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April 5, 2013

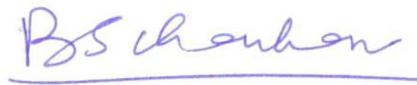
## **FOREWORD**

With the launch of this edition, The Indian Student Law Review is taking yet another step forward towards its goal of improving the flow of ideas, knowledge and information. The Law Journal in its second year, has made an attempt to expand its reach by circulating this edition internationally, thereby reaching out to the avid learners of Indian law, world-over. At the outset, such an effort is commendable and deserves great praise.

The most significant literature in the legal profession is in the hands of law students. It is my belief that a law school journal must act as a forum for the expression of views and ideas on issues, which need careful deliberation and discussion. It must inspire and train further, students, to undertake serious research and writing that will make a difference to them and to the society. The Indian Student Law Review is an entirely student driven initiative as the same has been conceptualised, formulated and executed by students. The Journal provides an annual opportunity to not only consider a range of legal issues, but also to think about the numerous ways in which we may argue about, and study the law. This publication is an opportunity for the students to enhance the depth of their understanding and knowledge of the law, and to push their academic and intellectual boundaries.

This edition carries in it, lectures, articles, notes, case comments and book reviews of a very wide spectrum from different fields of law. Justice P.Sathasivam, Judge, Supreme Court of India's, lecture on the Companies Act, provides a detailed picture about the prospective Companies Bill 2011, the social responsibilities of companies and also as regards the Competition Act, 2002. Justice F.M. Ibrahim Kalifulla, Judge, Supreme Court of India, has emphasised the significance and essence of 'Law Day', through his article titled, "Law Day & the Evolution of our Constitution", by charting out the evolution of our Constitution, by way of analysing our great constituent assembly debates. Justice M. Jaichandren, Judge, Madras High Court, makes an excellent presentation of how the Corporate Social Responsibility model can be made effective and can aid people with disabilities.

The combined work of the aforementioned distinguished academicians, legal luminaries and students, gives us a reason to believe, that the Indian Student Law Review will become an important forum for discourse in the field of law, combining years of wisdom and experience, with the vigour of youth and fresh thinking. I look forward to the Indian Student Law Review's contribution to the legal field, and am confident that in the future, this journal will invite the attention of legal scholars and experts from across the globe. I convey my congratulations to the Editorial board for all their efforts in bringing out this edition and wish them the best in their future endeavours.



(DR. JUSTICE B.S. CHAUHAN)

### **MESSAGE FROM THE CHIEF PATRON**

At the outset I am very glad to know that the Second Volume of the Indian Student Law Review (ISLR) published by the students of the School of Excellence in Law of the Tamil Nadu Dr. Ambedkar Law University is ready for release. The maiden issue of the Indian Student Law Review has made such a nice impact that the Tamil Nadu Dr. Ambedkar Law University Journal (ALUJ) has taken a clue and formatted its publication on the lines of the Indian Student Law Review. On a positive note, this indicates the spontaneous move to change on the part of the Editorial Board of the ALUJ on one side as well as the quest for improving the standards of publications from the Tamil Nadu Dr. Ambedkar Law University. In this regard, I would like to place on record my sincere appreciation to the Editorial Boards of both the ALUJ and the Indian Student Law Review.

The Second volume of the Indian Student Law Review has an article based on the Special Lecture delivered by Mr. Justice P. Sathasivam, Judge, Supreme Court of India, on the first C. Hari Krishnan Endowment Lecture on Corporate Law at the University last year. I sincerely hope that the best practice of publishing articles based on the special lectures organised at the Tamil Nadu Dr. Ambedkar Law University by eminent persons and experts get periodically published, both in the ALUJ and the Indian Student Law Review. Similarly, there is an article written by Mr. Justice F. M. Ibrahim Kalifulla to instil in the minds of young students of law and lawyers about the significance and essence of the 'Law Day'. Justice Jaichandren's article on Corporate Social Responsibility sets out a stratagem in making the Corporate Social Responsibility more effective and practical for implementation.

Other articles are from senior lawyer, Mr. Sriram Panchu on Mediation and the contributions from students from various National Law Schools in India as well as abroad make this second volume truly

representative in character, both in terms of content as well as the National Law Schools. The case comment as well as the Book Review components in this volume makes it informative and interesting. I am also happy to note that the Editorial Board of the Indian Student Law Review has received a large number of articles, out of which only the cream of the lot has found its place in the current edition. I only hope and wish that the successive Editorial Boards will follow suit and contribute to the quality of the journal in the years to come. With these few words I congratulate the Editorial Board and wish them success in their future endeavours.

**Prof. Dr. V. Vijayakumar,**  
*Vice- Chancellor*  
*Tamilnadu Dr. Ambedkar Law University*

## EDITORIAL

*“Live as if you were to die tomorrow. Learn as if you were to live forever.”*

***-Mahatma Gandhi***

Education and imagination are infinite processes that permeate all differences among people and are the fulcrum that bring together all specialists and intellects. They are mutually dependent and are catalytic stimulants for any progress; they are also not restricted to formalised systems, but transcend all dimensions of time, geography, subject and context. While standing on the shores of the ocean, we can see only up to the horizon; what is hidden from our vision is always more than what can be fathomed. The inspiring excerpt of the father of our nation epitomizes and symbolizes the very objective and purpose of our initiative in emphasizing the need to constantly learn, disseminate knowledge and share perspectives. On this note we present to you the second edition of the Indian Student Law Review (*ISLR*).

We at the ISLR are jubilant to share the resounding success of our maiden edition last year, which showcased the critical and incisive thoughts of some of the most discerning minds in the legal fraternity, and are elated to continue the tradition this year. With each edition, we have encountered increased enthusiasm and strengthened support from luminaries in the legal fraternity in providing guidance and sharing experiences to enkindle a variety of minds; this journal has in such attempts to spread the vivid and insightful learnings, strongly embraced the second year of its release to make a humble impact on those that seek to benefit from the enriching content gathered from great intellectual and analytical thinkers.

The authors have captured their perceptive viewpoints and shared valuable facts with such elegant simplicity that this compendium has universal applicability and can be appreciated by veterans and students alike from a variety of disciplines, apart from law. The language used and the contexts provided have gained a widespread audience, thus extending the reach of this journal. It is, therefore, a fair deduction that the beauty of learning is that it defies the diminishing marginal theory, which is so apt in all other circumstances where there is a limit or a super saturation point for any other activity; but there is no such restraint on learning. The more we learn, the more we yearn for greater insights into newer boundaries and unexplored regions as adventurers. In this sense, we are all perpetual students, crossing all time barriers.

Law as a discipline is profound in its individual identity, in terms of what exists, its precedence, analyses, interpretations, comparisons, creation of new standards and references; it percolates through various disciplines with a wide range of applications, and engenders one to understand the importance of unlearning and relearning as a continuum. As stated by Roscoe Pound, the great legal philosopher and teacher, *“The law must be stable, but it must not stand still”* and later reinforced by the famous jurist, Lord Denning, *“The law is to develop and not to stagnate”*. With this belief strongly instilled in us all, we the members of the ISLR, believe that a Law Review such as ours, which is a repository of knowledge and ideas, containing the very cream of analyses by luminaries of the legal academia, doyens of the bar and stalwarts of the judiciary, presents the best opportunity to effectively contribute to the evolution and advancement of law.

The Editorial Board strongly agrees with Maya Angelou in her belief that *“...you shouldn't go through life with a catcher's mitt on both hands; you need to be able to throw something back.”* It is with a

very clear focus that we at the ISLR have very willingly taken as our responsibility to passionately pursue the furtherance of legal research. Being an initiative undertaken by students of law, we recognize the importance of challenging ourselves cerebrally, through the exploration of a diverse range of legal topics and issues and it is our unpretentious objective that the contents of the ISLR pose precisely such challenges and ably assist the legal fraternity to enhance their understanding and knowledge of law.

We are extremely proud of the fact that our diverse list of contributors includes Supreme Court and High Court Judges, Supreme Court and High Court Advocates and Law students from Europe and India in this second edition. We have a unique blend of highly experienced veterans from both the Bench and the Bar, with the right balance of bright and young students, who also bring new arguments and fresh perspectives. In this manner, the journal presents a distinct experience for its readers on contemporary topics of law. The ISLR, therefore, also provokes university students to push their academic and intellectual boundaries, by providing an opportunity for them to publish their work and subject their perspectives to scrutiny by the sharpest legal minds of our era.

The current edition endeavors to coalesce a piquant mix of enticing lecture(s), insightful articles, thought provoking note(s) and a clear and critical analysis in the form of comment(s) and book review(s). Thus, there are precisely five segments in this edition classified under the categories- Lecture(s), Articles, Note(s), Comment(s), and Book review(s). On this note, I would like to provide a preview of the ensuing topics being presented in this journal.

The Law Review dawned with an extensive and analytical lecture delivered earlier this year in the TNDALU, School of Excellence in Law, University premises by Hon'ble Mr. Justice P.

Sathasivam of the Supreme Court of India, on the various frontiers and developments in the subject of Corporate Law in India. His Lordship brings to mind a significant principle in Company Law, *'Members may come and members may go, but the company can go on forever'*. With a lucid and concise summation of how Corporate Law has evolved and taken shape, he explains, through this special lecture, the various facets and concepts involved in the discipline of Corporate Law, by providing a step by step exploration on the features of a company, its advantages, procedure for formation, preparation of MOA & AOA, incorporation, hierarchy of Courts, the prospective Company Bill 2011, social responsibilities of companies and lifting of the corporate veil, while also briefly cruising through the Competition Act, 2002.

*"What is 'Law Day'?" "Why should there be a celebration at all for 'Law Day'?"* These inquisitive questions lingered in the mind of Hon'ble Mr. Justice F.M. Ibrahim Kalifulla of the Supreme Court of India, who takes us through a thought provoking investigation, elucidating the significance of *'The Law Day & The Evolution of Our Constitution'*. The article states how, as members of the legal fraternity, we have been celebrating this day, more as a symbolic gesture, without being truly aware of the purpose and essence behind its rich tradition and history, which led to the birth of our magnificent and comprehensive Constitution. The author elaborates by extensively analysing our constitutional debates, as he provides us a progressive approach, through the diverse and inspirational speeches, delivered by the founding fathers of our nation, who are also some of the brightest minds, India has ever produced. The readers are provided with a very scintillating and captivating experience, and feel a resurgence of their lost patriotism, remerge, as they get a life like experience, as if actually present during those turbulent times.

Just as citizens of India every individual is guided by the Directive Principles of State Policy in conducting himself or herself according to socially acceptable activities for the greater good, similarly corporate social responsibility is a measure of how responsible a company, as an individual corporate identity, is for conducting itself, conductively, to the society at large. Justice Jaichandren of the Madras High Court brings out, through his article titled, '*Changing dynamics in the concept of Corporate Social Responsibility,*' the significance of corporate social responsibility (CSR) and the responsibility of the business community in promoting the same. The author succinctly draws attention to the fact that the maintenance of global standards of responsibility is an essential facet for improvement of the human personality, better work standards and overall improvement of the human rights situation in our country and beyond. He also dwells on the legal impact of CSR, while providing a practical view of the persistent and long term problems associated with CSR.

Eminent jurist, Nani Palkhivala has reflected with frustrated irony on the Indian judicial system, in the following fashion; "*If longevity of litigation is made an item in Olympics, no doubt the Gold will come to India*". Sriram Panchu, Senior Advocate from the Madras High Court and a Mediation expert, through his article titled '*Mediation: An Overview,*' strongly emphasizes the need to promote mediation, as one of the front runners of dispute resolution, for an effective and efficient outcome. With the increase in number of cases before Courts and a dearth of judges to adjudicate, thereby leading to more pending cases, mediation has turned out to be a viable option and a very pertinent business strategy for parties who want to avoid the rigmaroles of the litigating process and amicably arrive at an efficient and effective conclusion to their conflict of interests. The author provides in a bird's eye view, the process and procedures

involved in mediation and the advantages in exercising the same. The article is overall a very good read for the legal fraternity in general, in getting a better understanding of the subject and the strategies for effective implementation as advocated by the author, while at the same time providing an enriching experience for a person who wants to learn about our ADR system. With adequately proficient implementations of ADR systems in Paris, London and Singapore, Indian entities engaged in global business need to embrace this strategy as a primary solution to effective dispute settlement.

The concept of surrogacy, which is seen by proponents of the Assisted Reproductive Technologies (Regulation) Bill, 2010 (ART Bill 2010), as the next step in women's empowerment, has been engaging the attention of not only ethicists, psychologists, sociologists and medical scientists, but also jurists. The method has given rise to innumerable legal issues especially in the field of personal laws. The spectacular scientific breakthroughs in reproductive technologies have brought into the fore several important jurisprudential questions of morality, legal regulation, family and the rights of a child. Dr. M.S. Soundara Pandian through his article titled, '*Surrogate Motherhood: An Indian Legal Perspective*', analyses the development in reproductive technologies in the context of family law, examines the proposed ART Bill 2010 in the backdrop of various constitutional and contractual provisions and suggests legal reforms to regulate surrogacy arrangements in India.

Time and again, it has been observed by relevant judicial authorities that securities options are not legally enforceable in India. The reasoning behind the same dictates that as far as '*securities*' are concerned, only certain specified transactions are permissible, because there is no actual delivery of securities at the time of making the contract. Harshad Pathak, a university student from the National Law University, Delhi, through his article titled '*Legality of Put Option*

*under the Securities Contract Regulation Act, 1956,* while negating the above proposition, boldly analyses the legal validity of ‘*put options*’ under the Securities Contracts (Regulation) Act, 1956, and simultaneously puts forth the view that such options amount to ‘*spot delivery contracts*’; and are, therefore, enforceable in law. The author, to the best of his knowledge, endorses a point of view that he feels is yet to receive the attention of the SEBI in all its deliberations involving options and has yet to be brought to the notice of any judicial or quasi-judicial authority.

When the patent system was evolved several years ago, it was a widely accepted presumption that relevant technology could be developed by using only the principles of physics, chemistry and engineering. The possibility of using the principles of biology was not recognized. But with the passage of time, due to the dramatic developments in the ability to select and manipulate genetic materials, interests in the development of commercially useful inventions involving living materials and their protection, gained momentum. Utkarsh Bhatnagar and Harendar Neel, university students from the Rajiv Gandhi National Law University, through their article titled, ‘*Patentability of Micro-Organism with Special Reference to the Indian Scenario,*’ highlight the key issues and problems regarding the definition and patentability of micro-organisms under various treaties and conventions and their practical applicability, with a specific reference to the Indian Scenario.

While it was originally coined to denote the regions of the world that did not align themselves with capitalism or communism, in the context of Third World Approaches to International Law (*TWAIL*), the Third World is a ‘*political reality*’ and denotes a set of experiences and shared histories that separate such geographies from the rest of the world. It is a stream of similar historical experiences that have given birth to a unique collective voice. In order to conceptualize the Third

World, it is essential to consider the exploitative and unjust nature of the international legal system and their impact on such regions of the world. Priyadhashani Sinha, a university student from Rizvi Law College, argues through her article titled, '*Third World Approaches to International Law*' that the modern international legal regime is tainted with a European bias and tends to favour First World nations over the Third World. After establishing the biased nature of modern international law and its reprehensible heritage of colonialism, the article then offers a look into what the TWAIL movement means, its history, features and objectives. The author concludes by describing solutions that are available to TWAIL scholars and leaders to combat the hegemonic world order and move towards a genuinely universal and equitable legal regime. The very nomenclature of Third World indicates a detachment and isolation of countries, some of which contribute enormously to the world's GDP. This article helps us ponder over the true sense of development in the light of harbouring such superficial diversities.

The right of workers to unionise has been considered decisive in the realisation of their Right to Life with dignity and liberty. The Right, guaranteed without any distinction whatsoever, *vide* Article 2 of the ILO's Convention No. 87, 1949, has a single exception provided *vide* the Convention's Article 9, which permits the States to determine the extent to which the guarantees provided for, shall apply to the armed forces and the police. Sahil Arora and Anchal Basu, university students from the West Bengal National University of Juridical Sciences, through their article titled, '*Military Unions and the Right to Collective Bargaining: A Case For Unionisation in the Indian Armed Forces*,' argue that the apprehension in the mind of nations, especially India, that unionisation may impact military readiness and discipline, are unfounded and are not based on any empirical evidence. The article, by elucidating the experience of

nations who have granted the right to forces, establishes that the Right, even if granted with restrictions, would apart from eliminating the present alienation that the forces feel; enhance military effectiveness, improve job satisfaction and increase the commitment level of the forces. In an attempt to build on this central theme, the authors recommend a variety of restrictions, which when placed on the Right, would have the desired impact of improving the work conditions of the armed personnel and still not impact the forces' ability to defend the territorial integrity and sovereignty. The article is an interesting read, providing a new perspective to a topic seldom discussed.

Two of the major changes made by the Copyright (Amendment Act), 2012 to Section 52 are, the expansion of the fair dealing defence to all works and the introduction of safe harbour provisions for intermediaries. Divya Srinivasan, a university student from the National Law University, Delhi, in her article titled, '*The Fair Dealing Doctrine and Safe Harbour Provisions for Intermediaries as Exceptions to Copyright Infringement: Steps in the Right Direction?*,' welcomes the addition of Section 52(1)(b) & (c), as it extends the protection of intermediaries from liability to cases of copyright infringement. The author suggests that such protection is required because holding service providers liable, who are mere conduits for provision of information, could hinder the growth of the internet and other media. The article also aims to examine whether, the Legislature has missed an opportunity to expand the existing '*Fair Dealing*' defences by introducing more generic '*Fair Use*' guidelines, under Section 52. The Fair Use Doctrine, being more flexible, has been seen as a more robust vehicle for users and with reference to this, the article discusses the differences between the Fair Dealing and Fair Use doctrines, the application of the Fair Use factors by Indian Courts and the appropriate standard to be implemented in India.

With the rapidly changing legal landscape in which governments and enforcers are increasingly cracking down on corrupt practices and a general international movement towards a ‘*zero tolerance*’ of corruption, it is becoming increasingly apparent that arbitrators must address indications and occurrences of corrupt practices. Bribery in particular, has become a very persistent problem in Arbitration transactions. Nadja Al Kanawati and Krisztina Balogh, from the University of Fribourg, Switzerland, in their Note titled, ‘*Arbitrability of Bribery Claims,*’ provide a very blunt and critical assessment of the same. The question raised by them through this note is; “*Can the Issue of Bribery be Resolved before an Arbitral Tribunal? Or, Whether the Same Must be Referred to a State Court?*” The authors answer these questions by scrutinizing theories and case laws as well as discussing the various challenges faced by arbitrators in deciding bribery allegations.

Cheque bouncing cases have become a very common phenomenon in our country. With the development of jurisprudence, the question raised is that if a Company cannot be solely liable for the dishonour of a cheque, as they cannot act on their own free will but through some other person, then should not the State impose vicarious liability when a company is found criminally liable? Mihir Naniwadekar, an Advocate from the Bombay High Court, provides us his answer, with a Case Comment titled ‘*Offences by Companies: An Analysis on Aneeta Hada v. Godfather Travels,*’ in which he discusses the impact of the principle of vicarious liability in criminal law, by applying the Common Law Doctrine of Attribution, under which the acts and mental state of the ‘*directing mind and will*’ of the company is to be treated in law, as if it were the acts and the mental state of the company itself.

The journal concludes with a Book Review presented by Alok Prasanna Kumar, an Advocate from the Supreme Court of India and a

former student of the University of Oxford . The author through his extensive analysis, presents his thought provoking review of one of the landmark decisions rendered in our country, which has played a heavy influence on the approach of law. The Book Review titled '*An Insider's View of the Kesavananda Bharati Case: Book Review of the TR Andhyarujina's the Kesavananda Bharati Case: The Untold Story of Struggle for Supremacy by the Supreme Court and the Parliament,*' decided by a 13-judge bench of the Supreme Court of India, gives us a good first person account of how the case itself was argued, how the clash of personalities played out and how all of this finally impacted the judgment when it was ultimately delivered.

Considerable thought and effort has been invested in compiling this journal and I hope we have successfully accomplished our duty in presenting to you an interesting and stimulating read. We are truly obliged to all the learned contributors, for their very interesting insights and thank them for their promptness in sharing their thoughts. We are also honoured and duty-bound to acknowledge the wisdom, knowledge and advice, which has been provided to us in copious quantities by eminent legal personalities such as Hon'ble Mr. Justice P. Sathasivam, Hon'ble Dr. Justice B.S. Chauhan and Hon'ble Mr. Justice F.M. Ibrahim Kalifulla, all sitting Judges of the Supreme Court of India, for their immense support and encouragement. I would like to take this opportunity in personally extending my gratitude to Hon'ble Mr. Justice F.M. Ibrahim Kalifulla, who is also my mentor, and who, without batting an eyelid, agreed to contribute an article close to his heart, amidst his hectic schedule and other commitments.

We are also thankful for the wide degree of freedom and constant encouragement provided by our Vice Chancellor, Professor Dr. V. Vijayakumar and our Director, Professor Dr. M.S. Soundara Pandian, and we remain in their debt for their moral support and

scholarly guidance. We also express our gratitude to the Honorary Board of Advisors, Honorary Board of Editors, the Panel of Expert Consultants and the Faculty Advisors for their support.

With the journal's growing demand, we will be releasing this journal beyond the frontiers of our country, thereby making it an internationally circulated law review, accessible to all. The topics dealt with in each edition, only confirms that there are a wide range of subjects that need to be appreciated, debated, reformed, modified or ammended for better implementation of suitable laws. The imbalances in society and the increasing moral ineptitudes, keep increasing in their capability to shock the sensibilities of society. In such turbulent times, it is with such literary debates and discussions that we can gain viewpoints and action on the same to whatever extent we can to make a difference. We wish to conclude on a reflection, epitomising our objective, very articulately elucidated by the elouquent Justice Krishna Iyer, in the prologue in the book, '*Justice V.R. Krishna Iyer – A Living Legend*' by P. Krishnawamy;

*“.....even when darkness surrounds, great thoughts reveal light. There is not enough darkness in all the world to put out the light of one small candle.”*

**VARUN SRINIVASAN**

*Editor in Chief*

*The Indian Student Law Review (ISLR) – 2012*

**Lecture**

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C. HARI KRISHNAN ENDOWMENT LECTURES ON CORPORATE LAW

BY  
HON'BLE JUSTICE P. SATHASIVAM<sup>1</sup>

**1. INTRODUCTION**

I deem it a matter of pride and privilege to be present before this august gathering of diverse luminaries from both the Bench and Bar, and the young minds of this institution, who are the future of this country, in delivering the first lecture for the '*Hari Krishnan Endowment Lectures*'. Through this lecture, I hope to explain the various principles and concepts involved in the subject of corporate laws, which I feel has great significance in our current legal scenario.

**2. CORPORATE LAWS IN INDIA**

According to me, the Indian Corporations are governed by two sets of laws namely;

- Company Law and
- Security Law

**a) COMPANY LAW**

The Indian Company law is largely based on its English counterpart. The Companies Act, 1956 is an important piece of legislation that governs the incorporation<sup>2</sup>, management and administration<sup>3</sup> and winding-up of companies<sup>4</sup>.

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<sup>1</sup> Sitting Judge, Supreme Court of India. Lecture delivered earlier this year in the Tamil Nadu Dr. Ambedkar Law University, School of Excellence in Law premises

<sup>2</sup> Section 12 of Companies Act, 1956

<sup>3</sup> Part VI, Sections 146 - 424 L of Companies Act, 1956

<sup>4</sup> Part VII, Sections 425 – 560 of the Companies Act, 1956

*b)* **SECURITIES LAW**

The Securities Laws in our country comprise of:

1. Securities Contracts (Regulation) Act, 1956, and
2. Securities & Exchange Board of India Act, 1992.

The Securities Contracts (*Regulation*) Act, 1956, keeps a tight vigil over all the Stock Exchanges of India. The provisions of the Act are formally administered by the Central Government. Since the enactment of the Securities & Exchange Board of India Act, 1992, the Board established under it, (*SEBI*) concurrently has powers to administer almost all the provisions of the Act. The topic I have chosen is extremely vast and hence, I would wish to limit my approach to the principle revolving under Company law only.

An incorporated company or corporation according to legal jurisprudence is an artificial person created by law with perpetual succession and common seal. It is similar to a natural person in many respects. Like a human being, a corporation has parents (*Promoters*)<sup>5</sup>, birth (*registration with appropriate authority*)<sup>6</sup>, rights and duties quite distinct from the promoters, marriage (*merger or amalgamation*)<sup>7</sup> and death (*winding up*)<sup>8</sup>. The primary distinction between a corporation and a natural person lies in its contractual power. Unlike a competent natural person, a Corporation always contracts through an agent. It cannot act on its own initiative.

**I. FEATURES OF A COMPANY**

- i. A company is a legal entity, distinct and independent of those persons who, from time to time, are its members.

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<sup>5</sup> Section 62 (6) of Companies Act, 1956

<sup>6</sup> Part II of Companies Act, 1956

<sup>7</sup> Sections 391 – 394 of Companies Act, 1956

<sup>8</sup> *Supra*, n.5

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- ii. The liability of the members can be limited to the extent they have agreed to contribute towards the capital of the company with reference to the number of shares and/or the amount of guarantee respectively undertaken by them.
- iii. As the company has an independent personality of its own, its members are not personally liable for any act or omission on the part of the company, unless the law expressly provides otherwise.
- iv. The company being a juristic person, distinct from the members constituting it, can acquire, own, enjoy and alienate property in its own name. As such, the property would be that of the company and no member can make any claim upon it so long as the company is a going concern.
- v. The company being a legal entity can sue and also be sued in its own name.
- vi. The continuity of the company and its functioning is not affected by the death, disability or retirement of any of its members. The company continues to exist, irrespective of change in its membership. It is commonly referred to as '*perpetual succession*'.
- vii. The members of the company equitably share profits by way of dividend and the assets of the Company (*in the event of its winding up*) in proportion to the capital respectively contributed by them.

**II. ADVANTAGES OF INCORPORATION OF COMPANY**

- i. The corporate form of business organization '*affords opportunity for professionalization of its management*' and entrusting the administration of its affairs to persons of professional competence and standing.

- ii. Incorporation of company provides '*better borrowing facilities*' as the company can raise a large amount, on comparatively easier terms, by issue of debentures, especially those secured by a floating charge or by accepting deposits from the public. Even banking and financial institutions prefer to render financial assistance to incorporated companies.
- iii. In certain cases, an incorporated company comparatively stands in a better position from the point of view of taxation on its income.
- iv. Shares of small denomination afford an '*opportunity to the small investors to invest*' according to their capacity.
- v. Increased investment in the funds of the Company is further ensured by permitting large number of persons to subscribe to its shares. Incorporation of a company affords better opportunity for strengthening capital resources, growth and development of the enterprise.

Once the company is brought into existence by its incorporation, it can only be dissolved by provisions of the law.

### **III. IS COMPANY A CITIZEN?**

It is a general belief that only human beings can be citizens. There is no provision in the Companies Act 1956 or in the Constitution of India or in the Citizenship Act, 1955, expressly conferring citizenship on a company. However, the General Clauses Act, 1897 defines persons as '*Person shall include any company or association or body of individual, whether incorporated or not*'<sup>9</sup>.

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<sup>9</sup> 3 (42) of General Clauses Act, 1897

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In *Charanjit Lal v. Union of India*<sup>10</sup>, the Supreme Court considered this problem and observed that the fundamental rights guaranteed by the Constitution are available not merely to individual citizens, but to corporate bodies as well, except where the language of the provision or the nature of the right compels the inference that they are applicable only to the natural persons.

*The question that can then be asked is, whether a Company be disentitled to claim fundamental rights? Quite often companies are faced with the problems of infringement of their fundamental rights to carry on business under Article 19(1) (g) of the Constitution and/or infringement of the right to equality and non-discrimination guaranteed by Article 14. Hence, the appropriate remedy to contest this issue is under writ jurisdiction.*

**IV. PRELIMINARY ISSUE OF MAINTAINABILITY OF WRIT**

According to me, there is no clear-cut law directly applicable on this issue. However, in numerous cases like in *Workmen of Meenakshi Mills Ltd and Ors v. Meenakshi Mills Ltd & Anr.*<sup>11</sup>; *R.C. Cooper & Anr v. Union of India & Ors.*<sup>12</sup>; *Bennett Coleman & Co and Ors. v. Union of India*<sup>13</sup>, the Supreme Court has entertained, admitted, heard and decided writ petitions filed by companies under Article 32 of the Constitution alleging the violation of fundamental rights relating to carrying on of the business of the company and /or discrimination in violation of Article 14.

From the above analysis of law, it is apparent that a company carrying on business is entitled to invoke the writ jurisdiction whenever its fundamental right to carry on business is infringed.

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<sup>10</sup> AIR 1952 SC 41

<sup>11</sup> 1994 AIR 2696, 1992( 3 )SCR 409, 1992( 3 )SCC 336, 1992( 1 )SCALE1248, 1992( 3 )JT 446

<sup>12</sup> AIR 1970 SC 564

<sup>13</sup> (1973) 2 SCR 757

## **V. PROCEDURE FOR FORMATION OF A NEW COMPANY**

Forming a company encompasses numerous procedures under law. Hence, to form a company as per the law, the following step-by-step procedure must be adhered to and, which I shall explain in detail;

### **i. SELECTION OF TYPE OF THE COMPANY**

The Promoters of a company may be individual entrepreneurs or a body corporate engaged in efforts to incorporate a company. They have the power of defining the object of the company and deciding various matters for the company proposed to be incorporated. It is depending upon the purposes for which the company is to be incorporated, proposed scale of operations, capital involved, etc. that the promoters can select the type of the company as they wish to form themselves into *viz*, a private company, public company, non-profit making company, etc.

### **ii. SELECTION OF NAME FOR THE PROPOSED COMPANY**

In order to choose the name of the company, 6 names are required to be selected in order of preference, after taking notes of numerous provisions, clarifications, circulars and rules made by the Ministry of Corporate Affairs, etc. Then the promoters are required to make an application to the concerned Registrar of Companies (RoC) which is to be submitted electronically on the portal of the Ministry of Corporate Affairs. An application shall be digitally signed by any one of the promoters or Managing Director, Director, Manager or secretary of the Company, along with the required fee for ascertaining, whether the selected name is available for adoption by the promoters of the proposed company. After receipt of the completed application in e-Form 1A, the Registrar shall intimate whether the proposed name is available for adoption or not. The confirmation of the name made available by the Registrar shall be valid for a period of six months. In case the promoters fail to submit all the required documents for

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incorporation within that period, then they are required to submit another application after payment of requisite fee.

iii. **APPLY FOR DIRECTORS IDENTIFICATION NUMBER AND DIGITAL SIGNATURES**

As per the proviso to Section 253 of the Companies Act, 1956, '*no company shall appoint or re-appoint any individual as a director of the company unless he has been allotted a Director Identification Number (DIN) under Section 266B*'<sup>14</sup>.

Section 266A<sup>15</sup>, which provides that '*every individual, intending to be appointed as Director of a Company shall make an application for allotment of Director Identification Number to the Central Government in the prescribed DIN Form*'. Therefore, before submission of the e-Form, all the Directors of the proposed company must ensure that they have a DIN. Specific care should be taken that a person does not have more than one DIN. Therefore, a DIN once obtained shall serve the requirement for all the companies in which one is a Director or intended to be a Director.

iv. **REQUIREMENT FOR HAVING DIGITAL SIGNATURES**

After the 16th of September, 2006, every document prescribed under the Companies Act, 1956 is required to be filed with the digital signature of the managing director or director or manager or secretary of the Company. Therefore, it is compulsorily required to obtain digital signature of at least one director to sign the e-Form and other documents. It may be noted that if the director or other persons covered have digital signatures, their signatures may be used for the above said purpose and there is no need to take new signatures again.

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<sup>14</sup> Inserted by the Companies (Amendment) Act, 2006, w.e.f. 01-11-2006

<sup>15</sup> *Supra*, n.15

v. **PREPARATION OF THE MEMORANDUM OF ASSOCIATION (MOA) AND ARTICLES OF ASSOCIATION (AOA)**

Drafting of the MoA and AoA is generally a step subsequent to the availability of name made by the Registrar. It should be noted that the main objects should match with the objects shown in e-Form. These two documents are basically the charter and internal rules and regulations of the companies. Therefore, they must be drafted with utmost care with the help of experts and the other object clause should be drafted in a broader sense.

vi. **STAMPING, DIGITALLY SIGNING AND E-FILING OF VARIOUS DOCUMENTS WITH THE REGISTRAR.**

- Memorandum of Association, duly signed by the subscribers and witnessed, showing the number of shares against their names electronically attached in PDF file. It should also be properly stamped as per the stamp duty applicable in the State, where the registered office of the company is to be situated. Simultaneously original stamped copy of the Memorandum of Association shall be submitted with the Registrar of Companies concerned.
- Articles of Association should be duly signed by the subscribers and witnessed, showing the number of shares against their names electronically. It should be properly stamped according to the authorized share capital as per the stamp duty applicable in the state, where the registered office of the company to be situated. Simultaneously original stamped copy of the Memorandum of Association shall be submitted with the Registrar of Companies concerned.
- Declaration in *e-Form 1* by an advocate or company secretary or chartered accountant engaged in whole time

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practice in India or by a person named in the Articles as a director, manager or secretary of the company, that all the requirements of the Companies Act, 1956 and the rules made there under have been complied with in respect of registration and matters precedent and incidental thereto, which may be accepted by the Registrar as sufficient evidence of such compliance. It should be carefully noted that details of all the companies in which directors are also director should be given and the names, addresses and other particulars of directors and promoters should be matched with the information provided in the DIN application Form.<sup>16</sup>

- Power of Attorney for should be furnished by all the subscribers in favour of any one subscriber or any other person authorizing him to file these documents and to with the Registrar and to obtain certificate of incorporation. The power of attorney should be given on Non-Judicial stamp paper of appropriate value and shall be submitted to the Registrar.<sup>17</sup>
- *E-Form 18* is to be filed with the Registrar electronically with the digital signatures in regard to location of the registered office. E-Form 18 shall also be certified by the company secretary or chartered accountant or cost accountant in whole –time practice.<sup>18</sup>
- *E-Form 32* is required to be filed with the Registrar electronically for filing particulars of directors. The personal details should match with the information provided in the DIN.*E-Form 32* shall be filed along with the adequate

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<sup>16</sup> Section 33(2)] (Appendix 2) of Companies Act, 1956

<sup>17</sup> (Appendix 3) of Companies Act, 1956

<sup>18</sup> Section 146 (2) (Appendix 4) of Companies Act, 1956

filing fee as prescribed under Schedule XIII of the Companies Act, 1956. However, no separate filing fee is required to be paid on the addendum of e-Form 32.<sup>19</sup>

***vii. PAYMENT OF FEES.***

The fees payable to the Registrar at the time of registration of a new company varies according to the authorized capital of a company proposed to be registered as per Schedule X to the Act. Fees can be calculated by the MCA portal.

***viii. OBTAINING CERTIFICATE OF INCORPORATION***

The Certificate of Incorporation is actually quite a simple document which contains the date of incorporation, the name of the company incorporated and also where the company was incorporated in India. Foreign companies can apply for the Certificate of Incorporation from only that state where it has decided to setup their head office in India. Hence the Certificate of Incorporation would carry the stamp of the issuing office and also details of the state where the company was incorporated.<sup>20</sup>

***ix. PREPARATION AND FILING OF PROSPECTUS***

When a company is preparing an initial public offering, it is required to file a prospectus, along with other documents, with regulators. The regulators review the information to confirm that it is accurate and complete. Passing a review does not mean that a company is endorsed by regulators; it simply indicates that the documentation provided is correct and the regulators have approved the company for an initial public offering. A subsequent company prospectus will be released each year with updated information. There are legal requirements that describe what a company prospectus must

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<sup>19</sup> (Appendix 5) Of Companies Act, 1956

<sup>20</sup> Section 33 & 34 of Companies Act, 1956

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include, and these vary by region. As a general rule, the document needs to contain information about the company that would help investors arrive at an informed decision when they decide to invest. It also contains information about the investment products, such as stocks and bonds that the company makes available.

**x. OBTAINING CERTIFICATE OF COMMENCEMENT OF BUSINESS.**

The Registrar, on perusal of the declaration in e-Form 19 or 20 and the statement in lieu of prospectus, as may be applicable, shall certify that the company is entitled to commence business and to exercise borrowing powers. The certificate shall be the conclusive evidence that the company is entitled to commence its business.<sup>21</sup>

**VI. FOREIGN COMPANIES**

A foreign company can commence operations in India by incorporating a company under the Companies Act, 1956 through:

- i. Joint Ventures
- ii. Wholly Owned Subsidiaries

Foreign equity in such Indian companies can be up to 100% depending on the requirements of the investor, subject to equity caps in respect of the area of activities under the Foreign Direct Investment (*FDI*) policy.

**3. OBJECTIVE OF CORPORATE LAW**

It is presumed and believed that the primary motive of the entire corporate world is profit making. However, the overall objective of corporate law should be to serve the interests of society as a whole. More particularly, the appropriate goal of corporate law is to advance

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<sup>21</sup> Section 149(6) of Companies Act, 1956

the aggregate welfare of all who are affected by its activities, including the shareholders of the firm, employees, suppliers, and customers, as well as third parties such as local communities and beneficiaries of natural environment. This is what economists would characterize as the pursuit of overall social efficiency.

#### **4. HIERARCHY OF COURTS**

The hierarchical system as envisaged under the Companies Act, 1956 is as follows:-

- Company law Board
- High Court
- Supreme Court of India

##### **a) COMPANY LAW BOARD**

The Central Government in terms of Section 10(E)<sup>22</sup> of the Companies Act, 1956 constituted an independent Company Law Board (CLB).

The CLB is a quasi-judicial body, exercising equitable jurisdiction, which was earlier being exercised by the High Court or the Central Government. The Board has powers to regulate its own procedures. The Company Law Board has framed '*Company Law Board Regulations 1991*'<sup>23</sup>, prescribing the procedure for filing the applications/petitions before it. The Central Government has also prescribed the fees for making applications/petitions before the Company Law Board, under the '*Company Law Board, (Fees on Applications and Petitions) Rules 1991*'<sup>24</sup>. The Board has its Principal Bench at New Delhi, and four Regional Benches located at New Delhi, Mumbai, Kolkata and Chennai.

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<sup>22</sup> Part IA [containing Section 10(E)] ins. by Act 53 of 1963, sec. 4 (w.e.f. 1-1-1964)

<sup>23</sup> <http://clb.nic.in/reg1991.htm>

<sup>24</sup> <http://www.mca.gov.in/Ministry/actsbills/rules/CLBFoAaPR1991.pdf>

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**b) HIGH COURT**

In terms of Section 10F<sup>25</sup> of the Companies Act, any person aggrieved by any decision or order of the Company Law Board may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board, on question of law arising out of such order.

The High Court, in Section 10F of the Companies Act, 1956 means the High Court having jurisdiction in relation to the place at which the registered office of the company is situated.<sup>26</sup>

**c) SUPREME COURT OF INDIA**

In terms of Section 10GF<sup>27</sup> of the Companies Act 1956, any person, aggrieved by any decision or order of the High Court may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the High Court, on a question of law arising out of such decision or order.

**5. PROSPECTIVE COMPANIES BILL, 2011**

The Ministry of Corporate Affairs, proposes to set up the National Company Law Tribunal (*NCLT*) and National Company Law Appellate Tribunal (*NCLAT*), which will replace the Company Law Board, Board for Industrial and Financial Reconstruction (*BIFR*) and Appellate Authority for Industrial and Financial Reconstruction (*AAIFR*).<sup>28</sup> It may be noted that provisions regarding constitution of *NCLT* and *NCLAT* were incorporated in the Companies (*Second Amendment*) Act, 2002. The Act was, however, challenged in the Madras High Court. The matter was finally decided by the Supreme

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<sup>25</sup> Ins. by Act 31 of 1988, sec. 5 (w.e.f. 4-8-1989)

<sup>26</sup> *Stridewell Leathers (P) Ltd. v. Bhankerpur Simbhaoli Beverages (P) Ltd.*, AIR 1994 SC 158: (1994) 19 Comp. Cas. 139: 1993 (3) Com LJ 405.

<sup>27</sup> Section 10GF ins. by Act 11 of 2003, sec. 6 (w.e.f. 1-4-2003)

<sup>28</sup> [http://www.mca.gov.in/Ministry/pdf/The\\_Companies\\_Bill\\_2011.pdf](http://www.mca.gov.in/Ministry/pdf/The_Companies_Bill_2011.pdf)

Court in *Union of India (UOI) v. R. Gandhi*<sup>29</sup>, *President, Madras Bar Association AND Madras Bar Association v. Union of India*<sup>30</sup> (UOI) wherein, the Court upheld that the creation of National Company Law Tribunal and National Company Law Appellate Tribunal and vesting in them, the powers and jurisdiction exercised by the High Court in regard to company law matters, are not unconstitutional and also declared that Parts 1B and 1C of the Act as presently structured, are unconstitutional. However, making suitable amendments may make Parts 1B and 1C of the Act, operational.

The revised Companies Bill, 2011, introduced in the winter session of Parliament also incorporates the guidelines provided by the Supreme Court. Once the Companies Bill, 2011, to be passed by Parliament, is enacted, Ministry of Corporate Affairs will constitute a National Company Law Tribunal (NCLT) that will not only replace CLB, but also handle cases currently with the High Courts, the BIFR and the AAIFR. It will have 62 members and 22 benches. Issues related to mergers and acquisitions, reduction in capital, and winding up of companies are currently handled by High Courts and cases of revival and rehabilitation by BIFR. All these will be transferred to NCLT.

## **6. SOCIAL RESPONSIBILITIES OF COMPANIES**

The ‘Sachar Committee’<sup>31</sup> has laid emphasis on social responsibilities of companies. Companies are not merely profit making institutions but are answerable for their functions to the shareholders of the company. In modern society a company is required to serve five types of masters, namely, (i) Shareholders (ii) Government (iii) Consumers, who compose the bulk of the society

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<sup>29</sup> JT 2010 (5) SC 553, 2010 AIR(SCW) 4004, 2010(5) SCALE 514, (2010) 6 SCR 857

<sup>30</sup> 2010 (5) SCALE 514

<sup>31</sup>[http://www.minorityaffairs.gov.in/sites/upload\\_files/moma/files/pdfs/sachar\\_comm.pdf](http://www.minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/sachar_comm.pdf)

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(iv) Creditors and; (v) Workers. The interest of these components who are directly or indirectly involved in the smooth running of a company are to be protected for the purpose of maximization of the welfare of the society. Openness in corporate affairs is the first principle in securing the responsive behaviour. Acceptance of the concept of social responsibility must be reflected in the information and disclosure that the company makes available for the benefit of various constituents like shareholders, creditors, workers and community.

Accountability of the public sector to the people through Parliament must find its parallel in the private sector in the form of social accountability. In other words, the company must be subject to public disclosure. Every company apart from being able to justify itself on the test of economic viability, will have to pass the test of a socially responsible entity. Thus, the Committee recommended that every company, along with the Directors' Report shall also give a Social Report which will indicate and quantify in as precise and clear terms as possible the various activities relating to social responsibility aspects, which have been carried out by the company in the previous years.

**7. DOCTRINE OF CORPORATE PERSONALITY**

Corporate personality has been described as '*the most pervading of the fundamental principles of company law*'. In fact, it constitutes the bedrock principle upon which company is regarded as an entity distinct from the shareholders constituting it. The concept of corporate or legal entity of the company was firmly established at common law in the case of *Salomon v. Salomon & Co Ltd.*<sup>32</sup>. In that case, Salomon had a private shoe business and he formed Salomon and Company Ltd. and sold his business to it. Salomon, his wife and five children were the only shareholders. Additionally, Salomon got \$10,000 worth of secured debenture and \$9,000 cash, which

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<sup>32</sup> (1897) AC 22

represented the cost of sale of his private business to Salmon & Co. On being liquidated, the company had enough funds to pay all debentures holders but not all unsecured creditors. The question that arose was whether, Salomon is the same person as Salomon & Co., so as to prevent him from taking priority over unsecured creditors. It was held that since Salomon & Co. had been validly formed, it enjoys a separate legal personality from Salomon. Consequently, Salomon could not forfeit the payment due to himself for his secured debentures.

#### **8. LIFTING THE CORPORATE VEIL**

When a creditor discovers that a debtor company is insolvent, the creditor will frequently want to recover the debt from a shareholder, director or associate of the insolvent company. There exist various statutory and common law mechanisms by which the corporate veil can be lifted and liability imposed on individuals or other companies.

##### **i. LIFTING THE VEIL WHERE STATUTE ITSELF CONTEMPLATES:**

The corporate veil may be lifted where a statute itself contemplates lifting the veil.<sup>33</sup> The Companies Act, Taxing, Welfare and other statutes, often contemplate provisions for lifting the corporate veil in certain cases. The lifting of the veil is not necessary or permissible beyond the essential requirement of the Act. Where a non-resident company sought to make investments in India, the Foreign Exchange Management Act (FEMA) and the Portfolio investment scheme, provided for the lifting of veil to find out if at least 60 percent of the shares were held by non-residents of Indian nationality or origin. In such a case, the corporate veil could be lifted to discover the nationality or origin of the shareholders to that extent

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<sup>33</sup> *Tata Engineering and Locomotive Ltd v. State of Bihar* AIR 1965 SC 40)

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and no more.<sup>34</sup> The Companies Act 1956 itself contemplates or provides for certain circumstances in which the corporate veil may be lifted and the members or directors of the company shall be made personally liable for certain transactions as explained below:

a) **REDUCTION OF MEMBERS BELOW LEGAL MINIMUM**

Under the Companies Act, 1956, if the number of members is reduced below the legal minimum, and the company carries on business for more than six months while the number is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is aware of the fact, shall be severally liable for the payment of the company's debts contracted during that time.<sup>35</sup>

b) **CONTRACTS AND DEEDS, INVESTMENTS, SEAL ETC.**

It contains provisions for execution of contracts, deeds etc., on behalf of the company. Directors may be personally liable if these are not executed on behalf of the company.<sup>36</sup>

c) **PUBLICATION OF NAME BY COMPANY**

If an officer of a company signs or authorizes the signature on behalf of a company on any bill of exchange, hundi, promissory note, cheque or order for money or goods, such person shall, apart from the commercial liability provided, be personally liable to the holder.<sup>37</sup>

d) **LIABILITY FOR FRAUDULENT CONDUCT OF BUSINESS**

In the course of winding-up of a company, if it appears that any

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<sup>34</sup> *LIC v. Escorts Ltd.*, AIR 1986 SC 1370

<sup>35</sup> Section 45 of Companies Act, 1956

<sup>36</sup> Sections 46 – 50 of Companies Act, 1956

<sup>37</sup> Section, 147 of Companies Act, 1956

business of the company has been carried on, with intent to defraud creditors of the company or any other persons or for any fraudulent purpose, the persons who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible.<sup>38</sup>

e) **JUDICIALLY RECOGNIZED PRINCIPLES TO LIFT THE CORPORATE VEIL**

When there is an express or implied agency between a company and its shareholders, generally, the Courts make use of the 'agency concept' to pierce the corporate veil.

- When the property of the company is held by trustees under an express or implied trust, the Courts would, though reluctantly, disregard the corporate personality of the company and enforce the trusts under which the property is held, even though in theory the company would be entitled to deal with the property as it pleases
- When the residence of a company has to be determined for the purposes of taxation, or jurisdiction, the Courts sometimes ignore the corporate entity and have regard to the place of residence of the company, namely, the place where the central management and control are actually exercised.
- When the members of a company ratify the act of the company not by a formal resolution but by other means less than a resolution, the Court sometimes considers itself at liberty to treat a decision of the shareholders as the decision of the company itself.
- The Courts also disregard the corporate entity of a company when there is a fraud, as when a company was incorporated as a device to conceal the identity of the perpetrator of the fraud.

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<sup>38</sup> Section 542 of Companies Act, 1956

## 9. COMPETITION ACT, 2002

India has, in the pursuit of globalization, responded by opening up its economy, removing controls and restoring to the liberalization concept. The natural corollary of this is that the Indian market should be geared up to face competition from within the country as well as from outside.

The Monopolies and Restrictive Trade Practices Act, 1969, has become obsolete in certain respects, in the light of international economic developments relating, more particularly, to competition laws and therefore, the Competition Act, 2002, was enacted to shift the focus from curbing monopolies to promoting competition.

The Competition Act, 2002 was passed by the Parliament in the year 2002, to which the President accorded assent in January 2003. It was subsequently amended by the Competition (Amendment) Act, 2007. In accordance with the provisions of the Amendment Act, the Competition Commission of India and the Competition Appellate Tribunal have been established. In the 21<sup>st</sup> century, the Competition Commission plays a vital role in prohibition of anti-competitive agreements and vividly discourages abuse of dominant position by the corporate sectors.

- Section 3 of the Act, directly prohibits any anti-competitive agreements among the enterprises.
- Section 4 of the Act emphatically states that no enterprise or group shall abuse its dominant position in course of its business.

The sole objective of the Competition Act, 2002 is to prohibit and punish any kind of anti-competitive activity prevalent in the society. In *Builders' Association of India v. Cement Manufacturers'*

*Association & Ors.*<sup>39</sup>, the Competition Commission of India, imposed a penalty of approximately six thousand crores (*USD 1.2 billion*) on cement manufacturers in India after holding them guilty of cartelization in the cement industry. The penalty has been imposed at the rate of 0.5 times the net profit of such manufactures, for the past two years. Additionally, the Cement Manufacturer's Association (the CMA) has been fined 10% of its total receipts for the past two years for its role, as the platform from which the cartel activity took place.

#### **10. INDIAN INSTITUTE OF CORPORATE AFFAIRS (IICA)**

IICA has been established by the Ministry of Corporate Affairs for capacity building and training of persons in various subjects and matters relevant to corporate regulation and governance such as, corporate and competition law, accounting and auditing issues, compliance management, corporate governance, business sustainability through environmental sensitivity and social responsibility, e-Governance and enforcement etc. The Institute has been designed with an eye on the future to provide a platform for dialogue, interaction and partnership between governments, corporate, investors, civil society, professionals, academicians and other stake holders.

#### **11. CONCLUDING REMARKS**

Business is the cornerstone of prosperity in society and indeed companies create the resources that permit social development and welfare. Companies that want to keep developing, have to be receptive to signals from and opinions expressed by the market, staff and the general public. Now that more and more customers and stakeholders are making demands of companies' ethical, social and environmental awareness, it is also natural for companies to be receptive to these issues and actively use them in their operations. Companies have

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<sup>39</sup> 2012 Comp LR 629 (CCI)

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always had to interpret society's moods or else they go out of business. Companies have always had to adapt to fit in with values and norms. It is very much in the interests of any company to be '*a good corporate citizen*'. With these few words of wisdom, I wish you all nothing but the best.

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**Article**

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*LAW DAY AND THE EVOLUTION OF OUR CONSTITUTION*

BY  
HON'BLE JUSTICE F.M. IBRAHIM KALIFULLA<sup>1</sup>

**ABSTARCT**

*The Constitution of India was adopted by the Constituent Assembly on "November 26", 1949. Thirty years after, under the leadership of Dr. L. M. Singhvi, the Supreme Court Bar Association declared November 26th as the National Law Day. Thereafter, every year, this day is celebrated as the Law Day, all over India, especially by members of the legal fraternity. This day is celebrated to honour the 207 eminent members of the Constituent Assembly who are considered the founding fathers of the Constitution of India. Through this article, I wish to emphasis the significance and essence of 'Law Day', its place in our deep legal history and the evolution of our constitution, by way of analysing our great constituent assembly debates.*

**1. INTRODUCTION**

As members of the Legal Fraternity, we have been celebrating the day called as 'Law Day', which is supposed to symbolize and epitomise the emergence and evolution of our marvellous Constitution. I have been a part of this wonderful tradition where various luminaries and doyens from both the Bench and Bar, join hands in celebrating this auspicious day, with great vigour and enthusiasm. But at the same time, I have also observed, that the majority of us, have not truly understood the real essence and significance behind the celebration of this day or its place in our great constitutional history. This made me introspect and ask myself, "What

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<sup>1</sup> Sitting Judge, Supreme Court of India

is this 'Law Day'?" "Why should there be a celebration at all calling itself as 'Law Day'?" This uncertainty has been looming large in my mind for quite some time. To provide clarity and to find out the reasons for its celebrations, I had an occasion to probe into the history of the making of our Constitution, with an intent and purpose of understanding the significance of celebrating such a special day, rather than just conducting it as a ritualistic process. This took me inevitably, to the Debates of our Constituent Assembly.

2. **LET US REMINISCE: A STEP-BY-STEP JOURNEY THROUGH OUR AMAZING CONSTITUENT ASSEMBLY DEBATES**

My experience while going through the Constituent Assembly debates was a very scintillating one. The debates run for pages, but I have, through this article, narrowed the scope and provided a concise, yet extensive analysis, on the glorious moments behind the framing of our wonderful Constitution.

While perusing through the Constituent Assembly Debates, I found that it consists of Twelve Volumes, the Debates commencing on the 9th of December, 1946 and continuing till the 24th of January, 1950. The Constitution of India was officially adopted on the 26th of November, 1949 and signed by the Members of the Assembly on 24th of January, 1950. Thereafter, the Constituent Assembly having accomplished the task of framing the Constitution assigned to it, adjourned *sine die* and became *functus officio*.

From what I learnt, the First Meeting was held on the 9th of December, 1946 in the Constituent Hall, New Delhi, where the proceedings commenced at 11.00 a.m., which was initiated by Shri Acharya J.B.Kripalani<sup>2</sup> who requested Dr.Sachidananda Sinha, the

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<sup>2</sup> I would like to refer to a famous quote of his – “For an unarmed people to fight Great Britain at a time when all its armed might was mobilised, when the

oldest Parliamentarian in India, as a Member of the Imperial Legislative Council from 1910 to 1920, to take the Chair as its Temporary Chairman. Apart from his credentials as the oldest Parliamentarian, he entered the Central Legislative Assembly in 1921, not only as an average member, but as its Deputy President. He was entrusted with the task of functioning as an Executive Councillor and Finance Member of the Government of Bihar and Orissa and was also the Vice-Chancellor of the Patna University for eight years, while also being the oldest Congress Member. The first thing he did, while speaking to the assembly, was to read three messages received from the United States of America, China and the Government of Australia. Through his inaugural address, he traced the history of other ancient constitutions and while referring to the British Constitution in particular, stated that it had an unwritten constitution, since the British Parliament as the Supreme Authority, used to make and unmake all laws and hence, there was no such thing as a Constitutional Law in Britain. Having stated this, to gain more insight, he then drew the attention of the Members, to the various other Constitutions by stating that France was the only State in Europe, which had a National

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*inexhaustible resources of America were at its disposal, appeared sheer folly. But then these men forgot that when the Congress under Gandhiji's lead took to revolutionary politics, it abandoned conventional political wisdom. It dared to risk and achieve. Was the Congress wise when it made the Khilafat issue, which it scarcely understood, its own? Was it again wise to resort to Salt Satyagraha to achieve independence? There was apparently no connection between salt and Independence. And what wisdom could there have been in Gandhiji walking with a flock of unarmed followers for 21 days to pick up a pinch of salt on the sea-shore? What political or any other wisdom could there be in Pandit Motilal Nehru manufacturing salt in his study in a laboratory test tube on a spirit lamp from a lamp of clay? What wisdom was there in selecting individual satyagrahis to walk from place to place shouting anti-war slogans till they were arrested? The fact is, the Congress under Gandhiji's lead has never done the conventionally obvious thing, and if it does so before the freedom fight is over and complete independence won, it will have missed its revolutionary role." - From the Presidential Address - J.B. Kripalani, I.N.C. Session, 1946, Meerut.*

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Assembly in 1789<sup>3</sup>, but they largely followed the Constitutional Convention held at Philadelphia by American Constitution-makers in 1787<sup>4</sup>. Ultimately, the Temporary Chairman suggested that the Philadelphia Convention and the American Constitution can be taken as a model for a Federal set up. In fact, it was stated that the American Convention held in Philadelphia in 1787 had been accepted by the World as a model, for framing independent federal constitutions for various countries. The basic principle was "*a series of agreements as well as a series of compromises*".<sup>5</sup> Therefore, the Temporary Chairman, by virtue of his long experience, advised;

*"That reasonable agreements and judicious compromises are nowhere more called for than in framing a constitution for a country like India."*<sup>6</sup>

His ultimate request was that;

*"The Constitution that your going to plan may similarly be reared for 'Immortality', if the work of man may justly aspire to such a title, and it may be a structure of 'adamantine strength, which will outlast and overcome all present and future destructive forces."*<sup>7</sup>

With these lofty ideas, the basic fabric was mooted. The Temporary Chairman traced how only in November 1939, the Congress Working Committee passed a resolution<sup>8</sup> to frame a

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<sup>3</sup> St. Rosemary Educational Institution. "The French National Assembly: 1789–1791." <http://schoolworkhelper.net/>. St. Rosemary Educational Institution

<sup>4</sup> "[T]he [American] political theory of a second chamber was first formulated in the constitutional convention held in Philadelphia in 1787 and more systematically developed later in the *Federalist*." Carroll, The Background of Unicameralism and Bicameralism, in *Unicameral Legislatures*, The Eleventh Annual Debate Handbook, 1937-38, 42 (Aly ed. 1938).

<sup>5</sup> <http://parliamentofindia.nic.in/ls/debates/vol1p1.html>

<sup>6</sup> *Supra* n.5

<sup>7</sup> *Supra* n.5

<sup>8</sup> Congress National Committee Resolution, October 22, 1939, Gandhi writing in Harijan, 28, October 1939, pp. 419-420, 292, CWMG, 71:1

Constitution through a Constituent Assembly. In fact, apart from the Congress Party, as far as the Muslim League was concerned, after the adoption of a resolution on Pakistan in March, 1940, the Muslim League had also agreed to have a Constituent Assembly and they wanted to frame the Constitution, one, for a separate Muslim State and the other, for Rest of India.<sup>9</sup> In fact, the present Constituent Assembly was constituted under the Scheme propounded by the British Cabinet Assembly. This although, was not to the liking of the Congress Party, as could be seen from Pandit Jawaharlal Nehru's speech when he moved the first resolution before the Constituent Assembly, where he expressed the view of the Congress Party in not reposing full agreement with the Scheme propounded by the British Cabinet Mission.<sup>10</sup>

The Temporary Chairman in his inaugural address ultimately concluded the same by summing up with the words of Great Indian Poet, Iqbal, thus;

*"Yunan-o-Misr-o-Roma sab mit gaye jahan se, Baqi abhi talak hai nam-o-nishan hamara. Kuch bat hai ke hasti mit-ti nahi hamari, Sadio raha hai dusman daur-e-zaman hamara."*<sup>11</sup>

He further went on to state; *"It means that Greece, Egypt, and Rome have all disappeared from the surface of the Earth, but the name and fame of India, our country, has survived the ravages of Time and the cataclysms of ages. Surely, surely, there is an eternal element in us which had frustrated all attempts at our obliteration, in*

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<sup>9</sup> Address by Quaid-i-Azam Mohammad Ali Jinnah at Lahore Session of Muslim League, March, 1940 (Islamabad: Directorate of Films and Publishing, Ministry of Information and Broadcasting, Government of Pakistan, Islamabad, 1983), pp. 5-23.

<sup>10</sup> <http://www.hindu.com/af/india60/stories/2007081550990300.htm>

<sup>11</sup> English Translation - Greek, Egyptians and Romans have all vanished, but we are still here. There must be something special that we still exist despite the whole world against us. - Muhammad Iqbal (1873-1938)

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*spite of the fact that the heavens themselves had rolled and revolved for centuries, in a spirit of hostility and enmity towards us.*"<sup>12</sup>

After this, the Temporary Chairman called upon the Members of the Constituent Assembly to present their credentials and sign the Register. There were in total 207 Members. The Madras Presidency was represented by 43 Members, which included the Hon'ble Sri C.Rajagopalachariar, Dr.B.Pattabhi Sitaramayya, the Hon'ble Dewan Bahadur Sir Gopalaswami Ayyangar, Diwan Bahadur Sir Alladi Krishnaswami Ayyar, Shrimati Ammu Swaminathan, Sri K.Kamaraja Nadar, Shri T.T.Krishnamachari, Rev.Jerome D'Souza, Dr.V.Subrahmanyam and others. Our Sarvepalli Sir S.Radhakrishnan, who was also a Member, was representing the United Provinces. The Hon'ble Sardar Vallabhbhai J.Patel was representing Bombay, while Dr. B.R.Ambedkar was from among the Members of Bengal. Hon'ble Pandit Jawaharlal Nehru and Hon'ble Mr. Rafi Ahmad Kidwai were representing the United Provinces, Hon'ble Dr. Rajendra Prasad, was from among the Members of Bihar, while Maulana Abul Kalam Azad and Khan Abdul Ghaffar Khan and others were representing North West Frontier Province. The proceedings were then adjourned to the 10th of December, 1946.

On the 10th of December, 1946, nothing of great significance, transpired, except the presentation of nominations for the post of Permanent Chairman of the Constituent Assembly. The proceedings were then adjourned till the 11th of December, 1946.

On the 11th of December, 1946, there were certain other nominations, which were also seconded, but they also related to the nomination of Dr. Rajendra Prasad, who was declared and elected as the Permanent Chairman of the Constituent assembly<sup>13</sup>, there being no

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<sup>12</sup> *Supra* n.5

<sup>13</sup> Dr. Sachithananda Sinha: The next item of today's agenda is the election of the permanent Chairman. I have received the following nomination papers:

serious threat to challenging that position. Closely after the declaration of the said election, he was led to as Chairman by Acharya J. Kriplani and Maulana Abul Kalam Azad Sahib. Then Sir S. Radhakrishnan was called upon to be the First Speaker. A grand speech was made by Sir S. Radhakrishnan, then by the Hon'ble Diwan Bahadur, Sir N. Gopalaswami Ayyangar and others.<sup>14</sup> As there was nothing of significance on the 12<sup>th</sup> of December, 1946, the House was adjourned to the 13<sup>th</sup> of December, 1946. This day was a very memorable day, *i.e.*, when the first Resolution towards the framing of the Constitution was moved by the Great Pandit Jawaharlal Nehru who in his speech, pointed out that the resolution moved by him states that “*it is our firm and solemn resolve to have a Sovereign Indian Republic*” and he made a specific mention that the word ‘*Republic*’ was not mentioned so far, but it will have to be understood that “*a free India can be nothing but a Republic*”.<sup>15</sup> After this, he went on to read the Resolution, which consisted of eight points<sup>16</sup>. It read as under:

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*"I propose the name of Dr. Rajendra Prasad, Member Constituent Assembly, the Chairmanship of the Constituent Assembly. I have secured the consent of the nominee.*

*Proposer.-J. B. Kripalani.*

*Seconder.-Vallabhbai Patel.*

*I agree to the nomination. Rajendra Prasad."*

<sup>14</sup> Full Speech - <http://parliamentofindia.nic.in/ls/debates/vol1p3.htm>

<sup>15</sup> Excerpt from his speech on the 13th of December, 1946 - “*We say that it is our firm and solemn resolve to have an Independent sovereign republic. India is- bound to be sovereign, it is bound to be independent and it, is bound to be a republic.....Now, some friends have raised the question: "Why have you not put in the word "democratic" here.....Obviously we are aiming at democracy and nothing less than a democracy. What form of democracy, what shape it might take is another matter?..... The democracies of the present day, many of them in Europe and elsewhere, have played a great part in the world's progress... We are not going just to copy, I hope, a certain democratic procedure or an institution of a so-called democratic country. We may improve upon it. In any event whatever system of Government. we may establish here must fit in with the temper of our people and be acceptable to them....We stand for democracy, It will be for this House to determine what shape to give to that democracy, the fullest democracy, I hope....”*

<sup>16</sup> *Supra* n. 5

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*“This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution;*

*WHEREIN the territories that now comprise British India, the territories that now form the Indian States, and such other parts of India as are outside British India and the States as well as such other territories as are willing to be constituted into the Independent Sovereign India, shall be a "Union of them all; and*

*WHEREIN the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the Law of the Constitution, shall possess and retain the status of autonomous Units, together with residuary powers, and exercise all powers and functions of government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom; and*

*WHEREIN all power and authority of the Sovereign Independent India, its constituent parts and organs of government, are derived from the people; and*

*WHEREIN shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and*

*WHEREIN adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and*

*WHEREBY shall be maintained the integrity of the territory of the Republic and its sovereign rights on land, sea, and air according to Justice and the law of civilised nations; and*

*This ancient land attains its rightful and honoured place in the world and make its full and willing contribution to the promotion of world peace and the welfare of mankind." (Emphasis Supplied)*

A reading of the entire speech of Panditji would indicate and disclose that there were certain significant absentees from these constructive, yet significant discussions. He only wished that when a tremendous task was undertaken, it should be done with the cooperation of all people, as the future of India that was envisaged, was not confined to any group, Section, province or other, but comprised of all the four hundred million people of India, who were present then. In fact, he regretted that some benches were empty and some colleagues, who might have been there, were absent. What he hoped for was that in the future stages of implementation of these principles, all of them would come and join him, thereby leading to the benefit of the Assembly. Besides this, he also outlined the duty cast upon every one of the Members to remember always that they were not there to function for one party or one group, but always to think of the country as a whole and always to think of the welfare of the citizens of the country. He also made a specific reference to the absence of our Great Mahatma Gandhi. To quote,

*"There is another person who is absent here and who must be in the minds of many of us today- the great leader of our people, the father of our Nation- who has been the architect of this Assembly and all that has gone before it and possibly of much that will follow. He is not here because, in pursuit of his ideals, he is ceaselessly working in a far corner of India. But I have no doubt that his spirit hovers over this place and blesses our undertaking."<sup>17</sup>*

This Resolution was seconded by the Hon'ble Shri Purushottam Das Tandon. After his brief speech, the Resolution was moved and the Chairman brought to the notice of the Assembly, the

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<sup>17</sup> Words of Freedom, Ideas of A Nation, by Jawaharlal Nehru, p. 33

receipt of 40 amendments<sup>18</sup> received by then and as the time was 1 O' Clock and it was a Friday, it was decided to adjourn the Assembly to Monday, the 16th December, 1946.

On the 16<sup>th</sup> of December, 1946, the First Amendment proposed by the Hon'ble Dr. M.R.Jayakar, who was an Ex. Judge of the Federal Court and the then sitting Member of Superior Tribunal, namely, the Judicial Committee of Privy Council. His Amendment to the Resolution was to the following effect:

*"This Assembly declares its firm and solemn resolve that the Constitution to be prepared by this Assembly for the future governance of India shall be for a free and democratic Sovereign State; but with a view to securing, in the shaping of such a constitution, the co-operation of the Muslim League and the Indian States, and thereby intensifying the firmness of this resolve, this Assembly postpones the further consideration of this question to a later date, to enable the representatives of these two bodies to participate, if they so choose, in the deliberations of this Assembly."*<sup>19</sup>

He was very particular and wanted the Assembly proceedings to be adjourned, in order to make sure that Muslim League is given an opportunity to participate in the deliberations, sit by the side of every individual, make speeches, not ex post facto, but before and during the passing of the First Resolution. According to him, this would be the real cooperation shown by the members and not get their opinion, once everything is over and done with. He continued that it was his duty to tell the august body that the course it proposes to adopt is wrong, illegal, premature, disastrous and dangerous, and that it would lead them to trouble, should it be avoided. The Meeting went on up to 5 O' Clock and was adjourned to the 17<sup>th</sup> of December, 1946.

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<sup>18</sup> *Supra* n. 5

<sup>19</sup> <http://parliamentofindia.nic.in/ls/debates/vol1p6.htm>

On the 17<sup>th</sup> of December, 1946, the Hon'ble Mrs. Vijayalakshmi Pandit, Sister of Pandit Jawaharlal Nehru also joined the Assembly.

The Chairman then called upon Dr. B.R.Ambedkar to join the discussion. Dr. Ambedkar, though initially stated that he was not well prepared, went on to make one of the most memorable and eloquent speeches of the debates.<sup>20</sup> In that, he pointed out what Dr. Jayakar stated on the previous day that in the absence of the Muslim League and the Indian States (*the Raja's*) it would not be proper for the Assembly to deal with the Resolution. He stated as follows-

*"So far as the ultimate goal is concerned, I think none of us need have any apprehensions. None of us need have any doubt. Our difficulty is not about the ultimate future. Our difficulty is how to make the heterogeneous mass that we have to-day take a decision in common and march on the way, which leads us to unity. Our difficulty is not with regard to the ultimate, our difficulty is with regard to the beginning. Mr. Chairman, therefore, I should have thought that in order to make us willing friends, in order to induce every party, every Section in this country to take on to the road it would be an act of greatest statesmanship for the majority party even to make a concession to the prejudices of people who are not prepared to march together and it is for that, that I propose to make this appeal. Let us leave aside slogans let us leave aside words, which frighten people. Let us even make a concession to the prejudices of our opponents,*

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<sup>20</sup> A very inspiring excerpt from the speech – *"Will history repeat itself? It is this thought which fills me with anxiety. This anxiety is deepened by the realisation of the fact that in addition to our old enemies in the form of castes and creeds we are going to have many political parties with diverse and opposing political creeds. Will Indian place the country above their creed or will they place creed above country? I do not know. But this much is certain that if the parties place creed above country, our Independence will be put in jeopardy a second time and probably be lost forever. This eventuality we must all resolutely guard against. We must be determined to defend our Independence with the last drop of our blood."*

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*bring them in, so that they may willingly join with us on marching upon that road, which as I said, if we walk long enough, must necessarily lead us to unity. If I, therefore, from this place support Dr. Jayakar's amendment, it is because I want all of us to realise that whether we are right or wrong, whether that agrees with the Statement of May the 16th or December 6th, leave all that aside. This is too big a question to be treated as a matter of legal rights. It is not a legal question at all. We should leave aside all legal considerations and make some attempt, whereby those who are not prepared to come, will come. Let us make it possible for them to come, that is my appeal."*<sup>21</sup>

Thereafter, some other Speakers made their speeches. The House was adjourned to the 18<sup>th</sup> of December, 1946.

On the 18<sup>th</sup> of December, 1946, some other Speakers including the Hon'ble Diwan Bahadur Sir N. Gopalaswami Ayyangar made his point of view. The House was then adjourned to the 19<sup>th</sup> of December, 1946.

On the 19<sup>th</sup> of December, 1946, when the discussion on the resolution continued, Mr. Somanath Lahiri was making his speech. There were certain interruptions. One Member wanted to know whether Mr. Somanath Lahiri was supporting the Resolution or supporting the amendment. The Chairman got up and stated that the Members will draw their own inferences, as to whether he was supporting the Resolution or opposing it or doing neither. Thus, there were some lighter moments also in the Assembly. Mr. Alladi Krishnaswamy Ayyar, later in his speech, said that without embarking upon a meticulous examination of the different parts of the Resolution, what was important was that at this session, the Assembly must be in a position to proclaim to our people and to the civilised world, what we are after. He concluded by saying that the Resolution before the House

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<sup>21</sup> <http://parliamentofindia.nic.in/ls/debates/vol1p7.htm>

received the blessings and support of Mahatma Gandhi, the architect of India's political destiny, from the distant village in Eastern Bengal and that it would be carried with acclamation by the whole House without dissent and that Hon'ble Dr. Jayakar would prefer to withdraw his amendment, unless he had strong conscientious objection to the course suggested.<sup>22</sup>

Opportunities were also presented for certain others to speak, after which the Assembly was adjourned to the 21<sup>st</sup> of December, 1946. On 21<sup>st</sup> of December, 1946, the Assembly met and discussed about the Rules of the Assembly, after which it was adjourned to the 23<sup>rd</sup> of December, 1946, on which day the Rules were adopted.

On the 23<sup>rd</sup> of December, 1946, the various Committees were constituted. The Assembly again met on 20<sup>th</sup> of January, 1947. By virtue of the Rules, which came to be adopted, the post of Chairman was re-designated as '*President*'.

Ultimately on 22<sup>nd</sup> of January, 1947, all members of the Assembly adopted the Resolution. A proposal to constitute an Advisory Committee consisting initially of 52 Members, out of which, 12 would be representing the general Sections, and others to be represented by minorities and the tribal and excluded areas was mooted. The names of the Members were also suggested and moved, which included among others, Mr. Jagjivan Ram, Dr. B.R.Ambedkar, Shri V.I.Muniswami Pillai, Maulana Abul Kalam Azad, Khan Abdul Gaffar Khan, Sardar Vallabhbhai Patel, Sri C. Rajagopalachariar and Alladi Krishnaswami Ayyar.

On the 25<sup>th</sup> of January, 1947, after the Election of the Business Committee was adopted, thereafter, Sri Rajagopalachariar moved a resolution for the constitution of a Committee consisting of 12 Members including, Pandit Jawaharlal Nehru and Alladi

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<sup>22</sup> <http://parliamentofindia.nic.in/ls/debates/vol4p14.htm>

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Krishnaswami Ayyar the object of the Resolution being, to help the Assembly in framing the Constitution, so as to not to leave for the future, any overlapping or conflicts that might occur if various proceedings took place without the correlation in different Sections of the Assembly or otherwise.

The Resolution was then put to vote and adopted. After this, the Assembly was adjourned till April, 1947. Between the 22<sup>nd</sup> of April and 2<sup>nd</sup> of May 1947, the Report of States Committee, Committee on Union subjects, Interim Report on Fundamental Rights were put to discussion. The Assembly met again on the 14<sup>th</sup> of July, 1947 and held its meetings till the 31<sup>st</sup> of July, 1947. The various reports submitted by different committees were discussed and appropriate decisions were taken.

On the 21<sup>st</sup> of July, 1947, the Resolution relating to the present form of our National Flag was moved and adopted. The Assembly was adjourned to 14<sup>th</sup> of August, 1947.

On 14<sup>th</sup> of August, 1947, after the last stroke of mid night, the President and all the Members stood up and took the Pledge as below:

*"At this solemn moment when the people of India, through suffering and sacrifice, have secured freedom, I....., a member of the Constituent Assembly of India, do dedicate myself in all humility to the service of India and her people to the end that this ancient land attain her rightful place in the world and make her full and willing contribution to the promotion of world peace and the welfare of mankind."*<sup>23</sup>

Thereafter, the decision to intimate to the Viceroy about the assumption of power by the Constituent Assembly and the Assembly's endorsement of Lord Mountbatten's appointment as Governor-

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<sup>23</sup> <http://164.100.47.132/LssNew/cadebatefiles/C14081947.html>

General of India was conveyed forthwith to him by the President and Pandit Jawaharlal Nehru. The House also approved it by adopting a motion.

Thereafter, the National Flag was presented by the Flag Presentation Committee headed by Smt. Sorijini Naidu, Smt. Vijayalakshmi Pandit and others. After this, the National Songs '*Sare Jahan se Achcha .....*' and the first verse of '*Janaganamana Adhinayaka Jaya He*' were sung.<sup>24</sup> Then the Assembly resumed at 10.00 a.m. on the 15<sup>th</sup> of August, 1947. His Excellency, the Governor-General on this occasion, made his Address. The Assembly was then adjourned to the 20<sup>th</sup> of August, 1947. The Report of the Union Powers Committee was then submitted by its Chairman Pandit Jawaharlal Nehru, in which it was stated that the Committee had come to a conclusion, *i.e.*, a conclusion, which was also reached by the Union Constitution Committee that the soundest framework for our constitution is a federation, with a strong Centre and in the matter of distributing powers between the Centre and the Units, the most satisfactory arrangement is to draw up three exhaustive lists on the lines followed in the Government of India Act of 1935, *viz.*, the federal, the provincial and the concurrent.<sup>25</sup> These three lists prepared were also submitted as an Appendix. On the Report of the Union Power Committee, discussions were held on 21<sup>st</sup>, 22<sup>nd</sup>, 25<sup>th</sup>, 26<sup>th</sup> and on the 29<sup>th</sup> of August, 1947, a Committee to scrutinize the Draft Constitution was constituted consisting of Shri Alladi Krishnaswami Ayyar, Shiri N.Gopaldaswami Ayyangar, The Hon'ble Dr. B.R.Ambedkar and four others.<sup>26</sup> The proceedings thus, continued on the consideration of various motions, passed month after month, till the 26<sup>th</sup> of November, 1949.

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<sup>24</sup> *Supra* n. 23

<sup>25</sup> Introduction to the Constitution of India, 3rd ed., By Brij Kishore Sharma, pg. 25

<sup>26</sup> *Supra* n.25, pg. 24

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On the 26<sup>th</sup> of November, 1949, it was decided, and the President in his address pointed out the various provisions in the Draft Constitution and when he talked about the Judiciary, he stated as under:

*"We have provided in the Constitution for a judiciary which will be independent. It is difficult to suggest anything more to make the Supreme Court and the High Court's independent of the influence of the Executive. There is an attempt made in the Constitution to make even the lower judiciary independent of any outside or extraneous influence. One of our articles makes it easy for the State Governments to introduce separation of Executive from Judicial functions and placing the magistracy which deals with criminal cases on similar footing as Civil Courts. I can only express the hope that this long overdue reform will soon be introduced in the States."*<sup>27</sup>

After this, the motion was moved by Dr. Ambedkar, for the vote of the House. The motion was '*that the Constitution as settled by the Assembly be passed*<sup>28</sup>'. The motion was adopted amidst cheers.

Finally, the President authenticated the Constitution. The Constituent Assembly then stood adjourned till the 26<sup>th</sup> of January, 1950. However, on the 24<sup>th</sup> of January, 1950, the Song '*Jana Gana Mana*<sup>29</sup>' was adopted as the '*National Anthem*'. Dr. Rajendra Prasad was elected as the First President of India, unopposed. All the members then signed the Constitution. Then the Constituent Assembly was adjourned, *sine die*.

This is how 26<sup>th</sup> January assumes greater significance in the Indian History, i.e. the Day on which the Indian Constitution in its un-amended form came to be adopted by the Constituent Assembly and

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<sup>27</sup> Dr. Rajendra Prasad: Correspondence and Select Documents, by Valmiki Choudhary – 1984, pg. 242

<sup>28</sup> <http://parliamentofindia.nic.in/ls/debates/vol11p12.htm>

<sup>29</sup> <http://parliamentofindia.nic.in/ls/debates/vol12p1.htm>

dedicated and delivered to our Nation and its people. In total at its commencement, there were 395 Articles in 22 parts and 8 schedules. Subsequently, so far 97 amendments<sup>30</sup> came to be made as between 1951 and 2012.

Thus, the *SOVEREIGN, SOCIALIST, SECULAR, DEMOCRATIC, REPUBLIC*<sup>31</sup> India came into being and the Constitution with its Preamble<sup>32</sup>, ensured that it would secure to all its citizens;

*JUSTICE, Social, economic and Political;*

*LIBERTY of thought, expression, belief faith and*

*Worship;*

*EQUALITY of status and of opportunity; and to*

*Promote among them all;*

*FRATERNITY assuring the dignity of the individual*

*And the unity and integrity of the Nation.*

### **3. SALIENT FEATURES OF OUR CONSTITUTION**

The salient features of the Constitution can be gathered from certain relevant Articles. Under Part-III, the Fundamental Rights and

<sup>30</sup> 97th Amendment to Article 19 and added part IXB on the 12 of January, 2012. The objective of the amendment was to encourage economic activities of cooperatives which in turn help progress of rural India. It is expected to not only ensure autonomous and democratic functioning of cooperatives, but also the accountability of the management to the members and other stakeholders.

<sup>31</sup> Subs. By the Constitution (42nd Amendment) Act, 1976, sec. 2, for “*SOVEREIGN, DEMOCRATIC, REPUBLIC*” (w.e.f. 3-1-1977)

<sup>32</sup> This particular extract from this judgement would worthwhile to note – “*Constitution is not to be construed as a mere law, but as the machinery by which laws are made. A Constitution is a living organic thing which, of all instruments has the greatest claim to be construed broadly and liberally*”; *Goodyear India v. State of Haryana*, AIR 1990 SC 781: (1990) 2 SCC 712, para 17

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the Safeguard of it are provided. Article 14 deals with '*Equality before Law*'<sup>33</sup>. Article 19 provides for protection of '*Freedom of Speech, etc.*'<sup>34</sup> Article 21 provides for protection of '*Life and Personal liberty*'<sup>35</sup>. Article 25 provides the freedom to practice any religion<sup>36</sup>. Article 30 prescribes the right of minorities to establish and administer educational institutions<sup>37</sup> and as a crown to all these Articles; Article 32 provides the remedies for enforcement of the Rights conferred under Part III<sup>38</sup>. The significance of Article 32 can be better stated by quoting the Speech of Dr. B.R.Ambedkar made in the Constituent Assembly, which I shall refer to shortly<sup>39</sup>.

Part-IV deals with Directive Principles of State Policy. The various Articles contained in this Part are obligations of the State towards the fulfilment of which, every state can be directed and interpreted. A reading of the Articles 38 to 51 would show that conscious, honest and sincere enforcement of the State machinery in its attempt to achieve the above directives would ensure the finest society for a human being to lead a peaceful and harmonious living.

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<sup>33</sup> The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

<sup>34</sup> 1) All citizens shall have the right- (a) to freedom of speech and expression;(b) to assemble peaceably and without arms;(c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; and (f) omitted (g) to practice any profession, or to carry on any occupation, trade or business.....

<sup>35</sup> No person shall be deprived of his life or personal liberty except according to procedure established by law.

<sup>36</sup> (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.....

<sup>37</sup> (1)All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.....

<sup>38</sup> (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.....

<sup>39</sup> *Infra*, n. 68

Part IV-A<sup>40</sup> deals with the Fundamental Duties that every citizen of India should perform which expects every Indian citizen to follow in order to achieve the goals set out in our Indian Constitution.

Part V deals with the Union, namely, the Central Government Organisation about the Executive set up, the Council of Ministers, the pivotal post of the Attorney General of India<sup>41</sup>, the conduct of the Government business<sup>42</sup>, the Parliament set up<sup>43</sup>, the Legislative Powers of the President<sup>44</sup>, the Judiciary<sup>45</sup> and the Office of the Comptroller and Auditor General of India<sup>46</sup>. Provisions have been made under this Chapter in Articles 52 to 151.

Part VI<sup>47</sup> deals with the 'States' with identical set up like that of the 'Union'. In that, I would like to state that Article 235 of the Constitution invests '*the control*'<sup>48</sup> with the respective High Courts. Thereby making it clear that the independence of the Judiciary is maintained at all levels to ensure that justice always remains supreme and available to the common man at times of need.

Part VII<sup>49</sup> consists of one single Article 238 which concerns with the States in Part III of the First Schedule and the said Article was omitted by the Constitution 7th Amendment Act 1956 since the

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<sup>40</sup> Added by the Constitution (42nd Amendment) Act, 1976, sec. 11 (w.e.f. 3-1-1977)

<sup>41</sup> Article 76

<sup>42</sup> Article 77

<sup>43</sup> Article 79

<sup>44</sup> Article 123

<sup>45</sup> Article 124

<sup>46</sup> Article 148

<sup>47</sup> The words "*IN PART A OF THE FIRST SCHEDULE*" omitted by the Constitution (Seventh Amendment) Act, 1956, sec. 29 and sch. (w.e.f. 1-11-1956)

<sup>48</sup> High Court of Judicature at *Bombay v. Shirish Rangrao Patil*, AIR 1997 SC 2631: (1997) 6 SCC 339: (1997) 4 SLR 321: 1997 SCC (L&S) 1486

<sup>49</sup> Rep. By the Constitution (7th Amendment) Act, 1956, sec. 29, and sch. (w.e.f. 1-11-1956)

entire First Schedule was substituted and the division of States into Part A and B was done away with.

Part VIII<sup>50</sup> deals with '*Union Territories*'. Part IX<sup>51</sup> deals with the '*Panchayats*'. Part IX-A<sup>52</sup> deals with the '*Municipalities*'. Part X deals with the Scheduled and Tribal Areas<sup>53</sup>, Part XI consisting of Articles 245 to 263 deals with the Relations between the Union and the States which prescribes the distribution of Legislative Powers and Administrative Relations.

Part XII deals with '*Finance, Property, Contract and Suits*'<sup>54</sup>. Part XIII deals with Trade, Commerce, and Intercourse within the Territory of India<sup>55</sup>.

Part XIV deals with the Services under the Union and the States. In that Part Article 315<sup>56</sup> concerns with Public Service Commission for the Union and for the States, its functions and other related matters. Part XIV-A was introduced by the Constitutional 42nd Amendment Act 1976 with effect from 3-1-1977, under which, the Administrative Tribunals came to be set up.

Part XV deals with '*Elections*', of which Article 324<sup>57</sup> which comes under the said Part provides enormous powers to the 'Election

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<sup>50</sup> Subs. By the Constitution (7th Amendment) Act, 1956, sec. 17, for article 239 (w.e.f. 1-11-1956)

<sup>51</sup> The territories in Part D of the 1st Sch. And other territories not specified in that sch. Was rep. by the Constitution (7th Amendment) Act, 1956, sec. 29 and sch. And ins. By the Constitution (73rd Amendment) Act, 1992, sec.2 (w.e.f. 24-4-1993)

<sup>52</sup> Ins. By the Constitution (64th Amendment) Act, 1992, sec. 2 (w.e.f. 1-6-1993)

<sup>53</sup> Articles 244 - 244A

<sup>54</sup> Articles 264 – 300A

<sup>55</sup> Articles 301 - 307

<sup>56</sup> (1) Subject to the provisions of this article, there shall be a Public Service Commission for the Union and a Public Service Commission for each State.....

<sup>57</sup> (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under

Commission' and Article 329<sup>58</sup> prescribes bar of interference by Courts in electoral matters. Part XVI deals with special provisions relating to certain classes, such as, Reservation of Seats for SC and ST in the House of People<sup>59</sup>, and similar such provisions for Anglo Indians and Backward Classes<sup>60</sup>. Part XVII<sup>61</sup> deals with the '*Official Language*'.

Part XVIII contains '*Emergency Provisions*' which includes Article 356<sup>62</sup> of the Constitution. The provision where under in case of failure of constitutional machinery in States, the President can proclaim and assume to himself all or any of the functions of the Government of the State<sup>63</sup>.

Part XIX contains miscellaneous Articles such as Protection of President and Governor<sup>64</sup>, etc. and under Part XX, Article 368 is provided which prescribes the power of Parliament to amend the Constitution and the procedure therefor<sup>65</sup>. Part XXI deals with

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this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission).....

<sup>58</sup> (a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any Court;.....

<sup>59</sup> Article 330

<sup>60</sup> Article 331

<sup>61</sup> Articles 343 - 351

<sup>62</sup> (1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion, he may, by Proclamation, made a declaration to that effect [in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation].....

<sup>63</sup> Article 356 - (1) If the President, on receipt of report from the Governor of the State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with 'he provisions of this Constitution, the President may be Proclamation.....

<sup>64</sup> Article 361

<sup>65</sup> Subs. By the Constitution (24th Amendment) Act, 1971, sec. 3, for "*procedure for amendment of the constitution.*"

*'Temporary, Transitional and Special Provisions'*<sup>66</sup>. While, the last Part XXII<sup>67</sup>, contains Articles 393 to 395 of the Constitution.

**4. SIGNIFICANT ROLE PLAYED BY THE JUDICIARY IN EVOLVING OUR CONSTITUTION**

As far as the successful working of our Constitution was concerned, we all can proudly proclaim as members of the legal fraternity that when it came to the question of either implementation of the constitutional protection or safeguarding the interest of the State, or for that matter, the continued existence of our independent India when there was much turmoil, Judiciary played a pivotal role. In fact, as I pointed out earlier, Dr.Rajendra Prasad as the President of the Constituent Assembly was pleased to remark that in the constitution itself, they have provided for a '*Judiciary*' which would be independent in its function. In fact, the Hon'ble President remarked that it was difficult to suggest anything more to make the Supreme Court and High Courts independent of the influence of the Executive. Thus, great confidence was reposed. While placing the judiciary as one of the pivotal pillars of our Constitution, the Members of the Constituent Assembly ensured that the ideals of the Constitutional provisions are maintained and no stone was left unturned, in the pursuit of the said goal. I would like to state that when we talk of the judiciary, it does not refer to Judges alone, but would definitely include, the joint effort of both the Bench and the Bar together and also the assistance of everyone connected with the judiciary, who contribute in the functions of the judicial forum are essential. With that view, when we trace out the five decades of our experience after the framing of our Constitution, I can proudly state that at every stage of the crisis, it was the judiciary which came to the rescue and saw that things were kept in order. In light of this context, it will not be out

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<sup>66</sup> Subs. By the Constitution (13th Amendment) Act, 1962, sec. 2, for "Temporary and Transitional Provisions" (w.e.f. 1-12-1963)

<sup>67</sup> Ins. By the Constitution (58th Amendment) Act, 1987, sec. 2 (w.e.f. 9-12-1987)

of place to quote what the Father of our Nation, the Great *Mahatma Gandhi* said-

*"I shall strive for a constitution, which will release India from all thralldom and patronage, and give her, if need be, the right to see. I shall work for an India, in which the poorest shall feel that it is their country in whose making they have an effective voice and India in which there shall be no higher class and low class people an India in which all communities shall live in perfect harmony. There can be no room in such India for curse of untouchability women shall enjoy the same rights as men. All interests not in conflict with the interests of the dumb millions will be scrupulously respected."*<sup>68</sup>

From a plain reading of the above excerpt, we could sense his broad vision, the high amount of magnanimity and the keen interest for maintaining justice for the fellow citizens of our country, irrespective of their caste, creed, colour or gender. The words spoken by him, were at a time when we were about to achieve independence *i.e.* when a sovereign India was about to be born.

It will also be appropriate to refer to The Rt. Hon'ble Lord Bingham of Cornhill, Lord Chief Justice of England and Wales, in his '*Law Day Lecture*' on the occasion of the Golden Jubilee Celebrations of the Supreme Court of India on 26-11-1999 at Vigyan Bhavan, New Delhi, when he quoted as to what Dr. B.R.Ambedkar said in the Constituent Assembly about the central importance of Article 32 of the Constitution:

*"I am very glad that the majority of those who spoke on this article have realised the importance and significance of this article. If I was asked to name any particular article in this Constitution as the most important - an article without which the Constitution would be a*

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<sup>68</sup> The Selected Works of Mahatma Gandhi , Vol. V - The Voice of Truth, Young India, 10-9-31, p. 255

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*nullity - I could not refer to any other article except this one. It is the very essence of the Constitution and the very heart of it and I am glad that the House has realised its importance.*"<sup>69</sup>

The Lord Chief Justice concluded his lecture by quoting what the then President of Bar Association of India, Mr. Fali Nariman<sup>70</sup> said in his speech, to quote-

*"I leave the last word to the President of the Bar Association of India who, of all people, is well placed to pass judgment<sup>71</sup>:*

*".... I believe that the Judges of the nineties and the Judges of today are somehow more important than the Judges of yesteryears simply because they have been called upon to discharge and have readily assumed, far greater responsibilities than their predecessors ever did. Over recent years 'judging' is no longer what it used to be. Judges have now a dominant role in society - and because of this they are more often criticised for what they do and what they say - and yet today, the highest Judiciary is also held in highest public esteem. This may sound paradoxical, but it is not. The public turns to the Judiciary, and ultimately to the highest Judiciary, more and more for the resolution of its problems - more than it ever did in the past."<sup>72</sup>*

Then, the question that would arise for consideration is how far have we been able to achieve the objectives and realize the goals as set in our Constitution? The implementation of the above said objectives would depend upon the performance of the three wings of the State, namely the Legislature, the Execution and the Judiciary. The Legislature is the organ of the Government in a democracy, which gives shape and direction to national policies and programmes. The

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<sup>69</sup> (2000) 1 SCC (Jour) 29

<sup>70</sup> President during 1991

<sup>71</sup> The Business of Judging: Selected Essays and Speeches: 1985-1999, By Tom Bingham, pg. 127

<sup>72</sup> Nariman, op, cit., at 27 (Supra, n. 70)

numerous legislative measures in the field of personal laws, marriage, position of woman, children and down-trodden, labour welfare, health and land reforms, industrialisation, taxation, etc., have been enacted by the Parliament and the State Legislatures, to cherish the goal of the paramount objective, namely, to secure to all the citizens, justice, social, economic and political. Very many legislations such as, Land Reforms Act<sup>73</sup>, Untouchability Act<sup>74</sup>, Children Labour (Prohibition and Regulation) Act<sup>75</sup>, the Factories Act<sup>76</sup>, Motor Transport Workers Act<sup>77</sup>, Plantation Labour Act<sup>78</sup>, Mines Act<sup>79</sup>, Industrial Disputes Act<sup>80</sup>, Women Welfare Legislations and other welfare legislations came to be enacted. Apart from these legislations, several other Planning Schemes such as, the Five Year Plans<sup>81</sup> came to be introduced with the above object, to achieve the constitutional goals. The various aforementioned legislations and the plans formulated by the Legislative Wing of the State, were put into effect with a view to achieve the objectives of our freedom fighters, whose goals were for a free India, to feed the starving millions, to clothe the naked masses, and to afford to every Indian, of any income, high or low, the fullest opportunity to develop himself according to his capacity. The spirit contained in the Objective Resolution makes it amply clear that our final aim after obtaining freedom from the British yoke was to establish a classless society with equal social, economic and political justice to all. It was with this objective, the Legislative Wing of our State brought into effect numerous legislative measures in the field of personal laws, marriage, position of woman, children and down-trodden, labour welfare, health and land reforms. The Executive Wing

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<sup>73</sup> Act No. 2 of 1977

<sup>74</sup> Act No.22 OF 1955. [8th May, 1955]

<sup>75</sup> Act, 1986 of [61 of 1986]

<sup>76</sup> Act No. 63 of 1948

<sup>77</sup> Act 27 of 1961

<sup>78</sup> Act LXIX of 1951

<sup>79</sup> Act No. 35 of 1952

<sup>80</sup> Act No. 14 OF 1947

<sup>81</sup> <http://planningcommission.nic.in/plans/planrel/fiveyr/welcome.html>

of the State had also made an effective beginning soon after attaining independence to execute policies and programmes designed by the legislative wing from time to time with regard to the actualization of the goal of distributive justice. Thus, the Executive Wing of the State also plays a vital role in aiding the other Wings of the State to achieve the constitutional goal. Then comes the other important component trinity of the State namely, '*The Judiciary*'.

In our Constitution Scheme, the Judiciary has been assigned the role of ensuring and enforcing distributive justice in accordance with the commitment envisaged in the Preamble. The Judiciary has been put under the constitutional obligation to hold the scale of justice in any legal conflict between the rich and the poor, the mighty and the weak, and function without fear or favour, by keeping all authorities legislative, executive, administrative, judicial and quasi-judicial within their respective bounds. Therefore, the need of the hour is that the Judiciary in India must capture the imagination of the lawmakers because of its special responsibility for safeguarding the spirit of distributive justice contained in our national Charter. It is for this reason, the Indian public by and large or on the side of the Judges and hold the higher Judiciary today, in the highest esteem. Large Sections of the people increasingly turn to the Judiciary, the penultimate forum in the land, for the resolution of their problems, more than they have ever done in the past. In the words of Justice V.R.Krishna Iyer;

*"Pragmatically speaking, Justice is what Justice does, and Justice, says Justinian, 'is the earnest and constant will to render to every man his due'. And so, in a just society, what is due to an individual or group or the collective community, shall be rendered."*<sup>82</sup>

I also happened to read the book of Justice Krishna Iyer, titled- "*Law versus Justice*", where he quoted the following beautiful passage of Robert Ingersol, who puts it as thus:

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<sup>82</sup> 1977 AIR 2328, 1978 SCR (1) 423

*"A Government founded on anything except liberty and justice cannot stand. All the wrecks on either side of the stream of time, all the wrecks of the great cities, and all the nations that have passed away--all are a warning that no nation founded upon injustice can stand. From the sand-enshrouded Egypt, from the marble wilderness of Athens, and from every fallen, crumbling stone of the once mighty Rome, comes a wail as it were, the cry that no nation founded on injustice can permanently stand"*<sup>83</sup>

To quote another passage in the same book of Mr. Justice Krishna Iyer-

*"In a country where executive and legislative excesses are an obsession with the people where social inequalities and power misuse are writ large, the judiciary should be not only above board--are they?--but also committed to fire-fighting operations wherever people suffer injustice. Not umpires in a boxing bout in a strictly adversary system but activist dispensers of all constitutional means to do justice, individual and collective, by affirmative action, community education in right and justice through the forensic process, mobilisation of the people to join the administration of justice."*<sup>84</sup>

Nowadays litigating in Court has become an indispensable part of social behaviour. Judicial intervention is invariably solicited to run day-to-day administration in most of the fields. There has been a growing tendency to make strategic use of the Judiciary and to exploit procedural niceties. At this juncture, I would like to clarify one misconception about the Judges and the Judiciary. People equate judiciary with judicial system and they treat both as one and the same. There I should state, is a misnomer. The Judicial system is a mechanism of dispensation of justice, whereas judiciary is an

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<sup>83</sup> Liberty and the Great Libertarians, By Sprading, Charles T., pg. 273

<sup>84</sup> Justice Krishna Iyer, *Law Versus Justice*, 1981.

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institution, which operates the system. Judges, lawyers, litigants, witnesses, they being the components of judiciary, are the operators.

There is also another misnomer, which is often referred to and quoted to as, '*judicial activism*'. Through the catena of celebrated decisions, which are published, the society was given an impression about the concept of Judicial Activism. In most cases, judiciary has activated the law, which was lying idle. By revamping or stimulating the process of law, the regime of law has become more bright and effective. Through certain decisions, they have put life in the law. Hence, the activism is only of law, and not of the judiciary.

While we are on this subject, I would also like to trace the history of the Judiciary. Atleast, in so far as the state of Tamil Nadu was concerned, I could gather from the Report of the First National Judicial Pay Commission<sup>85</sup>. It was originally known as '*Madras Patnam*' and the present site of '*Fort St. George*', was a grant made by the Hindu Raja of Chandragiri called '*Chinnappa Naickar*' for the East India Company. The history of the Courts of Law in Madras falls into three distinct periods. The first period was from 1600 to 1800; the second period was from 1801 to 1862 and the third period stated to have synchronized with the history of the present High Court. In the first period, there were Choultry Courts, which tried petty cases, Civil or Criminal. The important cases, where English subjects were involved, were remitted to England, while they persuaded the local Naik to deal with cases in which Indians were the parties. It was only the Charter dated 9th August, 1683<sup>86</sup>, granted by Charles (*the*) II, were the qualifications of the persons to preside in the Court, emphasized. It is stated that on 22nd July, 1687, the First legally qualified person, Sir John Biggs, entered upon his duties as Judge-Advocate. Then came Mayors Court and the Charter constituted the Mayor and Aldermen

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<sup>85</sup><http://www.manupatra.com/downloads/shetty%20commission%2019.04.02/shetty%20commission%2019.04.02/chapters/chapter%20toc.htm>

<sup>86</sup> Annals of the Honorable East-India Company, Volume 2, By John Bruce, pg. 495

into a Court of Record. The Mayor's Court was constituted in Madras in 1688. An appeal was provided from the Mayor's Court to the Governor and Council. In 1726, the Old Mayors Court were removed and New Mayors Court was established. A New Court of Small Causes called the '*Sheriff's Court*'<sup>87</sup> was created. Again on the 21st July, of 1729, the Sheriff's Court was abolished<sup>88</sup>. In 1763, the Mayor's Courts were re-established under the revised Letters Patent. Then came the Court of Recorder of Madras on 1-11-1778 and thereafter, on 26-12-1800, the Letters Patent establishing a Supreme Court of Judicature at Fort St. George, was issued. The new Supreme Court was to be a Court of record. It was invested with a Jurisdiction similar to the Jurisdiction of the Kings Bench in England. Between 1801 and 1862, Courts of two distinct descriptions existed in the Presidency of Madras. One was presided over by the Judges appointed by the Monarch of England, and the other one presided over by the Judges appointed by the East India Company. Pursuant to the powers vested with the Queen of England, in an enactment passed on 6th August, 1861, the High Court of Judicature at Madras came to be established on 16-6-1862 by virtue of Letters Patent published in the Fort. St. George Gazette of 19th August, 1862<sup>89</sup>. The New High Court was opened on Friday, the 15th August, 1862. The High Court was also conferred with the powers of Superintendence over Subordinate Courts and to frame Rules. On the emergence of the High Court of Judicature at Madras, the Supreme Court of Madras and other Courts were abolished.

##### 5. INSTANCES OF JUDICIAL SUPREMACY

In the context of the predominant role played by the Judiciary, which includes both the Bench and Bar, I feel it appropriate to refer to

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<sup>87</sup> Madras: Chennai a 400-year Record of the First City of Modern India, edited by Subbiah Muthiah, pg. 484

<sup>88</sup> *Supra*, n. 86

<sup>89</sup> Glimpses of The Justice System Of Presidency Towns (1687-1973), Mina Choudhuri, pg. 196

an anecdote mentioned in one of the articles of a '*Festschrift*'<sup>90</sup>. *Festschrift* on Nani Palkhivala, a renowned Jurist who appeared in the landmark case in the year 1972, popularly known as "*Kesavananda Bharati Versus State of Kerala*"<sup>91</sup>, was a case challenging the 24th, 25th and 29th Amendments to the Indian Constitution, which in fact, sought to further increase the States bar to abridge fundamental rights in the name of social justice. That case came to be heard by 13 Judges of the Honourable Supreme Court, the largest Bench ever convened, in the history of the Supreme Court of India.

Through this case, the doctrine of basic structure of the Constitution was formulated. This doctrine has been much acclaimed by those who shared the views of Nani Palkhivala's concern over the progressive civil bar in India. Through this doctrine, although the Parliament was free to amend any part of the Constitution, (including the fundamental rights) they could not alter the "*basic structure*" or framework of the Constitution. However, in 1975, during the state of emergency, when there was a move to review the decision of the *Kesavananda Bharati* case, by convening yet another Bench of 13 Judges for that purpose, Mr.Palkhivala, strongly opposed the move, arguing against the review for two full days and on the third day, the Bench was dissolved and the review was dropped. It is one of the more memorable instances to be quoted to proclaim the supremacy of the Judiciary in its endeavour to establish justice. Why I referred to this instance was to highlight the initiative and concern of a Member of the Bar to see that the basic structure of the Constitution is not touched by all means.

In the field of Agrarian Reforms, the Judiciary showed its considerable response. To be true, the Right to property has always been the bone of contention between the Supreme Court and the Parliament. The first challenge to the Constitution came when the

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<sup>90</sup> "*a collection of writings published in honour of a Scholar*"

<sup>91</sup> AIR 1973 S.C.1461

Supreme Court held the abolition of Zamindari as void on the ground that it discriminated between the rich and the poor in determining the compensation for the acquired property<sup>92</sup>. Subsequently, in various judgments ending with *R.C. Cooper v. Union of India*<sup>93</sup>, the Court rejected the view of the Constituent Assembly that on adequacy of compensation the field of judicial review is narrow. The difficulties arose because the Court had given a very wide connotation to clauses (1) and (2) of Article 31 regarding the limitations against compulsory acquisition of the property. The Judicial decisions interpreting fundamental rights raised serious difficulties in the implementation of the social revolution programmes, such as, fixing the limits on agricultural holdings, conferment of rights on tenant, property planning of urban and rural area, clearance of slums, acquisition of property for commercial or industrial undertaking in public interest. Certain similar enactments like that of the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961 were struck down by the Judiciary. In the famous Judgment *Golak Nath v. State of Punjab*<sup>94</sup>, the Court construed the term "*compensation*" to mean "*just*" and "*equivalent*" compensation for the property acquired. Following this standard, the Court held the statutory provisions on compensation *ultra-vires* on the ground that it was arbitrary and had no relation to the market value of the land on the date of acquisition, which might be much more than on the earlier date prescribed. The Judiciary's emphasis on the payment of full market value really created a great hurdle for the State. This resulted in certain constituent amendments including the introduction of a major change in Article 31(2). The amendment withdrew the powers of the Court to determine the adequacy of the compensation. It was made the sole business of the legislature to determine the amount of compensation or to lay down the principles or the manner in which it will be paid. Ultimately, by

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<sup>92</sup> A.I.R.1954 S.C.392 (*Kameshwar Singh vs State of Bihar*)

<sup>93</sup> A.I.R. 1970 S.C.564

<sup>94</sup> A.I.R.1967 S.C.1643

the 25th Amendment Act 1971, the Parliament was empowered to determine the quantum of compensation for property for public purpose and sought to protect laws giving effect to the policies of the State, towards securing the object of the directive specified in Article 39(b) and (c). It was on that juncture, it is claimed that in the famous Kesavananda Bharti's case, the Court echoed a novel philosophy by holding that the entire concept of the Fundamental Rights and specially that of property Rights should have social utility and be social service oriented. The Court said that property could justifiably be conditioned in the context of demand of the society at large if a community of equals is to be established, which is an elaboration of the ideal of justice-economic, social and political. Thus, the Court upheld the validity of Twenty-Fifth Amendment Act, 1971 and allowed precedence to the Directive Principles contained in Article 39(b) and (c) over Fundamental Rights to discourage concentration of the ownership of material resources and the means of production. In the words of Mr. Justice S.M. Sikri, former Chief Justice of India;

*"Perhaps the best way of describing the relationship between the Fundamental Rights of individual citizens, which imposes corresponding obligations upon the State and Directive Principles, would be to look upon the Directive Principles as laying down the part of the country's progress towards its allied objective and aims stated in the Preamble, with Fundamental Rights as the limits of that path, like the banks of a flowing river which could be mended or amended by the displacement, replacement or curtailment or enlargements of any part according to the needs of those who had to use the path."*<sup>95</sup>

His Lordship Mr. K.K. Mathew, on his part, went upon saying;

*"if the state fails to create conditions in which the Fundamental Freedom could be enjoyed by all, the freedom of the few*

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<sup>95</sup> *Supra*, n. 90

*will be at the mercy of many and then all the freedom will vanish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it.*"<sup>96</sup>

The Court held that in an organized society, no right can be absolute; right of one must be consistent with the right of the others. When it is not so the state has to step in and correct the imbalance and disharmony. In fact, *Justice Mathews*, in the course of his Judgment, said, "*Trust in the elected representative is the cornerstone of the democracy, when that trust fails everything else fails.*"

It was revealed that great attention was paid by the apex Court with regard to these amendments and it in turn avoided major direct confrontation between the Parliament and the Judiciary. The Judicial approach to the agrarian reforms became quite clear in the case of *Minerva Mills v. Union of India*<sup>97</sup>, wherein the Forty-second Amendment Act, 1976 was challenged. The Act was an attempt to make the Directive Principles more comprehensive and give them precedence over those Fundamental Rights which had been allowed to be relied upon to frustrate socio-economic reforms for implementing the Directive Principles. The text of the amendment was that no law giving effect to the policy of the State, towards securing all or any of the principles laid down in part IV, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Articles 14, 19 and 31. Similarly Article 368 of the Constitution was amended to the effect that after clause (3) the following words were added "*No amendment of this constitution (including the provision of Part III) made or purporting to have been made under this Article (whether before or after the commencement of Section 55 of the Constitution (Forty-Second Amendment) Act, 1976) shall be called in question in any Court on any ground.*" The after effects of these amendments were that all the Directive Principles of

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<sup>96</sup> *Supra*, n. 90

<sup>97</sup> A.I.R. 1980 S.C.1789

State Policy were given primacy over the Fundamental Rights, and the Parliament was given ultimate power to amend the constitution with the objective in mind that there was an urgent need to accomplish the goal of distributive justice without further loss of time to avoid frustration and provide timely relief to the poverty-ridden people. The Court, however, did not agree with these amendments and held Section 55 of Forty-second Amendment Act, 1976 as void and being beyond amending powers of the Parliament. The Parliament cannot, under Article 368 expand its amending power as to acquire for itself the right to repeal or abrogate the constitution or to destroy its basic structure. The Judicial trend reflected in the *Minerva Mills* case discloses that the Court made a sincere attempt to harmonize Parts III and IV by importing the Directive Principles in the construction of Fundamental Rights. The Supreme Court thus, held that where two judicial choices were available, the Court must give preference to social philosophy contained in part IV of constitution. The Court has shown a great sense of responsibility to uphold agrarian reforms and its legislation in its subsequent cases, with a zeal and to bring a balance between the individual and social interest.

## 6. CONCLUSION

If we take a close look at the Constitution, we will find that the rule of law runs through the entire fabric of the Constitution like a golden thread. Whatever change we wish to bring about in the socio-economic structure, the same has to be through the process of law and in order to achieve the new socio-economic structure where the little Indian will be able to enjoy the fruits of freedom; law has to play a definitive and positive role. It is, therefore, in the fitness of things that on the day on which the Constitution was adopted and enacted, we should emphasize and highlight the fundamental role of law in society and remind ourselves of the great and sublime purpose which law is intended to serve in a republic governed by the rule of law. We must realize that the end of law must be justice. Law and justice cannot afford to remain distant neighbours. There must be harmony between

law and justice. We must, in all seriousness, ask ourselves the question as to how far we have been able to fulfil the mission of law to deliver justice and to what extent we have succeeded in using law as a vehicle for ensuring social justice to the large masses of people in the country. If we look to the balance sheet of the functioning of the judiciary after the Constitution of India came into force, we can see that there are several achievements. At the same time, there are some serious problems which need our urgent attention. Our justice delivery system in spite of innumerable drawbacks and failings, still commands high esteem and the citizens have placed the judiciary on a high pedestal. We have to ensure that we come up to their expectations; we have to preserve the trust, confidence and faith reposed by the people of this country. As *Jan Hus*, a reformer and a national hero of the Czech people, wrote in a prayer, "*Seek the truth, listen to the truth, teach the truth, live the truth, abide the truth and defend the truth - unto death!*" Hence, "*Let justice rule though the heavens fall*" is the credo by which we decry tyranny and preserve our freedoms under law, which is the system of law we celebrate as, '*Law Day*'.

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RESPONSIBILITY

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**Article**

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CHANGING DIMENSIONS IN THE CONCEPT OF CORPORATE SOCIAL  
RESPONSIBILITY

BY  
HON'BLE JUSTICE M. JAICHANDREN<sup>1</sup>

**ABSTRACT**

*The concept of Corporate Social Responsibility has been a much talked about and debated phenomenon in legal parlance as the intertwining of business practicality and human values has often led to a multitude of legislations, most of which have done little to address the issues surrounding CSR. The maintenance of global standards of responsibility is essential for the improvement of the human personality, better work standards and overall improvement of the human rights situation in our country and beyond. The current paper takes a practical view of the persistent and long term problems associated with CSR and gives a definitional structure to the concept. The paper then deals with a number of examples of how the CSR model can be made effective, its long term impact on International Business and the methods by which it can help people with disabilities. It concludes by setting out a stratagem to make a more effective and practical method of employing CSR and implementing it.*

**1. INTRODUCTION**

Corporate Social Responsibility (CSR) is the responsibility recognized by the companies for acting in a socially responsible manner. In fact, there is no single universally accepted definition of CSR. It is generally understood to mean business decision making

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<sup>1</sup> Sitting Judge, Madras High Court

linked to ethical values, legal compliance and respect for people, community and the environment. It includes the treating of its employees fairly, with respect and imposes a responsibility on the company to operate with integrity and in an ethical manner in all its business dealings with customers, suppliers, lenders and others. It creates ethical pressure on the companies to give back to the society, at least a part of what they had gained from it. In general, self-regulation and cleansing, undertaken voluntarily by corporations, is known as corporate social responsibility (CSR), or ‘*corporate citizenship*’<sup>2</sup>. The 2001 European Commission Green Paper on CSR defines this responsibility as “*a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment*”<sup>3</sup>. In the 1980’s a network of companies came together to establish Business in the Community (BITC)<sup>4</sup>. Later, they launched the Percent Club, whose members donate one percent of the pre-tax profits to the community. A set of indicators have been developed by BITC for companies wanting to measure and report CSR. Furthermore, bilateral investment treaties (‘*BITs*’) emerged as a means of providing basic guarantees.<sup>5</sup>

## **2. SIGNIFICANCE AND DEVELOPMENT OF CSR IN THE INTERNATIONAL ARENA**

There are two types of Corporate Social Responsibility reports, namely, those where the companies may include the CSR report in their annual report and accounts or may publish it separately called as

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<sup>2</sup> Don Tapscott & David Ticoll, *The Naked Corporation: How The Age Of Transparency Will Revolutionize Business* 68-73 (2003).

<sup>3</sup> Promoting a European Framework for Corporate Social Responsibility: Green Paper, COM(01)366 final at 5,

<sup>4</sup> Business in the Community stands for responsible business, csr, corporate social responsibility.

<sup>5</sup> See Jeswald Salacuse, *BIT by BIT: the Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries*, 24 *Int’l Law.* 655, 659–60 (1990)

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the '*Social and Environmental Report*' or a '*Sustainability Report*'. These reports would indicate a company's commitment towards ethical behaviour and highlight their progress towards achieving their strategic CSR objectives. CSR reports and programs are put in public domain as a part of the damage control mechanism against attack by activist groups. This is supplemented by the initiatives undertaken by the International community, in combating unethical practices by using a number of instruments and guidelines. The International business community was made subject to pressures to adopt global standards of responsibility for TNCs and these were generally channelled into the formulation of non-binding guidelines or codes by intergovernmental organizations<sup>6</sup>. The most influential public international CSR instruments, which have an impact on the International scenario, are the OECD Guidelines, the UN Global Compact, and the 1998 ILO Declaration on Fundamental Principles and Rights at Work. The guidelines, especially those of the OECD are essentially guidelines to the Multinational Enterprises, whereby OECD States have agreed to adhere to the Guidelines and encourage their companies to observe them wherever they operate. The Guidelines were first published in 1976 and most recently updated in 2000<sup>7</sup>. They contain recommendations on human rights, employment and industrial relations, environment, bribery, consumer interests, science and technology, competition, and taxation. There are also a plethora of human rights instruments which help in enforcing corporate social responsibility and making good its voluntary character. These include the OECD Guidelines, the UN Norms on the Responsibilities of Transnational Corporations and other Business

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<sup>6</sup> Many of these are conveniently gathered together in United Nations Conference on Trade and Development, *International Investment Instruments: A Compendium* (1996).

<sup>7</sup> Stephen Tully, *The 2000 Review of the OECD Guidelines for Multinational Enterprises*, 50 INT'L & COMP. L.Q. 394 (2001).

Enterprises with regard to Human Rights<sup>8</sup>, the Preamble to the 1948 Universal Declaration on Human Rights (*UDHR*)<sup>9</sup> and the 1992 Rio Declaration on Environment and Development<sup>10</sup>. However, the problems facing the implementation of these instruments are the fact that these are instruments of ‘*soft law*’ and therefore, are non-binding in nature. This leads often to the fact that these codes, which were not legally binding, was used to justify failure or even refusal, to back them up with adequate procedures for monitoring compliance, or dealing with alleged violations<sup>11</sup>. The OECD, *for example* did not adopt a treaty to combat the bribery of foreign public officials until 1997, although a draft had been developed through the U.N. in 1979.<sup>12</sup> The bulk of the instruments developed since the 1970s, to establish standards of responsibility for international business, not only

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<sup>8</sup> Economic, Social and Cultural Rights: Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, U.N. ESCOR C.H.R., 55th Sess., 22nd mtg., U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2(2003).

<sup>9</sup> GA Res 217A(III), U.N. GAOR, 3d Sess., at 71-72, U.N. Doc. A/810 (1948).

<sup>10</sup> Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, Annex I, Agenda Item 21, at 8-11, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992)

<sup>11</sup> Despite pressures from its Trade Union Advisory Committee (“TUAC”), the OECD’s Committee on International Investment and Multinational Enterprise (“CIIME”) insisted that the OECD Guidelines should remain non-binding and that the CIIME should not reach conclusions on the conduct of individual enterprises. The CIIME wanted to avoid being seen as a “judicial or quasi-judicial forum.” See Org. for Econ. Co-operation & Dev., International Investment and Multinational Enterprises: Review of the 1976 Declaration and Decisions para. 84 (1979) [hereinafter Review of the 1976 Declaration and Decisions]. At most, the CIIME was willing to use the details of specific cases as illustrations of problems arising under the OECD Guidelines and issue “clarifications” where appropriate. *Id.* For an account and discussion of the early operation of the OECD Guidelines, see R. Blanplain, *The OECD Guidelines for Multinational Enterprises and Labour Relations 1976–1979: Experience and Review* (1979) [hereinafter Experience and Review]; R. Blanplain, *The OECD Guidelines for Multinational Enterprises and Labour Relations 1979–1982: Experience and Mid-Term Report* (1983).

<sup>12</sup> Draft International Agreement on Illicit Payments, U.N. ESCOR Comm. on an International Agreement on Illicit Payments, 2d Sess., Agenda Item 6, at 5, U.N. Doc. E/AC.67/L.3/Add. 1 (1979).

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remained non-binding in form, but were generally supported by weak mechanisms for monitoring compliance.<sup>13</sup> This lacuna was the background to the emergence of corporate codes in the late 1990s. This further led to questions regarding its effectiveness as a monitoring mechanism and its utility in actually laying down an ethical code of conduct, with regard to International business. These problems can be overcome by underlining the concept of Sovereignty in International law. The State must be allowed to regulate economic activities, taking place within their national jurisdiction and has to assume responsibility for the actions of such states. States which invite capital especially from foreign nations and in developing countries (*many of which had recently gained political independence*), have tried to gain their independence in the economic and financial spheres by regulating the amount and type of foreign investment, which is allowed within their countries<sup>14</sup>. Article 2(a) of the Charter of Economic Rights and Duties of States, asserts the primacy of national jurisdiction over financial elements and denies the existence of any obligation to grant preferential treatment to foreign investment<sup>15</sup>. This Charter expressed the formal right of states to assert total regulatory power over economic activity, within their borders, including, acquiring or limiting ownership rights. The adoption of voluntary codes is a method by which the companies can help fulfil their obligations. An OECD study collected 246 codes, about half of which were issued by individual firms, some forty percent by associations, and the remainder primarily by stakeholder coalitions and non-

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<sup>13</sup>. See Richter, *supra* note 12, at ch. 10.

<sup>14</sup> Rahmatullah Khan, *The Right of a State to Choose Its Social and Economic System*, in *International Law and Development* 31 (Paul De Waart et al. eds., 1988); Subrata Roy Chowdhury, *Permanent Sovereignty over National Resources: Substratum of the Seoul Declaration*, in *International Law and Development*, *supra*, at 59.

<sup>15</sup> Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1975)

governmental organizations ('NGOs')<sup>16</sup>. These codes generally dealt with matters of concern to consumers, such as labor and environmental standards, compliance with the law, and issues of potential risk to the firm, such as bribery and corruption.<sup>17</sup> There was a high degree of variety in the subject matter and of style, especially in the degree of specificity found in the codes' standards.<sup>18</sup> This revival of interest in establishing global standards of corporate responsibility once again attracted the interest of intergovernmental organizations ('IGOs'), which would form a good forum for the regulation of the activities surrounding the concept of corporate social responsibility. Thus, the former U.N. Secretary-General, Kofi Annan, in a speech to the World Economic Forum in Davos on January 31, 1999, challenged world business leaders to 'embrace and enact,' in their individual corporate practices and by supporting appropriate public policies, nine universally agreed-upon values and principles derived from U.N. instruments, which were embodied in a U.N. Global Compact.<sup>19</sup> This initiative was criticized by activists as no more than an attempt to lend the legitimacy of the U.N. to corporate public relations hype.<sup>20</sup> The ILO has also become involved, especially with regard to labor standards, and has established a business and social initiatives database.<sup>21</sup> These policies have resulted in private companies coming up with a number of initiatives, to ensure that companies do not fall foul of the States.

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<sup>16</sup> <http://www.oecd.org/industry/inv/corporateresponsibility/1922656.pdf>

<sup>17</sup> *Supra.* paras. 14–39

<sup>18</sup> *Supra.* para. 22.

<sup>19</sup> Secretary-General Kofi Annan, Address to the World Economic Forum in Davos, Switzerland (Jan. 31, 1999). For an account of the development of the U.N. Global Compact by its Executive Head, see G. Kell, *The Global Compact: Origins, Operations, Progress, Challenges*, 11 *J. Corp. Citizenship* 35 (2003).

<sup>20</sup> *See, e.g., Transnat'l Res. & Action Ctr., Tangled Up In Blue: Corporate Partnerships at the United Nations* (2000) available at <http://www.corpwatch.org/upload/document/tangled.pdf>.

<sup>21</sup> The database is available at [www.ilo.org/basi](http://www.ilo.org/basi).

**3. IMPLEMENTATION OF CSR BY COMPANIES**

Many large companies have adopted formal environmental policies with the objectives of creating a sustainable business and being environment friendly. For instance, a company that uses trees as raw material might adopt a policy of re-forestation to replace the trees they have cut down. The growing importance of CSR in the context of market and public policies raises a key issue relating to the legal recognition of CSR benchmarks, including the aspects relating to labels, certifications, ratings etc. and their progressive convergence across the market. Several initiatives have taken place in the recent past towards CSR convergence on benchmarks, including the European Union CSR Forum aimed at facilitating the exchange of experience and good practices in order to establish common guidelines for CSR tools. The new concept of CSR has been propounded by the Union, which states that it is dependent on the impact that the businesses have on society should be considered as their responsibility. This includes core factors such as taking responsibility for their actions, respect for applicable legislation, and for collective agreements between social partners. To fully meet their corporate social responsibility, enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders, with the aim of:

- a) maximizing the creation of shared value for their owners/shareholders and for their other stakeholders and society at large;
- b) identifying, preventing and mitigating their possible adverse

impacts<sup>22</sup>.

***I. INSTANCES OF IMPLEMENTATION***

- Nike and the other similar footwear and apparel companies are monitoring the working conditions in their supplier factories in developing nations;
- IKEA requires its rug suppliers in India to prohibit the employment of children and provide their families with financial assistance to keep children out of labour market;
- Starbucks and the other major coffee distributors and retailers sell coffee bearing their 'Fair Trade' label;
- Home Depot and the other major retailers of wood products no longer sell products harvested from old growth or endangered forests;
- British Petroleum and several other major firms in United States and Europe have significantly reduced its greenhouse gas emission;
- Shell and the other major extractive firms have adopted policies to address human rights and environmental abuses associated with its investments in developing countries;
- Timberland allows its employees to take one week off with pay each year to work with local charities;
- PepsiCo along with more than a dozen oil companies and consumer goods manufacturers have withdrawn investments from Burma because of human rights

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<sup>22</sup> Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions A renewed EU strategy 2011-14 for Corporate Social Responsibility

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concerns;

- Citibank, along with other major financial institutions has developed criteria for assessing the environmental impact of its lending decisions in developing countries.

**4. LEGAL IMPACT ON CSR**

A method of regulation of International business law is by instilling codes of conduct within the institution, which will regulate themselves internally. Corporate codes of conduct are policy statements that outline the ethical standards of conduct to which a corporation adheres. This would in general be general policy statement or be inserted in the corporation's contracts with suppliers, buying agents, or contractors, in the sense that they must agree to abide by the company's ethical standards. This ensures highest standards of conduct from the top to the bottom levels of the business community, which would help preserving the objective of corporate social responsibility. The codes in the OECD inventory address environmental and labor relations, followed by consumer protection and anti-corruption. Since MNEs involve the operation of multiple subsidiaries and work places, as well as a workforce of many hundreds of different people, it is imperative that efficient training of employees and external suppliers and maintenance of strict managerial control are put into operation and periodically reviewed. The OECD further mandates that the effectiveness of corporate codes should not be assessed on the basis of what corporations do, but on how societies manage to formulate and channel reasonable pressures for appropriate business conduct<sup>23</sup>. In *Kasky v. Nike*<sup>24</sup>, an activist sued Nike Corp. for false advertising over a publicity campaign it used to defend itself against accusations of engaging in inhuman manufacturing conditions

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<sup>23</sup> United Nations Millennium Declaration, G.A. Res. 55/2, U.N. GAOR, 55th Sess., Agenda Item 60(b), U.N. Doc. A/RES/55/2 (Sept. 18, 2000)

<sup>24</sup> 45 P.3d 243 (Cal. 2002)

in Asia. The California Supreme Court argued that since a company's public statements could conceivably persuade consumers to buy its products, such statements deserve only limited First Amendment protection (*freedom of speech*). This was confirmed on appeal in *Nike v. Kasky*<sup>25</sup>, by the U.S. Supreme Court in its decision of June 26, 2003.

*The Corporate Responsibility Bill, 2003*<sup>26</sup> which was established in the United Kingdom is model by which international business law regulates CSR. Article 2 of the Bill provides for extraterritorial application regarding all major CSR areas of concern, demanding that corporations consult with stakeholders<sup>27</sup>, further imposing a duty to prepare and publish reports. Articles 7 and 8, stress the environmental and social duties of directors as well as their responsibilities. Article 6 establishes the liability of the parent company with regard to its subsidiaries, mergers, disposals, acquisitions, and deals with the ambit of restructuring, irrespective of whether the injury to persons or harm to the environment occurred within the territorial or nautical limits of the United Kingdom. The impact of this provision could potentially revolutionize litigation claims against MNE operations abroad by a large range of claimants. Similarly, the British legislation requires that pension funds disclose, in their statements of investment principles, the extent to which social, environmental, or ethical considerations are taken into account in the selection, retention and implementation of investments. This helps to ensure a periodic review based on the retirements of different employees the scale of bottom line reporting as well as corporate social responsibility in international business law. Essentially, CSR recognizes that corporations are not only responsible to their shareholders, but owe, or should owe, particular duties to persons or communities directly or indirectly affected by their operations; such

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<sup>25</sup> 539 U.S. 654 (2003)

<sup>26</sup> <http://www.publications.parliament.uk/pa/cm200203/cmbills/129/2003129.pdf>

<sup>27</sup> Corporate Responsibility Bill, 2003, § 4, available at <http://www.publications.parliament.uk/pa/cm200203/cmbills/129/2003129.pdf>.

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persons or communities comprise a corporation's 'stakeholders'<sup>28.</sup> 'Stakeholder theory,' especially as propounded in the United States, recognizes various forms of relationships between the enterprise and its stakeholders: primary (*employees, customers, investors, suppliers*) and secondary (*all others*). Others refer to them as 'core,' comprising those that are essential for the corporation's survival; 'strategic,' i.e. those that are vital to its organization; and 'environmental,' which includes all of the remainder.<sup>29</sup>

**5. OVERCOMING THE HURDLES: SOLUTIONS TO IMPROVE THE IMPACT OF CSR**

In other words, CSR activities can create value addition. *Michael Eugene Porter*, the Bishop William Lawrence University Professor at Harvard Business School, a leading authority on company strategy and the competitiveness of nations and regions, has suggested the embedding of the concepts of CSR into corporate and business strategy to create competitive advantage. Corporate Social Responsibility is the latest buzz word to which increasingly more and more companies are getting attentive. Moreover, the governments are keen that companies take to CSR route as social welfare is becoming both public and private sector responsibility. The private sector has the assets and man power to counter backward forces and promote an open, global economy. As result of the global financial crisis and the global recession combined with other factors such as the rise of non-state actors in the global economy, and shifting demographics in the

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<sup>28</sup> Corporate Social Responsibility In international Law, Ilias Bantekas; OECD Principles of Corporate Governance Principle III, Organization for Economic Co-Operation and Development (OECD) Doc. SG/CG(99)5 (1999), available at <http://www.worldbank.org/html/fpd/privatesector/cg/docs/oecd-principles.pdf> [hereinafter OECD Principles]. See The OECD Guidelines for Multinational Enterprises 19, OECD Doc. OECD/GD(97)40 (2000),available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> [hereinafter OECD Guidelines].

<sup>29</sup> R. Edward Freeman, Andrew C. Wicks, and Bidhan Parmar, Stakeholder Theory and "The Corporate Objective Revisited"

form of urbanization and rising inequality, the free market system is in flux and a state of stagnation. Populist and protectionist pressures are challenging the open market system, which the private sector must help out with in order for the private sector and the national economy to grow. Neville Isdell, former chairman and CEO of the Coca-Cola Company, has proposed one approach for how companies can connect with society and contribute to the resolution of social problems while at the same time ensuring sustainable and profitable growth in the twenty-first century. Mr. Isdell's concept of MNC engagement, is what he calls '*Connected Capitalism*,' which goes beyond the new, engaged CSR to a new level of connectedness between the private sector, governments, NGOs, and civil society across three main platforms: communities, institutions, and their core business strategies<sup>30</sup>. The companies too are realizing the hidden costs of failing to meet this crucial social responsibility that is more ethically and morally binding than legal necessity. It entails going beyond just the legal responsibilities. There are, however, issues of labeling and standardization associated with CSR. Nonetheless, it is expected that a level playing field will emerge as the number of stake holders will also go on increasing. CSR must be seen by the companies as a responsibility not imposed by outside forces, but guided by conscience and the best practices of giving back to the society, people, communities, and the environment, what they took from them. What is even more important is that companies have begun to realize the criticality of CSR as value addition that might offer them competitive advantage in business. CSR is a concept to review the relationship between private enterprises and the society, which is founded on the idea that what is vital for a company to sustainably develop is to achieve, in a balanced manner, financial results (*e.g. to secure profits*), environmental results (*e.g. to protect the environment*), and social results (*e.g. to maintain good relations with employees and local*

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<sup>30</sup> The Evolution of Corporate Social Responsibility, Cooperation between the Private Sector and The U.S. Government, By Daniel F. Runde

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*communities*). As for the social issues in particular, it is generally becoming a common understanding that they include compliance with laws and regulations, accountability and information disclosure, consumer protection, fair trade, employment, human rights, and contribution to local communities. Thus, private sector enterprises, which form a major chunk of the entities present in International business law, have an important responsibility to undertake measures which are beneficial both to them and the society.

**6. CORPORATE SOCIAL RESPONSIBILITY AND DISABILITY**

Today, the new trend is to include disability issues not only in the field of *'welfare'*, but also in the field of *'employed labour'*. As such, there is a legal obligation for companies to employ disabled persons, as a part of the enforceable policies.<sup>31</sup> Today's enterprises are required to enhance corporate governance focusing on CSR, giving special consideration to environment, human rights, and labour. Human Capital Management and disability will have growing importance in CSR. In the United Kingdom, the Accounting For People Task Force, has proposed a reporting framework for Human Capital Management.<sup>32</sup> A majority of the *'Fortune 500'* corporations now have *'diversity'* policies which promise equality on a range of grounds, including sexual orientation.<sup>33</sup> CSR is premised on corporate compliance, against a background where stakeholders have changed their awareness and are now believing that enterprises have to take social and ethical actions to grow and to develop, in a sustainable and stable manner. It is also becoming common that *'Disability*

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<sup>31</sup> CSR and Disability, from now on "*CSR-D*" is the general inclusion of the disability aspect in the different elements of companies' CSR, considering people with disabilities among its stakeholders.

<sup>32</sup> Accounting for People: Report of the Task Force on Human Capital Management, Great Britain. Task Force on Human Capital Management

<sup>33</sup> The Corporate "*Me*": How Fortune 500 Companies Represent Diversity in Non-financial Reports, By Audrey Ballinger

*Employment*' is regarded as one of the key issues in CSR-oriented management.<sup>34</sup> The characteristics of recent international trends in disability employment and profession are equal opportunities and fair treatment, as well as prohibition of discrimination incompatible with the first two causes. In relating with discrimination against disabled persons, terms such as '*reasonable accommodation*' or '*reasonable adjustment*' are drawing attention. In 2001, the United Nations embarked on drawing '*Convention on the Rights of Persons with Disabilities*', in which several measures were proposed concerning labour rights.<sup>35</sup> They included the requirement to promote a labour market and work environment that are open, inclusive, and accessible to all persons with disabilities and to promote employment opportunities and career advancement for persons with disabilities in the open labour market, including opportunities for self-employment and starting one's own business, as well as assistance in finding, obtaining and maintaining employment. It was also designed to encourage employers to hire persons with disabilities, such as through affirmative action programs, incentives and quotas and to ensure the reasonable accommodations of persons with disabilities in the workplace and work environment.

International Labour Organisation's '*Code of Practice on Managing Disability in the Workplace*'<sup>36</sup> was unanimously adopted, following the tripartite meeting of experts (*governments, labour organizations, and employers' associations*) in October 2001, convened in Geneva, at the decision of the ILO Governing Body. They have been created keeping in mind, both the direct and indirect beneficiaries. This Code of Practice reflects the changes relating to the service conditions of employees such as the concept of disability, reasonable accommodations, and employment with assistance. It

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<sup>34</sup> <http://www.jil.go.jp/english/reports/documents/jilpt-research/no32.pdf>

<sup>35</sup> <http://www.un.org/disabilities/convention/conventionfull.html>

<sup>36</sup> <http://www.ilo.org/public/english/standards/relm/gb/docs/gb282/pdf/tmemdw-2.pdf>

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intends to encourage employers to incorporate active disability management strategies, based on the belief that persons with disabilities can make great contribution through jobs suitable for their skills and capabilities in workplaces and that employers can make profit by employing disabled persons, in both private and public companies, regardless of size, as long as they conduct appropriate management in respect of disability employment. Aiming at combating discrimination in the field of employment and occupation, the European Union's '*Equal Treatment Directive*' has an article to prohibit any direct or indirect discrimination based on particular religion or belief, particular disability, particular age or particular sexual orientation.<sup>37</sup> This article is applied to labour conditions such as selection criteria, recruitment conditions, vocational guidance, vocational training, employment and pay. Employers shall take appropriate measures, where needed in a particular case, to enable a person with disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a '*disproportionate burden*' on the employer. As such lack of reasonable accommodation could constitute discrimination. European member countries were supposed to amend individual domestic laws and regulations according to this '*Equal Treatment Directive*'. CSR is seen as the soul of every business. It has also become the password not only to overcome competition, but also to ensure sustainable growth. It is the alignment of business operations with social values. Of late, more and more companies perform in non-financial arenas such as human rights, business ethics, environmental policies, corporate contributions, community development, corporate governance, and workplace issues. From local economic development concerns to international human rights policies, companies are in fact being held accountable for their actions and their impact. Companies are also more transparent in disclosing and communicating their

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<sup>37</sup> Proposed Equal Treatment Directive, Emma Clark, SN/IA/5308

policies and practices as these impact employees, communities and the environment.

7. **CASE ANALYSIS: INDIA'S INITIATIVES TOWARDS CSR AND ITS IMPACT ON INTERNATIONAL LAW**

It is noted that Infosys, along with Microsoft had launched a program in 1998-99, called *Computers @ Classrooms*<sup>38</sup>. As part of this initiative, it had donated 1185 computers to 435 institutions across India. Most importantly, Infosys has been working closely with the government to conceptualize innovative ideas that has resulted in the Government of India bringing out three different plans aimed at eradicating poverty through Information Technology. The ITC group's socio-forestry initiative is an excellent paradigm where CSR and business have created harmonious associations. Likewise, every company has a cause that is closer to its heart. *For example*, the Aditya Birla group is involved in issues related to vocation training, education, leprosy eradication, widow remarriage and orphanages. In order to work out a comprehensive plan for its not-for-profit initiatives, the Tata Group has instituted the '*Tata Council for Community Initiatives*' – a central body that acts as a facilitator for its social initiatives.<sup>39</sup> While the Tata Group of companies may continue to provide health services, education and other tangible benefits, its focus is more on building self-reliant communities, and working towards sustainable livelihoods. For this the company intends to involve volunteers from within the group who will be project leaders. They will be responsible for measuring human impact on a five-point scale of human excellence. Cisco takes an entrepreneurial or venture-capital approach to social investing. They apply a four-stage '*Cycle of Innovation*' model to each of their social investments<sup>40</sup> By Cisco's

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<sup>38</sup> Corporate Governance: Principles, Policies and Practices, By A. C. Fernando, pg.

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<sup>39</sup> <http://www.csridentity.com/tata/TCCI%20Volunteering%20Brochure.pdf>

<sup>40</sup> <http://www.innovationpeople.co.uk/spicethecyclesofinnovation.pdf>

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education initiatives, one of the largest e-learning programs in the world, effective and innovative educational techniques have been introduced in schools and in other institutions to prepare students to enter the local talent pool and provide the skills needed to bolster economic growth. Most villages in India need basic infrastructures like schools, medical facilities, vocational centers, parks, computer centres, and counseling centers for employment. This needs the cooperation of non-governmental organizations, government organizations and corporations that can together create self-sustaining and empowered villages. With the involvement of more and more companies, a sense of competition would arise and it would eventually, create a win-win situation for all. Further, there are several groups and companies that undertake a number of charitable works, but as a matter of policy do not divulge the kind and extent of amount spent on such activities. Mahindra & Mahindra is one such company. Its activities include the K.C.Mahindra Education Trust, which promotes education at various levels and Nanhi Kali, a programme aimed at helping the underprivileged girl child at the Mahindra Foundation. Similarly, Nandan Nilekani, is known for donating freely to his alma mater, the Indian Institute of Technology.

In 1987, the World Commission on Environment and Development, established by a resolution of the United Nations General Assembly, defined sustainability as '*Development which meets the needs of the present without compromising the ability of future generations to meet their own needs*'.<sup>41</sup> Corporates recognize the fact that social and environmental stability and sustainability are two important pre-requisites for the sustainability of the market in the long run. They also recognize the fact that increasing poverty can lead to social and political instability. Such socio-political instability can, in turn, be detrimental to business, which operates from a variety of

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<sup>41</sup> From the World Commission on Environment and Development's (the Brundtland Commission) report *Our Common Future* (Oxford: Oxford University Press, 1987).

socio-political and cultural backgrounds. There is an increasing recognition of the triple-bottom-line; '*People, Planet and Profit*'. It recognizes that the stakeholders in a business are not just the company's shareholders and that sustainable development and economic sustainability are the two sides of the same coin. It is also understood that corporate profits are to be analyzed in conjunction with social prosperity. CSR policy would function as a built-in, self-regulating mechanism, whereby business would monitor and ensure their adherence to law, ethical standards, and international norms. CSR is a commitment to improve community well-being through discretionary business practices and contributions of corporate resources. As such, it is not mere charity. It is a core business strategy of an organization. In the present day context CSR goes by many names, which include: corporate citizenship, corporate philanthropy, corporate giving, corporate community involvement, community relations, community affairs, community development, corporate responsibility, global citizenship, and corporate societal marketing. It is a new way of doing business to cater to the needs of the market and its stakeholders. CSR is the way in which an organization strikes a balance between economic, social and environmental imperatives on the one hand and the expectations and welfare of the shareholders on the other. This implies that social responsibility or rather its execution involves a well-planned strategy. Assessment of the social environment, formulation of objectives, devising operational plans and programs, monitoring social progress, assessment of social and economic impact and summary of outcomes and performances are of utmost importance. CSR is becoming an increasingly important activity to businesses nationally and internationally. As globalization accelerates and large corporations serve as global providers, these corporations have progressively recognized the benefits of providing CSR programs in their various locations. The government had

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declared it compulsory for industries to be socially responsible. Public sector units may have to shell out 2-5% of profit in CSR.<sup>42</sup> Socially responsible business is a common term today as business and societies are unthinkable without each other.

**8. CONCLUSION**

Thus, Corporate Social Responsibility is about how companies manage the business processes to produce an overall positive impact on society. Therefore, a valid conclusion would always be directed at a functional relationship between the corporates and the society, where a third entity, the government plays the monitoring role. It is clear that CSR has moved from being a public relation tool or a feel-good factor to a key parameter to keep companies open and transparent. It now no longer stands in isolation but has become a part of good corporate governance policies. CSR models are based on the principle that goodwill earned from the stakeholders leads to benefits to the corporation, which in turn enables the corporation to further enhance stake holder value.

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<sup>42</sup> Guide on Corporate Social Responsibility (CSR) Audit, May, 2012, pg 19, 20

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**Article**

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*MEDIATION - AN OVERVIEW*

BY,  
MR. SRIRAM PANCHU<sup>1</sup>

**1. A BRIEF INTRODUCTION**

India's legal system, modelled on the colonial prescription, is the typical Anglo-Saxon method of ranging parties against each other in the *versus* mode, and letting them slug it out, with the Judge umpiring to ensure that the rules of the game are obeyed, and awarding victory to the successful contestant. '*The sporting theory of justice*'<sup>2</sup> is an apt phrase. It is attributed to Roscoe Pound, the great legal philosopher and teacher. Reaction to the overload of cases has grown from annoyance to vexation to frustration, and has now assumed the proportions of a system breakdown. Indeed it is proof of the famed resilience of the Indian people that they still continue to petition the Courts. Some however, are turning to faster providers of resolution like the mafia and the cop turned adjudicator; while others swallow injustice not wanting to add litigative injury to their woes. The adversarial method assures us a result in the form of a legal verdict but it comes with heavy cost in time and money. The nature of the adversarial process means that every step at every stage is resisted and fought out. Facts, substantive law and procedural rules provide

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<sup>1</sup> The Author is a Senior Advocate of the Madras High Court. He was instrumental in the creation of the Tamil Nadu Mediation and Conciliation Centre of the High Court, Madras, the first one in the country. He acknowledges the assistance of Ms. Sharanya Vaidyanathan, who is also a part of the Editorial Board of ISLR 2012, in preparing this article. For further reference, please visit <http://www.srirampanchumeditation.com>

<sup>2</sup> Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 RE.A.B.A. 395, 404-05 (1906), reprinted in 35 F.R.D. 273, 281 (1964), and in 40 AM. L. Rav. 729 (1906).

more than adequate ammunition for feuding. In this mindset, the least concession is interpreted as a sign of weakness. It is no wonder that cases will drag on, and drag down its parties. Litigation is destructive of relationships; *how many can survive accusations and charges, and the pride and fall that accompany victory and loss?* As an antidote to the adversarial way, consensual methods of dealing with conflict are increasingly being used to handle various types of conflict ranging from commercial to personal to public disputes. A notable event heralding the beginning of Court use of Alternate Dispute Resolution (ADR) processes was the 1976 Pound Conference held in the USA, so called because it followed the title and theme of Roscoe Pound's, rather direct attack in 1910 on the problems with the legal system – an Inquiry into the Popular Causes of Disaffection with the Judicial System.

## 2. **THE ARBITRAL PROCESS**

Arbitration, once thought to be the answer, has turned out to be a clone of Court based litigation; it is less formal but still maddeningly procedural as adversarial, and more expensive. Speedy resolution is an illusion. There are large time-gaps between sittings of arbitrators, who are not subject to regulation. Awards can be delayed and are. If questioned in Courts, enforcement has to await the result of the Court proceedings. In rather strong words *Desai J* of the Indian Supreme Court said in *M/s. Guru Nanak Foundation Vs M/s. Rattan Singh & Sons*<sup>3</sup>

*"... the way in which the proceedings under the (Arbitration) Act are conducted and without an exception challenged in Courts has made lawyers laugh and legal philosophers weep....."*

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<sup>3</sup> AIR 1981 SC 2975

One source of delay was the ease of recourse to Courts to examine the awards of arbitrators. The new Arbitration and Conciliation Act of 1996, narrowed the grounds of appeal. This in turn gives rise to apprehensions about vesting finality in a tribunal with little opportunity for correction. Opening the doors of appeal invites every loser to enter; slamming them shut results in unremedied miscarriage of justice.

### 3. LOK ADALATS

And then there are Lok Adalats (*translates into 'Peoples Courts'*). The panel comprises of a retired Judge and others such as, lawyers, social workers, retired government servants etc. They basically try to see if the parties are willing to settle at a figure somewhere between what the claimants asks for and what has been offered by the respondent. It's a standard '*why don't you split the difference*' or '*take some and give up*' approach. The merits of the cases are not gone into. Each case is disposed of in a few minutes, the time it takes to ascertain if the parties are willing to compromise at an intermediate figure. The basic difficulty with the Lok Adalat process appears to be that it does not examine the factual and legal aspects of the dispute between the parties, nor does it go into underlying interests for settlement. The main reason put forth to a party to yield on his stand is that it is going to take him years and years in Court to secure it. This is a really negative reason. The Court's delay in providing speedy resolution through the legal process is turned around to become the principal reason to reach a settlement. Splitting the difference can be a euphemism to distributing the pain of losing. The presiding officer is a retired judge who is perceived as a person of authority, and often behaves as one. Of course, this is magnified when a sitting judge presides. Lok Adalats work well in cases such as claims for compensation arising out of motor accidents and compulsory acquisition of land. These are capable of easy quantification and resolution by applying formulae and multipliers. Several such cases can be disposed of in one sitting. This speed of resolution in bulk is

the crowning virtue of the Lok Adalat process; it is mistakenly thought by judges and Court administrators that this can be repeated in many other types of cases.

#### **4. THE PROCESS OF MEDIATION**

Mediation, on which I would like to focus, is emerging as the fastest growing remedy from the Alternate Dispute Resolution stable. It is a voluntary and confidential process in which the Mediator, a neutral, helps parties in arriving at a solution that is acceptable to all the parties. This is designed to be risk-free since the outcome of the mediation is in the hands of the parties. The mediator guides the process but cannot impose any decision on the parties. Parties may terminate the mediation any time if they feel it is not serving their interests. Once agreement is reached, it becomes binding and can be enforced by the legal process.

In essence, it involves moving parties from a '*me v. you*' approach and an '*I am right and you are wrong*' attitude to a joint search for solutions to the dispute. This is done by focusing parties on their long-term interests, distinct from the positions they take in conflict. As an illustration, separating a husband from his wife, will take positions in what they demand in custodial and financial arrangements; a switch to long-term interests of the feuding parties and their children reveals the need to arrive at amicable solutions. Labour and management conflict can get bogged down in demands and lower counter offers, making settlement difficult; a longer perspective will underscore the virtual necessity of harmonious settlement for productivity, profits and wages and shift attention to the modalities of achieving agreement. Doses of realism show parties that their assumptions about the strength of their case and expectations of the legal process may be excessive. It is also useful to make parties confront the alternatives, often unpleasant, available to them if settlement is not reached. The law plays an important role in these processes and in working out a sustainable solution.

The flexibility of the process enables it to be designed to suit the demands of the individual case. Joint meetings enable parties to give their versions of the dispute, and opportunity to listen that of the other side. Disputed facts can be ascertained with joint fact-finding exercises or with the help of experts. Indeed, experts function better as neutrals, free from the impositions, subtle or stated, of partisan evidence discovery. Confidential information can be shared with the mediator with express request to avoid disclosure. Separate meetings with the mediator enable parties to speak openly, look at strengths and weaknesses, voice fears and concerns – all of which enables forward movement to exploring options for settlement. These options for settlement get discussed, modified and refined; they are matched with criteria that parties devise for a fair and workable settlement. As the process moves forward, a shift in attitudes takes place – there is less of blame and recrimination as parties' direct energies to jointly search for a solution.

The mediation process thus, focuses on the parties, tries to uncover the reasons for their dispute, and makes them participants in the search for equitable and sustainable solutions to the conflict. There is an empowering aspect here, in showing people that they are not disabled in dealing with the conflict that occurs in their lives. Further, the best suggestions for resolution often come from parties to the dispute; they know what is most important to them and where they can give room. Conflict places blocks on communication and the freedom to explore options for settlement; when these are released, creative problem solving is often the result. Advocating mediation is not to trash the adversarial system, which has been built up over centuries, and is premised on logic, argument, impartiality, consistency and appellate corrective opportunity. For a large body of cases, we need the standard format of litigative lawyering with its substantive laws and procedural rules and the final decisional authority vested in its Judges. Those which need constitutional law development, legal interpretation, declaration of rights, can and must only go to our

Courts. Severe imbalance in the power equation between parties, lack of bona fides, presence of fraud, misuse of authority, arbitrary and unreasonable official action call for the adjudicatory mechanisms of the law. Judicial review is the business of Courts and judges. Social changes through the law, dealing with egregious behaviour, gross negligence are for the Courts; so is statutory violation and enforcement. However, many cases are not about rights or about injustice, though we dress them up in these terms so that a Court may take cognizance of them. They are about parties who have fallen into conflict - as common a phenomenon for the human race as falling ill. The wear and tear of daily existence, occupational strain, friction in relationships, problems in transactions and heedless words are contributories and causes. What parties need is to be brought out of conflict – speedily and with less cost, and no further damage. The best result is a mutual agreement which ends the conflict. This can lead to the restoration of relationship, or a parting as amicable as possible.

**5. WHERE CAN MEDIATION BE USED?**

Mediation works well in cases where parties stand in some relationship with each other:

- i. Whether contractual, commercial or personal - arising out of all money claims, disputes relating to specific performance, disputes between bankers and customers, disputes between developers/builders and customers, disputes between landlords and tenants/licensor and licensees, disputes between insurer and insured;
- ii. In corporate disputes – between shareholders, intra-company, supplier and consumers.
- iii. Same as above, for partnerships.
- iv. Employer – employee conflict, partition suits, property matters, general civil disputes are other heads.

- v. The personal matters cover another wide range – matrimonial, maintenance, custody, sibling, parental fighting, partition among family members or co- parceners or co-owners.
- vi. All cases relating to tortious liability including - claims for compensation in motor accidents/other accidents;
- vii. All consumer disputes including- disputes where a trader/supplier/manufacture/service provider is keen to maintain his business/professional reputation and credibility or product popularity.
- viii. All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including disputes between neighbours (*relating to easementary rights, encroachments, nuisance etc.*), disputes between employers and employees, disputes among members of societies/associations/Apartment owners Associations.

Business and family converge in family business operations, which is common in India. Insurance and banking, medical and tenancies form another sizeable bulk. Mediation is also a useful first-try remedy in other disputes which are transactional. Its use ranges from local and neighbourhood conflict to the most complex commercial and transnational and multi-party disputes. It must be stated that cases are of many hues and bear different elements. No rigid categorization of efficacy of different methods is possible. The above is a general formulation going by the main attributes of types of dispute. In sum, mediation is indicated in relationship and transactional disputes and is an attractive first try method. The law Courts are the indicated remedy in a range of cases involving statutory interpretation and enforcement, and are available as a last resort when consensual methods do not succeed. Mediation has the advantage of

being applicable at any stage of the dispute – latent, full-blown, during Court pendency and even after.

**6. ADVERSARIAL METHOD v. CONSENSUAL PROCESS**

Coming to an important question, *when is the adversarial method to be used? and when does the consensual process come into play?* Once this hinges the proper application of the two, result in benefits and harmonization of two completely different ways of resolution. Clearly, all cases cannot be marked for the adversarial route. To apply the adversarial process as the only method of resolution is somewhat like a general hospital sending all arrivals to its surgical ward. And yet this is close to what our system has been doing all along. Every service provider looks to the needs of its constituents and develops responses suitable to those requirements. The failure to discriminate between the different types of conflict and suitable remedies is one of the chief deficiencies of the conventional legal system. We need therefore, to invoke the concept of appropriateness. This tells us that conflict is of different types, genesis and characteristics. As they vary in their basic nature they need different remedies. We do damage to parties when we fail to classify and provide differential remedy; that damage is clear on all counts – straining litigants, limiting lawyers and overloading Courts. We have been cutting the cause to fit the sole resolution system; instead we should tailor the resolution method to suit the type of conflict. Choosing the appropriate form of dispute resolution method thus becomes a key element, and may well spell the difference between smooth resolution and protracted conflict. An understanding of the different resolution methods and processes, accompanied by objectivity and discernment helps to choose and design a resolution method appropriate to the dispute on hand. For the legal profession, mediation and allied processes brings the opportunity to use legal knowledge and skills to achieve resolution and fashion creative solutions. That is the language most clients want to hear. It offers a new avenue for legal practice – as mediators and appearing as lawyers

representing parties in mediations. What is on offer is an enlargement of the dimensions of the legal profession, and thus, the prospect is more benefit than risk.

There are several reasons why lawyers will take to mediation;

- i. *First*, it is something that their clients will demand of them. As the litigating public perceives a process that gives them benefits in cost and time and solutions, they will ask their legal advisors for this facility. Demand will dictate supply.
- ii. *Second*, mediation is coming on to the legal landscape, prominently. Judges are backing its use. Senior lawyers are speaking for it. Enactments in the justice delivery system are incorporating its use. The Indian Arbitration and Conciliation Act, 1996 devotes half its coverage to this ADR method. The Civil Procedure Code, 1908 in Section 89 mandates that Judges shall refer the appropriate cases to mediation and conciliation.<sup>4</sup>
- iii. *Third*, lawyers know that adversarial disputing does not suit several types of cases, and did not yield good results for their clients. Lacking other methods, they were forced to continue litigating those causes. A structured settlement system gives them the alternative tool that has been missing, and permits them to use their discriminating capability. They will take to mediation because it gives them the opportunity to lead from dispute to solution, without the intervening antagonistic process. These see the practice of law as a helping profession.

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<sup>4</sup> Refer to *Afcons Infrastructure Ltd. V. Cherian Varkey Construction Pvt. Ltd.*, JT 2010 (7) SC 616 = 2010 AIR(SCW) 4983 = (2010) 8 SCC 24 = (2010) 8 SCR 1053

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- iv. *Fourth*, because lawyers make good mediators with their legal knowledge, their ability to analyze a case and focus on the essentials, persuasive powers, and skill in crafting legally sound settlements.
- v. *Fifth*, lawyers can add to their practice by representing parties before a Mediator. In many disputes, and certainly in the complex and weighty ones, parties are better off with the assistance of counsel at the mediation sessions. A shift in approach is needed here. The effort is not to win at the expense of the other or to demolish the other side's arguments, but to look at the facts, law and the key needs of parties to get mutual advantage solutions. Versatile lawyers who can perform this attitudinal change will produce success stories for their clients. Satisfied clients, and a reputation for good settlements, will bring in more work, practice and income.
- vi. *Sixth*, lawyers representing clients in mediation render a professional service. For this service the lawyer charges his fees. Studies reveal that clients are far more willing to pay these fees than litigative ones because they participate and see progress in resolution and appreciate the service the lawyer renders by bringing the dispute to an early end. Lawyers can dispose of cases faster, earn an income from them now, rather than postpone them to an uncertain future. As a lawyer spelt it out rather practically – fifteen years later, *who knows if the cause will still exist? Who knows if the client will exist? Who knows if I will? Who knows if the client will still be mine?*
- vii. *Seventh*, mediation will become a professional service. In the Western world, retired judges and lawyers are becoming full time mediation mediators, earning substantial incomes and the satisfaction of bringing

disputes to a close. Judges have quit lifetime tenure posts to become mediators. Once mediation arrives on the scene corporations, other organizations and individuals will look for mediators.

- viii. And *eight*, if the lawyer community does not take to it, others will. Demand is never satisfied by a vacuum. While other vocations such as accountants, business leaders, psychologists, respected community elders, can and do contribute to the mediator numbers, it is members of the legal profession who are first choice in a large body of disputes. If they reject it, it will mean a loss to the disputant public, and a loss of opportunity of rewarding professional practice.

Certainly, some individual cases will show loss of fees, which would be got from long drawn out litigation. However, if the reasons outlined above are borne in mind, the end result is a significant plus for the lawyer community. The judiciary has welcomed mediation, primarily to relieve case loads. Sensitive judges are also appreciative of the aspect of appropriate methods of resolution, of fitting forum to fuss, as a leading writer on mediation would have it. A method of resolution outside the Courts was unlikely to make much impact because of doubts over its legitimacy and enforcement. Now that the judiciary backs mediation it is gaining acceptance in the legal profession and the public. Perhaps this is how it will start in the countries where out of Court settlement is infrequent and people are used to looking to the Courts for all redressal. This is in contrast to the USA and UK, where mediation started outside the Court campus, and looking at its success, judges started referring cases to private mediators and then moved to create Court centre's for mediation.

The difference in origin has important consequences. A Court led initiative moves the Bench, Bar and litigants to the mediation table in large numbers and does so quicker than private mediation efforts. It

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can place mediation on the legal landscape in a short span. It can signal the community that this is under the umbrella of the judicial system and hence, trustworthy. The official backing makes it easier (*though not easy*) to get governments, public sector organizations, banks and insurance companies to come to mediation. Kick-start funding may become available. State and Court resources can be used for training, housing and staffing mediation centers. However, the flip side is that it becomes Court controlled. An indifferent Chief Justice can cause projects to run aground. Advocate mediators and organizers can feel stifled by the bureaucracy and hierarchy that accompany officialdom. A Court initiative that hogs the headlines and captures public attention may lessen the attractiveness of private initiative. Court annexed Centre's depend on voluntary effort or pay nominal fees; this may hinder mediation from becoming a full-fledged professional service capable of supporting careers where disputants pay in proportion to the services that are rendered. The solution is to encourage both. The Court initiative is needed to seed mediation, to help relieve docket congestion, to offer litigants the service without much cost. It is also an excellent ground for training and garnering experience. Private mediation too should flourish where the stakes are higher, where parties want specific mediators, rather than the Court roster, and for matters that are not in Court, either pre or post litigative. Coexistence is possible and beneficial, there is no need for exclusivity and competition; the case load is large enough for both initiatives and more. And once the two begin working, it is also likely that more disputes will be brought to the fore, which are now borne with sufferance, because people find the process of litigative redressal too daunting. The benefits of adopting and incorporating mediation are substantial and cover every segment. Disputant satisfaction will be enhanced by the use of processes which save time, cost and relationships. Solutions can be arrived at, which address the real causes of dispute and which are durable and sustainable. Parties participate in the finding of solutions to their problems; this enables better results to emerge. And these benefits are possible without risk.

Once mediation takes off, judges will find that they are able to get to grips much faster with the cases that only the Court can deal with, and that includes both urgent and long- pending cases. Issues of rights, individual and social justice claims, governance and administrative review benefit for the simple reason that they can come to the fore of the Court docket.

### **7. THE ARBITRATION AND CONCILIATION ACT, 1996**

Earlier statutes like the Industrial Disputes Act<sup>5</sup> and the Family Courts Act<sup>6</sup>, envisaged conciliators intervening at an early stage. Neither bore success. The conciliators were not trained; the process was not given importance and came to be merely as a necessary stopping point before launching into adversarial action. The first serious attempt to bring mediation into the general legal system was made in 1996. The Arbitration Act of 1940 was replaced by the Arbitration and Conciliation Act, 1996. One part of the Act was devoted to conciliation<sup>7</sup> and it provided for the method of appointment by parties<sup>8</sup> failing which the Court, the role<sup>9</sup> and duties of conciliators, safeguards as regards confidentiality<sup>10</sup>, decrees of Courts confirming agreements etc. The Arbitration Act has a specific provision (Sec 30), which says that it is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute, and that with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitration proceedings to encourage settlement<sup>11</sup>. A settlement so

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<sup>5</sup> Act NO. 14 OF 1947

<sup>6</sup> Act No.66 of 1984

<sup>7</sup> Part III, Arbitration and Conciliation Act, 1996

<sup>8</sup> Section 64 of the Arbitration and Conciliation Act, 1996

<sup>9</sup> Section 67, 80 of the Arbitration and Conciliation Act, 1996

<sup>10</sup> Sections 69, 70, 75 of the Arbitration and Conciliation Act, 1996

<sup>11</sup> Section 30 reads as follows:

30.Settlement.-

(1) It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the

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achieved can be recorded in the form of an arbitral award on agreed terms. So here we have the possibility of an *arb-med*<sup>12</sup> or a *med-arb*<sup>13</sup>. Properly done, *arb-med* and *med-arb* will be welcomed by the parties and be viewed as accomplishing the most favorable result. A settlement incorporated into an award is enforceable in Court, but as it results from a mediated settlement it is much less likely to be disputed, a result that creates a strong advantage for this hybrid process. India's Courts seem averse to forgoing scrutiny of arbitrator's awards and the Court review process can be quite lengthy. Amendments limiting challenges to violations of public policy have been overcome by generous interpretative expansion of the meaning of that term, which has been characterized as an '*unruly horse*.' If a party has spent a great deal of time and money in the arbitration process, and is looking at the road ahead with more such pitfalls, closure is an attractive proposition. All the more in a situation where it can take several years to reach the end of the road in a Court proceeding following the arbitration. Judicial referral of cases pending in Court to mediation came through the amendment to Section 89 of

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arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

(2) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(3) An arbitral award on agreed terms shall be made in accordance with Section 31 and shall state that it is an arbitral award.

(4) An arbitral award on agreed terms shall have the same status and effect as any other arbitral award on the substance of the dispute.

<sup>12</sup> Arb-Med is a special blend of ADR that is growing in popularity as more attorneys find out about its use and effectiveness. In essence, it combines the best of arbitration with the best of mediation, providing parties an effective, efficient avenue to settlement every time.

<sup>13</sup> It is mediation followed by an arbitration, if the parties do not agree to settle their dispute at the mediation. The distinguishing feature is that the same person is both the mediator and the arbitrator.

the Code of Civil Procedure, 1908<sup>14</sup>. Though amended in 1996, this was brought into force only in 2002 because of protest by lawyers against other amendments to the Code. The protest flared into country wide agitation; mediation would have been an ideal remedy if used then. Section 89 of the Code of Civil Procedure, 1908 says that where the Court is of the view that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for arbitration, Lok Adalats, conciliation or mediation<sup>15</sup>. This is rather careless draftsmanship. Its prescription that the Judge should frame

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<sup>14</sup> Sec. 89 was repealed by Act 10 of 1940, sec. 49 and Sch. II and again added by Act No. 46 of 1999, Section 7 (*w.e.f.* 1-7-2002).

<sup>15</sup> Section .89 reads as follows:

Settlement of disputes outside the Court.

(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the Court may reformulate the terms of a possible settlement and refer the same for-

- (a) arbitration;
- (b) conciliation
- (c) judicial settlement including settlement through Lok Adalat; or
- (d) mediation.

(2) Where a dispute had been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-Section (1) of Section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed. Also read Order X of the CPC, 1908 along with this provision

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the terms of settlement amounts to a negation of the ADR processes. 'For if the Judge is to frame substantive terms, he can do so only after examining the case in depth and hearing the parties.' Why then refer the matter to ADR at all? If terms of settlement are to be framed by the Judge, parties and mediators are going to feel bound by them and will not be able to engage in the creative processes enabling parties to come up with options for settlement. The sheer impracticality of this part of Section 89 has resulted in referring Judges ignoring it altogether. It would however be better to suitably amend it. The Section does another unwise thing. It casts conciliation and mediation as separate processes. There is little difference between the two expressions; they are used interchangeably, world over. Some countries use the expression 'conciliation' and others use the term 'mediation'. Both words refer to the processes of leading parties from conflict to solution by informal and consensual methods which focus on shared interests and stress the benefits of harmonious solutions. The judgment of the Supreme Court in the case of *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd*<sup>16</sup> has to a great extent removed such confusion, and also laid down a proper framework and procedure for conducting Court-referred mediations. The High Court at Madras was the first to create an institutional structure for Court annexed mediation. Its Chief Justice Markandey Katju created the Tamil Nadu Mediation and Conciliation Centre as an official organ of the Court<sup>17</sup>, with a Supervising Committee of Judges and an Organizing Committee from the Bar. The Centre's mandate is to train mediators and administer the Scheme for referral of cases. Senior lawyers make up a significant portion of the mediator list, judges readily refer cases to what they term as 'our Centre', and there is an even distribution on the roster of mediators. A few hundred

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<sup>16</sup> *Supra*, n.4

<sup>17</sup> [www.hcmadras.tn.nic.in/adr.htm](http://www.hcmadras.tn.nic.in/adr.htm). "The Tamil Nadu Mediation and Conciliation Centre inaugurated, on 9th April, 2005 as a part of the Madras High Court in the presence of The Hon'ble Thiru. Markandey Katju, Chief Justice, Madras High Court, the Chief Patron", Retrieved 25th June, 2012

lawyers have signed up to be mediators. It appears that an institutionalized Scheme has the advantages of official support, more ready acceptance among judges, lawyers and litigants, accountability and continuity. Innovations such as carrying mediation cases in the Court's cause-list, making Courtrooms available for mediation after Court hours, a full Court resolution on referral of cases to mediation have furthered the movement in the Madras High Court ( *credit for these must go to Justice A P Shah, who succeeded Katju J as Chief Justice in Madras*)<sup>18</sup> . On these lines the High Courts at Delhi<sup>19</sup>, Allahabad<sup>20</sup> and Karnataka<sup>21</sup> have set up centres. The High Court at Calcutta too has resolved to set up a Centre there. It seems that the mediation movement is gaining ground in our Courts. In all this, public pronouncements of its efficacy and need by present and past Chief Justices of India has provided tremendous encouragement. The then Chief Justice, Justice M Y Eqbal<sup>22</sup> has considerably advanced the facilities by providing a state-of-the-art mediation centre. At a national level, the Mediation and Conciliation Project Committee headed by a Judge of the Supreme Court has worked to spread the movement across the country. Mediation is now on the national legal landscape, and it is time now to see how it can take root and spread. Action is needed on several fronts.

#### **8. LAW SCHOOL'S ROLE IN PROMOTING MEDIATION**

The law schools should move from their preoccupation with the adversarial process and begin to expose students to the broad range of dispute resolution. Civil and criminal procedures will teach

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<sup>18</sup> [www.hcmadras.tn.nic.in/hhist.htm](http://www.hcmadras.tn.nic.in/hhist.htm). "He assumed charge as the Chief Justice of Madras High Court on 12 November 2005". Retrieved 4th January, 2012

<sup>19</sup> Delhi High Court Mediation and Conciliation Centre, Known as "SAMADHAN", was established in May 2006.

<sup>20</sup> Allahabad High Court Mediation and Conciliation Centre, was established in October, 2006.

<sup>21</sup> The Bangalore Mediation Centre (BMC), was setup in January, 2007.

<sup>22</sup> Presently a Sitting Judge of the Supreme Court of India

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the students, how to conduct adversarial litigation in the Courts; instruction in mediation will be given to understand how consensual resolution is conducted, and when each can be tried. Some will prefer to be traditional litigators. Even for them, a knowledge of mediation helps. They will be able to realize when a case may be better mediated than fought, and send it on to a colleague who practices mediation. Some may prefer to focus on mediation. Others may undertake both. For those whose career path takes them to institutions and corporate's knowledge of mediation will form an essential part of their skills. As part of continuing legal education for the Bar, a mediation course can teach lawyers to mediate and represent clients in mediation, and can also emphasize the duty of lawyers to recommend and aid mediation. Training in mediation is necessary, even for the senior lawyer or retired Judge. It's a mistake to think that because one is an expert on the law, one can automatically be a good mediator. There are skills that need to be learned, and learning them will save the mediator and his parties much time and failed mediations. The training does not take long. Given legal experience, a training program for a few days would be sufficient to impart basic mediation skills. After the initial discussion on the need for mediation and its theoretical aspects, the training would focus on how to conduct mediation. Role plays and simulated exercises enable participants to get the feel of the actual, and receive corrections and suggestions. Issues of confidentiality and applicable legal provisions are gone into. The basic course should be followed by observation of mediations and mentored sessions, and an advanced course. For those without the legal experience, a longer course would be necessary. While we may use training material from abroad, that must be integrated with our legal, social and institutional culture.

### **9. MEDIATION AS A PART OF COURT SYSTEM**

With the orientation and training in place, the Courts can create a program for referral of cases under Sec 89 of the Code of Civil Procedure, 1908. This is best done under a Scheme, which

involves the Judges and members of the Bar. The Scheme should provide the mechanism for referrals, for appointment of mediators, conduct of proceedings and reporting to the Court. Referral systems, formats, feedback and reporting should be standardized and placed in a manual of procedures. It is also advisable that the Court allots a suitable place for mediation in the Court premises. This sends a powerful signal to the litigant that mediation is part of the established system and had the mandate of the Court. Such a scheme draws the elements of energy and support from the Bar, and judicial overseeing and backing. Our plan should be to have a Mediation room as part of every Court complex. Judges will therefore need orientation on evaluating cases and marking them to the alternative routes possible. The National Judicial Academy, Bhopal and the State Judicial Academies are good training grounds. Superior Courts can run programmes for their judges. Every judge is a potential referee under Section 89 and must keep this possibility in mind. An additional option is for the Court to assign a Judge or other officer to perform this function, especially for cases, which are buried in the docket heap and will not surface for some time. Certification or accreditation of mediators will also be necessary. Successful completion of training may be linked to serving on a volunteer panel of mediators for a period of time. Provision should also be made for withdrawal of the certification for proven bad behaviour. The success of the mediation movement will depend on the trust that the public reposes in mediators; therefore, the need for certification and its withdrawal. A Code of Ethics and Conduct is necessary. Attention should be paid to laws, which already have provision for mediators. The Family Court and the Labour Court are examples. We also need to see, which other statutes need changes to enable or encourage mediation. The Court Fees Act<sup>23</sup> should receive amendment to provide for the full refund of the fee to the litigant. The creation of a National Plan for mediation

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<sup>23</sup> ACT NO. 7 OF 1870

and setting up of a National Mediation Institute for training, overall co-ordination and development will go a long way.

a) **Financial Perspective**

Funds are needed for training, for administering Court schemes and for paying mediators. Parsimony will result in low quality schemes. Certainly we will have service-oriented and *pro bono* efforts, but the system cannot be dependent on these. Since mediation is cost-effective for running a legal system, perspective governance at judicial and executive leadership should respond to this need.

b) **Delays in the Court System**

Delay in the Courts is one reason why a party will refuse to mediate. Realistic compensatory costs, which factor in the benefit obtained by delayed resolution will help to remedy this. Another measure is to identify the cases where one side is taking advantage of the system's delays, and mark them out for early hearing. An impending trial is an excellent inducement to come to the mediating table.

**10. MEDIATION AND GOVERNMENT DISPUTES**

Mechanisms for mediation are needed where government and public sector units are involved. Mediation often involves giving up some to gain more. Discretionary decision making of bureaucrats is limited by fears of audit and police enquiries, and political *witch hunts*. So even where a settlement is possible, and would benefit the Government, most officials take the safer recourse of leaving the dispute to be resolved by a Court through litigation. It would be a great pity if the cases involving the State stayed out of the mediatory circle.

- i. *Firstly*, their numbers are huge; Courts dockets are clogged largely because of litigation in which the State is a party.

- ii. *Secondly*, many of these do not involve dispute on a point of law or require a precedent to be applied; they arise from acts or omissions of a purely administrative nature. There is no need to spend the precious hours of a superior Court Judge to resolve matters which can be sorted out across the table.
- iii. *Thirdly*, public sector organizations are present in different economic fields. They are large entities, and their disputes reflect their size. Litigation ties up their money, contracts, economic potential and commercial possibility. The stakes involved are enormous in terms of contracts, property, licenses and rights. When locked up in litigation, they represent unproductive public assets.

## **11. MEDIATION AND BUSINESS DISPUTES**

Mediation is ideally suited for business and commercial disputes. It has been enthusiastically embraced by corporates in the West. Several of the *Fortune 500* companies have pledged to consider the use of mediation before commencing adversarial arbitration or litigation. Commercial disputes need quick resolution, businessmen (*and women*) are not in the business of disputing – they need to resolve efficiently and move on. Participation, respect for relationships, savings in cost and time, is music to the business ear. Contractual agreements now have a mediation clause coming before an arbitration provision. A phenomenon now taking place is that disputes, which see very high stakes – putting the loser to serious setback or ruin – invariably head for, and stay at, the mediation table since parties want to do all they can to avoid that risk. In an era where globalized business is becoming the norm, mediation becomes all the more relevant. Companies abroad are used to it. Its risk proof assurance makes it safe. Its speed and solution based approach means that on-going contracts need not terminate. It avoids the negotiating obstacle that invariably crops up – that of choice of law and choice of

jurisdiction. And there is flexibility in choice of mediators, with options of drawing from law and business. Coming in as a dispute resolver prior to arbitration and litigation, mediation can handle differences before they spin out of control. In the USA one of the significant steps in the growth of mediation was a pledge taken by the leading companies. Organized by the Center for Public Resources, this stated their resolve to consider mediation as a first try dispute resolver before embarking on litigation.

### **12. MEDIATION AND FAMILY DISPUTES**

Mediation is well suited for family disputes. Almost all families experience difficulties. Family disputes involve conflicts between persons who are related in some way, who are a part of a family or have been a part in the past. These disputes are in the nature of, feuds between couples, parents and siblings, between separated couples and their families' conflicts owing to division or partition of property, etc. In comparison to litigation through Courts, mediating a family dispute helps in keeping confidentiality and is flexible in meeting family needs. Mediation allows families to be in complete control of the process and makes arrangements that suit the family wants well. The end result of this process is that families are in a situation where they can continue to be cordial as if there were no differences at all.

### **13. MEDIATION AND FAMILY BUSINESS DISPUTES**

Mediation is good for business disputes, and for family disputes. When businesses are owned and run by families, it is doubly the case that mediation should be resorted to. Family business conflict is a brew that takes in money and property, position and power, relationship and standing, dominance and chafing, superiority and inferiority complexes, childhood insecurity and ageing irrelevance. Inflamed, it can visit contestants, families, business units with multiple damage. Once started, it is difficult to limit the acrimony

from spreading, or to douse the fires of fighting. That is why mediation is an invaluable aid – it addresses concerns, it is confidential, it can devise complex and sensitive solutions, it provides face – saving, it focuses attention on relationships, and can basically pay attention to the substantive and the human factors underlying the dispute. The history of major dispute among business families in India (*e.g. the Pais of Manipal, the Chhabria brothers, the heirs of Ramnath Goenka, and the Ambani bothers*) shows that settlement by formal or informal mediation has been the most efficacious method of resolution. Unfortunately, however, in many cases it came after protracted litigation so that much damage was done before a negotiated result could be put in place. This discussion on family businesses is of particular relevance to India and indeed to Asia, where many industrial and commercial enterprises are run or controlled by families.

#### **14. MEDIATION AND OTHER DISPUTES**

- i. Resident associations can use it to settle local conflict. Communal clashes cannot be resolved by any method other than dialogue and the focus on a larger perspective.
- ii. Schools can use it to handle disputes amongst children; to learn that conflict can be resolved well, and by the disputants, is an invaluable social lesson.
- iii. Any organization will see that it helps in handling disputes internally and externally. Companies, firms, manufacturing and service sectors, banks and insurance outfits will use this for disputes with employees, for structuring and salvaging contracts, dealing with complaints, customer issues, supplier disputes and so on. Mediating claims helps to resolve them, keep litigation down, and improve satisfaction of those dealing with the organization.

## *MEDIATION - AN OVERVIEW*

- iv. At an institutional level a mediation process signals a willingness to look at the other point of view and a desire to reach an amicable solution and retain the relationship.
- v. Religious bodies, which unfortunately see so much conflict now, will find the underlying harmony appealing. The Church has already shown an interest in using mediation to handle disputes with and among parishioners and the diocese.
- vi. Public sector organizations are good candidates for the mediation table; there is a direction of the Supreme Court of India that they should try to settle disputes between themselves instead of heading off to Court.
- vii. Industry federations are important mediums to sensitize their members. They can create cells to push for awareness, to educate, to handle disputes. They can also stress the importance of introducing mediation clauses in agreements.
- viii. For society as a whole, it also carries an important message that conflict can be handled and resolved by ourselves and does not have to result in regression and increased conflict.

### **15. CONCLUDING OBSERVATIONS**

Till now, mediation and like processes were put in a category called ADR, which meant Alternative Dispute Resolution. The term Alternative had the connotation of these processes being outside the legal framework. Resort to them was not in the first instance, but only in exceptional cases. Practitioners of the main system, the litigative one saw the alternatives as different, perhaps even lower in status, and in competition. With Courts and lawyers now taking to mediation, we are on our way to an enlargement of the legal system so that it houses both adversarial and consensual methods. We are increasing access to justice without decreasing the quality of justice. We are used to the

Courts rendering just verdicts. The participation of parties in resolving their conflict offers a level playing field that also encourages a just result. We should now use the term Appropriate Dispute Remedy and apply it to the entire legal system, indicating thus that it is premised on offering the best possible solution to the malady of dispute. That will mark one of the most significant changes in legal development. If we can invoke the concept of appropriateness, we can tailor the resolution method to suit the nature of the conflict. That may well spell the difference between smooth resolution and protracted conflict. Till now, the 'A' in ADR meant Alternative. Now, the embracing of mediation enables us to have an expanded system of dispute resolution, Our Courts can then house practitioners and practices of adversarial litigation and consensual peacemaking. Such a unified legal system would then be one based on the basic criteria of Appropriate Dispute Resolution. This is a powerfully new way of looking at our legal system – one which harmonizes the values of the law, the needs of the public and the ethics of legal practice. A new paradigm of dispute resolution is being created. It adds another dimension to legal practice. It enables parties to participate in the resolution of their conflict with substantial benefits. It harnesses the positive energies of litigants and lawyers, aided by mediators, to attack the problem instead attacking each other. It offers multiple benefits for all involved. It not only eases the pressure on the Courts but also makes it the provider of consensus. It is a mediation model of partnership between the Bench and the Bar to achieve these results. Through judicial initiative and involvement of the Bar, mediation is becoming an idea whose time has come in India. In an age of escalating conflict amongst individuals, societies and nations, it offers a vision of settling disputes amicably and with mutual benefit.

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**Article**

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*SURROGATE MOTHERHOOD: AN INDIAN LEGAL PERSPECTIVE*

BY,  
DR. M.S. SOUNDARA PANDIAN<sup>1</sup>

**1. INTRODUCTION**

Procreation of children is one of the main objects of marriage. It is a natural desire of every human being to leave behind his descendants for the continuity of lineage. Matrimonial happiness depends not only on satisfying biological need of sexual urge, but also on begetting of a child. Attainment of parenthood gives social recognition of the parties to the marriage. A situation of childlessness arises if a married couple is unable to procreate children due to infertility. This results in depression and insecurity amongst the parents and affects them not only psychologically and socially, but also their lineage is discontinued. Therefore, adoption was the only alternative. Due to the advancement of medical science over the last thirty years, modern reproductive techniques like artificial insemination and in vitro fertilization are being resorted to. It is estimated that 15 percent of couples around the world are infertile. The magnitude of the infertility problem has enormous social implications. In instances, wherein the wife is unable to conceive, surrogacy is available as an alternative due to advancement in medical science. Surrogacy has been found to be a more suitable alternative than adoption for such couples, as the child which is born has a genetic connection with the parents. The roots of surrogacy in India can be traced back to 3 October, 1978, as on this date, Kanupriya alias Durga was born in Kolkata using the In Vitro Fertilization (*IVF*)

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<sup>1</sup> Professor of Law and Director, School of Excellence in Law, Tamil Nadu Dr. Ambedkar Law University, Chennai – 28

technique, few months after the world's first IVF boy, Louise Joy Brown, was born in Great Britain on July 25, 1978<sup>2</sup>. Since then the field of Assisted Reproductive Technology (ART) has developed rapidly. Following the Supreme Court's decision in 2008<sup>3</sup>, India has emerged as a leader in international surrogacy due to the legalization of commercial surrogacy. Today, India is the most favoured destination for surrogate mothering. The factors, which have attracted foreign couples to prefer India as a destination for surrogacy are, simpler procedures, lesser costs involved, poverty, illiteracy, lack of regulations of ART clinics, possibility of allegiance of any law on the subject, and judicial approval regularizing commercial surrogacy. Thus, 'rent-a-womb' has become a thriving industry, unbridled by law<sup>4</sup>. Fertility clinics in India are becoming more competitive, and charging patients a huge sum of money for a complete package including fertilization, the surrogate's fee and the delivery of baby at a hospital.<sup>5</sup> The Law Commission Report points out that in India itself the fertility tourism contributes to a 25,000 crore industry.<sup>6</sup> The total cost of a surrogacy arrangement in India is roughly in the range of Rs 4-12 lakhs, depending on the IVF clinic and is thus, around one-third of what it costs in the US or any other western country, where it is legal.<sup>7</sup> According to a recent report, the 'industry reproductive outsourcing' referring particularly to commercial gestational surrogacy in India is estimated to be worth over Rs. 2000 crores.<sup>8</sup> Anand Town in Gujarat, is a hub for surrogate mothers<sup>9</sup>, along with

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<sup>2</sup> Report of the Law Commission of India, 228 (2009) P 9

<sup>3</sup> *Baby Manji Yamada v. Union of India*, AIR 2009 SC 84

<sup>4</sup> Aarti Dhar, "Rent-a-Womb, a thriving industry unbridled by law", *The Hindu*, July 15, 2012, Chennai Edition, p.9

<sup>5</sup> ShilpaKannan, "Regulators eye India's surrogacy sector", *India Business Report*, BBC World, 23 Mars, 2009

<sup>6</sup> Report of the Law Commission of India, 228 (2009) P 9

<sup>7</sup> Kohli, Namita, "Moms on the Market", *The Hindustan Times*, 13, March 2011

<sup>8</sup> *Supra* n.6

<sup>9</sup> Rekha P, Pahuja, "Problems of Surrogacy - A Critical Study", *Nyaga Deep*, Vol.XII, Issue 2, April 2011

Indore, Pune, Mumbai, Delhi, Kolkata and Trivandrum. Though surrogacy is a method to create progeny, its virtues are still hotly debated. Many proponents of the Assisted Reproductive Technologies (*Regulation*) Bill, 2010 advocate that surrogacy is the next step towards empowerment of women<sup>10</sup>. While talking about surrogacy as a tool of empowerment, many issues remain unaddressed- like questions of women's right, rights of bodily anatomy and emotional complexity. Along with this, one finds it quite ironic that surrogacy as a concept in its commercial terms is acceptable only in the third world economies; whereas, almost all the developed nations condemn it?<sup>11</sup> It is true that surrogacy as a concept has the potential to liberate as well as exploit women. At the moment, the concept of surrogacy has been engaging the attention of not only ethicists, psychologists, sociologists and medical scientists but jurists as well. This method has given rise to innumerable legal issues especially in the domain of personal laws. The spectacular breakthrough in the reproductive technologies has brought forth enormous jurisprudential questions of morality, legal regulation, in the family and child's rights domain. This paper attempts to understand the development in reproductive technologies in the context of family law, and examines the proposed ART Bill, 2010 in the backdrop of various constitutional and contractual provisions and suggests legal reforms to regulate surrogacy arrangements in India.

## **2. MEANING AND KINDS OF SURROGACY**

Surrogacy is a constituent of human assisted reproduction. It is derived from a Latin word '*Surrogare*' which means a substitute *i.e.* appointed to act in place of. According to Black's Law Dictionary, Surrogacy means "*the process of carrying and delivering a child for*

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<sup>10</sup> Dr. Nafis Sadik, "*The Right to Reproductive and Sexual Health*"

<sup>11</sup> Sapna Raheem, "*Freedom of Trade and Commerce and Reproductive Markets in India: Assisted Reproductive Technologies Bill and its Challenges*"

another person”.<sup>12</sup> Surrogacy is an arrangement or agreement by which a surrogate woman agrees to be impregnated by non-coital means, using either the intended father’s sperm or intended mother’s egg or both, with the intention that the intended parents are to become the parent of the resulting child after the child’s birth.<sup>13</sup> Surrogacy is essentially a contract of service by which a woman agrees to carry a baby in accordance to the terms of the contract. It basically involves three promises:

- i. The surrogate who offers her services carries the baby according to the terms of the Contract, either in the capacity of the gestational mother or genetic mother.
- ii. The surrogate and her husband agree to relinquish all parental rights at the birth of the child and;
- iii. The intended parents agree to remunerate the surrogate for her service.

#### I. KINDS OF SURROGACY ARE:

##### a) Natural Surrogacy

In traditional surrogacy, the surrogate is pregnant with her own biological child, but the child is conceived with the intention of relinquishing the child to be raised by others such as the biological father and his spouse or partner, if any. In such a case the child is genetically related to the surrogate mother. It involves artificial insemination using the sperm of the intended father or intrauterine insemination (*IUI*) or intra-cervical insemination (*ICI*) which is performed at a fertility clinic.<sup>14</sup> This is also known as Traditional or Straight Surrogacy.

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<sup>12</sup> Report of the Law Commission of India, No.228, p.9.

<sup>13</sup>IOWA Law Review 1987, 73, Iowa L. Rev. 943 (1987), [www.iowa.edu/skflaw/surrog.html](http://www.iowa.edu/skflaw/surrog.html)

<sup>14</sup> *Supra* n.3

**b) Gestational Surrogacy**

In gestational surrogacy, a surrogate is only a carrier / female host and is not genetically or biologically related to the child. The surrogate is implanted with an embryo that is not her own and becomes pregnant with the child.<sup>15</sup>

**c) Donor Surrogacy**

It involves artificial insemination of the surrogate mother by using the sperm of an outside donor and not of the intended father. In this method, surrogate mother alone is genetically related to the child<sup>16</sup>.

**d) Altruistic Surrogacy**

In this method, the surrogate receives no financial reward for her pregnancy or the relinquishment of the child (*although usually all expenses related to the pregnancy and birth are paid by the intended parents, such as medical expenses, maternity clothing, accommodation, diet and other related expenses*).<sup>17</sup>

**e) Commercial Surrogacy**

In this form, the gestational carrier is paid to carry a child until maturity in her womb and is usually resorted to by higher income infertile couples who can afford the cost involved. It is also known as ‘womb for rent’ or ‘outsourced pregnancy’.<sup>18</sup>

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<sup>15</sup> *Supra* n.3

<sup>16</sup> *Supra* n.3

<sup>17</sup> *Supra* n.3

<sup>18</sup> *Supra* n.3

### **3. LEGAL ISSUES ON SURROGACY**

#### **I. Legal Status Of A Surrogacy Contract**

One of the fundamental issues that manifest in a surrogacy arrangement is its legality. As mentioned earlier, a Surrogacy arrangement is essentially a contract of service in which a woman carries a baby in accordance to the terms agreed thereof. To examine whether the consideration and object of the contract is lawful, reference is made to Section 23 of the Indian Contract Act, 1872. In legal parlance, an agreement is unlawful if it is forbidden by law, immoral or opposed to public policy<sup>19</sup>. In India, at present, there is no prevalent law that forbids the practice of surrogacy. The concept of ‘immorality’ in law is generally confined to sexual immorality only.<sup>20</sup> Surrogacy through AI / IVF, which does not contemplate cohabitation, is not to be construed as immoral. The concept of ‘Public Policy’ is a dynamic concept, changing with the current trends of society, varying from generation to generation. The twin touchstone of public policy is the advancement of public good and prevention of public mischief.<sup>21</sup> A Contract having the tendency to injure public interest or public welfare is one that is opposed to public policy. Surrogacy is an option available to a childless couple for whom adoption is not a legally viable option. For a childless couple, surrogacy, either commercial or non-commercial, is a feasible alternative to adoption. It neither affects public good nor does it result in public mischief. However, the law regarding surrogacy is characterized by confusion and uncertainty.

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<sup>19</sup> Section 23 of Indian Contract Act. 1872 reads as follows:

“23. *What considerations and objects are lawful and what not.- The consideration or object of an agreement is lawful, unless- it is forbidden by law [I] ; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another or; the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.*”

<sup>20</sup> *Gherulal Parakh v. Mahadeodas Maiya*, AIR 1959, SC 781.

<sup>21</sup> *Ratanchand Hirachand v. Askar Nawaz Jung*, AIR 1976, AP 112.

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This is further hampered by a complex set of moral and ethical issues that are enumerated as follows;

- i. There is no doubt that a significant number of people who oppose surrogate motherhood, think of it as an unnatural and wrong practice, which should not attract the protection of law. Such agreements are detrimental to the interest of women and children and should not be enforced by law.
- ii. The agreement advanced against a surrogacy agreement is that it leads to commodification of children and the practice has turned into a '*baby selling market*'.
- iii. The feminists who oppose the idea of surrogacy believe that there is a threat to the health of the surrogate who is being used as a child making machine, unaware of the risks to her health and also the pain of giving away the child at the time of making the agreement.<sup>22</sup>
- iv. Surrogacy arrangement does not empower women. Instead it provides an opportunity for women to sign away their rights.<sup>23</sup>
- v. The most serious objection raised against surrogacy is that, the body of the surrogate mother is simply used as an incubator by the commissioning couple. The woman is subjected to an invasive procedure for which she has no need and the natural child carrying process is distorted by the fact that the surrogate mother is counseled against bonding, as she is to part with the child after birth<sup>24</sup>.
- vi. Institutionalization of surrogacy would promote unnatural and undesirable means of family formation<sup>25</sup>.

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<sup>22</sup> *Runkles v. Maryland*, 590, A 2d 552 (Md.1991)

<sup>23</sup> Vossmeier M. Celeste Schejbal, "*What Money Cannot Buy : Commercial Surrogacy and The Doctrine of Illegal Contracts*", 32, STLULJ 1171 (1988).

<sup>24</sup> Elizabeth A. Erickson, "*Contracts to Bear a Child*" 66 California Law Review, 611 (1978).

<sup>25</sup> Waller Louis, "*Surrogate Parenting*", Report of the National Bio Ethics Consultative Committee, 5-7 (April 1990).

- vii. The procedure amounts to dehumanization and degradation of women. Surrogacy in many ways is felt to be a form of ultra or bio-prostitution in which more than a mere sexual act is involved and the women's body is used to incubate a foreign embryo in exchange of money<sup>26</sup>.
- viii. It amounts to commercialization, which becomes a tool in the hands of the wealthy, to tempt and manipulate the weaker sections of the society into selling their organs for money, ignoring their human emotions and physical comforts.<sup>27</sup>

Placing the above mentioned objections, the critics plead that commercial surrogacy should be banned in India. The advancement and increase in awareness of the techniques in medical science, will only resort to surrogacy as an accepted convention among childless couples and thereby, any legislative enactment introduced with an intent to ban and label such practice as immoral, will only portray the lack of conviction in promoting a positive cause. What cannot be stopped *defacto*, should be regulated and regularized *dejure* in the interest of all the parties, especially in the interest of the child who in the absence of such regulation might suffer as an innocent victim. In view of the above reasons, surrogacy arrangement does not suffer from any legal infirmity and is neither tainted with any immorality nor is it opposed to public policy. As far as the legality of the concept of surrogacy is concerned, it would be worthwhile to mention that Article 16.1 of the Universal Declaration of Human Rights, 1948 opines, interalia, that “*Men and women of full age without any limitation due to race, nationality or religion have the right to marry and form a family*”. The Judiciary in India too has recognized the reproductive rights of humans as a basic right<sup>28</sup>. Under Article 21 of the

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<sup>26</sup> Hari Swarup, “*Surrogate Motherhood: A New Woman Rights Problem*”, World Congress on Law and Medicine, held on 22-25 Feb. 1985 at New Delhi.

<sup>27</sup> *Surrogate motherhood: the ethics of using human beings*, Thomas A. Shannon

<sup>28</sup> *B.K.Pasthsarathi v. Government of Andhra Pradesh* AIR 2000 AP 156

Constitution, Right to life has been widened by surrogacy. The interpretation of the word ‘*Personal Liberty*’ in Article 21 is of the widest amplitude and covers a variety of rights, which go to constitute the personal liberty of man. Right to life does not mean a mere animal existence and includes the right to live with human dignity<sup>29</sup>. Any right to privacy implicit in Article 21 must encompass and protect the personal intimacies of a citizen in relation to his family, marriage, procreation, motherhood and child rearing<sup>30</sup>. Now, if reproductive rights get a constitutional protection, surrogacy, which allows an infertile couple to exercise that right, also gets the same constitutional protection<sup>31</sup>. It can be said that surrogacy might just further the right to procreation and to have a family, which is implicit under Article 21. Unfortunately, law is very slow to react to the rapid advancement of science and changing behavioral patterns of society. This maximal pace is made apparent when it is realized that as of this day no law has been passed. More importantly, this industry has a quasi-legal status in India, since there is no law regulating it, with only some non-binding guidelines, which includes the National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India given by the Indian Council of Medical Research (ICMR),2005. In cases of surrogacy that have gone to courts, the practice has not been rendered illegal, though there are some judicial pronouncements questioning the ethics of its practice.

## **II. Legitimacy of a Surrogate Child**

A vital issue in personal law manifests in surrogacy arrangement relates to the legitimacy of the surrogate child. Is the

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The Court upheld that the right to reproductive autonomy of an individual as a fact of his right to privacy and agreed with the decision of the US Supreme Court in Jack T. Skinner V State of Oklahoma ( 316 US 535) which characterized the right to reproduce “as one of the basic civil rights of man.

<sup>29</sup> *Maneka Gandhi v. Union of India*, AIR 1978, SC 597.

<sup>30</sup> *R. Rajagopal v. State of Tamilnadu*, AIR 1955, SC 264.

<sup>31</sup> “*Need for Legislation to regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of parties to a Surrogacy*”, 5<sup>th</sup> August, 2009.

surrogate child legitimate? If so, to whom the child belongs? And who is considered the natural mother of the surrogate child? The legitimacy of children is the direct outcome of the concept of marriage. The settled rule is that the children born within the lawful wedlock are legitimate children of the man and his wife. As a corollary to this, children born outside the lawful wedlock are considered illegitimate<sup>32</sup>. Legal presumption as to the maternity of the child is assigned to its birth mother<sup>33</sup>. The ‘*child-mother*’ relationship is conclusively determined at the point of birth regardless of whether the child is conceived through sexual intercourse or AI or IVF. The traditional laws do not presuppose the mother’s genetic tie to the child. In the U.S.A., the concept of mother has undergone a radical change with the development of genetic engineering. Now, the concept of a genetic mother is also considered in the reproductive biology. When a surrogate is merely a gestational mother, the intended parents who provided the genetic imprint for the child are to be considered as natural and legal parents provided, they have not relinquished or waived their rights to assume the legal status of natural parents<sup>34</sup>. As a result, the surrogate child is the legitimate child of the intended parents. In the U.K., mother means “*the woman, who is carrying or has carried a child as a result of the placing in her an embryo or sperm and eggs, and no other woman, is to be treated as the mother of the child*”<sup>35</sup>. Legally, the child’s mother is the woman who carries it i.e., the surrogate host, not the mother who provided the ova. Indian courts in this regard follow the English Common Law. Due to this, the surrogate mother is admitted to be the mother of the surrogate child. If the surrogate is a married woman, the legitimacy of a child during subsistence of a valid marriage is almost concluded under Section 112

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<sup>32</sup>Paras Diwan , *Family Laws in India*, 2001 Edition, p.279.

<sup>33</sup> Black’s Law Dictionary® 4226 (Bryan A. Garner ed., 2009).

<sup>34</sup> *Belsito v. Clark*, 644 N.E. 2d. 760 *ohio.com*.

Pl.1994,<http://www.surrogacy.com/legals/article/courtdec.html>.

<sup>35</sup> Sec.27 (1) the Human Fertilization and Embryology Act, 1990, U.K.

of the Indian Evidence Act 1872<sup>36</sup> and for all legal purposes, the child would be the legitimate child of the surrogate and her husband, unless he proves to the contrary. It is clear that the intended parents are not to become the legal parents of the surrogate child. The position is still worse if the surrogate mother is unmarried. Of course, an unmarried woman resorting either to natural or artificial means of reproduction does not commit any offence as such. It's a different matter that the society does not approve of such conduct. A child of an unmarried surrogate woman is considered illegitimate. In both cases, the surrogate child may not become natural and legitimate child of the intended parents. The only way out for the surrogate child to become the natural and legitimate child of the intended parents is adoption. However, in India, the law of adoption is not liberalized to overcome the situation. Under the personal laws of India, the institution of adoption is recognized only by Hindu law and not by Mohammedan or Parsi law. Christians in India are left with no legal sanction for a valid adoption<sup>37</sup>. Even under Hindu law, an adoption is valid only when the adoptive parents and the child to be adopted are Hindus<sup>38</sup>. When either the surrogate woman or the intended parents are non-Hindus, adoption is invalid. The issue gets complex when the surrogate woman and her husband refuse to give the child in adoption to the intended parents who are genetically related to the child. Under this circumstance, adoption is not possible even if their personal law paves way for adoption. This position of law may cause a grave injustice to the intended childless parents who desire to have their genetic child through surrogacy. As the proposed ART Bill, which declares that the

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<sup>36</sup> Section 112 reads as follows: "*S. 112: Birth during marriage, conclusive proof of legitimacy.- The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.*"

<sup>37</sup> E.d. Devadasan, *Christian Law in India*, 1974, p.327.

<sup>38</sup> Sec.7, Sec.8 and Sec.10 of the Hindu Adoption and Maintenance Act, 1956.

intended parents are the legitimate parents of the surrogate child, has not been passed yet, it is desirable that the intended parents can apply for a parental order, which will give them full and permanent parental rights once the child is born. At present, family courts may be vested with the jurisdiction to entertain such petition and pass necessary orders notwithstanding the religion of the parties to the surrogacy arrangement. Such arrangement may continue till the ART Bill is passed by the Parliament.

### **III. Surrogacy and Consummation of Marriage**

A problem may arise when the intended parents seek to avoid the marriage on the ground of non-consummation of marriage, due to impotency of the party either during the pregnancy of the surrogate or after the delivery of the surrogate child. In this situation a question may arise. Can the surrogacy arrangement with the consent of both the spouses approbate the marriage in the absence of consummation of marriage? A marriage is consummated when parties have sexual intercourse after solemnization of marriage<sup>39</sup>. Under all personal laws, incapacity to consummate the marriage entitles the other party to a decree of nullity of marriage<sup>40</sup>. The courts in England have taken the view that even when the wife resorted to AID with the consent of her husband who is psychologically impotent, a marriage cannot be consummated. To have a child by AID is no approbation of marriage<sup>41</sup>. Probably it was in this background, the Royal Commission on Marriage and Divorce 1956 recommended that when parties had resorted to AI, either party should not be allowed to seek a declaration that their marriage is void on the ground of impotency<sup>42</sup>. Though the recommendation contains merit, it has not been acted upon by the British Parliament so far. In India, under the Hindu Marriage Act,

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<sup>39</sup> Paras Diwan, *Family Law*, Edition 2001, p.96

<sup>40</sup> Paras Diwan, *Family Law*, Edition 2001, p.72

<sup>41</sup> *R.E.L. v. E.L.* (1949) Probate Division 211

<sup>42</sup> *Modi's Medical Jurisprudence & Toxicology*, 21<sup>st</sup> Edition, New Delhi, p.471.

1955<sup>43</sup>, the Special Marriage Act 1954<sup>44</sup>, the Parsi Marriage Act, 1936<sup>45</sup> and the Dissolution of Muslim Marriage Act 1939<sup>46</sup>, non-consummation of marriage makes the marriage a nullity. However, in Muslim law, consummation of marriage is presumed in the presence of a valid retirement<sup>47</sup>. The proposed ART Bill, 2010 is silent on this issue. Hence, the present position of law seems to be more favourable to the petitioner spouse who seeks to nullify the marriage on the ground of non-consummation of marriage notwithstanding the fact that the surrogacy arrangement is made with the consent of both the spouses. It is submitted that the right to matrimonial remedy is to be exercised as soon as the impotency of the other party comes to light. If the party without seeking the remedy gives consent for the surrogacy arrangement with the knowledge that the other spouse suffers from impotency, it is understood that the party has waived the right to seek matrimonial remedy. Thereafter, the spouse is stopped from seeking such remedy on consideration of the surrogate child's welfare. In the light of the above reason, it is desirable that consummation of marriage may be presumed between the intended parents who resort to surrogacy arrangement with their consent for getting a child. This presumption may operate from the moment the surrogate woman is conceived through AI or in case of IVF by placing of the embryo in the womb of the surrogate woman.

**IV. Custodial Rights Over a Surrogate Child:**

Surrogacy may also present a problem on surrogates' refusal to hand over the custody of the child to the intended parents. A surrogate mothers' claim for custody of the child may be strengthened when she is the genetic mother. Even with artificial insemination the surrogate is

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<sup>43</sup> Section 12 of the Hindu Marriage Act, 1955

<sup>44</sup> Section 24(1) of the Special Marriage Act, 1954

<sup>45</sup> Section 30 of the Parsi Marriage Act

<sup>46</sup> Section 2(v) of the Dissolution of Muslim Marriage Act 1939

<sup>47</sup> A.A.A. Fyzee, *Outlines of Mohammedan Law* pg.108 (4th Ed. 1974).

still the biological mother of the child, irrespective of whether the surrogate mother is related or unrelated to the social family of the child, or whether she has taken money from the child's social parents. There is every possibility that the surrogate mother would feel attached to the child she bears, would refuse to hand over the child to the father and, might state a claim on the custody of the child. The judicial approach in foreign countries to this problem is in favour of the intended parents only. In Britain, under magistrate's order surrogate mother Kim Cotton was restrained from removing the baby from the hospital where the baby was born. The High Court eventually awarded the baby to the couple who commissioned it, with Kim Cotton receiving a substantial fee for providing her womb<sup>48</sup>. No surrogate has ever gotten custody of her baby in American Courts. In the U.S.A., the Uniform Parentage Act 1973 has recognized both genetic and birth test as a means of establishing a mother-child relationship. When a gestational surrogate delivers a child, the genetic parents of the child are the natural and legal parents<sup>49</sup>. In India, Hindu law lays down that the custody of a child up to the age of 5 years should ordinarily be with the mother<sup>50</sup>. Under other personal laws, though there is no statutory provision, the Indian Courts have consistently taken this view<sup>51</sup>. The Indian Courts are very often influenced by the principle of '*paramount welfare of the child*' in deciding the custodial right of the father and mother in matrimonial litigations. It is not known whether the courts would extend the principle of '*paramount welfare of the child*' to disputes relating to custody of the child between surrogate and intended parents. The law as it stands now is in favour of the surrogate, as she cannot be denied the title of natural mother. In the light of the above factors, it is desirable that the object and intention of the parties to the surrogacy

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<sup>48</sup> H.K. Saharay, *Laws of Marriage and Divorce* 1999 Edition, p.35.

<sup>49</sup> *Belsite v. Clark* 644 N.E. 2d, 760 pl.1994.

<sup>50</sup> Sec.6 of The Hindu Minority and Guardianship Act, 1956.

<sup>51</sup> Paras Diwan, *Family Laws in India*, 2001 Edition, p.230.

arrangement and the paramount welfare of the child are the guiding principles to award the custody of the child. Awarding custody to the intended parents is the general rule and the contrary is an exception.

**V. Inheritance Rights of Surrogate Child**

Last but not the least, the legal issue relating to surrogacy in personal law is the right of the parties to the surrogacy arrangement. This issue may raise several questions.

- i. Is the surrogate child entitled to succeed the property of the surrogate mother dying intestate either at delivery or thereafter?
- ii. Can the surrogate child inherit the property of the surrogate's husband who dies intestate during surrogate's pregnancy?
- iii. Can the surrogate mother claim inheritance rights against the properties of her surrogate child who dies intestate after some years?
- iv. Is the surrogate child entitled to inherit the properties of both or either of the intended parents died intestate as a child born at the time of their death or as a child begotten in the surrogate's womb at the time of death of intended parents but born after their death?
- v. Can the surrogate child acquire coparcenary interest in the ancestral property of the intended parents or surrogate mother's husband, in case they are Hindus?

All the above questions lead to a common one: Whose legal heir is the surrogate child? The general principle of inheritance is that inheritance is closely linked with legitimacy of heirs. Under all personal laws, legitimacy of a child is entirely based on lawfulness of the marriage between the child's parents. However, the child and the mother are always entitled to inherit their properties mutually, as the question of legitimacy between the child and its mother is not relevant for the purpose of inheritance. As discussed earlier, under the existing

laws in India, the surrogate mother and her husband are the natural and the legal parents of the surrogate child. The child is therefore, the legal heir of the surrogate mother and her husband, provided that the surrogate's husband has consented for such surrogacy arrangement. As a result, the answer is affirmative in respect to the first three questions. The surrogate child has no right of inheritance in the properties of the intended parents. A complication may arise when the surrogate mother after delivery, as the natural guardian of the surrogate child, claims the property of the intended father or mother dying intestate during her pregnancy by which time the child could not have been given in adoption. Her claim would fail even when intended parents have any genetic linkage with the child, as the intended parents do not adopt the child. This position may prejudicially affect the interest of the child. The Surrogacy agreement should protect not only the rights of the parties but also the rights of the product i.e., the surrogate child. It is therefore, desirable that the surrogate child is deemed to be the child of the intended parents from the moment the child is begotten for the purpose of testamentary and intestate succession.

#### **VI. Law Relating to Surrogacy Abroad**

In many foreign countries, surrogacy is regulated by legislation enacted during recent years. In the U.S.A., surrogacy (*including commercial fee - for service surrogacy*) is legal in about half the states. Some states have enacted legislations on surrogacy. Some other states recognize surrogacy, though not expressly enacted. Few states like Arizona, New York, North Dakota and Utah have declared surrogacy contracts void and unenforceable<sup>52</sup>. Kentucky, Louisiana, Nebraska and Washington on the other hand, have taken a less restrictive approach, passing legislation that voids only those surrogacy contracts that provide for compensation to the surrogate. In

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<sup>52</sup> 'Legal overview of surrogacy laws by States'. The American Surrogacy Center, Inc. (TASC), Marietta, G.A.

contrast, Florida, New Hampshire and Virginia have adopted the minority approach by making them legal and enforceable but they prohibit commercial surrogacy<sup>53</sup>. The State of Florida has two excellent statutes that specifically regulate surrogacy. This law provides that a couple wishing to enter into such an arrangement must sign an agreement with a surrogate for her to carry the biological child of the intended father. The surrogate agrees that upon birth, the intended couple will obtain custody and later adopt the child. Since surrogacy is well protected in Florida, it has become a frequent location for surrogacy all over the world<sup>54</sup>. In California and Ohio, the intended parents are considered to be the legal parents in cases where there is no genetic parental relationship between surrogate and child<sup>55</sup>. Arkansas recognizes the intended parents as the legal parents whether or not the surrogate has a genetic parental relationship to the child<sup>56</sup>. In Australia, commercial surrogacy is prohibited. *The Artificial Conception Act, 1985 (ACT)* provides that where a married woman gives birth to a child as a result of AI or IVF with the consent of her spouse, she and the spouse are presumed at law to be the parents and the donor of the gametes have no legal relationship at all with the child. It is not rebuttable, that is, it is conclusive for all purposes. No claim at all can be made to the child by a genetic parent. However, this hardship in surrogacy agreements can be removed only by adoption. The surrogate child on adoption by the intended parents will become their child. In the U.K., *The Surrogacy Arrangement Act, 1985* prohibits not only commercial surrogacy but also commercial agencies from assisting in the creation of surrogacy arrangements. The said Act permits making of a surrogacy arrangement on payment of reasonable expenses to surrogate with an order of Court. However, surrogacy arrangement is not enforceable by or against any of the

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<sup>53</sup> Raghav Sharma ; “An International, Moral & Legal Perspective ; The Call for Legalization of surrogacy in India” ( July 2, 2009)

<sup>54</sup> Surrogacy Here in Florida, [www.legalsurrogacy.com/surrogacy-law.html](http://www.legalsurrogacy.com/surrogacy-law.html).

<sup>55</sup> “Surrogate Motherhood”, [www.geneletter.org/archives/surrogatestatus.html](http://www.geneletter.org/archives/surrogatestatus.html).

<sup>56</sup> *Supra* n.53

parties making it. Therefore, once the child is born, the intended parents and the surrogate mother can enter into a parent responsibility agreement. This gives them equal rights over the child. After 6 weeks, the intended parents can apply for a parental order, which will give them full and permanent parental right over the child<sup>57</sup>. An executive committee recently constituted by the Government to review both the legislations has recommended to repeal *The Surrogacy Agreement Act, 1985* and Sec. 30 of *the Human Fertilization and Embryology Act, 1990* and their replacement by a new Surrogacy Act. In Canada, Commercial surrogacy is prohibited under *the Assisted Human Reproductive Act, 2004*. Alternative surrogacy remains legal. In France since 1994 any surrogacy arrangement whether commercial or altruistic is illegal, unlawful and prohibited by law. Israel is the first country in the world to implement a few of state – controlled surrogacy in which each and every contract must be approached directly by the state<sup>58</sup>. With the enactment of law to regulate surrogacy arrangement, surrogate motherhood in western countries, is fast gaining ground.

#### **VII. The Artificial Reproductive Technologies (Regulation) Bill 2010- An Evaluation**

The newly drafted *Artificial Reproductive Technologies (Regulation) Bill, 2010* recognises new developments in reproductive technology and aims to regulate the practice to ensure that these are no obstacles to anyone who intends to resort to surrogacy. Whatever justification one can give to the recent bill, there is a dire need for immediate attention to the various issues on surrogacy relating to reproductive freedom and procreative liberty. It is also necessary to examine how public conscience perceives commercial surrogacy. The Bill mainly aims to regulate the already thriving surrogacy industry in India, which the Law Commission referred to as a ‘*pot of gold*’ while

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<sup>57</sup> “Childlessness overcome through surrogacy”, [www.surrogacy.org.uk/faqs.html](http://www.surrogacy.org.uk/faqs.html)

<sup>58</sup> <http://surrogacy.laws.india.com>

noting that the infertility clinics have managed to reach the end of the rainbow.<sup>59</sup> The highlights of the Bill are as follows:

- i. Constitution of authorities to recognize assisted reproductive technology by framing policies and guidelines. These authorities are also to receive any complaints relating to surrogacy. The Bill stipulates the establishment of Advisory Boards at the state and national level. The proceedings before these boards are to be considered as judicial proceedings<sup>60</sup>.
- ii. The assisted reproductive clinics are to be regulated by the Advisory Boards and their registration and accreditation is to be mandatorily sought before the Registration Authority<sup>61</sup>. This entails that these clinics will function under heavy regulation.
- iii. It details the rights of the parties namely, intended parents, surrogates, gamete donors and children<sup>62</sup>.
- iv. It criminalizes advertisements related to pre-natal sex determination<sup>63</sup>.
- v. A draft of the surrogacy agreement has also been given in the schedule in the Draft Rules.
- vi. The Bill confers to unmarried couples and single person's the right to have children<sup>64</sup>.
- vii. It also legalizes commercial surrogacy<sup>65</sup>, although altruistic surrogacy alone was recommended by LCI, single parenthood and live-in relationships<sup>66</sup> and entitles gays and lesbians to start families using surrogate mothers. The Bill proves that apart from all the expenses involved, the surrogate mother may also receive

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<sup>59</sup> Jwala. D. Thapa, "*The 'Babies M': The Relevance Of Baby Manji Yamada V. Union Of India (UoI) And In The Matter Of Baby "M"*"

<sup>60</sup> Sec.5 to 11, ART Bill 2010

<sup>61</sup> Sec. 12, ART Bill 2010

<sup>62</sup> Sec. 32 to 36, ART Bill 2010

<sup>63</sup> Sec. 37, ART Bill 2010

<sup>64</sup> Sec.2 (g), Sec. 2 (x), Sec.2 (dd), ART Bill 2010

<sup>65</sup> Sec. 2 (aa), ART Bill 2010

<sup>66</sup> Sec. 2 (dd), ART Bill 2010

- monetary compensation from the couple or individual, as the case may be, for agreeing to act as such surrogate<sup>67</sup>.
- viii. The Bill also makes it mandatory for the foreigners to submit the certificates on their country's policy on surrogacy and that the child born to an Indian surrogate mother will enter into the commissioning parents' country<sup>68</sup>.
  - ix. The Bill also provides that anyone acting as a surrogate mother should be between 21-35 years old and cannot give birth to more than 5 children including her own<sup>69</sup>.
  - x. The surrogate mother is not allowed to take embryo transfer for the same parents over three times<sup>70</sup>.
  - xi. To have a married woman as a surrogate mother, her spouse's consent is mandatory<sup>71</sup>.
  - xii. Only an Indian citizen can be considered for surrogacy within India and women cannot be sent abroad for surrogacy<sup>72</sup>.
  - xiii. The donor's identity has to be kept confidential<sup>73</sup>.
  - xiv. A prospective surrogate mother should not engage in any act that may harm the foetus during the pregnancy period or after birth<sup>74</sup>.
  - xv. The baby's birth certificate should have the name of those individuals who had commissioned the surrogacy<sup>75</sup>.
  - xvi. In case of any congenital abnormalities, the commissioning parents would have to take the child's custody<sup>76</sup>.
  - xvii. The Bill also includes a provision that says that foreign couple will have to identify a local guardian to take care of the surrogate

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<sup>67</sup> Sec 34 (3), ART Bill 2010

<sup>68</sup> Sec 34 (19), ART Bill 2010

<sup>69</sup> Sec 34 (5), ART Bill 2010

<sup>70</sup> Sec 34 (9), ART Bill 2010

<sup>71</sup> Sec 34 (16), ART Bill 2010

<sup>72</sup> Sec 34 (22), ART Bill 2010

<sup>73</sup> Sec 33, ART Bill 2010

<sup>74</sup> Sec 34 (23), ART Bill 2010

<sup>75</sup> Sec 35 (7), ART Bill 2010

<sup>76</sup> Sec 34 (11), ART Bill 2010

mother during her gestation period as well as after delivery, till the baby is handed over to the commissioning parents<sup>77</sup>.

Even though vesting rights on women to make reproductive choices is a step to empowerment, lots of issues remain unsettled. The ART Bill fails to keep a check on the existing misuse of surrogacy arrangements.<sup>78</sup> Depending on his finance, a man can make contractually binding demands on the surrogate's behavior and her quality of service rendered.<sup>79</sup> Thus, the women from poorer sections are treated no lesser than chattel, with this outsourced mode of reproductive services.<sup>80</sup> The clause also perpetuates inequality due to lack of bargaining power. The sense of morality in Indian society is such that it prohibits transactions in human bodies, which is clearly brought out by the legal ban on prostitution and organ trafficking. Living in a community involves a price; the society can make judgments about certain moral issues, which might be against individual freedoms. If commercial surrogacy were to be allowed without any unambiguous regulations, it is likely to create a situation where the womb is rented out to an individual analogous to organ loaning. Custody claims over the child is an area, which requires consideration. The Bill exhibits the strong bias against the claims of the surrogate mother over the child by making it mandatory that she relinquish her rights over the child. It assumes that the genetic lines are stronger than the emotional bonds that the surrogate may develop. The commissioning couple is allowed to abort the foetus if they do not desire it by compensating the surrogate, but the surrogate is not allowed to do so except on expert medical advice. Also it fails to envisage a situation where a person does not want the child after delivery. The Bill does not recognize the rights of the surrogate and

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<sup>77</sup> Sec 34 (19), ART Bill 2010

<sup>78</sup> Supra n.11

<sup>79</sup> R.Anleu, "Surrogacy for Money Not Love", 6(1), Gender and Society 30, 48 (1992) at 39

<sup>80</sup> Supra n.11

fails to adhere to the norms of equality. The Bill contradicts with the national policy, which prescribes two children to ensure stable population and women's health. Those opting for surrogacy cannot be exceptions. Surrogacy permits for nine possible cycles of ova transplantation (*a maximum of three cycles for a single commissioning couple and three surrogate babies, in a life time irrespective of her own children*). This would risk maternal mortality. Another important issue regarding IVF is the high probability of births, and women acting as surrogates often undergo fetal-reduction. Furthermore there is no standardization for these women. There is no existing mechanism that holds commissioning couples and ART clinic liable for her well-being and all the arrangements happen in mere good faith. The primary objection against this Bill is the lack of a comprehensive legal framework to touch upon various dimensions pertaining to the status of the child, rights of the donors, custody issues of the child, if the commissioning parents decide to get divorced or separated. What will happen if the surrogate mother wants to keep the baby due to a real 'maternal urge', something that the contract could not or did not presume? There could be cases, where the child is born with physical deformities or some other form of medical infirmity<sup>81</sup>. Can it then be safely presumed that the 'best interest' of a physically or mentally disabled child vest with the commissioning parents and not with the gestational mother? The contractual undertaking that governs the parties before entering into the arrangement does not allow any amendments after the birth of the child. There are moral questions that emerge, of which the law has no answer. What if both the commissioning parents die? Will the custody be transferred to other family members or can the best interest argument lead the custody to be vested with the other genetic parents involved. There could also be situations where multiple births take place as in twins, triplets or even quadruplets. How such a situation would be regulated, if commissioning parents refuse to accept the other child? Personal laws

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<sup>81</sup> Sec 34(11), ART Bill 2010

of almost all the communities proscribe marriage amongst close blood relationships. However, to keep up with the privacy policies, there can emerge situations where in such prohibited degrees are not complied with. How far is this justified? The rules governing adoption have not been prescribed in the personal laws of many religions. How can such a gamut of arrangements function in this regard? These are some of the many questions that await legal answers. The aforesaid issues can be addressed by rectifying or improving the provisions of the Bill. The Bill should clearly prescribe the formation of a legal relationship between the parent and the child, and fix for the entitlements in widest possible terms, possibly before the child is born. The legal parenthood should be vested with the commissioning couple whether they get divorced or widowed or whether the child is abnormal or has survived abortion attempt. However, in cases when the commissioning parents voluntarily wish to relinquish the custody of the child and surrogate mother also wish to keep the child for her, then, there should be no hesitation in giving her the status of a legal mother after adoption. It is necessary that the proposed bill envisages such possibilities and be accommodative of such changing interest. In cases, where both the parents have died or for any other reason, the child will not be living with his intended parent, the custody of the child can be handed over to a guardian, who had been or who is appointed by the intended parent. In cases involving change in custody of a child, which is born through surrogacy, such change should be done through court proceedings to be on a safer side and in order to protect the best interest of the child. Under the Bill, option of surrogacy is available to any adult who desires to have a child irrespective of the marital status—single, married, divorced, etc<sup>82</sup>. Unmarried couples living together and having a sexual relationship as per their country are also included. The implications with respect to homosexuals, bisexuals, and transgenders here are not in conformity with the penal statute in India, which proscribes such alternate sexuality. The provision of the Bill,

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<sup>82</sup> Sec 32 (1), ART Bill 2010

pertaining to foreign gay couples, would attract much criticism<sup>83</sup>. While ARTs can be hailed as a boon for non- heterosexual people who can now have children through surrogacy, the Indian ART industries cater to the demands of only foreign homosexual couples. This shows discrimination in terms of who can access these technologies. Keeping in mind the international standards of gay rights, the availability of ARTs should be deliberated upon and provided with to ensure such rights to everyone who wish to fulfill their parental desire. The assumption that to be the parents of a child, presupposes a relationship of not more than two persons of different sex, will be made irrelevant. The US laws do not oppose single men, unmarried women, or homosexual couples from choosing ART arrangements as they are the only means to have a child. In this circumstance, they are automatically granted the parental rights. The Supreme Court has also held that the intended parent may be a single male or male homosexual couples<sup>84</sup>. The right to found a family is independent of

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<sup>83</sup> AFP, “India bans gay foreign couples from surrogacy”, 18 Jan 2013

<sup>84</sup> *Supra* n.2: “This case has brought to light the absence of regulation of the existing surrogacy industry in India. Thus, it can be said to be the direct precursor of the newly enacted ART (Regulation) Bill, 2010. The case developed in the backdrop of the Gujarat riot of 2008. Baby Manji was born on the 25th July 2008 to Japanese biological parents who came to Anand in the year 2007, looking for surrogates. The fertilized egg of both the biological parents (intended parents) was implanted in the womb of the Indian surrogate mother. Her biological parents soon developed marital problems and her mother left for Japan before her birth. They were divorced by the time Baby Manji was born. It is not clear from the Judgement if the surrogacy was responsible for the matrimonial discord. The father too had to go back to Japan as his visa expired and thus, she was under the case and supervision of her parental grandmother in the clinic in Anand. She was issued a birth certificate in the name of her genetic father by the municipality of Anand. According to the existing laws, the birth certificate would entitle the biological parents to adopt the baby. She was breast fed by an Indian lady but later had to be shifted to Rajasthan due to the riots where she was placed under intensive care as she developed complications due to as infection. Subsequently, a written petition was filed by a NGO M/S SATYA in the Rajasthan High Court challenging the legality of the surrogacy as it was feeding an illegal industry in India. The court ordered for the production of the child which was challenged by the grandmother of the baby before the Supreme Court. The court set aside the order of the High Court and held that complaints relating to the misuse of

the right to marry and includes the right of married or unmarried couples as well as single persons to have children by procreation or adoption.<sup>85</sup> The scientific progress achieved in this field undoubtedly demands a dynamic interpretation, which includes not only natural, but artificial procreation as well. In general, ARTs are made available to any consenting adults, who desire to have a child using these technological innovations. Neither the marital status of the persons (*married, unmarried, single, divorced*) nor their sexual orientation (*heterosexual, homosexual or bisexual*) is generally used as a decision making criterion. The vacuum exists due to the lack of a coherent jurisprudence, non-uniformity on legal standards, different understanding of the nomenclatures, unequal access to resources and varying economic standards of the countries coupled with the inevitable aspects of cultural relativism renders legal regulation on this subject extremely difficult. The ethical considerations of right to reproduce, accountability and justice in the distribution of resources, demographic considerations vis-à-vis individual autonomy are some of the vast array of aspects that deserve a cumulative policy design. The profound significance of the entire discourse becomes all the more urgent to theorize as vulnerabilities of all the participants throw challenges within the collective conscience of social, ethical and certainly of legal character. There is no supervisory and regulatory body under which all ART clinics offering their services could be placed, except a set of guidelines, brought out by the Indian Council of Medical Research in 2005, which, however, are not legally binding. In the absence of any law on the subject, infertility clinics in India

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*surrogacy and it being an illegal racket in India should be made before the commission set up under the Commissions for Protection of Child Rights Act, 2005. As no such complaint was made, the order requiring the production of the child was not valid. An additional prayer that the passport of the baby be granted and that the grandmother's visa be extended was allowed and directions to that effect were given to the government."*

<sup>85</sup> United Nations University, "Artificial Methods of Procreation"  
<http://archive.unu.edu/unupress/unupbooks/uu08ie/uu08ie0r.htm>

which are baby makers, treat couples for infertility and in case of their inability to have a baby through natural reproductive process, use artificial insemination procedures and also assist in finding surrogates. These clinics also arrange donors of gametes when required, determine the money involved, arrange for legal help to work out the terms of the surrogate agreement and the benefits to each of the parties, supervise the pregnancy of the surrogate mother, monitor during the gestation period, successfully deliver the child, obtaining of birth certificate from the municipal corporation and the final formalities to ensure that the baby is handed over to the intending parents<sup>86</sup>. With each successful birth, the stamp on the legality of the activities is sanctioned in absence of any state and central legislation. Although ICMR guidelines do exist, there is no central or state body to ensure that these regulations are followed strictly when it comes to surrogacy. Prejudicial authorization of surrogacy arrangement by the court of law is desirable to ensure the fairness of the terms of the agreement. Incidentally, financial considerations seem to be the main reason for the surrogates to participate in these arrangements. These agreements are carried out with the help of local lawyers as in case of problems; parties settle and move ahead with whatever comes out of the agreement as long as one gets the baby and the other, the money for surrogacy. The infertility clinics maintain a low profile in the absence of a concrete law. The uncertainty regarding the rights and duties of the parties involved, coupled with the absence of specialized forums for redressal of grievances related to surrogacy ensures that matters relating to breach of contract, non-pregnancy, exploitation and violation of human rights are swept under the carpet.

#### **4. CONCLUSIONS AND SUGGESTIONS**

21<sup>st</sup> century has been recognized as the Bio Tech Century. India as a developing country along with the western world is actively

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<sup>86</sup> SAMA Team, Assisted Reproductive Technologies: For whose Benefit? 44(18) Eco. & PL weekly 25. (2009).

engaged with genetic engineering that has posed many challenges including medico-legal problems. Medical advancement has revolutionised family building through AI, IVF in surrogate motherhood, which is gradually becoming popular in India. The infertile couples have started resorting to this technique to overcome childlessness. This method is likely to be more in demand with the changing role of women, who now hold important positions in commerce, industry, science and politics and would naturally find it inconvenient to bear a child. With the legal vacuum, these medico-legal issues remain unsettled leading to various complications especially in personal laws. The question relating to legitimacy, custodial right, succession right, religion of the child etc., should be answered in unambiguous terms in the proposed legislation. There is more demand for amendments in the area of personal law, contract law and other fields of civil law. In the absence of any generally accepted moral or religious standards, human rights have been frequently referred to as the major contemporary guidelines for legislators, courts, jurists and other competent authorities. It is therefore, imperative that proposed law must be enacted for surrogate motherhood without any further loss of time. In this process, due reconsideration should necessarily be given on all the social, ethical and legal issues inherent in surrogate motherhood by engaging an expert committee representing scientists, medical practitioners, lawyers, legal academicians, sociologists and psychologists, so that procreative liberty and social welfare may be balanced. This endeavour to bring about legislation on surrogacy will be a boon to childless couples, not only solving their problems but also addressing all the legal issues arising out of surrogate motherhood.

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**Article**

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*LEGALITY OF PUT OPTION UNDER THE SECURITIES  
CONTRACT REGULATION ACT, 1956*

BY,

HARSHAD PATHAK<sup>1</sup>

**ABSTRACT**

*Put option is a contract for the purchase or sale of a right to buy securities in future, at a predetermined price. The buyer of a put option has the right, but not the obligation to sell an agreed quantity of a particular commodity or financial instrument, to the seller at a certain time for a certain price called strike price. While the Bombay High Court has recently upheld the distinction between options and forward contracts, we are far from receiving an authoritative interpretation as to the nature of such a clause. The Supreme Court's direction to SEBI to take a relook at the application filed by MCX Stock Exchange Limited to operate as a stock exchange in light of the amended MIMPS Regulations without being influenced by the aforementioned decision of the Bombay High Court only adds to the prevailing uncertainty. It has been time and again observed by varying judicial authorities that put options are not legally enforceable in India because there is no actual delivery of securities at the time of making the contract. The same opinion is strongly endorsed by Securities Exchange Board of India (hereinafter referred to as SEBI) as well. However, it is the very proposition that is being negated by the given paper. In such context plagued with dividing opinions and continuous ambiguity, the given paper intends to analyze the legal validity of put options under the Securities Contract*

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*Regulation Act (SCRA), 1956. The author simultaneously puts forth the view that put options amount to ‘spot delivery contracts’; thereby, being enforceable in law, and making comparisons with forward contracts redundant. Such proposition is based upon a complete understanding of the meaning of ‘securities’, as defined in the SCRA, and a drawing a distinction between ‘actual’ and ‘physical’ delivery with respect to intangible commodities. The author, to the best of his knowledge, endorses a point of view that is yet to receive the attention of the SEBI in all its deliberations involving options and has yet to be brought to the notice of any judicial or quasi-judicial authority.*

**1. INTRODUCTION**

An ‘option in securities’ means “a contract for the purchase or sale of a right to buy or sell, or a right to buy and sell, securities in future, and includes a put, a call or a put and call in securities”.<sup>2</sup>

A put option on the other hand, is a contract for the purchase or sale of a right to buy securities in future, at a predetermined price. “The buyer of a put option has the right, but not the obligation to sell an agreed quantity of a particular commodity or financial instrument, to the seller at a certain time for a certain price called strike price.”<sup>3</sup>

Time and again, it has been observed by relevant judicial authorities that options are not legally enforceable in India. The reasoning behind the same dictates that as far as ‘securities’ are concerned, only certain specified transactions are permissible. One of the permissible transactions in securities is a ‘spot delivery contract’. This paper intends to analyze the legal validity of put options under the Securities Contract Regulation Act, 1956 (*herein referred as ‘SCRA’*); and simultaneously put forth the view that such options

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<sup>2</sup> Securities Contracts (Regulation) Act, Section 2 (d) (1956).

<sup>3</sup> *The Commissioner of Income Tax v Bharat R Ruia*, (2010) 199 Taxman 265 (Bom. H.C.) 7.

amount to ‘*spot delivery contracts*’; and are therefore, enforceable in law. Put option is a transaction that is assumed to take place in the future, for a price agreed today, and consequently, is often labeled as a forward contract. Such contracts, alleged to be speculative, are thus, rendered unenforceable. It is this very proposition that the paper endeavours to negate. The judicial opinion, declaring options as forward contracts is not only erroneous, but based upon an incomplete understanding of the meaning and scope of the term ‘*securities*’. Spot Delivery Contract provides for the actual delivery of securities and the payment of a price thereof either on the same day as the date of the contract or on the next day. The paper puts forth the idea that a put option is a transaction in securities that takes place, not at a future point of time, but in the present itself. There is an actual delivery of securities involved taking place on the same day as that of the contract. The idea rests on understanding the scope and meaning of ‘*securities*’, as defined under the SCRA.

Pursuant to the same, the author has *first* attempted to define the subject matter of ‘*options*’, which is, rights in securities, as opposed to shares, stocks etc. and deliberate upon the recognition of rights as a valid consideration in law.

*Second*, the concepts of ‘*delivery*’ and ‘*possession*’ are subject to a discussion so as to draw a distinction between actual, physical and constructive delivery of tangible and intangible goods.

*Third*, in order to appreciate the changing economic context, emphasis is laid on the gradual change in the legislative intent behind the SCRA, especially since the advent of the New Economic Policy in 1990. The author attempts to highlight the gradual inclination towards the acceptability of options as being legally enforceable. It is asserted that the legislative intent behind the enactment of any Statute is with respect to the substantial provisions of the Statute itself. Therefore, an amendment to the statute must be construed as an amendment to the legislative intent at the time of its enactment. The purpose behind such

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discussion is to interpret the SCRA in context of the current economic scenario, keeping in mind the needs of the market.

*Fourth*, and last, a summarizing conclusion is sought in response to the various questions raised while addressing the issue of legality of put option. However, before proceeding with the idea intended to be put forth, it is apt to initially assess the current legal position as far as the legal validity of options in India is concerned. It is necessary to understand the recent judicial trends, in order to negate them satisfactorily.

**2. CURRENT LEGAL POSITION**

In view of the provisions of the SCRA and notifications issued there under, the validity of Options has been often called into question by the Securities and Exchange Board of India (*herein referred as 'SEBI'*). The recent trend reflects the inclination of SEBI towards declaring such options to be legally unenforceable in India. In 2010, SEBI first outlawed the clauses in agreements dealing with forward contracts such as buyback agreements and put and call options in its order against MCX Stock Exchange Limited.<sup>4</sup> It was followed by the *BALCO Arbitration Award*, wherein Sterlite Industries had call option on a 49% stake in BALCO's shareholding and it sought to enforce this option and purchase the BALCO shares from the Government of India. The Arbitral Tribunal ruled, by a majority of two arbitrators against one, that the call option was illegal.<sup>5</sup> However, the issue involved in the *BALCO Arbitration Award* was that of free transferability of shares of a public company, as mandated by Section 111A, *Companies Act, 1956*, instead of the question of actual delivery

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<sup>4</sup> *MCX Stock Exchange Ltd. v SEBI*, (201) WTM/KMA/MRD/296/09/2010 (SEBI).

<sup>5</sup> Press Release, Sterlite Industries (India) Ltd., Update on Balco Arbitration Award (Jan. 27, 2011).

[http://www.moneycontrol.com/livefeed\\_pdf/Jan2011/Sterlite\\_Industries\\_\(India\)\\_Ltd\\_270111.pdf](http://www.moneycontrol.com/livefeed_pdf/Jan2011/Sterlite_Industries_(India)_Ltd_270111.pdf)

of securities. A similar stance was also visible in SEBI's recent directive to Vedanta Resources and Cairn Energy to drop the put and call options, and pre-emption right clauses from their original deal agreement.<sup>6</sup> Recently, Vulcan Engineers had informally approached SEBI to determine the legality of its preferential allotment of 14% shares to SIMEST SPA, an Italian financial institution. SIMEST was the beneficiary of a put option whereby it could require Terruzzi Fercalx, another Italian company to purchase its shares in Vulcan Engineers after a predetermined time. The informal guidance had been sought as a matter of interpretation under the SEBI (*Substantial Acquisition of Shares and Takeovers*) Regulations, 1997. In response, SEBI stated that the transaction under this arrangement would not qualify as spot delivery contract as defined in Section 2(i) of SCRA. Therefore, the pre-agreed buyback of VEL shares from SIMEST through put/call option was told not to be valid under SCRA.<sup>7</sup>

Contrary to the aforementioned instances, there have been instances where options have been successfully enforced in India without being labeled as legally invalid. In April, 2011, Essar had a put option over 22 per cent of Vodafone Essar Limited (VEL) with Vodafone and the same option was also successfully exercised by Essar to sell its 22 per cent to Vodafone. Similarly Vodafone also had a call option over the remaining 11 per cent of VEL owned by the Essar Group. This call option was also exercised by Vodafone and by the virtue of maturity of both these options Vodafone acquired 33% shares of VEL owned by Essar and its group companies for a consideration of USD 5 Billion. Prior to the same, the Punjab and Haryana High Court had held a similar clause to be valid in the case of *Rama Petrochemicals Ltd v. Punjab State Development Industrial*

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<sup>6</sup> Reena Zachariah, SEBI ruling on Cairn deal may hit M&As of listed companies, *The Economic Times*, April 20, 2011.

<sup>7</sup> V. Umakanth, SEBI Reasserts Views on Put and Call Options (June 21, 2011), <http://indiacorplaw.blogspot.com/2011/06/sebi-reasserts-views-on-put-and-call.html>.

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*Corporation*<sup>8</sup>. It observed that the provisions of the SCRA 1956 will be excluded from application to the Financial Collaboration Agreement by virtue of the 1961 notification issued by the Central Government. Consequently, Clause 22 of the agreement, stating that Rama has to purchase (*buy back*) the shares of PSIDC in its company in two equal installments before the expiry of third and fourth years after the commencement of commercial production, was found to be legal and enforceable. Significantly, in a recent development, the SEBI order, which denied permission to MCX Stock Exchange Ltd. to trade in securities, was set aside by the Bombay High Court clarifying that '*option contracts*' differ from '*forward contracts*', which are prohibited under the SCRA.<sup>9</sup> However, the Court made no observations as to whether such contracts are in the nature of '*contract in derivatives*.' This is of significance since Section 18A of the SCRA states that contracts in derivatives shall be legal and valid if such contracts are traded on the floor of a recognized stock exchange and settled on the clearing house of a recognized stock exchange in accordance with the rules and bye-laws of such stock exchange.<sup>10</sup> The Special Leave Petition filed by SEBI before the Supreme Court of India, challenging the decision of the Bombay High Court, was also disposed of by the apex Court under consent terms. It makes for the Regulator to amend the Securities Contracts (Regulation) (*Manner of Increasing and Maintaining Public Shareholding in Recognized Stock Exchanges*) Regulations, 2006 ('*MIMPS Regulations*') and to take a relook at the application filed by MCX Stock Exchange Limited to operate as a stock exchange in light of the amended MIMPS

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<sup>8</sup> *Rama Petrochemicals Ltd v Punjab State Development Industrial Corporation*, (2006) CWP No. 12861 (Punjab and Haryana H.C.).

<sup>9</sup> *MCX Stock Exchange Ltd. v. SEBI*, (2012) Writ Petition No. 213 of 2011 (Bom. H.C.).

<sup>10</sup> Securities Contracts (Regulation) Act, Section 18A (1956).

Regulations.<sup>11</sup> The bench, however, asked SEBI not to be influenced by various observations made by the Bombay High Court in its judgement, setting aside the SEBI's order.<sup>12</sup> Consequently, we are yet to witness a definite legal stance by the apex Court as to the legality of options. SEBI, in turn, contrary to its initial stance, has granted MCX-SX permission to deal in equity and equity futures & options, interest rate futures and wholesale debt segments subject to a few conditions.<sup>13</sup> However, the clearance comes without any clarification as to the legal validity of options in India. Moreover, the administrative decision by SEBI can also not act as a judicial precedent for future instances. Thus, in light of the prevailing uncertainty, the paper intends to put forth a point of view that differs from the opinion of SEBI; while simultaneously adopting a line of reasoning not considered by the Bombay High Court in making its recent observations.

### 3. OPTIONS AND SECURITIES

#### 1. Meaning of 'Securities'

Section 2 of the SCRA defines the term 'securities'<sup>14</sup> to include, *inter alia*,

- i. Shares, scrips, stocks, bonds, debenture stock debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;
- ii. Derivatives;
- iii. Government securities;

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<sup>11</sup> MCX Stock Exchange Ltd. v. SEBI, (2012) Special Leave to Appeal (Civil) No(s).11738/2012 (S.C.).

<sup>12</sup> PTI, Supreme Court asks SEBI to reconsider MCX-SX plea in 3 months, The Economic Times, April 11, 2012.

<sup>13</sup> ET Bureau, Market excited as MCX stock exchange gets SEBI approval, The Economic Times, July 11, 2012.

<sup>14</sup> Securities Contracts (Regulation) Act, Section 2(h) (1956).

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- iv. Such other instruments as may be declared by the Central Government to be securities; and
- v. Rights or interest in securities.

‘Securities’ refers to “*an instrument that evidences the holder's ownership rights in a firm, e.g., a stock; the holder's creditor relationship with a firm or government, e.g., a bond; or the holder's other rights, e.g., an option.*”<sup>15</sup> The term ‘*securities*’ has been inclusively defined, within the Act. Any right or interest created in any share, stock, bonds etc., or any other form of securities defined under Section 2(h), would also amount to ‘*securities*’ under the Act. The last meaning attributed to the term – rights or interest in securities - is of special relevance to the given paper. The definition of ‘*securities*’, therefore, creates a distinction between two kinds of securities.

*First*, securities that are capable of being physically possessed through the possession of the ownership documents. These are the securities in which a specific right or interest can be created, and include shares, stocks, debentures, government securities. For the sake of convenience, it is preferred to refer to these kind of securities as ‘*physical securities*’, though the usage may not be completely accurate.

The *second* kind involves ‘*notional*’ or ‘*constructive*’ securities, which are primarily the rights or interest created in the former kind of securities. Such securities can be possessed via acquiring control, as well as be transferred, but are incapable of physical possession. The Securities Appellate Tribunal (SAT) had upheld the same distinction in *Alok Khetan*,<sup>16</sup> albeit through the use of different words. It was held that a letter of allotment created a right in

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<sup>15</sup> Black’s Law Dictionary® 4226 (Bryan A. Garner ed., 2009).

<sup>16</sup> *Alok Khetan v SEBI*, (2007) Appeal No. 55 (Securities Appellate Tribunal).

the shares, and this right could be transferred. A transfer of this right, and not merely a letter of allotment, was treated as a transfer of securities. The letter of allotment is a mere representation of the intangible right.

*“Rights so embodied may conveniently be termed ‘documentary intangibles’, and their significance lies in the fact that the document which manifests them is to most intents and purposes equated with goods and is susceptible to the same remedies of specific delivery, damages for conversion and the like.”<sup>17</sup>*

In *Alok Khetan*, a company had allotted, through a letter, certain preferential shares to the appellants, amongst others, without the payment of allotment money at the time of allotment. The appellants had then immediately sold the same shares to a third party to manipulate the market in the scrip of the company; in a manner that was violative of the provisions of the SCRA. One of the many questions involved was whether such a transfer of shares, through only a letter of allotment, could be treated as a transfer of securities. The Tribunal had observed in response that;

*“The appellant had not received the shares in the physical form but surely the letter of allotment that he received created a right in him and his interest in the specific shares which had actually been allotted... therefore, the letter of allotment by itself was a security which was traded by the appellant.”<sup>18</sup>*

However, the transaction was found to be illegal as there was no payment of price on the same day as that of the contract, or the next day.

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<sup>17</sup> Roy Goode, *Commercial Law* 28 (Penguin Books 2004).

<sup>18</sup> *Supra*, n. 16

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**II. Option in Securities**

An ‘option in securities’ means “a contract for the purchase or sale of a right to buy or sell, or a right to buy and sell, securities in future, and includes... a put, a call or a put and call in securities.”<sup>19</sup>

The essentials of an option in securities are that - *firstly*, subject matter must be a right – either to buy; or sell; or buy and sell – certain physical securities. *Secondly*, the transaction of the physical ‘securities’ involved must be in future. An option, therefore, creates a right in securities that can be documented like shares, stocks etc.; the right itself amounting to constructive securities under the SCRA.<sup>20</sup> Therefore, the subject matter of any option must necessarily be a right *ad rem*, and not any other form of physical securities like shares, stocks, debentures etc.

To summarize, an “option gives the holder the right to buy or sell an underlying asset at a future date at a predetermined price... A put option is the right to sell. The buyer of a put option has the right, but not the obligation to sell an agreed quantity of a particular commodity or financial instrument, to the seller at a certain time for a certain price called strike price.”<sup>21</sup>

**III. Rights as Consideration**

Subject to certain statutory exceptions, any agreement made without consideration is void.<sup>22</sup> Agreements are also void, if their consideration is unlawful.<sup>23</sup> Accordingly, the existence of a lawful consideration is central to the legal validity of any agreement. The

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<sup>19</sup> *Supra*, n. 2

<sup>20</sup> Securities Contracts (Regulation) Act, Section 2(h)(iii) (1956).

<sup>21</sup> *The Commissioner of Income Tax v Bharat R Ruia*, 199 Taxman 265 (Bom. H.C. 2010).

<sup>22</sup> The Indian Contract Act, Section 25 (1872).

<sup>23</sup> The Indian Contract Act, Section 24 (1872).

subject matter of a Put Option is necessarily a right to buy securities in the future, at a pre-determined strike price. Therefore, while the consideration for one party to such an agreement is the payment of price, the other party's consideration is the granting of the specified right to buy in securities. Rights are recognized to be a valid consideration. The Indian Contract Act provides that “[w]hen, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.”<sup>24</sup>

“Right’ means a legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is a wrong.”<sup>25</sup>

The Supreme Court of India, in *Chidambara Iyer v PS Rangaiyer*<sup>26</sup>, had clarified that a valuable consideration in the sense of law may consist of some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. Therefore, it is a settled proposition that ‘rights’ have been recognized as a valid consideration irrespective of their nature, or the benefit they accrue to the promisor.

After all, “an invisible right notionally embodied in a document or instrument may, miraculously, become the object of a pledge, or a possessory security. A person who disposes outright of a debt, apparently retaining nothing in his hands, physical or metaphysical, yet has power in certain conditions to make an effective transfer of the same debt to a second transferee.”<sup>27</sup>

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<sup>24</sup> The Indian Contract Act, Section 2(d) (1872).

<sup>25</sup> Black's Law Dictionary® 1436 (Bryan A. Garner ed., 2009).

<sup>26</sup> (1966) AIR SC 193.

<sup>27</sup> Roy Goode, Commercial Law 24 (Penguin Books 2004).

#### 4. **SPOT DELIVERY CONTRACT**

##### I. **Essentials**

*'Spot Delivery Contract'* means a contract which, *inter alia*, provides for "... actual delivery of securities and the payment of a price therefore either on the same day as the date of the contract or on the next day, the actual period taken for the despatch of the securities or the remittance of money therefore through the post being excluded from the computation of the period aforesaid if the parties to the contract do not reside in the same town or locality."<sup>28</sup>

In order to qualify as a spot delivery contract, the contract for sale of securities must provide for actual delivery of securities and the payment of price either on the same day as the date of the contract or on the next day, etc.<sup>29</sup>

Accordingly, a spot delivery contract has three essentials:

- i) Actual Delivery of Securities;
- ii) Payment of a price;
- iii) Both either;
  - On the same day as the date of contract, or
  - On the next day.

It has already been put forth that the subject matter of an option, in this regard a put option, must always be a right in securities. This right in securities is itself to be construed as a constructive security. The question of legality of options arises out of the concern that in the absence of an actual delivery of securities involved, such a transaction would be speculative in nature, and not considered legal under the SCRA. However, the premise on which the argument is

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<sup>28</sup> Securities Contracts (Regulation) Act, Section 2(i)(a) (1956).

<sup>29</sup> *Niskalp Investments and Trading Co Ltd v Hunduja Tmt. Ltd.*, (2007) 79 SCL 368 (S.C); *Norman Hamilton v Umedbhai Patel*, (1979) 81 BOMLR 340 (Bom. H.C.).

based overlooks the nature of securities involved in an option. Since a put option is a transaction of constructive securities, as opposed to physical securities, there is indeed an actual delivery of the securities involved.

*“A put option is the right to sell. The buyer of a put option has the right, but not the obligation to sell an agreed quantity of a particular commodity or financial instrument, to the seller at a certain time for a certain price called strike price.”*<sup>30</sup>

The right to sell to an assured buyer at a pre-determined strike price gets transferred to the buyer of a put option, the moment the agreement comes into force. Such a right, amounting to constructive securities, therefore, gets actually delivered on the same day as that of making the contract. Consequently, as long as the payment of price is made on the same day, a put option ought to be considered as a spot delivery contract. The distinction between actual and physical delivery is also a matter of discussion; however, reserved for later heads. It must also be realized that a spot delivery contract does not necessitate that the physical securities in which the right has been created by the put option be also delivered on the same day as that of the contract or the next day. Such securities in which the right has been created are not the subject matter of the put option. The subject matter of an option, as discussed earlier, must only be a right in securities. Thus, any assumption to the contrary, mandating an actual delivery of physical securities through an option is in direct contradiction to the very nature of an ‘*option in securities*’. Such assumptions are not envisaged by the SCRA.

As far as the legality of a put option is concerned, it is irrelevant when do the securities in which the right has been created actually get delivered, or if they get delivered at all. There might be certain situations wherein the put option, despite being bought, is

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<sup>30</sup>*Supra*, n.3

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never exercised. The legality of the option would then be contingent upon its exercise. This proposition not only defies reason, but also reflects an erroneous and incomplete understanding of ‘options’. It has already been discussed that rights are valid consideration in the sense of law. Moreover, the legality of any contractual clause must be pre-determined, and not rest upon the performance of either of the party. It shall indeed be an absurd assertion that a specific contractual clause is legally valid if exercised immediately, but invalid in case of delay. Hence, since a put option does involve an actual delivery of the constructive securities involved on the same day as that of the contract, it amounts to a Spot Delivery Contract, irrespective of its exercise.

***II. Legality***

*“The Central Government may, by order published in the Official Gazette, direct that the powers (except the power under Section 30) exercisable by it under any provision of this Act shall, in relation to such matters and subject to such conditions, if any, as may be specified in the order, be exercisable also by the Securities and Exchange Board of India or the Reserve Bank of India.”<sup>31</sup>*

In the exercise of the same, the Central Government has directed that certain powers under, *inter alia*, Section 16 of SCRA 1956 shall be exercisable by SEBI.<sup>32</sup>

The power delegated states that;

*“[i]f the Central Government is of opinion that it is necessary to prevent undesirable speculation in specified securities in any State or area, it may, by notification in the Official Gazette, declare that no*

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<sup>31</sup> Securities Contracts (Regulation) Act, Section 29A (1956).

<sup>32</sup> SEBI, Delegation of Powers to SEBI under SC(R) Act So No. 573(E) (July 30, 1996), <http://www.sebi.gov.in/acts/act02b.html>.

*person in the State or area specified in the notification shall, save with the permission of the Central Government, enter into any contract for the sale or purchase of any security specified in the notification except to the extent and in the manner, if any, specified therein.*<sup>33</sup>

Moreover, “[a]ll contracts in contravention of the provisions of sub-Section (1) entered into after the date of notification issued there under shall be illegal.”<sup>34</sup>

The Securities and Exchange Board of India has thereby, in exercise of the said power, duly notified that,

*“[N]o person... shall, save with the permission of the Board, enter into any contract for sale or purchase of securities other than such spot delivery contract or contract for cash or hand delivery or special delivery or contract in derivatives as is permissible under the said Act...”*<sup>35</sup>

In light of the same, any Spot Delivery Contract for the sale or purchase of securities is enforceable under the Indian law. Since Put Option satisfies the essentials of a Spot Delivery Contract as defined under the SCRA, it ought to be considered as legally valid and enforceable in India.

## **5. DELIVERY AND POSSESSION**

### **I. Theoretical Meaning**

Delivery refers to “*the formal act of transferring something; the giving or yielding... control of something to another.*”<sup>36</sup> In terms

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<sup>33</sup> Securities Contracts (Regulation) Act, Section 16(1) (1956).

<sup>34</sup> Securities Contracts (Regulation) Act, § 16(2) (1956).

<sup>35</sup> SEBI, SO 184(E) (March 1, 2000), <http://www.sebi.gov.in/acts/.html>.

<sup>36</sup> Black’s Law Dictionary 494 (Bryan A. Garner ed., 2009).

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of delivery of goods, “*delivery means voluntary transfer of possession from one person to another.*”<sup>37</sup>

Actual delivery is “*the act of giving real and immediate possession to the buyer or the buyer’s agent.*”<sup>38</sup> Ideally, “*the use of the words ‘actual delivery’... would rule out the possibility of constructive or symbolic delivery. It means real delivery as opposed to notional delivery.*”<sup>39</sup>

The statutory definition of ‘*delivery*’, given in the Sale of Goods Act, 1930, is capable of a number of different meanings and is not confined to the transfer of physical possession. The use of words ‘*delivery*’ and ‘*possession*’ encompasses all forms - physical and constructive. Constructive delivery ‘*denotes the transfer of control of the goods to the buyer without physical possession*’<sup>40</sup>. Thus, it is pertinent to study the co-relation between ‘*delivery*’ and ‘*possession*’. Possession of an asset can be defined “*as control, directly or through another, either on the asset itself or of some larger object in which it is contained, or of land or buildings on or beneath which it is situated, with the intention of asserting such control against others, whether temporarily or permanently.*”<sup>41</sup> However, like ‘*delivery*’, the meaning of ‘*possession*’ varies according to the nature of issue in which the question is raised. For example, in the case of *Re Atlantic Computer Systems plc*<sup>42</sup>, the United Kingdom Court of Appeal held that a company, which took computers under an equipment lease and let them to the intended end-user under a sub-lease nevertheless continued to hold possession as between itself and the head lessor.

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<sup>37</sup> The Sale of Goods Act, § 2(2) (1930).

<sup>38</sup> Black’s Law Dictionary 494 (Bryan A. Garner ed., 2009).

<sup>39</sup> *Davenport & Co Pvt Ltd v Commissioner Of Income Tax*, (1975) AIR SC 1996 (S.C.); *Thakurlal Shivprakash Poddar v Commissioner of Income Tax*, (1979) 116 ITR 190 (Madhya Pradesh H.C.).

<sup>40</sup> Roy Goode, Commercial Law 265 (Penguin Books 2004).

<sup>41</sup> Roy Goode, Commercial Law 42 (Penguin Books 2004).

<sup>42</sup> *Re Atlantic Computer Systems plc*, (1990) BCC 859 (Court of Appeal).

Accordingly, possession has three essentials:

- i) Existence of an asset;
  - Tangible, or
  - Intangible
- ii) Control over the asset;
  - Direct, or
  - Indirect
- iii) Intention of asserting such control against others;
  - Temporarily, or
  - Permanently

Possession, therefore, exists in terms of control over the asset and the intention to assert the same, independent of the capability of an asset to be physically possessed or not.

Similarly, the Supreme Court of India, in *Tata Consultancy Services v. State Of Andhra Pradesh*<sup>43</sup>, had observed that the information technology within a floppy, or a disk to amount to ‘goods’ under the Andhra Pradesh General Sales Tax Act, 1957 since ‘it was capable of being transmitted, transferred, delivered, stored, possessed etc.’<sup>44</sup> The decision was most recently upheld by the Madras High Court in *Infotech Software Dealers v. Union of India*<sup>45</sup>

## **II. Legal Meaning**

The term ‘*actual*’ delivery has often been used interchangeable with ‘*physical*’ delivery. Any distinction between the two has rarely been recognized. By actual delivery, it is often erroneously “*meant the*

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<sup>43</sup> *Tata Consultancy Services v. State Of Andhra Pradesh*, AIR 2005 SC 371 (S.C.).

<sup>44</sup> *Tata Consultancy Services v. State Of Andhra Pradesh*, AIR 2005 SC 371 (S.C.).

<sup>45</sup> *Infotech Software Dealers v. Union of India*, (2010) W.P.Nos.3811, 18886 of 2009 (Madras H.C.).

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*transfer of physical possession to the buyer or his agent.*<sup>46</sup> Examples of such interpretation may be found in the Indian legal system. The Negotiable Instruments Act, 1881, for instance, stipulates that, “*the making, acceptance or endorsement of a promissory note, bill of exchange or cheque is completed by delivery, actual or constructive...*”<sup>47</sup> The Transfer of Property Act, 1882 upholds the same while interpreting the term ‘*actionable claim*’;

“*[A]ctionable claim means a claim to any debt, other than a debt secured by mortgage of immoveable property... or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant...*”<sup>48</sup>

The relevant point here is that there does not appear to be any distinction made between ‘*actual*’ and ‘*physical*’ delivery. An attempt to provide a clear meaning had been made by the Supreme Court of India in *Jute Investment Co. Ltd. v. Commissioner of Income-tax*<sup>49</sup>, and the Madhya Pradesh High Court in *Thakurlal Shivprakash Poddar v Commissioner of Income Tax*<sup>50</sup>, while elaborating upon the interpretation of a ‘*speculative transaction*’.

“*Speculative transaction means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips.*”<sup>51</sup>

The apex Court had observed that the use of the words, actual delivery in the definition of the speculative transaction, would rule out the possibility of notional or constructive delivery. The observation

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<sup>46</sup> Roy Goode, Commercial Law 265 (Penguin Books 2004).

<sup>47</sup> The Negotiable Instruments Act, Section 46 (1881).

<sup>48</sup> The Transfer of Property Act, Section 3(c) (1882).

<sup>49</sup> (1980) 121 ITR 56.

<sup>50</sup> (1979) 116 ITR 190

<sup>51</sup> Income Tax Act, Section 43 (5) (1961).

was based on the landmark judgment of the Supreme Court in a separate case of *Davenport & Co Pvt Ltd v Commissioner Of Income Tax*.<sup>52</sup> Therein the appellant had contracted to purchase certain goods from a third person. The appellant, however, did not take actual delivery of the goods, as it had no go-downs for keeping the goods. The aforesaid transactions resulted in a substantial loss to the appellant, which was sought to be adjusted as a trading loss in the assessment year 1959-60. The question that fell for consideration was whether the transaction referred to above entered into by the appellant was a 'speculative transaction' within the meaning of the Income Tax Act, 1922. The legal position is that any ordinary trading loss incurred by a person could be deducted from his Income Tax returns, unless it arose from a speculative transaction.<sup>53</sup> Moreover, the condition of actual delivery of goods contemplated to be sold must be satisfied for it to be eligible for deduction. It was contended by the appellant that there was an actual delivery of goods through the exchange of delivery orders. Accordingly, the loss sustained by the appellant would not be a loss of speculative transaction. In response, it was contended that actual delivery cannot be constructive in nature. Since there was no actual delivery in the given case, any corresponding deduction made shall be invalid. The apex Court, while ruling against the Appellant, upheld the distinction between 'actual' and 'constructive' delivery. It noted that there cannot be an actual delivery of goods through the delivery bonds, and the necessary conditions for a valid tax deduction have not been satisfied. Accordingly, 'actual' and 'physical' deliveries have been made interchangeable aspects of law by denoting them a similar, if not completely identical, meaning.

Contrary to the aforementioned legal position, the author, in the next head, shall attempt to distinguish the mentioned judicial

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<sup>52</sup> *Davenport & Co Pvt Ltd v Commissioner Of Income Tax*, (1975) AIR SC 1996 (S.C.).

<sup>53</sup> Income Tax Act, Section 24(1) (1922).

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instances from those of possession of securities on the basis of the subject matter of an option, that is, constructive securities.

***III. Actual Delivery of Securities***

The co-relation between delivery and possession is essential to present discussion concerning the actual delivery of securities. It may be restated that any commodity is said to be actually delivered if there is an actual transfer of possession from one person to another. The essentials of '*possession*' have already been discussed, and though highly relevant, do not require to be reproduced. The judicial understanding of the word '*actual delivery*' reflects a slightly rigid interpretation that fails to acknowledge the distinction between '*actual*' and '*physical*' securities. While such understanding is not disputed, it is put forth that the same interpretation has no significant bearing on the present discussion; the reasons being two fold.

*First*, the observations made by the Supreme Court of India are apt as far as the goods are tangible in nature. In each of the discussed cases, the goods involved were capable of being physically held and possessed. However, applying the same yardstick universally to the possession and delivery of intangible commodities would be erroneous. It would imply that any commodity that cannot be physically held is not capable of being actually delivered. In a world dominated by numerous intangible rights pertaining to intellectual property, as well as other transferable contractual rights of a similar nature, such a conclusion would be inherently flawed and easily disputable.

*Secondly*, the observations of the apex Court must not be understood and applied out of context. The decisions cited were pertaining to the deductions permissible under the Income Tax Act, 1961 and tax evasion.

As the Supreme Court of India itself has observed,

*“[T]he general rule of construction is not only to look at the words but to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning according to what would appear to be the meaning intended to be conveyed by the use of the words under the circumstances.”*<sup>54</sup>

The issue involved here, on the other hand, is with respect to the legal validity of Put Options in India, being governed by the SCRA. The only definitions and interpretations relevant to the discussion must also be either with reference to the SCRA itself, or the Companies Act, 1956.<sup>55</sup> After all, *“parliament would legislate to little purpose if the objects of its care might supplement or undo the work of legislation by making a definition clause of their own.”*<sup>56</sup>

As discussed, securities, under the SCRA, are either physical or constructive. While the former includes shares, stocks etc. in which rights or interest can be created, the latter includes those very rights or interest created in the physical securities. Such constructive securities are capable of being actually delivered, as envisaged by the SCRA, meaning that their actual delivery cannot rest upon the notion of physical delivery of the securities involved therein. This is so because rights are not tangible commodities that can be held in hand. However, their existence is contingent upon the possibility of its exercise. A right exists if it can be exercised at any point of time by any person possessing the right, subject to the applicable limitations. Thus, a person possesses a right in securities if the three essentials of possession are satisfied, namely – existence of the right, control over the right, and an intention assert such control against others. Any instance, in which, such a right, along with the control over it, is transferred from one person to another, must be construed as an ‘*actual delivery*’ of the right.

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<sup>54</sup> *Jagir Singh and Others v. State of Bihar & anr.*, (1976) AIR SC 997 (S.C.).

<sup>55</sup> Securities Contracts (Regulation) Act, Section 2A (1956).

<sup>56</sup> *Netherseal Co. v. Bourne*, (1889) 14 AC 228.

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Put Option, hence, is a perfect example of the above instance wherein, the right to sell certain physical securities,

- i) At a future point of time;
- ii) To an assured buyer;
- iii) For a fixed strike price; is actually delivered from one person to another.

**6. LEGISLATIVE INTENT BEHIND THE SCRA**

It is a known principle that the interpretation is best, which makes the textual interpretation match the contextual. “*A statute is best interpreted when we know why it was enacted.*”<sup>57</sup>

Therefore, “*it would be permissible to look into the legislative intent, and the conditions prevalent prior to the enactment of the ... act can certainly be referred to for the purpose of construing the provisions of law.*”<sup>58</sup>

SCRA was passed with an intention to prevent undesirable ‘speculations’. Speculation means “*a position in an asset designed to perform well if some random variable, such as the asset’s price, achieves a certain value.*”<sup>59</sup>

Prior to the enactment of SCRA, the *Gorwalla Committee* had been constituted for suggesting ways and means of preventing and controlling speculation in shares of public limited companies.<sup>60</sup> The

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<sup>57</sup> *Reserve Bank of India v Peerless General Finance & Investment Co.*, (1987) 1 SCC 424 (S.C.).

<sup>58</sup> *Dahiben Umedbhai Patel & Ors. v. Norman James Hamilton & Ors.*, (1983) 85 BOMLR 275 (Bom. H.C.).

<sup>59</sup> P. Ramanathan Aiyar, *Advanced Law Lexicon* 4433(2009).

<sup>60</sup> *Mysore Fruit Products Ltd. & Ors. v. The Custodian & Ors.*, (2005) 107 BOMLR 955 (Bom. H.C.); *Norman J. Hamilton & Anr. v. Umedbhai S. Patel & Ors.*, (1979) 81 BOMLR 340 (Bom. H.C.); *Dahiben Umedbhai Patel & Ors. v. Norman James Hamilton & Ors.*, (1983) 85 BOMLR 275 (Bom. H.C.)

SCRA came to be enacted on the basis of the recommendations made by the said committee. The Statement of Objects and Reasons of the SCRA also shows “*that the object of the Act was to provide for regulation of stock exchanges and of transactions in securities dealt in on them with a view to preventing undesirable speculation in them.*”<sup>61</sup>

“*Speculative transaction means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips.*”<sup>62</sup>

“*A transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is settled otherwise than by the actual delivery or transfer of the commodity or scrips is a speculation transaction.*”<sup>63</sup>

The same intent is visible even within the provisions of the SCRA. The Securities Contract Regulation Act, 1956 gives the Central Government the power to declare certain contracts illegal in order to avoid undesirable speculation.<sup>64</sup> Initially, options were considered to be highly speculative in nature and were indeed intended to be prohibited. Section 20(1) of the SCRA originally stated that “*notwithstanding anything contained in this act or in other law for the time being in force, all options in securities entered into after the commencement of this act shall be illegal.*”<sup>65</sup>

However, the past few decades have witnessed a drastic change in the legislative intent behind the enactment of the SCRA; thereby, influencing the interpretation of its provisions. Legislative

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<sup>61</sup> *Mysore Fruit Products Ltd. & Ors. v. The Custodian & Ors.*, (2005) 107 BOMLR 955 (Bom. H.C.).

<sup>62</sup> Income Tax Act, Section 43 (5) (1922).

<sup>63</sup> Neerja Kapur, The Doubtful Legality of OTC Derivative Markets in India, <http://www.algindia.com/publication/article4100.pdf>.

<sup>64</sup> Securities Contracts (Regulation) Act, Section 16 (1956).

<sup>65</sup> Securities Contracts (Regulation) Act, Section 20(1) (1956). (Now Omitted)

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intent behind any enactment of law is always with respect to the substantive content of the law itself. Thus, any amendment made to a statute is an amendment of its original legislative intent. It signifies a change in the intention behind its enactment. In India, the economic conditions in the 21<sup>st</sup> century are different to those that were prevalent in 1956. Options, which were earlier considered to be speculative in nature, are now being accepted as necessary financial instruments to secure transactions in securities. India's recent progress toward economic growth stems from reforms undertaken after the 1991 fiscal crisis, and the subsequently adopted New Economic Policy. As a part of the liberalization strategy, the government of India initiated divestment programs to sell government equity in several public-sector enterprises;<sup>66</sup> simultaneously encouraging foreign investment.<sup>67</sup> Thus, the process of liberalization, initiated in the 1991, paved way for an increased amount of Foreign Direct Investment in the country, further supplemented by the disinvestment strategies inviting bulk investments from the private sector. Such increase in investment in the Indian economy necessitated an improvement in the available risk management tools. Since the very purpose of options was to provide security for large scale monetary transactions, the arguments in favour of legalization of options in securities began gathering momentum. In 2003, Mr. M S Sahoo, Director, SEBI observed on similar lines,

*“In the recent past, there have been substantial improvements in the functioning of the securities market. However, there were inadequate advanced risk management tools. In order to provide such*

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<sup>66</sup> Charan D Wadhwa, India Trying To Liberalise: Economic Reforms Since 1991, <http://www.apcss.org/Publications/Edited%20Volumes/RegionalFinal%20chapters/Chapter16Wadhva.pdf>, 266.

<sup>67</sup> The Harris School, The University of Chicago, Economic Reform in India – Task Force Report (Jan. 2006)<http://harrisschool.uchicago.edu/news/press-releases/ipp%20economic%20reform%20in%20india.pdf>, 13.

*tools and to deepen and strengthen the cash market, a need was felt for trading of derivatives like options.*"<sup>68</sup>

Considering the same, the enactment of Securities Laws (Amendment) Act 1995 was hardly surprising. The said Act omitted the phrase '*by prohibiting options and*' from the long title of the SCRA. Section 20 of the SCRA, which prohibited 'all options in securities', was also repealed.<sup>69</sup> Moreover, SEBI notification in the year 2000<sup>70</sup> allowed '*contract for derivatives as is permissible under the SCRA*'; signifying its intent to give legal recognition to 'options'. Derivative includes either "*a security derived from a debt instrument, share, loan, whether secured or unsecured, risk instrument or contract for differences or any other form of Security*"<sup>71</sup>; or "*a contract which derives its value from the prices, or index of prices, of underlying securities.*"<sup>72</sup>

Accordingly, options, being contracts in derivatives, are recognized to be legal, in accordance with Section 18A of the SCRA, as long as they are "*traded on a recognised stock exchange*",<sup>73</sup> or "*settled on the clearing house of the recognised stock exchange*",<sup>74</sup> both in accordance with the rules and bye-laws of such stock exchange. The mentioned amendments are to be construed as being indicative of the legislative intent behind the SCRA. The amendments made to the act, viewed in the backdrop of India's liberal economic policy, reflect a gradual and visible shift away from the legislative intent behind the enactment of SCRA prevalent in 1956. While the initial focus was solely on the prevention of undesirable speculations,

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<sup>68</sup> MS Sahoo, Historical Perspective of Securities Laws (Sept. 2003), <http://www.icsi.edu/>, 9.

<sup>69</sup> Omitted by Securities Laws (Amendment) Act (1995).

<sup>70</sup> SEBI, SO 184(E) (March 1, 2000), <http://www.sebi.gov.in/acts/.html>.

<sup>71</sup> Securities Contracts (Regulation) Act, Section 2 (a)(ac)(A) (1956).

<sup>72</sup> Securities Contracts (Regulation) Act, Section 2 (a)(ac)(B) (1956).

<sup>73</sup> Securities Contracts (Regulation) Act, Section 18A(a) (1956).

<sup>74</sup> Securities Contracts (Regulation) Act, Section 18A(b) (1956).

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the need to address the ever increasing demand for a secure market is now being addressed. It is pertinent to note that options are being increasingly recognized as necessary advanced risk management instruments. This is precisely why trading in options in securities was introduced both on the National Stock Exchange and the Bombay Stock Exchange in 2001.<sup>75</sup> Even SEBI, while issuing to cease notifications to certain brokers who were entering into non-genuine transactions without any intention to transfer the shares, described options as unique trading instruments, and stressed on the multiple important purposes performed by them.<sup>76</sup> In light of the same, declaring such transactions, which satisfy the legal pre-requisites laid down in the SCRA, as illegal solely on the basis of them being speculative in nature would be a step backwards as far as liberalization is concerned. Such a backward step is neither preferable, nor desired by the market forces.

**7. CONCLUSION**

Options, by transferring a right to purchase or sell securities in future, at a pre-determined strike price, reduce the amount of risk that comes with any investment. The legality of Put Option is advocated by identifying and defining the subject matter of such transactions. The subject matter of a Put Option is not shares, stocks, debentures etc. but necessarily the right to purchase the same at a future point of time, for a fixed strike price. These rights are to be considered as ‘*securities*’ themselves within the ambit of the SCRA. The issue of legality, therefore, rests upon the question as to whether or not there is an actual delivery of securities involved taking place when any Put Option is purchased. As elaborated earlier, there is an actual delivery

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<sup>75</sup> A Sarkar, Indian Derivative Markets in *The Oxford Companion To Economics In India* 56 (Kaushik Basu ed., 2006).

<sup>76</sup> Press Release, SEBI, Re: Dealing with futures and options contracts on the National Stock Exchange (June 19, 2007), [http://www.watchoutinvestors.com/Press\\_Release/sebi/2007191.asp](http://www.watchoutinvestors.com/Press_Release/sebi/2007191.asp).

of securities taking place in a Put Option. The possession of the rights involved gets ‘*actually*’ delivered to the purchaser of such Option at the very instant an agreement to the same comes into force. The actual delivery is immediate, subject to the conditions of the contract, and takes place the moment the dotted line is signed by both the parties. Actual delivery of such ‘*constructive securities*’ must not be confused with their physical delivery. As evident, rights are not tangible commodities that can be held in hand. Therefore, as far as intangibles are concerned, there exists no concept of physical delivery. The actual delivery of such intangibles can only take place through the delivery of the relevant documents, and is signified by a change in possession of the right. Therefore, assuming that there is no delay in the payment of price, a Put Option satisfies all the requisites of a Spot Delivery Contract. Accordingly, Put Options are legally valid transactions of securities within the scope and meaning of the SCRA.

India is an economy that is growing at an alarmingly encouraging rate. The basis of such consistent growth over the past two decades has been heavy investments from all across the world. It comes as no surprise that India is being primed as one of the most lucrative markets for investors – foreign and domestic. However, the same is accompanied by an increasing desire for the market to be structured in a secure manner so as to encourage more of the same. The amendments made to the SCRA provide an adequate reflection of a similar need. Under such circumstances, the necessity of options cannot be ignored. Options are one of the most appealing advanced risk management tools, which encourage continuous investment by providing a safer framework for all investors. A put option provides ample security in an uncertain market, and investments are of a high monetary value. Such a security is, therefore, a valuable economic asset in itself, minimizing the risk associated with every investment. The economy is, as a consequence, portrayed as a safer market to the current and potential investors, thereby, receiving the continuous benefits of further investments.

*LEGALITY OF PUT OPTION UNDER THE SECURITIES CONTRACT  
REGULATION ACT, 1956*

As has been rightly exclaimed by Milton Friedman,

*“The most important single central fact about a free market is that no exchange takes place unless both parties benefit.”*

Appreciating the statement, it may not be a herculean task to identify and acknowledge that the ultimate beneficiaries in the proposed scenario are not only the plethora of investors purchasing a Put Option, but the market itself. It is only growth, if it is continuous.

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**Article**

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*PATENTABILITY OF MICRO-ORGANISM WITH SPECIAL REFERENCE  
TO THE INDIAN SCENARIO*

BY

UTKARSH BHATNAGAR & HARENDAR NEEL<sup>1</sup>**1. INTRODUCTION****I. DEFINING MICRO-ORGANISMS**

Conventionally a micro-organism is considered as an organism, i.e., too small to be seen by the naked human eye and can be viewed only under a microscope, usually, an ordinary light microscope. Micro-organisms include bacteria, fungi, virus, protists and other prokaryotes as well as some microscopic plants (*phytoplankton*) and animals (*zooplankton*).<sup>2</sup> The European Commission (EC) Directive<sup>3</sup> on Micro-organisms defines it as “*any micro-biological entity, cellular or non-cellular, capable of replication or transferring genetic material*”.<sup>4</sup> Article 31.15 of the Vienna convention stipulates that ‘*a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty*’. In determining the ‘*ordinary meaning*’ of the term

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<sup>1</sup> The authors are 2nd year B.A., L.L.B (Hons.) students from the Rajiv Gandhi National Law University, Punjab, Patiala

<sup>2</sup> Unknown, Patentability of Microorganism in India ITAG BUSINESS SOLUTION LTD. (May 22, 2012) [http://www.itagbs.com/articles/patent\\_micro.html](http://www.itagbs.com/articles/patent_micro.html).

<sup>3</sup> Directive 98/44/EC of the European Parliament and of the Council of 6th July, 1998 on the legal protection of biotechnological invention made under the provision of the Treaties of Rome, 1957

<sup>4</sup> *R. v. Re Legal Protection of Biotechnological Inventions: The Netherlands (Italy and Norway, intervening) v. European Parliament and E.U. Council (E.C. Commission, intervening)* (Case C-377/98) Before the Court of Justice of the European Communities

<sup>5</sup> Article 31.1 Of Vienna Convention on the Law of Treaties reads, “*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*”.

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'*micro-organism*', the dictionary/scientific definition of '*micro-organisms*' is not conclusive, since there are several such definitions, embodying different approaches.<sup>6</sup> Micro-organism can be defined as "*any of the various microscopic organisms, including algae, bacteria, fungi, protozoa and viruses*".<sup>7</sup> They are usually of the order of microns (*millionths of a metre*) or tens of microns in linear dimensions, and include bacteria, mycoplasma, yeasts, single celled algae and protozoa.<sup>8</sup> The word is neither been defined in Budapest Treaty nor under the TRIPS Agreement. The ambiguity associated with defining the term '*micro-organism*' is noted by another commentator<sup>9</sup> in the context of

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<sup>6</sup> However, some member states opine that, in accordance with the Vienna Convention, one should still look to a dictionary, when interpreting the term 'microorganism'. The Relationship between the TRIPS Agreement and the Convention on Biological Diversity: Summary of Issues Raised and Points Made Note by WTO Secretariat IP/C/W/368 (8 August 2002) <[http://www.wto.org/english/tratop\\_e/trips\\_e/art27\\_3b\\_e.htm#secretariatdocs](http://www.wto.org/english/tratop_e/trips_e/art27_3b_e.htm#secretariatdocs)>:

The question of how WTO Members and, if necessary, a WTO panel should interpret the term "*micro-organism*" given the absence of a definition has been discussed. One view has been that the principles of international law regarding the interpretation of treaties, in particular Articles 31 and 32 of the Vienna Convention on the Law of Treaties, should be used. (US IP/C/W/209.) The Vienna Convention provides that the basic rule of interpretation is the ordinary meaning of terms in their context and in the light of the agreement's object and purpose. In this regard, it has been said that the dictionary meaning should suffice for distinguishing plants and animals from micro-organisms for the purposes of the TRIPS Council. (Japan, IP/C/M/29 para. 151; Korea, IP/C/M/32 para. 140; Switzerland, IP/C/M/30 para. 163, IP/C/W/284; United States, IP/C/M/35 para. 222, IP/C/M/28 para. 131, IP/C/W/209.) The Concise Oxford Dictionary defines the ordinary meaning of "*microorganism*" as "*an organism not visible to the naked eye, e.g., bacterium or virus.*"

<sup>7</sup> Oxford Advanced Learner's Dictionary, Oxford University Press, ed. 7 2006.

<sup>8</sup> Shannad Basheer, limiting the patentability of pharmaceutical inventions and micro-organisms: a trips compatibility review, Social Science Research Network (May 23, 2012) <http://ssrn.com/abstract=1391562>.

<sup>9</sup> Dr. Paul Oldham Global Status and Trends in Intellectual Property Claims: Microorganisms' Submission to the Executive Secretary of the Convention on Biological Diversity ISSN: 1745-395X (Online)(May 24,2012) [www.cesagen.lancs.ac.uk/resources/docs/microorganisms/microorganismspublished.doc](http://www.cesagen.lancs.ac.uk/resources/docs/microorganisms/microorganismspublished.doc)

the Budapest Treaty.<sup>10</sup> The authors' cite a WIPO document, which states:<sup>11</sup> *"The treaty does not define the term micro-organism so that it may be interpreted in a broad sense as to the applicability of the Treaty to Micro-organisms to be deposited under it."*

A conclusion can be drawn from the above statement that TRIPS envisages some flexibility in defining the term 'micro-organism'. The Commission on Intellectual Property (CIPR), in its report opined that:<sup>12</sup> *"Even where TRIPS requires patent protection to be available, for example in respect of micro-organisms, there is still scope for developing countries to restrict the scope of protection. In particular, in the absence of any universally recognized definition of what constitutes a "micro-organism", developing countries remain free to adopt a credible definition that limits the range of material covered."*<sup>13</sup> The UK government legitimized the view above by stating that:<sup>14</sup> *"It is also pertinent to note that in its submission to the TRIPS Council, India stated that 'national laws vary considerably on this issue. Therefore, it should be left to national policy to decide what patentable micro-organisms are.'"*<sup>15</sup>

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<sup>10</sup>WIPO International Patent Classification. (7th edition 1999). (May 24, 2012) [http://www.wipo.int/classifications/fulltext/new\\_ipc/index.htm](http://www.wipo.int/classifications/fulltext/new_ipc/index.htm)

<sup>11</sup> WIPO Introduction to the Budapest Treaty Paragraph 10 (may 24,2012) <http://wipo.int/aboutip/en/budapest/guide/download.htm>

<sup>12</sup> Commission on Intellectual Property Rights, Report of the Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy (May 24, 2012) [http://www.iprcommission.org/papers/text/final\\_report/reportwebfinal.htm](http://www.iprcommission.org/papers/text/final_report/reportwebfinal.htm).

<sup>13</sup> *Supra*, n. 12

<sup>14</sup> UK Government Response to the Report of the Commission on Intellectual Property Rights: Integrating Intellectual Property Rights and Development Policy.

<sup>15</sup> This assumption is based on the fact that despite a clear mandate under TRIPS, such a referral has been made in the first place. Secondly, India's statements at various international fora seem to suggest that it is interested in a more restrictive approach to the issue of patentability of micro-organisms and other living matter, than its Western counter-parts. Illustratively, India's submissions relating to the review of Article 27.3(b) to the Council for the Trade Related Aspects of Intellectual Property Rights, Document IP/C/W/161 (3 November 1999)

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It may therefore be appropriate to conclude that India has some flexibility in defining the term ‘*micro-organism*’ in a manner consistent with its current socio-economic imperatives. The fact that the precise contours of such flexibility are uncertain does not mean that a member state has unqualified freedom in this regard. India cannot therefore resort to an extreme definition that would have the effect of denying protection to micro-organisms altogether. Further, if the term is defined too narrowly, it may run foul of:

- the clear mandate under Article 27 of TRIPS to grant patent protection to all ‘*inventions*’ and;
- the ‘*non-discrimination*’ principle under Article 27.1.16

**II. BUDAPEST TREATY, 1977**

Generally micro-organisms, which occur naturally, are not patentable but patent can be granted to such micro-organisms that is manipulated or altered, such as through gene insertion, mutation, etc., can be the subject of a patent. Patent law requires that the details of an invention must be fully disclosed in order for others skilled in the relevant field to be able to replicate it. In the case of inventions

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[http://www.iprsonline.org/submissions/article273\\_1999.htm](http://www.iprsonline.org/submissions/article273_1999.htm) (11 November 2005) where it states: ‘There are many grey areas in defining the scope of patentable microorganisms and microbiological processes multilaterally. The WTO could consider various dimensions of this in these discussions. The first is the difference between discovery and invention – only the latter should be patented. *For example*, patent on *Streptomyces Vioaceus* a micro-organism accessed from the soil in Hyderabad, India (Patent No. 4992376), granted by US PTO in 1991, to Bristol Myers would not be a valid patent’. This seems to suggest that India would use the ‘*discovery*’ exception in a more effective way to deny patents to micro-organisms, although the same may have been patented in the US.

16 Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. (5) Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

involving the use of Micro-organisms, these patentability requirements may be difficult to fulfill.<sup>17</sup> To overcome these problems, intellectual property offices in many countries, recommended that the written description of an invention involving the use of a new micro-organism, be supplemented by the deposit of the micro-organism in a recognized culture collection. The Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure was introduced in 1980 in an effort to implement such recommendations.<sup>18</sup> The Budapest Treaty recognizes ‘*international*’ depositary authorities for micro-organisms, sets out the minimum standards for such collecting authorities, and also sets out the guidelines for the deposit of micro-organisms. This treaty enables the deposit of the micro-organisms, to help to satisfy the patentability requirements and also while ensuring that the micro-organism is fully disclosed to the public. The term ‘*Micro-organism*’ is not defined in the Treaty. Tissue culture and nucleic acid molecules *e.g.*, plasmids, can be deposited under the Treaty, even though they are not strictly Micro-organisms. The Treaty does not specify at which point during the patenting process the sample must be deposited by the inventor; this is governed by national law. National laws also govern the conditions under which the samples can be accessed by other interested parties. Currently, there are 61 Contracting States to the Budapest Treaty (*as of 30 September 2005*), including the United States and Australia. The European Patent Organization has also formally declared its acceptance of the Treaty.

### **III. TRIPS AND PATENTING MICRO ORGANISM**

TRIPS obliges to provide patents to all products and processes that are new, involve an inventive step and are capable of industrial

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<sup>17</sup> *Budapest Treaty* on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, April 28, 1977

<sup>18</sup> P. Narayanan, *Patent Law*, Eastern Law House ed. 4, 2006.

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application. However, governments are allowed to exclude from patentability plants, animals and essentially biological process for their production. In the case of plant varieties, however, governments are obliged to protect them by patenting ‘*an effective sui generis system*’, or a combination thereof. Micro-organisms and microbiological process are explicitly not allowed for exclusion from patentability. Nevertheless, the lack of definitions leaves the interpretation of terms used in this article to national legislation.<sup>19</sup> On 16 April 1994, India signed the General Agreement on Trade and Tariff (*GATT*) along with 116 other nations. The agreement also established the World Trade Organization (*WTO*), which succeeded *GATT* and is now policing the implementation of the Uruguay Round Agreement. Under *WTO*, no country has the option to choose the part that it likes and abstain from others. *TRIPS* further focused on patentable subject matter in relation to biological materials. *For example*

- i. Plants, animals, essential biological process of production of plants and animals may be excluded from patenting.
- ii. Micro-organisms per se and non-biological and microbiological processes are patentable.<sup>20</sup>

Article 27(3)(b)<sup>21</sup> of the *TRIPS* Agreement, talks about patenting of micro-organisms. Essentially, biological processes for the

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<sup>19</sup> Intellectual Property Reading Material, (World Intellectual Property Organization (*WIPO*)), Publication 476E, Sections 4.60 and 4.61, p .59

<sup>20</sup> D.P. Mittal, *Indian Patent Law*, Taxman Allied Services Pvt. Ltd, New Delhi, 1999

<sup>21</sup> Article 27(3)(b) of the *TRIPS* Agreement reads, “*plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.*”

production of plants and animals other than non-biological and microbiological processes.<sup>22</sup> In recognition of the territorial nature of IPR and the need to maintain appropriate local differences, TRIPS set down minimum standards for protection, thus, the provisions are drafted in very generic terms. Article 27(3)(b)<sup>23</sup> of the TRIPS Agreement, allows member states to deny patents for “*plants and animals, other than Micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.*”<sup>24</sup> As a result, TRIPS makes it obligatory for all its signatories. In compliance with TRIPs, the Patents Act 1970, as amended in June 2002, gives patent rights for new micro-organisms.

#### **IV. DIFFERENT USES OF MICRO-ORGANISMS IN FIELDS OF MOLECULAR BIOLOGY & BIOTECHNOLOGY**

- i. Gene Silencing
- ii. Gene Therapy
- iii. Cloning & Transformation
- iv. Vaccine – Edible Vaccines, Live Vaccines
- v. Transgenic

#### **2. INDIAN SCENARIO AS TO PATENTABILITY OF MICRO-ORGANISMS**

##### **I. A GLANCE THROUGH HISTORY**

On the 16 of April 1994, India signed the GATT along with 116 other nations. The agreement also established a World Trade Organization, which succeeded GATT and is now policing the implementation of the Uruguay Round Agreement. The WTO has been successful in having 132 members which account for over 90 per

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<sup>22</sup> *Supra*, n. 21

<sup>23</sup> *Supra*, n. 21

<sup>24</sup> *Supra*, n. 21

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cent of the world trade. To comply with the TRIPs requirement, India, as a signatory, amended its Patent Act, 1970 in bits and parts. Under the WTO, no country has the option to choose the parts it likes and abstain from others. The TRIPs Agreement of WTO imposes a number of restrictions and rules, on member countries. *First*, TRIPs ensures that patent protection is available for all fields of technology, including agriculture, energy, and healthcare. *Second*, members can exclude certain inventions from patentability if the exploitation of which would be affecting the morality of general public. It also stipulates further that no member country can exclude an invention from patentability simply because the domestic law prohibits it. The Uruguay Round focused on patentable subject matter in relation to biological materials<sup>25</sup> and thereby:

- i. Plants, animals, essential biological process of production of plants and animals may be excluded from patenting. However provides protection of plant variety by a sui generis system or by patent or by any combination thereof.
- ii. Micro-organism per se and non-biological and micro biological are patentable.

**II. DIMMINACO AG v. CONTROLLER OF PATENTS AND  
DESIGNS AND OTHERS**

Although the Indian Patent Act, 1970 does not permit patenting of micro-organisms, *per se*, this particular case at the Calcutta High Court is a case to understand the intricacies of patenting. This case clarified the position relating to patentability of biotechnology inventions, particularly in a case where a process of manufacture of vaccine involving a living end product was involved.

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<sup>25</sup> S Sekar, *Patenting Microorganisms: Towards Creating a Policy Framework*, *Journal of Intellectual Property Rights*, Vol. 7 May 2002, pp 211-221

In this case, a Swiss company *Dimminaco A.G.*<sup>26</sup> filed an application for an invention relating to a process for the preparation of bursitis vaccine, which was capable of protecting poultry against infectious bursitis infection, and with isolation and preparation of novel virus useful for preparing such vaccines. The controller of patents had rejected the claims saying that the ‘*claim*’ did not fall within Section 2(1)(j)<sup>27</sup> of the Patent Act, 1970, and therefore, could not be called an invention. The Calcutta High Court has addressed the issue of whether a process involving micro-organisms that are living as an end product can be patented. Prior to the case, the applicant had requested a patent for the process of creating a vaccine to protect poultry from infectious bursitis. The controller of patents determined the process was not an invention because the end product produced by the process contained a living organism, and thus, was not patentable. The applicant appealed the controller’s decision in the Calcutta High Court. The controller claimed that a patent is given only for a process that results either in an article, substance or manufacture, and a vaccine with a living organism is not an article, substance or manufacture. The Court used the customary dictionary meaning of manufacture, because it was not defined in the Patents’ Act, and determined the term manufacture as where ‘*the material in question after going through the process of manufacture has undergone any change by the inventive process and it becomes a material which is different from the starting material*’. The Court determined that this meaning does not exclude the process of preparing a product that contains a living substance from patentability. The Court found that no statute precluded a living end product from the definition of manufacture. Also, the Court decided

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<sup>26</sup> *Dimminaco AG v. Controller of Patents and Designs and Others* (2002) I.P.L.R. 255, (Calcutta High Court)

<sup>27</sup> Sec. 2(1)(j) of the Patents Act, 1970 reads, “‘*invention*’ means a new product or process involving an inventive step and capable of industrial application (ja) ‘*inventive step*’ means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art;”

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that ‘*since the claim process for patent leads to a vendible product, it is certainly a substance after going through the process of manufacture*’. The Court ultimately concluded that ‘*a new and useful art or process is an invention*’, and because the process is new and useful, it is apparently patentable under Section 5 read with Section 2(j)(i) of the Patents Act. The Court determined that ‘*where the end product is a new article, the process leading to its manufacture is an invention.*’ although the definition of invention has been amended, this change may enhance the Court’s invention argument, because now the elements of manufacture, article, or substance are no longer required. Rather, the new definition merely calls for a new, non-obvious and useful product or process. The main issue in contention between the parties was whether the phrase ‘*method of manufacture*’ used in Section 2(1) (j) could be said to include a ‘*live organism*’. The Court, in its positive affirmation, has held that the dictionary meaning of the term ‘*manufacture*’ did not exclude from its purview the process of preparing a vendible commodity that contains a living organism. Thus, the Court in this case has identified the ‘*vendibility*’ test as the most effective test to determine whether the process of manufacture ought to be patented or not.<sup>28</sup> The judgment opens up new opportunities for obtaining patents in India on Micro-organism related inventions, which were hitherto not granted. Further, the importance of definitions in the Act has been clearly brought out. The law cannot be left to the interpretation of individuals. There has to be a consistent interpretation, which should follow some logic.

**III. PATENT AMENDMENT ACT**

In The Indian Patents Act, 1970 has been amended with effect from January 2005 to comply with the TRIPS agreement. The main

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<sup>28</sup> Tenneti, V. C., *Patenting of biotechnology material: Socio-ethical and legal issues*. 2010. Paper presented at the National Seminar on ‘*The Convergence of Law and Biotechnology*’, D.E.S. Law College & DLSPC, Pune, during 17–18 February 2010.

provision of the Act is to allow the grant of product patents in the field of chemical, pharmaceutical, food and biotechnology. Patentable biotechnological inventions can be broadly categorized as: '*Products in the form of chemicals, Micro-organisms, plant extracts, fermented material; processes/methods for using useful products and compositions/ formulations of product such as vaccines, proteins, hormones*'. Thus, TRIPS and the Indian Patent Law clearly state that micro-organisms are patentable. Section 3(j) of the Indian Patents Act<sup>29</sup> is worded in similar terms as Article 27(3)(b) and provides that the following shall not be considered an invention: plants and animals in whole or any part thereof other than Micro-organisms but including seeds, varieties and species and essentially biological processes for the production or propagation of plants and animals. However, despite this apparent mirroring of the TRIPS position, it is pertinent to note that micro-organism per se were, till recently, excluded from the scope of patentability. This result stemmed from Section 5 (1) of the Patents Act, 1970 which read as follows:

In the case of inventions –

- i. Claiming substances intended for use, or capable of being used, as food or as medicine or drug, or
- ii. Relating to substances prepared or produced by chemical processes (*including alloys, optical glass, semi-conductors and inter-metallic compounds*), no patent shall be granted in respect of claims for the substances themselves, but claims for the methods or processes of manufacture shall be patentable.

Any doubts as to whether a '*chemical process*' would include a biotechnological process were laid to rest by the 2002 amendments<sup>30</sup> which clarified that a '*chemical process*' in Section 5 would include a

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<sup>29</sup> This Section was added by the Patents (*Amendment*) Act, 2002 which came into effect on 20 May 2003.

<sup>30</sup> Explanation to sec. 5 (2) of the Patents Act, added by the 2002 Amendments.

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'*bio-chemical*', '*bio-technological*' and '*micro-biological*' process. The 2005 amendments did away with Section 5, with the result that Micro-organisms are now patentable as products. Further, one can no longer mount an objection on the ground that the invention claims '*living*' matter and is therefore non-patentable subject matter.<sup>31</sup> India's policy imperatives, call for some limitation on the extent of patentability of micro-organisms (*at least when compared with the patent regimes of the developed world*),<sup>32</sup> it is possible to strategically utilize the flexibilities in the TRIPS agreement to achieve this end.

a) **Subject Matters of Patentability**

Any patent application must go through two stages before actual patent rights are awarded by the Patent Office. The *first* of these inquiries deals with eligibility of invention to be invention without restriction, that determines what types of inventions can be considered for patent protection. Patent eligibility thus, performs a gatekeeper

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31 In *Dimminaco* (n 134), the Kolkata High Court categorically ruled that the term 'manner of manufacture' (the precursor to the term "*invention*") in the Indian Patent Act did not preclude the patenting of 'living organisms'.

<sup>32</sup> This assumption is based on the fact that despite a clear mandate under TRIPS, such a referral has been made in the first place. Secondly, India's statements at various international fora seem to suggest that it is interested in a more restrictive approach to the issue of patentability of micro-organisms and other living matter, than its Western counter-parts. Illustratively, India's submissions relating to the review of Article 27.3(b) to the Council for the Trade Related Aspects of Intellectual Property Rights, Document IP/C/W/161 (3 November 1999) <[http://www.iprsonline.org/submissions/article273\\_1999.htm](http://www.iprsonline.org/submissions/article273_1999.htm)>(11 November 2005) where it states: '*There are many grey areas in defining the scope of patentable microorganisms and microbiological processes multilaterally. The WTO could consider various dimensions of this in these discussions. The first is the difference between discovery and invention – only the latter should be patented. For example, patent on *Steptomyces Vioaceus* a micro-organism accessed from the soil in Hyderabad, India (Patent No. 4992376), granted by US PTO in 1991, to Bristol Myers would not be a valid patent*'. This seems to suggest that India would use the '*discovery*' exception in a more effective way to deny patents to micro-organisms, although the same may have been patented in the US.

function.<sup>33</sup> If an invention is not patent eligible, no other provision of the patent law can secure patent rights for that invention. The Indian Patent Act, 1970, which is considered as model law in the history of the Patent regimes, provides for a simple definition of the term, 'invention',<sup>34</sup> which is the foundation in determining the steps for the grant of patents. Novelty, as the *first* essential criteria means that the invention must be new and it must be different from 'prior art'.<sup>35</sup> 'Prior art' suggests that it should not have been published anywhere in the world or in public domain before the date of filing of patent application.<sup>36</sup> An inventive step or non-obviousness implies that an invention should not be obvious to a person skilled in the Art. A person skilled in art is presumed to be an ordinary practitioner aware of what was common general knowledge in the art before the date of filing.<sup>37</sup> Such person need not possess any inventive capability and he could never go against the established scientific principles, nor try to neither enter in an unpredictable area nor take incalculable risk. For an invention to be patentable, the Indian patent law requires the invention to be new, to have inventive step (*non-obvious*) and to be industrially applicable (*utility*).<sup>38</sup> Additionally, the invention must be repeatable. The question whether the substances such as Micro-organisms or other biological materials, which are present in nature, can be treated as new, is to be decided by applying the above criteria. The requirements of inventive step constitute one of the most complex questions in the field of biotechnology. It is a mandatory requirement

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<sup>33</sup> *Supra* n. 6

<sup>34</sup> *Supra* n. 26

<sup>35</sup> VK Ahuja, *Intellectual Property Rights in India*, vol. I, Lexis Nexis Butterworths Wadhaw, Nagpur, 2009.

<sup>36</sup> Indian Patent office is held by Controller General of Patents Designs and Trademarks in Department of Industrial Policy and Promotions (Ministry of Commerce and Industry, Government of India)

<sup>37</sup> Pankaj Musyuni, patenting of biotechnological products issues perspective to us, europe and india, *IJPSR* (2011), Vol. 2, Issue

<sup>38</sup> NR Subbaram, *Patent Law: Practice and Procedures*, Wadhaw and Nagpur, ed. 2, 2007.

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of the patent law to provide detailed information of the invention to be protected. This is commonly referred to as ‘*sufficiency of disclosure*’.<sup>39</sup> It is significant to note that, in order to meet the test of ‘*sufficiency of disclosure*’, so far as the biological inventions are concerned, practice has been developed now, wherein, the inventor has to deposit the sample of the living entity involved in the invention with an authorized depository authority.<sup>40</sup> However, though Section 10(4) of the Act stipulates the requirement of sufficiency of description, as regards to inventions involving biological materials, the Act is silent on how to meet the requirement. Certain biotechnological inventions are barred from patenting under the Indian Patent Act such as living and non-living substances occurring in nature. This includes any Micro-organism available or found in nature, but does not include any Micro-organism, which is modified in its character or isolated. *For instance*, such Micro-organisms, which are modified in its character, and the resultant product or process is contrary to public order or morality, which causes serious prejudice to human, animal or plant life or health or to the environment.

Apart from these, according to the Act, any process for the medicinal, surgical, curative, prophylactic, diagnostic, therapeutic or other treatment of human beings or any process for a similar treatment of animals to render them free of disease or to increase their economic value or that of their product is also not allowed to be patentable. Further, the Act also excludes from patenting the plants and animals in whole or any part thereof, including seeds, varieties and species and essentially biological processes for production or propagation of

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<sup>39</sup> P. Narayanan, Patent Law, Eastern Law House ed. 4, 2006

<sup>40</sup> TRIPS Agreement and Amendment of Patents Act in India, Economic and Political Weekly, 2005, Vol.37, No.32, P.3354-3360

plants and animals.<sup>41</sup> The inventions relating to processes or methods of production of tangible and non-living substances by bioconversion or using such Micro-organisms or by utilizing the above referred biologically active substances were considered and held patentable. Although, there was no specific mention in the Act of 1970, regarding patentability of live forms such as Micro-organisms, gene-cell lines *etc.*, the spirit of patent law was to exclude them from patentability.

***b) Invention v. Discovery***

Section 3 of the Indian Patent Act provides that, “*The mere discovery of a scientific principle or the formulation of an abstract theory or discovery of any living thing or non-living substances occurring in nature*”.<sup>42</sup> It is quite clear that it does not prohibit any invention, which is the result of human intervention, where living beings have been used initially for conducting experimentation. Moreover, the Draft Patent Manual of India reads that there is a difference between discovery and invention. A discovery adds to the amount of human knowledge by disclosing something already existent, which has not been seen before, whereas an invention adds to the human knowledge by creating a new product or processes involving a technical advance as compared to the existing knowledge.<sup>43</sup> In other words, only something truly non-natural, such as a genetically engineered micro-organism, would be treated as patentable.<sup>44</sup> An ASEAN working group meeting made a similar

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<sup>41</sup> S. Gupta, The Problems Raised by Biotechnological Inventions for Patent Scope Interpretation Indian lawyers (June 2, 2012) <http://www.interlawyer.com/articles/patent-scope.html>

<sup>42</sup> Supra Note 38

<sup>43</sup> Draft Patent Manual, 2008, para 4.4.1, p. 56.

<sup>44</sup> The landmark case in this regard is *Diamond v Chakrabarty* 447 U.S. 303 (1980) where the Supreme Court found that Chakrabarty's genetically engineered bacterium (*capable of breaking down crude oil bacterium*) was patentable on the ground that it is an artificially made composition of matter that has properties not found in any naturally occurring bacterium.

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recommendation *i.e.* that only genetically engineered Micro-organisms ought to merit patent protection and that ‘*naturally occurring and mutated/selected Micro-organism should be excluded from patentability.*’<sup>45</sup> It is pertinent to note that although most member states provide a general exception against patenting principles of nature or products of nature, they embody different approaches in terms of when such ‘*discoveries*’ would cross over to ‘*inventions*’.

***c) Exclusion under Article 27(2): Order public and Morality***

It is easy to say that patents have to do with economics, not morality, and therefore that moral issues are irrelevant to patent law, but this position is difficult to maintain in view of the fact that EPC Article 53(a), specifically raises the question of morality as a possible ground for denying the grant of patent for what would otherwise be a patentable invention.<sup>46</sup> Article 27 (2) of the TRIPS agreement and the ambit of the ‘*morality*’ exception enshrined therein has already been discussed in the first half of this paper dealing with the proposed exclusion and its compatibility with Article 27.<sup>47</sup> As discussed, it is the commercialization (*of the invention*) that must be contrary to ordre public/morality and not the grant of the patent itself. In other words, one cannot deny a patent to a micro-organism on the ground that it is

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<sup>45</sup> Recommendations of the Working Group on Biodiversity, Biotechnology, Traditional/Indigenous Knowledge, and Traditional Medicine ASEAN Regional Working Group Meeting, Jakarta, Indonesia, (2- 4 May 2000), cf Chakravarthi Raghavan ASEAN for Protecting Indigenous/Traditional Knowledge’ (5 May 2000)<http://www.twinside.org.sg/title/asean.htm>>

<sup>46</sup> Phillip W. Grubb and Peter R. Thomsen, Patents for Chemicals, Pharamaceuticals, and Biotechnology, Oxford University Press, ed. 5, 2010.

<sup>47</sup> Akira Ojima Detailed Analysis of TRIPS (Chikujo Kaisetsu TRIPS Kyotei) Japan Machinery Center for Trade and Investment, 1999, page 127. (Copy on file with author). Correa: Integrating Public Health (n 17) 15 where he considers excluding essential medicines on the grounds of morality and states that ‘*the admissibility of exceptions based on ordre public will depend on the interpretation of both Article 27.2 and Arts. 7 and 8, but does not seem a promising basis for exclusion from patentability.*’

'immoral' to do so, whilst at the same time permitting the same to be commercialized.<sup>48</sup> Given India's recent focus on biotechnology, prohibiting all forms of commercialization of micro-organisms does not appear to be a feasible solution.<sup>49</sup> Further difficulties in invoking this exception arise from the fact that morality standards are largely indeterminate and that, in terms of institutional competence, it is difficult for patent examiners to engage with moral/ethical standards. A good example is the *Harvard Onco-Mouse case*,<sup>50</sup> where the main issue was whether allowing a patent for a transgenic non-human mammal prone to developing cancer contravened the ordre public/morality clause in the EPC.<sup>51</sup> The EPO held that the usefulness of the invention in cancer research outweighed any suffering that

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<sup>48</sup> One of the key reasons for introducing the 'commercial exploitation' aspect in this provision was to prevent member states from excluding pharmaceutical inventions on the ground that it was harmful to public health. Akira Ojima (n 54). Correa: Integrating Public Health (n 17) 15 where he considers excluding essential medicines on the grounds of morality and states that 'the admissibility of exceptions based on ordre public will depend on the interpretation of both Article 27.2 and Arts. 7 and 8, but does not seem a promising basis for exclusion from patentability.'

<sup>49</sup> A recent article in Nature states: '*The biggest boost to the biotechnology industry has come from the government itself. "Biotech is the government's priority area," says science minister Kapil Sibal. Less than a year after Sibal took office, the Department of Biotechnology (DBT) released an ambitious plan to create a biotechnology industry that would generate US\$5 billion in revenues per year and create one million jobs by 2010.*' KS Jayaraman 'Biotech Boom' *Nature* (28 July 2005) 480. *the Draft National Biotechnology Development Strategy (June 2, 2012)* <<http://dbtindia.nic.in/biotechstrategy/BiotechStrategy.pdf>> which states that '*Biotechnology can deliver the next wave of technological change that can be as radical and even more pervasive than that brought about by IT. Employment generation, intellectual wealth creation, expanding entrepreneurial opportunities, augmenting industrial growth are a few of the compelling factors that warrant a focused approach for this sector.*'

<sup>50</sup> European Patent Register entry for European patent no. 0169672, under "Inventor(s)". Consulted on February 22, 2008

<sup>51</sup> *Onco-Mouse* [1989], Official journal of the European Patent Office (Exam) 476; [1990] Official journal of the European Patent Office, 476, 490 (IBA); [1991] E.P.O.R. 525 (Exam). 188 S Basheer Patenting Genes and Gene Sequences: The Next El Dorado EDIP (2003) 30.

might be caused to the animal, and that the invention was therefore a 'moral one'.

### **3. SUGGESTIONS & CONCLUSION**

Biotechnological developments requires precise research and collective studies in order to have a better and optimum understanding of the implications of biotechnological patents. India may not provide for a *per se* exclusion of 'micro-organisms' from patentability. However, should Indian policy require some limitation on the scope of protection provided for 'micro-organisms', the TRIPS agreement does provide some latitude by which this might be achieved. The various options available to India are highlighted below:

As the term is not defined anywhere, it could be defined in precise terms. We need to define micro-organisms. The broad categorization as 'biological material' as used in European Union is preferable.<sup>52</sup>

- i. An IDA should be established in our country at the earliest, as our country has already become member of the Budapest Treaty.
- ii. Documentation of our traditional knowledge relating to microbes should be done.
- iii. The exception that mere discovery would not be capable of patenting could be strengthened by stipulating that mere isolation or purification of a micro-organism by known procedures will not render it patentable. Rather, only truly 'invented' micro-organisms such as genetically engineered ones would be granted patent protection.
- iv. In principle, the 'morality' exception could be used to deny patents to Micro-organisms. However, this could not be done

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<sup>52</sup> S Sekar, Patenting Microorganisms: Towards Creating a Policy Framework, Journal of Intellectual Property Rights, Vol. 7 May 2002, pp 211-221

without, at the same time prohibiting any form of commercialization of a micro-organism, a result that may not fit in well with the government's recent policy towards fuelling the growth of the biotechnology industry.

- v. The general patentability criteria (*novelty, non-obviousness, utility and written description*) could be tailored to specifically apply to patent applications claiming micro-organisms. This could be in the form of examination guidelines to be applied strictly by the patent office to ensure that only truly meritorious inventions are granted patent protection.<sup>53</sup>

In order to maintain fair and adequacy of supply of the biotech based medicines and other health products, the countries should adopt a range of policies to ensure that the new patent regime will not hamper their human right to health. They also need to ensure that their IP protection regimes do not run counter to their public health policies and that they are consistent with human rights protection. So far as the utility criteria for the grant of a patent is concerned, high standards need to be strictly implemented and only inventions that have clear substantial, credible and current utility should be allowed. Such an approach would avoid lot of patents, which might hamper research and also make the scientific advancements to remain within the public domain. Harmonization of the conflicting opinions of different countries should be the guiding spirit and the key for permitting innovations, in the field of biotechnology for grant of patents. The international patent regime should be harmonized in such a way that the sovereignty over resources is maintained and simultaneously international collaboration for biotechnological research is carried on. The approach, while dealing with the biotechnology should be practical and efficient. Patent is yet the most viable tool for patent protection. Patent system provides optimum protection by encouraging inventors to concentrate on view of industrial

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<sup>53</sup> *Supra* n. 7

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applications also. Human rights approaches to intellectual property rights always have a controversial issue between rights of inventors, creator and the interests of society and public. Thus, there is also an imperative need for adopting a balanced human rights approach to IP regimes to facilitate and enhance growth of scientific attitude. In a broad way, it automatically has an advantageous impact on an individual, group level and also approaches the benefits of source at both levels. The international legal system pertaining specially to patent regime needs to be redefined with association of ongoing biotechnological development in developing countries.<sup>54</sup> The approach, while dealing with the biotechnology should be practical and efficient. Patent is yet most viable tool for patent protection. Patent system provides optimum protection by encouraging inventors to concentrate on view of industrial applications also. Human rights approaches to intellectual property rights always have a controversial issue between rights of inventors, creator and interests of society and public. Thus, there is also an imperative need for adopting a balanced human rights approach to IP regimes to facilitate and enhance growth of scientific attitude. In a broad way, it automatically has an advantageous impact on an individual group level and also approaches the benefits of source at both levels.

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<sup>54</sup> Pankaj Musyuni, patenting of biotechnological products issues perspective to us, europe and india, IJPSR (2011), Vol. 2, Issue 6

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**Article**

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*THIRD WORLD APPROACHES TO INTERNATIONAL LAW*

BY,

PRIYADHARSHANI SINHA<sup>1</sup>**1. INTRODUCTION**

*“For too long have we the people of Asia been petitioners in Western Courts and chancelleries. The story must now belong to the past. We propose to stand on our own legs and to co-operate with all others who are prepared to co-operate with us. We do not intend to be the playthings of the others...The countries of Asia can no longer be used as pawns by others; they are bound to have their own policies in world affairs”.*<sup>2</sup>

A close study of the history of international law reveals that it has been inextricably linked with colonialism. International law, as it exists today, owes its evolution to the interaction among Western European states during the last 400 years.<sup>3</sup> This law has been inherited by the worldwide community of states and is supposed to be binding on all of them. However, such a law fails to take into account the needs and interests of non-European states, who have had a negligible part to play in its formation. The former practice of colonialism is continued under the guise of international law in the form of neo-colonialism and continues to have a detrimental effect on the Third

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<sup>1</sup> The author is currently in the 4th Year pursuing her Bachelor of Law (LLB) from Rizvi Law College, University of Mumbai.

<sup>2</sup> Jawaharlal Nehru —Asia finds herself again!, Inaugural speech at Asian Relations Conference, New Delhi, March 23, 1947, Vol I, p 300, as quoted in R.P. Anand, *“Towards a New International Legal Order”*, Changing Dimensions of International Law, an Asian Perspective (Martinus Nijhoff, 2006), p. 24

<sup>3</sup> R.P. Anand, *Asian States and the Development of Universal International Law*, (Vikas, 1972), p. xi (preface)

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World while working to the advantage of the First World. In order to have peace and order in an increasingly shrinking and interdependent world, it is essential to have a body of law that is acceptable to all and is sensitive to the aspirations of the developing world. Third World Approaches to International Law (*hereinafter, TWAIL*) hopes to challenge this ongoing relationship between international law and colonialism and, at the same time, aspires to free the Third World from the clutches of colonialism (*and its successor: neo-colonialism*). TWAIL scholars seek to challenge the unjust international legal order and remove it of biases that continue to permeate the global order. This paper on TWAIL will pan out in *two parts*. The *first part* offers an elucidation of the development of modern international law and its Eurocentric bias. The *second part* looks at TWAIL and is divided into five Sections; the *first* deals with what TWAIL means, the *second* offers a brief history of the TWAIL movement, the *third* outlines the defining features of TWAIL, the *fourth* summarizes TWAIL objectives and the *fifth* offers some solutions to rid international law of colonialism. I also add two of my own solutions in this Section.

#### **2. PART I: THE DEVELOPMENT OF MODERN INTERNATIONAL LAW**

In order to understand why TWAIL emerged as a scholarly movement and what the motivating factor was for it, it is necessary to study the history of international law and more specifically, its Eurocentric nature. Before the Second World War, international law was supposed to be a product of European civilization, based on their customs and treaties, and applicable only among them (*including nations populated by people of European descent*).<sup>4</sup> Modern international law commenced its development among the numerous European states, which had emerged out of the disintegration of the Holy Roman Empire and the Treaty of Westphalia in 1648 and

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<sup>4</sup> R.P. Anand, “*The Formation of International Organizations and India: A Historical Study*”, *Leiden Journal of International Law*”, Vol.23 (2010), p.5

matured only after the Industrial Revolution in Europe. Although scholars like Hugo Grotius and his contemporaries, for instance, the Spanish theologians and other classical jurists, were said to be the founders of international law, in reality, they were bystanders who were seen mostly as rationalizers and thinkers and who hardly had any influence on the actual conduct of states and their relations with other states.<sup>5</sup>

After the downfall of Napoleon, when the Congress of Vienna met in May 1814, the victorious powers, namely, Austria, Great Britain, Prussia and Russia, and later France, took control of all important matters. This scene continued for the next fifty years; these European powers took the political affairs of Europe into their own hands and decided among others, the fate of small countries, interfered in their domestic affairs, set boundaries, exercised parental control over weaker states, made rules and enforced their decisions.<sup>6</sup> They were aptly called the European Concert of Great Powers and “*enforced open dictatorship over other states without giving them any right to participate*”.<sup>7</sup> Modern international society, and law, owes its origins to this exclusive club. Even European writers have maintained that modern international law is no more than four hundred to five hundred years old and is an offspring of Western Christian civilization. The great German jurist Oppenheim, in his ninth edition of International Law asserts that “*the predominant strain of modern international law was in its origins largely a product of Western European Christian civilization during the 16<sup>th</sup> and 17<sup>th</sup> centuries.*”<sup>8</sup>

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<sup>5</sup> Anand, *supra* n. 1, pg 7

<sup>6</sup> *Supra*, n. 3, pg 8

<sup>7</sup> Recueil Des Cours 1986, By Hague Academy of International Law, pg. 62

<sup>8</sup> Oppenheim’s International Law, Ninth Edition (Ed. Sir Robert Jennings and Sir Arthur Watts), (London, 1997), pp. 87-88., quoted in R.P. Anand, Towards a Universal International Law for the Universal International Society: India’s Role and Contribution (date of publication unknown), p. 3)

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The result of this dictatorial system, in the words of legal scholar C. H. Alexandrowicz, was that “*Asian states who for centuries had been considered members of the family of nations found themselves in an ad hoc that created legal vacuum which reduced them from the status of international personality to the status of candidates competing for such personality*”.<sup>9</sup> Several European writers also recognized the absurdity of such a situation, but this was overlooked by the great powers, who were driven primarily by ambition. Most of the crucial rules of modern international law(s) were/was formulated in the second half of the nineteenth century according to the needs of European business and political interests. These rules found their origins in treaties and customs amongst European countries or countries of European origin in North America.<sup>10</sup> While classical jurists such as Gentilis, Grotius and others had placed emphasis on the religious and moral foundations of natural law as the basis for the conduct of international relations, with the gradual rise of nationalism in Europe, the observance of natural law declined.<sup>11</sup> Natural law was replaced by positivism, which relied more on the “*practice of states and conduct of international relations as evidenced by customs and treaties, as against derivation of norms from basic metaphysical principles*”.<sup>12</sup> An important consequence of such a positivist philosophy was the emphasis on Eurocentrism in legal and political thinking and in the development of international law. This led to the development of a regional outlook in Europe by the end of the eighteenth century and by the nineteenth century, non-European nations and peoples were “*reduced to mere objects of international law with no legal status and no voice*”.<sup>13</sup> Several Asian

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<sup>9</sup> C. H. Alexandrowicz, “*Mogul Sovereignty and the Law of Nations*”, Indian Yearbook of International Affairs, Vol. 4 (1955), p. 318 as quoted in Anand, *Supra* note 1

<sup>10</sup> *Supra*, n. 9, pg 12

<sup>11</sup> *Supra*, n. 9, pg 12

<sup>12</sup> *Supra*, n. 9, pg 12

<sup>13</sup> *Supra*, n. 9. pg 13

states in the Indian subcontinent and in Southeast Asia who had been defeated and colonized had already been eliminated from the family of nations. Even those countries, which had survived such as Turkey, Persia, Siam, China and Japan, were treated as being outside the family of civilized nations. International law had become limited to the ‘civilized’ and Christian people of Europe or those of European origin. It was held to be a direct product of the ‘special’ civilization of modern Europe. It was openly said for the first time in history that, states that existed outside of European civilization must formally enter into the circle of civilized and law-abiding countries.<sup>14</sup>

Thus, the world was divided into the three zones of ‘civilized’, ‘uncivilized’ or ‘barbarous/savage’. Civilized nations included the European states and their colonies so long as they were controlled and populated by persons of European birth or origin, and North and South American states. The second zone consisted of partially recognized states such as Turkey, Persia, China, Siam and Japan. The third zone included the remaining countries. What is important to note is that it was considered that the law of nations, or international law, did not apply to semi-civilized or uncivilized nations. At best, they were to be treated according to the principles of Christian morality.<sup>15</sup> Only civilized states were regarded as sovereign while uncivilized states were not. Civilization thus, became a precondition for sovereignty. Furthermore, the idea of civilization was constructed in such a manner so as to be synonymous with European values. All non-European entities were thus, uncivilized.<sup>16</sup>

The end result of such a viewpoint was that any aggression towards Asian and African countries could not be questioned

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<sup>14</sup> *Supra*, n. 9, pg 14

<sup>15</sup> *Supra*, n. 9, pg 15

<sup>16</sup> Contributed Papers (author unknown), TWAIL: A Twist in the Tale of International Law?, October 28, 2010 available at <http://legalsutra.org/668/twail-a-twist-in-the-tale-of-international-law/>

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according to this biased European version of international law. Thus, when France conquered Algeria, it was not seen as a violation of international law but rather as a necessary act of '*discipline*'.<sup>17</sup>

Dr. Anand has posited that it cannot be denied that whenever there is a society, whether national or international, there is law.<sup>18</sup> He maintains that this is because law is the consequence of man's needs in society. However, even though international law is presumably thousands of years old, we are told that it is only 500-600 years old and did not actually exist before the mid-1600s and the treaty of Westphalia. Although there is little doubt that international law existed in the international relations of ancient civilizations such as China, India, Egypt and Assyria, these systems of international law have been ignored by modern European powers and seen merely as '*religious precepts*' or moral obligations.<sup>19</sup> Various arguments were raised to combat this '*other*' international law, prime among them being that these earlier systems of law were confined to their own civilizations, were not universal, and have left no trace of continuity in history.<sup>20</sup> More importantly, it was indicated that "*there is no evidence of any historical linking with international law of later ages*"<sup>21</sup> and modern times, said to have emerged after the breaking down of Western Europe into various countries in the 1600s. Thus, although international law has a varied and vibrant history, we are told it is only a recent phenomenon, and not older than the United Nations (*hereinafter*, UN) itself.<sup>22</sup> Assertions of the '*naturally*' Eurocentric nature of international law is all the more surprising because it does not explain the rules of law that governed European relations with Asian states since times immemorial. *What kind of rules had applied*

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<sup>17</sup> Anand, *supra* n. 3, pg. 16

<sup>18</sup> Anand, *supra* n. 3, pg. 1

<sup>19</sup> Anand, *supra* n. 3, pg 1

<sup>20</sup> Anand, *supra* n. 3, pg. 1

<sup>21</sup> Arthur Nussbaum, A Concise History of the Law of Nations (New York, 1962), pp. 3-5; as quoted in Anand, *supra* note 7, 2

<sup>22</sup> Anand, *supra* n. 3, pg 5

*in such situations, if international law only originated in the 1600s?* These relations could not have been based entirely on religious or moral principles because those particular Asian states belonged to different religions and societies.<sup>23</sup> European states had intimate commercial, political and trade relations with Asian states much before the 1600s and yet, they ignored the legal foundations of these interactions. Even if the legal systems of ancient civilizations can be discounted on the basis that these civilizations hardly interacted with the outside world, Dr. Anand has stated that this could not be true during the medieval period, during, which time Europeans went to Asian states and developed complex commercial and political relations. *What rules of international law applied between the European and Asian states during this time?* The Europeans could not have survived in Asian countries without some rules of international law. And presuming that some rules did apply, *how come these rules had no influence on the 'new' international law that emerged shortly thereafter?*<sup>24</sup>

It is disturbing to note that most European international lawyers talk about the development of international law during this period without any mention of Asian states and the role they had to play in the formation of modern international law. Dr. Anand suggests that there is no doubt that the system of international law as it exists today *"largely developed in the context of European countries' needs and demands and struggles to have trade and commercial relations with India and other Asian countries."*<sup>25</sup> International law must have been applied in their relations from the very beginning, but once the European powers defeated the Asian states and established colonies there, they dismissed the principles of international law that they themselves had set and no one challenged this unpalatable situation.

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<sup>23</sup> Anand, *supra* n. 7, pg. 4

<sup>24</sup> *Supra*, n. 23

<sup>25</sup> *Supra*, n. 23

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It was assumed that it was due to the superiority of European civilization over other civilizations that Europeans dominated the sphere of international law. This sense of domination and power became more evident as Europe's economic and military power rapidly advanced in the nineteenth century. International law, which had earlier been seen as the law of Christian European peoples, now came to be defined as the law of civilized nations with the underlying assumption that European civilization was the only civilization worth recognition in international law.<sup>26</sup> The intense rivalry among European states in the sphere of colonization led to immense tension and the beginning of an arms race that seemed to see/have no end. Europe fell into a civil war ultimately leading to the First World War (*hereinafter*, WWI). Even leading up to the war, '*the position of such states as Persia, Siam, China, Abyssinia, and the like, was to some extent anomalous*'.<sup>27</sup> Although there had been considerable interaction between these '*so called semi-civilized states*' and European states, as a result of belonging to '*ancient but different civilizations, there was a question of how far the relations with their governments could usefully be based upon the rules of international society*'.<sup>28</sup> This situation persisted even though treaties were concluded with these nations and full diplomatic relations had been established.<sup>29</sup> In the meantime, although the League of Nations was set up after WWI to avoid war in the future, it could not prevent another world war from occurring and Europe met with the Second World War in 1939. Meanwhile, independence movements were gaining pace in Asia whose leaders gradually came to realize the injustice that their people were being subjected to on a daily basis. Strong freedom movements were started and the British colonial empire gradually broke up leaving in its wake

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<sup>26</sup> Anand, *supra* n. 1, pg 17

<sup>27</sup> Anand, *supra* n. 3, pg 6

<sup>28</sup> L. Oppenheim, *International Law* (1905), 89 as quoted in Anand, *supra* note 3, 6

<sup>29</sup> Anand, *supra* note 3, pg 6

a number of independent Asian and African states, hungry for their place in the new international world order.

This new international world order no longer had Europe at the centre of it. Instead, the United States and the Soviet Union emerged as the two dominant world powers and subsequently plunged into a cold war. Meanwhile, China emerged as a great power. After 1955, the membership of the UN, increased dramatically to include new Asian and African states. The drive towards decolonization in the thirty years immediately following the establishment of the UN may tempt one to conclude that international law had disassociated itself from its colonial past. However, while the criterion of being a civilized nation as a basis for participation in the community had been abandoned, the erstwhile dominating practices of colonialism continued even in this new world era. This subtle continuance of colonialism happened in a number of ways. The newly empowered 'Third World' had hoped that they would get a chance at participating in the formation of a new and more universal international law. However, their efforts were neutralized. *Firstly*, the General Assembly, whose majority consisted of the Third World, did not have the courage to make laws and their recommendations were dismissed most of the time in favour of the decisions of the powerful Security Council. *Secondly*, it was held that the new states were bound by the already existing doctrine of international law. *Thirdly*, new laws could not be formed without the agreement of nearly all the member states. The developed world was never going to accept the economic and legal plans of the newly empowered states since it was in direct contradiction to their interests. Thus, the Third World became entrapped in an international legal system that had been forged during the colonial period and which it had no chance in changing for the better. While the Third World had been included in international law, it had been stripped of performing any meaningful act. TWAIL scholar, Anthony Anghie, describes the situation as thus:

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*“The contradiction was that even while the West asserted that colonialism was a thing of the past, it nevertheless relied precisely on those relationships of power and inequality that had been created by that colonial past to maintain its economic and political superiority which it then attempted to entrench through an ostensibly neutral international law.”*<sup>30</sup>

To further drive home the point that colonialism continued in an underground fashion even after its so-called demise in the mid-twentieth century, we will examine the subtle political and economic means used by the First World power to subjugate Third World states. In the political arena, the grant of statehood is one area of international law where the former colonial powers exercised unfair means. The Montevideo Convention of 1933 lays down the criteria for determining statehood, namely a permanent population, a defined territory, government, and capacity to enter into relations with other states.<sup>31</sup> However, an entity can be conferred legal personality only through its recognition by other states. This has led to complications. There has been a clear tendency by the First World to accord recognition to states that have democratic governments. Furthermore, the phrase ‘*capacity to enter into relations with other states*’ reminds one of the European notion of ‘*civilization*’ that had been common in the nineteenth century.<sup>32</sup> Thus, by characterizing states as ‘*civilized*’ or ‘*uncivilized*’ based on if they had democratic governments or if they had the capacity to enter into relations with other states, the systematic exclusion of non-European states from the civilized world order is duplicated in modern international law.

In the economic arena, the neo-colonial slant of modern international law has been revealed through the policies of the World

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<sup>30</sup> Anghie, *Imperialism Sovereignty and the Making of International Law*, (Cambridge, 2005), p. 215

<sup>31</sup> Contributed Papers, *supra* note 15

<sup>32</sup> *Supra*, n.31

Bank and the International Monetary fund (*IMF*). These international financial institutions fervently promote the economic policies and processes associated with globalization, liberalization and privatization.<sup>33</sup> While this is presumably done with a view to promote development, it can be said that these policies are aimed at making the Third World vulnerable to exploitation by the First World. *For example*, the removal of trade barriers leaves developing economies at the mercy of the unequal terms of trade in relation to developed countries. Moreover, the entry of foreign capital and multinational corporations (*MNCs*), into developing countries, cuts short the growth of the local industries.<sup>34</sup> In this way, the unfair economic practices carried on in colonial times continues in the present and places the Third World nations at the mercy of the developed world.

Professor Mutua has described the situation thus:

*“The regime of international law is illegitimate. It is a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West. Neither universality nor its promise of global order and stability make international law a just, equitable, and legitimate code of global governance for the Third World. The construction and universalization of international law were essential to the imperial expansion that subordinated non-European peoples and societies to European conquest and domination. Historically, the Third World has generally viewed international law as a regime and discourse of domination and subordination, not resistance and liberation.”*<sup>35</sup>

Thus, even after the official end of colonialism, the Western powers still exercised control over the Third World through various

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<sup>33</sup> *Supra*, n. 31

<sup>34</sup> *Supra*, n. 31

<sup>35</sup> Makau wa Mutua, ‘What is TWAIL?’ (2000), Proceedings of the 94th Annual Meeting of the American Society of International Law at p.31

political and economic means. It is in this context that Third World Approaches to International Law (*TWAIL*) has emerged in order to achieve the three objectives of: Deconstructing, understanding and unpacking the uses of international law as a means of furthering colonialism, of constructing and presenting an alternative legal framework for international governance and of eradicating underdevelopment in the Third World.<sup>36</sup>

### **3. PART II: WHAT TWAIL STANDS FOR**

Let us look at what the *TWAIL* movement means and stands for. *TWAIL* is both a political and intellectual movement.<sup>37</sup> *TWAIL* is driven by scholars from the Third World and rejects the traditional assumptions of international law and argues for a reformation of this unfair system by cleansing it of racial bias to create a truly fair international legal system that embraces inclusivity. The movement seeks to turn away from the imperialist foundation of international law and argues that the international legal system should be devoid of racial bias, exploitation and oppression.<sup>38</sup> *TWAIL* scholars have not sought a single overarching voice or treatise. In its place, they have created a vibrant ongoing debate around questions of colonial history, power, identity and difference. Along with other critical traditions, it seeks to challenge marginalization and domination, and hopes to give birth to an emancipatory international law.

#### **I. HISTORY OF TWAIL**

*TWAIL* is not a recent phenomenon. It is part of a long standing tradition of criticism of the new international legal order. Its roots stretch all the way back to the Afro-Asian anti-colonial struggles

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<sup>36</sup> *Supra*, n. 34, p. 31

<sup>37</sup> *Supra*, n 34, p. 33

<sup>38</sup> James, Thuo Gathii, *TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography*, Trade, Law, and Development, vol. 3 (2011), p. 34

of the 1940s–1960s, and before that to the Latin American decolonization movements. The harsh realities of the post-colonial world and the continuance of colonialism from underground, through both political and economic means gave rise to the Group of 77 and its proposals for the ill-fated New International Economic Order (*NIEO*).<sup>39</sup> Also, in 1955, the Bandung conference of Asian and African States was held in Indonesia with its main aims of opposing the colonialism or neo-colonialism of the great powers at that time, that is, the United States and the Soviet Union. A 10-point ‘*declaration on promotion of world peace and cooperation*’ was unveiled at the conference. Today’s TWAIL scholars stand on the shoulders of Bandung and the Group of 77.<sup>40</sup> The development of TWAIL as a scholarly movement began at Harvard in the spring of 1996. Three more TWAIL conferences were held in 2001, 2007 and 2008 and TWAIL courses have been taught throughout the world<sup>41</sup> indicating that it has gradually found its place as a revisionist critique of modern international law. Additionally, contemporary TWAIL scholarship has benefited from engagement with other critical schools of international legal scholarship, such as feminist, Critical Legal Studies (*CLS*), New Approaches to International Law (*NAIL*), Marxian, poststructuralist, and critical race approaches to international law and global politics.<sup>42</sup>

## **II. MAIN FEATURES OF THE TWAIL MOVEMENT**

Let us now look at some of the main features that characterize the TWAIL movement. There are seven such features and we shall briefly look at each of them one by one.

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<sup>39</sup> *Supra*, n. 37, pg 34

<sup>40</sup> Griffith, William E. *Cold War and Coexistence: Russia, China and the United States*. Englewood Cliffs, NJ: Prentice Hall, 1971. Neuhauser, Charles. *Third World Politics: China and the Afro-Asian Peoples' Solidarity Organization, 1957–1967*. Cambridge: East Asian Research Center, Harvard University, 1968.

<sup>41</sup> *Supra*, n. 37, pg. 33

<sup>42</sup> *Supra*, n. 37, pg 34

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- i. **TWAIL is antiheirarchical:** The growth of modern international law has been driven by the supremacy of Europeans over non-European people, the former having taken it upon themselves to ‘civilize’ the latter. Mutua states that international law might have been the most crucial weapon in the spread of Eurocentrism. TWAIL, however, assumes the moral equivalency of all cultures and peoples and rejects ‘othering’ or the “creation of dumb copies of the original.”<sup>43</sup>
- ii. **TWAIL is counterhegemonic:** TWAIL is against the global hegemony of the West, which has been legitimized by the UN under the guise of universality. The West and its selective use of UN organs to further its interests is a violation of the lofty ideals of the UN. Western control of the global economy is a matter of “public record”. TWAIL attempts to give full representation to all the silenced voices of the developing world. TWAIL aspires to democratize national and international structures of governance so that everyone has a chance of being heard.<sup>44</sup>
- iii. **TWAIL is suspicious of universal creeds and truths:** TWAIL does not appreciate the practice of conferring universality on ideas and practices that are European in origin. When such practices are given the sanction of international law, it is even more objectionable. Through such practices, powerful forces are “able to force their views on the rest of the world and freeze them as eternal, inflexible truths, much in the same way Christianity was forced on non-European peoples.”<sup>45</sup>
- iv. **TWAIL is a coalitionary movement:** The phenomenon of globalization has led to the worldwide presence of injustice

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<sup>43</sup> Mutua, *supra* n 34, at 36

<sup>44</sup> Mutua, *supra* n 34, at 37

<sup>45</sup> Mutua, *supra* n 34, at 37

and domination. TWAIL believes that it is essential to form coalitions with similar movements in all societies, including in the West, to combat this injustice and presence of powerlessness and exploitation. Hence, TWAIL has sought alliances with like-minded communities such as critical race theory (CRT) and new approaches to international law (NAIL)<sup>46</sup>.

- v. **TWAIL is deeply committed to taking world history as opposed to western history more seriously:** TWAIL scholars agree that a historical perspective is crucial to understanding the current features of the international system. TWAIL aims to study the history of colonialism to figure out how this resulted in the exploitation and subjugation of the peoples of the Third World. A key feature is to “*seek to write the Third World’s shared historical experiences into the processes and outcomes of international thought and action.*”<sup>47</sup>
- vi. **TWAIL takes the equality of third world peoples much more seriously:** Twailian scholars insist that all action concerning international law should proceed based on the assumption that the people of the Third World deserve the same dignity, rights and benefits that are accorded to citizens of Northern states.<sup>48</sup>
- vii. **TWAIL puts considerable emphasis on ways to offer resistance to the global hegemonic order:** Twailian scholars seek to study the different ways in which the global hegemonic order can be countered through resistance and what response this has elicited from the developed

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<sup>46</sup> Mutua, *supra* n 34, at 38

<sup>47</sup> Okafor, *supra* n 37, at 178

<sup>48</sup> Okafor, *supra* n. 37, at 179

countries. They also aspire to research the effects that such resistance has had on law and society.<sup>49</sup>

### **III. OBJECTIVES OF THE TWAIL MOVEMENT**

*What are the objectives of such an ambitious movement?* Professor Mutua has delineated three key objectives of deconstructing, understanding and unpacking the uses of international law as a means of furthering colonialism, of constructing and presenting an alternative legal framework for international governance and of eradicating underdevelopment in the Third World.<sup>50</sup> Furthermore, Professor Mutua has said that any TWAIL scholarship or political action must be '*fundamentally oppositional*'<sup>51</sup> to an issue in international law. Such an attack must relate to an issue that is of importance to the Third World. The purpose of such scholarship is to eliminate or alleviate the harm and injury that the Third World would likely have suffered as a result of the unjust practices of the First World. The author or political actor at a bare minimum should expose or attack a particular phenomenon that is hostile to the Third World.

Another objective of TWAIL is to challenge the hegemony of the dominant narrative of international law<sup>52</sup> by examining issues of race, class, gender, sex, ethnicity, economics and so on. Yet another important objective of TWAIL that must be mentioned is to sever ties between international law and colonialism to establish a truly global and egalitarian legal system. However, scholars are divided as to how they can pursue this objective. While the affirmative reconstructionists hope to bring about a total reformation of international law as the only means of rescuing it from the final vestiges of colonialism, the

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<sup>49</sup> Okafor, *supra* n 37, at 179

<sup>50</sup> Mutua, *supra* n 34, at 31

<sup>51</sup> Mutua, *supra* n 34, at 36

<sup>52</sup> Gathii, *supra* n 37, at 37

minimalist assimilationists see a struggle from within the arena of international law as a more effective method.

#### **IV. SOLUTIONS POSED BY TWAIL SCHOLARS**

Having established the fact that the Third World throughout its history and into the present era has suffered and continues to suffer at the hands of the great powers of the West, it is important to think about the solutions for eradicating such an unfair state of affairs. Four distinct solutions will be discussed here. The first involves writing resistance into international law and the second involves reforming the UN General Assembly. The last two solutions, suggested by me, involve asserting authority in the international arena and reforming the UN Security Council. One TWAIL scholar particularly well-known for suggesting resistance as a solution is Balakrishnan Rajagopal who has directed his efforts to ‘*de-elitizing*’ international law by introducing resistance into it.<sup>53</sup> Without these voices, Rajagopal argues, that even areas such as human rights and development will be swallowed in the ever-expanding scope of international law.<sup>54</sup> One famous *example* of resistance is that posed by Indian Judge Radhabinod Pal at the International Military Tribunal for the Far East in Tokyo that sought to punish Japanese charged with crimes against peace and war crimes. Pal referred to the violence that the victorious powers had meted out in Asia. In his view, people under colonial rule could not be expected “*to submit to eternal domination only in the name of peace*”.<sup>55</sup> He believed anti-colonial justice took “*precedence over peace rather than peace taking precedence over justice*”.<sup>56</sup> Pal defended the actions of the accused Japanese, arguing that they had

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<sup>53</sup> Ruth Buchanan, “*Writing Resistance into International Law*”, presented at a workshop called “*Situating TWAIL: Inspirations, Challenges, Possibilities*” at the University of British Columbia in May, 2008.

<sup>54</sup> *Supra*, n. 52, p.3

<sup>55</sup> Gathii, *supra* n. 37, at 36

<sup>56</sup> *Supra*, n. 52, p. 36

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been defensive rather than aggressive. This is a well-remembered *example* of resistance to the hegemonic world order.

The other solution to this issue is to reform the United Nations. This has been suggested by Dr. Anand as well.<sup>57</sup> According to the affirmative reconstructionists, the only way to rid international law of its colonialist foundation is to change the institutions of international law. The UN suffers from a major drawback, namely, that the General Assembly, which consists of all nations, merely has the power to make recommendations, which are most of the time ignored and seen as ‘*soft law*’. The real power lies in the hands of the veto-wielding powers of the Security Council. The affirmative reconstructionists thus, call for reforms in the UN Charter to correct this shortcoming. They envision reforms that would give General Assembly resolutions greater weightage and divesting power from the Security Council and vesting it with the General Assembly.<sup>58</sup> However, the affirmative reconstructionists lack an action plan for achieving these goals. Meanwhile, the minimalist assimilationists seek to change the system from within. However, this might be a difficult proposition given the diversity of interests among the Third World. There is a risk of losing focus and fragmenting the central tenets leading to a weak opposition. A renowned scholar of international law has suggested that every violation of the existing international law contains the seeds of a new rule.<sup>59</sup> This presents an opportunity for the third world to transform international law from within. This would involve identifying those practices that carry on the practice of neo-colonialism and then repeatedly violating those practices. This would lead to creating a new rule of international law. Such a transformation has been termed as

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<sup>57</sup> R.P. Anand, *Sovereign Equality of States in International Law*, (Hope, 2008), p.174

<sup>58</sup> *Supra* n. 15

<sup>59</sup> Anthony D’Amato, “*The Theory of Customary International Law*” 82 *American Society of International Law Proceedings* 242 (1988), at 246., as quoted in *Contributed Papers, Supra*)

seeking legitimacy through defiance.<sup>60</sup> However, such an approach contains shortcomings, the prime among them being that it is not possible for Third World states to take collective action given the diversity of interests. If only a few states participate in the resistance, it would not serve any purpose. Therefore, in order to strengthen international law, it is important for third world states that are unable to take part in a particular episode of resistance to still give their support to it and stand by it.<sup>61</sup> This would go a long way in furthering the cause of the resistance and the dominant powers might listen if they see that the resistance is supported by a large group of aggrieved nations.

Now, I will present two of my own solutions that can be used to counter the unjust international legal regime as it exists today. *Firstly*, the developing world should not surrender themselves to the developed countries when it comes to major international issues. It should put up a strong front and make its wishes and priorities clear without being overpowered. One area where the developing world has already flexed its muscles and shown that it will not bow down to the developed world is the area of climate change. The recently concluded climate change talks in Durban under the auspices of the UN led to a deal known as the Durban Platform for Enhanced Action that would bring all major emitters in its fold. The decision, which was crafted after three days of virtually non-stop consultations, was adopted by all countries. The deal requires that countries begin in 2012 to negotiate a new global regime for climate change. The new legal framework must be in place by 2015, and will be implemented from 2020.<sup>62</sup> Led by Jayanthi Natarajan, India's Environment Minister, India put up a

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<sup>60</sup> *Supra*, n. 58

<sup>61</sup> *Supra*, n. 58

<sup>62</sup> Durban climate talks: Proposed global climate regime could be a new Protocol, December 12th 2011, available at [http://articles.economictimes.indiatimes.com/2011-12-2/news/30507640\\_1\\_climate-talks-climate-change-legal-instrument](http://articles.economictimes.indiatimes.com/2011-12-2/news/30507640_1_climate-talks-climate-change-legal-instrument)

spirited fight and asked for the principle of equity to be observed at the conference. What India meant by this was that there should be a differentiation in responsibility between the developed and developing countries in reducing carbon emissions. Although India ultimately lost in this respect, as the Durban Platform did away with this principle, it still emerged as a force to be reckoned with in the talks. India cemented its position as the leader and moral voice of the developing world as the EU and the US were forced to address its demands.<sup>63</sup>

Natarajan's speech was exceptionally fiery as she vowed that India would not bow down to the inflexible developed world<sup>64</sup>. Other developing countries also joined. Countries like Pakistan, Philippines and Egypt came out in support demanding a more equitable deal that would secure the development space for the poorer nations even though their obligations under the new pact would increase after 2020. As a result, although the principle of equity was unfortunately done away with, nevertheless, a compromise was reached wherein the developing countries bought time until 2020 to cut carbon emissions. As evidenced at Durban, if India, in concert with developing countries, continues to be strong-willed and courageous in standing up to the Western powers, it can succeed in gaining concessions and finding a place for itself in the international world order.

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<sup>63</sup> Durban climate talks end, new global climate change regime from 2020, December 11th, 2011, available at [http://articles.timesofindia.indiatimes.com/2011-12-11/developmental-issues/30504463\\_1\\_eu-roadmap-climate-talks-climate-change](http://articles.timesofindia.indiatimes.com/2011-12-11/developmental-issues/30504463_1_eu-roadmap-climate-talks-climate-change)

<sup>64</sup> Receiving a standing ovation, she said, "Am I to write a blank cheque and sign away the livelihoods and sustainability of 1.2 billion Indians, without even knowing what the EU roadmap contains? I wonder if this is an agenda to shift the blame on to countries who are not responsible (for climate change). I am told that India will be blamed. Please don't hold us hostage. We will not give up the principle of equity." China's minister too stood up in support and attacked the European Union. Xie Zhenhua said, "What qualifies you to tell us what to do? We are taking action. We want to see your actions."

*Secondly*, India, along with other developing nations such as the African states, should push strongly for a place as a permanent member of the UN Security Council. This ties in with the earlier solution of reforming the UN; however, this remedy looks at reforming the Security Council (*hereinafter, Council*), and not the General Assembly. Even though the world has changed considerably since the time that the Council was formed in 1945, the actual structure of the Council has changed very little. The winners of the Second World War still dominate the Council and currently include the United States, the United Kingdom, France, Russia and China. However, this structure has been challenged both by India, which is the largest democracy in the world and by the African states who have demanded two permanent seats for themselves on the basis of historical injustices and the fact that a large part of the Council's agenda is concentrated in Africa. India deserves a permanent seat in the Council on the basis of the following facts:

- i. India is the third largest and a regular constant contributor of troops to the UN peacekeeping missions.
- ii. India is one of the main contributors to the UN regular budget
- iii. India has the world's second largest population and is the world's largest liberal democracy.
- iv. Currently, India maintains the world's third largest active armed force and is a nuclear weapon state.

An African nation should also be included in the Council on the basis of the following reasons:

- i. Africa is the second-largest and second most populous continent behind Asia.
- ii. Africa has more UN members than any other continent.
- iii. Africa is seen as militarily non-threatening.
- iv. Africa has support from both developing nations and developed nations in its bid for a permanent Council seat.

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With India and the continent of Africa already having secured the backing of a number of the major powers in their aspiration for a permanent seat in the Council, it looks as though the Council will indeed be reformed in the near future. Expanding the Council to include members of the world order who had hitherto been exploited and subjugated by the Western powers will indeed change the face of the international legal order and allow for fairness and justice. It is hoped that the UN will act swiftly to include these states in the Council and thereby bring about some semblance of equity in international law.

#### 4. CONCLUSION

TWAIL has achieved a lot. Led primarily by its maverick leader, Antony Anghie, TWAIL scholarship has re-examined the historical foundations of international law. Contemporary TWAIL scholars have made major contributions by presenting marginalized and alternative knowledge about international law. There is no doubt today that TWAIL presents a distinctive voice in the field of international law. As Professor Mutua has said, TWAIL aims at eradicating the “*conditions of underdevelopment in the Third World*”.<sup>65</sup> The process of exorcising the last vestiges of colonialism from the international legal system is still not complete. While the world is changing beyond recognition, we are still living with outdated laws. International law needs to change to become more sensitive to the needs and aspirations of Third World states. The TWAIL movement faces many challenges including internal fragmentation, the problem of collective action among the third world states and the impediments likely to be posed by developed nations. According to Professor Mutua, the challenge of TWAIL is to “*carry the struggle of countering European hegemony forward and to realize that the script of resistance and liberation is a historical continuum,*

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<sup>65</sup> Mutua, *supra* n. 34, at 33

*taken sometimes in small, localized and painful steps*".<sup>66</sup> Aforementioned TWAIL scholar Balakrishnan Rajagopal has said that the prospects for the "*transformation of international law into a counter-hegemonic tool*" are "*bleak on its own*", and that the "*future of the world—its ability to deal with problems of peace, war, survival, prosperity, planetary health and pluralism—depends on a range of factors, including the politics of the 'multitude'*".<sup>67</sup> What remains to be seen is whether the Third World can successfully rescue itself from the shackles of colonialism in the quest for a more equitable and genuinely universal international legal order.

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<sup>66</sup> *Supra*, n. 63, pg 34

<sup>67</sup> Buchanan, *supra* n 58, at 4

*MILITARY UNIONS AND THE RIGHT TO COLLECTIVE BARGAINING: A CASE  
FOR UNIONISATION IN THE INDIAN ARMED FORCES*

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**Article**

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*MILITARY UNIONS AND THE RIGHT TO COLLECTIVE BARGAINING: A  
CASE FOR UNIONISATION IN THE INDIAN ARMED FORCES*

BY,  
SAHIL ARORA & ANCHAL BASU<sup>1</sup>

**1. INTRODUCTION**

*“In democratic countries, the science of association is the mother of all sciences, the progress of all the rest depends upon the progress it has made.” - Alexisde Toequeville; Political thinker and Historian<sup>2</sup>*

The freedom to associate has been widely regarded as the very lifeblood of a democracy.<sup>3</sup> It assumes relevance especially in the field of labour law as it provides workers, having an unequal bargaining position, the opportunity to form unions so as to collectively negotiate with the employers and satisfy those demands which impact their ability to lead a life with dignity and liberty.<sup>4</sup> The disparities existing between the individual worker and the employee are thus balanced out and the abuse of the weaker party is prevented. It is keeping in mind this central position that the freedom enjoys in the contour of labour welfare, that the ILO has provided, *vide* Article 2 of Convention No. 87, that the workers and employers have the right to establish and join trade organizations of their choosing.<sup>5</sup> The right is guaranteed without

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<sup>1</sup> The authors are 3<sup>rd</sup> year B.A., LL.B.(Hons.) students from the West Bengal National University of Juridical Sciences

<sup>2</sup> *Mani Ram and Others v. State of Haryana*, (1996) 112 PLR 45.

<sup>3</sup> M.P.Jain, *Indian Constitutional Law* (6th ed. 2010)

<sup>4</sup> Guy Davidov, *Notes, Debates and Communications: The (Changing?) Idea of Labour Law*, 146 *Int'l Lab. Rev.* 311, 314 (2007).

<sup>5</sup> See International Labour Organization Convention, July 9, 1948, I.L.O. No. 87, Article 2 (“*Workers and employers, without any distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organization of their own choosing, without previous authentication*”).

any distinction and its only exception is with regard to the armed forces and the police, in whose regard, the state may, determine the extent to which the right is applicable.<sup>6</sup> The exclusion flows from the unique function the forces perform in protecting the democracy from threats emanating from outside or rebels within and the consequent need of order and obedience, which scholars submit,<sup>7</sup> cannot be maintained if the forces are allowed to unionize. It is owing to this traditional thought process, that the fathers of our Constitution provided *vide* Article 33 that the extent to which the rights as engrained in Part III of the Constitution are applicable to the armed forces, shall be determined by the Parliament itself.<sup>8</sup> Accordingly, the forces '*Conditions of Service*' has prohibited personnel to be a member of, or to be associated in any way, with a trade union.<sup>9</sup> The paper, presenting an argument in favour of unionization in the armed forces, provides that given the deplorable work conditions of the forces, there is an urgent need to extend the right to unionize to the forces, albeit in a limited manner. The paper is divided into *five parts*. The *first* part delves into the need to unionize the forces and attempts to allay the scepticism surrounding such a move. The *second* part provides an overview of the models adopted by various states in terms of the unionization in the armed forces. The *third* part analyses the position of law in India whereas the *fourth* part suggests the formation of a '*weakened association*', wherein the right to associate is guaranteed to the personnel but in a limited manner. Finally, in the last part of the paper, the author asserts that at the first instance such a '*weakened association*' should be allowed to be registered and once it satisfies the conditions laid down by the government, it could be

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<sup>6</sup> *Supra* n. 4, Article 9.

<sup>7</sup> J. Kuhlmann, '*What do European officers think about future threats, security and missions of the armed forces?*', 42(3), *Current Sociology* 100 (1994).

<sup>8</sup> See *A.P. Police Officers Association v. Secretary, Home*, Writ Petition No. 4042 of 1993, Order dated 27.02.2001.

<sup>9</sup> The Navy Act, No. 62 of 1950, S19; The Army Act, No. 46 of 1950, § 21; The Air Force Act, No. 45 of 1950, §21, available at <http://indiacode.nic.in/>.

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recognized by it as a bargaining agent for the armed personnel. This would not only ensure that the working conditions of the forces improve but also would allay fears that such unionization would hamper the security of the country.

**2. THE NEED TO UNIONIZE AND THE SCEPTICISM  
REGARDING ITS POSSIBLE REPERCUSSIONS**

The notion of military unions has been viewed by many to be in conflict with the unique nature of the forces, which are as a matter of tradition, based upon a hierarchy of subordination, characterized by order and obedience.<sup>10</sup> It has been asserted that without limits on this right, the forces would not be able to protect democracy against threats emanating from outside or within.<sup>11</sup> The forces would be able to utilize this additional power to endanger the democratic nature of their society<sup>12</sup> and cause indiscipline within the army. The restriction on the right thence did not mean that the rights of the soldiers were obviated, but that they must yield to the unique function of the military service. Having said that, it is pertinent to note that with the constant abuse of power by the superiors in tasking the soldiers with work over and above what the latter is obligated to perform; and given the desperate need for revision in pay and family welfare provision, the soldier becomes helpless and gets affected psychologically.<sup>13</sup> This dis-satisfaction, coupled with their lack of influence over military

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<sup>10</sup> *Supra* n. 6; See also, D. Denholm and T. Humes, The case against military unionism, in A. Sabroskyat(ed.), *Blue Collar Soldiers?* 86 (1977).

<sup>11</sup> Lindy Heinecken, *Military Unionism in South Africa: Legality and Potential for Development*, 4 *Af. Sec. Rev.* (1995).

<sup>12</sup> A. Sabrosky, *Military unionism in America: Retrospect and prospect*, in Sabrosky (ed.), *Blue Collar Soldiers?* 154 (1977).

<sup>13</sup> *The Times of India*, *Foe Within: Fragging on the rise in forces* [http://articles.timesofindia.indiatimes.com/2010-04-28/india/28139419\\_1\\_fragging-paltry-salaries-psychological-research](http://articles.timesofindia.indiatimes.com/2010-04-28/india/28139419_1_fragging-paltry-salaries-psychological-research): See also Institute of Defense Studies & Analysis, *Fragging Cases in the Indian Army*, [http://idsa.in/idsastrategiccomments/FraggingCasesintheIndianArmy\\_BSSachar\\_201106](http://idsa.in/idsastrategiccomments/FraggingCasesintheIndianArmy_BSSachar_201106).

policies concerning their well-being, has resulted in a working environment wherein the personnel feel alienated. The personnel become disillusioned and their commitment levels are bound to drop. The ineffectiveness of the avenues of dispute resolution doesn't help either. The aggrieved personnel have either resort to the highly bureaucratic army leadership or an unresponsive civilian administration.<sup>14</sup> The unofficial associations comprising ex-servicemen, a mode of redressal considered apt by the government, has, apart from representation of the view point of the forces before the Sixth Pay Commission, hardly achieved much success. The government being under no obligation to consult such associations opts to treat such associations as mere advisors, which in turn has impacted the ability of the latter to act as legitimate 'pressure groups'.

The increasing instances of suicides and fragging in the armed forces<sup>15</sup> are testament to this growing discontent within the forces. The Supreme Court too has expressed concern regarding the recent incidents of return of medals, burning of artificial limbs and fratricidal assaults by the forces, and opined that, "*armed forces personnel have many grievances which are not being properly addressed by the Union Government.*"<sup>16</sup> It is in such a scenario that the need for unions among the forces arises. The impact of such unionization has been excessively elaborated by scholars such as Broedling and Segal, who have observed that the formation of appropriate techniques regarding

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<sup>14</sup> The Army Act, No. 46, 1950, §§26 and 27; The Air Force Act, No. 45 of 1950, §§ 26 and 27; The Navy Act, No. 62 of 1957, §23, available at <http://indiacode.nic.in/>.

<sup>15</sup> See Yahoo News, 17 Fragging cases in Indian armed forces since 2007 (March 11, 2012), <http://in.news.yahoo.com/17-fragging-cases-indian-armed-forces-since-2007-111912973.html>; See Also Times of India, Suicides remain a big killer in armed forces; toll already over 70 this year (June 12, 2012), [http://articles.timesofindia.indiatimes.com/2011-08-09/india/29868049\\_1\\_suicide-rate-stress-related-deaths-road-accidents](http://articles.timesofindia.indiatimes.com/2011-08-09/india/29868049_1_suicide-rate-stress-related-deaths-road-accidents).

<sup>16</sup> Indian Military News, Supreme Court Concerned at growing discontent among armed forces (March 5, 2012), <http://indianmilitarynews.wordpress.com/2010/09/12/sc-concerned-at-growing-discontent-among-armed-forces/>.

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personnel participation in the military structure would, apart from eliminating the present alienation that the forces feel; enhance military effectiveness, improve job satisfaction and increase the commitment level of the forces.<sup>17</sup> The Handbook on the *Sociology of the Military* further provides that the advantages of unionization extend to providing individual security, a valorization of dignity and an improvement in social communication.<sup>18</sup> Therefore, the right to unionize, which has been extended to all forms of civil servants and emergency services, cannot be withheld from the armed forces in an absolute manner.

**3. THE RIGHT TO UNIONISE IN OTHER JURISDICTIONS**

The right to unionize and collectively bargain is a right that has been recognized as one of the most basic rights in International Law and by most modern constitutions.<sup>19</sup> However, as aforementioned, the extent to which the right is made applicable to the armed forces is left to be determined by the nations themselves.<sup>20</sup> In furtherance of this, various states have allowed the armed forces to bargain collectively.<sup>21</sup>

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<sup>17</sup> David Segal, Worker democracy in military organisation, in W. Taylor, R. Arango and R. Lockwood (eds.), *Military Unions - U.S.Trends and Issues* 28 (1977); Laurie A. Broedling, Employee participation and the future management of the United States Armed Forces, in W. Taylor, R. Arango and R. Lockwood (eds.), *Military Unions - U.S.Trends and Issues* 23-24 (1977).

<sup>18</sup> Giuseppe Caforio, *Handbook of the sociology of the Military* 315(2002).

<sup>19</sup> Hani Ofek-Ghendler, *Military Unionization in Israel: Time for Change*, 3 IDF L.R. 114 (2007-08).

<sup>20</sup> *Supra* n. 4; See also International Labour Organization Convention, June 27, 1978, I.L.O. No. 151, Article 1(3); International Labour Organization Convention, June 19, 1981, I.L.O. No. 154, Article 1(2).

<sup>21</sup> Roy J. Adams, *The Human Right of Police to Organize and Bargain Collectively*, Feb. 12, 2012, <http://www.law.berkeley.edu/faculty/sklansky/conference/Adams%20paper.doc>. (In its 1994 survey of the state of Freedom of Association in the world, the ILO mentioned that legislation in all of the following countries permitted the police and other armed forces to unionize and bargain collectively: Australia, Austria, Belgium, Cote d'Ivoire, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg,

The armed forces are said to have been accepted as ‘*citizens in uniform*’, with all the associated rights.<sup>22</sup> The associations that have resulted out of these developments *inter alia* seek provision of vital equipment, revisions in pay and family welfare.<sup>23</sup> The argument is that “*what applies to other public servants, emergency services and the police, cannot be withheld from the armed forces under peaceful conditions, since they are all important elements of the welfare state.*”<sup>24</sup> Dispute resolution is mainly allowed through bargaining requiring binding arbitration to settle bargaining impasses.<sup>25</sup> Out of all the prevailing models in the world, the only model which allows for the union to have the absolute right to unionize is the one prevalent in Sweden. The forces are even permitted to strike and the government able to lock-out.<sup>26</sup> The attempt has been highly successful and the

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Malawi, Netherlands, New Zealand, Niger, Norway, Portugal, Senegal, Spain, Sweden, Tunisia, UK and the USA).

<sup>22</sup>Richard Bartle, Independent Representation in the British Army: Has the time finally arrived?, in G Caforio, G, Kummel, Military missions and their implications reconsidered: the aftermath of September 11th, 492 (2005), available at [http://books.google.co.in/books?hl=en&lr=&id=orEt2AdmwE0C&oi=fnd&pg=PA481&ots=wDDYYwo1MB&sig=kH6zP3h7sGTCXZhr5knx\\_H678xQ#v=onepage&q&f=false](http://books.google.co.in/books?hl=en&lr=&id=orEt2AdmwE0C&oi=fnd&pg=PA481&ots=wDDYYwo1MB&sig=kH6zP3h7sGTCXZhr5knx_H678xQ#v=onepage&q&f=false). (The paradigm shift that has to be seen is that under Article 11 of the earlier European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 everyone had the right to “join trade unions”. The proviso earlier being that there had to be reasonable restrictions to the armed forces. However, with amendment in 2003, such qualifications have been removed. This has been seen by authors as a change in perception).

<sup>23</sup>United Kingdom National Defence Association, <http://www.uknda.org/Sections.asp?sid=1&sectid=5&>

<sup>24</sup> L. Heinecken, Societal trends, defence legislation and military unionisation, Afr. Def. Rev. July 17, 1994 at 16; See also Francisco Cardona, Collective Relations in the Civil Service, Feb. 12, 2011, <http://www.oecd.org/dataoecd/28/58/38699594.pdf>.

<sup>25</sup> Barry Paisner & Michelle Haubert-Barela, Correcting The Imbalance: The New Mexico Public Employee Bargaining Act And The Statutory Rights Provided To Public Employees, 37 N.M.L. Rev. 357 (2007).

<sup>26</sup> Comptroller General’s Report to the United States Congress, Information on Military Unionization and Organisation, 22 (1977). (*The union has been extremely successful in improving the conditions of the personnel by negotiating a 40 hour week and provisions for payment for overtime*).

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union has been able to regulate the work hours and the issue regarding payment of overtime.<sup>27</sup> Germany on the other hand, has the largest military association in the world, which comprising present and ex-servicemen, acts as a pressure group.<sup>28</sup> Similar to the law as prevalent in Germany, is the law as applicable to the Dutch armed forces<sup>29</sup> where the forces have been guaranteed the right since 1883. The unions are involved in the process of mandatory consultation with the authorities regarding service conditions of the forces and are divided on the lines of rank, branch of service and religion.<sup>30</sup> The present status of the right in Europe thence is not whether the right should be guaranteed to the personnel, but the extent to which it should be guaranteed.<sup>31</sup> The model which assumes specific relevance for India though is the one prevailing in the United States of America, which like India faces threats from transnational terror groups. The prevailing opinion among lawmakers in the United States, which has been one of the greatest proponents of the right to unionize, is that the security personnel, including the armed forces must be one of the most highly unionized professions in the country for they believe that the level of unionization of the forces and their military preparedness is directly related.<sup>32</sup> It is accordingly that the armed forces have been accorded with the right to unionize limiting to the right to collectively bargain. The right is suspended in times of emergency and does not

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<sup>27</sup> L. Heinecken, Societal trends, defence legislation and military unionization, *Afr. Def. Rev.* 16 (1994).

<sup>28</sup> D. Cortright, Unions and Democracy, in W. Taylor, R. Arango and R. Lockwood (eds.), *Military Unions - U.S. Trends and Issues* 225(1977).

<sup>29</sup> Lindy Heinecken, *Military Unionism in South Africa: Legality and Potential for Development*, 4 *Afr. Sec. Rev.*, No. 5 (1995);

<sup>30</sup> *Supra* n. 21 at 3.

<sup>31</sup> Francisco Cardona, *Collective Relations in the Civil Service* (March 12, 2012), <http://www.oecd.org/dataoecd/28/58/38699594.pdf>.

<sup>32</sup> Andria Knapp, *Labour Law Colloquium: The First Anniversary of the Ohio Public Sector Collective Bargaining Law: Challenges and Solutions: Anatomy of a Public Sector Bargaining Unit*, 35 *Case W. Res.* 395 (1985).

extend to the right to strike.<sup>33</sup> Similar views have been expressed by the South African Supreme Court wherein it observed that given the fact that the right would be restricted in times of emergency, there is nothing to suggest that in ordinary circumstances, the military preparedness would be hampered by the unions.<sup>34</sup>

#### **4. POSITION OF LAW IN INDIA**

The Constitution of India, 1950, *vide* Article 33 gives competence to the Parliament to restrict or abrogate any of the fundamental rights of the armed forces.<sup>35</sup> The specific acts of the armed forces therefore specifically provide that the central government may by way of notification restrict the rights of the persons subject to this act, in terms of membership, or association with any trade union or labour union.<sup>36</sup> Consequently, the Central Government has issued notifications time and again to restrict the rights of the forces to associate with trade unions. Furthermore, notifications have also been issued to restrict the rights of personnel who are neither combatants nor in the active service of the forces. This has been done on the pretext that even though the personnel may not have been combatants or involved in the maintenance of law and order, they still form an intrinsic part of the forces *vide* Section 2(1)(i) of the Army Act, 1950 (*hereinafter*, 'Army Act') which provides that the army act (*and its limitation regarding non association with trade or labour unions*) shall apply even to such persons who though not otherwise subject to military law, but are followers of, or accompany, any portion of the regular army.<sup>37</sup> Identical provisions exist in the

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<sup>33</sup> *Supra*

<sup>34</sup> *South African National Defence Union v Minister of Defence and Others*, (2007) 28 ILJ 1909 (CC) (South Africa).

<sup>35</sup> India Const. Article 33.

<sup>36</sup> The Army Act, No. 46 of 1950, § 21(a); The Air Force Act, No. 45 of 1950, § 21(a); The Navy Act, No. 62 of 1957, §19(1)(a), available at <http://indiacode.nic.in/>.

<sup>37</sup> The Army Act, No. 46 of 1950 § 2(1)(i), available at <http://indiacode.nic.in/>.

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Navy Act, 1957<sup>38</sup> (*hereinafter*, 'Navy Act') and the Air Force Act, 1950<sup>39</sup> (*hereinafter*, 'Air Force Act'). The Court's interpretation of the aforementioned provisions and the consequent declaration of the Central Government notifications which restrict the rights to unionize of personnel who are non-combatants as *intra vires* is problematic.

The *Hon'ble* Supreme Court, taking assistance from Section 2(1)(i) of the Army Act, liberally interpreted the term 'armed forces', and held in *Ous Kutilingal Achudan Nair v. Union of India*<sup>40</sup> that even though the employees before it were cooks, chowkidars, barbers, carpenters, mechanics, bookmakers, tailors etc. and are governed by the civil service regulations, they come within the ambit of 'camp followers' and thence form an integral part of the armed forces. Article 33 of the Constitution would therefore, be applicable and the Central Government therefore, had the competence to curtail their fundamental right to associate under Article 19(1)(c). Similar pronouncements have been made regarding civilian employees like carpenters, tailors, bookmakers, sweepers, cooks etc., who were employed in the Army Medical Corps, Lucknow<sup>41</sup> and the General Reserve Engineering Force, whose primary job is to merely construct roads in border areas<sup>42</sup>. The Court held in the latter case that given the fact that the services were under the control of the Ministry of Defence, there was a need for discipline in the personnel and thence the restrictions to the formation of unions is apt. The rationale of the Court is in complete ignorance of the fact that even the Indian Defence Estate Services is under the Ministry of Defence as well, like the Indian Defence Estates Services, yet it's Class C and D officers

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<sup>38</sup> The Navy Act, No. 62 of 1957, §§ 2(e) and 2(f), available at <http://indiacode.nic.in/>.

<sup>39</sup> See The Air Force Act, No. 451950, §3(d), available at <http://indiacode.nic.in/>.

<sup>40</sup> AIR 1976 SC 1179

<sup>41</sup> *Gopal Upadhyay v. Union of India*, (1995) III LLJ 465 SC.

<sup>42</sup> *R. Viswan v. Union of India*, (1983) II LLJ 157 SC.

are allowed to unionize under the CCS (*Conduct*) Rules of 1964.<sup>43</sup> Merely because the purpose of these auxiliary services is to support the armed forces, it does not imply that the rights which they are entitled to enjoy as civil servants should be taken away. Furthermore, there is little doubt that the negative impact of unionization on military preparedness, if any, would be negligible if the right is applied to such auxiliary services. The restriction on the right of the auxiliary services to unions must thence be held to be unreasonable, for the positives of making the right available to such personnel far out-weigh any negative impact it may have. The term ‘*armed forces*’ in Article 33 should therefore, be interpreted to imply merely the ‘*regular armed forces*’ who are liable to offer continuous military service<sup>44</sup>, which would then give way for the personnel involved in the auxiliary services to form unions. Similar interpretation was made by the Bombay High Court in the case of *C.A.D. Civilian Workers Union v. State of Maharashtra*<sup>45</sup>, wherein it held that the regular armed forces and the auxiliary forces form two distinct classes and for the purposes of the payment of professional tax, only the regular members of the armed forces are exempted. The classes, the Court held were ascertainable and thence based on intelligible differentia. The same differentiation can be made in the present case as well so that auxiliary services are excluded from the restriction placed on unionization.

## **5. THE FORMATION OF A WEAKENED ASSOCIATION**

### **I. Right To Unionize Subject To Reasonable Restrictions**

There is currently no empirical study that unequivocally substantiates the claim that military unionization automatically injures military effectiveness,<sup>46</sup> and the denial of a fundamental right on the

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<sup>43</sup> Central Civil Service (Conduct) Rules, 1964, Rule 2(b).

<sup>44</sup> The Army Act, No. 46 of 1950, §3(xxi), available at <http://indiacode.nic.in/>.

<sup>45</sup> 2006 (5) BomCR 901

<sup>46</sup> Lindy Heineken, Court Rules in Favor of Democracy, as cited in Hani Ofek-Ghendler, Military Unionization in Israel: Time for Change, 3 IDF L.R. 119 (2007-

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basis of a mere apprehension has been held to be arbitrary and unreasonable.<sup>47</sup> Yet, it would be understandable, given the security threats that India faces in the 21st century and the scepticism surrounding the impact of unionization on the forces, if as a first step, the absolute right to unionize is not granted to the forces. What may be practicable though is a model which while taking into consideration the unique security threats that India faces, correspondingly inculcates restrictions which while ensuring that the forces are allowed representation, allays any fears regarding its negative impact on military readiness and effectiveness.

**II. Restrictions Which May Be Practicable**

In any case, there is nothing to suggest that the order and discipline, if at all hampered by the unions, cannot be restored by way of imparting the severest of penalties or that the ambit of the unions cannot be restricted so as to deny the union the right to collectively bargain in times of emergency; the denial of the right to strike, or any other coercive method of agitation; specifying that the recognition of the association stands cancelled if the association does anything which impacts the efficiency of the force and/or undermines its discipline and suspending the rights when emergency is declared, much like many other countries.

It is pertinent to note that similar restrictions have been held to be constitutional by the Court in the case of *A.P. Police Officers*

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08), available at

[www.mil.za/Magazines/SALUT/Salut/Archive/fpdoc/OICourtrules.htm](http://www.mil.za/Magazines/SALUT/Salut/Archive/fpdoc/OICourtrules.htm)

<sup>47</sup> *Karnataka State Road Transport Corporation Staff and Worker's Federation, Bangalore v. Karnataka State Road Transport Corporation*, Bangalore, 2000 (4) KarLJ 370 (wherein the Court held that, “a mere joining of in a trade union cannot be presumed and assumed to come in the way of rendering security service ineffective... a mere apprehension cannot by itself be taken as a ground for denying this fundamental right. Such absolute unrestricted regulation can only be termed as an arbitrary act... Public order can be maintained even without such restrictions”).

*Association v. Secretary, Home*,<sup>48</sup> wherein while noting that the constables, head-constables, sub-inspectors etc. had the right to form a union, the Court observed that the state retains the right to impose such restrictions as it deems necessary in the interest of maintenance of public order. The Court thence held reasonable the restrictions on the union to restrict its members to only police officers; to not resort to strike, delay in performance of service or any other coercive method of agitation; to not resort to any activity which may affect the efficiency of the force; and that the association shall be apolitical.

### **III. Separate Unions For The Different Classes**

It is submitted that the Indian model can have similar restrictions. Additionally, given that majority of the grievances in the forces arise from the status that a class enjoys, and there is exists a probability that a single union may lead to a conflict of interest between the varied class of personnel in the forces<sup>49</sup>, it is suggested that based on the Dutch model, there are multiple unions based on rank and branch of service.<sup>50</sup> This would ensure that the concerns of all classes are addressed.

### **IV. Limitations On The Ambit Of The Unions**

There could also be a restriction to the effect that the right may only extend to collectively bargain on issues relating to conditions of service of the employees and not include areas which directly or indirectly relate to military operations. Furthermore, even if a model which gives the entire force the right to organize and collectively bargain is not accepted, the right could at the very least be extended to form associations which could act as pressure groups, with periodic consultations with the authorities. As mentioned previously, this

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<sup>48</sup> Writ Petition No. 4042 of 1993, Order dated: 27.02.2011.

<sup>49</sup> Gwyn Harries Jenkins, Group Representation in the Armed Forces, ARI Research Note 95-39(June 1995).

<sup>50</sup> *Supra* n. 25.

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model has been effectively implemented in Germany which has the largest association of armed personnel.<sup>51</sup> This model would be better than the present model wherein the associations of ex-servicemen are invited merely for consultative purposes at the whims of the authorities.

**V. Auxiliary Services**

Irrespective of the model adopted, the right to unionize must be extended to the auxiliary services since they are civilian non-combatants, governed by civil service regulations, serve in the forces up till the age of 60,<sup>52</sup> and given the restrictions that will be placed on this right, the negative impact on the forces seems marginal, if at all.

**VI. Differentiation On The Basis Of Area Of Operation**

Under the Canadian model, are distinguished on the basis of their area of operation. The right to strike has been granted to the police serving in municipal areas but not under the federal jurisdiction, *i.e.*, the Royal Canadian Mounted Police.<sup>53</sup> In this light, if in India such a regime has to be implemented, then distinction must be made on the basis of where the forces are serving. Restrictions may be imposed on these rights in counter-insurgency operation zones and the borders. However, with nearly 60% of the services being stationed in peacetime stations such a model may be experimented with.

**6. REGISTRATION AND RECOGNITION OF A UNION OF ARMED PERSONNEL**

Having asserted that the forces must be granted the right to unionize, it is pertinent to consider whether the existing law allows for

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<sup>51</sup> *Supra* n. 23.

<sup>52</sup> *Ous Kutilingal Achudan Nair and Ors. v. Union of India*, AIR 1976 SC 1179., *Supra Note* 39

<sup>53</sup> *Roy Adams*, *supra* note 20.

the registration of such a union. The Trade Union Act, 1926 provides that a trade union can be validly registered when it comprises of workmen employed in an industry or trade.<sup>54</sup> The Defence in India, being a sovereign function is covered under the exception of the triple test for what is an industry<sup>55</sup> and despite a catena of cases that have narrowed down the list of exceptions; Defence is still covered under sovereign functions.<sup>56</sup> In addition to this, the right to register one's trade union has been restricted to employer-employee relationships, with the exception of relationships between the state and public servants who form part of the essential and regal administrative machinery of the government.<sup>57</sup> The armed personnel therefore, neither satisfy the qualification of 'workmen', nor the qualification of working in a 'trade' or an 'industry'. The issue though has been dealt by the Supreme Court of South Africa, where also a trade union can only be validly registered provided it comprises employees who come within the ambit of 'workmen' and are employed in an 'industry'. The Court noting the lacuna asserted that though soldiers may not strictly come within the ambit of 'workmen' as understood presently, since they are not employed in the context of a contractual relationship, this distinction does not preclude the classification of soldiers as workmen.<sup>58</sup> It also stated that many of the issues concerning the armed personnel (*such as conditions of service, work hours, salary etc.*) are similar to the concerns of other workmen and therefore the absolute denial of the right to unionize would be arbitrary.<sup>59</sup> Asserters of the

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<sup>54</sup> The Trade Unions Act, No. 16 of 1926, §2(g), available at <http://indiacode.nic.in/>.

<sup>55</sup> *Bangalore Water Supply and Sewerage Board v. A.Rajappa*, AIR 1978 SC 548 (per Krishna Iyer J.).

<sup>56</sup> *Sub-Division Inspector of Post v. Theyyam Joseph*, (1996) 8 SCC 489; *Physical Research Laboratory v. K.G. Sharma*, (1997) 4 SCC 257; *State of U.P. v. Jai Bir Singh*, (2005) 5 SCC 1.

<sup>57</sup> *The Tamil Nadu Non-Gazetted Government Officers' Union, Madras and another v. The Registrar of Trade Unions, Madras*, AIR 1962 Madras 234, (per Anantanarayanan J.) at 13.

<sup>58</sup> *South African Defence Union v. The Ministry of Defence*, 1999 (6) BCLR 615

<sup>59</sup> *Supra* n. 58

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right to unionize among the forces also take heart from the judgment of the Bombay High Court, which categorically held that the association comprising Grade-C and Grade-D officers of the Air Force was validly registered under the Trade Union Act, 1926.<sup>60</sup> The issue of registration of unions comprising personnel in auxiliary services therefore appears largely settled. Now, as far as other personnel is concerned, the judiciary could follow the course undertaken by the South African Supreme Court and allow for registration of trade unions comprising armed personnel. Such registration though would not by itself give the union the right to be recognized by the government as a bargaining agent.<sup>61</sup> The government could recognize the unions not as a matter of right but on their discretion, after ensuring that the union satisfies the conditions as suitably laid down. Once, such recognition is granted under traditional labour laws, the state could, following the examples set by the United States and South Africa, qualify the unions to negotiate in the first instance and binding arbitration if the former fails.

## **7. CONCLUSION**

The prospect of unionization in the armed forces, despite being a topic of interest in the constitutional and political perspective, has not had adequate textual research. *Via* this paper the researcher has had an opportunity to do so. The paper's central hypothesis is answered in the affirmative that the forces in India should be allowed to unionize albeit under certain conditions. The author asserts that though questions regarding the possible impact unionization may have on the military readiness of a country will always arise, but it is only prudent to not deny the right before its negative impacts are

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<sup>60</sup> *Indian Air Force Employees Union v. State Of Maharashtra, Commissioner of Profession Tax, Union Of India*, 2003 (5) BomCR 817.

<sup>61</sup> *Delhi Police Non-gazetted Karmachari Sangh v. Union of India*, AIR 1987 SC 379, at 13

conclusively ascertained. The right, even if granted subject to restrictions would, much like other industrial dispute mechanisms, create a common bargaining platform for negotiations between the forces and the government and lead to the protection and advancement of the rights of the soldiers. In any case, the state can abrogate the right if it believes that the military preparedness, efficiency or discipline is being adversely impacted. The researcher would like to conclude by stating that the term '*national defence*' necessarily implies the defence of all those beliefs and values that set a nation apart, and it is indeed ironic that in the name of national defence, we are subverting one of the greatest liberties that a citizen can enjoy- the freedom of association; a right, which indeed sets this nation apart

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*THE FAIR DEALING DOCTRINE & SAFE HARBOUR PROVISIONS FOR  
INTERMEDIARIES AS EXCEPTIONS TO COPYRIGHT INFRINGEMENT: STEPS  
IN THE RIGHT DIRECTION?*

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**Article**

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*THE FAIR DEALING DOCTRINE & SAFE HARBOUR PROVISIONS FOR  
INTERMEDIARIES AS EXCEPTIONS TO COPYRIGHT INFRINGEMENT:  
STEPS IN THE RIGHT DIRECTION?*

BY,

DIVYA SRINIVASAN<sup>1</sup>

**1. INTRODUCTION**

Section 52 of the Copyright Act, 1957, which enunciates the rule that certain acts shall not constitute an infringement of copyright, is integral to the development of copyright law in India<sup>2</sup>. The exceptions to copyright infringement, including the concept of fair dealing, are necessary to prevent copyright protection from proving as a hindrance to the legitimate use of copyrighted work in the furtherance of knowledge.<sup>3</sup> The purpose of Section 52 is to protect the freedom of expression under Article 19(1) of the Constitution of India in order to facilitate unhindered research, private study, criticism or review or reporting of current events.<sup>4</sup> Such purpose is consistent with the justification for the copyright regime, that is, to encourage the creation and dissemination of works. Hence, the provision restricts the copyright regime, which, if unchecked, has the potential to defeat its own purpose. Accordingly, there is a need for ‘*balance between the rights owners and the interest of the public in access to protected works*’<sup>5</sup> which is dealt with by the creation of exceptions, defences

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<sup>1</sup> The author is a student of National Law University, Delhi and is currently studying in the IVth year, BA., LLB. (Hons.)

<sup>2</sup> R.G Chaturvedi, Iyengar’s The Copyright Act 395 (2008).

<sup>3</sup> R.G CHATURVEDI, IYENGAR’S THE COPYRIGHT ACT 396 (2008).

<sup>4</sup> *Wiley Eastern Ltd v. Indian Institute of Management* (1996) PTR 46 (Del)

<sup>5</sup> Davies & Harbottle, Copinger And Skone James On Copyright 1.34 (2010).

and limitations to copyright. The exceptions provided to copyright infringement assume great importance, and need to be constantly refined in order to keep pace with the changing social and technological developments. Since the enactment of the Copyright Act in 1957, major changes have been made to Section 52 on only one occasion in 1994, even though minor amendments were introduced in 1983 and 1999. The extensive amendments made by the Copyright Amendment Act, 2012 are, thus, welcome. This paper discusses the amendments made to Section 52 of the Copyright Act, 1957. The second Section explains two important amendments that were made to Section 52, specifically, the extension of fair dealing exceptions to all works, and the introduction of safe harbour provisions. The next Section deals with the concept of fair dealing as compared to fair use, and debates as to whether more general fair use exceptions ought to be introduced in the copyright law. In the final Section, the author analyses the changes that have been made, and provides a conclusion.

## **2. AMENDMENTS TO SECTION 52**

The Copyright (*Amendment*) Act, 2012, has made two important amendments to Section 52 of the Copyright Act, 1957 that shall be discussed. Firstly, the extension of fair dealing to all works, and secondly, the introduction of safe harbour provisions to protect intermediaries from liability for copyright infringement.

### **I. SCOPE OF THE FAIR DEALING EXCEPTION**

The Copyright (*Amendment*) Act, 2012, has expanded the scope of fair dealing under Section 52 by replacing the words “*literary, dramatic, musical or artistic work*” used in Section 52(1) (a) and 52(1) (b) with the expression “*any work*”. Thus, the fair dealing provisions now apply to any work except a computer programme. With this amendment, the provisions have been extended

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to cinematographic films and sound recordings.<sup>6</sup> This amendment assumes practical importance in light of the Delhi High Court's decision in *Supercassettes Industries v. Chintaman Rao*<sup>7</sup>, where it refused to apply the fair dealing provisions to a cinematograph film. The Court held that it was to protect the financial investment that goes into making of cinematograph films and sound recordings, which enjoy far greater public appeal and attraction than the original literary, dramatic, musical and artistic works, that the Parliament did not permit an unlicensed use of such work even for the purpose of criticism or review or reporting of current events. In fact, given that the basic purpose of fair dealing is to protect the freedom of speech and expression,<sup>8</sup> it could be argued that the inapplicability of the fair dealing provisions to cinematographic films and sound recordings violates Article 19(1) (a) of the Constitution, though such an argument has been rejected by the Court.<sup>9</sup> Thus, the expansion of the scope of Section 52 is welcome in ensuring equal treatment to all classes of work under the Copyright Act.

**II. SAFE HARBOUR PROVISIONS FOR INTERMEDIARIES**

The amendments to Section 52 have resulted in the introduction of two new sub-clauses [(b) and (c)] that aim to protect intermediaries from liability for copyright infringement.

**(i) Section 52(1)(b) and (c)**

The new Section 52(1)(b) provides that the transient or incidental storage of a work or performance purely in the technical

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<sup>6</sup> Zakir Thomas, Overview of changes to the Indian Copyright Law, 17 Journal of Intellectual Property Rights 324 (2012).

<sup>7</sup> CS(OS) 2282/2006 (Delhi H.C.) (Unreported).

<sup>8</sup> *Supra*, n. 4

<sup>9</sup> *Supercassettes Industries v. Chintaman Rao*, CS(OS) 2282/2006 (Delhi H.C.) (Unreported).

process of electronic transmission or communication to the public will not constitute copyright infringement. Similarly, sub-clause (c) provides that transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder is not infringement. These provisions are similar to the ‘*safe harbour*’ provisions available in various jurisdictions that aim at protecting the internet and other service providers from liability when copyright infringement is committed by third parties on their services.<sup>10</sup> The new provisions were required as holding service providers liable for copyright infringement will hinder the growth of the internet in its nascent stage, especially in India.<sup>11</sup> Section 52(1)(c) also includes a ‘*notice and take down*’ procedure that is absent in Section 52(1)(b). This procedure provides that if the owner of the copyright in the work that is being temporarily stored gives a written complaint to the person responsible for the storage of the copy, then such person has to refrain from facilitating access to the work for a period of twenty one days. If no order is received from the Court within these twenty one days, then the person may re-enable access to the work. However, this notice procedure is not present in Section 52(1)(b); the reasons for the exclusion not being clear. Moreover, sub-clause (c) also explicitly states that it does not apply when the person responsible for the storage is aware or has a reasonable basis to believe that he is storing an infringing copy.

This requirement is akin to the US Digital Millennium Copyright Act, 2000, that requires actual knowledge, or in its absence, awareness of facts or circumstances from which infringing activity is apparent in order to make the service provider liable.<sup>12</sup> The American

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<sup>10</sup> (eg) Digital Millennium Copyright Act, 1998 (U.S.), § 512.

<sup>11</sup> Seiber, Criminal Liability for the transfer of Data in International Networks - New Challenges for the Internet, 13(1) Computer Law and Security Report 151 (1997).

<sup>12</sup> Digital Millennium Copyright Act, 1998 (U.S.), § 512(c)(1)

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Courts, while interpreting the standard of knowledge required have made it clear that mere knowledge of prevalence of infringement does not amount to actual knowledge, unless the defendant had knowledge of specific and identifiable infringements of particular individual items.<sup>13</sup>

***(ii) The Need for Safe Harbour Provisions***

The introduction of these safe harbour provisions in the Copyright Act is welcome for two important reasons. *Firstly*, it clarifies the legal position on intermediary liability. Prior to the 2012 amendment, the law relating to liability of intermediaries was contained in the Information Technology Act, 2000 (*hereinafter referred to as IT Act*).<sup>14</sup> However, the applicability of Section 79 to cases of copyright infringement was in doubt.<sup>15</sup> This ambiguity arose apparently due to conflicting provisions in Sections 79 and 81. Section 79 begins with the phrase “*Notwithstanding anything contained in any law for the time being in force*”, while the proviso to Section 81 states that “*nothing contained in this Act shall restrict any person from exercising any rights conferred under the Copyright Act, 1957 or the Patents Act, 1970.*”<sup>16</sup> The Delhi High Court in *Super Cassettes Industries v. Myspace Inc*<sup>17</sup>, had in fact, recognised that Section 79 of the IT Act does not apply to cases of copyright infringement, as Section 81, being a *non-obstante* clause, has an over-riding effect. Thus, it is possible that the safe harbour provisions in the Information Technology Act, were inapplicable to cases of copyright infringement.

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<sup>13</sup> *Viacom v. YouTube* 2010 WL 2532404 (S.D.N.Y 2010); *Sony Corporation of America v. Universal City Studios, Inc* 464 US 417 (1984).

<sup>14</sup> Information Technology Act, 2000, § 79.

<sup>15</sup> Thilini Kahandawaarachchi, Liability of Internet service providers for third party online copyright infringement: A study of the US and Indian laws, 12 *Journal of Intellectual Property Rights* 553, 559 (2007).

<sup>16</sup> Information Technology Act, 2000, § 81.

<sup>17</sup> CS(OS) No. 2682/2008 (Delhi H.C.) (Unreported).

It would be incongruous if intermediaries were immune from liability in cases of defamation, obscene content etc., but not in cases of copyright infringement. The recent amendments provide an answer to this previously unresolved question.

*Secondly*, the judicial interpretation of the existing safe harbour provisions has not been entirely sympathetic to intermediaries. *For example*, the Delhi High Court decision in *Super Cassettes Industries Ltd. v. My Space Inc. & Anr*<sup>18</sup> went so far as to suggest that intermediaries screen all user generated content to check for infringement prior to making the content available online. Holding that post infringement measures may not be *prima facie* sufficient safeguards for the infringement, the Court held:

*“There is no reason to axiomatically make each and every work available to the public solely because user has supplied them unless the defendants are so sure that it is not infringement. If the defendants cannot exercise diligence of this nature, the necessary inference that can be drawn is that the defendants are making itself liable for infringement by its inactions to enquire about the source of the works at the appropriate stage.”*

This could easily be used to demonstrate that it is possible that there is an emerging judicial trend towards requiring due diligence / content clearance to be conducted by intermediaries regardless of practical feasibility. However, this trend has been halted by the 2012 amendments.

**(iii) Transient or Incidental Storage**

The safe harbour provisions in Section 52(1)(b) and (c) are available in cases of transient or incidental storage of work. On the other hand, Section 79 of the IT Act covers any third party

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<sup>18</sup> CS(OS) No. 2682/2008 (Delhi H.C.) (Unreported).

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information, data, or communication link hosted by an intermediary.<sup>19</sup> An intermediary is broadly defined as any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, webhosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes.<sup>20</sup> Thus, the protection available to intermediaries under the Copyright Act is actually very limited as compared to that available under the Information Technology Act. The provisions seem to be applicable primarily to search engines, with other kinds of online services being covered or not covered depending on one's interpretation of the word 'incidental'.

*(iv) Due Diligence*

Section 79 of the Information Technology Act, 2000 specifies that the safe harbour provisions will only be applicable if the intermediary has '*observed due diligence*', while discharging his duties.<sup>21</sup> No such condition is present in the amendments to Section 52. These requirements of due diligence become important due to the interpretation given by the Delhi High Court in *Avnish Bajaj v State of Delhi*<sup>22</sup>. The Court held that Baazee.com (*the intermediary*) had failed to exercise due diligence since its filters were faulty and allowed content that was pornographic in nature to pass through. Similarly in *Super Cassettes Industries v MySpace Inc*<sup>23</sup>, the Court held that due diligence meant that the intermediary had the duty to perform pre-infringement enquiries.

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<sup>19</sup> Information Technology Act, 2000, § 79.

<sup>20</sup> Information Technology Act, 2000, § 2(w)

<sup>21</sup> Information Technology Act 2000, § 79(2)(c).

<sup>22</sup> (2005) 3 Comp. L.J. 364 (Del).

<sup>23</sup> CS(OS) No. 2682/2008 (Delhi H.C.) (Unreported)

Thus, it would seem that the Indian Courts have included efficient filtering and monitoring of content as part of an intermediary's duty of due diligence. However, the amended Section 52 makes it clear that the only duty on the service provider is to take post infringement measures in accordance with the Notice and Takedown Procedure laid down in the proviso to Section 52(1)(c). It is highly impractical to expect service providers to screen all the content passing through their systems, given the large number of transactions that are taking place. In fact, it would be impossible for the intermediary to prevent every instance of copyright infringement. As observed by the Court in *Religious Technology Service Centre v. Netcom*, information service providers only offer the opportunity to publish, and are unable to exercise any influence on what people say on the internet.<sup>24</sup> Moreover, the phrase '*due diligence*', has nowhere been defined in IT Act, and is subject to varying interpretations by the service providers.<sup>25</sup> Hence, the amended Section 52 is an improvement over Section 79 of the IT Act in this regard.

(v) **Expeditious Removal of Infringing Material**

Section 52(1)(c) does not provide any indication as to the time within which access to the infringing material must be disabled. In fact, both the Motion Picture Association and the Indian Music Industry, in their suggestions to the Parliamentary Standing Committee, recommended that the service providers be required to act expeditiously upon receiving the notification. They were concerned that the current law gave them time till the Court order was received to act on the notification.<sup>26</sup> Such a provision for expeditious removal or disablement of access to the material is provided for in Section 79

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<sup>24</sup> 907 F Supp 1361, 1367 (N.D. Cal, 1995)

<sup>25</sup> Thilini Kahandawaarachchi, Liability of Internet service providers for third party online copyright infringement: A study of the US and Indian laws, 12 Journal of Intellectual Property Rights 553, 559 (2007).

<sup>26</sup> Standing Committee on Human Resource Development, Two Hundred and Twenty Seventh Report on The Copyright Amendment Bill, 2010, 19.7 (2010).

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of the IT Act. The Intermediary Guidelines issued under that Act further specify that the access should be disabled within thirty six hours of receiving the notice.<sup>27</sup> Similarly, the US Digital Millennium Copyright Act also provides for expeditious removal.<sup>28</sup> Thus, Section 52(1)(c) could have also benefited from such an addition.

(vi) **Requirement of Obtaining a Court Order**

The amended Section 52(1)(c) provides that the service provider can re-enable access to the material within 21 days unless it receives a Court order refraining it from facilitating access. On the other hand, the IT Act does not provide any time period, other than specifying that the intermediary must preserve the information for ninety days for investigation purposes.<sup>29</sup> This leads to the conclusion that the removal of the material must be permanent. Section 512 of the US Digital Millennium Copyright Act also does not provide for the obtainment of a Court order to make the removal permanent. Instead, it provides for a detailed notification and counter-notification procedure. The user whose material has been removed may file a counter notice stating, under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.<sup>30</sup> Upon receiving such counter-notification, the service provider shall provide the copyright owner with a copy of the counter-notification and re-enable access to the material in less than fourteen days.<sup>31</sup> It has been argued that the procedure under the DMCA increases the risk of ‘*wrongful takedown*’ as it often leaves subscribers

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<sup>27</sup> Information Technology (Intermediaries guidelines) Rules, 2011, rule 4.

<sup>28</sup> Digital Millennium Copyright Act, 1998, § 512(c).

<sup>29</sup> Information Technology (Intermediaries guidelines) Rules, 2011, rule 4.

<sup>30</sup> Digital Millennium Copyright Act, 1998, § 512(g)(3).

<sup>31</sup> Digital Millennium Copyright Act, 1998, § 512(g)(2).

no chance to explain, before their materials are taken down.<sup>32</sup> In *Online Policy Group v. Diebold*<sup>33</sup>, it was argued that greater checks should be introduced into the notice and takedown procedures of the DMCA, and parties misusing DMCA provisions should be liable for damages incurred by those they target. Section 52(1)(c) provides an advantage in this regard as the requirement of obtaining a Court order within 21 days provides a safeguard against frivolous requests. However, the Business Software Alliance in its recommendations to the Standing Committee has argued that the proviso to Section 52(1)(c) is burdensome to service providers since it imposes on the copyright owner the near impossible onus of getting a judicial order in favour within fourteen days (*as was provided by the Amendment Bill*). Such *ex parte* injunctions/orders are highly discretionary in nature which cannot be claimed as a matter of right.<sup>34</sup> In accordance with this suggestion, the Parliamentary Committee had suggested that the stipulation of the fourteen days period be reconsidered<sup>35</sup>, upon which the Parliament amended the time period in the proviso to 21 days. However, this extension of time period does not address the concern of the copyright owners that getting an *ex parte* injunction is subject to the discretion of the Court, and will not be possible even in all cases of genuine copyright infringement. Though this argument seems to assume that there is no bar to the intermediary enabling access to the information upon failure to obtain a Court Order within twenty one days, such a position is not entirely accurate, especially if the copyright owner has provided the intermediary with convincing proof

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<sup>32</sup> Tian Yi Jun, WIPO Treaties, Free Trade Agreement and Implications for ISP Safe Harbour Provisions (The Role of ISP in Australian Copyright Law, 16 Bond Law Review 198 (2004).

<sup>33</sup> 337 F. Supp. 2d 1195 (N.D. Cal. 2004)

<sup>34</sup> Standing Committee on Human Resource Development, Two Hundred and Twenty Seventh Report on The Copyright Amendment Bill, 2010, 19.8 (2010).

<sup>35</sup> Standing Committee on Human Resource Development, Two Hundred and Twenty Seventh Report on The Copyright Amendment Bill, 2010, 19.10 (2010).

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of the infringing nature of particular content.<sup>36</sup> This is because the service provider will then be considered to be ‘*aware or have reasonable grounds for believing*’ that the storage is of an infringing copy, rendering the safe harbour provision in Section 52(1)(c) inapplicable to it. Hence, it can be concluded that the notice procedure in Section 52 is an improvement over the procedure as laid down in the IT Act. It even provides greater safeguards than the DMCA as the requirement of procuring a Court order within twenty one days will go a long way in deterring frivolous requests. However, whether the practical difficulties of procuring such an order within twenty one days in the Indian legal system will render the procedure ineffective remains to be seen.

**III. THE FAIR DEALING – FAIR USE DIVIDE**

**(i) The Doctrine of Fair Dealing**

Fair Dealing of copyright material is the extra-legal use, which is usual, reasonable and customary. Fair dealing provisions must be interpreted so as to strike a balance between the exclusive rights granted to the copyright holder, and the often competing interest of enriching the public domain.<sup>37</sup> Fair dealing has not been defined anywhere in the Copyright Act, or by the Indian judiciary. The famous English case of *Hubbard v. Vosper*<sup>38</sup> has commented on the doctrine of fair dealing as follows:

*“It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the*

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<sup>36</sup> Nandita Saikia, ISP/OSP Safe Harbours and Takedown Laws: Copyright and Information Technology, June 15, 2012, available at <http://copyright.lawmatters.in/2012/06/safe-harbour-for-osps-and-isps-in-2012.html>

<sup>37</sup> *Chancellor Master and Scholars of University of Oxford v. Narendra Publishing House*, 2008 (38) PTC 385 (Del).

<sup>38</sup> (1972) 2 WLR 389

*quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them..... Next, you must consider the proportion of text used. Whether the dealing was fair or not is a question of fact that has to be decided in every case.”*

The Indian law contains the doctrine of fair dealing, similar to that used in Canada and the United Kingdom, as opposed to the doctrine of fair use prevalent in the United States of America. The fair dealing defences in the Indian law are enumerated in the several clauses of Section 52. They have been typically interpreted as exhaustive, inflexible and certain, since any use not falling strictly within an enumerated ground is considered an infringement.<sup>39</sup> Thus, the fair dealing defences are traditionally applied only to a work used for a closed set of enumerated purposes.<sup>40</sup>

(ii) **The Doctrine of Fair Use**

In contrast, the USA has preserved the more general ‘Fair Use’ exception to copyright law. This defence applies to any copyrighted work and can cover any of the restrictions placed by copyright. While research, criticism, news reporting and teaching are specifically mentioned, the defence is not confined to these purposes and has been found to cover a range of circumstances,<sup>41</sup> such as parody. For the use to be fair, a number of factors have been considered, but *four*, illustrative factors that must be considered have been provided for in the US Copyright Act, 1976.<sup>42</sup> These factors are the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to

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<sup>39</sup> *M/s. Blackwood & Sons Ltd. v. A.N. Parasuraman* AIR 1959 Mad 410; *Civic Chandran v. Ammini Amma* 1996 PTR 142

<sup>40</sup> Ayush Sharma, Indian Perspective of Fair Dealing under Copyright Law: Lex Lata or Lex Ferenda? 14 *Journal of Intellectual Property Rights* 523 (2009).

<sup>41</sup> Copyright- Should Fair Dealing be replaced with Fair Use?, July 15, 2011, available at <http://legalpiracy.wordpress.com/2011/07/15/copyright-%E2%80%93-should-fair-dealing-be-replaced-by-fair-use>

<sup>42</sup> *Campbell v. Acuff Rose Music*, 510 US 569 (1994)

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the copyrighted work as a whole and the effect of the use upon the potential market for or value of the copyrighted work.<sup>43</sup>

(iii) **Comparative Analysis**

a) **Flexibility in Judicial Interpretation**

The fair use defence, being far more expansive than the limitations on copyright that exist in other countries<sup>44</sup>, gives Courts the ‘*elbow room*’ they need to create new exceptions (*or modify existing ones*) as technology develops and society changes.<sup>45</sup> It has been suggested that the ‘*Fair Use*’ exception in the US is one of the factors creating a positive environment in the US for innovation and investment in innovation.<sup>46</sup> This doctrine has been commended as being “*entirely equitable and so flexible as virtually to defy definition*”.<sup>47</sup> On the other hand, the restrictive nature of the fair dealing exceptions only gives judges the flexibility to rule within the scope defined in case law or the various Acts. This means the defences are “*characterized by a certain rigidity, that leaves Judges no elbow room for the deliverance of just results.*”<sup>48</sup> *This rigidity in the fair dealing exception has led to a “growing mismatch between what is allowed under copyright*

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<sup>43</sup> Copyright Act, 1976 (U.S.), § 107.

<sup>44</sup> Tyler G Nwby, What's Fair Here Is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law? 51(6) Stanford Law Review 1633 (1999).

<sup>45</sup> Copyright- Should Fair Dealing be replaced with Fair Use?, July 15, 2011, available at <http://legalpiracy.wordpress.com/2011/07/15/copyright-%E2%80%93-should-fair-dealing-be-replaced-by-fair-use/>

<sup>46</sup> Ian Hargreaves, Digital Opportunity, A Review of Intellectual Property and Growth, ¶ 5.12 (2011).

<sup>47</sup> *Time Inc v. Bernard Geis Associates* 293 F Supp 130 (SDNY 1968).

<sup>48</sup> Angelopoulos, Freedom of expression and copyright: the double balancing act 3 IPQ 328 (2008).

*exceptions, and the reasonable expectations and behaviour of most people.”<sup>49</sup>*

***b) Certainty of Law***

It could be argued that this rigidity is balanced by a degree of certainty that is desirable in law,<sup>50</sup> while the fair use doctrine provides “*flexibility at the expense of certainty*”.<sup>51</sup> The *Hargreaves Review*, which was an independent review on intellectual property and growth commissioned by the British Government, found that many of those who gave evidence were concerned that adopting fair use would bring “*massive legal uncertainty,... an American style proliferation of high cost litigation; and a further round of confusion for suppliers and purchasers of copyright goods.*”<sup>52</sup> The fair use factors are considered to be so malleable that there is no discernible trend in judicial decisions as to which uses are fair.<sup>53</sup> Although fair use’s attention to context is certainly salutary, “*it is so case specific that it offers precious little?? to artists, educators, journalists, Internet speakers, other*” who want to use the copyrighted work.<sup>54</sup> *There exists a great deal of uncertainty amongst users as to whether the use of the copyrighted work shall amount to fair use. The Chilling Effects Report documents the culture of anxiety that now exists as rights holders*

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<sup>49</sup> Ian Hargreaves, *Digital Opportunity, A Review of Intellectual Property and Growth*, ¶ 5.10 (2011).

<sup>50</sup> Copyright- Should Fair Dealing be replaced with Fair Use?, July 15, 2011, available at <http://legalpiracy.wordpress.com/2011/07/15/copyright-%E2%80%93-should-fair-dealing-be-replaced-by-fair-use/>

<sup>51</sup> Burrell, *Reining in copyright law: is fair use the answer?* 4 IPQ 361 (2001).

<sup>52</sup> Ian Hargreaves, *Digital Opportunity, A Review of Intellectual Property and Growth* (2011).

<sup>53</sup> D Nimmer, *Fairest of them All’ and other Fairy Tales of Fair Use* 66 Law & Contemp Probs 263 (2003).

<sup>54</sup> D Nimmer, *Fairest of them All’ and other Fairy Tales of Fair Use* 66 Law & Contemp Probs 263 (2003).

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*aggressively attempt to thwart potential fair uses of work.*<sup>55</sup> *In fact, a US Court has criticized the obscure doctrine as “the most troublesome in the whole law of copyright”.*<sup>56</sup>

More recently, the “*Digital Learning Challenge*” White Paper focused specifically on the educational sector and called for clearer fair use rules.<sup>57</sup> The study reveals that many educators unnecessarily obtain licenses for copies for classroom use. Doing so out of excessive caution, when fair use would otherwise apply, is harmful.<sup>58</sup>

*c) Legality of Fair Use*

There exist doubts as to the legality of the fair use defence under TRIPS, as the TRIPS agreement requires that any exceptions and limitations to copyright be confined to “*certain special cases.*”<sup>59</sup> Article 13 of the TRIPS Agreement expressly limits the scope of exceptions that members may create to any exclusive right of the copyright owner. This article provides that “*Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.*”<sup>60</sup> Even though the US is a signatory to TRIPS, it is uncertain

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<sup>55</sup> J Urban and L Quilter, Efficient Process or ‘Chilling Effects?’ Takedown Notices Under Section 512 of the DMCA, 22(4) Santa Clara Computer and High Technology Law Journal 621 (2006).

<sup>56</sup> *Dellar v. Samuel Goldwyn Inc* 104 F 2d 661 (2nd cir, 1939).

<sup>57</sup> W Fisher et al, The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age – A Foundational White Paper Berkman Center for Internet and Society Publication No. 2006-09 (2006), p 57.

<sup>58</sup> W Fisher et al, The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age – A Foundational White Paper Berkman Center for Internet and Society Publication No. 2006-09 (2006), p 58

<sup>59</sup> Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS), Article 12.

<sup>60</sup> Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS), Article 12.

as to whether fair use satisfies this requirement,<sup>61</sup> with member States questioning the validity of the fair use doctrine.<sup>62</sup>

(iv) **Application of Fair Use Factors by Indian Courts**

The Indian Courts have applied the fair use factors in determining the scope of fair dealing in a number of cases. With regard to the first fair use factor of the purpose and character of use, the Court in *Blackwood & Sons v. AN Parasuraman*<sup>63</sup> held that in order to constitute unfairness there must be an intention to compete and to derive profit from such competition. The test of ‘commercial exploitation’ was applied in the case of *Rupendra Kashyap v. Jivan Publishing House*<sup>64</sup>, where the Court observed that if a publisher commercially exploits the original work, and in doing so, infringes the copyright, the defence of fair dealing would not be available. Moreover, the test of ‘transformative character’ of the use has also been applied by Courts to see if the purpose of the use is substantially different from that of the copyrighted work.<sup>65</sup>

The *second* fair use factor of nature of the copyrighted work has attracted little attention in Indian Courts.<sup>66</sup> It received mention in *Civic Chandran v. Ammini Amma*<sup>67</sup> where the Court held that the nature of the work (i.e.) to criticize the social structures in Kerala, by itself meant the certain sequences, events and incidents would be

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<sup>61</sup> Burrell, Reining in copyright law: is fair use the answer? 4 IPQ 361 (2001).

<sup>62</sup> World Trade Organisation Review of Legislation on Copyright and Related Rights-United States, October 30, 1996, available at <http://www.wto.org/wto/ddf/ep/public>

<sup>63</sup> AIR 1959 Mad 410

<sup>64</sup> (1996) 38 DRJ 81.

<sup>65</sup> *Chancellor Master and Scholars of University of Oxford v. Narendra Publishing House* 2008 (38) PTC 385 (Del); *Syndicate of the Press of the University Cambridge v. BD Bhandari & Othrs* RFA (OS) No.21 of 2009 & FAO (OS) No.458 of 2008 (Delhi H.C.) (Unreported).

<sup>66</sup> Ayush Sharma, Indian Perspective of Fair Dealing under Copyright Law: Lex Lata or Lex Ferenda? 14 Journal of Intellectual Property Rights 523 (2009).

<sup>67</sup> 1996 PTR 142 (Ker).

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common to both the prior and subsequent work, and the latter was not meant to imitate the former.

The *third* fair use factor regarding the amount and substantiality of the portion used in relation to the copyrighted work as a whole has received most attention from the Indian Courts. In *Blackwood & Sons v. AN Parasuraman*<sup>68</sup>, it was held that regard has to be had to the substantiality of the quantity and the quality of the matter reproduced. If there were an abstraction of something of value to an appreciable degree, there could be no fair dealing. In *Civic Chandran v. Ammini Amma*<sup>69</sup>, the Court held that reproduction of the whole work or a substantial portion of it will normally be permitted and only extracts or quotations from the work will be permitted even as ‘fair dealing’. The quantum of extracts or quotations permissible will depend upon the circumstances of each case.

The *fourth* fair use factor which is the effect of the use upon the potential market is for or value of the copyrighted work was applied in *ESPN Star Sports v. Global Broadcast News Ltd*<sup>70</sup>, where the Court endorsed the likelihood of competition and held that if the work is being used to convey the same information as the author for a rival purpose, it may be unfair. Thus, the results obtained while applying the fair use or fair dealing offences available across various jurisdictions, may actually be similar.<sup>71</sup>

(v) **Appropriate Standard for India**

In spite of the expansion of the fair dealing defences through the 2012 amendments, the Legislature never considered whether

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<sup>68</sup> AIR 1959 Mad 410.

<sup>69</sup> 1996 PTR 142 (Ker).

<sup>70</sup> 2008 (36) PTC 492 (Del).

<sup>71</sup> Giuseppina D’Agostino, Healing Fair Dealing? A Comparative Copyright Analysis of Canadian Fair Dealing to UK Fair Dealing and US Fair Use, 148 (Comparative Research in Law and Political Economy, Research paper no 28/2007)

copyright law in India would be benefited by a policy shift from the doctrine of fair dealing to that of fair use. For instance, though the Standing Committee on the Draft Bill has used the term ‘*Fair Use*’ a number of times in its Report<sup>72</sup>, it has not contemplated as to whether India’s fair dealing exceptions could be improved by the addition of more general guidelines as to what does not constitute infringement. It is clear that the Indian Courts have applied the fair use factors in many situations. The only difference is that fair use may have applied to any situation, not merely one enumerated.<sup>73</sup> A liberal construction of fair dealing provisions in the UK<sup>74</sup> has resulted in recommendations against a switch to the fair use doctrine.<sup>75</sup> The Indian Courts have also demonstrated a certain amount of flexibility in cases regarding fair dealing, reiterating that it is impossible to develop a ‘*rule of thumb*’ for cases of fair dealing as each case depends on its own facts and circumstances.<sup>76</sup> Moreover, the ‘*Fair Use*’ doctrine in the US has been built up over time (through case and statute law). “*A complex web of understandings, agreements and policy statements support the legislative provisions*”,<sup>77</sup> such as the Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions that assist educators in interpreting their actions, would amount to fair use. Importing the fair use doctrine to India, where there is limited jurisprudence on fair dealing, may harm copyright law rather than benefit it. Hence, a switch to the fair use doctrine may not be appropriate in the Indian context. Another option would be a hybrid

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<sup>72</sup> F. Supp. 2d 1195 (N.D. Cal. 2004)

<sup>72</sup> Standing Committee on Human Resource Development, Two Hundred and Twenty Seventh Report on The Copyright Amendment Bill, 2010, 14.4, 20.4, 20.7 (2010).

<sup>73</sup> D Vaver, Canada’s Intellectual Property Framework: A Comparative Overview, 17 IPJ 125, 150 (2004).

<sup>74</sup> L Bently And B Sherman, *Intellectual Property Law* 193 (2004).

<sup>75</sup> Andrew Gowers, Gowers Review of Intellectual Property (2006).

<sup>76</sup> *ESPN Star Sports v. Global Broadcast News & Othrs* (2008) 36 PTC 492 (Del).

<sup>77</sup> Burrell, Reining in copyright law: is fair use the answer? 4 IPQ 361 (2001).

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fair use and fair dealing model, such as that used in Singapore.<sup>78</sup> This involves a mixture of general, fair use-style factors for lawful use, combined with more specific, fair dealing-style requirements in certain cases.<sup>79</sup> Thus, India should not replace Fair Dealing entirely with Fair Use, but can consider the introduction of the Fair Use guidelines as an additional ground in Section 52 that would provide flexibility and result in the expansion of the exceptions.

### **3. CONCLUSION**

The amendments made to Section 52 of the Copyright Act, 1957 has overall, had the effect of expanding the available exceptions to copyright infringement. The introduction of the safe harbour provisions for intermediaries is a welcome step. These provisions are well-drafted and appear to provide an improvement over similar provisions contained in Section 79 of the Information Technology Act, 2000. However, the provisions seem to be rather limited in scope and would have benefited from a more detailed notice and takedown procedure as is present in the DMCA, especially as it is unclear in what manner the Intermediary Rules will interact with the Copyright Act. A transposition of the US Fair Use defence may not work in the Indian scenario, especially since it can be argued that application of Indian fair dealing provisions may produce a similar result. In fact, a Consultation Paper published by the Irish Copyright Review Committee believes that the 2012 amendments to the Copyright Act have introduced ‘*an expanded fair dealing exception that goes a very*

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<sup>78</sup> Copyright- Should Fair Dealing be replaced with Fair Use?, July 15, 2011, available at <http://legalpiracy.wordpress.com/2011/07/15/copyright-%E2%80%93-should-fair-dealing-be-replaced-by-fair-use/>

<sup>79</sup> Copyright Act 1988 (Singapore), § 35- 37

*long way down the road to a fair use doctrine*'.<sup>80</sup> However, the Legislature ought to have considered this important aspect before passing the amendments. A number of countries such as Australia<sup>81</sup>, the United Kingdom<sup>82</sup> and Ireland<sup>83</sup> have commissioned either independent or Government reviews to consider whether their Copyright law would benefit from the transposition of the doctrine of '*fair use*'. While some of these reports did not recommend the introduction of general fair use provisions, they were guided by the economic, social and legal situation prevalent in their countries. For instance, the Hargreaves Review recommended against fair use as it believed that the fair use doctrine would be impermissible under EU law. Thus, what India needs is a comprehensive review to be commissioned by the Government to investigate the benefits of the Fair Use doctrine, and in light of the unique socio-legal environment prevalent in India, analyze whether the country's copyright regime requires such an amendment.

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<sup>80</sup> Copyright Review Committee (Ireland), Copyright and Innovation: A Consultation Paper 114 (2012).

<sup>81</sup> Australian Government Attorney-General's Department, Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the digital age, Issues Paper (2005)

<sup>82</sup> Ian Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth (2011)

<sup>83</sup> Copyright Review Committee (Ireland), Copyright and Innovation: A Consultation Paper (2012).

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Note

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THE ARBITRABILITY OF BRIBERY CLAIMS

BY  
NADJA AL KANAWATI & KRISZTINA BALOGH<sup>1</sup>

**1. ARBITRATION**

Arbitration is an alternative dispute resolution method by which the parties voluntarily submit their dispute to an arbitral tribunal, usually in the form of an arbitration clause integrated in their contract. The reasons parties decide to partake in arbitration, as opposed to state Court proceedings, are manifold: parties are often attracted to arbitration because arbitration is generally confidential; the hearings are set in private and neutral surroundings of the parties' and tribunal's choice. Further, the partial and final awards are not published, and hence are not available to third parties, thus providing the parties, usually large firms, corporations or government entities with excellent means for protecting their trade and government secrets, their image or essentially their value on the market. Additionally, arbitration is known to be less costly and swifter than state Court proceedings<sup>2</sup>, so parties to large transactions are well-advised to opt for arbitration clauses in their contracts already based on considerations of cost and time efficiency alone. Yet, perhaps the main reason, why parties increasingly choose this dispute resolution mechanism, is the very nature of arbitration, namely, that it is entirely based on the parties' mutual agreement. The keyword truly is the one of '*choice*' in arbitration, the parties choose not only the seat of arbitration, which determines the law governing the arbitration

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<sup>1</sup> The authors are (B. Law) Law Students, from the University of Fribourg, Switzerland, 6th Semester

<sup>2</sup>Fouchard, Philippe/Gaillard, Emmanuel/Goldman, Berthold, International Commercial Arbitration, the Hague 1999, at no. 1.

procedure, *i.e.*, the *lex arbitri*<sup>3</sup>, but also the specific rules, which are to govern the procedure before the arbitral tribunal, *i.e.*, most commonly a set of arbitration rules provided for by an arbitration institution.<sup>4</sup> Thanks to such ready-made rules, parties need not spend hours negotiating the rules applicable should a dispute arise, but can agree, by including such an arbitration clause in their contract, to adopt the procedural rules they are both at ease with. Furthermore, another convincing aspect of arbitration is the fact that the arbitrators that ultimately adjudicate the case, are usually of the parties' choosing and experts in the field pertaining to the dispute. According to most institutional rules, or by virtue of the parties' agreement, a three-member tribunal will be appointed.<sup>5</sup> Upon its constitution, the tribunal indeed is considered to be the '*master of the proceedings*'<sup>6</sup> and according to the '*competence-competence doctrine*', arbitral tribunals have the power to decide upon their own jurisdiction, *i.e.*, the competence to decide on their own competence.<sup>7</sup> Arbitrators will

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<sup>3</sup> According to The 2010 Arbitration Survey: Choices of International Arbitration, a study conducted by White & Case, the most important factor in the parties' decision about the seat of arbitration, is the formal legal infrastructure“ of the seat, which includes the national arbitration law, track records in enforcing agreements to arbitrate and arbitral awards, neutrality and impartiality of the seat and whether the country has enforced the New York Convention or not, as seen on <http://choices.whitecase.com/news/newsdetail.aspx?news=3787>

<sup>4</sup> Such as the ICC Rules, LCIA Rules, Swiss Rules, DIS Rules, SIAC Rules, just to name a few. Notably, the United Nations General Assembly in 1966 established a United Nations Commission on Trade Law (*UNCITRAL*), which has edicted the UNCITRAL Arbitration Rules 2010 (frequently used as the applicable rules of procedure for ad hoc arbitration) and the UNCITRAL Model Law in International Commercial Arbitration 1985 with amendments of 2006, which has been adopted in over 60 countries, as seen on [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)

<sup>5</sup> It may sometimes be possible to elect one person as a sole arbitrator.

<sup>6</sup> Arbitral tribunals, just as state Courts, have full power to issue procedural orders or provisional measures and may decide on the course of procedure (see for example: Born, Gary, *International Commercial Arbitration*, Austin 2009, pp. 2354 et seqq.).

<sup>7</sup> Redfern, Alan/Hunter, Martin, *Law and Practice of International Commercial Arbitration*, 4th ed., London 2004, at paras. 5-39 et seqq.; Born at pp. 851 et seqq

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make use of such competence whilst determining the arbitrability of the claims brought before them, such as, for instance, claims involving allegations of corruption or bribery.<sup>8</sup> The award rendered by the tribunal will be final, with a limited possibility for appeal, and will thus also be enforceable; due to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (*the New York Convention*), arbitral awards obtained in one country are directly enforceable in another signatory state<sup>9</sup>, without any possibility of challenge based on the merits of the award.<sup>10</sup> This is particularly relevant if the party has assets in a country other than the country of the seat of arbitration. The criteria for an enforceable award are few, but their observance is imperative; reasons for unenforceability of an arbitral award are found in Article V New York Convention<sup>11</sup> and six of these seven grounds are also set out in Article 34, UNCITRAL Model Law in *International Commercial Arbitration of 1985* with amendments of 2006 (*the UNCITRAL Model Law*) as reasons for having an arbitral award set aside by the national Court of the place of arbitration.<sup>12</sup> The violation of national and/or transnational public policy is included in said catalogues of reasons for unenforceability and setting aside of arbitral awards. They represent the grounds most commonly invoked by parties attempting to challenge an award

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(*cit. FN 6*); see also for explicit provisions of the competence-competence doctrine, instead of many: Article 21 UNCITRAL Rules; Article 19 Model Law; Article 6(9) ICC Rules.

<sup>8</sup> See below Chapter 3.

<sup>9</sup> To date, 146 countries are parties to the New York Convention, as seen on [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)

<sup>10</sup> Article 1 and 5 New York Convention.

<sup>11</sup> The text of which has been, evidently, almost literally, reproduced in most state laws, and represent an internationally accepted standard, as also the Model Law in Article 36 adopts the same grounds.

<sup>12</sup> Broches, Aron, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration*, Boston 1990, at pp. 188 et seqq.; UNCITRAL Secretariat, *International Commercial Arbitration – UNCITRAL Secretariat Explanation of Model Law*, at no. 42, available online at: <http://faculty.smu.edu/pwinship/arb-24.htm>

dealing with allegations of bribery.<sup>13</sup>

## 2. **BRIBERY**

Bribery is defined by Black's Law Dictionary as follows; "*the corrupt payment, receipt, or solicitation of a private favor for official action*".<sup>14</sup> It constitutes a criminal offence in most countries in the world and governments as well as international organizations such as the United Nations and the International Criminal Court are increasing their anti-corruption efforts.<sup>15</sup> Unfortunately, it is still quite common in international business transactions; in fact, *Kofi Annan*<sup>16</sup> called it "[...] *an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organized crime, terrorism and other threats to human security to flourish*".<sup>17</sup>

A differentiation has to be made between bribery of public officials and bribery between private persons:

### I. **PUBLIC BRIBERY**

Public bribery is criminalized in all states. There is an international consensus that the state and its government officials should not grant benefits to individuals based on payments or gifts

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<sup>13</sup> See below Chapter 3.3.1.

<sup>14</sup> Black's Law Dictionary, Garner, Bryan A. [ed. in Chief], 9th edition, St. Paul, 2009

<sup>15</sup> Cf. United Nations Convention on Corruption, 2004 New York ("*UN Convention*"); Memorandum to the OECD Working Group on Bribery in International Business Transactions, available online at: <http://www.iccwbo.org/uploadedFiles/ICC/policy/anticorruption/pages/Memorandum%20to%20OECD%20working%20group.pdf>

<sup>16</sup> Former Secretary General of the UN (1997 – 2006).

<sup>17</sup> Speech of the Secretary General on the adoption of the UN Convention against Corruption, October 31st, 2003, New York, online available at <http://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html>

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such individuals made to them. The *ratio legis* behind its criminalization is that public bribery threatens the integrity and sovereignty of a state. If officials act not according to the law, but because they have obtained illegal incentives from individuals, the state is no longer in control of its actions and loses the power to act according to its goals and will. The criminalization of such actions is, for the most part, unproblematic and accepted. It can, however, present difficulties in countries where so called ‘*facilitation payments*’ are the norm, without which no business transaction can be concluded. Companies dealing with officials of such countries often find themselves between a rock and a hard place, on the one hand they cannot conclude the deal without making such payments and on the other, they are violating their own code of conduct and international conventions and laws regarding bribery. Such violations can result in hefty fines and even jail time for the offending individual behind the company.<sup>18</sup>

### II. PRIVATE BRIBERY

Private bribery is often referred to as ‘*commercial bribery*’, which Black’s Law Dictionary defines as follows: “(1) *The knowing solicitation or acceptance of a benefit in exchange for violating an oath of fidelity, such as that owed by an employee, partner, trustee or attorney. (2) A supposedly disinterested appraiser’s acceptance of a benefit that influences the appraisal of goods or services. (3) Corrupt dealing with the agents or employees of prospective buyers to secure an advantage over business competitors.*”<sup>19</sup>

Unlike public bribery, there is no international consensus regarding the treatment of private bribery and it is not yet criminalized

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<sup>18</sup> Siemens was fined a record amount of \$800m by US authorities for its bribery and corruption scandal (cf.

<http://www.guardian.co.uk/business/2008/dec/16/regulation-siemens-scandal-bribery>

<sup>19</sup> Black’s Law Dictionary (cit. FN 14).

in all countries. There are, however, several international conventions that suggest the enactment of legislations criminalizing private bribery.<sup>20</sup> However, to this day, only some countries have followed up and actually enacted corresponding legislation. Most notably, in the United Kingdom, the Bribery Act, 2010, dedicates its 7<sup>th</sup> Section to the criminalization and sanctioning of private bribery. It even creates a liability for companies who fail to prevent bribery committed by their employees; the respective knowledge is not relevant for a sanctioning. Also, India has recently ratified the UN Convention against Corruption and its Prime Minister has announced that private bribery may indeed become illegal in India.<sup>21</sup> While public bribery threatens the integrity of the state, private bribery threatens the free market and competition. If a private party is influenced in its decision-making by something other than availability and demand, competition is distorted and other competitors suffer. Private bribery is a threat to the foundations of our economic system – free competition on a free market.

### **III. ARBITRABILITY OF BRIBERY**

Irrespective of the differentiation between public and private bribery, the question of arbitrability persists. As more and more parties opt for arbitration as their method of choice for dispute resolution, this question becomes more and more relevant. The authors will present answers to this question by analyzing case law on the topic and discussing the established '*theory of severability*' before

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<sup>20</sup> African Union Convention on preventing and combating corruption, Maputo 11 July 2003; Framework Decision of the Council of the European Union on Combating Corruption in the Private Sector, Brussels 22 July 2003; United Kingdom Bribery Act 2010; United Nations Convention against Corruption, New York 2004; United Nations Convention against Transnational Organized Crime, 2003.

<sup>21</sup> PTI "*Private Sector Bribery could become criminal offence: PM*" (October 21st, 2011), available online at [http://articles.timesofindia.indiatimes.com/2011-10-21/india/30306197\\_1\\_criminal-offence-foreign-public-officials-public-procurement-law](http://articles.timesofindia.indiatimes.com/2011-10-21/india/30306197_1_criminal-offence-foreign-public-officials-public-procurement-law).

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addressing the issue of enforceability of arbitral awards rendered when bribery is involved, as well as the question of evidence and which standard of proof must be applied.

### (i) Case Law Analysis

The case probably most cited in this matter is ICC 1110 – also referred to as the ‘*Lagergren decision*’, named after the sole arbitrator who rendered it.<sup>22</sup> The award was rendered in 1963 – the parties, an Argentinean engineer and a British company, concluded a contract regarding electricity projects in Argentina. When the British company only received one of the contracts from the Argentinean government, it refused to pay the promised commission to the engineer. Both parties then decided to submit their dispute to ICC Arbitration and opted for a single arbitrator, *in casu* Mr. Lagergren, a Swedish national. Mr. Lagergren decided not to assume jurisdiction over the case, thereby exercising his *competence-competence*, because of the (*alleged*) bribery tainting the contract between the parties. He famously held that parties who have engaged in bribery have forfeited ‘*any right to ask for assistance from the machinery of justice*’<sup>23</sup>.

Since 1963 the arbitration community has changed its opinion on this topic. In fact, it is to be noted, that recent case law has established arbitral tribunals’ jurisdiction over bribery issues, even though the contract containing the arbitration clause was tainted by such illegal actions.<sup>24</sup> Most arbitrators now no longer shy away from

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<sup>22</sup> ICC Case No. 1110, Final Award of 1963, online available at <http://www.translex.org/201110>.

<sup>23</sup> *Supra* n. 23

<sup>24</sup> Instead of many: *Fiona Trust and Holding Co. v Privalov*, House of Lords decision of 24 January 2007; ICC 5622, Final Award of 1988; *Jiangsu Materials Group Light Industry and Weaving Co. v Top-Capital Holdings Ltd. and Prince Development Ltd.*, Chinese Supreme People’s Court decision of 1998; *National Power Case*, Swiss Federal Supreme Court Case of 2 September 1993; *Wena Hotels Ltd. v Arab Republic of Egypt*, 2nd ICSID Award of 28 January 2002; *Westacre Investments Inc. v Jugoinport SPDR Holding Co. Ltd.*, the United

assuming jurisdiction over cases involving bribery allegations, using the theory of severability to justify this decision.<sup>25</sup>

Most case law concerns public bribery; there is almost no mention of private bribery. This might be because it is a rather new trend to consider private bribery as a condemnable behavior and it could also be that private bribery is harder to trace than its public counterpart. However, the differentiation is without pertinence regarding the question of arbitrability – as the issue is one of illegality and *contra bonos mores* in general, which does not differ between these two forms of bribery.

(ii) **The Theory of Severability**

The parties' agreement is the primary source of jurisdiction for arbitral tribunals. Accordingly, arbitral tribunals have a duty to solve the disputes the parties consensually choose to submit to them.<sup>26</sup> It would undermine the very purpose of an arbitration clause if the mere allegation of bribery raised by one party would suffice to circumvent such a clause.<sup>27</sup> However, in cases where the contract containing the arbitration clause is tainted by bribery, even the arbitration clause itself is affected by the illegality of the bribery. This is where the

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*Kingdom's High Court decision of 12 March 1999; Doctrine: Lew, Julian D./Mistelis, Loukas A./Kröll, Stefan, Comparative International Commercial Arbitration, the Hague 2003, at no. 9-80; Mistelis Loukas A., Legal Issues Arising out of Disputes Involving Fraud, Bribery, Corruption and other Illegality or Illicitness Issues, in: Enforcement of Arbitration Agreements and Institutional Arbitral Awards – The New York Convention in Practice, Gaillard, Emmanuel/Di Pietro, Domenico (eds.), at pp. 590 et seq.*

<sup>25</sup> See *Infra* Chapter 3.2.

<sup>26</sup> Crivellaro, Antonio, Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence, in: Arbitration – Money Laundering, Corruption and Fraud, ICC Publication No. 651, Paris 2003, at p. 118; Sheppard, Audley/Delaney, Joachim, Corruption and International Arbitration, at p. 2, available online at:

[http://iacconference.org/documents/10th\\_iacc\\_workshop\\_Contracts\\_Taken\\_to\\_International\\_Arbitration.pdf](http://iacconference.org/documents/10th_iacc_workshop_Contracts_Taken_to_International_Arbitration.pdf).

<sup>27</sup> Fiona Trust Case (cit. FN 24).

## THE ARBITRABILITY OF BRIBERY CLAIMS

theory of severability steps in. According to this theory, the arbitration clause can be severed from the rest of the contract. Thus, the validity of the agreement to arbitrate can be separated from the potential invalidity of the underlying contract due to bribery.<sup>28</sup> It is upon this theory that arbitral tribunals found their decision to assume jurisdiction, in spite of bribery allegations.<sup>29</sup>

### (iii) Challenges facing Arbitrators

Now that it has been established that arbitral tribunals do have the power to adjudicate matters of bribery, the authors will discuss some of the challenges arbitrators face when confronted with such a case. It is an arbitrator's duty to render an enforceable award.<sup>30</sup> *Could the enforceability be put in jeopardy when the case involves bribery?* Bribery is an issue of criminal law and as such falls within the public policy of each state. If an arbitral tribunal assumes jurisdiction – is it acting outside its competence ('*ultra vires?*') *Could this be grounds for unenforceability or setting aside under the New York Convention, respectively the UNCITRAL Model Law?* Furthermore, the allegation of bribery is of very sensitive character and might require a factual investigation – how can an arbitral tribunal investigate these issues and what is the standard of proof an arbitrator must apply when considering such claims?

#### a) Public Policy and Enforceability of Arbitral Awards

The relevant law to determine issues of public policy is the law

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<sup>28</sup> Martin, Timothy A., International Arbitration and Corruption: An Evolving Standard, available online at: [http://www.timmartin.ca/fileadmin/user\\_upload/pdfs/Corruption\\_and\\_Intn\\_l\\_Arbitration\\_Apr2003\\_.pdf](http://www.timmartin.ca/fileadmin/user_upload/pdfs/Corruption_and_Intn_l_Arbitration_Apr2003_.pdf)

<sup>29</sup> Westacre Case (cit. FN 24).

<sup>30</sup> Bühler, Michael W./Webster, Thomas H., Handbook of ICC Arbitration, Commentary, Precedents, Materials, London 2005, at no. 11-3; Horvath, Günther J., The Duty of the Tribunal to render an Enforceable Award, in: Journal of International Arbitration, Vol. 18 / Iss. 2, London, 2001, at p. 135.

of the seat of arbitration.<sup>31</sup> Under Article 34(2)(b)(ii) of the UNCITRAL Model Law, a conflict with the public policy of the place of arbitration is a reason for setting aside an award. Likewise, Article V(2)(b) of the New York Convention, stipulates public policy as a reason for possible unenforceability. When enforcing an award, the public policy of the respective country of enforcement is decisive.<sup>32</sup> Additionally, an arbitral tribunal has to consider international or transnational public policy.<sup>33</sup> According to BORN: “*a legal principle is part of transnational public policy if it is dealt with equally among several legal systems due to fundamental principles of law*”.<sup>34</sup>

While public bribery, as seen above, is criminalized by a vast majority of countries and represents a norm of transnational public policy, the same cannot yet be said for bribery between private persons.<sup>35</sup> However, there is a trend towards criminalization of private bribery, and it might soon become a norm of transnational public policy. When rendering an award regarding an issue of bribery the arbitral tribunal might be risking unenforceability or setting aside procedures, as the issue is one of public policy, usually reserved for state Courts. If, however, the arbitral tribunal renders a decision, which is in accordance with the international practice in this matter, the authors see no reason as to why such an award should not be

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<sup>31</sup> Mistelis, Loukas A./Brekoulakis, Stavros L., *Arbitrability: International and Comparative Perspectives*, Alphen aan den Rijn 2009, at nos. 6-1 et seqq.; Redfern/Hunter, at no. 6-07 (cit. FN 7).

<sup>32</sup> Mistelis/Brekoulakis, at nos. 1-3 et seqq. (cit. FN 31); Redfern/Hunter, at no. 10-51 (cit. FN 7).

<sup>33</sup> Fouchard/Gaillard/Goldman, at nos. 1533 et seq. (cit. FN 2).

<sup>34</sup> Born, Gary B., *International Commercial Arbitration: Cases and Materials*, Kluwer Law International, Austin 2011, pp. 2193 et seq.; Sayed, Abdulhay, *Corruption in International Trade and Commercial Arbitration*, Kluwer Law International, The Hague 2004, p. 288; Arfazadeh, Homayoon, *Considérations pragmatiques sur la compétence respective de l'arbitre et du juge en matière de corruption*, in: Bull. ASA (Bulletin of the Swiss Arbitration Association) 19/2001, at p. 225.

<sup>35</sup> Barratt, James/Ichilcik, Hayley, *Bribery*, in: *The European and Middle Eastern Arbitration Review*, 2011.

upheld. After all, arbitration's main pillar is party autonomy and the parties have decided to submit a dispute to the jurisdiction of an arbitral tribunal – this decision should not be affected by bribery allegations.

***b) Evidentiary Support and Standard of Proof***

Arbitral tribunals are not criminal Courts, but institutions mainly concerned with contract law. So when arbitrators are confronted with bribery, they do not suddenly become criminal judges but rule only on the contractual consequences of bribery.<sup>36</sup> This, however, does not mean that arbitrators should take allegations of bribery lightly. In fact, bribery allegations require a high standard of proof.<sup>37</sup> In ICC 1110, Mr. Lagergren observed that the commission payments at cause involved very large sums of money and that “*although these commissions were not to be used exclusively for bribes, a very substantial part of them must have been intended for such use*”. This was deemed a sufficient indicator for bribery.

However, according to the *Westinghouse Case*<sup>38</sup> a ‘*preponderance of evidence*’ was the usual standard of proof necessary, which would not suffice for allegations of corruption, where ‘*clear and convincing evidence*’ were to be required. The *Hilmarton*<sup>39</sup> judgment even demands ‘*proof beyond doubt*’.<sup>40</sup>

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<sup>36</sup> Arfazadeh, at p. 681 (cit. FN 34); Raeschke-Kessler, Hilmar, Corruption in Foreign Investment – Contracts and Dispute Settlement between Investors, States and Agents, in: The Oxford Handbook of International Investment Law, Muchlinski P./Ortino F./Schreuer C. (eds.), Oxford 2008, at p. 18.

<sup>37</sup> ICC 4145 (cit. FN 24); ICC Case No. 8891, Award of 1998; ICC Case No. 6401, Award of 1990, 1991; Born, Gary, Bribery and an Arbitrator's Task, available online at: <http://kluwerarbitrationblog.com/blog/2011/10/11/bribery-and-an-arbitrator-s-task/>; Scherer, Matthias, Beweisfragen bei Korruptionsfällen vor Internationalen Schiedsgerichten, in: Bull. ASA 19/2001, at pp. 690 et seq.; Martin (cit. FN 28).

<sup>38</sup> ICC 8891 (cit. FN 37).

<sup>39</sup> ICC Case No. 5622, Award of 1988.

It is precisely the obtaining of this evidence that can prove a difficult task for arbitrators. An arbitral tribunal's investigative powers are limited – it is unclear whether arbitral tribunals may investigate *ex officio*. However, similarly to state Courts, under most arbitration rules, the tribunal may compel the production of documents and, if necessary, one can always rely on a state Court to subpoena witnesses or other evidence.<sup>41</sup> Arbitral tribunals are, in any event, required to rule over facts disputed by the parties – *why should they not be competent to rule on alleged bribery?* The difficulty for arbitrators is the threat of vacating an award – the fear of being overturned on appeal in state Courts is not quite as persistent as the fear of arbitrators that their awards may be vacated.<sup>42</sup> In a situation involving bribery, the fact that a tribunal upheld a contract in spite of bribery could lead to annulment of the award; but, on the other hand, ruling that a contract is null and void when bribery is not established with sufficient certainty, could also be grounds for unenforceability.<sup>43</sup>

### 3. CONCLUSION

Arbitration is often chosen as a tool to solve disputes quickly, confidentially and efficiently. An allegation of bribery should not be enough to exclude the possibility of an arbitral tribunal's jurisdiction, as the mere raising of such allegations cannot serve as an easy tool to circumvent the agreement to arbitrate. However, arbitrators must tread carefully when adjudicating matters involving bribery in order not to risk unenforceability of the award. It is the authors' opinion that as the

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<sup>40</sup> Scherer, Mathias, Circumstantial Evidence in Corruption Cases before International Arbitral Tribunals, International Arbitration Law Review Vol. 5 Iss. 2, 2002, available online at

[http://www.lalive.ch/files/msc\\_circumstantial\\_evidence\\_in\\_corruption2.pdf](http://www.lalive.ch/files/msc_circumstantial_evidence_in_corruption2.pdf)

<sup>41</sup> Born (cit. FN 37).

<sup>42</sup> In the authors' opinion, the reason for this lies in the fact that arbitrators rely on party appointment – so if their awards are vacated, the chance for reappointment is smaller; whereas, state Courts are often overturned on appeal and the judge is not personally implicated.

<sup>43</sup> Born (cit. FN 37).

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popularity of arbitration grows even more, the powers of arbitral tribunals will be extended as well, and the arbitrability of bribery will no longer be questioned. Already today, most arbitral tribunals assume jurisdiction in spite of bribery allegations – the ‘*Lagergren*’ doctrine is long left behind. Equipped with the ‘*theory of severability*’ and taking into consideration that it is not an arbitral tribunal’s intent to replace a state criminal court, but only to rule on the contractual consequences of bribery, there really is no reason not to allow the parties’ dispute to be solved according to their chosen method. Arbitrators will come to feel more comfortable dealing with issues of corruption and bribery as they will increasingly be confronted with them, as more and more contracts contain arbitration clauses. Moreover, as international regulation of both public and private bribery becomes more concrete, the danger for a violation of Article V (2)(b) of the New York Convention becomes smaller and smaller as the arbitrators will have a better idea of what the (*transnational*) public policy for these issues is. As the threat of unenforceability will thus, diminish – arbitrators will be in an even better position to handle the bribery aspects of a dispute brought before them. In the authors’ opinion, the remaining problem is the standard of proof and the methods an arbitrator will have at his or her disposal to obtain that proof.

As far as documentary evidence is concerned, an arbitral tribunal’s power is similar to a state Court’s – as most arbitration rules allow the tribunal to compel documents from either party. However, should one party not cooperate with the arbitral tribunal’s order, the arbitrators lack the power of enforcement and must rely on state Courts for subpoenas. Having to rely on a different body for such instrumental parts of the procedure can be tedious and impractical. In conclusion, the authors are of the opinion that arbitrators can and should rule on the contractual consequences of bribery if the parties chose to submit their dispute to arbitration, especially when the

occurrence of bribery is not even in question.<sup>44</sup> However, arbitral tribunals should exercise the necessary caution when dealing with cases where the allegations of bribery are heavily disputed and the factual evidence is unclear or insufficient.

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<sup>44</sup> Like in *World Duty Free Company Limited v The Republic of Kenya*, Award of 4 October 2006, ICSID case NO. ARB/00/7, where the evidence of bribery came in form of the party's own testimony.

**Case Comment**

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OFFENCES BY COMPANIES: AN ANALYSIS ON ANEETA HADA V.  
GODFATHER TRAVELS

BY,  
MIHIR NANIWADEKAR<sup>1</sup>

**ABSTRACT**

*Prosecutions involving Section 138 of the Negotiable Instruments Act 1881, have plagued the Indian Courts ever since the provision was introduced by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988. The Amendment was brought about to enhance the level of dependability and credibility of the 'payment systems' in the country. The Section was an attempt at creating strict liability for defaulters. The usual requirement of mens rea to constitute a crime was dispensed with. Through this present case comment, the author desires to analyze the decision rendered in Aneeta Hada v. Godfather Travels & Tours Pvt. Ltd.<sup>2</sup> and whether the Courts' were right in quashing the proceedings against both the director and the company, as they were not arraigned as an accused.*

**1. INTRODUCTION**

Any legal system containing systematic rules of corporate criminal liabilities, must find an appropriate balance between two foundational principles: a corporation's duty, as a separate legal entity, to take responsibility for its own actions, and the need to ensure

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<sup>2</sup> (2012) 5 SCC 661

that vicarious liability is minimally invoked in criminal prosecutions. The *first* principle emerges as a corollary of the separate personality of corporate entities: a company, having its own existence in law, capable of having its own rights, must also have certain duties, and a failure to perform those duties must result in an attachment of responsibility. The *second* principle is based on the rationale that the law ought not to fasten criminal liability on a person for the acts of another.<sup>3</sup> Indeed, the rationale for the evolution of vicarious responsibility in the law of tort itself would indicate that such a rationale would not be sufficient for imposing vicarious liability in criminal law.<sup>4</sup> These principles often conflict in the case of companies; for, at first glance, companies cannot act on their own – they must act through some other person. *If they must act through some other person, must not the state impose vicarious liability when a company is found criminally liable?* The answer can be found in the common law doctrine of attribution, under which the acts and mental state of the ‘*directing mind and will*’ of the company is to be treated in law as if it were the acts and the mental state of the company itself.<sup>5</sup> On doing so, it may be concluded that the company is liable directly for the acts and intentions of its ‘*directing mind and will*’.<sup>6</sup>

## 2. AN EXTENSIVE ANALYSIS

The above mentioned points however, leave open a question about the directing mind and wills. After all, although their intentions and acts were ‘*attributed*’ to the company, they were, in a plain sense, the principal actors. *Shouldn’t they be liable in such cases?* The answer, in the Indian context, has been found by a limited introduction of vicarious responsibility in criminal law. Certain specific statutes

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<sup>3</sup> See for example, *Sham Sundar v. State of Haryana*, AIR 1989 SC 1982.

<sup>4</sup> Winfield & Jolowicz on Tort, 18th ed., 2010.

<sup>5</sup> *Lennard’s Carrying Co. v. Asiatic Petroleum*, [1915] AC 705; followed and explained in several cases subsequently. See *Meridian Global v. Securities Commission*, [1995] 2 AC 500.

<sup>6</sup> *Iridium India v. Motorola*, (2011) 1 SCC 74.

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provide for Sections on ‘*offences by companies*’: these provide that where a company has committed an offence, certain persons in charge of and responsible to the company for the conduct of its affairs shall be liable as well as for the criminal acts of the companies.

A typical provision may be found under Section 141 of the Negotiable Instruments Act<sup>7</sup>. Numerous other enactments lay down the same rule.<sup>8</sup> One major issue in this connection is the extent of liability of the persons in charge of and responsible. This issue has led to a wealth of case law: *for example*, one may usefully refer to *SMS Pharmaceuticals v. Neeta Bhalla & Anr.*<sup>9</sup>

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<sup>7</sup> “141. *Offences by companies.* – (1) *If the person committing an offence under Section 138 is 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 person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:*

*Provided further that where a person is nominated as a Director of a Company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.*

(2) *Notwithstanding anything contained in sub-Section (1), where any offence under this Act, has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.”*

<sup>8</sup> The Information Technology Act and the Negotiable Instruments Act are just two examples. Similar provisions are ubiquitous in statutorily created offences.

<sup>9</sup> “*There is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a person can be subjected to criminal process. A liability under Section 141 of the NI Act is sought to be fastened vicariously on a*

One other issue is of interest: *can these provisions be invoked only when the company has been found guilty of an offence? Or is it open to invoke these provisions against (say) a director, when the company itself has not been found guilty? What if the company has not even been charged? And, what if for some legal or practical reason, the company cannot be proceeded against?* These questions recently came up before a three-judge Bench of the Supreme Court of India in *Aneeta Hada v. Godfather Travels*.<sup>10</sup>

The appellant in the case was the authorized signatory of International Travels Limited, a company registered under the Companies Act, 1956. She issued a cheque in favour of the respondent. The cheque was dishonoured. The respondent initiated criminal proceedings by filing a complaint before the concerned Judicial Magistrate under Section 138 of the Negotiable Instruments Act. In the complaint, the company, International Travels Limited was not arrayed as an accused. Nonetheless, the Magistrate took cognizance of the offence against the accused appellant. The appellant

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*person connected with the company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in connection against the person sought to be made liable. Under Section 141 what is required is that the persons who are sought to be made criminally liable should be, at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for the conduct business of the company at the time of commission of an offence, who will be liable for criminal action. The liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary facts which make a person liable. It is necessary to specifically aver in a complaint that at the time the offence was committed, the person accused was in charge of and responsible for the conduct of the business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of a Section 141 cannot be said to be satisfied.”- (2005) 8 SCC 89*

<sup>10</sup> *Supra*, n. 2

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invoked the jurisdiction of the High Court under Section 482 of the Code of Criminal Procedure for quashing of the criminal proceeding. The High Court refused to quash the proceedings. An appeal was filed against this order, which initially came up before a Bench of two learned Judges. On a difference of opinion, the matter was referred to a Bench of three learned Judges. (*In the connected matter, Avnish Bajaj v. State*<sup>11</sup>, the Delhi High Court had refused to quash a prosecution under the Information Technology Act, which had a similar provision of liability of directors. *Aneeta Hada* was therefore taken as the lead matter before the Supreme Court)

Before the three-judge Bench, the appellants raised several contentions, which were accepted and the appeal was allowed. The arguments of the appellants can be analyzed under *three* broad heads:

- a) argument from text;
- b) argument from the concept of vicarious liability;
- c) argument from precedent.<sup>12</sup>

The argument from text was that Section 141 of the Negotiable Instruments Act (*which is detailed above*) was applicable only in cases of ‘*offences by companies*’, and for invoking the Section; a finding must be given that a company has committed an offence. This is impossible unless the company is present as an accused before the trial Court. The argument from the concept of vicarious liability was that Section 141 is a special provision introducing vicarious liability, and “*the essence of vicarious liability is inextricably intertwined with the liability of the principal offender*”. The argument from precedent was based on the correct interpretation of prior judgments on the

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<sup>11</sup> (2005) 3 CompLJ 364 Del

<sup>12</sup> This division in three heads is not made in the judgment, but is made here for analytical purposes.

point: *C.V. Parekh*,<sup>13</sup> *Sheoratan Agarwal*,<sup>14</sup> and *Anil Hada*.<sup>15</sup> In this note, it is proposed to examine the *first two* arguments: this does not at all imply that the argument from the precedent is any less important. However, the issue now being settled by a three judge Bench in *Aneeta Hada*<sup>16</sup>, any reconsideration would only be by a larger Bench, if one is to be constituted on this issue. This larger Bench would in any case not be bound simply by arguments of precedent. Hence, in this backdrop, we shall examine the argument from text and the argument from concept.

Insofar as the argument from text is concerned, it is submitted that the text is not clear. The relevant part of the Section says, “*If the person committing an offence under Section 138 is 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.*” Thus, for invoking the Section, (a) a person must have committed an offence u/s 138, (b) that person must be a company, (c) there must be another person in charge of and responsible to the company for the conduct of its affairs. If these conditions are satisfied, the person referred to in (a) as well as the person referred to in (c) shall be guilty of the offence. The language used is “*If the person committing an offence under Section 138 is a company...*” and not “*if a company has charged of committing an offence under Section 138*”. One may wonder, is ‘*committing an offence*’ not distinct from ‘*being charged of an offence*’? Further, is ‘*committing an offence*’ any different from ‘*performing the acts which constitute the offence*’? Now, if ‘*committing an offence*’ is different from ‘*performing the acts which constitute the offence*’, what is the exact meaning of the phrase,

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<sup>13</sup> (1970) 3 SCC 491.

<sup>14</sup> (1984) 4 SCC 352.

<sup>15</sup> (2000) 1 SCC 1.

<sup>16</sup> *Supra*, n. 2

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‘committing an offence’? ‘Committing an offence’ can mean either that the person has, in fact, committed the acts, which are the ingredients of the offence; or it can mean that the person is, in law, found guilty of committing the offence. On the first interpretation, there would be no need for that person to be charged: on the second interpretation, merely charging would not be sufficient – what would be needed is that the person be proven to be guilty of the offence. Thus, one could either say that the person in charge can be prosecuted on the averments that the company has committed, in fact, the acts constituting the offence. Alternatively, one could say that the person in charge can be prosecuted only when the company is found guilty, in law, of the offence. The interpretation adopted by the Court – that requiring the company to be ‘charged’ is somewhat of a middle ground. It is not clear as to whether this middle ground has sufficient textual support. One could of course argue that if the company is charged, that is *prima facie* indicative of the fact that the company has in law committed the offence. Whether this is sufficient to comply with the mandate of Section 141 is not fully clear.

Further, the Section says that the “*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...*” The key words, for present purposes, would be, ‘every person... as well as the company’. What is the meaning to be attached to ‘as well as’? Does it mean *both*, or does it mean *both or either*? The Supreme Court held, “*Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words “as well as the company” appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the*

*company is a juristic person and it has its own respectability...*” One could also then say that on a strict interpretation, ‘*committing an offence*’ as opposed to ‘*performing the acts which constitute an offence*’ must mean that a competent Court finds the company guilty first. However, the Supreme Court also clarified that “*Needless to emphasize, the matter would stand on a different footing where there is some legal impediment and the doctrine of lex non cogit ad impossibilia gets attracted...*” It is submitted that this qualification requires further consideration. If the provision means that the company must be prosecuted and not only the directors, any derogation from this must emerge from the language itself. The language nowhere indicates that there can be an exception where the company cannot be proceeded against. If the company cannot be proceeded against and the provision – on its true construction – requires the company to be prosecuted before the directors are prosecuted: the result must be that the directors escape. The result cannot be that; the directors can be prosecuted if the company cannot be prosecuted, but cannot be prosecuted if the company can be but isn’t proceeded against. The language of the Sections does not admit of such a construction. With great respect, some further elaboration on this point may be required when an appropriate fact situation arises before the Supreme Court. Insofar as the argument from the concept of vicarious liability is concerned, a few short comments must be made. The argument is based on the premise that Section 141 imposes vicarious liability, *i.e.*, liability for another’s actions. The underlying assumption is that the liability is imposed on the directors for the acts of the company.<sup>17</sup> This premise has attained almost axiomatic status in case law.<sup>18</sup> *But how true is this premise?* The concept of vicarious liability arises most often in the law of tort, and a classic textbook

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<sup>17</sup> For the contrary view, refer to S. 141(2) and the comments in the judgment of Sirpurkar J. when Aneeta Hada was before the two-judge Bench of Sinha and Sirpurkar JJ.

<sup>18</sup> Sabita Ramamurthy, 2006 (9) SCALE 212, Sarav Investment, 2007 (12) SCALE 123.

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says,<sup>19</sup> “... vicarious liability signifies the liability which D may incur to C for damage caused to C by the negligence or other tort of A...It is important that we should not confuse vicarious liability with the primary liability of D for damage caused to C by the act of A.”

Thus, vicarious liability arises on account of damage cause by the acts of another, but even primary liability may arise on account of the acts of another. All cases of vicarious liability are cases where liability arises due to the acts of another. But this does not mean that all cases where liability arises due to the acts of another are cases of vicarious liability.<sup>20</sup> It is therefore submitted that Section 141 is not a true vicarious liability provision. If one examines the first proviso, there is no liability if the person proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence. Knowledge of commission of a wrong is no requirement of vicarious liability. The Proviso indicates that the offence u/s 141 is really an offence for failing to exercise due diligence. This is a classic case of primary liability – the liability is not simply because the company has committed an offence, but arises because the person in charge has failed to exercise due diligence. In this background, attempts to show that liability u/s 141 is ‘*inextricably intertwined*’ with the liability of the company are misguided: the company is liable for dishonouring the cheque, the person in charge is liable for failing to exercise due diligence. It is submitted that this aspect requires further clarification by the *Hon’ble* Supreme Court.

### **3. CONCLUSION**

Thus, as a matter of principle, it may be apposite for this area of law to be revisited by the *Hon’ble* Supreme Court. However, one cannot say that the judgment of the *Hon’ble* Bench itself may require

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<sup>19</sup> Winfield & Jolowicz on Tort, 18th ed., 2010.

<sup>20</sup> For example, see *Hartwell v. Attorney General*, [2004] UKPC 12.

reconsideration: this is because, as a matter of precedent, the *Hon'ble* Bench has followed the judgment of an earlier three-judge Bench in *C.V. Parekh's* case. Unless the Supreme Court revisits the issue, therefore, one must treat the issue as being settled. One aspect, which may continue giving rise to controversies is the exception provided by the Supreme Court of there being some legal or factual impossibility in proceeding against the company. The Supreme Court's conclusions may well have been geared to promoting practical justice between the parties: whether the conclusions are doctrinally coherent remains a debatable point. Further, the test which is to be adopted for when a company 'cannot' be prosecuted is unclear. One can hope for a further amplification of the application of the principles laid down in *Aneeta Hada* in future cases.

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### **Book Review**

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*AN INSIDER'S VIEW OF THE KESAVANANDA BHARATI CASE: BOOK REVIEW OF THE TR ANDHYARUJINA'S "THE KESAVANANDA BHARATI CASE: THE UNTOLD STORY OF STRUGGLE FOR SUPREMACY BY THE SUPREME COURT AND THE PARLIAMENT".*

By

ALOK PRASANNA KUMAR<sup>1</sup>

### **ABSTRACT**

*Andhyarujina's book, part original research and part reconstruction of the existing first person accounts of the Kesavananda Bharati case decided by a 13 judge bench of the Supreme Court of India gives us a good first person account of how the case itself was argued, how the clash of personalities played out, and how all of this finally impacted the judgment when it was finally delivered. However, the legal critique of the basic structure doctrine itself is fairly shallow and does not really advance a strong argument of t the doctrine apart from reflecting the author's opinion.*

### **1. INTRODUCTION**

Professor Dr. B Errabi<sup>2</sup>, a fine Constitutional law professor and an honest and thorough academician, if there was ever one, startled us with a confession in the middle of one of our Constitutional

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<sup>2</sup> The author had the privilege of being taught Constitutional Law by Prof. Dr. B Errabi while pursuing B.A., LL.B( Hons.) at NALSAR University of Law.

Law classes – he had not actually read all the 11 judgments in the *Kesavanandabharati v State of Kerala*<sup>3</sup> case decided by the Supreme Court of India in their entirety! It was not accompanied by gasps of disbelief in my class as much as sighs of relief as we knew that now we would not be expected to read every last word of the 1000 and more pages, two columned, miniscule font-sized monstrosity of a judgment.

It would be hard to extract that confession out of most people who confidently mouth platitudes to the basic structure doctrine these days, but it is a pity that the most important case in the history of modern India is virtually inaccessible to all but the most dogged and patient of researchers. That, however, should not take away from efforts to grapple with the impact and consequences of that judgment (*some of which we are still only now understanding*) or the circumstances and events that led to it.

The *locus classicus* on this issue, by far, is Granville Austin's "*Working a Democratic Constitution: The History of the Indian Experience*"<sup>4</sup> and the trajectory of events described in the book, and the panoramic view of the judiciary– the Indira Gandhi conflict drawn by him continues to dominate our understanding of the case.<sup>5</sup> Barring some hitherto unforeseen revelations, Austin's narrative continues to hold the field and Andhyarujina's book<sup>6</sup> aids, to use a metaphor from the world of art, the interesting and intricate details to the portrait that gives the picture perspective.

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<sup>3</sup>1973 SCR 1

<sup>4</sup> Granville Austin, "*Working a Democratic Constitution: The Indian Experience*", Oxford University Press, 2000.

<sup>5</sup> Austin, *supra* note 3 pages 258 to 269. There are various accounts of the hearing by some of the judges and the lawyers who were part of the hearing, but Austin's book by far takes the most magisterial view of things.

<sup>6</sup> Tehmtan R Andhyarujina, "*The KesavanandaBharati case: The untold story of struggle for supremacy by Supreme Court and Parliament*", Universal Law Publishing, 2011.

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In this review of Andhyarujina's book, I will briefly discuss the important facts about the hearing itself that have emerged and the implications of the same in the first half of this review and then deal with the criticism of the basic structure doctrine that have been leveled at it by Andhyarujina in the second half.

2. **PART I**

Reading Andhyarujina's account, one is struck by the extraordinary and sometimes, frankly bizarre circumstances under which this case was argued. Whether it was the seemingly trivial, school-boyish "dispute" between HM Seervai and Niren De on who gets to open the Respondents' case<sup>7</sup> or the open sniping between the 13 judges on the Bench during the course of the hearings<sup>8</sup> as though they were 13 scorpions in a bottle<sup>9</sup>, we get glimpses of the far-less-than-savoury doings and dealings that went on behind the scenes in this case. Most crucially, some pieces of the jigsaw puzzle fall into place regarding the controversial 'View of the Majority' and we get some sense of Chief Justice Sikri's attempt to gerrymander a majority in this case out of the 11 judgments delivered.<sup>10</sup> For this, Andhyarujina's book must be necessarily commended.

In the course of his research, Andhyarujina has managed to uncover the circumstances under which the controversial "View of the Majority" came into existence.<sup>11</sup> Andhyarujina leaves us in no doubt that the 'View of the Majority' was a sneaky attempt by Justice Sikri

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<sup>7</sup>Andhyarujina supra n. 5, pages 26 - 29.

<sup>8</sup>Andhyarujina supra n. 5, pages 20 - 24.

<sup>9</sup> See Max Lerner, "Nine Scorpions in a Bottle: Great Judges and Cases of the Supreme Court" Edited by Richard Cummings, Arcade Publishing, 1994.

<sup>10</sup>Andhyarujina supra n. 5 pages, pages 58 - 61

<sup>11</sup>Andhyarujina supra n. 5, pages 50 - 58.

to gerrymander a majority view of the case when the actual scope of the majority decision was itself controversial since Justice Khanna held that there was a basic structure to the Constitution, but that ‘*fundamental rights*’ or Part III of the Constitution was not so basic to the Constitution after all<sup>12</sup>. While Andhyarujina’s claim that the ‘*View of the Majority*’<sup>13</sup> obviously lacks in legitimacy is strengthened by the circumstances in which it was created and the fact that four judges (*Justices Ray, Mathew, Beg and Dwivedi*) refused to sign it<sup>14</sup>, it would be farfetched to suggest as Andhyarujina does (*adopting Seervai’s initial line of argument*<sup>15</sup>), that there is in fact no *ratio decidendi* that can be culled out of the *KesavanandaBharati case*.<sup>16</sup>

The *ratio decidendi* of a case is almost always an ex post facto analysis of what the judges said, and what it means for a subsequent case. Put very simply, the *ratio decidendi* of a case is the decision that was made by the judge in the context of the material facts of the case.<sup>17</sup> This definition of *ratio decidendi* is easy to apply in the context of a judgment which does not involve more than two or three opinions but is an absolute nightmare when it comes to cases such as

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<sup>12</sup>*KesavanandaBharati v State of Kerala*, 1973 Supp SCR 1 1001-1002. Justice Khanna’s reasoning why Fundamental Rights were not one of the basic features of the Constitution seems somewhat shaky (See *Kesavananda Bharati v State of Kerala*, 1973 Supp SCR 1, 682 and he “*recanted*” on this point in the subsequent case of *Indira Gandhi v Raj Narain* 1975 Supp SCC 1.

<sup>13</sup> For a discussion on the problems of trying to gerrymander by trying to put Justice Khanna in with the majority, see HM Seervai, “*Fundamental Rights Case: At the Crossroads*”, (1973) 75 Bom LR 47. Seervai seems to have subtly altered his view on Khanna’s judgment subsequently. See Seervai “*Constitutional Law of India*”, NM Tripathi Pvt Ltd Bombay, 1996 pages 1355-7 where he disagrees with Khanna that the fundamental right to property is not a basic feature of the Constitution despite other such rights being basic features.

<sup>14</sup> Andhyarujina supra n. 5 pages 56 - 57.

<sup>15</sup> HM Seervai supra n. 12.

<sup>16</sup> Andhyarujina supra n. 5 page 62.

<sup>17</sup> See Al Goodhart, “*Essays in Jurisprudence and Common Law*” (Cambridge 1931) 5 - 8.

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the *Golaknath case*<sup>18</sup> or the *Kesavananda Bharati case* which features 7 and 11 opinions respectively.<sup>19</sup> In fact, the question of how to ascertain the *ratio decidendi* of the *Kesavananda Bharati case* has been grappled with by authors almost ever since the judgment was handed down.<sup>20</sup> One could perhaps now say with some certainty that the *ratio decidendi* of the *Kesavananda Bharati case* is that judicial review is a basic feature of the Constitution that cannot be taken away from the Constitution by an amendment. However, Andhyarujina does not address the argument at that level, and this is where one must disagree with his argument about the *ratio decidendi* of the *Kesavananda Bharati case*. The ratio of *Kesavananda* can only be determined with reference to the actual judgments delivered by the 13 judges between them and the facts of the case as set out by the judges therein. The legitimacy or otherwise of the 'View of the Majority' has nothing to do with the inquiry as to what is the ratio of the *Kesavananda Bharati case*. In fact, Justice Chandrachud in a passage from *Minerva Mills v Union of India*<sup>21</sup> quoted by Andhyarujina himself makes it quite clear that the legitimacy of the 'View of the Majority' has no bearing on the question of what is the actual ratio of the *Kesavananda Bharati case*.

In determining the ratio of the *Kesavananda Bharati case*, we cannot ignore the subsequent decisions of the Supreme Court that

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<sup>18</sup> *IC Golaknath v State of Punjab* (1968) 3 SCR 214

<sup>19</sup> See in this regard Dr. AR Biswas, "Ratio Decidendi and Common Cause v Union of India" 1987 4 SCC (Jour) 25,33-34.

<sup>20</sup> See Joseph Minattur, "The Ratio in the *KesavanandaBharati Case*" 1974 (1) SCC Jour 73; KSubbaRao, "The Two Judgments: *Golaknath and KesavanandaBharati*" 1973 (2) SCC Jour 1; Surendra Malik, "The Fundamental Right case" 1973 (2) SCC (Jour) 32 and UpendraBaxi, "The Constitutional Quicksands of *KesavanandaBharati and the Twenty Fifth Amendment*" 1974 (1) SCC Jour 45.

<sup>21</sup> AIR 1978 SC 1789

have analyzed the opinions in *Kesavananda* to determine what the ratio was in that case. Applying our earlier definition of *ratio decidendi*, it can even be argued that the ratio of these cases is what the ratio of *Kesavananda* is. Indeed, the ratio of the *Kesavananda* case is what the Supreme Court in *Indira Gandhi v Raj Narain*<sup>22</sup> has said it is, and any analysis of whether or not there is a coherent *ratio* in *Kesavananda* will also have to critically analyze and examine the reasoning in *Indira Gandhi* case. In terms of methodology, this is what is required and Andhyarujina's book does not extend to this and in my view, draws the unsubstantiated conclusion that the legitimacy of the 'View of the Majority' has a strong bearing on the *ratio decidendi* of the case.

Andhyarujina also attempts to clear up another controversy - the how's and whys of the abortive attempt to overrule *Kesavananda Bharati* by the Central Government and then Chief Justice of India, AN Ray.<sup>23</sup> At the height of the Emergency, the correctness of the *Kesavananda* judgment, and specifically the validity of the Basic Structure Doctrine were sought to be re-examined by another 13 judge Bench of the Supreme Court, but mysteriously, within four days of the hearing, the Bench was '*dissolved*' and no judgment came of it. Why the attempt was made and why it was abandoned at such an early stage has been the subject matter of some debate. There are several accounts of the same written by judges and counsel,<sup>24</sup> and given the contradictions between them, Andhyarujina attempts to put the record straight. Andhyarujina seems to give most credence to Justice Krishna Iyer's account of what happened, (*as corroborated by Justice Bhagwati who spoke to Andhyarujina*) though by far the consensus

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<sup>22</sup>1975 Supp SCC 1

<sup>23</sup> For another account of this incident, see Austin, *supra* note 3, page 328 - 333.

<sup>24</sup> Andhyarujina discusses a few and compares the fairly conflicting accounts of the same. See Andhyarujina *supra* note 5, pages 95 - 104.

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that Andhyarujina settles on seems to be that the Bench was dissolved mostly at the instance of a significant majority of judges on the Bench who had serious reservations about overturning *Kesavananda*. While Palkhivala's eloquence and arguments on the correctness of the *Kesavananda* judgment were no doubt persuasive, but the leading cause of the dissolution of the Bench seems to be the reluctance of the majority of judges to make a ruling against the Basic Structure doctrine. It's perhaps safe to say that for the foreseeable future, there is not likely to be any attempt to overrule *Kesavananda* by setting up a 13 judge Bench. It's also interesting to note that despite the narrowness of the *Kesavananda* verdict, in just two years it had gained fairly widespread acceptability among the judiciary and the Bar. The catalyst for this is not hard to find; the *Indira Gandhi* case, or more specifically the 39th Amendment. The theoretical fears that judges expressed during the *Kesavananda* hearings were fully realized by the egregious 39th Amendment that attempted to place the Prime Minister above the law (*or at least election law*) for all practical purposes.

A narrative such as the one Andhyarujina constructs in this book put judgments in their proper perspective as not just markers in the development of Constitutional Law in the country, but also the fossil record that helps us understand the socio-political climate of the nation. The *Kesavananda* case was argued with definite political overtones hinting at the larger conflict over the wisdom and effectiveness of Government's policies of the day, specifically land acquisition and nationalization of industries. Much as we would like to believe otherwise, the book also lays bare each individual judge's

own political leanings deeply impacting the way the judiciary approached the issue of property rights under the Constitution.<sup>25</sup>

The story of the *Kesavananda* case also helps us appreciate why the judiciary is so powerful today. The absence of deeply divisive issues (*in terms of socio-economic ideology that are radically opposed to each other*) and a fragmented polity (*seen in the multiple coalitions that have ruled since 1996*) means that the judiciary no longer finds itself in a situation where it has to constantly fend off attacks to its own institutional integrity from other institutions. As Andhyarujina brings out in his book, the *Kesavananda* case was decided by a deeply divided Court, which was beset with ideological disagreement over the wisdom of the government's policies of the day. The manner in which some of the judges who decided the *Kesavananda* case were appointed<sup>26</sup> and how this reflected in not just the judgments delivered, but also the sharp exchanges and the prejudices that they carried to the Bench (*as illustrated by Andhyarujina*), not to mention the subsequent supersessions, all give us some perspective on the whys of the Second Judges and Third Judges<sup>27</sup> cases as well. The Second and Third Judges cases are good illustrations of the strong defences the judiciary has put up post-*Kesavananda* against Executive and Legislative interference, helped in no small part by a wavering and weak Executive.

### 3. PART II

While the original research providing us a narrative of the *Kesavananda* case is by and large the focus of the book, Andhyarujina

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<sup>25</sup> Justices Shelat, Hegde, and Grover along with Chief Justice Sikri were completely opposed to the Government while Justices Ray, Mathew, Palekar, Beg and Dwivedi were completely in favour of the Government. Justice Ray and Justice Hegde clashed quite frequently during the course of arguments in Court over questions and points put to Seervai or Palkhivala. See Andhyarujina supra note 5 pages 21 - 23.

<sup>26</sup> See in this context, George H Gadbois Jr., "*Judges of the Supreme Court of India: 1950 - 1989*", Oxford University Press India, 2011 pages 151 - 164.

<sup>27</sup> Supreme Court Advocates on Record Association v Union of India AIR 1994 SC 268 and In Re: Presidential Reference AIR 1999 SC 1.

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also includes a critique of the Basic Structure doctrine itself.<sup>28</sup> Here the book seems somewhat shallow and its analysis, incomplete. The essential premise is a grudging acceptance of the fact that while the Basic Structure doctrine may be functionally necessary, it is not conceptually and theoretically sound enough to be capable of proper application<sup>29</sup> – a charge which his guru HM Seervai effectively rebutted in his *magnum opus*.<sup>30</sup>

The underlying premise of the criticism attempted by Andhyarujina (*which Seervai had originally espoused in the case but later abandoned*) is that the power of Parliament to exercise its constituent power is unlimited. This is based on the belief and assumption that Parliament reflects the will of the people and the power of the people is unlimited. This belief was challenged as far back as the third decade of the 20th century by Carl Schmitt. Schmitt separated constituent power, *i.e.*, the power to actually create and destroy Constitutions, from the ordinary legislative power of the Parliament.<sup>31</sup> This distinction is essential as without it, the Constitution ceases to have any identity as a document of its own, and merely becomes the instrument of the party or the persons in power at any given moment. The consequence of this, as Schmitt himself puts it, is that a person when taking the oath to defend the Constitution is merely taking an oath to defend the power of amendment that is wielded by a body; a concept that reduces Constitutionalism to a

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<sup>28</sup> Andhyarujina supra n. 5 pages 114 - 127.

<sup>29</sup> Andhyarujina supra n. 5 page 121.

<sup>30</sup> Seervai "*Constitutional Law of India*" supra n. 12 pages 3160 - 3161.

<sup>31</sup> Carl Schmitt, *Verfassungslehre* (Berlin: Duncker & Humblot, 1928); Buss, Andreas, *Dual Legal*

<sup>31</sup> Systems and the Basic Structure Doctrine of Constitutions: The Case of India, 19 No. 2 CANJLS 23.

nullity and places absolute power in the hands of an elected body with no fetters.<sup>32</sup>

The idea that Parliament has no fetters apart from those expressly placed upon it by the Constitution is now losing traction as a fundamental principle of Indian Constitutional law.<sup>33</sup> The underlying notion that the Parliament is ‘*sovereign*’ in the Austinian sense is slowly being abandoned in favour of the principle that it is the Constitution that is supreme.<sup>34</sup> Justice Reddy’s judgment in *GVK Industries*<sup>35</sup> is only the latest of a long line of judgments which first questioned and then slowly but surely undermined the idea of an all-powerful Parliament. Rather, what seemed like utter heresy to the judges of the *Kesavananda* Bench, *i.e.*, Parliament is a creature of the Constitution and draws its powers (*and not just the limitations on its powers alone*) solely from the Constitution is now practically dogma. When viewed from this perspective, the Basic Structure doctrine seems far more obvious and less of a judicial chimera. It is true that its proper scope and extent need to be clarified and outlined, but that exercise rests only at the penumbra of the doctrine itself and not at its very core as *Seervai*, and by extension, *Andhyarujina* make it out to be. *Andhyarujina* also questions the Basic Structure doctrine on the basis of its inherent vagueness and incoherence in some of its concepts, as also the disinclination of constitutional Courts in Pakistan, Sri Lanka and Malaysia to apply the same in the context of

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<sup>32</sup>*Supra*, n. 30. It is a different matter that Schmitt, perhaps of out of fear or cowardice, made a 180 degree turn on this aspect when the Nazis took over in Germany and went on to become their chief legal theorist and apologist. Cite book on Schmitt’s life. Also see in this context, Kumarjit Banerjee and Bulbul Khaitan, “Resolving the ‘Paradox of Constituent Power and Constitutional Form’ from a Schmittian Account of Sovereignty: Its Relevance to the Understanding of ‘Constituent Power’ and ‘Amending Power’” 2008 NUJS Law Review 1 NUJS L.Rev (2008) 547.

<sup>33</sup>*GVK Industries v Income Tax Officer*, 2011 4 SCC 36, 65-66, paras 69 - 70.

<sup>34</sup> *Supra*, n. 31

<sup>35</sup> *Supra* n. 31

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their country. The first objection, I think, is somewhat specious as the Constitution itself is littered with vague phrases (*'life', 'liberty', 'equal', 'freedom', 'expression'* to take a few examples from Part III alone) but that has not prevented the growth and development of a rich jurisprudence of human rights in this country vesting these words with meaning. Rather, the legal system itself is designed in a manner that vests judges with the discretion to decide the scope of these terms and also gives them a set of rules and principles which can be coherently applied to determine the scope of these terms.<sup>36</sup> This does raise questions as to what it means for the Rule of Law but that would require a fuller examination of the Rule of Law itself which would be beyond the scope of this paper.

As far as the *'rejection'* of the basic structure doctrine goes, in the examples given, perhaps only the Malaysian Supreme Court has categorically denied the existence of the Basic Structure in its Constitution.<sup>37</sup> The position of the Pakistan Supreme Court is less clear as it seems that while the Parliament cannot amend the Constitution to get rid of the Basic features, the Supreme Court does not necessarily have the powers to strike down such an amendment<sup>38</sup>, while the Sri Lankan Supreme Court has rejected it on the basis that the amending power given to the Parliament in Sri Lanka is much wider. South Asian Constitutional Courts having been the most active in *'cross-constitutional borrowing'* of concepts and ideas such as Public Interest Litigation, we may not have heard the last word on this either. The Bangladesh Supreme Court on the other hand, in *Anwar*

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<sup>36</sup>Endicott, Timothy, "Law and Language", *The Stanford Encyclopedia of Philosophy* (Fall 2010 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/fall2010/entries/law-language/>

<sup>37</sup>*Phang Chin Hok v Public Prosecutor*, 1980 MLJ 70

<sup>38</sup>*Mobasher Hassan v Federation of Pakistan* PLD 2010 SC 265

*Hussain Chowdhary v Bangladesh*<sup>39</sup>, has expressly approved and applied *Kesavananda*.

#### 4. CONCLUSION

Admittedly, the shallow critique of the Basic Structure doctrine is not the focus of the work, and does not, in any way, take away from its importance in helping place the *Kesavananda case* in its proper perspective. The story of the *Kesavananda case* is not a mere collection of corridor gossip but an important historical milestone in the modern political history of India. By bringing out the circumstances and reasons for the controversial judgment, Andhyarujina has carried out some exemplary original research in this regard and needs to be commended. At a time when unlike their predecessors, Seervai and Nani Palkhivala, senior counsel of the day have neither the time nor the inclination (*and some would unkindly say, the intelligence*) to engage with academia and theory of the law, Andhyarujina's book is to be welcomed and a must read for any scholars of law interested in understanding the historical and political circumstances in which the *Kesavananda case* was heard and decided. That said, it does not offer us a strong or focused academic critique of the Basic Structure doctrine itself.

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<sup>39</sup>1989 BLD (Supp) 1

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