervision was proving to be the final nail in the coffin of the contractor lobby. But he was killed just a day before that. The Chhatarpur Police found his body at Kandaghati in Chhatarpur on May 15, 2008. His mutilated body and a belt around his neck suggested he was strangled and his face smashed to deform it beyond recognition. The police buried the body as unidentified the same day. It was later exhumed by his colleagues and taken to his native village, where his last rites were performed.[7]

4. *Rinku Singh Rahi* (born 1982) is a whistleblower bureaucrat, Provincial Civil Services (PCS) civil servant, fighting against corruption in Uttar Pradesh sponsored welfare schemes. He suffered an attempt on his life when local gangsters shot him six times, damaging his jaw and the vision of one eye, for exposing corruption.

   He was fighting corruption in his own department and state-run schemes since 2009. He was denied access to information on his own department. Instead, an attempt on his life was made allegedly at the behest of Principal Secretary Navtej Singh, and other department officials during the Mayawati government. Thereater he started a hunger strike in Lucknow hoping that Akhilesh Yadav government would pay heed to his demands for a reply on his pending RTI application; a criminal investigation into the corruptions charges; and act against miscreants but instead was admitted to a psychiatric ward.[8]

5. *S P Mahantesh* was posted as Deputy Director of Cooperative Audit, he exposed the official's involvement in notifying the media about site allotment scams in Karnataka, such as the irregularities in the BEML Employees Cooperative Society. He handed over to *The Hindu* a copy of the audit report of the BEML ECS which showed several irregularities pertaining to land acquisition, layout formation and allotment of sites. He blew the whistle

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[6] *Supra note* 5.
[7] *Ibid.*
[8] *Ibid.*

on cooperative housing scams. He was brutally attacked on 16/05/2012 resulting into his death.[9]

It is evident that the gruesome murders of the whistleblowers raised serious concern for enacting effective laws for their protection. The Supreme Court took serious note on the murder of Satyendra Dubey and in April 2004, pressed the government into issuing an office order, the Public Interest Disclosures and Protection of Informers Resolution, 2004 designating Central Vigilence Commission (CVC) as the nodal agency.[10]

India participated in the United Nations Convention against Corruption (UNCAC) and signed convention on 09 December 2005[11]. It is the first global legally binding anti-corruption instrument that urges State Parties to create legal and policy frameworks in accordance with globally accepted standards, international regime to tackle corruption more effectively.[12]

In 2010, The Public Interest Disclosure and Protection to Persons Making the Disclosure Bill, 2010 was introduced in the Lok Sabha by the then Union Minister of State for Personnel, Public Grievances and Pensions Shri. Prithviraj Chavan. The objective of the proposed law is to protect those who expose corruption and wrongdoing. The same was passed by the Lok Sabha on 27 December 2011 and was passed by Rajya Sabha on 21 February 2014. The same received the President's assent on 9 May 2014[13]. The Act has not come into force till now.

II

Purpose of the Act

The object of the Act[14] is to establish a mechanism to receive complaints relating to disclosure on any allegation of corruption or wilful misuse of power or wilful misuse of discretion against any public servant and to inquire or cause an inquiry into such disclosure and to provide adequate safeguards against

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9 Available at: http://timesofindia.indiatimes.com/city/bengaluru/Attacked-Karnataka-government-auditor-SP-Mahantesh-dies-in-hospital/articleshow/13311883.cms (Visited on February 11, 2015).

10 Raval, "CVC must protect 'bravehearts". Times of India, April 13, 2004.

11 Available at: https://www.unodc.org/unodc/en/treaties/CAC/signatories.html (Visited on February 13, 2015).

12 Available at: http://www.unodc.org/documents/southasia/publications/research-studies/CI_Report.pdf (Visited on February 13, 2015).

13 Available at: http://egazette.nic.in/WriteReadData/2014/159420.pdf (Visited on February 13, 2015).

14 The Whistle Blowers Protection Act, 2011 No. 17 of 2014.

victimization of the person making such complaint and for matters connected therewith and incidental thereto.

III

Main Features of the Act

1. The Act seeks to protect the whistle blowers i.e. persons making a public interest disclosure related to an act of corruption, misuse of power, or criminal offense by a public servant.

2. Any non-governmental organization, a public servant or any other person may make such a disclosure to the Competent Authority.[15]

   Competent Authority[16] means-

   (i) in relation to a Member of the Union Council of Ministers, the Prime Minister;

   (ii) in relation to a Member of Parliament, other than a Minister, the Chairman of the Council of States if such Member is a Member of the Council of States or the Speaker of the House of the People if such Member is a Member of the House of the People, as the case may be;

   (iii) in relation to a Member of the Council of Ministers in a State or Union territory, the Chief Minister of the State or Union territory, as the case may be;

   (iv) in relation to a Member of Legislative Council or Legislative Assembly of a State or Union territory, other than a Minister, the Chairman of the Legislative Council if such Member is a Member of the Council or the Speaker of the Legislative Assembly if such Member is a Member of the Assembly, as the case may be;

   (v) in relation to—

   (A) any Judge (except a Judge of the Supreme Court or of a High Court) including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions; or

   (B) any person authorized by a court of justice to perform any duty, in connection with the administration of justice, including a liquidator, receiver or commissioner appointed by such court; or

   (C) any arbitrator or other person to whom any cause or matter has been referred for decision or report by a court of justice or by a competent public authority, the High Court;

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[15] *Supra note* 14, Section 4(1).

[16] *Ibid.* Section 3(b).

(vi) in relation to—

(A) any person in the service or pay of the Central Government or remunerated by the Central Government by way of fees or commission for the performance of any public duty except Ministers, Members of Parliament and members or persons referred to in clause (a) or clause (b) or clause (c) or clause (d) of article 33 of the Constitution, or in the service or pay of a society or local authority or any corporation established by or under any Central Act, or an authority or a body owned or controlled or aided by the Central Government or a Government company as defined in section 617 of the Companies Act, 1956, owned or controlled by the Central Government; or

(B) any person who holds an office by virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election in relation to elections to Parliament or a State Legislature; or

(C) any person who holds an office by virtue of which he is authorized or required to perform any public duty (except Ministers and Members of Parliament); or

(D) any person who is the president, secretary or other office-bearer of a registered co-operative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the Central Government or from any corporation established by or under a Central Act, or any authority or body or a Government company as defined in section 617 of the Companies Act, 1956 owned or controlled or aided by the Central Government; or

(E) any person who is a chairman, member or employee of any Central Service Commission or Board, by whatever name called, or a member of any selection committee appointed by such Commission or Board for the conduct of any examination or making any selection on behalf of such Commission or Board; or

(F) any person who is a Vice-Chancellor or member of any governing body, professor, associate professor, assistant professor, reader, lecturer or any other teacher or employee, by whatever designation called, of any University established by a Central Act or established or controlled or funded by the Central Government or any person whose services have been availed of by such University or any such other public authority in connection with holding or conducting examinations; or

(G) any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the Central Government or any local or other public authority, the Central Vigilance Commission or any other authority, as the Central Government may, by notification in the Official Gazette, specify in this behalf under this Act;

(vii) in relation to—

(A) any person in the service or pay of the State Government or remunerated by the State Government by way of fees or commission, for the performance of any public duty except Ministers, Members of Legislative Council or Legislative Assembly of the State, or in the service or pay of a society or local authority or any corporation established by or under a Provincial or State Act, or an authority or a body owned or controlled or aided by the State Government or a Government company as defined in section 617 of the Companies Act, 1956, owned or controlled by the State Government; or

(B) any person who holds an office by virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election in relation to municipality or Panchayats or other local body in the State; or

(C) any person who holds an office by virtue of which he is authorized or required to perform any public duty in relation to the affairs of the State Government (except Ministers and Members of Legislative Council or Legislative Assembly of the State); or

(D) any person who is the president, secretary or other office-bearer of a registered co-operative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the State Government or from any corporation established by or under a Provincial or State Act, or any authority or body or a Government company as defined in section 617 of the Companies Act, 1956 owned or controlled or aided by the State Government; or

(E) any person who is a chairman, member or employee of any State Service Commission or Board, by whatever name called, or a member of any selection committee appointed by such Commission or Board for the conduct of any examination or making any selection on behalf of such Commission or Board; or

(F) any person who is a Vice-Chancellor or member of any governing body, professor, associate professor, assistant professor, reader, lecturer or any other teacher or employee, by whatever designation called, of any University established by a Provincial or State Act or established or controlled or funded by the State Government and any person whose services have been availed of by such University or any such other public authority in connection with holding or conducting examinations; or

(G) any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the State Government or any local or other public authority, the State Vigilance Commission, if any, or any officer of the State Government or any other authority, as the State Government may, by notification in the Official Gazette, specify in this behalf under this Act;

(viii) in relation to members or persons referred to in clause (a) or clause (b) or clause (c) or clause (d) of article 33 of the Constitution, any authority or authorities as the Central Government or the State Government, as the case may be, having jurisdiction in respect thereof, may, by notification in the Official Gazette, specify in this behalf under this Act;

3. No action shall be taken on public interest disclosure by the Competent Authority if the disclosure does not indicate the identity of the complainant or public servant making public interest disclosure or the identity of the complainant or public servant is found incorrect or false.[17]

4. Subject to the provisions of this Act, the Competent Authority shall, on receipt of a public interest disclosure under section 4,—Should conceal the identity of the complainant unless the complainant himself has revealed his identity to any other office or authority while making public interest disclosure or in his complaint or otherwise.[18]

5. While seeking comments or explanations or report referred to in sub-section (3), the Competent Authority shall not reveal the identity of the complainant or the public servant and direct the Head of the Department of the organization concerned or office concerned not to reveal the identity of the complainant or public servant:

Provided that if the Competent Authority is of the opinion that it has, for the purpose of seeking comments or explanation or report from them under

[17] *Supra note* 14, Section 4(6).

[18] *Ibid.* Section 5(1) (b).

sub-section (3) on the public disclosure, become necessary to reveal the identity of the complainant or public servant to the Head of the Department of the organization or authority, board or corporation concerned or office concerned, the Competent Authority may, with the prior written consent of the complainant or public servant, reveal the identity of the complainant or public servant to such Head of the Department of the organization or authority, board or corporation concerned or office concerned for the said purpose:

Provided further that in case the complainant or public servant does not agree to his name being revealed to the Head of the Department, in that case, the complainant or public servant, as the case may be, shall provide all documentary evidence in support of his complaint to the Competent Authority.[19]

6. The public authority to whom a recommendation is made under sub-section (7) shall take a decision on such recommendation within three months of receipt of such recommendation, or within such extended period not exceeding three months, as the Competent Authority may allow on a request made by the public authority:

   Provided that in case the public authority does not agree with the recommendation of the Competent Authority, it shall record the reasons for such disagreement.[20]

7. The Competent Authority shall not entertain or inquire into any disclosure—
   (a) in respect of which a formal and public inquiry has been ordered under the Public Servants (Inquiries) Act, 1850; or
   (b) in respect of a matter which has been referred for inquiry under the Commissions of Inquiry Act, 1952.[21]

8. The Competent Authority shall not investigate, any disclosure involving an allegation, if the complaint is made after the expiry of seven years from the date on which the action complained against is alleged to have taken place.[22]

9. For the purpose of any such inquiry (including the preliminary inquiry), the Competent Authority shall have all the powers of a Civil Court while trying a suit under the Code of Civil Procedure, 1908, in respect of the following matters, namely:—

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[19] *Supra note* 14, Section 5(4).
[20] *Ibid.* Section 5(8).
[21] *Ibid.* Section 6(2).
[22] *Ibid.* Section 6(3).

(a) summoning and enforcing the attendance of any person and examining him on oath;
(b) requiring the discovery and production of any document;
(c) receiving evidence on affidavits;
(d) requisitioning any public record or copy thereof from any court or office;
(e) issuing commissions for the examination of witnesses or documents;
(f) such other matters as may be prescribed.[23]

10. Subject to the provisions of section 8, no obligation to maintain secrecy or other restriction upon the disclosure of information obtained by or furnished to the Government or any public servant, whether imposed by the Official Secrets Act, 1923 or any other law for the time being in force, shall be claimed by any public servant in the proceedings before the Competent Authority or any person or agency authorized by it in writing and the Government or any public servant shall not be entitled in relation to any such inquiry, to any such privilege in respect of the production of documents or the giving of evidence as is allowed by any enactment or by any rules made thereunder:

Provided that the Competent Authority, while exercising such powers of the Civil Court, shall take steps as necessary to ensure that the identity of the person making complaint has not been revealed or compromised.[24]

11. No person shall be required or be authorized by virtue of provisions contained in this Act to furnish any such information or answer any such question or produce any document or information or render any other assistance in the inquiry under this Act if such question or document or information is likely to prejudicially affect the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence,—

(a) as might involve the disclosure of proceedings of the Cabinet of the Union Government or any Committee of the Cabinet;

(b) as might involve the disclosure of proceedings of the Cabinet of the State Government or any Committee of that Cabinet, and for the purpose of this sub-section, a certificate issued by the Secretary to the Government of India or the Secretary to the State Government, as the case may be, or, any authority so authorized by the Central or State

[23] *Supra note* 14, Section 7(2).
[24] *Ibid.* Section 7(4).

Government certifying that any information, answer or portion of a document is of the nature specified in clause (a) or clause (b), shall be binding and conclusive.[25]

12. The Central Government shall ensure that no person or a public servant who has made a disclosure under this Act is victimized by initiation of any proceedings or otherwise merely on the ground that such person or a public servant had made a disclosure or rendered assistance in inquiry under this Act.[26]

13. If any person is being victimized or likely to be victimized on the ground that he had filed a complaint or made disclosure or rendered assistance in inquiry under this Act, he may file an application before the Competent Authority seeking redress in the matter, and such authority shall take such action, as deemed fit and may give suitable directions to the concerned public servant or the public authority, as the case may be, to protect such person from being victimized or avoid his victimization:

Provided that the Competent Authority shall, before giving any such direction to the public authority or public servant, give an opportunity of hearing to the complainant and the public authority or public servant, as the case may be:

Provided further that in any such hearing, the burden of proof that the alleged action on the part of the public authority is not victimization, shall lie on the public authority.[27]

Notwithstanding anything contained in any other law for the time being in force, the power to give directions under sub-section (2), in relation to a public servant, shall include the power to direct the restoration of the public servant making the disclosure, to the status quo ante[28]

14. The Competent Authority shall, notwithstanding any law for the time being in force, conceal, as required under this Act, the identity of the complainant and the documents or information furnished by him, for the purposes of enquiry under this Act, unless so decided otherwise by the Competent Authority itself or it became necessary to reveal or produce the same by virtue of the order of the court.[29]

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[25] *Supra note* 14, Section 8(1).
[26] *Ibid.* Section 11(1).
[27] *Ibid.* Section 11(2).
[28] *Ibid.* Section 11(4).
[29] *Ibid.* Section 13.

15. Any person, who negligently or mala fidely reveals the identity of a complainant shall, without prejudice to the other provisions of this Act, be punishable with imprisonment for a term which may extend up to three years and also to fine which may extend up to fifty thousand rupees.[30]

16. Any person who makes any disclosure mala fidely and knowingly that it was incorrect or false or misleading shall be punishable with imprisonment for a term which may extend up to two years and also to fine which may extend up to thirty thousand rupees.[31]

17. Where an offence under this Act has been committed by any Department of Government, the Head of the Department shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.[32]

18. Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

    Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he has exercised all due diligence to prevent the commission of such offence.[33]

19. Any person aggrieved by any order of the Competent Authority relating to imposition of penalty under section 14 or section 15 or section 16 may prefer an appeal to the High Court within a period of sixty days from the date of the order appealed against.[34]

20. No Civil Court shall have jurisdiction in respect of any matter which the Competent Authority is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.[35]

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[30] *Supra note* 14, Section 16.
[31] *Ibid.* Section 17.
[32] *Ibid.* Section 18(1).
[33] *Ibid.* Section 19(1).
[34] *Ibid.* Section 20.
[35] *Ibid.* Section 21.

21. No court shall take cognizance of any offence punishable under this Act or the rules or regulations made thereunder save on a complaint made by the Competent Authority or any officer or person authorized by it.[36]

    No court inferior to that of a Chief Metropolitan Magistrate or a Chief Judicial Magistrate shall try any offence punishable under this Act.[37]

22. The Central Government may, by notification in the official Gazette, make rules for the purpose of carrying out the provisions of this Act.[38]

23. The State Government may, by notification in the Official Gazette, make rules for the purpose of carrying out the provisions of this Act.[39]

IV

Conclusion and Suggestion

Though the Act was supposed to be drafted in such a way that the whistleblowers may feel safe and protected under the law but it has been observed that the Act is made to suppress the voice of the whistleblowers. It lacks in providing the feeling of safety to the whistleblowers due to the reasons discussed below.

The Act provides no action shall be taken on a disclosure if it does not indicate the identity of the complainant or public servant or if "the identity of the complainant or public servant is found to be incorrect". The history is evident that in many cases[40], the disclosure of identity has resulted into murder of the whistleblower. It is suggested that in case of receipt of any complaint, same should be considered and preliminary investigation should be done instead of taking no action upon the same.

Information related to national security has been kept out of the purview of the Act. It is suggested that the complaint related to national security should be considered on top priority and the whistleblower be protected under the Act.

The Act is not applicable to Jammu and Kashmir. It is suggested that protection to the whistleblower at Jammu and Kashmir should also be provided.

The Act is not applicable to the armed forces and the Special Protection Group mandated to provide security to the Prime Minister and former prime

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[36] *Supra note* 14, Section 22(1).
[37] *Ibid.* Section 22(2).
[38] *Ibid.* Section 25(1).
[39] *Ibid.* Section 26.
[40] *Supra note* 5.

ministers, among others. It is suggested that it should be made applicable to these forces.

The provisions of this Act are not applicable upon a judge of the Supreme Court or a High Court and accordingly gives arbitrary exemption to them.

For complaint against a Minister, the competent authority is the Prime Minister and for Member of Parliament, Speaker or Chairman of the House. It is suggested that in these cases some independent agency composed of Judges of High Court or Supreme Court must be established.

The provision stating that any person who makes any disclosure mala fidely and knowingly that it was incorrect or false or misleading shall be punishable with imprisonment for a term which may extend up to two years and also to fine which may extend up to thirty thousand rupees, creates fear among the whistleblowers.

Considering the fact that disclosure of the identity of the whistleblower may result into his murder, the punishment of upto three years of imprisonment and fine upto fifty thousand of rupees for revealing the same, is comparatively very less.

No action will be taken on the complaints made after the expiry of seven years from the date on which the action complained against is alleged to have taken place. It is suggested that the limitation period should be increased from seven to ten years. What constitute victimization is not comprehensively defined in the Act. No Appeal lies under section 20 of the Act against the penalty imposed on complainant under section 17. Private sector has been kept outside the purview of this Act. It is suggested that the private sector should be included in the purview of the Act considering the current scenario of our country.

On the whole its a positive step in the right direction but still much more needs to be done.

ONE PERSON COMPANY: ENCOURAGING CORPORATIZATION OF ENTREPRENEURIAL VENTURES

*Dr. Bharat**

Abstract

The notion of 'One Person Company', as mooted by the J.J. Irani committee report, is conceived in the Indian corporate structure by the Companies Act, 2013.[1] At the outset One Person Company opens up new-fangled landscape of business prospects and brilliant potential for entrepreneurial ventures. The introduction of One Person Company in the legal system is all set to promote entrepreneurship by proving impetus to corporatization as under this entrepreneur will enjoy the benefit of limited liability coupled with the advantage of separate legal entity.[2] The business vehicle of One Person Company is popular in UK, USA, UAE, Australia, Singapore, China and several other countries. Although, in India it is in budding stage but it is all set bloom and blossom in the times to come.

I

Introduction

Legal personality recognized at law can only be given by the state through its laws by way of statute or other recognized law.[3]

In the British Commonwealth, many consider the nineteenth century case of *Broderip v. Salomon* to have cemented the modern corporation at the centre of today's social and commercial life.[4] The *Salomon* case began in the filthy

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1 With increasing use of information technology and computers, emergence of the service sector, it is time that the entrepreneurial capabilities of the people are given an outlet for participation in economic activity. Such economic activity may take place through the creation of an economic person in the form of a company. Yet it would not be reasonable to expect that every entrepreneur who is capable of developing his ideas and participating in the market place should do it through an association of persons. We feel that it is possible for individuals to operate in the economic domain and contribute effectively. To facilitate this, the Committee recommends that the law should recognize the formation of a single person economic entity in the form of 'One Person Company'. Such an entity may be provided with a simpler regime through exemptions so that the single entrepreneur is not compelled to fritter away his time, energy and resources on procedural matters.

2 The Ministry of Corporate Affairs, Government of India vide its G.S.R. Notification No. 250(E) dated March 31, 2014 notified the Companies (Incorporation) Rules, 2014 under the Companies Act, 2013 which provide for formation of One Person Company.

3 *Gani Fawehinmi v. Nigeria Bar Association*, (No. 2) [1989] 2 NWLR (PT.105) 588 at 633.

4 At first instance and the court of appeal, the *Salomon* case is reported as *Broderip v. Salomon*, [1895] 2 Ch. 323. The final appeal at the House of Lords is reported as *Salomon v. A. Salomon & Co.*, [1897] A.C. 22 (H.L.).

backstreets of Dickensian London, where the Salomon family struggled to keep its boot-making business afloat. From these humble beginnings, the laws of corporate governance now facilitate the immense growth and influence of today's mega-corporations. Many attribute *Salomon* for establishing the corporation as a legal entity separate from its owners and imposing a veil between the corporation and its shareholders.[5]

The principal forms of business organizations permitted in India are Sole Proprietorship, Partnership and Companies. Sole Proprietorship is the oldest and most common form of business. Traditionally, in India, it has been the trend to start a business in form of sole proprietorship. Though over the year business carried under sole proprietorship model has flourished due to economic growth coupled with ever increasing demand but sole proprietorship has always been tagged as "unorganized" form of business across all the sectors. It is expected that with the acceptance of 'One Person Company' as 'legal corporate form of entrepreneurship', the growth of unorganized sector into organized form will be expedite.[6]

The existing law requires minimum two members to incorporate a company. Such a company must have at least two members as its shareholders throughout the company's existence. Such a provision was probably to keep a distinction between a sole proprietor and a company. To gain advantage of being a legal entity, over the years, people have started forming the companies by adding a nominal member and allotting him one single share, which is the minimum requirement to incorporate a company under the provision of the law, and thereby retaining the rest of the shares for themselves and eventually controlling operations single handedly. Thus, a person by legally circumventing provisions of the existing law can enjoy the status and benefit of a company while operating and functioning like a proprietary concern for all practical purposes.[7]

II

Dawn of one Person Company

With the enactment of the Companies Act 2013, the requirement of two or more person is no longer required to incorporate a company. Now, a person who intends to incorporate a company can individually form a private limited company without the involvement and interference of any other individual as a

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5 Allan C. Hutchinson and Ian Langlois, "*Salomon Redux: The Moralities of Business*," *35 Seattle U.L. Rev.*, 1109 (2012).

6 Available at: http://www.caclubindia.com/articles/one-person-company-a-new-business-ownership-concept-20452.asp#. VPwzbnyUdr (Visited on February 19, 2015).

7 *Ibid.*

proprietor. This up-to-the-minute concept of One Person Company is in the interest of the new entrepreneurs who want to launch the corporatized from of entrepreneurial venture.[8]

With increasing use of information technology and computers, emergence of the service sector, it is time that the entrepreneurial capabilities of the people are given an outlet for participation in economic activity. Such economic activity may take place through the creation of an economic person in the form of a company. Yet, it would not be reasonable to expect that every entrepreneur who is capable of developing his ideas and participating in the market place should do it through an association of persons. We feel that it is possible for individuals to operate in the economic domain and contribute effectively. To facilitate this, the Committee recommends that the law should recognize the formation of a single person economic entity in the form of 'One Person Company'. Such an entity may be provided with a simpler regime through exemptions so that the single entrepreneur is not compelled to fritter away his time, energy and resources on procedural matters.[9]

At the outset, One Person Company opens up new-fangled landscape of business prospects and sparkling prospective for entrepreneurial ventures. One Person Company is a company which has only one person as member.[10]

Accordingly, the hurdle of necessitating a second person to form a company is overcome and the sole person exclusively holds all the shares and stakes in the company.

One Person Company provides an entrepreneur congregation of features otherwise, available to an association of people. It will not to be erroneous to say that One Person Company is similar to that of a proprietorship concern devoid of the ills faced by the proprietors generally. The introduction of One Person Company is a budge to encourage corporatization of micro businesses and entrepreneurship with an uncomplicated regime so that the small entrepreneurs are not compelled to desecrate and devastate their time, energy, money and resources on complex statutory compliances.

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[8] The Companies Bill, 2013 was passed by the Lok Sabha on December 18, 2012 and by the Rajya Sabha on August 8, 2013. It obtained the assent of the President of India on August 29, 2013 and it was notified in the Official Gazette on August 30, 2013. The Companies (Incorporation) Rules, 2014 were notified by the Ministry of Corporate Affairs vide its G.S.R. Notification No. 250(E) dated March 31, 2014.

[9] The notion of 'One Person Company', as mooted by the J.J. Irani Committee Report, is conceived in the Indian legal system by the Companies Act, 2013.

[10] *The Companies Act 2013*, Section 2(62).

A sub-domain of Private Company,[11] the process of incorporating a One Person Company is the same as that of a private company and the first One Person Company namely "Vijay Corporate Solutions One Person Company Private Limited" was registered in Delhi on April 28, 2014, with an authorized capital of one lakh rupees, under "Community, Personal & Social Services Sector".[12]

III

One Person Company: Salient Features

"I worship individuals for their highest possibilities as individuals and I loathe humanity for its failure to live up to these possibilities."

- Ayn Rand[13]

As an alternative model, the origin of 'One Person Company' is not only expected to encourage corporatization entrepreneurial ventures but also safeguard the small & medium enterprises and business organizations in the unorganized sector with the concept of limited liability.

The salient features of One Person Company are:[14]

1. Desire for personal freedom that allows the professional skilled person to adopt the business of his choice.
2. Personality driven passion and implementation of a business plan.
3. The desire of the entrepreneurial person to take extra risk and willingness to take additional responsibility.
4. Personal commitment to the business which is a sole idea of the person and close to his heart.
5. It is run by individuals yet, One Person Companies are a separate legal entity similar to that of any registered corporate.
6. A One Person Company is incorporated as a private limited company.

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[11] *Supra note* 10, Section 2(68)

[12] The Ministry of Corporate Affairs, "*Monthly Newsletter*," Vol. 36, 2 (May 2014). Availale at: *<http://www.mca.gov.in/Ministry/pdf/Monthly_Newsletter_May_2014.pdf>* (Visited on January 28, 2015.

[13] February 2, 1905 to March 6, 1982 was a Russian–American novelist, philosopher, playwright, and screenwriter. She is known for her two best-selling novels, *The Fountainhead* and *Atlas Shrugged*, and for developing a philosophical system she called Objectivism. Born and educated in Russia, Rand moved to the United States in 1926. She had a play produced on Broadway in 1935–1936. After two early novels that were initially unsuccessful in America, she achieved fame with her 1943 novel, The Fountainhead.

[14] CS R Sridharan, *One Person Company*, 6 (2014).

7. It must have only one member at any point of time and may have only one director.
8. The member and nominee should be natural persons, Indian Citizens and resident in India. The term "resident in India" means a person who has stayed in India for a period of not less than 182 days during the immediately preceding one calendar year.
9. One person cannot incorporate more than one One Person Company or become nominee in more than one One Person Company.
10. If a member of One Person Company becomes a member in another One Person Company by virtue of his being nominee in that One Person Company then within 180 days he shall have to meet the eligibility criteria of being Member in one One Person Company.
11. One Person Company to lose its status if paid up capital exceeds Rs. 50 lakhs or average annual turnover is more than 2 crores in three immediate preceding consecutive years.
12. No minor shall become member or nominee of the One Person Company or hold share with beneficial interest.
13. Such Company cannot be incorporated or converted into a company under Section 8 of the Companies Act, 2013.
14. Such Company cannot carry out Non Banking Financial Investment activities including investment in securities of any body corporate.
15. No such company can convert voluntarily into any kind of company unless 2 years have expired from the date of incorporation, except in cases where capital or turnover threshold limits are reached.
16. An existing private company other than a company registered under Section 8 of the Act which has paid up share capital of Rs. 50 Lakhs or less or average annual turnover during the relevant period is Rs. 2 Crores or less may convert itself into One Person Company by passing a special resolution in the general meeting.

Although One Person Company permits an individual to run his business as an incorporated company, yet it is not akin to sole proprietorship as One Person Company has a separate legal entity, distinct from its owner, whereas in sole proprietorship there exists no difference between the business and its owner.

IV

The Mantra: One Shareholder, One Director and One Nominee

One Shareholder, One Director and One Nominee is the mantra upon which the One Person Company hurls. These three one's of One Person Company are discussed hereunder:

(i) *One Shareholder*

Only a natural person, who is a resident and citizen of India, can form a One Person Company provided he is major and competent to contract. Meaning thereby, all those who are incapacitated to contract, minor, non-resident Indians, foreign citizen and other legal entities like societies or other corporate entities cannot form a one person company. Ensuring dedication and devotion to the business endeavour, the law provides that a person can slot-himself in only one 'One Person Company' at any given time.

(ii) *One Director*

Lord Denning held in his judgment that the directors and managers are the directing mind and will of the company, and the state of mind of these personnel is the state of mind of the company and is treated by law as such.[15] One Person Company being a legal fiction must have a Director. One Person Company should have at least one director but in no case the total number of directors should be more than fifteen.[16] In case, the Director of the company is not specified in the incorporation document, it is assumed that the lone shareholder is the sole director of one person company.[17]

(iii) *One Nominee*

Comprehending the unforeseen incidents and accidents in the life of 'only member' of One Person Company, the Companies Act, 2013 introduces the notion of 'nominee' for ensuring eternity to the life of the company. The person forming the One Person Company has to nominate a Nominee, who should be the resident and citizen of India, with his prior consent in writing. However, the member and also the nominated person have the privilege to withdraw the name

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[15] *H.L. Bolton (Engineering) Company Ltd. v. T.J. Graham and Sons Ltd.*, (1956) 3 All E.R. 624; See also Peter Burns, "Feature of Corporate Criminal Liability or Why the Brains of the Corporation are not necessarily its intimate friends," *2 Can. Bus. L. J.*, 475 (1977-78); *Freeman v. Complex Computing Co. Inc.*, 119 F.3d 1044 (2d Cir. 1997).

[16] *Supra note 10*, Section 149.

[17] *Ibid.*, Section 152.

and consent respectively as being the Nominee of the One Person Company.[18] The nominee takes over the reins of the One Person Company in the event of death or inability of the sole member to contract.[19] In case, as a result of death or inability of the sole member to contract the nominee befalls to be the sole member then he need to appoint another person as a nominee and also the befalling member of the One Person Company should in no case be member of any other One Person Company. If a person becomes member in any One Person Company by virtue of being a nominee in that company, then such person should ensure, within a period of one hundred eighty days that he chooses either of the two One Person Companies.

V

One Person Company: Encouraging Corporatization

An entrepreneur is an individual who opts to go into business by himself; and all the unhealthy, unfortunate, untoward, unseemly and unlucky happenings in the business environment are not under the control of an entrepreneur. Hence it is important to secure the personal liability of the entrepreneur, if the entrepreneurial venture falls into predicament. While doing the business as a proprietorship the personal assets of the entrepreneur are always at risk, but it is not so in case of One Person Company. This serves as an encouragement to corporatization and reprieve to an entrepreneur.

One Person Company has opened the doors of the corporate sector in the form of a company limited by shares, or a company limited by guarantee, or an unlimited company.[20] The individual entrepreneurs having the entrepreneurial expertise and experience or the individuals working as employees or professionals have the choice of corporatizing their ideas and dreams through One Person Company.

Small entrepreneurs can now set up 'one person companies' to directly access target markets rather than being forced to share their profits with middlemen... This would provide tremendous opportunities for millions of people, including those working in areas like handloom, handicrafts and pottery. They are working as artisans and weavers on their own, so they don't have the legal entity as a company. But the One Person Company would help them do business as an

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18 *Supra note 10*, Section 3.
19 *Ibid.*
20 *Ibid.*, Section 3(1) and 3(2).

enterprise and give them an opportunity to start their own ventures with a formal business structure.[21]

The concept of One Person Company is new so far India is concerned though such a form of business exists elsewhere. The concept can be used for a single person enterprise to a gigantic enterprise. It may be set up for a simple business like trading or complicated knowledge based business which may require association of experts with the business. It may appoint managerial personnel as per its business needs.[22]

The One Person Company augurs well for entrepreneurs from unorganized sectors with new idea and ventures, aspiring entry into the corporate world, with minimum statutory compliance requirements and maximum exemptions under the law.[23]

VI

One Person Company: Statistical Outlook

One Person Companies are imperatives because they would give entrepreneurial capabilities of people an outlet for participation in economic activity and such economic activity may take place through the creation of an economic person in the form of a company.[24] The statistical outlook evidently depicts that the Companies Act, 2013 help the startup entrepreneurs to test the new corporate model of One Person Company.

Up to December 31, 2014, a total number of 1,403 One Person Companies have been registered with collective authorized capital of Rs. 31.31 crore. Economic activity wise classification of One Person Company up to December 31, 2014 reveals that highest number of One Person Company are in Business Services (775) followed by Community, Personal & Social Services (196), Trading (135) and Manufacturing (106).[25]

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21 The then Union Minister of Corporate Affairs, Sachin Pilot, stated in a press conference at New Delhi on September 9, 2013. Available at: *http://articles.economictimes.indiatimes.com/2013-09-08/news/41873696_1_sachin-pilot-corporate-affairs-minister-sachin-new-companies-act*> (Visited on February 19, 2015).

22 V.R. Narasimhan, "One Person Company – A Dynamic Form of Business," *Company Secretary: The Journal for Corporate Professionals*, Vol. XLIII, No. 06, 660 (June 2013).

23 [2014] 122 CLA (Mag.) 6.

24 B.P. Bhargava, *New Company Law: An Insight*, 111 (2013).

25 *Available at: http://www.mca.gov.in/Ministry/pdf/Monthly_Information_Bulletin_CorporateSector_December_2014.pdf*> (Visited on February 22, 2015).

The same is depicted through the following chart:[26]

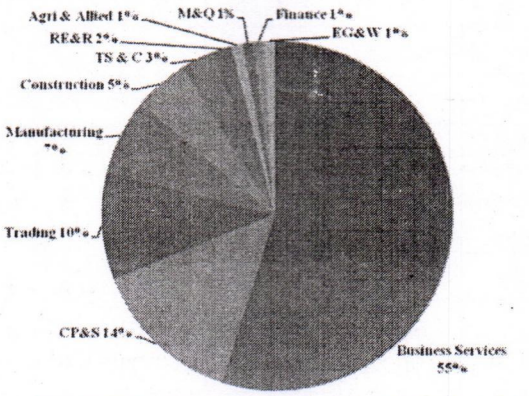

Chart depicting Sector-wise One Person Companies as on December 31, 2014

During the month of December, 2014, a total of 277 One Person Companies have been registered with authorized capital of Rs. 5.90 crore. Economic activity wise classification of One Person Company during the month reveals that highest number of 129 One Person Company have been registered in Business Services, followed by 62 in Community, Personal & Social Services and 39 in Trading.[27]

Economic Activity-wise One Person Companies					
S.No.	**Economic Activity**	**Upto December 31, 2014**		**During December, 2014**	
		No.	**Authorized Capital**	**No.**	**Authorized Capital**
I	**Agriculture and Allied Activities**	**21**	**89.00**	**5**	**9.00**
II	**Industry**	**195**	**534.00**	**31**	**49.00**
1	*Manufacturing*	*106*	*257.00*	*17*	*23.00*
2	*Construction*	*65*	*203.00*	*10*	*22.00*
3	*Electricity, Gas & Water Companies*	*9*	*31.00*	*2*	*2.00*
4	*Mining & Quarrying*	*15*	*43.00*	*2*	*2.00*

[26] In the chart 'M&Q' is Mining & Quarrying; 'EG&W' is Electricity, Gas & Water; 'TS&C' is Transport, Storage & Communication; 'CP&S' is Community, Personal & Social Services; 'RE&R' is Real Estate & Renting.

[27] *Ibid.*

III	**Services**	**1,186**	**2,498.00**	**241**	**532.00**
1	*Business Services*	*775*	*1,564*	*129*	*238.00*
2	*Trading*	*135*	*316.00*	*39*	*136.00*
3	*Real Estate and Renting*	*31*	*89.00*	*3*	*4.00*
4	*Community, Personal & Social Services*	*196*	*390.00*	*62*	*133.00*
5	*Finance*	*12*	*54.00*	*3*	*12.00*
6	*Transport, Storage & Communications*	*37*	*85.00*	*5*	*9.00*
IV	***Others***	***1***	***10.00***	-	-
Total		**1,403**	**3,131.00**	**277**	**590.00**

Highest number of fifty eight One Person Companies have been registered in Delhi (20.94 %) followed by thirty nine in Uttar Pradesh (14.08 %) and thirty six in Maharashtra (13.00 %) during the month of December 2014.[28]

VII

Conclusion

The introduction of One Person Company in the corporate structure is all set to promote entrepreneurship by proving impetus to corporatization as under this entrepreneur will enjoy the benefit of limited liability coupled with the advantage of separate legal entity. At a point of time, when Government of India has created the Ministry for Skill Development and Entrepreneurship, One Person Company has the potential of promoting the business acumen by encouraging corporatization.

One Person Company will give an entrepreneur all benefits of a private limited company which essentially means they will have access to credits, bank loans, limited liability, legal protection for business, access to market etc all in the name of a separate legal entity. It is a substantial shift from existing concept where at least two persons are required to incorporate a private company. One Person Company is best suited for start-up ventures, propriety businesses etc. since it offers a business platform which allows absolute control over all business affairs with limited liability.[29] With more than 1,400 One Person Companies

[28] *Supra note 26.*

[29] Available at: *http://blog.ipleaders.in/one-person-company-a-new-age-concept/#ixzz3S0Cqdx00*> (Visited on January 10, 2015).

have been chronicled in just nine months timeline starting April 2014, the notion of One Person Companies opens up spectacular possibilities to bring the unorganized sector of proprietorship into the organized version of a corporate sector.

The model is luminous for small enterprises who are looking at testing the waters of corporatization and also for entrepreneurs with innovative ideas, novel thoughts and new ventures who are trying to explore the corporate world with minimum compliances and maximum benefits. Opening boulevard for more heartening entrepreneurial prospects, One Person Companies are indomitable not only to boost the confidence of small entrepreneurs but also to boost India's global economy.

FREEDOM OF EXPRESSION AND MAINTENANCE OF PUBLIC ORDER: CONTEMPORARY ISSUES AND STATE RESPONSE

Saadiya*

Abstract

We are living in troubled times, in a complex world- a world where it is difficult to demarcate between the real and the virtual. With the media of expression expanding exponentially, the consequent impact on right to Freedom of expression is well expected. In the recent past, India has witnessed an increase in the culture thriving on mob mentality. Any expression offending the sensibilities of a group can trigger a frenzied mob vandalising art galleries/theatres/universities/news channel offices or private property of the alleged offender. Artists and authors are condemned for their creations which a handful might find objectionable or offending religious or cultural morality. Cinematographic films are censored, effigies of celebrities/artists burnt, galleries vandalised, literary works banned and authors are banished from their motherland. The vital issue here is the growing intolerance of public towards individuals exercising their legitimate right to express themselves and incapacity of state to protect them. The government has the tendency of succumbing to pressure from the mob and restraining individual liberty in the interest of "public order." Such state action has ignited the debate on legitimacy of use of the ground of public order for restricting artists and individuals. In this paper the author broadly assesses the legitimacy of state action while claiming to balance individual freedom of expression and maintaining public order in the light of empirical data collected in the month of March-April 2014 by taking a sample of 331 subjects. The case of Salman Rushdie, the movie Vishwaroopam and Azaad Maidan rioting are some incidents which the author discusses in detail.

I

Introduction

When a well-known actress makes a statement about pre-marital sex in an interview for a leading magazine which is distorted and republished in a periodical, the sensibilities of the public get greatly offended and she gets as many as twenty three criminal complaints filed against her.[1] The screening of a multi-

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1 See *S. Khushboo* v. *Kanniammal & Anr.* (2010) 5 SCC 600. The Supreme Court in the judgment dated April 28, 2010 quashed all the 22 criminal cases against popular film actress Khushboo and upheld her right to freedom of speech and expression.

million movie based on the backdrop of terrorism gets banned in the state of Tamil Nadu for the fear of offending Muslim sensibilities thereby disturbing communal harmony.[2] Another movie based on the subject of reservation is banned in the State of U.P, A.P and Punjab due to the fear of breach of law and order.[3] A girl's seemingly harmless status update on Facebook questioning the shutting down of a city on the death of a Right wing political figure revered by millions, leads to vandalism of her uncle's clinic and eventually her arrest under the Information Technology Act, 2000[4] (hereinafter refered as I.T. Act.). The author of an objectionable work of fiction is forced to cancel his visit for a literary festival in India for the fear of disruption of public order by Muslims offended by the prior publications of the author.[5] The fear of mob's volatile reaction and vandalism lead to self censure and withdrawal of a book from print in India by

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2 See report dated January 24, 2013 by J SmDanial Stalin, "Kamal Haasan's *Vishwaroopam* banned in Tamil Nadu," *Available at:* http://www.ndtv.com/article/south/kamal-haasan-s-vishwaroopam-banned-in-tamil-nadu-321455. (Visited on February 1, 2014).

3 The screening of the movie *Aarakshan* was suspended in the states of Uttar Pradesh, Andhra Pradesh and Punjab by the state governments for the apprehension of disruption of law and order even after the censor board had cleared the movie for public viewing. See *Prakash Jha Productions* v. *Union of India* (2011) 8 SCC 372. See report dated August 11, 2011 "Andhra bans Prakash Jha's *Aarakshan* after Punjab, UP," *Available at:* http://indiatoday.intoday.in/story/prakash-jha-aarakshan-ban/1/147722.html (Visited on February 1, 2014).

4 The girls were arrested under the now unconstitutional section 66A of the Information Technology Act, 2000. *See Shreya Singhal v. Union of India (Writ Petition (Criminal) No. 167/2012.* Also see Report Dated November 19, 2012 by PTI, "Two Mumbai girls arrested for Facebook post against Bal Thackeray get bail," *Available at:* http://indiatoday.intoday.in/story/2-mumbai-girls-in-jail-for-tweet-against-bal-thackeray/1/229846.html. (Visited on February 8, 2013).

5 Booker prize winner author Salman Rushdie was scheduled to visit the Jaipur Literary Festival in January 2012. He cancelled his visit apparently due to pressure from the state government. Although the state government expressed its oblivion about Rushdie's plans and it was clarified by Rushdie himself that he is cancelling his visit owing to death threats. The organizers tried to get him speak via video conference but permission for the same was denied by the authorities who feared a law and order situation. See *infra* part III (ii).

6 Wendi Donigers's book *The Hindus: An Alternative History,* was withdrawn from print and all its copies were destroyed by its publisher Penguin Books India after an out of court settlement in the backdrop of a case being filed against the book under section 295A of the Indian Penal Code, 1860 by a right wing activist Dina Nath Batra, head of *Shiksha Bacho Andolan*, a fringe Hindu right-wing group dealing with education and text books. Fearing safety of its employees from threats of attack by right wing fundamentalists offended by the content of the book, the publisher *suo moto* took the decision of withdrawing the book from market and destroying all copies of what was in stock. See Official statement of Penguin India after withdrawing the book from circulation *Available at:* http://www.penguinbooksindia.com/en/content/penguin-india%E2%80%99s-statement-%E2%80%98-hindus%E2%80%99-wendy-doniger. (Visited on February 21, 2014). Also

a publishing house.[6] Interestingly, the book continues to be available in its electronic version in India. The past two decades are full of such instances when the decreasing level of tolerance and offended sensibilities has led to various public order situation or apprehension thereof, leading thereby to curtailment of freedom of expression of individuals.

In this paper the researcher discusses some of the incidents that have occurred in the past and had either led to public order situations or curtailment of individual rights because of the fear of breach of public order. Before analyzing the specific incidents, in the first part of the paper, the concept of "public order" is discussed briefly. Thereafter, in the next part, certain incidents in the recent past are analyzed. Based on the analysis the researcher narrows down some research questions which are tested by an empirical survey[7] and discussed in the next part. Finally, on the basis of the survey results a conclusion is arrived at.

II

Public Order

"No happiness without liberty, no liberty without self government, no self government without constitutionalism, no constitutionalism without morality and none of these great goods without stability and order."[8]

Public order is considered to be an elemental need in any organized society

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See Report dated February 13, 2014 by Ellen Barry, "Indian Publisher withdraws book, stoking fears of nationalist pressure," *Available at:* http://www.nytimes.com/2014/02/15/world/asia/indian-publisher-withdraws-book-stoking-fears-of-nationalist-pressure.html?_r=0. (Visited on February 24, 2014) and See article dated February 15, 2014 by Ratna Kapur "Totalising History, Silencing Dissent," *Available at:* http://www.thehindu.com/todays-paper/tp-opinion/totalising-history-silencing-dissent/article5691509.ece. (Visited on February 24, 2014).

7 For the purpose of the study, a survey was conducted in the month of March-April 2014and a sample was taken from population within a certain age range. The data was generated by two methods- online survey (sample that comprised of people who use social media) and individual data collection by distribution of questionnaire. A total of 331 subjects undertook the survey, of which 51.1% were females. The maximum numbers of respondents were from the age group 25-34 at 52.6% followed by the 18-24 age group at 34.7%. Classifying the respondents on the basis of educational background, 21.5% were pursuing graduation, 23.6% were already graduates and 41.1% were postgraduates. 5.7% were doctorate holders, 5.4% SSC pass and 2.1% had only pursued their studies until high school. Of the total sample, Respondents were further classified by the religion of parents which turned out to be 56.8% Hindus, 38.7% Muslims and rest 4.5% comprising of Christians, Sikhs and atheists. 0.3% belonged to parents of different religions. The data was analyzed by using SPSS and applying chi square tests.

8 Quoting from Introduction of the Federalist by Clinton Rossiler, D.D. Basu, *Commentary on Constitution of India*, (2007).

and no association can flourish in a state of disorder.[9] It is an expression of wide connotations and includes public safety or interest and signifies that the state of tranquility prevailing among the members of a political society, as a result of the internal regulations enforced by the Government which they have established.[10] Public safety ordinarily means security of the public or their freedom from danger, external or internal. From a wider point of view, public safety would also include the securing of public health by prevention of adulteration of foodstuffs and the like but from the point of view of public order, it has a narrower meaning and offences against public safety would include- creating internal disorder, interference with the supply or distribution of essential commodities or services, inducing members of police to withhold their services or to commit breach of discipline, or inducing public servants engaged in services essential to the life of the community to withhold their services.[11] It is distinct from the terms "law and order" and "of security of state."

(i) Public Order and the Constitution

"Public order" is listed both in List II[12] and List III[13] of the Seventh Schedule thus making it both a State and Central Subject. The distinct use of terms "security of State" and "maintenance of public order" in entry 3 of List III, implies that broadly the Constitution requires a line to be drawn in the field of public order or tranquility marking off, may be, roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance, treating for this purpose differences in degree as if they were differences in kind.[14] It is important to note that the term used in the amended clause is not "maintenance of public order." The Hon'ble Supreme Court in *Ramji Lal Modi*[15]noticed that the language employed in the amended clause uses the expression "in the interests of" and not "for the maintenance of" and cited *Debi Soron* v. *The State of Bihar*,[16] wherein the Patna High Court pointed out that "in the interests of" makes the ambit of the protection very wide. A law

[9] *Supra note* 8.

[10] *Romesh Thapar* v. *State of Madras* AIR 1950 SC 124.

[11] *See Brijbhushan* v. *State of Delhi* AIR 1950 SC 129; *State* v. *Ramanand* AIR 1956 Pat 188; *Dalbir* v. *State of Punjab* AIR 1962 SC 1106.

[12] List II Entry 1, Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power).

[13] List III Entry 3 Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention.

[14] *Supra* note 10.

[15] AIR 1957 SC 620.

[16] AIR (1954) Pat. 254.

may not have been designed to directly maintain public order and yet it may have been enacted in the interests of public order.

Absence of public order is an aggravated form of disturbance of public peace which affects the general current of public life or the community at large,[17] and any act which merely affects the security of others may not constitute a breach of public order. For an act to be held prejudicial to public order it must be shown that it is likely to affect the public at large and is not limited to affecting an individual. By virtue of the penal laws, anticipatory action can be taken by the authorities in case of likelihood of *immediate danger of breach of peace*.[18] Now what could be considered as *likely* to affect the public at large is a question to be decided objectively on basis of the circumstances prevailing at the time the expression was made or to the audience it was targeted at and not merely on conjectures.

Article 19(1) (a)[19] of the Indian Constitution guarantees every citizen a right to freedom of speech and expression subject to reasonable restrictions under 19(2). The State may make a law imposing reasonable restrictions on the right *in the interest of* 'security of the State,' 'friendly relations with foreign States,' 'public order,' 'decency,' 'morality,' 'sovereignty and integrity of India,' or 'in relation to contempt of Court, defamation or incitement to an offence.' Prior to the First Constitutional Amendment in 1951, "public order" did not find any mention in clause 2. The original clause reads as- Article 19(2): Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of Court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow the State.

It is interesting to note that during the course of Constitutional Assembly Debates when the Article 13 of the Draft Constitution corresponding to Article 19 of the present Constitution was being discussed, and some members had suggested the use of terms like 'interest of general public,' 'general public interest' and 'public order,' Shri Amiyo Kumar Ghosh a member of the Constituent

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17 *Ram Manohar* v. *State of Bihar* AIR 1966 SC 740.

18 Section 144 Cr. P. C, 1973 confers power to the District Magistrate to issue order in urgent cases of nuisance or apprehended danger. In *Babulal Parate* v. *State of Maharashtra* AIR 1961 SC 884, sec. 144 was challenged as being an encroachment on the fundamental rights of the citizens to freedom of speech and expression and to assemble peaceably and without arms, guaranteed under Art. 19(1) (a) and (b) of the Constitution. The Hon'ble court while upholding the constitutionality of the section held that the power conferred by the section is exercisable not only where present danger exists but is exercisable also when there is an apprehension of danger.

19 Article 19(1) (a) reads- All citizens shall have the right to freedom of speech and expression.

Assembly from Bihar pointed out that these words are being used without defining them and it would take a lot of time and effort on the part of Supreme Court to define these terms and by incorporating such words in the sub clauses, wide powers are being conferred to the legislature which can restrict the freedom guaranteed to the people under clause 1.[20]

Post *Romesh Thapars*'[21] case, which led to the retrospective amendment of Article 19(2) in 1951,[22] the Hon'ble Apex court has interpreted the scope and ambit of public order in a plethora of cases.[23] The power of State to enact a law curtailing freedom of expression has to be exercised within the four corners of reasonable restrictions as provided for in clause (2) of article 19 and not beyond.

(ii) Public Order Plea: A Deception?

The public order justification for restricting freedom of speech has been questioned by Rajeev Dhavan who claims it to be legacy of British Raj adopted by the Supreme Court without looking at the nature of social and political protests.[24] Dhavan has dissected the press laws under the lens of three paradigms; first concerning 'law and order,' second concerning the monopolism of Indian Press and the third related to the commitment of journalism to developmental aims.[25] For the purpose of our study, it is the first paradigm that is of immense importance. Dhavan traces the use of the "public order" justification for imposing restrictions on the exercise of 'free' speech since the time of British *Raj* and how the British public policy has remained an important feature of Indian public law even after independence. The British used the broad argument of 'public interest' and argued that public order must be maintained at all costs. The Constitution framers too juxtaposed the threat of violence as the prime reason for restricting freedom of speech and the need for restraint was always regarded as more fundamental than the fundamental right to free speech. The Supreme Court did not question this paradigm although they occasionally reminded the Government to use the power to prevent 'public

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20 *See* Constitutional Assembly Debates 770 (Book no 2. Vol. VI Lok Sabha Secretariat).

21 The Supreme Court in *Romesh Thapar* held that local breaches of public order were no grounds for restricting the freedom of speech guaranteed by the constitution. See *supra* note 10.

22 The Constitution (1st Amendment) Act, 1951.

23 *See Brijbhushan* v. *State of Delhi* AIR 1950 SC 129, *Ramji Lal Modi.* v. *The State of U.P.* AIR 1957 SC 620, *Ram Manohar* v. *State of Bihar* AIR 1966 SC 740, *The Superintendent, Central Prison, Fatehgarh* v. *Ram Manohar Lohia* (1960) 2 S.C.R. 821; *Babulal Parate* v. *State of Maharashtra* AIR 1961 SC 884 *Dalbir* v. *State of Punjab* AIR 1962 SC 1106, *O. K. Ghosh* v. *E. X. Joseph,* AIR 1963 SC 812 etc.

24 *See* Rajeev Dhavan, *Only the Good News: On the Law of the Press in India* (1987)

25 *Ibid.*

order' and not just 'law and order.'[26] The unquestionable supremacy of the strong public order paradigm proved a useful vehicle to deal with all forms of oppositional resistance.[27] The first step in this process was to depict any threat to public order as a natural 'effluence' to India's complex structure.[28]

Dhavan points out that contemporary India has not redressed its emphasis on public order by looking at the nature of social and political protests. They have reified public order so that it represents a self contained and irrefutable logic.[29] Such process of reification has its roots in the nineteenth century when the public law of British India sought to create a system that would legitimate itself and camouflage political repression as publicly desirable legal action in the name of the rule of law.[30] In consonance with Dhavan, can it now be argued that the twenty first century Indian political class has learnt and perfected the art of deception in the name of public order? If that is the case, it is high time that we introspect and rewrite the public order jurisprudence which has been thoroughly imprinted on the Indian mindsets still struggling hard to get over the colonial legacy.

III

Public order v. Public Intolerance-The State Response

In June 2014, screening of a Sri Lankan Movie was cancelled after a militant outfit threatened cinema owners and the police refused to provide for protection to theatres.[31] This is not the first time when movies have been targeted by fundamentalist organizations. Mani Ratnam's *Bombay,* Meera Nair's *Fire, Water* have all faced the ire of right winged fundamentalist for offending their sensibilities.[32] In this section we would endeavor to analyze the events as they

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26 *Supra note* 24.

27 *Ibid.*

28 *Ibid.*

29 *Ibid.*

30 *Ibid.*

31 Screening of the India-Sri Lanka joint collaboration directed by acclaimed Sri Lankan filmmaker Prasanna Vithanage, *With you, Without you,* which had been screened in more than thirty film festivals across the globe, was cancelled in Chennai after officials at two multiplexes received threat calls from Tamil groups. Report by Karthick S, dated June 22, 2014 "Sri Lankan filmmaker seeks Jayalalithaa's help to screen 'With You, Without You' in Tamil Nadu," *Available at:* http://timesofindia.indiatimes.com/india/Sri-Lankan-filmmaker-seeks-Jayalalithaas-help-to-screen-With-You-Without-You-in-Tamil-Nadu/articleshow/37026648.cms. (Visited on June 25, 2014).

32 See report dated May 3, 2006 by Elisabeth Bumiller, "Film Ignites wrath of Hindu Fundamentalists," *Available at:* http://www.nytimes.com/2006/05/03/movies/03wate.html?_r=0. (visited on March 29, 2014). Also see report dated February 3, 2013 by Anuj Kumar, "Ban Culture Goes Back a Long way," *Available at:* http://www.thehindu.com/

unfolded trying to understand the link between the controversy and public order situations and how the State has responded to these.

(i) The curious case of Vishwaroopam

National award winner Kamal Hassan's multi million project *Vishwaroopam* is a curious case where politics, movie business and *mullahs* meet providing a perfect recipe for projected public order situation. *Vishwaroopam* is an action movie set in the backdrop of post 9/11 world with the action switching between America and Afghanistan. Once the movie was complete, defying normal convention, in a move that could have changed the way movie business has always been done in the Country. Hassan decided to release the movie on DTH (Direct-to-Home) services on the same day as its theatre release. Hassan's decision did not go well with the theatre owners who thought the move would start a trend which is going to cripple the theatre industry.[33] In the middle of the raging controversy between an existing business model and a proposed business model, the *mullahs* came into scene with objections being raised as to the demonization of Muslims in the movie.

Apprehending breach of public order by an assumed violent reaction of Muslims, the State of Tamil Nadu banned the movie from screening.[34] Although the movie was banned in Tamil Nadu, it ran successfully in the rest of the Country especially in the neighboring State of Kerala with movie theatres close to Kerala-Tamil Nadu border raking in moolah with fans crossing borders to watch the movie in Kerala.[35] Surprisingly, no incidents of arson or rioting were reported from any part of the country where the movie was playing. It is quiet curious to see why it was only in the State where the movie was supposed to be released simultaneously on DTH that the Muslims were expected to behave violently and disrupt public order. If it were the Muslim organizations who were protesting against the movie for offending their sensibilities, then why did the

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news/national/ban-culture-goes-back-a-long-way/article4373077.ece. (Visited on February 8, 2013).

33 See report dated December 11, 2012 by Sangeetha Kandavel, "Kamal Hassan's plan to show Vishwaroopam on DTH irks Theater owners," *Available at:* http://articles.economictimes.indiatimes.com/2012-12-11/news/35749555_1_theatre-owners-film-industry-vishwaroopam. (Visited on February 11, 2014)

34 See report dated Jan 23, 2013 by PTI, "Tamil Nadu bans screening of 'Vishwaroopam'," *Available at:* http://www.thehindubusinessline.com/news/tamil-nadu-bans-screening-of-vishwaroopam/article4336330.ece. (Visited on February 11, 2013).

35 See Report dated February 4, 2013 by Binoy Valsan, "Border Theaters in Kerala Benefit from 'Vishwaroopam Controversy," *Available at:* http://timesofindia.indiatimes.com/city/coimbatore/Border-theatres-in-Kerala-benefit-from-Vishwaroopam-controversy/articleshow/18326977.cms (Visited on February 11, 2014).

movie not offend Muslims in the other parts of the Country? After a round of negotiations between Hassan, Muslim organizations and the State Government, a settlement was reached whereby certain scenes were edited and sound clips muted, breaking the impasse and finally the ban was lifted.[36] Fearing more loss of money in case the matter was pursued in Court, Hassan withdrew the petition from Madras High Court where he had challenged the ban on screening of the movie.[37] The edited movie ran successfully thereafter.

The whole controversy raises certain important questions. The movie ran peacefully in other parts of the Country without any violent reactions even without the edits. What difference did the edits make in the State of Tamil Nadu? Post 9/11, in any movie where the base plot is terrorism, Muslims are being projected as terrorists especially in the West. All the Hollywood action movies based on the concept of Islamic Terrorism run without any violent reactions from the Muslims either in the West, Middle East or India. Was the apprehension of the State Government of Muslim organizations running amuck protesting taking the State in siege based on any reasonable grounds? Was this whole controversy about Mullahs getting offended by Muslims being projected in bad light or was this all about money? Anuj Srivas[38] analyzes the controversy in terms of the Streisand effect[39] and consequent economic impact on the movie. He argues that the call for ban on the movie resulted in more people wanting to watch it in theatres who might otherwise have waited for its release

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36 See Report dated February 2, 2013 by PTI, "Vishwaroopam row ends; Kamal Haasan, Muslim groups reach accord," *Available at:* http://timesofindia.indiatimes.com/india/Vishwaroopam-row-ends-Kamal-Haasan-Muslim-groups-reach-accord/articleshow/18307737.cms. (Visited on February 12, 2014).

37 See Report dated February 4, 2013 by PTI, "Kamal Hassan, government withdraw pleas in HC on Vishwaroopam," *Available at:* http://articles.economictimes.indiatimes.com/2013-02-04/news/36742923_1_haasan-today-tamil-movie-vishwaroopam-kamal-haasan. (Visited on February 12, 2014).

38 See opinion dated February 2, 2013 by Anuj Srivas, "Viswaroopam, DTH and the Streisand Effect," *Available at:* http://www.thehindu.com/opinion/blogs/blog-hypertext/article4371921.ece (Visited on February 12, 2014).

39 The Streisand Effect describes how efforts to suppress a juicy piece of online information can backfire and end up making things worse for the would-be censor. The effect is named after the American singer and actress Barbra Streisand, who sued the California Coastal Records Project, which maintains an online photographic archive of the California coastline, on the grounds that its pictures included shots of her cliffside Malibu mansion, and thus invaded her privacy. The suit had an opposite effect of what Ms Streisand intended and thousands of people who would have not bothered earlier, now browsed the archive specifically to see her mansion. "What is Streisand Effect?" *Available at:* http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-what-streisand-effect. (Visited on February 12, 2014).

on DTH.[40] The truth of projected demonization of Muslims getting offended by a movie and reacting violently disrupting public order would be tested by an empirical survey conducted by the researcher.[41]

Although *Vishwaroopam* is an out and out fictional movie, at this juncture, the researcher finds it appropriate to analogize its situation with that of the documentary *In Memory of Friends*[42] based on the issue of terrorism in Punjab, telecast of which was refused by Doordarshan for the fear of hurting sentiments, creating communal hatred and inciting violence.[43] The refusal of Doordarshan was challenged by the documentary filmmaker as infringing the fundamental right to expression under Article 19(1) (a) of Indian Constitution. The Bombay High Court observations while holding the action of Doordarshan to be unjustified, directed the telecast of the documentary are pretty relevant for our purpose. The Hon'ble High Court observed-

"We must judge the film in its entirety from the point of view of its overall impact. I have already recorded that there is no justification of the fundamentalists. On the other hand, there is a strong condemnation of those responsible for the killing of innocent people in the name of the religion. The documentary viewed in its entirely is capable of the creating a lasting impression of the message of peace and co-existence and there is no fear of the people being overwhelmed or carried away by excerpts showing interviews with fundamentalist groups. The standard to be applied by the Board or Courts for judging the film should be that of an ordinary man of common sense and the prudence and not that of an out of the ordinary or hypersensitive man."

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40 In Srivas's words- "before the ban— watching Viswaroopam on DTH should have been the moral choice for all paying consumers. After the last two weeks, people are more determined than over to show the fringe radicals they are wrong and are determined to watch it in theatres." *Supra* note 38.

41 See *infra* Part V.

42 The documentary tells the story of a small group of activists in Punjab even when faced with hostilities from terrorists, risked its life to propagate secularism and humanism. The film follows a group of leftist activists led by playwright Gursharan Singh and some other activists as their group travels through Punjab commemorating the martyrdom of Bhagat Singh. Bhagat Singh's writing on the necessity of class struggle, of its power to overcome barriers of religion and his uncompromising atheism are highlighted in the film. The film portrays how fundamentalists are trying to use the image of the popularity of Bhagat Singh amongst the youth to its cause of Khalistan. In the documentary there are also some excerpts interview with terrorist groups and also an excerpt of an interview of a victim of the unfortunate riots in Delhi that took place following the assassination Mrs. Indira Gandhi. *See Anand Patwardhan* v. *The Union of India and Others*, AIR 1997 Bom 25.

43 *Ibid.*

The Court supported its view by quoting Justice Vivian Bose[44]

"... That the effect of the words must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view. This is in our opinion, is the correct approach in judging the effect of exhibition of a film or of reading a book. It is the standard of ordinary reasonable man or as they say in English law, the man of the top of the Clampham omnibus'."

At this point, the observation of the Supreme Court in the *Prakash Jha Productions* v. *Union of India*[45] becomes equally relevant. The Hon'ble Court held-

"It is for the State to maintain law and order situation in the State and, therefore, the State shall maintain it effectively and potentially. Once the Board has cleared the film for public viewing, screening of the same cannot be prohibited in the manner as sought to be done by the State in the present case."

The controversy on *Prakash Jha* arose when a high-Level Committee of State Government ordered deletion of some portions of movie *Aarakshan* on the ground of apprehended breach of peace or ban public exhibition of the film after the Censor Board had certified the movie fit for public viewing, the Court categorically emphasized the responsibility of the State to maintain law and order. The Court supported its view by citing *K.M Sankarapaa* wherein the Hon'ble Court categorically had held "once an expert body has considered the impact of the film on the public and has cleared the film, it is no excuse to say that there may be a law and order situation and that it is for the State Government concerned to see that the law and order situation is maintained and that in any democratic society there are bound to be divergent views."[46] Keeping in sight the Supreme Court judgments mentioned above as well as the judgment delivered by the Bombay High court in the case of *Anand Patwardhan,*[47] it is not difficult to predict what the decision of the Madras High Court would have been in case Hassan did not withdrew the petition fearing more loss of money by delay in screening.

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[44] *Bhagwati Charan Shukla* v. *Provincial Government*, AIR 1947 Nag 1.
[45] (2011) 8 SCC 372.
[46] (2001) 1 SCC 582
[47] *Supra* note 42.

(ii) The Rushdie Affair

Salman Rushdie, born a Muslim, self- proclaimed atheist, has his name firmly inked in the history of post-colonial literature. Famous or infamous, depending from which side of the world you view him, Rushdie, best known for *The Satanic Verses,* has the distinction of being the first author of Muslim lineage in the modern times to have been issued a *fatwa* against.[48] The saying "one man's' villain is another man's' hero" is apt for Rushdie who on the one hand has a fatwa issued against him and on the other has been conferred the honor of Knighthood by the Queen of England.

The winner of the Booker award[49] was invited to attend the Jaipur Literary Festival, which is an annual literary festival organized in the Pink City, an event which he had previously attended in its second year *i.e.,* in 2007. However, after five years of his last visit and after almost two and a half decades of the publication of the objectionable work of fiction, Rushdie was forced to cancel his visit for the literary festival apparently because of Governmental pressure.[50]Although the State Government expressed its oblivion about Rushdie's plans and it was clarified by Rushdie himself that he is cancelling his visit owing to death threats.[51] The organizers tried to get him speak via video conference but permission for the same was denied by the authorities who feared a law and order situation by Muslims who had apparently gathered outside the venue and were ready to create ruckus, if Mr. Rushdie were to address the gathering via the video conference.[52] Although the video link to the fest was cancelled, Mr.

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[48] On February 14, 1989 by a broadcast by Tehran radio, the Ayatollah of Iran was quoted to be saying, "I inform the proud Muslim people of the world that the author of the Satanic Verses book which is against Islam, the Prophet and the Koran, and all those involved in its publication who were aware of its content, are sentenced to death. I ask all the Muslims to execute them wherever they find them.' See report dated February 15, 1989 by Peter Murtagh, "Rushdie in hiding after Ayatollah's death threat, *Available at:* http://www.theguardian.com/books/1989/feb/15/salmanrushdie. (Visited on January 16, 2014).

[49] See report dated July 11, 2008 by Arifa Akbar, "Rushdie wins Booker of Bookers with Midnight's Children, "*Available at:* http://www.independent.co.uk/arts-entertainment/books/news/rushdie-wins-booker-of-bookers-with-midnights-children-865047.html. (Visited on January 18, 2014).

[50] See report dated January 20, 2012 by Amrita Tripathi, "Salman Rushdie asked to skip Jaipur Literature festival?" *Available at:* http://ibnlive.in.com/news/salman-rushdie-asked-to-skip-jaipur-literature-festival/221436-17.html. (Visited on January 18, 2014).

[51] See report dated January 20, 2012 "Salman Rushdie pulls out of Jaipur literature festival," *Available at:* http://www.bbc.com/news/world-asia-india-16644782. (Visited on January 18, 2014)

[52] See Report dated January 26, 2012 by William Dalrymple, "Why Salman Rushdie's voice was silenced in Jaipur," *Available at:* http://www.theguardian.com/books/2012/jan/26/salman-rushdie-jaipur-literary-festival. (visited on January 18, 2014).

Rushdie spoke to journalist Barkha Dutt in an interview telecast nationwide on NDTV at the very same time he was supposed to speak to audience live at Jaipur.[53]

The cancellation of Mr. Rushdie's visit and non-occurrence of Rushdie's video conference poses certain questions. Can the citizenry in a democratic country like India be really so bothered about arrival of a man accused of blasphemy in the Country so much so as to cause a threat to public order? If yes, then why did the same citizenry, ignored the arrival of Mr. Rushdie in the same literary festival in the same city in the year 2007? And why was the public order not disrupted when he attended the India Today Conclave after two months of the literary festival in March 2012? In fact, Rushdie had visited India a number of times after the fatwa controversy had died down in its natural death.[54] What was different in the Jaipur literary festival in 2012? Even if we assume that the state had reliable intelligence report of threat of violence in case Mr. Rushdie turns up, isn't it the duty of the state maintain public order? Banning his work is a separate question altogether but Mr. Rushdie as a PIO *i.e.,* a person of Indian origin has every right to visit his motherland whenever it pleases him. And it is the State's responsibility to provide him safe access to the Country of his origin not to bow down to threats of violence, if there are any. The researcher is in with full agreement to the observation made by the Madras High Court in the case of the movie *Da Vinci Code* wherein para 50, the Hon'ble Court held[55]-

"If a section of the society threatens to express its views by unlawful means thereby curtailing the fundamental rights of citizens, the State owes its duty not to please those persons who threaten such breach of peace, but to protect those persons whose fundamental rights are threatened to be violated."

The question which was raised in the *Vishwaroopam* controversy is reiterated again here-do people(Muslims here) really have that tendency of resorting to violence and disrupting public order when they are offended by say

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[53] See full transcript of Rushdie's interview dated January 25, 2013 "Full transcript: I'm returning to India, deal with it - Salman Rushdie to NDTV," *Available at:* http://www.ndtv.com/article/india/full-transcript-i-m-returning-to-india-deal-with-it-salman-rushdie-to-ndtv-170122?curl=1418544632. (Visited on January 18, 2014).

[54] Rushdie in his memoir *Joseph Anton* writes about his first visit to Delhi post fatwa and correctly sums it up-". For the vast majority of Indian Muslims, the controversy was an old hat, and inspite of the efforts of the politicians and the imams (both of whom made blood & thunder speeches) nobody could really be bothered to march. *Oh, there is a novelist in town for a dinner? What's his name? Rushdie? So what?"* Salman Rushdie, *Joseph Anton: A Memoir,* (Jonathan Cape, London, 2012).

[5] *Sony Pictures Releasing of India Ltd.* v. *The State of Tamil Nadu,* (2006) 3 MLJ 289.

a piece of work or a person.

At this juncture, the researcher would like to make a passing reference to the judgment delivered by Calcutta High Court in the case of Bangladeshi writer Taslima Nasreen's autobiography *Dwikhandita*.[56] The Court observed[57]-

"Besides the point of law, there is another angle to the issue to be considered. There were no reports of any communal trouble, tension or disharmony of any nature among various communities in India after the publication of the book in November, 2003. Subsequently, it had gone in for a reprint in the same month. This goes to show that the citizens of this Country and especially the followers of Islam whose sentiments, it is alleged the book had hurt, are responsible and mature enough to examine the book in the right perspective, ignore any comments, whatsoever, in a book by a single individual on their Prophet whom they hold in highest reverence. Rather, the banning of the book calls into question the sanity, catholicity and maturity of the socially aware followers of Islam in India and is an insult to their understanding and spirit of tolerance."

IV

Viral Videos and Public Disorder

Internet which is definitely capable of mobilizing public opinion, making the otherwise oblivious public aware of the political realities, is now becoming a very dangerous tool in the hands of bigots and hate mongers who find themselves easily armed with the enormous power of social media and use it to spread hatred, arouse ill-will, encourage enmity and disrupt public order. In the recent past we have witnessed the viral spread of certain video messages which were followed by disruption of public order and rioting. The Azaad maidan rioting and the Muzzafarnagar riots in 2013, were both preceded by wide circulation of videos accompanied by spiteful, venomous, bigoted messages. In this part, one such video and the consequent public disorder would be analyzed.

(i) One video, Whatsapp and the Mumbai Mayhem

The video, which is the subject of deliberation, is the one which finally led to running of special trains from all parts of India to North East transporting individuals belonging to a certain ethnicity fearing violence from a certain community. The video which depicted horrifying pictures of individuals belonging to one particular community allegedly being persecuted for their faith was widely circulated via internet and mobile phones. Communities wide protests started to

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[56] *Sujato Bhadra* v. *State of West Bengal* (2005), 3CALLT436(HC)

[57] *Ibid.* Para 104.

build up and a rally was organized in Mumbai calling for demonstration condemning atrocities against the community. As the rally was proceeding peacefully, some miscreants started behaving violently and within minutes the entire scene transformed into utter chaos. Media persons were attacked, OB Vans burnt, stones pelted on policeman, buses, private and police vehicles were torched. Apart from the loss of public property, two persons were killed and more than 50 were injured as a result of the rioting in Azad Maidan.[58] After disrupting Mumbai, the video caused mayhem in Pune and students and professionals belonging to North Eastern states were attacked.[59] The rumor factory milled a classic- a predicted backlash against the individuals of North Eastern ethnicity by Muslims provoked by the video, as a result of which mass exodus began from Bangalore towards Guwahati. Special trains were planned to shift those scared of the impending attacks by a Muslims protesting against persecution, to their native States.[60]

The entire Mumbai/Pune/Bangalore chaos raised very important questions. First, is with respect to the doctored video which is alleged to be the culprit causing all the chaos.[61] The video which was so obviously doctored, was circulated across the length and breadth of the Country via WhatsApp[62] and other messaging mobile phone applications[63] along with the message questioning

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58 See report by The Hindu, dated August 12, 2012 "Two Killed as protests in Mumbai against Assam Riots turn violent," *Available at:* http://www.thehindu.com/news/national/other-states/two-killed-as-protest-in-mumbai-against-assam-riots-turns-violent/article3754170.ece. (Visited on January 18, 2014).

59 See report by The Hindu, dated august 14, 2012 "9 held for targeting N-E students," *Available at:* http://www.thehindu.com/news/national/other-states/9-held-for-targeting-ne-students/article3766205.ece (Visited on January 18, 2014).

60 See report by the Hindu, dated August 16, 2012 "After rumours northeaster people flee Bangalore," *Available at:* http://www.thehindu.com/news/national/karnataka/after-rumours-northeast-people-flee-bangalore/article3776549.ece. (Visited on January 18, 2014).

61 See report by The Indian Express, dated August 17, 2012 "Pune attacks against north east students too provoked by Assam video," *Available at:* http://www.indianexpress.com/news/pune-attacks-against-northeast-students-too-provoked-by—assam-video—say-police/988047/ and report by NDTV dated August 14, 2012 "Doctored MMS Provoked Pune Attacks on North Eastern Community," *Available at:* http://www.ndtv.com/article/cities/doctored-mms-provoked-pune-attacks-on-north-eastern-community-254540. (Visited on January 18, 2014).

62 Whatsapp is a cross-platform mobile messaging application which allows users to exchange messages without having to pay for SMS. It uses the same internet data plan which the user is using for email and web browsing on the phone.

63 A Mobile phone application more popularly known as mobile apps or simply "App" is a software application which runs on various communication devices, smart phones, tablets, iphones, ipads and other mobile devices. It is easily downloadable and designed to educate, entertain, or assist consumers in their daily lives. A mobile app may be a mobile Web site bookmarking utility, a mobile-based instant messaging client, Gmail for mobile, and many

the motive behind media's silence on the purported persecution.[64] The video's plea to Muslims to take some action against the governmental apathy against persecution of their brethren was heard only in Mumbai where a rally was organized and representatives of the community gave certain speeches. Were the riots a result of the speeches which aggravated the sense of impending persecution amongst the protesters? If the Mumbai police are to be believed, the violence erupted separately from the speeches as none of the rioters arrested for violence heard any speech.[65] Can it then be said that it was the doctored video attached to the message that led to the mayhem or the whole thing was a part of a larger political conspiracy by creating an atmosphere of fear and distrust between different communities thereby polarizing the voters keeping in mind the peculiar political realities of our Country?[66]

Was the video really provocative enough to incite its recipients to violence? If yes, then why did the violence erupt only in Maharashtra? Assuming that the video message circulating in Mumbai/Pune was provocative by a greater degree than what was in circulation in the rest of India, how do we fix liability? Would every single individual, who had mindlessly forwarded the message on a free messaging application like WhatsApp, never considering the content of the message to be capable of causing chaos of such magnitude, be apprehended under the now unconstitutional Section 66A[67] of the IT Act? Or is it only the creator of the doctored video who is to be held responsible under the Section? How do the authorities trace down the origin of the doctored video and the

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other applications. See http://www.webopedia.com/TERM/M/mobile_application.html. Some popular smart phone platforms that support mobile apps are Windows Mobile, Android, Symbian, Java ME, Apple's iOS, Blackberry Ltd's BlackBerry 10, Samsung's Bada, Hewlett-Packard's web OS, and embedded Linux distributions (Visited on January 18, 2014).

64 The author who is based in Delhi too received the video from a friend based in Aligarh, U.P via Whatsapp in the first week of August of 2012.

65 See the report of the Hindu, dated November 10, 2012 "57 Accused in Azad Maidan Riots Case Chargesheeted," *Available at:* http://www.thehindu.com/news/national/other-states/57-accused-in-azad-maidan-riots-case-chargesheeted/article4082295.ece. (Visited on January 18, 2014).

66 See report by Pranati Mehra, dated August 21, 2012 "Was there a method to madness at Azad Maidan on August 11," for one side of the alleged political conspiracy behind the Azad Maidan Riots in Mumbai *Available at:* http://www.governancenow.com/news/regular-story/was-there-method-madness-azad-maidan-august-11. (Visited on January 18, 2014).

67 Section 66A, which has now been held unconstitutional following the *Shreya Singhal* ruling, penalized sending "grossly offensive" messages or information that can cause annoyance, inconvenience, hatred or mislead the recipient through communication service, etc. What is "grossly offensive" for one could be perfectly normal, non offensive for the other. With the net of subjectivity in the statutory language cast wide, the Supreme Court held it to be violative of article 19(1)(a). *See Shreya Singhal* v. *Union of India (Writ Petition (Criminal) No. 167/2012).*

message? What if the origins are traced to foreign jurisdictions? It is practically impossible for the authorities to keep track of the ever evolving mobile phone applications and their use by anti social elements.[68]

What is the liability of Whatsapp as an intermediary[69] under the IT Act? A Mobile App service provider like Whatsapp is an intermediary within the meaning of section 2(1) (w) of the amended IT Act, 2000. Section 79 of the IT Act coupled with the IT Rules mandate a duty of exercise of due diligence upon intermediaries, while discharging their obligations under the law.[70] Under the Rules, once an intermediary discovers, or is notified of proscribed content, it must "disable" the content within 36 hours—effectively precluding any

[68] In Pakistan, mobile phone applications like WhatsApp were banned for some months in an effort to cripple the capability of terrorist organizations who now plan and coordinate criminal activities using Smartphones which are difficult to monitor. See the report by Dawn dated October 4, 2013 "Sindh Govt to block WhatsApp, Viber and other services for 3 months," *Available at:* http://www.dawn.com/news/1047209/sindh-govt-to-block-whatsapp-viber-other-services-for-3-months.(Visited on January 18, 2014).WhatsApp messages are sent via the internet, the records of which are only in the device used and once the chat history is deleted from the phone, it goes to a certain part of the phone's memory which is however is overwritten as more data is moved to this section. See report by David Shamah in The Times of Israel dated March 9, 2013 "Top Cop details the complexities of fighting cyber-crime," *Available at:* http://www.timesofisrael.com/top-cop-details-the-complexities-of-fighting-cyber-crime/. (Visited on January 18, 2014). Also see report by Sandip Dighe for DNA dated December 16, 2013 "Think twice before you forward that message,"*Available at:* http://www.dnaindia.com/pune/report-think-twice-before-you-forward-that-message-1936309. (Visited on January 18, 2014).

[69] An 'intermediary,' with respect to any particular electronic records, means any person who on behalf another person receives, stores or transmits that record or provide any service with respect to that record.

[70] Rule 3 reads-The intermediary shall observe following due diligence while discharging his duties, namely : —

(1) The intermediary shall publish the rules and regulations, privacy policy and user agreement for access-or usage of the intermediary's computer resource by any person.

(2) Such rules and regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that —

(a) belongs to another person and to which the user does not have any right to;

(b) is grossly harmful, harassing, blasphemous defamatory, obscene, pornographic, paedophilic, libellous, invasive of another's privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever;

(c) harm minors in any way;

(d) infringes any patent, trademark, copyright or other proprietary rights;

(e) violates any law for the time being in force;

(f) deceives or misleads the addressee about the origin of such messages or communicates any information which is grossly offensive or menacing in nature;

(g) impersonate another person;

investigation of a complaint's legitimacy.[71] Under the rules, intermediaries are also authorized to immediately terminate access or usage rights.[72] They must also preserve related user records for ninety days for investigatory purposes. The rule is not a flexible, discretionary standard: under the rules, intermediaries must "strictly follow the provisions of the Act or any other laws."[73] Section 79 of the Act was challenged in *Shreya Singhal* on the grounds that the intermediary is called upon to exercise its own judgment under sub-rule (4) and then disable information that is in contravention of sub-rule (2), when intermediaries by their very definition are only persons who offer a neutral platform through which persons may interact with each other over the internet. Further, no safeguards are provided as in the 2009 Rules made under Section 69A. The Hon'ble Court while appreciating that Section 79 is an exemption provision refused to strike down the Section as unconstitutional and held-

"Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a Court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not. We have been informed that in other countries worldwide this view has gained acceptance, Argentina being in the forefront. Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79. With these two caveats, we refrain from striking down Section 79(3) (b)."[74]

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[71] Rule 3 Sub-rule (4) of I.T. Act 2000 reads- The intermediary, on whose computer system the information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through email signed with electronic signature about any such information as mentioned in sub-rule (2) above, shall act within thirty six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub-rule (2). Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes,

[72] Sub Rule(5) I.T. Act. 2000. The Intermediary shall inform its users that in case of non-compliance with rules and regulations, user agreement and privacy policy for access or usage of intermediary computer resource, the Intermediary has the right to immediately terminate the access or usage lights of the users to the computer resource of Intermediary and remove non-compliant information.

[73] Sub rule (6) The intermediary shall strictly follow the provisions of the Act or any other laws for the time being in force.

[74] *Supra* note 68. *Para 117.*

Exercise of due diligence by Mobile Apps service provider would distinctively involve not to violate the privacy of its user.[75] Is it practically possible for an intermediary like Whatsapp with over 450 million active users in India[76] to monitor all messages being circulated via its network is a perplexed question mired with practical difficulty.

The question we ponder upon is this- do videos- doctored or real, offensive or not, drive people out of their homes, on to the streets and disrupt public order? Or is the manipulation of the mob by a handful of people for ulterior motives which leads to rioting and disorder?

V

Freedom of Expression and Public Disorder: Empirical Evidence

During the analysis of various incidents in the preceding two sections, a number of questions arose with respect to the apprehended danger of breach of peace with respect to exercise of freedom of expression. Is the State justified in taking into account an apprehended reaction of a certain community while deciding matters that affect an individuals' fundamental right? Is the apprehension of the state real or in the garb of preventing law and order situation, it is the vote bank politics which is being played?

For ascertaining the truth behind the common assertion that public order situations arise because of offensive/blasphemous expressions, an empirical survey[77] was conducted by the author, the results of which are pretty interesting.

In view of the *Azaad maidan* rioting and subsequent issues arising due to messages communicated via mobile phones and internet, the respondents were asked certain questions regarding such messages and their response towards them. Of all the respondents, a total of 78.6% admitted of receiving messages of socio-political importance, 42.3% of whom received such messages frequently. Of the total respondents who received such messages, 60% admitted of taking them seriously and 36.3% admitted of taking such messages seriously at times. Only 38.5% of the respondents would check the authenticity of the information received, whereas 35.8% would cross check sometimes. 25.8% denied crosschecking the veracity of information at all times.

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75 Pavan Duggal, *Laws Relating to iPads, Tablets, Smartphones & Smart Devices*, 98 (2013).

76 Source Report by Prasnato K Roy in the Economic Times dated February 20, 2014, "Why Whatsapp is so big in India," *Available at:* http://articles.economictimes.indiatimes.com/2014-02-20/news/47527156_1_whatsapp-facebook-founder-mark-zuckerberg-india-numbers. (Visited on March 16, 2014).

77 See *supra* note 7.

The respondents were classified on the basis of educational qualifications and the results were telling quite a tale. 57.1% of respondents with high school background admitted of checking the veracity sometimes as compared to 42.9% which never checked the authenticity. As the level of education increased upto senior secondary level, 30.8% admitted of crosschecking authenticity at all times and an equal number denied checking at all times whereas 38.5% admitted of checking sometimes. As we move further up the education ladder, we see that the respondents who were studying in college, 43.5% admitted of checking authenticity at all times, 40.3% sometimes and only 16.1% denied verifying the content of forwarded messages. This percentage of respondents who do not authenticate information which had fallen to 16.1% at college level again increased to 40% at graduate level. 35% of graduate respondents admitted of cross checking authenticity at all times and 25% sometimes. The percentage of respondents not checking authenticity at all again dropped at the post graduate level to 20% and 40% of the post graduates admitted of cross checking authenticity at all times and 40% sometimes. At the doctorate level, 47.1% of the respondents admitted of cross checking authenticity at all times and23.5% sometimes. 29.4% denied verifying the content of forwarded messages at all times. On applying the Chi Square tests, the p-value (0.029) was found to be less than the significance level thereby conclusively proving the nexus of education with the curiosity level of the respondents. As the level of education increases, the tendency of respondents to believe whatever they read without questioning its authenticity, decreases.

Of the total respondents, 39.3% denied seeing any pictures/videos of violence inflicted on certain communities based on religion / language / ethnicity, shared on social networking sites. 32% admitted of seeing such pictures and 28.7% stumbled across such pictures / videos of violence some times. Of the respondents who saw such pictures often, 17.9 % believed them to be true. 56.6% believed them to be true sometimes and only 25.5% did not assume them to be truthful.

When the respondents were asked whether they feel agitated or angry on reading news accompanied with pictures/videos of oppression of your community, a majority of 67.4% answered in affirmative. Of the respondents who felt agitated / angry, 47.5% admitted of expressing their anger without verifying the authenticity of the news. Out of these, 50% expressed their anger by active discussions in groups, 20.8% by further sharing their angst on social / mobile media.

When the respondents were asked if on reading any post on social media

which is offensive and they personally know it not to be true, do they put forward their opinion by means of comment, a majority of 51.7% answered in affirmative.

Of the 48.3% who do not respond on reading the false offensive posts, 44.4 % simply want to avoid getting involved into any debate whereas 16.9% feel that their opinion does not matter and since it is not going to change anything, there is no point in putting forth their view point. A significant few at 8.8% avoid commenting for the fear of affecting their personal relationships, whereas 3.8% are concerned about their image and fear that by responding on such posts, people might distance themselves from them.

With respect to the controversies regarding cinema and offended sensibilities, the respondents were asked if they felt hurt on seeing any picture / video / movie that questioned their faith a sizeable majority at 67.7% answered in affirmative. When these respondents were further asked whether they expressed their hurt by resorting to violence, a whopping majority at 79% answered in negative. Only 21% admitted of expressing their hurt sentiments by resorting to violence. The respondents were classified according to their educational qualifications and it was found that irrespective of the differences in the level of education, respondents were equally hurt by seeing pictures that were offensive. However, when it came to the expression of their hurt sentiments by resorting to violence there was a remarkable difference in the response. Of the 21% admitting of resorting to violence, 80% were educated only until high school. 38.5% till senior secondary, 27.5% were studying in college. The percentage further slumped after graduation at 18.2% and 17.1% at post graduate level to a complete 0% at doctorate level. On applying Chi Square tests the p-value (0.003) came lower than the significance value proving that there is a direct correlation between education level of respondents and violent reactions to offensive expressions.

When the respondents were classified on the basis of religion, it was found out that Muslims at 74.2% were the most hurt on seeing offensive posts followed by Hindus at 65.4%. Christians and Sikhs came at 50% both. However, when it came to expressing their hurt by resorting to violence, the Sikhs admittedly were most likely to respond by resorting to violence, followed by Christians at 25% and Hindus at 23.6%. Muslims at 16.8% surprisingly emerged as least volatile of the lot. However, on checking the results by applying Chi Square tests, it becomes amply clear that religion of respondents has no direct correlation with either getting hurt or expression by violent means as p-value (0.118 and 0.260) is higher than the significance level. So it can safely be assumed, that all religious denominations behave similarly when it comes to offensive expressions

with no distinction between religions *inter se*.

When the respondents were asked whether when a person not belonging to their faith expresses an opinion which according to you is insulting or offensive, you feel angry, a majority of 61.6% answered in affirmative. When further asked whether they expressed their anger by resorting to violence, a whopping majority of 82.8% denied using any violent means categorically. Of the 17.2% who admitted of resorting to violence, 80% believed with utmost surety that violence was justified by religion. When the respondents were classified on the basis of their educational qualifications, the results came out to be pretty interesting.

All the respondents with education till high school level felt angered on listening to blasphemous expression; however only 28.6% admitted of resorting to violence in order to express their anger. Of the respondents who had completed education until senior secondary, 72.2% felt angry, of which 30.8% admitted of venting their anger by resorting to violence. Of the respondents studying in college, 63.4% felt angry of which 26.7% admitted of expressing the anger with violence. With the increase in education level from graduation onwards, there is a constant slump in reaction with 17.8% of graduates admitting to resorting to means of violence, to 10% post graduates and 7.7% doctorates.

What comes across evidently from the survey is the nexus of education with violence. Public order is more likely to be disturbed by the less educated lot who can easily come under political influences.

VI

Conclusion

The advocates of free speech completely oppose any restrictions on speech because they feel that freedom can at times come at an unbearable cost which we have to bear because "freedom is important enough even for sacrifices that really hurt" and believes that people who love freedom should not give hostages to its enemies "even in the face of the violent provocations they design to tempt us."[78] Freedom of expression cannot be held ransom for the fear of apprehended breach of peace. But is there really an apprehension of breach of peace? On the basis of the results of the empirical survey as discussed in the last part of the paper, read with the analysis of specific incidents discussed in parts III and IV of this Paper, the answer is essentially in negative.

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[78] Ronald Dworkin, *Freedoms Law: The Moral Reading of the American Constitution*, 225 (1996).

Also, in the light of Supreme Court judgment in *Prakash Jha Productions* v. *Union of India*[79] wherein the Court categorically emphasized the responsibility of the State to maintain law and order, the argument of curtailing freedom of expression for fear of apprehended breach of public order loses its legitimacy. On the basis of the discussion on the public order justification in the second part of the paper, the researcher humbly submits that in contemporary Indian society Dhavan's argument still holds good, as political repression is now replaced by political manipulation taking place in the name of community and caste based vote bank politics. State with its political agendas plays the caste and community based vote bank politics in the name of public order and deceives the public. Education, evidently, plays an important role in the same. In the light of the evidence adduced above, the researcher humbly submits that it does not make any sense on the part of the State, to limit individual freedom taking the plea of offended sensibilities or apprehending public order situations when there is none. Thus, it can be concluded by saying that it is the State's responsibility to maintain public order and for that the State has to ensure high education levels for the entire citizenry so as to curb the growing public intolerance and mob mentality.

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[79] *Supra* note 45.

THE HUMAN RIGHT TO A SUSTAINABLE ENVIRONMENT: IMPLICATIONS AND PARADOXES IN SOUTH ASIAN REGION

Dr. Yogesh Pratap Singh & Ayaz Ahmad***

Abstract

Environmental and human rights concerns are so intricately intertwined that both are increasingly getting subsumed by each other. A perspective study of the two most contested and hotly debated issues of 21st century may help in developing joint mechanism which can respond to environmental challenges as swiftly as it deals with human rights issues. International environmental law and international human rights law have led to catatonic developments at the municipal level which often lack fruitful synchronization. However, growing pattern of convergence between environment and human rights can be deciphered through a careful study of judicial verdicts cutting across jurisdictions. This raises hope that institutional frame of environment protection can be utilized to agitate human right issues and the vice-verse opening up multiple forums which may provide calibrated remedies.

I

Introduction

In recent years, the relation between human rights and environmental issues has become an issue of vigorous debate. The link between the two emphasises the need for a decent physical environment for all, as a condition for living a life of dignity and worth. There is growing realization that growth and development can not be sustained without addressing environmental concerns. In fact, the whole concept of sustainable development is an attempt to make growth sustainable by synthesizing environmental concerns with development. Debate about human right to environment is borne out of such attempts of synthesis which must be studied from this contextual prism. Human rights and environmental law have traditionally been envisaged as two distinct, independent spheres of rights. Towards the last quarter of the 20th century, however, the perception arose that the cause of protection of the environment could be promoted by setting it in the framework of human rights, which had by then been firmly established as a matter of international law and practice. It therefore highlights the presently existing human rights as a route to environmental

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protection. But this is not the only approach through which the environmental protection and human rights are viewed.

The second approach is where environmental protection is described as a possible means of fulfilling human rights standards. Here, environmental law is conceptualized as 'giving a protection that would help ensure the well-being of future generations as well as the survival of those who depend immediately upon natural resources for their livelihood.' Here, the end is fulfilling human rights, and the route is through environmental law. This approach is advocated as a means to improve mutual institutional framework of governing both environment and human right issues. A third approach to the question of 'human rights and the environment' is to deny the existence of any formal connection between the two at all. According to this approach, there is no requirement for an 'environmental human right.' The argument goes that, since the Stockholm Conference in 1972, international environmental law has developed to such extents that even the domestic environments of states has been internationalized.[1]

Nevertheless, clearly there is a prima facie rhetorical and moral advantage in making the environment a human rights issue.[2] There has been a simultaneous increase in 'legal claims for both human rights and environmental goods,' which is a clear reflection of the link between 'human' and the 'environment' and the dependence of human life on the environment. The worse the environment becomes, the more impaired are human rights, and vice versa. That is the reason why there is the need for sustainable development which means, ecologically sound development of economies, science and technology, and all other fields. This is a sine qua non for both protection of the environment and further promotion of human rights.[3]

II

Contextual Retrospect

Improvement in institutional arrangements to provide easily accessible environmental justice to people is a part of the international agenda highlighted

1 See "Human rights and the Environment" by Y. K. Sabarwal, Former Chief Justice of India, *Available at:* www.sci.nic.in/speeches/speeches_2005/humanrights.doc (Visited on December 12, 2014).

2 Margaret De Merieux, "Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms" 21(3) *Oxford Journal of Legal Studies* 521 (2001).

3 Hilly, Barry E, Wolfson, Steve, Targ, Nicholas "Human Rights and the Environment: A Synopsis and Some Predictions" *Georgetown International Environmental Law Review,* Spring 2004.

in instruments like Rio Declaration on Environment and Development, 1992 and the Aarhus Convention, 1998. Such institutional changes carry a greater significance in case of emerging market economies like India where trade and development issues are set to clash with environmental imperatives. At this time there are several regional human rights charters (African Charter and American Convention), other conventions like the Aarhus Convention, and multiple national constitutions that contain an explicit pronunciation of a human right to (a clean and healthy) environment. And late 2007, the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples, which in article 29 proclaims "Indigenous peoples have the right to the conservation and protection of the environment..." The next step could and should be made in due time at UN level: To conceive, acknowledge and respect the international human right to a clean and healthy environment for all.[4]

Over the years, the international community has increased its awareness on the relationship between environmental degradation and human rights abuses. It is clear that, poverty situations and human rights abuses are worsened by environmental degradation. There are several reasons for this conclusion. The exhaustion of natural resources leads to unemployment and emigration to cities. This affects the enjoyment and exercise of basic human rights. Environmental conditions contribute to a large extent, to the spread of infectious diseases. Degradation of environment poses new problems such as environmental refugees. Environmental refugees suffer from significant economic, socio-cultural, and political consequences. Environmental degradation also worsens existing problems suffered by developing and developed countries. Air pollution, for example, accounts for 2.7 million to 3.0 million of deaths annually and of these, 90% are from developing countries.[5]

Environmental and human rights law have many essential things in common that enable the creation of a field of cooperation between the two: Firstly, both disciplines have deep social roots; Secondly, both disciplines have become internationalized. The international community has assumed the commitment to observe the realization of human rights and respect for the environment. The protection of the environment is internationalized, while the State-Planet Earth relationship has become a concern of the international community. Thirdly, both areas of law tend to universalize their object of protection. Human Rights are presented as universal and the protection of the environment appears as everyone's responsibility. Moreover the enjoyment of all human rights is closely

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4 Shyam Diwan & Armin Rosencranz, *Environmental Law and Policy in India- Cases, Materials and Statutes*, 49 (2005).

5 P. Leelakrishnan, *Environmental Law in India*, 86 (2008).

linked to the environmental issue. Not only rights to life and health in the first place, but also other social, economic, cultural, as well as political and civil rights[6] can be fully enjoyed only in a sound environment. And certainly, to go to an extreme, they cannot be enjoyed at all if the environment becomes impaired beyond a certain critical level. The whole of mankind could in such a case perish together with all its civilization, including human rights. Thus, the protection and improvement of man's environment arise directly out of a vital need to protect human life to assure its quality and condition, to ensure the prerequisites indispensable to safeguarding human dignity and the development of the human personality, and to create an ethos promoting individual and collective welfare in all the dimensions of human existence.[7]

III

Human Right to Environment in the Realm of Human Rights Jurisprudence

Human rights are distinct from other rights in the general family of rights. If the right to a healthful environment satisfies certain criteria, it is entitled in the view of modern jurists to be regarded as a human right and not a mere right.[8] Human rights are general rights in that they pertain to all human beings as such, and while the understanding of them may vary from region to region and from culture to culture, the concept of human rights remains universal. Human right cannot be withheld from an individual by reference to his race, citizenship, religion, sex, place of birth, or any such limiting class qualification. The right to a healthful environment satisfies the human right test of generality.

The second test of a human right lies in its importance. Human rights are more basic or fundamental than other rights. They are, in fact, the source of other rights, which are derived or flow from them. This test, applied to the right to a healthful environment, is easily satisfied when we remember that a healthful environment is a fundamental requirement for the protection and enhancement of the quality of life and, in certain circumstances, proceeds beyond the issue of human survival on the planet.

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6 Boyle Alan and Anderson Michael, *Human Rights Approaches to Environmental protection,* 5 (1997).

7 M. Cranston, What are Human Rights? (Basic Books. 1963), Quoted in P. Alston, " Conjuring Up New Human Rights: A Proposal for quality Control," 78 A.J.I.L607-615, n.30 (1986). *Available at:*http://archive.unu.edu/unupress/unupbooks/uu25ee/uu25ee0n.htm (Visited on January 15, 2015).

8 See "An introductory note on a human right to environment" by Alexandre Kiss. *Available at:* http://archive.unu.edu/unupress/unupbooks/uu25ee/uu25ee0k.htm (Visited on February 01, 2015).

The third characteristic of human rights is that they are essential and enduring and unvarying in identity, change with the context of time and circumstance. The right to a healthful environment may be regarded also as a vital aspect of the right to life, for without a sound environment it would not be possible to sustain an acceptable quality of life or even life itself.

The fourth characteristic of basic human rights is said to lie in their inalienability. They constitute the central core of human rights indispensable to the nature of the human personality. It can be unhesitatingly concluded that the right to a healthful environment is not a right that can be waived or surrendered, having regard to its fundamental relationship with the basic life process of a human being. It is not possible to conceive of life or an acceptable quality of life without a sound environment to sustain it. Viewed in the context of all these criteria, it appears that in jurisprudential terms the right to a healthful environment qualifies as a human right.[9]

(i) Reading Human Right to Environment in Human Right Instruments

Although the Universal Declaration on Human Right has no direct reference to human right to environment, it reveals its concern for environment by enunciating right to health and well-being of people. Article 25 of the UNDHR declares "everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, medical care and necessary social services..."

Fundamental human rights such as the right to the highest attainable standard of health - enshrined in the Covenant on Economic, Social and Cultural Rights (1966)[10] - and the right to life - enshrined in the Covenant on Civil and Political Rights (1966) - depend on a clean and healthy environment. The main question in this context is whether the right to life imposes positive obligations on the state. Does the state have to provide adequate living conditions like better drinking water and clean air, so that this fundamental human right is not negatively affected? This question has been answered affirmatively by Indian constitutional courts and indeed by all advanced legal systems in the world including the United Nations Human Rights Committee. The natural inference of this answer is that the environmental rights of people must be protected as part and parcel of human rights. In this sense we can conclude that there are many human rights which come as package deal many times including the human right to environment

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9 *Ibid.*

10 This is recognized in Article 12 (2) (b) of the International Convention on Economic, Social and Cultural Rights, which contain a short reference to the improvement of environmental hygiene as a step towards the realization of the right to health.

as collateral benefit. One only needs to have a clear vision to unfold the packaging.

More recently drafted international human rights instruments do specifically mention the value of the environment in their systems of protection. These include:

- The Convention on the Rights of the Child (1989);[11] and
- The ILO Convention No.169 concerning Indigenous and Tribal Peoples (1989)

Furthermore, rights to environmental protection have been recognized by the Human Rights Committee, established under the Covenant on Civil and Political Rights. So too the Committee on Economic Social and Cultural Rights (CESR) has clarified the links between the environment and some of the substantive rights enshrined in the Covenant on Economic, Social and Cultural Rights; notably with the General Comment on the Right to Adequate Food and the General Comment the Right to Adequate Housing.[12] Importantly, in 2002, the CESR explicitly recognized the human right to water.

Article 24 of the African Charter on Human and People's Right states that "All peoples shall have the right to a general satisfactory environment favorable to their development" Although Article 24 seems to qualify the protection of the environment with development; it is nonetheless an affirmation of environmental rights in Africa.

Article 11 of the San Salvador Protocol which is an Additional Protocol to the Inter-American Convention on Human Rights (1994) states that "everyone shall have the right to live in a healthy environment and to have access to basic public services; the state parties shall promote the protection, preservation and improvement of the environment". Here again we see that the right to healthy

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11 Article 24 of the Convention on the Rights of the Child, which recognizes the "right of the child to the enjoyment of the highest attainable standard of health" mandates that State Parties consider the "dangers and risks of environmental pollution". Article 29 includes the respect for the environment as one of the goals of educational programmes. For the full text of the Convention, *Available at:* http://www.ohchr.org/en/professionalinterest/pages/crc.aspx (Visited on February 02, 2015).

12 In its Comment on the Right to Adequate Food the Committee interpreted the phrase "free from adverse substances"in Article 11 of the Covenant to mean that the state must adopt food safety and other protective measures to prevent contamination through "bad environment hygiene". General Comment 12, E/C. 12/1999/5. The Comment on housing states that "housing should not be built on polluted sites nor in proximity to pollution sources that threaten the right to health of the inhabitants". U.N. CESCR, General Comment 4, U.N. Doc. E/C.12/2000/4 (2000). *Available at:* http://www1.umn.edu/humanrts/gencomm/escgencom14.htm (Visited on January 16, 2015).

environment is attached with the right to life.

In 1989, a Sub-Commission of the United Nations Commission on Human Rights under the leadership of Mrs. Fatma Zohra Ksentini was assigned to study the possibility for a human right to environment. In 1994, the Ksentini Report concluded that environmental rights are a part of the existing human rights. The Draft Principles on Human Rights and the Environment, which are included in the annexure of the report, emphasize this. In particular Principle 1 says that human rights and the environment are indivisible. The Report details analysis of the relationship between human rights and the environment, concluding that environmental damage has an adverse effect on the enjoyment of a series of human rights, and that human rights violations in turn damage the environment[13]. In a way report found that human rights and environment rights are indispensable for each other, therefore, one must support the other.

Here, the "shift from environmental law to the [human] right to a healthy and decent environment" is clearly noticeable. In other words, the Ksentini Report "greened" existing Human Rights, meaning that existing human rights may already contain environmental rights. Although it is a welcome development but it must be followed by a U.N. resolution to have desirable impact on the evolution of human right to environment.

The most comprehensive international statement on environmental rights to date is the 1994 Draft Declaration of Principles on Human Rights and the Environment, appended to the Report of the UN Special Rapporteur on Human Rights and the Environment.[14] First, it sets out a series of general principles, including the human right to a secure and healthy environment. Secondly, it defines a series of substantive rights, including the human right to protection of the environment, the right to safe and healthy water, the right to preservation of unique sites, and the rights of indigenous peoples to land and environmental security. Thirdly Draft Declaration delineates procedural rights, including the right to environmental information, and active participation in environmental decision-making, and the right to effective redress for environmental harm and finally Draft Declaration sets out the duties of both individuals and states, including government obligations to disseminate information, facilitate public participation, control harmful activities, monitor and manage environmental use, and provide effective remedies and redress for harm.

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13 UN Doc. E/CN.4/Sub.2/1989/C23 (1989).

14 The Report was presented to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, at its 46th Session, UN Doc, E/CN.4/Sub.2/1994/9

IV

Human Right to Environment in the Realm of Environmental Regime

The first perhaps most crucial step towards tracing the human right to environment is to study the existing international regime of environment protection and to see if it gives recognition to human right to environment. The relationship between the quality of the human environment and the enjoyment of basic human rights was first recognized by the UN General Assembly in the late 1960s.[15] The Stockholm Declaration on the Human Environment 1972 (Stockholm Declaration) which laid down the foundation of modern international environmental law also declared the agenda and framework for discussions and initiatives on the subject of human right to environment.

Let us now examine the Stockholm Declaration in order to find out whether it contains a human right to a clean environment. Especially two principles talk explicitly of such a right. Principle 1 of the Stockholm Declaration very clearly lays down the genesis of a human right to environment[16]. More importantly it is recognized in this principle that quality of environment has direct bearing on the enjoyment of fundamental freedom of equality and dignity of life. It is logical to conclude from the language of above principle that life of dignity is not possible in the absence of good quality environment.[17] 'Adequate conditions of life' can be created only in the 'environment of quality that permits a life of dignity and well-being' which implies that existence of quality environment is a pre-condition to create other conditions adequate for life. It implies that human right to environment must get precedence over any other condition that is necessary to support life. The principle clearly nullifies all the claims of developmental rights trumping environmental rights.

According to Principle 7 of the Stockholm Declaration, the States are required to take steps to prevent pollution of the environment by substances, which affect human health. In this principle we find that emphasis is on prevention of environment pollution so as to protect human health. Human right documents clearly lay down that right to health is a human right. Once it is admitted that

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15 UNGA Resolution 2398 (XXII) (1968).

16 Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

17 This conclusion has been used later to establish that human right to environment is a peremptory norm of customary international law.

protection of human right to health is not possible without protecting the right to environment it naturally follows that the later right is also a human right.

Forwarding a similar line of argument, Judge Weeramantry of the International Court of Justice in his separate opinion in the case of *Gabcikovo-Nagymaros*[18] stated that "the protection of the environment is likewise, a vital part of contemporary human rights doctrine, for it is *sine qua non* for numerous human rights such as the right to health and the right to life itself..... as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments."[19]

Ten years later, the World Charter on Nature explicitly referred to the right of access to information and the right to participate in environmental decision-making[20] and a decade after that, in 1992, the Rio Declaration acknowledged the right to a healthy and productive life in harmony with nature and the right of access to environmental information and of public participation in environmental decision-making.[21] The Rio Declaration also explicitly affirmed the rights of indigenous communities in managing their environment in order to preserve their "identity, culture and interests and their effective participation in the achievement of sustainable development" (Article 22), and for the protection of the "environment and natural resources of people under oppression, domination and occupation" (Article 23).

The right to participate is a basic premise of democratic societies, highlighted under Agenda 21 at the 1992 World Summit on Sustainable Development. This right is understood to be the individuals' right to participate in decisions (investment decisions, urban planning decisions, and commercial policy decisions) that directly or indirectly affects their habitat. Undoubtedly, few communities participate in the decisions that bring about severe environmental contamination in their areas and result in deterioration of health. Yet local and international organizations, governments, and civil society in general tend to isolate human rights issues into a civil and political sphere and treat environmental degradation as an entirely unrelated issue.

Human rights cannot be secured in a degraded or polluted environment. The fundamental right to life is threatened by soil degradation and deforestation and by exposures to toxic chemicals, hazardous wastes and contaminated drinking

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18 Gabcikovo-Nagymaros Project, *Hungary* v *Slovakia* (1997) ICJ Rep.7.

19 Separate Opinion of Judge Weeramantry p. 91-92, Available at http://www.icj-cij.org/docket/files/92/7383.pdf (Visited on February 10, /2015).

20 World Charter for Nature (1982), paras 15-16, 23.

21 Rio Declaration on Environment and Development (1992), Principles 1 and 10.

water. Environmental conditions clearly help to determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture. It is time to recognize that those who pollute or destroy the natural environment are not just committing a crime against nature, but are violating human rights as well.[22]

We can conclude that environmental protection is a pre-condition to the enjoyment of internationally-guaranteed human rights, especially the rights to life and health. Environmental protection is thus an essential instrument in the effort to secure the effective universal enjoyment of human rights. So it is not only the one way round that the environmental protection should be seen from the human rights perspective but it makes sense if we try to protect basic human rights by improving the quality of our environment which in turn enables us to have meaningful and dignified life.

V

Human Right to Environment: A Principle of *Jus Cogens*

According to Article 53 of the Vienna Convention on the Law of Treaties,[23] *jus cogens* is a peremptory norm of general international law which is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. It implies that principles of *jus cogens* may operate to invalidate a treaty or agreement between states to the extent of the inconsistency with any of such principles or norms[24]. These principles signify that international law is going beyond the bilateral and state centric interaction. It is becoming more and more responsive to the needs of more globalized international relations and the demands of increasingly integrated international community interests[25]. However, the process of identifying and enumerating the principles of *jus cogens* is not completely settled yet. As per Article 64 of the Vienna Convention on the Law of Treaties if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates. In this Article the word 'emerges" opens up the possibility of customary international law also giving birth to the principles of *jus cogens*.[26] Accordingly

22 Klaus Toepfer, Executive Director of the United Nations Environment Programme, in his statement to the 57th Session of the Commission on Human Rights in 2001.

23 *Available at:* https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf (Visited on April 11, 2015)

24 Stark, *International Law*, 49 (1994)

25 Bimal N. Patel (ed.), *India and International Law*, 58 (2005)

26 *Supra* note 21.

this rule (*jus cogens*) will also apply in the context of customary rules so that no derogation would be permitted to such norms by way of local or special custom.[27]

However, the obtainable literature on the normative content and effects of *jus cogens* provide but a much diffused portrait. It might be said in the most abridged forms, that scholars of International law belong to either one of two factions i.e. *affirmants* and *sceptics*. Describing the effects of *jus cogens* norms, affirmants quote Article 53 of the Vienna Convention which is perceived as expressing a rule pertinent to international law at large. Whether considered in relation to conflicts only between *jus cogens* and international treaties, or more widely, in the context of international law in general, the definition laid down in Article 53 applies. *Jus cogens* norms for some affirmants, have effects going even beyond those described in Article 53. On the other hand, there is a progressively diminishing group of '*sceptics*' who accept the rules enshrined in the Vienna Convention concerning the effects of *jus cogens* , accentuating, however, that in international law consensus has not (yet) been achieved on the normative content of that concept. They argue that for this reason *jus cogens* must be treated as existing merely on paper. Hence, according to the sceptics, *jus cogens is* a term used only for rhetorical purposes. It lacks all reference in positive law.

Banking on the affirmants and after reading a human right to environment in international environmental law and international human rights law another related question arises whether human right to environment has acquired the status of peremptory norm of customary international law. To answer this question I will refer to Article 4 of International Covenant on Civil and Political Rights. It provides that no derogation from right to life as protected by Article 6 is possible even during emergency. Now as we have concluded above that human right to environment is part and parcel of right to life it can be justly concluded that no derogation is possible from human right to environment even during emergency. This is nothing but incorporation of the principle of *jus cogens* which means that no treaty obligation can be imposed in derogation with the peremptory norm of customary international law.[28]

From above discussion we can conclude that human right to environment has acquired the status of peremptory norm of customary international law. It means that even during period of emergency derogation from human right to environment is not permissible either by executive actions of a State or with the mutual collusion of more than one States.

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27 Malcolm N. Shaw, *International Law*, 125 (2008).

28 Gurdip Singh, *Environmental Law in India*, 59 (2005).

VI

Implications of Human Right to Environment for SAARC Region

A positive affirmation of human right to environment under International law will open new avenues of cooperation and partnership among member countries of SAARC (South Asian Association for Regional Cooperation) as the natural environment of this region constitutes an integrated whole which calls for collaborated efforts to improve human condition in the region.

The administration of SAARC countries can play an instrumental role in effective enforcement of environmental regulations having serious bearing on the health and economic situation of the people of this fast developing region. Howsoever good the legislation or policy of a country may be; in the end what matters is how effectively the administration has been successful in implementing it. Though the human rights standards have been enforced by the member countries individually; the environmental concerns have not been addressed holistically by the administrative machinery these countries. Administrative regulation implies surveillance and control of environment affecting behavior. It extends from standard setting and quality control enforcement to the outright management of environmental services, chiefly at state or local levels of government which must act in unison to move in the same direction. The exercise of administrative discretion without uniform policy guidance inevitably results in environmental transformation or even degradation in one form or the other of an entire region irrespective of national boundaries. This can be direct, for example a decision to build a dam which will affect the river system or indirect, for example a grant of mining authorization which may result in various forms of trans-boundary pollution.

The basic task of protection and control of environmental quality involves the integration of man's artificial and managed systems with the evolved systems of the natural world. Imbalances and incongruities among these systems are the underlying causes of resource depletion, pollution, and qualitative deterioration of the environment. The essential purpose of environmental administration is therefore to obtain a synthesis of artificial and natural systems that will simultaneously serve man's needs and values, and maintain the life-support systems of the biosphere upon which man's welfare and survival ultimately depend.[29] The underlying principle of the environmental management is to ensure that environmental factors are taken into account in developmental decisions.

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[29] Lynton K. Caldwell "Environmental Quality as an Administrative Problem" *Annals of the American Academy of Political and Social Science*, Vol. 400, The Government as Regulator, 103 (1972).

Administrative law principles such as reasonableness, public participation in decision making and public access to information can potentially contribute to the better environmental decision-making across SAARC countries.[30] European, African and American regions have already moved in this collaborative endeavor in the form of regional agreements to protect human right to environment on the premise that environment does not recognize national boundaries and hence calls for concerted efforts across countries to be effective.[31]

VIII

Human Right to Environment: An Appraisal of Environmental Policy in India

Even though India has had a long and rich tradition of environmental protection, which took the form of worship of some animals and trees, large-scale degradation of the environment has resulted from population pressures, rapid industrialization, and indiscriminate use of forest areas for fuel, power generation, and irrigation purposes.[32] India's best known environmental movement is undoubtedly the Chipko (Hug the Trees) movement that emerged in 1973 among the hill people in the northern state of Uttar Pradesh. In their effort to save forest resources from exploitation by outside contractors, the protesters stopped commercial felling in nearby forests by placing themselves between tree and logger's saw. These developments highlight the link between human right to environment with the right to livelihood of forest dwellers and indigenous people.

(i) Environment under Indian Constitutional Framework

India is one of the few countries of the world whose constitution includes a commitment to environmental protection and improvement. Although some provisions for improvement in the quality of life were included when the Constitution was proclaimed in 1950, a direct reference to environmental protection and improvement was introduced with the Constitution (Forty-second Amendment) Act of 1976. This amendment interjected a new public policy dimension by obligating the central government to protect and improve the environment for the good of society as a whole. Article 48A of the Constitution

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30 *Ibid,* p 107.

31 *See* Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998. Also, San Salvador Protocol which is an Additional Protocol to the Inter-American Convention on Human Rights (1994) & African Charter on Human and People's Rights.

32 O. P. Dwivedi; B. Kishore "Protecting the Environment from Pollution: A Review of India's Legal and Institutional Mechanisms" *Asian Survey*, Vol. 22, No. 9, 894 (Sep. 1982).

(Forty-second Amendment) specifically refers to environmental protection as an obligation of the state: "The State shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country."[33]

The term "environment" has not been defined in the Constitution, but it could be interpreted in a broad manner as the quality of the physical-natural environment. The words "protect" and "improve" are also meaningful in the sense that the State is obligated not only to endeavor to preserve the environment in whatever degraded form it is at present but also to improve its quality. It further clarifies that the State is not obligated to protect and improve the environment but merely shall endeavor to do so.[34]

(ii) Environment under Legislative Framework

Environmental legislation in recent years has taken account of human health and safety aspect and sustainable development. The scope of access to environmental information and public participation in the decision making is limited with several regulations guiding the procedures of environmental impact assessment.[35] Some provisions in the legislative framework deal with access to environmental information.[36] If the mere enactment of laws relating to the protection of environment were to ensure a clean and pollution free environment, then India would, perhaps, be the least polluted country in the world[37]. Failure on the part of the governmental agencies to effectively enforce environmental laws and non-compliance with statutory norms by polluters resulted in an accelerated degradation of the environment.

The year 1972 marks a watershed in the history of environmental management in India. Prior to 1972 environmental concerns such as sewage disposal, sanitation, and public health were dealt with by different Ministries of the Government of India, and each pursued these objectives without any proper coordination system established at the federal or the intergovernmental level. In February 1972 a National Committee on Environmental Planning and Coordination (NCEPC) was established in the Department of Science and Technology.[38] The Committee was to plan and coordinate while the responsibility

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33 India, The Constitution: The (Forty-second Amendment) Act 1976, Article 48A.

34 *Ibid.*

35 The Indian Environment Protection Act 1986 and Rules 1992; The Industries (Development and Regulation) Act 1951; The Environmental Clearance Notification 1993.

36 Section 20 of Environment Protection Act 1986 [any one can receive information, report and details on environmental pollution].

37 *See* Shyam Divan and Armin Rozencranz, *Environmental Law and Policy in India: Cases, Materials and Statutes*, 2nd (2001).

38 India, National Committee on Environmental Planning and Coordination, Inaugural Function, 2 (April 12, 1972).

for execution remained with the various ministries and agencies of the government. At the behest of the NCEPC, almost all the States and the Union Territories have established environmental boards under terms similar to those of the national committee.

Since the 1970s an extensive network of environmental legislation has grown in the country which includes the Water (Prevention and Control of Pollution) Act, 1974, The Forest (Conservation) Act, 1981, The Air (Prevention and Control of Pollution) Act, The Environment (Protection) Act 1986, The Wildlife (Protection) Act, 1972.

The National Green Tribunal was established in the year 2010 under the National Green Tribunal Act 2010 for effective and expeditious disposal of cases relating to environmental protection, conservation of forests and other natural resources including enforcement of any legal right relating to environment. Once it is recognized that human right to environment is a legal right relating to environment then it can be safely argued that the NGT is a relevant forum for agitating this right.

(iii) Role of Indian Judiciary

The judiciary a spectator to environmental exploitation for more than two decades has recently assumed a pro-active role of public educator, policy maker, super-administrator, and more generally, amicus environment. We can say environmental law in India is the story of India's judiciary responding to the complaints of its citizens against environmental degradation and administrative sloth.[39]

The most characteristic feature of the Indian environmental law is the important role played by the public interest litigation. The majority of the environment cases in India since 1985 have been brought before the court as writ petitions, normally by individuals acting on pro bono basis. The public interest litigation is as a result of the relaxation of the *locus standi* rule. There was departure from the "proof of injury" approach. This form is usually more efficient in dealing with environmental cases, for the reason that these cases are concerned with the rights of the community rather than the individual. The Supreme Court, in its interpretation of Article 21, has facilitated the emergence of the environmental jurisprudence in India. Supreme Court has essentially interpreted the right to life under Article 21 to include a right to healthy and pollution free environment.[40] For example in *Municipal Council, Ratlam v.*

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39 Devi Prasad. M "Environmental Jurisprudence in India – The role of Supreme Court.", 3.

40 *Id* at 8

Vardichand[41] receiving a complaint from Sri Vardichand, the respondent, about unhygienic condition prevailing in the municipal area of Ratlam due to the discharge of refuse by an alcohol factory in the nallah of the area which added to the miseries of the locality, the Supreme Court through Justice Iyer ordered the Municipal Council to take steps in protecting the individual right to a clean environment. The Court observed:

"A responsible Municipal Council constituted for the precise purpose of preserving public health and providing better finances cannot run away from its principle duty by pleading financial inability. Providing drainage systems- not pompous and attractive, but in working condition and sufficient to meet the needs of the people cannot be evaded if the Municipality is to justify its existence."[42]

The early environmental cases decided by the Supreme Court, which have resulted in the closure of limestone quarries in the Dehradun region,[43] the installation of safeguards at a chlorine plant in Delhi[44] and the closure of pollution tanneries on the Ganges,[45] revolutionized the way environmental law was viewed in India. Further, with the Supreme Court's adoption of the 'precautionary principle', the onus of proof is on the developer or industrialist to show that his or her action is environmentally benign. This principle was applied by the SC in *Vellore Citizens' Welfare Forum v. Union of India*[46] and the *Taj Trapezium Case*[47] with dramatic results.

(iv) Role of Civil Society

Environmental protests in India now pose a serious challenge to the dominant ideology of the meaning and patterns of development. One protest movement differs from another in its way of expressing demands and organizing the struggle, and also in fundamental perceptions about the meaning and purpose of development. These movements represent a wide spectrum of groups and activities that cuts across specific regions and issues. They mobilize large masses of people, organize popular resistance that transcends political and social barriers, and create new socio-political actors.[48]

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41 *Municipal Council, Ratlam v. Vardichand,* AIR 1980 SC 1622.

42 *Ibid.*

43 *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh* (Dehradun Quarrying Case), AIR 1985 SC 652.

44 *M.C.Mehta v. Union of India* (*Shriram Gas Leak Case*), AIR 1987 SC 965.

45 *M.C.Mehta v. Union of India* (Ganga *Pollution {Tanneries} Case*), AIR 1988 SC 1037.

46 *Vellore Citizens Welfare Forum v. Union of India,* AIR 1996 SC 2715.

47 *M.C.Mehta v. Union of India,* AIR 1997 SC 734.

48 Ashok Swain "Democratic Consolidation? Environmental Movements in India" *Asian Survey,* Vol. 37, No. 9. 828 (Sep., 1997).

In recent years, voluntary organizations have been increasingly viewed as an integral part of India's development process. Hundreds of these organizations are working at the micro-level and, although environmental concerns are relatively new, they are an overwhelming phenomenon. Indeed, since the beginning of the last decade, almost all Indian NGOs have been working with environmental issues.[49] Community organizations have emerged through local initiatives that, in some areas, extend social traditions of protecting local rights and environment. NGOs, on the other hand, are local or external interveners that create and support such community groups in their efforts. There also has been a resurgence of social action groups that are now mobilizing the weaker sections of society to fight in order to protect their environment. People have become more concerned about protecting their environment and it is very well seen in the social movements be it Narmada Bachao Andolan or Chipko Movement.

IX

Conclusion

The right to a clean and healthy environment appears to be moving, slowly but surely, to a higher degree of relevance. Whether or when a right to a clean and healthy environment will be recognized as a fundamental right under international and domestic laws remains to be seen. But it is quite apparent that environmental and human rights are inextricably linked. All global and regional human rights bodies have accepted the link between environmental degradation and internationally-guaranteed human rights. Environmental protection is a pre-condition to the enjoyment of internationally-guaranteed human rights, especially the rights to life and health. Environmental protection is very essential to secure the effective universal enjoyment of human rights. So it is not only the one way round that the environmental protection should be seen from the human rights perspective but it makes sense if try to protect basic human rights by improving the quality of our environment which in turn enables us to have meaningful and dignified life. It is no accident that in those countries where the environment has been most devastated, human suffering is the most severe.

International human rights law and in particular environmental rights law, is complicated, slow and has limited enforceability. Not all states are party to the relevant regional or international conventions, and their citizens thus do not enjoy access to the relevant international courts. Access to international courts can generally only be obtained when national remedies have been exhausted. Even when a case does manage to work its way up through the international legal system, victories are still few and far between. And then, even when the law

[49] *Ibid.*

comes down on the side of those who have been violated, governments do not always take up their responsibilities to rectify the situation.

Nonetheless, the existing human rights declarations and covenants do carry significant moral weight, and can be used to bring global attention to violations happening in the most remote corners of the earth. Important regional and national legislative initiatives exist, including the Inter-American Convention on Human Rights, the European Union's Charter of European Rights and the new African Charter of Human and Peoples' Rights, all of which specifically acknowledge the right to a healthy environment. Significant public pressure can be exerted on governments through the rulings of the courts that enforce these and other international rights laws. Affected communities are learning to make use of these national and international legal systems to bring attention to their plights and strengthen their campaigns for justice.

An overview of the Environmental protection in India reveals distinct patterns and characteristics where we can trace the link between the human rights and the environmental protection and the best example is the interpretation of article 21 of Indian constitution by the judiciary. Indian judiciary stand apart, it has played a very pro-active role in developing the jurisprudence on environmental protection. Indian Supreme Court has interpreted the right to life under Article 21 to include a right to healthy and pollution free environment. The environmental movement in India is on the lines of the sustainable development where environmental concerns are given adequate attention while moving on the path of economic development. In India though laws are in place but they are not effectively implemented because of the administrative inefficiency.

JUDICIAL AND LEGILSTIVE TRENDS

JUDICIAL TRENDS

*Akash Anand**

I

Ram singh & Ors v Union of India on March 17, 2015[1]

Bench: Ranjan Gogoi & Rohinton Fali Nasiman, Original Judgement 64 pages

For the various reasons indicated above, we cannot agree with the view taken by the Union Government that Jats in the 9 (nine) States in question is a backward community so as to be entitled to inclusion in the Central Lists of Other Backward Classes for the States concerned. The view taken by the NCBC to the contrary is adequately supported by good and acceptable reasons which furnished a sound and reasonable basis for further consequential action on the part of the Union Government. In the above situation we cannot hold the notification dated 4.3.2014 to be justified. Accordingly the aforesaid notification bearing No. 63 dated 4.3.2014 including the Jats in the Central List of Other Backward Classes for the States of Bihar, Gujarat, Haryana, Himachal Pradesh, Madhya Pradesh, NCT of Delhi, Bharatpur and Dholpur Districts of Rajasthan, Uttar Pradesh and Uttarakhand is set aside and quashed.

The Supreme Court in this petition considered what weightage the advice/ recommendation tendered by the National Commission for Backward Classes should receive in the decision making by the Union Government is a crucial determination that this Court is required to make in the present case. The observations in *Indra Sawhney* and the expressed provisions contained in Section 9 of the NCBC Act clearly indicate that the advice tendered by the NCBC is ordinarily binding on the Government meaning thereby that the same can be overruled / ignored only for strong and compelling reasons which reasons would be expected to be available in writing. As the constitution of the NCBC is traceable to the opinion rendered in Indra Sawhney, there can be no doubt that even when the exercise undertaken by the Central Government is one under Section 11 of the Act, the views expressed by the NCBC in the process of the consultation mandated by Section 11, would have a binding effect in the normal case. It will, therefore, be necessary to note what had prevailed with the NCBC in tendering its advice in the instant case not to include the Jat community in the

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[1] Available at : http://supremecourtofindia.nic.in/FileServer/2015-03-17_1426575022.pdf (Visited on March 19, 2015)

Central Lists of other backward classes in the nine States in respect of which the reference was made to the Commission. A lengthy narration is unavoidable for it is only upon setting out the relevant facts and circumstances in their proper conspectus that the intrinsic merit of the advice tendered by the NCBC can be determined.

The court said that undoubtedly, the report dated 26.02.2014 of the NCBC was made on a detailed consideration of the various reports of the State Backward Classes Commissions; other available literature on the subject and also upon consideration of the findings of the Expert Committee constituted by the ICSSR to examine the matter. The decision not to recommend the Jats for inclusion in the Central List of OBCs of the States in question cannot be said to be based on no materials or unsupported by reasons or characterized as decisions arrived at on consideration of matters that are, in any way, extraneous and irrelevant. Having requested the ICSSR to go into the matter and upon receipt of the report of the Expert Committee constituted in this regard, the NCBC was under a duty and obligation to consider the same and arrive at its own independent decision in the matter, a duty cast upon it by the Act in question. Consideration of the report of the Expert Body and disagreement with the views expressed by the said body cannot, therefore, amount to sitting in judgment over the views of the experts as has been sought to be contended on behalf of the Union. In fact, as noticed earlier, the Expert Body of the ICSSR did not take any particular stand in the matter and did not come up with any positive recommendation either in favour or against the inclusion of the Jats in the Central List of OBCs. The report of the said Body merely recited the facts as found upon the survey undertaken, leaving the eventual conclusion to be drawn by the NCBC. It may be possible that the NCBC upon consideration of the various materials documented before it had underplayed and/or overstressed parts of the said material. That is bound to happen in any process of consideration by any Body or Authority of voluminous information that may have been laid before it for the purpose of taking of a decision. Such an approach, by itself, would not make either the decision making process or the decision taken legally infirm or unsustainable. Something more would be required in order to bypass the advice tendered by the NCBC which judicially (Indra Sawhney) and statutorily (NCBC Act) would be binding on the Union Government in the ordinary course. An impossible or perverse view would justify exclusion of the advice tendered but that had, by no means, happened in the present case. The mere possibility of a different opinion or view would not detract from the binding nature of the advice tendered by the NCBC.

According to the court relevance, at this stage, would be one of the arguments

advanced on behalf of the Union claiming a power to itself to bypass the NCBC and to include groups of citizens in the Central List of OBCs on the basis of Article 16(4) itself. Undoubtedly, Article 16(4) confers such a power on the Union but what cannot be overlooked is the enactment of the specific statutory provisions constituting a Commission (NCBC) whose recommendations in the matter are required to be adequately considered by the Union Government before taking its final decision. Surely, the Union cannot be permitted to discard its self-professed norms which in the present case are statutory in character.

Out of many issues according to the court one such issue which arises from the contentions advanced on behalf of the respondents, particularly on behalf of the Union Government, is that the OBC lists of the concerned States, by themselves, can furnish a reasonable basis for the exercise of inclusion in the Central Lists. The above contention is sought to be countenanced by the further argument that the Union and the State Governments under the constitutional scheme have to work in tandem and not at cross purposes. While there can be no doubt that in the matter of inclusion in the Central Lists of other backward classes, the exercise undertaken by the State Governments in respect of the State Lists may be relevant what cannot be ignored in the present case is the very significant fact that in respect of all the States the inclusion of Jats in the OBC Lists was made over a decade back. A decision as grave and important as involved in the present case which impacts the rights of many under Articles 14 and 16 of the Constitution must be taken on the basis of contemporaneous inputs and not outdated and antiquated data. In fact, under Section 11 of the Act revision of the Central Lists is contemplated every ten years. The said provision further illuminates on the necessity and the relevance of contemporaneous data to the decision making process.

The apex court after referring to lot of cases held that the backwardness contemplated by Article 16(4) is social backwardness. Educational and economic backwardness may contribute to social backwardness. But social backwardness is a distinct concept having its own connotations. The extracts of the Minutes of the Meeting of the Cabinet held on 2nd March, 2014 which had preceded the impugned notification dated 4th March, 2014 tends to overlook the fact that crucial test for determination of the entitlement of the Jats to be included in the Central Lists is social backwardness. This would be evident from Para 3 of the Minutes of the Cabinet Meeting dated 2nd March, 2014 which is extracted below:

"The ICSSR has observed that Jats in Haryana are a land owning community and while their share in Class I & II Government services is closer to their

population, they lag behind both in school and higher educational enrolment. In the National Capital Territory of Delhi, in terms of social and educational standing, Jats lag behind as compared to Gujars, who have been included as OBC in the Central List. Similarly, in Uttar Pradesh and Uttarakhand, in the enrolment in higher and technical education, Jats lag behind Ahirs/Yadav. In Himachal Pradesh, the State Commission has come to the conclusion that the Jat Community is socially, educationally and economically backward and is fit for inclusion in the State list of OBCs. In Rajasthan, too, as regards literacy rate, enrolment in graduation level courses and representation in Government services, Jats lag behind."

In the opinion of the court in this case in so far as Haryana is concerned, the test adopted appears to be educational backwardness. Similarly for the NCT of Delhi also, educational backwardness has been taken into account as the determining factor for inclusion of Jats along with the fact that the Jats are behind the Gujars who are already included in the Central Lists of OBCs. Similarly, in Uttar Pradesh and Uttarakhand, the test appears to be educational backwardness; same is the position with regard to Rajasthan. Though the States of M.P., Gujarat and Bihar have also been included in the Central Lists of OBCs by impugned notification, no apparent consideration of the cases of these States is reflected in the Minutes of the Cabinet Meeting dated 2nd March, 2014. Of course, the Cabinet is not expected to record the manner of its consideration of each of the States but when it is done so for some of the States, the absence of any mention of the other States would be a strong basis to conclude that the States that do not find any mention in the Minutes, in fact, did not receive the consideration of the Cabinet, at all.

A very fundamental and basic test to determine the authority of the Government's decision in the matter would be to assume the advice of the NCBC against the inclusion of the Jats in the Central List of Other Backward Classes to be wrong and thereafter by examining, in that light, whether the decision of the Union Government to the contrary would pass the required scrutiny. Proceeding on that basis what is clear is that save and except the State Commission Report in the case of Haryana (Justice K.C. Gupta Commission Report) which was submitted in the year 2012, all the other reports as well as the literature on the subject would be at least a decade old. The necessary data, on which the exercise has to be made, as already observed by us, has to be contemporaneous. Outdated statistics cannot provide accurate parameters for measuring backwardness for the purpose of inclusion in the list of Other Backward Classes. This is because one may legitimately presume progressive advancement of all citizens on every front i.e. social, economic and

education. Any other view would amount to retrograde governance. Yet, surprisingly the facts that stare at us indicate a governmental affirmation of such negative governance inasmuch as decade old decisions not to treat the Jats as backward, arrived at on due consideration of the existing ground realities, have been reopened, inspite of perceptible all round development of the nation. This is the basic fallacy inherent in the impugned governmental decision that has been challenged in the present proceedings. The percentage of the OBC population estimated at "not less than 52%" (Indra Sawhney) certainly must have gone up considerably as over the last two decades there have been only inclusions in the Central as well as State OBC Lists and hardly any exclusion therefrom. This is certainly not what has been envisaged in our Constitutional Scheme.

In so far as the contemporaneous report for the State of Haryana is concerned, the discussion that has preceded indicate adequate and good reasons for the view taken by the NCBC in respect of the said Report and not to accept the findings contained therein. The same would hardly require any further reiteration. Past decisions of this Court in *M.R. Balaji* v. *State of Mysore* and *Janaki Prasad* v. *State of Jammu & Kashmir* had conflated the two expressions used in Articles 15(4) and 16(4) and read them synonymously. It is in Indra Sawhney's case (supra) that this Court held that the terms "backward class" and "socially and educationally backward classes" are not equivalent and further that in Article 16(4) the backwardness contemplated is mainly social. The above interpretation of backwardness in Indra Sawhney (supra) would be binding on numerically smaller Benches. We may, therefore, understand a social class as an identifiable section of society which may be internally homogenous (based on caste or occupation) or heterogeneous (based on disability or gender e.g. transgender). Backwardness is a manifestation caused by the presence of several independent circumstances which may be social, cultural, economic, educational or even political. Owing to historical conditions, particularly in Hindu society, recognition of backwardness has been associated with caste. Though caste may be a prominent and distinguishing factor for easy determination of backwardness of a social group, this Court has been routinely discouraging the identification of a group as backward solely on the basis of caste. Article 16(4) as also Article 15(4) lays the foundation for affirmative action by the State to reach out the most deserving. Social groups who would be most deserving must necessarily be a matter of continuous evolution. New practices, methods and yardsticks have to be continuously evolved moving away from caste centric definition of backwardness. This alone can enable recognition of newly emerging groups in society which would require palliative action. The recognition of the

third gender as a socially and educationally backward class of citizens entitled to affirmative action of the State under the Constitution in *National Legal Services Authority* v. *Union of India* is too significant a development to be ignored. In fact it is a path finder, if not a path- breaker. It is an important reminder to the State of the high degree of vigilance it must exercise to discover emerging forms of backwardness. The State, therefore, cannot blind itself to the existence of other forms and instances of backwardness. An affirmative action policy that keeps in mind only historical injustice would certainly result in under-protection of the most deserving backward class of citizens, which is constitutionally mandated. It is the identification of these new emerging groups that must engage the attention of the State and the constitutional power and duty must be concentrated to discover such groups rather than to enable groups of citizens to recover "lost ground" in claiming preference and benefits on the basis of historical prejudice.

The court held that perception of a self-proclaimed socially backward class of citizens or even the perception of the "advanced classes" as to the social status of the "less fortunate" cannot continue to be a constitutionally permissible yardstick for determination of backwardness, both in the context of Articles 15(4) and 16(4) of the Constitution. Backwardness can no longer be a matter of determination on the basis of mathematical formulae evolved by taking into account social, economic and educational indicators. Determination of backwardness must also cease to be relative; possible wrong inclusions cannot be the basis for further inclusions but the gates would be opened only to permit entry of the most distressed. Any other inclusion would be a serious abdication of the constitutional duty of the State. Judged by the aforesaid standards we must hold that inclusion of the politically organized classes (such as Jats) in the list of backward classes mainly, if not solely, on the basis that on same parameters other groups who have fared better have been so included cannot be affirmed.

II

BCCI v *Cricket Association of Bihar & ors*[2]

Bench T. S. Thakur J., Fakkir Mohamed Ibrahim Kalifulla J.

Original Judgement 138 pages.

In this case the maintainability of the writ petition under article 32 was in question. This court while dealing with the issue referred to Zee Telefilms Ltd. and Anr. v. Union of India and Ors. (2005) 4 SCC 649 where the question was whether the respondent-BCCI is 'State' within the meaning

[2] Available at: http://supremecourtofindia.nic.in/FileServer/2015-01-22_1421928541.pdf (Visited on March 19, 2015).

of Article 12 fell directly for consideration of this Court . By a majority of 3:2 this Court ruled that respondent-BCCI was not 'State' within the meaning of Article 12.

The apex court in this case observed as follows:

This Court held that the Board was not created by any statute, nor was a part of the share capital held by the Government. There was practically no financial assistance given to the Board by the Government, and even when the Board did enjoy a monopoly status in the field of cricket such status was not State conferred or State protected. So also there is no deep and pervasive State control. The control, if any, is only regulatory in nature as applicable to other similar bodies. The control is not specifically exercised under any special statute applicable to the Board. All functions of the Board are not public functions nor are they closely related to governmental functions. The Board is not created by transfer of a government-owned corporation and was an autonomous body

Relying upon the tests laid down in Pradeep Kumar Biswas' case this Court held that the Board was not financially, functionally or administratively dominated by or under the control of the Government so as to bring it within the expression 'State' appearing in Article 12 of the Constitution. Having said that this Court examined whether the Board was discharging public duties in the nature of State functions. Repelling the contention that the functions being discharged by the Board were public duties in the nature of State functions which would make the Board a State within the meaning of Article 12 this Court observed: It was then argued that the Board discharges public duties which are in the nature of State functions. Elaborating on this argument it was pointed out that the Board selects a team to represent India in international matches. The Board makes rules that govern the activities of the cricket players, umpires and other persons involved in the activities of cricket. These, according to the petitioner, are all in the nature of State functions and an entity which discharges such functions can only be an instrumentality of State, therefore, the Board falls within the definition of State for the purpose of Article 12.

Assuming that the above mentioned functions of the Board do amount to public duties or State functions, the question for our consideration is: would this be sufficient to hold the Board to be a State for the purpose of Article 12? While considering this aspect of the argument of the petitioner, it should be borne in mind that the State/Union has not chosen the Board to perform these duties nor has it legally authorized the Board to carry out

these functions under any law or agreement. It has chosen to leave the activities of cricket to be controlled by private bodies out of such bodies' own volition (self arrogated). In such circumstances when the actions of the Board are not actions as an authorized representative of the State, can it be said that the Board is discharging State functions? The answer should be no. In the absence of any authorization, if a private body chooses to discharge any such function which is not prohibited by law then it would be incorrect to hold that such action of the body would make it an instrumentality of the State. The Union of India has tried to make out a case that the Board discharges these functions because of the de facto recognition granted by it to the Board under the guidelines framed by it, but the Board has denied the same. In this regard we must hold that the Union of India has failed to prove that there is any recognition by the Union of India under the guidelines framed by it, and that the Board is discharging these functions on its own as an autonomous body."

Having said that this Court recognized the fact that the Board was discharging some duties like the Selection of Indian Cricket Team, controlling the activities of the players which activities were akin to public duties or State functions so that if there is any breach of a constitutional or statutory obligation or the rights of other citizens, the aggrieved party shall be entitled to seek redress under the ordinary law or by way of a writ petition under Article 226 of the Constitution which is much wider than Article 32. This Court observed: 31. Be that as it may, it cannot be denied that the Board does discharge some duties like the selection of an Indian cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to public duties or State functions and if there is any violation of any constitutional or statutory obligation or rights of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is not a State. Under the Indian jurisprudence there is always a just remedy for the violation of a right of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution, which is much wider than Article 32."

Based on the above precedents on the matter in hand the court held as follows:

The majority view thus favours the view that BCCI is amenable to the writ

jurisdiction of the High Court under Article 226 even when it is not 'State' within the meaning of Article 12. The rationale underlying that view if we may say with utmost respect lies in the "nature of duties and functions" which the BCCI performs. It is common ground that the respondent-Board has a complete sway over the game of cricket in this country. It regulates and controls the game to the exclusion of all others. It formulates rules, regulations norms and standards covering all aspect of the game. It enjoys the power of choosing the members of the national team and the umpires. It exercises the power of disqualifying players which may at times put an end to the sporting career of a person. It spends crores of rupees on building and maintaining infrastructure like stadia, running of cricket academies and Supporting State Associations. It frames pension schemes and incurs expenditure on coaches, trainers etc. It sells broadcast and telecast rights and collects admission fee to venues where the matches are played. All these activities are undertaken with the tacit concurrence of the State Government and the Government of India who are not only fully aware but supportive of the activities of the Board. The State has not chosen to bring any law or taken any other step that would either deprive or dilute the Board's monopoly in the field of cricket. On the contrary, the Government of India have allowed the Board to select the national team which is then recognized by all concerned and applauded by the entire nation including at times by the highest of the dignitaries when they win tournaments and bring laurels home. Those distinguishing themselves in the international arena are conferred highest civilian awards like the Bharat Ratna, Padma Vibhushan, Padma Bhushan and Padma Shri apart from sporting awards instituted by the Government. Such is the passion for this game in this country that cricketers are seen as icons by youngsters, middle aged and the old alike. Any organization or entity that has such pervasive control over the game and its affairs and such powers as can make dreams end up in smoke or come true cannot be said to be undertaking any private activity. The functions of the Board are clearly public functions, which, till such time the State intervenes to take over the same, remain in the nature of public functions, no matter discharged by a society registered under the Registration of Societies Act. Suffice it to say that if the Government not only allows an autonomous/private body to discharge functions which it could in law takeover or regulate but even lends its assistance to such a nongovernment body to undertake such functions which by their very nature are public functions, it cannot be said that the functions are not public functions or that the entity discharging the same is not answerable on the standards generally applicable to judicial review of State action. Our answer to question No.1, therefore, is in the negative, qua, the first part and affirmative qua the second. **BCCI may not be State under Article 12** of the Constitution but is

certainly amenable to writ jurisdiction under Article 226 of the Constitution of India.

III

Nand Kumar v *State of Bihar*[3]

Bench Bench: Surinder Singh Nijjar, Pinaki Chandra Ghose JJ.

Original Judgement 23 pages.

The facts of the case, briefly, are as follows: 1. The appellants were appointed on daily wages. It is not in dispute that some of the appellants had also worked as daily wagers for a long period. It is also not in dispute that the services of said daily wagers varied from period to period. Nand Kumar, appellant, was appointed as an Accounts Clerk on daily wage basis on September 18, 1982. In 2006, the State Legislature passed the Bihar Agriculture Produce Market (Repeal) Act, 2006 (hereinafter referred to as the Repeal Act, 2006) with effect from September 1, 2006. As a result whereof, the Bihar Agriculture Produce Market Act, 1960 and rules framed thereunder in the year 1975 stood repealed, save and except certain decisions rendered earlier as well as disciplinary proceedings initiated or pending against its employees were saved. The claim of the appellants is that they have worked on daily wage basis for a long period and cannot be relieved from service by virtue of Section 6 of the Repeal Act, 2006 and, furthermore, such decision is violative of the principles of natural justice and accordingly is arbitrary. A question has also been raised in these appeals whether the daily wage employees are included within the meaning of all officers and employees as used in Section 6(i) of the Repeal Act, 2006. The High Court while answering the said question and dealing with the writ petitions, has observed that the said Section under the Repeal Act itself maintains the distinction between the status of daily wage employees and regular employees of the Board.

The Supreme Court observed that it has been held that

The concept of equal pay for equal work is different from the concept of conferring permanency on those who have been appointed on ad hoc basis, temporary basis, or based on no process of selection as envisaged by the rules. This Court has in various decisions applied the principle of equal pay for equal work and has laid down the parameters for the application of that principle. The decisions are rested on the concept of

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[3] Available at: http://judis.nic.in/supremecourt/imgs1.aspx?filename=42059 (Visited on March 20, 2015).

equality enshrined in our Constitution in the light of the directive principles in that behalf. But the acceptance of that principle cannot lead to a position where the court could direct that appointments made without following the due procedure established by law, be deemed permanent or issue directions to treat them as permanent. Doing so, would be negation of the principle of equality of opportunity.

The Apex court further held that it would not be just or proper to pass an order in exercise of jurisdiction under Article 226 or 32 of the Constitution or in exercise of power under Article 142 of the Constitution permitting those persons engaged, to be absorbed or to be made permanent, based on their appointments or engagements. Complete justice would be justice according to law and though it would be open to this Court to mould the relief, this Court would not grant a relief which while directing that appointments, temporary or casual, be regularized or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain not at arms length since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily

employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution.

The court also highlighted that when a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

IV

Dr. Subramanian Swamy v *Director, CBI & Anr on 6 May, 2014* [4]

Bench: R.M. Lodha, A.K. Patnaik, Sudhansu Jyoti Mukhopadhaya, Dipak Misra, Fakkir Mohamed Kalifulla.

Original Judgement - 71 pages

The issue before apex court was regarding constitutionality of section 6-A of Delhi special police establishment act, 1946 which was challenged under article 32 of constitution.

Section 6-A of the Delhi Special Police Establishment Act, 1946 (for short, the DSPE Act), which was inserted by Act 45 of 2003, Section 6-A. Approval

[4] *Subramaniam Swamy* v. *CBI* (2014) 8 SCC 682. Available at: http://www.supremecourtcases.com/index2.php?option=com_content&itemid=99999999&do_pdf=1&id=46240 (Visited on May 15, 2015).

of Central Government to conduct inquiry or investigation.- (1) The Delhi Special Police Establishment shall not conduct any inquiry or investigation into any offence alleged to have been committed under the Prevention of Corruption Act, 1988 (49 of 1988) except with the previous approval of the Central Government where such allegation relates to the employees of the Central Government of the Level of Joint Secretary and above; and such officers as are appointed by the Central Government in corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by that Government.

(2) Notwithstanding anything contained in sub-section (1), no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any gratification other than legal remuneration referred to in clause (c) of the Explanation to section 7 of the Prevention of Corruption Act, 1988 (49 of 1988).

Since Section 6-A came to be inserted by Section 26(c) of the Central Vigilance Commission Act, 2003 (Act 45 of 2003), the constitutional validity of Section 26(c) has also been raised.

In short, the moot question is whether arbitrariness and unreasonableness or manifest arbitrariness and unreasonableness, being facets of Article 14 of the Constitution are available or not as grounds to invalidate a legislation.

The Supreme Court held that classification which is made in Section 6-A on the basis of status in the Government service is not permissible under Article 14 as it defeats the purpose of finding prima facie truth into the allegations of graft, which amount to an offence under the PC Act, 1988.

Can there be sound differentiation between corrupt public servants based on their status? Surely not, because irrespective of their status or position, corrupt public servants are corrupters of public power. The corrupt public servants, whether high or low, are birds of the same feather and must be confronted with the process of investigation and inquiry equally. Based on the position or status in service, no distinction can be made between public servants against whom there are allegations amounting to an offence under the PC Act, 1988.

Corruption is an enemy of the nation and tracking down corrupt public servants and punishing such persons is a necessary mandate of the PC Act, 1988. It is difficult to justify the classification which has been made in Section 6-A because the goal of law in the PC Act, 1988 is to meet corruption cases with a very strong hand and all public servants are warned through such a legislative measure that corrupt public servants have to face very serious consequences.

The equal protection of the laws is a pledge of the protection of equal laws. But laws may classify..... A reasonable classification is one which includes all who are similarly situated and none who are not. Mathew, J., while explaining the meaning of the words, similarly situated stated that we must look beyond the classification to the purpose of the law. The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good. The classification made in Section 6-A neither eliminates public mischief nor achieves some positive public good. On the other hand, it advances public mischief and protects the crime-doer. The provision thwarts an independent, unhampered, unbiased, efficient and fearless inquiry / investigation to track down the corrupt public servants.

The court further outlined that essence of police investigation is skilful inquiry and collection of material and evidence in a manner by which the potential culpable individuals are not forewarned. The previous approval from the Government necessarily required under Section 6-A would result in indirectly putting to notice the officers to be investigated before commencement of investigation. Moreover, if the CBI is not even allowed to verify complaints by preliminary enquiry, how can the case move forward? A preliminary enquiry is intended to ascertain whether a prima facie case for investigation is made out or not. If CBI is prevented from holding a preliminary enquiry, at the very threshold, a fetter is put to enable the CBI to gather relevant material. As a matter of fact, the CBI is not able to collect the material even to move the Government for the purpose of obtaining previous approval from the Central Government.

Further it observed that It is important to bear in mind that as per the CBI Manual, (Paragraph 9.10) a preliminary enquiry relating to allegations of bribery and corruption should be limited to the scrutiny of records and interrogation of bare minimum persons which being necessary to judge whether there is any substance in the allegations which are being enquired into and whether the case is worth pursuing further or not. Even this exercise of scrutiny of records and gathering relevant information to find out whether the case is worth pursuing further or not is not possible. In the criminal justice system, the inquiry and investigation into an offence is the domain of the police. The very power of CBI to enquire and investigate into the allegations of bribery and corruption against a certain class of public servants and officials in public undertakings is subverted and impinged by Section 6-A.

The court then said that the justification for having such classification is founded principally on the statement made by the then Minister of Law and

Justice that if no protection is to be given to the officers, who take the decisions and make discretions, then anybody can file a complaint and an inspector of the CBI or the police can raid their houses any moment. If this elementary protection is not given to the senior decision makers, they would not tender honest advice to political executives. Such senior officers then may play safe and give non-committal advice affecting the governance. The justification for classification in Section 6-A is also put forth on the basis of the report of the Joint Parliamentary Committee to which CVC Bill, 1999 was referred particularly at the question relating to Clause 27regarding amendment of the DSPE Act (the provision which is now Section 6-A). The Joint Parliamentary Committee, in this regard noted as follows: The Committee note that many witnesses who appeared before the Committee had expressed the need to protect the bonafide actions at the decision making level. At present there is no provision in the Bill for seeking prior approval of the Commission or the head of the Department etc. for registering a case against a person of the decision making level. As such, no protection is available to the persons at the decision making level. In this regard, the Committee note that earlier, the prior approval of the Government was required in the form of a Single Directive which was set aside by the Supreme Court. The Committee feel that such a protection should be restored in the same format which was there earlier and desire that the power of giving prior approval for taking action against a senior officer of the decision making level should be vested with the Central Government by making appropriate provision in the Act. The Committee, therefore, recommends that Clause 27 of the Bill accordingly amended so as to insert a new section 6A to the DSPE Act, 1946, to this effect.

The court further observed that as a matter of fact, the justification for Section 6-A which has been put forth before us on behalf of the Central Government, was the justification for Single Directive 4.7(3) (i) in Vineet Narain case as well. However, the Court was unable to persuade itself with the same. In Vineet Narain case in respect of Single Directive 4.7(3) (i), the Court said that every person accused of committing the same offence is to be dealt with in the same manner in accordance with law, which is equal in its application to everyone. We are in agreement with the above observation in Vineet Narain case, which, in our opinion, equally applies to Section 6-A. In Vineet Narain case, this Court did not accept the argument that the Single Directive is applicable only to certain class of officers above the specified level who are decision making officers and a distinction can be made for them for the purpose of investigation of an offence of which they are accused. We are also clearly of the view that no distinction can be made for certain class of officers specified

in Section 6-A who are described as decision making officers for the purpose of inquiry/investigation into an offence under the PC Act, 1988. There is no rational basis to classify the two sets of public servants differently on the ground that one set of officers is decision making officers and not the other set of officers. If there is an accusation of bribery, graft, illegal gratification or criminal misconduct against a public servant, then we fail to understand as to how the status of offender is of any relevance. Where there are allegations against a public servant which amount to an offence under the PC Act, 1988, no factor pertaining to expertise of decision making is involved. Yet, Section 6-A makes a distinction. It is this vice which renders Section 6-A violative of Article 14. Moreover, the result of the impugned legislation is that the very group of persons, namely, high ranking bureaucrats whose misdeeds and illegalities may have to be inquired into, would decide whether the CBI should even start an inquiry or investigation against them or not. There will be no confidentiality and insulation of the investigating agency from political and bureaucratic control and influence because the approval is to be taken from the Central Government which would involve leaks and disclosures at every stage. Can it be said that the classification is based on intelligible differentia when one set of bureaucrats of Joint Secretary level and above who are working with the Central Government are offered protection under Section 6-A while the same level of officers who are working in the States do not get protection though both classes of these officers are accused of an offence under PC Act, 1988 and inquiry / investigation into such allegations is to be carried out.

Our answer is in the negative. The provision in Section 6-A, thus, impedes tracking down the corrupt senior bureaucrats as without previous approval of the Central Government, the CBI cannot even hold preliminary inquiry much less an investigation into the allegations. The protection in Section 6-A has propensity of shielding the corrupt. The object of Section 6-A, that senior public servants of the level of Joint Secretary and above who take policy decision must not be put to any harassment, side-tracks the fundamental objective of the PC Act, 1988 to deal with corruption and act against senior public servants. The CBI is not able to proceed even to collect the material to unearth prima facie substance into the merits of allegations. Thus, the object of Section 6-A itself is discriminatory. That being the position, the discrimination cannot be justified on the ground that there is a reasonable classification because it has rational relation to the object sought to be achieved.

The Apex Court then held that the signature tune in Vineet Narain case is, However high you may be, the law is above you. We reiterate the same. Section 6-A offends this signature tune and effectively Article 14. Undoubtedly, every

differentiation is not discrimination but at the same time, differentiation must be founded on pertinent and real differences as distinguished from irrelevant and artificial ones. A simple physical grouping which separates one category from the other without any rational basis is not a sound or intelligible differentia. The separation or segregation must have a systematic relation and rational basis and the object of such segregation must not be discriminatory. Every public servant against whom there is reasonable suspicion of commission of crime or there are allegations of an offence under the PC Act, 1988 has to be treated equally and similarly under the law. Any distinction made between them on the basis of their status or position in service for the purposes of inquiry / investigation is nothing but an artificial one and offends Article 14.In view of our foregoing discussion, we hold that Section 6- A(1), which requires approval of the Central Government to conduct any inquiry or investigation into any offence alleged to have been committed under the PC Act, 1988 where such allegation relates to (a) the employees of the Central Government of the level of Joint Secretary and above and (b) such officers as are appointed by the Central Government in corporations established by or under any Central Act, government companies, societies and local authorities owned or controlled by the Government, is invalid and violative of Article 14 of the Constitution. As a necessary corollary, the provision contained in Section 26 (c) of the Act 45 of 2003 to that extent is also declared invalid.

V.

Shreya Singhal v *Union of India*[5]

Bench: J. Chelameswar, Rohinton Fali Nariman JJ.

Original Judgement - 123 pages.

Section 66A has been challenged on the ground that it casts the net very wide – "all information" that is disseminated over the internet is included within its reach. The constitutionality of sec 66A has been challenged

66-A. Punishment for sending offensive messages through communication service, etc. —Any person who sends, by means of a computer resource or a communication device,— (a) any information that is grossly offensive or has menacing character; or (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use

[5] Available at: http://supremecourtofindia.nic.in/FileServer/2015-03-24_1427183283.pdf (Visited on May 15, 2015).

of such computer resource or a communication device; or (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine. Explanation.— For the purposes of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message."

The court while holding the provision as unconstitutional outlined that two things will be noticed. The first is that the definition is an inclusive one. Second, the definition does not refer to what the content of information can be. In fact, it refers only to the medium through which such information is disseminated. It is clear, therefore, that the petitioners are correct in saying that the public's right to know is directly affected by Section 66A. Information of all kinds is roped in – such information may have scientific, literary or artistic value, it may refer to current events, it may be obscene or seditious. That such information may cause annoyance or inconvenience to some is how the offence is made out. It is clear that the right of the people to know – the market place of ideas – which the internet provides to persons of all kinds, is what attracts Section 66A. That the information sent has to be annoying, inconvenient, grossly offensive etc., also shows that no distinction is made between mere discussion or advocacy of a particular point of view which may be annoying or inconvenient or grossly offensive to some and incitement by which such words lead to an imminent causal connection with public disorder, security of State etc. The petitioners are right in saying that Section 66A in creating an offence against persons who use the internet and annoy or cause inconvenience to others very clearly affects the freedom of speech and expression of the citizenry of India at large in that such speech or expression is directly curbed by the creation of the offence contained in Section 66A.

This leads us to a discussion of what is the content of the expression "freedom of speech and expression". There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1) (a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in. It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to

cause public disorder or tends to cause or tends to affect the sovereignty & integrity of India, the security of the State, friendly relations with foreign States, etc. Why it is important to have these three concepts in mind is because most of the arguments of both petitioners and respondents tended to veer around the expression "public order?

The court in this case while distinguishing American speech protection said that so far as the second apparent difference is concerned, the American Supreme Court has included "expression" as part of freedom of speech and this Court has included "the press" as being covered under Article 19(1) (a), so that, as a matter of judicial interpretation, both the US and India protect the freedom of speech and expression as well as press freedom. Insofar as abridgement and reasonable restrictions are concerned, both the U.S. Supreme Court and this Court have held that a restriction in order to be reasonable must be narrowly tailored or narrowly interpreted so as to abridge or restrict only what is absolutely necessary. It is only when it comes to the eight subject matters that there is a vast difference. In the U.S., if there is a compelling necessity to achieve an important governmental or societal goal, a law abridging freedom of speech may pass muster. But in India, such law cannot pass muster if it is in the interest of the general public. Such law has to be covered by one of the eight subject matters set out under Article 19(2). If it does not, and is outside the pale of 19(2), Indian courts will strike down such law.

The Supreme Court had that we have to ask ourselves the question: does a particular act lead to disturbance of the current life of the community or does it merely affect an individual leaving the tranquility of society undisturbed? Going by this test, it is clear that Section 66A is intended to punish any person who uses the internet to disseminate any information that falls within the sub-clauses of Section 66A. It will be immediately noticed that the recipient of the written word that is sent by the person who is accused of the offence is not of any importance so far as this Section is concerned. (Save and except where under sub-clause (c) the addressee or recipient is deceived or misled about the origin of a particular message.) It is clear, therefore, that the information that is disseminated may be to one individual or several individuals. The Section makes no distinction between mass dissemination and dissemination to one person. Further, the Section does not require that such message should have a clear tendency to disrupt public order. Such message need not have any potential which could disturb the community at large. The nexus between the message and action that may be taken based on the message is conspicuously absent – there is no ingredient in this offence of inciting anybody to do anything which a reasonable man would then say would have the tendency of being an immediate

threat to public safety or tranquility. On all these counts, it is clear that the Section has no proximate relationship to public order whatsoever. The example of a guest at a hotel 'annoying' girls is telling – this Court has held that mere 'annoyance' need not cause disturbance of public order. Under Section 66A, the offence is complete by sending a message for the purpose of causing annoyance, either 'persistently' or otherwise without in any manner impacting public order.

VI

Gunmala Sales Pvt. Ltd v *Anu Mehta & Ors on 17 October, 2014* [6]

Bench: Ranjana Prakash Desai, N.V. Ramana

Original Judgement - 53 pages

In these appeals, we are concerned with the question as to whether the High Court was justified in quashing the proceedings initiated by the Magistrate on the ground that there was merely a bald assertion in the complaint filed under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881 (the NI Act) that the Directors were at the time when the offence was committed in charge of and responsible for the conduct and day-to-day business of the accused-company which bald assertion was not sufficient to maintain the said complaint.

6. Respondents 1 to 4 filed an application before the High Court of Calcutta under Section 482 of the Code for quashing the proceedings pending before the learned Magistrate. The High Court framed two questions as under: (i) Whether the Directors can be prosecuted on the bald assertion made in the complaint, that the Directors thereof and were at the time when the offence committed in charge of and were responsible for the conduct and day to day business of the said accused No.1 company. (ii) Whether the Director who has resigned can be prosecuted after his resignation has been accepted by the Board of the Directors of the Company. So far as the first question is concerned, the High Court, after referring to certain judgments of this Court, held that except the averment that the Directors were in-charge of and responsible for the conduct and day to day business of the Company, nothing has been stated in the complaint as to what part was played by them and how they were responsible for the finances of the company, issuance of cheques and whether they had control over the funds of the company. The High Court observed that the complaint lacked material averments. The High Court quashed the proceedings on this ground. So far as the second question is concerned, the High Court held that it is not necessary to answer it because the first question is answered in favour of

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[6] Available at: http://judis.nic.in/supremecourt/imgs1.aspx?filename=42037 (Visited on March 15, 2015)

respondents 1 to 4. The High Court quashed the complaint. Being aggrieved by the said order, the appellant has approached this Court by way of this appeal.

We may summarize our conclusions as follows: a) Once in a complaint filed under Section 138 read with Section 141 of the NI Act the basic averment is made that the Director was in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed, the Magistrate can issue process against such Director; b) If a petition is filed under Section 482 of the Code for quashing of such a complaint by the Director, the High Court may, in the facts of a particular case, on an overall reading of the complaint, refuse to quash the complaint because the complaint contains the basic averment which is sufficient to make out a case against the Director. c) In the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about role of the Director in the complaint. It may do so having come across some unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of the process of the court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at the relevant time or a Director who had resigned long before issuance of cheques. In such cases, if the High Court is convinced that prosecuting such a Director is merely an arm-twisting tactics, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, uncontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the possibility of such a case being there cannot be ruled out. In the absence of such evidence or circumstances, complaint cannot be quashed;

d) No restriction can be placed on the High Courts' powers under Section 482 of the Code. The High Court always uses and must use this power sparingly and with great circumspection to prevent inter alia the abuse of the process of the Court. There are no fixed formulae to be followed by the High Court in this regard and the exercise of this power depends upon the facts and circumstances of each case. The High Court at that stage does not conduct a mini trial or roving inquiry, but, nothing prevents it from taking unimpeachable evidence or totally acceptable circumstances into account which may lead it to conclude that no trial is necessary qua a particular Director.

LEGISLATIVE TRENDS

*Neeraj Kumar Gupta**

I

The Constitution (124th Amendment) Act and the National Judicial Appointments Commission Act, 2014

The Parliament has passed the Constitution (124th Amendment) Act (the Amendment Act) and the National Judicial Appointments Commission Act, 2014 (the NJAC Act). The Amendment Act and the NJAC Act deals with matters related to the appointment of Judges of Supreme Court including Chief Justice of India and appointment and transfer of the Judges, including the Chief Justices of various High courts of India.

The Amendment Act amends the provisions of the Constitution related to the appointment of Supreme Court and High Court judges, and the transfer of High Court judges. Article 124 (2) of the Constitution provides that the President will make appointments of Supreme Court (SC) and High Court(HC) judges after consultation with the Chief Justice of India and other SC and HC judges as he considers necessary. The Amendment Act amends article 124 (2) of the Constitution to provide for a Commission, to be known as the National Judicial Appointments Commission (NJAC). The NJAC would then make recommendations to the President for appointments of SC and HC judges.

The Amendment Act also inserts three new articles – articles 124A, 124B and 124C — relating to composition, functions and law relating to NJAC. Article 124A provides for the composition of the NJAC. It provides that the NJAC would consist of: (i) Chief Justice of India, who will be the *ex-officio* Chairperson of the Commission (ii) Two senior most Supreme Court Judges as *ex-officio* members (iii) The Union Minister of Law and Justice, member *ex-officio* (iv) Two eminent persons (to be nominated by a committee consisting of the Chief Justice of India, Prime Minster of India and the Leader of Opposition[1] in the Lok Sabha). Of the two eminent persons, one person would be from the SC/ ST/OBC/minority communities or be a woman. The eminent persons shall be nominated for a period of three years and shall not be eligible for re-nomination.

Article 124B, provides for the functions of the NJAC which include: (i) Recommending persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High

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[1] The term has been given a wider meaning and it includes, in case there is no leader of opposition, the leader of the single largest party in the Lower House.

Courts; (ii) Recommending transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and (iii) Ensuring that the persons recommended are of ability and integrity.

Article 124C, enables Parliament to pass a law to: (i) regulate the procedure of appointments, and (ii) empower the NJAC to lay down the procedure for its functioning, and manner of selection of persons for appointment, through regulations.

Apart from these major changes the Amendment Act also amends various incidental provisions related to appointment and transfer of Judges. These amendments include amendments to articles 127, 128, 217,222, 224A and 231.

In the light of the power conferred under newly enacted article 124C the Parliament has passed the NJAC Act. The NJAC Act provides for the procedure to be followed by the NJAC for recommending persons for appointment as Chief Justice of India and other Judges of the SC, and Chief Justice and other Judges of HC. The NJAC Act can be discussed under various headings as follows:-

Reference by the Central Government to NJAC for Making Recommendation for Filling up the Vacancies in the Supreme Court and the High Courts: -- Section 4(1) of the NJAC Act provides that when the NJAC Act enters into force the Central Government will, within thirty days make reference to the NJAC regarding the existing vacancies in the Supreme Court and High Courts. In cases of vacancies arising out of the completion of the term of judges, the reference to the NJAC will be made six months prior to the completion of such term.[2] In situations like death of the judge or resignation of the judge, the reference has to be made within thirty days of such event.

Procedure of Recommendation for Appointment of Supreme Court Judges: - The NJAC shall recommend the senior most judge of the Supreme Court for appointment as Chief Justice of India. Provided he is considered fit to hold the office.[3] The person whose name is being considered for the post of Chief Justice of India will not participate in the meeting.[4] Other judges of the Supreme Court will be recommended on the basis of their ability, merit and other criteria specified in the regulations made by the commission under the NJAC Act.[5] However, the NJAC Act provides that if any of the two members

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[2] Section 4(2).
[3] Section 5(1).
[4] Proviso, Section 5(1).
[5] Section 5(2).

do not agree on a particular name then the NJAC will not recommend such name for the appointment to the Central Government. The NJAC shall not recommend a person for appointment if any two of its member do not agree to such recommendation.[6] The NJAC Act also empowers the NJAC to specify such other procedure and conditions, by way of regulations, for selection and appointment of a Judge of the Supreme Court as it may consider necessary.[7]

Procedure of Recommendation for Appointment of High Courts Judges: The NJAC is to recommend a Judge of a High Court to be the Chief Justice of a High Court on the basis of *inter se* seniority of all the judges in High Courts. The ability, merit and other criteria of suitability as specified in the regulations would also be considered.[8] For recommending other judges of the High Court, the NJAC will take the nomination of the Chief Justice of that High Court.[9] Such nomination of the Chief Justice of the High court will be made by him in consultation with the two senior most judges of that High Court and such other judges and the eminent Advocates of that High Court as will be specified by the regulations made by the NJAC.[10] Apart from the nomination made by the Chief Justice of the High Court the ability and merit is still to be considered by the NJAC and the NJAC is also required to seek the written views of the Governor and the Chief Minister of the State concerned.[11] However the NJAC is empowered to alter the procedure to appoint the Chief Justice of the High Court and other judges of the High Court by virtue of Section 6(8). Even in cases of recommendation relating to High Court Judges the Veto Power of two members can be exercised which leads to non recommendation of the name on which Veto has been exercised by two members.[12]

It is to be noted that the recommendation made by the NJAC is binding on the President as the word shall has been used in Section 7. However, the President is entitled to ask the NJAC to reconsider their recommendation for once. If the NJAC still recommends the appointment after being asked to reconsider, in such situation the President is bound to appoint the person/s recommended.[13]

Transfer of High Court Chief Justices and other High Court Judges: - The NJAC is to make recommendations for transfer of Chief Justices and

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6 Second Proviso, Section 5(2).
7 Section 5 (3).
8 Section 6(1).
9 Section 6(1).
10 Section 6(3).
11 Section 6(7).
12 Section 6(6).
13 Provisos, Section 7.

other judges of the High Courts." The procedure to be followed will be specified in the regulations.[14]

II

The Citizenship (Amendment) Act, 2015

The Citizenship (Amendment) Act, 2015 (the Amendment Act) is enacted to amend the Citizenship Act, 1955 (the Principal Act) by the Parliament and it came into force on 6 January 2015.

The Principal Act provides for acquisition, termination, deprivation, determination of Indian citizenship and other related aspects and provides for acquisition of Indian citizenship by birth, descent, registration, naturalisation and incorporation of territory under certain circumstances, and also for the termination and deprivation of citizenship.

Section 2 of the Principal Act has been amended by the Amendment Act with a substituted clause (ee) regarding Overseas Citizen of India Cardholder who is a person registered as an Overseas Citizen of India Cardholder by the Central Government under Section 7A.

Section 5 of the Principal Act, which provides for registration of an individual as a citizen, who is not illegal migrants, has been amended. Clause (f) and (g) of sub-section 1 of the Principal Act is amended to liberalise the residency requirement regarding individuals applying under this section. A new Sub-section 5(1A) has been inserted which allows the Union Government to relax the requirement of 12 months stay or service if special circumstances exist in cases related to citizenship by registration and naturalization, such relaxation up to 30 days may be permitted by the government.

Section 7A, 7B, 7C and 7D of the Principal Act which deals with overseas citizenship has been substituted by new Sections. New Section 7A provides that now the Central Government can register an Overseas Citizen of India Cardholder and not only Overseas Citizens, upon application by any person of full age:-

- who is a citizen of another country but was a citizen of India when Constitution commenced, or
- who was eligible to become Indian citizen at the commencement of constitution, or
- who belonged to a territory which became part of India after 15 August 1947, or
- who is a child or grand-child of such citizen, or

[14] Section 9.

- who is a minor child whose parents are citizen of India, or spouse of foreign origin of a citizen of India, or
- Whose marriage was registered for a continuous period of not less than 2 years when application was presented but to be eligible for registration such spouse must undergo security clearance by authority in India.

However, if a person whose grandparents, great grandparents had been a citizen of Pakistan or Bangladesh or as notified by Central Government in official Gazette will not be eligible for registration as Overseas Citizen of India Cardholder under this section.

The Central Government may, by notification in the Official Gazette, specify the date from which the existing Persons of Indian Origin Cardholders shall be deemed to be Overseas Citizens of India Cardholders.[15]

Section 7B talks about the conferment of rights on Overseas Citizen of India Cardholder and provides that they will be entitled to such rights as may be notified by the Central Government. However, they are not entitled to certain rights that are conferred on a citizen of India like rights given under articles 16, 66, 124, 217 of Constitution, Section 16 of Representation of People Act 1950, Section 3 and 4, 5, 5A, 6 of Representation of People Act 1951.

Section 7C provides to the overseas citizen of India cardholder an option to renounce such status. If a person ceases to be an overseas citizen of India Cardholder then his spouse and children also cease to be so.

Section 7D prescribes about cancellation of overseas citizen of India Cardholder registration if it was obtained by fraud, false representation, if he has done disaffection towards Constitution, if cardholder trades with enemy country when India is at war, if such person is imprisoned for not less than 2 years within 5 years after registration as Overseas Citizen of India Cardholder, or if it is needed to do so in the interest of sovereignty of India or if marriage of such cardholder has been dissolved by court of law.

Section 18 of the principal act has been amended and clause (eea) and (eeb) has been inserted which deal with conditions and manner in which a person can be registered and manner of renunciation as an Overseas Citizen of India Cardholder.

Third schedule of principal act has been amended. The Citizenship (Amendment) Ordinance has been repealed but anything done or any action taken under the principal Act will be deemed to have been done under the provisions of this Act.

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[15] Section 7A (2).

III

The Coal Mines (Special Provisions) Act, 2015

The Parliament has passed the Coal Mines (Special Provisions) Act, 2015 (the Act) which replaces the Coal Mines (Special Provisions) Second Ordinance, 2014. The Ordinance was promulgated by the President in the light of the order of the Supreme Court cancelling the allocations of 204 coal blocks out of 214 made during the period of 1993 to the date of judgment. The object of the Act is to "ensure public interest...by taking immediate action to allocate coal mines...keeping in view the energy security of the country".[16]

The Act amends the Coal Mines (Nationalization) Act, 1973 and the Mines and Minerals (Development and Regulation) Act, 1957. The Act consists of 33 sections divided in six chapters. It also contains four Schedules.

Under the Coal Mines (Nationalisation) Act[17] a new provision has been inserted by that Act. Before this amendment, coal mining was allowed to government companies, companies that the government had sub-leased the mines to, and private companies engaged in *a specified end-use* such as power, iron and steel, cement and coal washing. The Act provides that now those companies and the joint ventures can also carry out coal mining activities which are not involved in end-use.[18]

The Act creates three categories of mines. These are Schedule I mines, Schedule II mines, and Schedule III mines. Schedule I mines is defined as all the 204 coal mines, the allocation of which was cancelled by the Supreme Court in August 2014, any land acquired by the prior allottee in or around the coal mines, and mine infrastructure.[19] Schedule II mines includes 42 Schedule I mines that are currently under production or about to start production.[21] Schedule III mines means those 32 Schedule I mines that have been earmarked for a specified end-use or any other mine as may be notified under Section 7 of the Act.[21]

Section 4(1) of the Act provides that the Schedule I mines can be allocated by way of either public auction or government allotment. The public auction route for Schedule I mines are open for all the companies, corporation or joint ventures who carry coal mining operation in India in any form, either for own consumption, for sale or for any other purposes.[22] The government

[16] Preamble of the Act
[17] 26 of 1973.
[18] Add section 3A
[19] Section 3(1) (p).
[20] Section 3(1) (q).
[21] Section 3(1) (r).
[22] Section 4(2).

allotment[23] of the Schedule I mines can be made on restricted grounds. Such allotment has to be made to:-

- government companies, corporation or their joint ventures, or
- companies, corporation or their joint ventures those have been awarded a power project, and
- Such power projects have been awarded on the basis of competitive biddings (including ultra mega power projects).

Schedule II and III mines will be allocated by way of public auction. To bid for these blocks one has to qualify as either a company engaged in specified end-use including a company having a coal linkage which has made such investment as may be prescribed, a joint venture company having a common specified end-use and they are also independently eligible to bid in accordance with the Act, government companies, corporation or their joint ventures formed by such companies or corporation or with any other company having common specified end-use.[24]

A prior allottee shall not be eligible to participate in the auction process if he has not paid the additional levy[25] imposed by the Supreme Court, or if he is convicted of an offence related to coal block allocation and sentenced to imprisonment for more than three years.[26]

Under Section 6 of the Act the Central Government is empowered to appoint a nominated authority who will be an officer of the rank of a joint secretary in the government. Functions of such nominated authority are conducting the process of auction and allotment, executing the vesting and allotment orders, collecting the auction proceeds and transferring them to the respective state governments. The nominated authority may take the help of an expert in executing the functions related to the allocation in the Act.[27]

Section 8(4) of the Act deals with vesting order. It provides that vesting order shall transfer and vest upon the successful bidder, rights and licenses which include all the rights, title and interest of the prior allottee, in Schedule I coal mines, a mining lease that will be granted by the state government, and any statutory licences, approval or consent required to undertake coal mining operations in Schedule I coal mines, if already issued to the prior allottee.

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[23] Section 5.
[24] Section 4(3).
[25] Section 3(1)(a) defines it as "the additional levy as determined by the Supreme Court in Writ Petition (Criminal) 120 of 2012 as two hundred and ninety-five rupees per metric tone of coal extracted.
[26] Section 4(4).
[27] Section 6(2).

Section 9 provides that Compensation only for land and immovable mining infrastructure shall be paid to the prior allottee after paying secured creditors. For the purpose of such compensation, land shall be valued as per the registered sales deed together with 12% simple interest from the date of purchase or acquisition, till the date of the execution of the vesting order. Mine infrastructure shall be valued as per the audited balance sheet of the previous financial year. Prior allottees shall not be entitled to compensation till the additional levy has been paid.[28]

Section 27 provides that Tribunal constituted under the Coal Bearing Areas (Acquisition and Development), Act, 1957 will adjudicate any dispute arising out of any action of the Central Government/ nominated authority or any dispute between the successful bidder or allottee and prior allottee arising out of any issue connected with the Act.

IV

The Motor Vehicles (Amendment) Act, 2014

The Motor Vehicles (Amendment) Bill, 2014 was introduced in Lok Sabha on December 15, 2014. The amendment Act has amended the Motor Vehicles Act, 1988.

Under the Motor Vehicle Act, 1988 a "motor vehicle" or "vehicle" is defined as any mechanically propelled vehicle adapted for use upon roads. The power of propulsion is transmitted from an external or internal source and includes a chassis to which a body has not been attached and a trailer. It does not include (i) a vehicle running upon fixed rails, or (ii) a vehicle of a special type adapted for use only in a factory or in any other enclosed premises, or (iii) a vehicle having less than four wheels fitted with engine capacity of not exceeding 25 cubic centimetres.[29]

The amendment Act brings e-carts and e-rickshaws under the ambit of the Act. E-carts and e-rickshaws are defined as special purpose battery powered vehicles, having three wheels, and with power up to 4000 watts.[30] They can be used for carrying goods or passengers, for hire or reward. They should have been manufactured, equipped and maintained in accordance with specifications as prescribed.

Under the Act, a person shall be granted a learner's licence to drive public service vehicles, goods carriages, educational institution buses and private service

[28] See section 16.
[29] Section 2 (28).
[30] Section 2A (2).

vehicles, only if he has held a driving licence to drive a light motor vehicle[31] for at least one year.[32]

The amendment Act adds a proviso to the Act to exempt e-rickshaw and e-cart drivers from this requirement. The amendment Act states that the conditions for issuing of driver licences for e-cart or e-rickshaw shall be prescribed.

The amendment Act also provides for the central government to make Rules on the specifications for e-carts and e-rickshaws, and the manner and conditions for issuing driving licenses.

V

The Insurance Laws (Amendment) Act, 2015

This Insurance Laws (Amendment) Act, 2015 (the Amendment Act) has been passed to replace the Insurance Laws (Amendment) Ordinance, 2014, which came into force on 26th day of December 2014. The amendment Act amend the Insurance Act, 1938, (Insurance Act), General Insurance Business (Nationalisation) Act 1972, (Nationalisation Act) and Insurance Regulator and Development Authority Act 1999 (IRDA Act).

The amendment Act is passed to remove archaic and redundant provisions in the legislations and incorporates certain provisions to provide Insurance Regulatory and Development Authority of India (IRDAI) with the flexibility to discharge its functions more effectively and efficiently. It also provides for enhancement of the foreign investment cap in an Indian Insurance Company from 26% to an explicitly composite limit of 49% with the safeguard of Indian ownership and control.[33]

Apart from above stated objectives the amendment also aims to secure capital availability, consumer welfare and empowerment of IRDA. The amendment also seeks to achieve promotion of re-insurance Business in India and define health insurance business. It also aims to provide strengthened industry councils and robust appellate tribunals.[34]

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[31] According to Section 2 (21), a light motor vehicle is a motor car, tractor or road roller not weighing more than 7500 kilograms.

[32] Section 7.

[33] Press Information Bureau Government of India Ministry of Finance, "Major Highlights of the Insurance Laws (Amendment) Bill, 2015 Passed by Parliament; Provides for Enhancement of the Foreign Investment Cap in an Indian Insurance Company from 26% to an Explicitly Composite Limit of 49% with the Safeguard of Indian Ownership and Control; Provides Insurance Regulatory and Development Authority of India (IRDAI) with Flexibility to Discharge its Functions More Effectively and Efficiently Among Others.

[34] *Ibid.*

Section 2 of the Amendment Act replaces the reference to the Companies Act as the Companies Act 2013 instead of Indian Companies Act 1913 and Companies Act 1956. Similarly the words Actuary and Authority have been substituted in the Insurance and IRDA Act respectively. Clause 5(A) of the Insurance Act which defined Chief Agent has been omitted.

Clause 6 (C) has been inserted which defines the meaning of Health Insurance business to as "the effecting of contracts which provide for sickness benefits or medical, surgical or hospital expense benefits, whether in-patient or out-patient travel cover and personal accident cover". Clause (7A) has been substituted with regard to Indian Insurance Company meaning with reference to Companies Act 2013. Clause 8 has been omitted and in Clause 8A after the words "general insurance business" the words "health insurance business has been inserted. Clause 9 of the Act which defines the term insurer has been substituted which defines it as an Indian insurance company, corporation, cooperative society and a foreign company involved in re-insurance business. In clause 10-16 of section 2 of the Insurance Act some words are omitted and some new words are inserted.

Section 2CB has been inserted which provides that no person can take or renew an insurance policy regarding an immovable property, and ship and aircraft registered in India with a foreign insurer without prior permission of the authority. The contravention of this provision has been made punishable with penalty of 5 crore rupees.

In Section 3 of Insurance Act, sub-section (2) has been amended with regard to registration. Sub-Section (2C) of Section 3, which deals with appeal to the Central Government in case of refusal to register, has been amended. The amended provision provides that now the appeal shall lie to the Securities Appellate Tribunal. Sub-section (3), (4), (5) and (5A) which deals with withholding and cancelling the registration has also been substituted. There is a substitution of new section for Section 3A relating to payment of annual fee for registration by the insurer which liberalises the process.

Section 4 also has some substitution regarding minimum limits for annuities and benefits secured by life insurance policies. Section 5 also has been changed and section 6 which deals with regard to requirement of capital have also been substituted which incorporates the provision for health insurance. Section 6A (1) which provides that registered public company cannot carry on business until certain conditions are followed has been amended. Sub-sections of 6A (3) (6), (7), (8), (9), (10) and Section 6AA, 6C, 7, 8, 9 of Insurance Act has been omitted. Section 10 has been amended and there is a substitution of new section

for Section 11 regarding accounts and balance sheet. There is substitution in Section 12 relating to audits and amendment to Section 13 of the Insurance Act.

Section 14 which relates to record of policies and claims has been substituted. Section 15, which relates to submission of returns, is also amended. Sections 16, 17, 17A have been omitted. Section 20 which deals with the custody, inspection and supply of document, Section 21 dealing with the power of IRDA in case of unsatisfactory return, and section 22 dealing with the power of the IRDA to order revaluation of the return have been amended. Section 27, 27A, 27B 27C and 27D has been amended regarding investment of assets. Investment by insurer in certain cases and general insurance business provisions has also been amended; manner and condition of investment, prohibition for investment of funds outside India are also amended. Section 28A and 28B is amended regarding statement and return of investment of assets. Section 29 regarding prohibition of loans to director, manager, partner etc. of the insurer company has been substituted. Section 30 regarding liability of directors for loss due to contravention of Section 27 (A, B, C, D) or 29 has also been amended. Section 31, 31A, 31B also have been substituted, regarding power to restrict payment of excessive remuneration. Section 32 has been omitted and 32A, 32B amended and 32D has been inserted regarding insurer's obligation with respect to insurance business in third party risk of motor vehicles. Section 33 regarding power to investigate and inspect by the authority is amended. Section 34B and 34C has been substituted, 34H has been amended and 34G has been omitted. Section 35 has been amended; Section 36 which deals with sanctions of amalgamation and transfer by authority has also been amended.

Sections 38 dealing with assignment and transfer has been substituted. The new provision confers power on the insured to transfer the policy in part as well, the provision also make provision to ensure the *bonafide* of the transfer or assignment. Similarly, certain changes have also been made in section 39 which deals with insurance policies' nomination by policy holder.

Again, section 40, dealing with prohibition of payment by way of commission to procure business has been substituted. Section 40A has been omitted and 40B and 40C which deals with the expenses on the management has been amended. Section 41(2) has been amended and the penalty in case of contravention of Section 41(1) has been increased from five hundred rupees to ten lakh rupees. Section 42 dealing with appointment of insurance agents and 42A, B, C dealing with prohibition of insurance business via agent, multilevel marketing and special agents have been substituted. Section 42E dealing with

conditions for intermediary insurance and Section 43 dealing with record of insurance agents has been substituted.

Section 44 has been omitted and Sections 44A and 45 dealing with power to call for information and policy cannot be called in question just for misstatement after 3 year period, respectively has been substituted. 47A and 48 has been omitted and 48A providing that no insurance agent shall be or remain the director of the insurance company.

Section 52, 52A dealing with prohibition of business on dividing principle has been substituted and when administrator for management of insurance business may be appointed. Section 52D dealing with termination and appointment of administrator has been substituted. Section 52E, F, G amended and Section 52H to 52N is omitted.

Sections 64A and 64B have been omitted. Sections 64C, D, F have been substituted to incorporate council related to health insurance. Section 64-I which provided for the qualifying exam to become an insurance agent under section 42 has been omitted. Sections 64 J (2) and 64 L (2) dealing with the levy of fees by the executive committee of insurance council has been amended. The new provisions ensure that the council will be entitled to levy such fee only as may provided by such council under its by-laws. Thus making it certain and clear what amount may be levied.

Sections 64 N and R has been amended and the words Central Government has been replaced by the words "authority specified", enabling the central government the power to delegate the function provided in the section. Sections 64S, 64T, 64U, 64UA – 64UL has been omitted. New Section 64ULA has been added regarding transitional provisions in the Act. Section 64UM regarding surveyors is amended and 64V and 64VA, 64VC amended regarding how to value the assets and liabilities, sufficiency of assets, restrictions on opening of new place of business. Part III and IIIA and IV have been omitted. In Sections 102, 103 and 104 some changes have been incorporated regarding penalty for carrying on business which is in contravention of Section 3 of the Act and contravention of Section 27, 27A, 27B, 27D and 27E of the Act.

Section 105 has been amended. New Section 105B and C have been substituted which deals with penalty for failure to comply with Sections 32B, C and D regarding power to adjudicate and factors that the adjudicating officer has to take. Amendment has been made to Section 106A and omission of Section 107, 107A has taken place. In Section 109 changes in regarding cognizance of offence and substitution of new section 110 regarding appeal to securities

appellate tribunal has been added in the Act. Section 110E, 110G, 110H is omitted but 110HA inserted regarding penalty with regard to arrears of land revenue that can be recovered. Section 111 has been amended and Section 113 regarding acquisition of surrender value by policy has been substituted. Section 114, 114A amended and 5th, 6th and 8th schedules have been omitted.

New Section 10B is inserted in Amendments to General Insurance Business (Nationalisation) Act 1972 regarding enhancement of equity capital of general insurance companies. Section 25 of this Act is omitted. Section 2, 3 and 16 is amended. Insurance Laws (Amendment) Ordinance 2014 is repealed but anything done under the above said all Acts shall be deemed to have done under the provisions of the said Acts.

BOOK REVIEWS

LAW OF TORT including compensation under the Consumer Protection Act - 7th Edition, 2015, by S.P. Singh, Universal Law Publishing Company, New Delhi, India, ISBN: 978-81-7534-943-8, Pages 398, Price Rs. 395 /-.

The Law of Torts as administers in India in modern times is the English law as found suitable to Indian conditions and as modified by the Acts of the Indian Legislature. Its origin is linked with the establishments of British courts in India. The application of the English law as rules of justice, equity and good conscience has therefore been a selective application.

The term 'tort' is the French word for English word 'wrong' and of the Roman term 'delict'. It was introduced into the English law by Norman jurists. The word 'tort' is derived from the Latin term 'tortum', which means to twist and implies conduct which is twisted or tortious. It now means a breach of some duty independent of contract giving a civil cause for action and for which compensation is recoverable.

In the words of Bhagwati, CJ, "We have to evolve new principles and lay down new norms which will adequately deal with new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for that matter, of that in any foreign country. We are certainly prepared to receive light from whatever source comes best to build our own jurisprudence. The principle aim of the law of torts is compensation of victims or their dependents. Grants of exemplary damages in certain cases will show that deterrence of the wrong-doer is also another aim of the law of torts.

The Consumer Protection Act came as the much needed relief to the beleaguered consumer. The remedy under the Consumer Protection Act is a more easily accessible alternative in addition to that already available to the aggrieved consumers by way of civil suit under other Acts. It is a benevolent social legislature that enshrines the right and remedies of the consumers. The *dictum caveat venditor* (let the seller beware) compels the seller to take responsibility for the product and discourages seller from selling products of unreasonable quality.

The consumer can now seek redressal against manufacturers, traders of goods and providers of various types of services. A separate Department of Consumer Affairs was also created in the central and state government to exclusively focus on ensuring protection of the right of consumers, as enshrined in the act.

The book Law of Torts including Compensation under the Consumer Protection Act, under the review, aims to introduce and clarify, in easy language, some of the many issues relating to the Law of Tort and Consumer Protection Act. In order to help the foundation and overview, the emphasis is on understanding the bigger picture.

This book consists of 28 chapters. Chapter 1, 2, 3 and 4 are explained in detail and new cases have been incorporated. Chapter 5 deals with General Defences, Act of State and Judicial Acts, which is hardly available in other textbooks. These topics have been incorporated along with the case laws, for the students benefit. Chapters 6, 7, 8, 9, 10 and 11 deal with different issues. Chapter 9 dealing with trespass of persons, includes mayhem, has been dealt with in detail and will be a delight for students. Chapter 12, 13, 14, 15, 16 and 17 deal with torts relating to Incorporeal Personal Property Torts, affecting domestic and service relationship, negligence, contributory negligence, nervous shock (detailed cases), liability of the occupiers for dangerous premises. Chapters 18 and 19 deal with vicarious liability of the State. Chapters 20 to 26 deal with defamation, nuisance, strict liability and absolute liability, liability of dangerous animals, malicious prosecution, death in relation to tort and remedies. Chapter 27 deals with Consumer Protection Act and chapter 28 with the Motor Vehicle Act (liability without fault in certain cases). This chapter also gives the latest citations of the Supreme Court.

Law of tort, including compensation under Consumer Protection Act is the 7th edition. The reviewer has read the earlier edition too and therefore having right to fair comment on the improvement of the book vis – a vis the previous editions.

This edition of 2015 has been satisfactorily updated covering The Consumer Protection Act and the Motor Vehicle Act in the context of liability without fault in certain cases, along with the recent cases decided by the Supreme Court. This book will be very beneficial for students, lawyers and researchers and will serve as a good source book for those who want to have a good understanding of the subject. The author has shown much ability, understanding and diligence in penning it down. The book though easy and simple language tries to make us understand the basic ingredients of the law of torts. As a practical handbook, incorporating Motor Vehicle Act, it is a must read for students of all disciplines.

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MUSLIM LAW, 2014, by S.K.Raghuvanshi, New Era Law Publications, Haryana, India, ISBN: 978-93-80456-22-5, Pages 269, Price Rs. 250/- .

Family law in India has a complex legal structure where different religious communities are guided by their own personal laws, each of which historically evolved under various social, religious, political, and legal influences. It covers an enormous area of domestic relations such as marriage, matrimonial remedies of divorce, judicial separation, nullity, maintenance, legitimacy of children and custody, guardianship, adoption, joint family, intestate and testamentary succession. This multiplicity of diverse family laws some of which are codified while others are uncodified, make it a very vast area of study. Muslim law is one of the most dynamic personal legal systems of the world. In Indian legal system, Hindu personal law has undergone changes by a continuous process of codification but the Muslim personal law has been comparatively left untouched by legislations.

The book under review primarily deals with Muslim personal Law and other legislations applicable to Muslims. The book is divided into 13 chapters. The First Chapter is Introductory in nature and it has been divided into five parts by the author. The Part One of the Chapter discusses origin of Islam and Muslim law in context of situation prevailing in pre-Islamic society. It also deals with how Islam was propagated by Prophet Mohammad and about the historical development of Islam. Part Two of the Chapter discusses the kinds and historical development of schools and Sub- Schools of Islam. Part Three discusses Law as per Islam. Part Four of the chapter discusses traditional and modern sources of Muslim law like Quran, customs, legislations, Judicial decisions etc. In this Part author has discussed wide range of legislations which are applicable to Muslims such as The Mussalman Waqf Validating Act, 1913, Prohibition of Child Marriage Act,2006, The Muslim Personal Law (Shariat) Application Act, 1937, Dissolution of Muslim Marriage Act, 1939 ,Muslim Women (Protection of Rights on divorce) Act, 1986, Punjab and Haryana's Muslim in Muslim Shrine 's 1942 ,The Caste Disability Removal Act, 1850, Wakf Act 1995 . Further the author emphasis on the need to reform Muslim law and has also examined Article 44 of the Constitution of India relating to Uniform Civil Court in that context. Under Part Five on whom there will be application of Muslim law has been discussed.

The Second Chapter deals with the provisions and laws relating to Marriage or Nikah. The author has discussed the nature, capacity, forms, and conditions of marriages including annulment of unlawful marriage in a great detail along with required case laws and enactments. The application and impact of Prohibition

of Child Marriage Act, 2006 on Nikah has also been discussed. Law relating to marriage of a Muslim performed under Special Marriage Act, 1954 also finds a very brief mention in this Chapter.

The Third Chapter discusses the concept of Dower or Mahr. The chapter is nicely webbed to include what is Mahr, amount of Mahr, Mahr when payable, claim of Mahr, remedies for non- payment of Mahr and it has been explained nicely with the help of case laws. It also covered a discussion on the effect Dowry Prohibition Act, 1961, on Maher.

The Fourth Chapter deals with the provisions relating to dissolution of marriage. The author has discussed the traditional kinds of Talaq to dissolve the marriage. It also deals with the provisions of section 2 of Dissolution of Muslim Marriage Act 1939, which creates rights in favor of Muslim woman to dissolve the marriage on certain grounds. Further the author has discussed the rules relating to Iddat, divorce during illness, legal effects of divorce, and the concept of Restitution of Conjugal Rights.

The Fifth Chapter deals with the rules relating to of parentage and legitimacy prevailing among the Muslims. It covers the law relating to Parentage and legitimacy including mother child relation, father child relation, custody of child, acknowledgement of Paternity, and law under the Indian Evidence Act 1872 relating to legitimacy. The author also deals with the concept of adoption which has been recognized in such areas where the Shariat Act does not apply as in Jammu and Kashmir, a Muslim may adopt under customary law if any. Among Meo tribes of Haryana, the author has mentioned here is customary law allowing adoption.

The Sixth Chapter deals with the provisions relating to the guardianship. The author discusses the Muslim personal law on Minority and Guardianship including Indian legislation on guardianship i.e. Guardians and Ward Act, 1890. The author has explained in detail the various facets of guardianship of person and property under this Chapter.

The seventh Chapter deals with the provisions relating to maintenance of wife, parents and children. The author discusses law regarding the maintenance of wife under Muslim law, Criminal Procedure Code, 1973 and under The Muslim Women (Protection of Rights on Divorce) Act, 1986 including case laws, wherever required. The author has also discussed the rights of children and parents to maintenance under Muslim law, Criminal Procedure Code, 1973. The Maintenance and Welfare of Parents and Senior Citizen Act, 2007 dealing with the maintenance of parents also finds a very brief mention in this Chapter.

The Eighth Chapter deals with the concept of Gift or Hiba. The author has

discussed various aspect of Hiba including concept, capacity to make Hiba, capacity to receive Hiba, object of Hiba, forms of Hiba, delivery of possession, principles of Musha, revocation of gifts, gifts other than Hiba .

The Ninth Chapter deals with the concept of Will or Wassiyat according to Islamic law. The author has discussed the definition of will, conditions relating to legator and legatee, formalities of will, and subject matter of will. Further the concept of abatement of legacies, conditional will, contingent will, deathbed gifts or Marz- ul- Maut and deathbed acknowledgement of debts has also been discussed by author.

The tenth Chapter discusses the concept of Wakf. It covers definition, characteristics, subject matter, object, modes of creations of Wakf, capacity to create Wakf , in whose favour it may be created, rules relating to the appointment, power and functions of Mutawali , Wakf of Musha , doctrine of Cypress, rules relating to beneficiary of Wakf. The author has also discussed the statutory provisions of Wakf Act, 1995.

The eleventh Chapter contains Muslim personal law rules relating to succession and inheritance. The author has discusses the rules of Sunni law of inheritance and Shia law of inheritance with the help of illustrations in a very elaborative way.

The twelfth Chapter discusses the concept of pre-emption or Shufa. It covers definition, nature, subject matter, enforcement of right, legal devices for enforcement and evading of the pre- emption right. The author has also analyzed the constitutionality of pre- emption right with special reference to 44th constitution amendment.

The thirteenth Chapter discusses the rules of administration of estates of a Muslim deceased. It covers the rules relating to the management of the division and distribution of properties of a deceased person.

Structured in a clear and lucid manner the book is reservoir of knowledge on the Muslim Law. The reviewer has no doubt that the book will be eminently useful for all academic scholars of Muslim law. The book is recommended for all law libraries being a good reference work with extensive research contents from the various sources in the field of Muslim law. The price of book is very reasonable taking into account the exhaustive information contained in the book. However reviewer has observed that a little more meticulousness in editing and incorporation of judgments would have further added to the quality of the book.

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COMPANY LAW, 2015, by Krati Rajoria, Allahabad Law Agency, India, ISBN: 978-93-8158-710-2, Pages 327, Price Rs. 285/-.

The history of the Company law in India started during the British Raj. The Joint stock Companies Act, 1850 was the first company law enforced in India which was based on the British Companies Act, 1844 (also known as the Joint stock companies Act 1844). However, it did not grant the privilege of limited liability, but recognized company as a distinct legal entity. The Joint Stock Companies Act, 1856 introduced the concept of limited liability in England for the first time. The next year in 1857, in India, legislation was enacted conferring the benefit of limited liability protection to companies other than banking and insurance companies. In 1860, the benefit of limited liability was applied to banking companies in India through the Joint Stock Companies Act of 1860. Later in 1866 following the enactment of the Companies Act of 1862 in England, a new company law was passed for India "for consolidating and amending the laws relating to incorporation, regulation and winding up of Trading Companies and other Associations" known as the 'The companies Act of 1866'. This was the first comprehensive company law in the history of company law in India. The companies Act of 1866 was repealed by the Companies Act 1913. The 1913 Act was modeled on the English Companies (Consolidation) Act, 1908. However, the 1913 Act failed during the course of its operation as it could not satisfy the peculiar features of the Indian trade and commerce. In 1936, following the enactment of the English Companies Act of 1929, significant amendments was made to Indian law by way of the Companies (Amendment) Act, 1936. However, even after the 1936 amendment, the requirements of the Indian trade and commerce could not be satisfied and thus, it underwent numerous amendments to address defects in the legislation and also on account of constitutional developments (viz. the enactment of the Government of India Act, 1935) until the Companies Act, 1956 was enacted after India's independence. The Companies Act, 1956 was passed on the recommendations of Shri H.C. Bhabha Committee. The Act was based on the English Companies Act, 1956, however with some modifications to suit the Indian conditions.

The Companies Act, 1956 however also was not free from defects and has to undergo several amendments to suit with the changes in time. With the passage of time, the changes in economic environment induced an extensive revamp of the laws to fulfill the contemporary corporate needs, like, transparency and governance, globalization, etc. especially to create an environment to facilitate the growth of the corporate sector and other stakeholders in India. In 2009 the Companies Bill 2009 was introduced in Lok Sabha which was referred to the Parliamentary Standing Committee on Finance; however the 2009 Bill was

withdrawn with the introduction of the Companies Bill, 2011. The 2011 Bill, was finally approved by the Lok Sabha on December 18, 2012 as the 'Companies Bill, 2012' and by the Raja Sabha on August 8, 2013. It received the assent of the President of India on August 29, 2013 and thus the Companies Act, 2013 was passed.

The Companies Act, 2013 marked a new inning in the corporate sector and it is believed that it would significantly change the manner in which corporate sectors operate in India. The 2013 Act, which replaced almost six decades old Companies Act, 1956 consists of 29 chapters and 7 schedules with about 37 new definitions. It welcomed the current global economic environment in which companies operate and protects the interests of shareholders and removes administrative burden in several areas and attempts to harmonize with international requirements. It also promoted self-regulation and thus introduced novel concepts including one-person company, small company and dormant company. Innovative concepts like class action suits, insider trading, National Financial Reporting Authority and establishment of Serious Fraud Investigation Office for investigation of fraud are added in the 2013 Act for investor protection and transparency. The new Act also introduced the concept of Corporate Social Responsibility (CSR) and mandates the constitution of Corporate Social Responsibility committee in every company having a net worth of Rs.500 crore or more, or turnover of Rs.1000 crore or more, or net profit of Rs.5 crore or more and that such classes of companies should ensure that the company spends at least 2 per cent of the average net profits every financial year. The appointment of at least one woman director in listed company is another novel law introduced by the new Act. The companies Act, 2013 removed the Company Law Board and provided for the constitution of National Company Law Tribunal and National Company Law Appellate Tribunal and both Tribunal and Appellate Tribunal are not bound by the procedure laid down in the Code of Civil Procedure, 1908 but shall be guided by the principles of natural justice and also has powers to regulate its own procedure. Both Tribunal and Appellate Tribunal have also been given the powers of a High Court in cases of contempt. The new Act also permits to either appear in person or authorize chattered accountants or company secretaries or cost accountants or legal practitioners or any person to present his case before the Tribunal and Appellate Tribunal.

The book has a total of twelve chapters. Chapter one titled 'Company: Meaning, Nature, Theories and Kinds' explaining the meaning and etymology of company law and the definition under the Companies Act, 2013. It also discusses the different theories and characteristics of company law. The new types of companies introduced by the 2013 Act and the differentiation between

various types of companies are also described in chapter one. Chapter two is on the formation of a company and its constitutional documents and matters incidental thereto. Chapter three describes prospectus and securities. It also elaborates on the acceptance of deposits by companies, securities and shares. Chapter four is especially dedicated to share capital and dividend, while chapter five is on borrowings. Chapter six is on directors and pragmatically discuses the every detail related to the board of directors. Account and audits is given in chapter seven. The National Company Law Tribunal and National Company Law Appellate Tribunal are discussed in chapter eight followed by mergers and acquisitions in chapter nine. Prevention of oppression and mismanagement with the new concept class action and revival and rehabilitation of sick companies are in chapters ten and eleven respectively. The last chapter i.e. chapter 10 is on the winding up of companies. Besides, the twelve chapters, the book has additional information on the Companies Amendment Bill, 2014 and highlights of the Companies act, 2013 which would be educational to the readers.

The book is soft cover bound; the size is approximately 24cm x 16cm and about half inch thick. It is easy to hold and read. The print is legible. The front size and the line spacing are standard. In short, the print quality is excellent. The book has footnotes and thus very useful for researchers. The book has table of cases. The reviewer finds everything perfect, except that it has no subject or word index which could be used to easily locate important words on specific topics. The book has an ISBN number and is reasonably priced. The language used is simple and thus it would not only be useful for law students and legal professionals but also to other stream students and professionals who are interested in company law. The book is recommended to keep not only in law school library but also in various other libraries.

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CONFLICT OF LAWS (PRIVATE INTERNATIONAL LAW), 2015, by G.P. TRIPATHI, Allahabad Law Agency, Faridabad, India, ISBN, 978-93-8158-706-5, Pages 606, Price Rs. 325/-.

The book *Conflict of Laws (Private International Law)* by Dr. G. P. Tripathi deals with the present position of Private International law in India. It proceeds towards a comparison of Indian rules of Private International law with those of other major legal systems and international conventions and lays emphasis on the need for unification of rules of Private International law so as to secure justice & eliminate injustice.

The book is a significant contribution to the existing studies in this increasingly important field of Private International Law. Private International law is a part and parcel of the municipal law of every country and is applied where the dispute is not confined merely to domestic issues but involves some foreign elements as well. In a situation where the parties to a private dealing are subjects of two different nations or the dispute has some extra territorial connection, the court has to determine two basic issues before the actual and substantial adjudication of the dispute - (a) Whether the court, before which matter has been brought, has the jurisdiction to decide the dispute (b) The question of the appropriate law which should govern the matter so as to secure the maximum justice to both the parties. Once the court determines these two issues and makes a judicial pronouncement in accordance with the law as determined in the second issue, there arises a third issue; how the judgment delivered by one court is to be enforced in that nation with which the dispute has some connection. Broadly speaking, these three issues form the scope of Private International law.

What makes this book an interesting and informative read is the fact that the author has managed to come up with a close critical reading of the present scenario within the limited scope of 15 chapters. It begins with a chapter which is largely introductory in nature and explains the nature, meaning and scope of Private International law and its relations with Municipal law & Public International law. The author has aptly compared Private International law with the railway inquiry counter as Private International Law does not actually adjudicate the rights and liabilities of parties and only determines the law which will govern the matter. Problems related to the actual working of Private International law have also been discussed with practical approach in this chapter. The most remarkable feature of the chapter is the manner in which the author has explained the scope of Private International law with the help of caselaw and hypothetical illustrations. It highlights the existing grey areas in

the field of Private International Law and also the practical problems in the actual working of Private International Law. It is followed by the second chapter 'Theories of Conflict Rules', which explains as to how theories of conflict rules are important for understanding and resolving international commercial disputes. It clarifies all the major theories like 'Theory of International Comity', 'The Economic Interdependence Theory', 'Theory of Acquired and Vested Rights', 'Local Law Theory', 'Public/Government Interest Theory'. This chapter also carries comments on the local law theory and government interest theory.

In 'The choice of Jurisdiction', the third chapter, the jurisdiction (forum), in a dispute involving some foreign element is sought to be determined, while the following chapter -'Choice of Appropriate Law' - discusses the concept of choice of law. It discusses the meaning and concept of jurisdiction, inherent power of the court with respect to determining jurisdiction, and the problem of creating fortuitous circumstances so as to affect jurisdiction. The former contains a good discussion on International conventions relevant for determining jurisdiction in International law like Brussels Convention, Modified Brussels Convention, Lugano Convention, and International Carriage of Goods Conventions. Forum shopping and dispute settlement modes in WTO and NAFTA have also been discussed. It also brings into picture, the laws prevailing in India for determining the jurisdiction in the cases involving foreign elements. The fourth chapter introduces the stage for determination of choice of law, in cases involving foreign elements. It contains the impressive explanation of the method of determining choice of law rules with the focus on the rules for the determination of choice of law in International commercial and arbitration disputes in Indian and International perspective.

As the text moves on towards Chapter 5, the topics dealt with grow deep and intricate, yet lucid. For example, 'Characterization', the fifth chapter, deals with one of the most important steps while applying Private International law. It discusses briefly the concept of characterization with foreign cases and also examines the meanings of various Latin phrases like Lex Domicilii, Nationality, Lex Causes, Lex Fori, Lex Situs, Lex Loci, Renvoi, Action in personam, Action in Rem, Forum Shopping etc. Chapter 6 is 'Revnvoi' which discusses the practical approach to the concept of Renvoi, meaning of Renvoi, kinds of Renvoi (Single Renvoi, Total Renvoi, Double or Mutliple Renvoi). It also discusses the major dilemmas and judicial responses to the approach of Renvoi, Limitations of Doctrine of Renvoi, advantages and disadvantages of Doctrine of Renvoi.

Chapters 7 and 8 deal with certain particular aspects of the law under purview. Chapter 7 discusses the nature and Principle of Domicile, and its connection

with Permanent home. It contains a good deal of discussion on the various rules relevant for the actual determination of domicile like Domicile of organ, Domicile of dependence, Domicile of Choice etc., as applicable in India and other major legal system and also the reforms which are necessary to be brought in Indian legal system. It also discusses the nature of domicile contained in Indian constitution and its relationship with citizenship. The discussion has been made very impressive with the help of specific and landmark caselaw on the subject. Chapter 8 is a well- worked chapter and exhaustively covers all aspects of Marriage and Sexual relations which do not properly fall within the concept of marriage. It discusses the rules determining the essential validity of Marriage and formalities of marriage as applicable in India, England, Australia, Scotland and China. It also discusses the Hague convention guiding the nations in this regard. It also contains the verbatim reproduction of The Foreign Marriage Act, 1969. The relevant provisions of Indian Succession Act, 1925 have also been discussed in this chapter.

The subsequent chapters look at the law with respect to the foreign elements. Chapter 9 discusses the importance and scope of autonomy enjoyed by the parties in determining the law applicable to them for governing their contract. It discusses the rules for determining the proper law of contract. It also delves into the closest and most real convention theory (Localization Theory) which is very important in determining the choice of law in International commercial contract. The issue as to whether law of limitation is procedural aspect or substantive aspect has also been explained substantially in the chapter. Chapter 10 'Torts wherein Foreign Elements are involved' discusses all possible legal approaches in such a commission of tort where some foreign element is also involved. It contains a good discussion on the applicable theories i.e. Theory of Law of Forum, Theory of Place of the Tort and the Theory of Proper Law of Tort and their criticism. It traces the development of law of tortuous liability in Private International Law in England form the case of Philips v. Eyre in 1870 to Boys v. Chaplin in 1971 and reform in such law introduced by Private International law (miscellaneous Provisions) Act, 1955 in England.

Chapters 11 ('Lex Situs Principle and Property') and 12 ('Lex Forism, Adjudication and Choice of Law') take the discussion further. These chapters discuss in detail the principles of Lex Situ and Lex Fori respectively, their meanings, scope and area of their applicability, there relation with Renvoi and the way in which principles of Lex Situ and Lex Fori are applicable in India and England. More importantly, it contains the arguments for or against reform in the present legal situation. Chapter 13 discusses the meaning of foreign court, foreign judgment and reciprocating territory as per Indian law. It also discusses

doctrinal foundation theories with respect to the Recognition and Enforceability of foreign judgment. This chapter contains a good deal of discussion on Section 13, 14 & 44A of CPC which are the relevant provision, providing for recognition and enforceability of foreign judgment in India. Stay application and anti suit injunction have also been discussed with sufficient detail. The exhaustive discussion on all landmark cases makes this chapter interesting and easy to understand.

The last two chapters offer a convincing discussion on certain aspects which are often overlooked. Chapter 14 deals with the Indian cyber law i.e. The IT Act, 2000 with special emphasis on Indian rules of Private International law contained in it. The author points out the importance of rules of Private International law in this area and traces the historical development of law in this regard. It discusses the Private International law aspect of contract law, copyright law, competition law, consumer law when the internet acts as a medium of communication. Important International caselaw on the matter is the remarkable feature of this chapter. The final chapter discusses the rules of Private International Law with respect to Intellectual Property Rights. It discusses the provisions relating to Private International Law in the Copyright Act, 1987 and Copyright (Amendment) Bill 2010, Patent Act, 1970, Trade Mark Act, 1999, Geographical Indication of Goods (Registration and Protection) Act, 1999, Design Act, 2000, Semi Conductor Integrated Circuit Layout Design Act, 2000, Protection of Plant Varieties and Farmer's Rights Act, 2001 & Biological Diversity Act 2002.

It is an acknowledged fact that in the present era of globalization where trans-border commercial, social and personal interaction is increasing by the day, the relevance of Private International law is of utmost importance. Despite increasing applicability of Private International law, scholarly work and research in the area has been almost negligible. The existing literature in the area is either obsolete or incomplete. In such a scenario, the launch of this well-researched work covering various aspects of the subject, will provide a big relief to the practicing advocates, students of LL.B & LL.M as well as research scholars.

Though there is no doubt that the book is exhaustive in all aspects of Private International Law, there are some minor aspects which demand further attention. One aspect where the author could have laid more emphasis upon is the arrangement of facts in the individual chapters. For instance, in some chapters, case law has been discussed even prior to the explanation of basic concepts and continued after the concepts have been explained. Again, some topics like

Renvoi have been discussed as separate topics but have been discussed more impressively in certain other parts of the book. This view does not mean to overlook the significance of the book; rather it suggests that since most of the Private International Law as it exists today is uncertain, more convincing views on the part of the author are desirable in all areas, especially in the grey areas.

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LAW OF NOTICES WITH ELECTRONIC NOTICES, by Dr. Rajesh Gupta & Dr. Gunjan Gupta, New Delhi, Universal Law Publishing Co. Pvt. Ltd., 2014, ISBN: 978-93-5035-483-4, Pages 970, Price Rs. 1250.

The concept of notice is critical to the integrity of legal proceedings. Due process requires that legal action cannot be taken against anyone unless the requirements of notice and an opportunity to be heard are observed. There are several types of notice each of which has different results: public notice (or legal notice), actual notice, constructive notice, and implied notice. At common law, notice is the fundamental principle in service of process. In this case, the service of process puts the defendant "on notice" of the allegations contained within a criminal defendant to be notified of the charges and their grounds.

Legal proceedings are initiated by providing notice to the individual affected. If an individual is accused of a crime, he has a right to be notified of the charges. In addition, formal papers must be prepared to give the accused notice of the charges. An individual who is being sued in a civil action must be provided with notice of the nature of the suit. State statutes prescribe the method of providing this type of notice. Courts are usually strict in requiring compliance with these laws, and ordinarily a plaintiff must put this information into a plaint that must be served upon the defendant in some legally adequate manner. The plaintiff may personally serve the plaint to the defendant. When that is not practical, the papers may be served through the mail. In some cases a court may allow, or require, service by posting or attaching the papers to the defendant's last known address or to a public place where the defendant is likely to see them. Typically, however, notice is given by publication of the papers in a local newspaper. When the defendant is not personally served, or is formally served in another state, the method of service is called substituted service.

Notice may also refer to commonly known facts that a court or administrative agency may take into evidence during a trial or hearing. Judicial Notice is a doctrine of evidence that allows a court to recognize and accept the existence of a commonly known fact without the need to establish its existence by the admission of evidence. Courts take judicial notice of historical events, federal, state, and international laws, business customs, and other facts that are not subject to reasonable dispute.

Administrative proceedings use the term official notice to describe a doctrine similar to judicial notice. A presiding administrative officer recognizes as evidence, without proof, certain kinds of facts that are not subject to reasonable dispute. Administrative agencies, unlike courts, have an explicit legislative function as well as an adjudicative function: they make rules. In rule making, agencies

have wider discretion in taking official notice of law and policy, labeled legislative facts.

In India, the legal system, trade and commerce are based on written documentation and proving of the same by evidence. With the modernization and introduction of E-mail, Internet, etc, paper transaction is going to be eliminated. The United Nations Commission on International Trade Law (UNCITRAL) adopted the model law on E-Commerce in 1996. India was a signatory to it. The introduction of the Information Technology Act, 2000 which provides legal recognition to transactions carried out by means of electronic communication is well placed.

A court of law cannot render justice unless the ultimate decision is based on the contemporary law as prevailing in the society. A decision based on an old law, which does not satisfy the requirements of the present situation, and environment should be avoided. In such a situation the efforts of the courts should be to give the law a "purposive, updating and an ongoing interpretation". This position makes the interface of justice delivery system with the information technology inevitable and unavoidable. The greatest virtue of the law is its flexibility and its adaptability; it must change from time to time so that it answers the cry of the people, the need of the hour and the order of the day. Thus, the justice delivery system cannot afford to take the information technology revolution lightly. The Indian Judiciary has understood this requirement very pertinently. The Supreme Court has encouraged the use of information technology for effective justice administration. The judicial response vis-à-vis information technology is positive and technology friendly. In M/S SIL Import, USA v M/S Exim Aides Silk Exporters, the words "notice in writing", in Section 138 of the Negotiable Instruments Act, were construed to include a notice by fax. The Supreme Court observed: "A notice envisaged u/s 138 can be sent by fax. Nowhere is it said that such notice must be sent by registered post or that it should be dispatched through a messenger. Chapter XVII of the Act, containing sections 138 to 142 was inserted in the Act as per Banking Public Financial Institution and Negotiable Instruments Laws (Amendment) Act, 1988.Technologiacl advancements like Fax, Internet, E-mail, etc were on swift progress even before the Bill for the Amendment Act was discussed by the Parliament.

The book has fifty five chapters. Chapter one titled 'Notice-A Prologue, discuss the Meaning, Nature, object and scope of notice, and importance of notice as a limb of 'Principle of Natural Notice', in the light of doctrine of Audi Alterm Partem, right to notice and heavy costs' explaining the meaning and

etymology and definition of Notices under law. It also discusses the different theories and definition of notice. The judicial pronouncement with respect to the right to notice and cost impact of notice are also described in chapter one. Chapter two is on the electronic form of notices and its effect under different laws. Chapter three discuss the statutory provisions and requirements for notices and their practical implications. It also elaborates comparative provisions of laws of notices in different countries. Chapter four is especially dedicated to the types and classifications of notices, while chapter five is on the various requirements of notices.

Chapter six is designed to discuss about services of notices and various aspects attributing the same. Person competent to give notice is given in chapter seven while Person competent to receive notice is discussed in chapter eight. Chapter nine deals with various aspects regarding waiving of statutory notice. Chapter ten deals with the applicability of law of limitation and the notices. It also discuss various situations where statutory notice is required under different law and its impact on limitation. Chapter eleven enumerates definitions and meaning of various words used in notices and their interpretation.Provisions of notices under administrative evacuee property Act, 1950, The Administrative Tribunals Act, 1955, The Advocates Act, 1961, Air (Prevention and Control of Pollution) Rules, 1982, Antiquities and Art Treasures Act, 1972, Arbitration and Conciliation Act, 1996, The Architects Act, 1972, Bar Council of India Rules, 1975, Births, Deaths, and Marriages Registration Act, 1886, The Cantonments Act, 2006 and The Carriage by Road Act, 2007 and The Multimodal Transportation of Goods Act, 1993 and relevant rules framed there under are elaborately discussed under Chapters twelve to twenty two respectively. While chapter twenty three elucidate in detail the provisions of Code of Civil Procedure and notices and also enumerate various draft formats of various notices disused thereunder. While chapter twenty four elucidate in detail the provisions of The Constitution of India and notices and also enumerate various draft formats of various notices disused thereunder.While chapter twenty five elucidate in detail the provisions of Contract Act, 1872 and notices and also enumerate various draft formats of various notices disused thereunder. While chapter twenty six elucidate in detail the provisions of Code of Criminal Procedureand notices and also enumerate various draft formats of various notices disused thereunder. The Chapter twenty seven deals and discusses about the notices and various forms in respect of dishonor of cheques. The chapter twenty eight elaborated about the definition and right of easement, licenses and distinction between easement and license and various forms of notices under The Indian Easements Act, 1882.The Chapter twenty nine deals and discusses about the notices and

various forms under The Electricity Act, 2003. While chapter thirty elucidate in detail the provisions of The Indian Evidence Act, 1872 and notices and also enumerate various draft formats of various notices disused thereunder. The Chapter thirty one deals and discusses about the notices of accidents, prohibition of manufacture or possession of explosive by young or other persons , power to make rules thereunder and various forms under The Explosive Act, 1884.The Chapter thirty two elaborated about the definition and meaning of service by post, commencement and termination of time and orders, rules thereunder The General Clauses Act, 1887.While chapter thirty three elucidate in detail the provisions of The Guardian and Wards Act, 1890 and notices and also enumerate various draft formats of various notices disused thereunder. While chapter thirty four elucidate in detail the provisions of The Industrial Dispute Act, 1947 and The Industrial Dispute Rules, 1957 and elaborately discussed about notice of change, changes in condition of services, strike and lock out, retrenchment and compensation to workmen thereunder and also enumerate various draft formats of various notices disused thereunder. The Chapter thirty five elaborated about notice under other Labour Laws and discussed about the notices under Workmen Compensation Act, 1923, Trade Unions Act, 1926, The Payment of Gratuity Act, 1972 and The Payment of Wages Act, etc. enumerate various draft formats of various notices disused thereunder. The Chapter thirty six deals and discusses about the provisions and various forms of notices under The Land Acquisition Act, 1894. The chapter thirty seven elaborately discussed about the provisions of marriage and divorce under various statutes like Hindu Marriage Act, 1955, The Christian Marriage Act, 1872, The Parsi Marriage And Divorce Act, 1936, The Dissolution of Muslim Marriages Act, 1939, The Muslim Women (Protection of Rights on Divorce) Act, 1986, the Special Marriage Act, 1954 and The Indian Divorce Act, 1869 and enumerate various draft formats of various notices disused thereunder. While chapter thirty eight elucidate in detail the provisions of The Motor Vehicle Act, 1988 and Central Motor Vehicle Rules, 1989 and discusses about the transfer of ownership, termination of hire and purchase of agreements etc. thereunder and also enumerate various draft formats of various notices disused thereunder.The Chapter thirty nine deals and discusses about the notices and various forms for the change of name of person. The Chapter forty elaborated about notice under The Narcotics Drugs and Psychotropic Substances Act, 1985 and The Narcotics Drugs and Psychotropic Substances Rules 1985 and various notices disused thereunder. The Chapter forty one elaborated and discussed the provisions and notices under The Public Premises (Eviction of Unauthorized Occupants) Act, 1971.The chapter forty two elaborated and discussed the provisions and notices under The Chartered Accounts Act, 1949 and Chartered Accounts Regulations, 1949. The Chapter

forty three deals and discusses about various provisions of The Partnership Act, 1932 and the notices and various forms under thereunder. While Chapter forty four elucidate in detail the provisions of Indian Penal Code, 1860 and notices and also enumerate various draft formats of various notices disused thereunder. While Chapter forty four to fifty five elucidates in detail the provisions of Police Act, 1861, Indian post Office Act, 1898, The Prevention of Food Adulteration Act, 1954 and Prevention of Food Adulteration Rules, 1955, Indian Penal Code, 1860, Law of Notices, Sale of Goods Act, 1930, Specific Relief Act, 1963, The Indian Succession Act, 1925, The Trade Marks Act, 1999, The Transfer of Property Act, 1882, The Indian Treasure Trove Act, 1878 and The Waqf Act, 1995 and notices and also enumerate various draft formats of various notices disused thereunder.

The book is hard cover bound; the size is approximately 24cm x 16cm and about three inch thick. It is easy to hold and read. The print is legible. The font size and the line spacing are standard. In short, the print quality is excellent. The book has footnotes and thus very useful for researchers. The book has table of cases. The book has an ISBN number and is reasonably priced. The language used is simple and thus it would not only be useful for law students but also for legal professionals and faculties. The book is recommended to be mandatorily kept not only in law school/colleges library but also in every law library.

Neeraj Kumar

Assistant Professor, Campus Law Centre, University of Delhi

COMMEMMORATIVE SECTION

Remembering Professor B.P. Srivastava

Professor Bindabashni Prasad Srivastava, affectionately addressed as "BPBhai" or "Binduji" by his students and younger colleagues like me, was born in the holy town of Faizabad, U.P. in 1933. As an illustrious student coming from a smaller town he earned the chance of entering the portals of the Lucknow University for his graduate and post-graduate studies in Law. The Lucknow Law Faculty was at that time rated as the cherished law education destination for many, not only because it had the largest pool of American Law School trained teachers in its Faculty. It was such a rich academic legacy that enabled Professor Srivastava to be appointed as a Law Lecturer even when he was still an LL.M. second year student. Those were the days when in the Lucknow Law Faculty every class was engaged by two teachers (a senior and a junior). Thus, over sixty five years ago a Law teaching training scheme was already in place that we are still struggling to introduce in some of the law schools today, in view of our realization of woeful lack of teaching abilities amongst the new crop of post-graduate candidates. Professor Srivastava had his early training in the Lucknow Law Faculty ethos which he served for almost two decades before joining the Delhi Law Faculty in late sixties.

In Delhi University, Professor Srivastava taught at Law Centre-I and Campus Law Centre till his retirement in 1996. As one of the Public Law teachers, whose expertise lay in the Constitutional Law and Administrative Law, Professor Srivastava was rated as the front rank teachers in the Faculty. The students know very well that in Professor Srivastava's Constitutional Law class they could get a first rate analysis of the elements of the legislative and judicial law on the point, but not a bit of sociological dimension. I remember his long debates with me on land reform measures of early seventies. He often took a strong position against the Constitution Amendments to nullify the effect of pro – land rights judicial ratings of the Apex Court. He was also a strong votary of freedoms of the citizens, particularly the freedom of speech and expression. I remember still his brilliant comment on Ranjit Udesi case. However, it was paradoxical that such an ardent defender of speech and expression was not very open to hearing 'no' or dissent of any kind in its private life. This made Professor Srivastava's persona a unique blend of extremes. Clear-headed and unrelenting in public matters like discipline and rule implementation, but considerate, kind to the extent of being partial in personal spheres and dealings. This often made him a loner even in a crowd and left him only with a few trusted friends, through a large crowd of courtiers and admirers. I sadly reminisce how with the changing

times in the Delhi Law Faculty, I had to mutely witness the reality of being eased out of his circle of his trusted" friends. But all this did not affect our personal relationship, and I continued to meet, him till one month before his demise, at Lucknow.

B.B. Pande*

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FORM IV

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I, Prof. Usha Tandon, hereby declare that the particulars given above are true to the best of my knowledge and belief.

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