# Chanakya National Law University Journal

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# Chanakya National Law University Journal

# CNLU Law Journal

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# FROM THE EDITORIAL BOARD

In the words of Barbara Tuchman, "Books are the carriers of civilization. Without books, history is silent, literature dumb, science crippled, thought and speculation at a standstill". The beauty of a Law Journal lies in its dynamism. It gives the reader an insight of the contemporary legal issues and acts as a thought provoking instrument. The CNLU Law Journal, post its inception and the overwhelming success of the last four volumes, revisits you with its fifth volume, with a heightened consciousness of surpassing the benchmark that it has created for itself. The Journal, a literary endeavour of Chanakya National Law University, presents to you, a holistic collage of ideas, thoughts and visions with a noted tinge of criticism and ingenuity from amongst the minds of scholars, academicians and students of legal fraternity.

CNLU Law Journal in its fifth Volume also embodies the Convocation address of Chief Justice of India Hon'ble Justice H.L. Dattu. Chanakya National Law University had its second Convocation on February 14, 2015 where the students were blessed by the address by Justice Dattu, where he highlighted the role of Bihar in producing intellectuals in the field of law. He also pointed out that a convocation day is one of the most momentous occasions in the education of young adult as it signifies the culmination of the path of formal education, along with the presentation of an array of new paths ahead to choose from. Justice Dattu concluded his address by asking the young lawyers to undertake a mission to launch a movement for the regeneration of our great values and traditions, and to work towards maintaining and reviving idealism in the youth of our country.

It was said by Ralph Nichols that the most basic of all human needs is the need to understand and be understood. The best way to understand people is to listen to them. Since not all of us are privileged enough to get the opportunity of listening to the prominent people in field of law, the Editorial Board of the fifth Volume decided to include the speech made by Former Chief Justice of Patna High Court and Chancellor of the University Justice L. Narasimha Reddy on the Republic Day in the CNLU Law Journal. Justice Reddy in his speech highlighted the glorious history of the State of Bihar. The article discusses the role played by individuals from Bihar in winning independence for the country. In this regard he points out that the birth of the constituent assembly took place on 09.12.1946 in the hands of Dr. Sachidanand Sinha, who hailed from this State, as its

provisional Chairman. He was succeeded by Dr. Rajendra Prasad as the regular Chairman of the Assembly shortly thereafter who was member of the Advocates Association of Patna High Court. Justice Reddy also appealed to the State Government coupled with other philanthropic individuals and institutions, to make available, adequate land for the Courts and accommodation of Judges at a subdivisional or Block levels in order to ensure access to justice for all.

The article by Prof. Dr. Lakshminath and Dr. Mukund Sarda explores various facets of human rights right from the use of the expression in the UN Charter to its assimilation with the concept of globalization. Their article titled 'From Human Rights to Human Dignity: An Unending Story' deals in detail with the jurisprudential aspect of human rights. The authors by referring to the theories put forth by various jurists have analyzed human rights in the post modernity era and the contemporary conspectus of human dignity. The article concludes with suggestions from the author for injecting certain universal truths in the human mind so that human dignity can be preserved and ensured.

'The article by Justice Abhijit Sinha and Prof. Dr. A. Lakshminath entitled "*Advance Decree — A Diagnostic Ventilator*" has propounded a very innovative concept of **Advance Decree** as one of the possible efficacious means of resolving the persistent problem of pending cases escalating day by day. The paper commences with the need for rejuvenation and transformation of the Indian judicial system from British vintage regime to its original position of a revered and respected sentinel of people's rights, trust, faith and safety. The paper proceeded very lucidly by giving the conceptual analysis, illustrations and relevant amendments in the Code of Civil Procedure, 1908 and the Legal Service Authorities Act, 1987. The paper concludes with a strong submission that how the concept of "Advanced Decree" can serve a mechanism of preventive litigation and how it provides a win-win situation for both the parties.'

The article titled '*NOTA- A Progress or Regress to Society*?' deals in detail with the "None of the above option" and provides how it is an extended form of Freedom of speech and how it is relevant to the present voting culture in India with it's increasing number of corrupt politicians and mounting discontent among voters and their low turnout during elections, NOTA is a welcome step.

The paper titled '*Challenges to Cyber Crime Investigation: A Need for Statutory and Infrastructural Reforms'* deals with the dynamics of cyber crime and how it is to be dealt differently. In order to deal with its peculiarity various loopholes and reforms have been suggested.

The author Rajalakshmi Natarajan in the article titled '*International Trade Laws Tryst with Investment Arbitration- Implications on the Multilateral Trading System and the Road Ahead*' has focused upon the conjunction of trading and investment and how both affect the multilateral trading system. It also examines the trading disputes internationally and finding remedies to enforce trade obligations.

In this article titled *"An Analysis of the Juxtaposition of the International Trade Law and International Tax Law with reference to Direct Taxation"*, the authors have made an earnest attempt to analyze the inter-dependence and overtone of trade law and tax law with reference to direct taxation. The paper has discussed the role of WTO in regulating the domestic direct regulation policies of member states. The paper provides an overview of the Internal Tax regime, examined in the backdrop of WTO agreements, forming a relationship between Taxation and International Trade.

In this article titled *"Tussle of State and Non-State: BCCI and RTI, A Fight for Transparency"*, the authors have tried to elucidate the rhetorical resistance between BCCI as a State and Non-State and the need for its transparency. The article, in its limited scope, has raised a very pertinent question of not including BCCI under the ambit of RTI which makes it a monopoly sector without any accountability. The authors have also discussed the constitutional aspect of BCCI as a State under Art. 12 and considering as a Public Authority and be included under RTI.

## CASE COMMENTS

In the case comment titled 'Revealing the Judicial Ambivalence on Obscenity: A Case Comment on *Aveek Sarkar* v. *State of W.B.*' the author aims to settle the debate between the Freedom of speech and expression vs. reasonable restriction on Obscenity through this case. In order to settle this, various international and national judgments have been examined.

In this case comment, the authors have brought into light the landmark judgment of *Dashrath Rupsingh Rathod* v. *State of Maharashtra* where the Supreme Court gave an important ruling on matters pertaining to S. 138 of Negotiable Instruments Act, 1881. Overruling its previous judgment in *K. Bhaskaran* v. *Sankaran Vaidhyan Balan*, the Supreme Court categorically ruled that complaint of dishonour of a cheque can be filed only in the court within whose jurisdiction the cheque is dishonoured. Critically analyzing, the authors have lauded the judgment for limiting the territorial jurisdiction in such cases, thus safeguarding the innocent defendants from recurring and manipulative exploitation of the provisions by the complainants.

In the case comment '*National Legal Services Authority* v. *Union of India*: The Supreme Court has Started the Ball Rolling', the author Anand Swaroop Das highlights the position of transgender persons in India through the overdue yet path breaking case of *National Legal Services Authority* v. *Union of India* and examines the effect of this judgment in regard to it's high and low points.

## ACKNOWLEDGMENT

Chanakya National Law University rejoices the growth of the CNLU Law Journal, which has attracted contributions from all across the country and can boast of a colossal cascade of remarkably promising works. The release of the fifth volume strengthens the endeavour that seeks to create a forum to sensitize critical thinking along with a motto to bring forward to you, the valuable opinions of scholars and students. This has been made possible by the blessing of the Almighty and the support and co-operation extended by the University administration.

The beauty of the journey lies neither in its beginning nor in its end but rather in the distance that is covered between the two. The same is true for us in the journey of our association with this Journal. We extend our thanks to our faculty advisors Dr. B.R.N. Sharma, Dr. P.P. Rao, and Dr. Manoranjan Kumar for their indispensable insight and participation in the growth of this Journal. Last but not the least, to our Hon'ble Vice Chancellor, Prof. Dr. A. Lakshminath for his invaluable guidance and encouragement at every step of this journey.

We believe that the synthesis of ideas presented herein shall go a long way in moulding both our 'thought process' and our 'legal culture'. May each reader of this journal appreciate the effort put into it.

# CONVOCATION ADDRESS*

—*Justice H.L. Dattu***

Hon'ble Chancellor and Vice-Chancellor of this esteemed University, Brother and Sister Judges, distinguished personalities on and off the dais, Professors, faculty members, proud parents and most importantly, the reason for which we have gathered i.e., today's celebration– the young adults before us; ready and eager to take their next step in becoming future stalwarts of our great Nation.

It is an honour to have been invited to deliver an address on the Second Convocation of Chanakya National Law University. This University is quite young, being established just in the year 2006, but the initiatives it has taken since its birth and the quality of education rendered, show that age is not a measure of achievement- the measure is the Students. It is remarkable that in a short span of time, the Students of this prestigious University have ushered a new era in legal excellence.

This University has been continuously involved in its endeavour of serious academic research and teaching. I have been informed that the Legal Aid Society of the University is actively involved in spreading legal literacy and providing free legal aid. Innovation in teaching methodology and curriculum review has led to the University undertaking to train personnel in specialized areas with social justice objectives, such as Child Rights, Human Rights, etc.

It is said that it is the Students who make the University what it is. It is in honour of these students that we have collected on this momentous day. The Stars of today's event are all the young adults before me. I congratulate and pass on my good wishes to each and every one of the students before me. I extend an extra-special congratulation to those of you who received distinctions and awards today. Each of you has brought immense happiness to your parents and family- the pride they feel is most evident on their faces. I offer my heartfelt felicitation to today's Stars for that wonderful achievement.

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* Delivered at the 2nd Convocation of the Chanakya National Law University, Patna at Patna on February 14, 2015.

** The Honb'le the Chief Justice of India.

A Convocation Day has been said to be one of the most momentous occasions in the education of young adult. It signifies the culmination of the path of your formal education, along with the presentation of an array of new paths ahead of you to choose from. I am able to see zeal and enthusiasm in everybody's face assembled here. I can understand that though your eyes are here, your minds are excited for the big occasion of the day. As you are about to take your first step into real world, it may be appropriate for me to remind you that the principle of 'survival of fittest' exactly applies to this noble profession of Advocacy and there are no short-cuts to success.

At this juncture, I want to remind you all about a saying of Mohandas Karamchand Gandhi that 'education without courage is like a wax statue-beautiful to look at, but bound to melt at the first touch of a heat and pressure'. Therefore, don't lose your heart even in the worst stages of life and fight against it. To quote an old cliché, every dark cloud will have a silver lining. Success breeds success and failure is never a final one. Dear Graduates, worry not about your failure, if any, anywhere in your life, since it is the duty of everyone to convert failure as the stepping stone for the success. Your idealism, your character, your integrity are the invaluable assets of our country. All these qualities have got to be combined and integrated for the purpose of achieving and fulfilling the traditional human values in the betterment of life.

Lawyers all over India have looked upon this State with veneration, respect and regard for their learning, scholarship, simplicity and great adherence to the traditions of Indian culture. This University is situated in the land of astounding beauty and is surrounded by the mighty Ganges. Patna is one of the oldest continuously inhabited places in the world and the history of Patna spans at least three millennia. It has the distinction of being associated with the two most ancient religions of the world, namely, Buddhism and Jainism. Patna has been one of the nerve centers of this Nation's First War of Independence, participated actively in India's Independence movement.

The State of Bihar enjoys the pride of place with its rich and unique intellectual and cultural heritage. It has given birth to a number of intellectuals who spread the light of knowledge and wisdom not only in this Country but in the whole world. Shri L.N. Sinha, former Attorney General for India, Chief Justices B.P. Sinha and L.M. Sharma, former Chief Justices of India hail from this State. Shri Rajendra Prasad, the first President of India and Smt Meira Kumar, the first woman Speaker of the Lok Sabha were born in Patna itself. The great products of this State have made their mark across the borders as well- Shri Parmanand Jha, the present Vice President of Nepal, Shri Girija Prasad Koirala, former Prime Minister of Nepal, Sir Seewoosagur Ramgoolam, the first Chief Minister and Prime

Minister of Mauritius and his son Shri Navinchandra Ramgoolam, also a former Prime Minister of Mauritius owe their ancestry to this glorious State.

There can be no greater advantage for a young adult, than finding inspiration in your own surroundings- you need not look beyond the State itself which has been your home through the formative years of legal education. The State has produced great lawyers, eminent Judges who have adorned high positions and wielded great influence in the evolution of culture, Constitution and the development of our great Nation. You, who are the successors of that great tradition, must bear responsibility to not only live up to that tradition, but to surpass it.

> To quote from Chankya's Neeti, "*He who gives up what is imperishable for that which is perishable, loses that which is imperishable; and undoubtedly loses that which is perishable as well*." It is perhaps in that sense that this University chose- "*Gyandhanam Mahaddhanam"*, which means "Spreading of Knowledge is the greatest gift" as its motto. It is said that a rich man is always anxious that his wealth may be plundered or embezzled, lost in speculative business or gambling. Today's rich man can easily become tomorrow's pauper. As depicted in the epic Mahabharata, Yudhishthira lost his entire kingdom in a day and Dhritarashtra lost all his sons along with the kingdom they had acquired by deception against their cousins, the Pandavas.
>
> Material wealth and happiness can be compared with the instability of a drop of water on a lotus leaf. The Wealth of Knowledge, however, cannot be snatched or taken away. It is permanent, never burdensome to carry, and causes no anxiety. Instead, it alleviates one's anxiety. Therefore, knowledge is the most stable form of wealth. Is there any form of wealth that increases by passing it on to others? Thousands of candles can be lit from one single candle, and the life of that one candle will not be shortened. Knowledge never decreases by being shared.
>
> The profession of law is called a noble profession. It does not remain noble merely by calling it as such, unless there is a continued, corresponding and expected performance of a noble profession. Its nobility has to be preserved, protected and promoted. An institution cannot survive on its name or on its past glory alone. The glory and greatness

> of an institution depends on its continued and meaningful performance with grace and dignity. Regrettably, there is a perception in society that we live in a time when there are no men and women to match the erstwhile Himalayan peaks of our fraternity, if there is a crisis of moral leadership.
>
> The profession of law being noble and an honourable one, it has to continue its meaningful, useful and purposeful performance inspired by and keeping in view the high and rich traditions consistent with its grace, dignity, utility and prestige. I urge the young adults before me today to aim to achieve the same and to give effect to in its true letter and spirit. An honest, clean and efficient legal fraternity would serve the cause of justice which again is a noble one.

The legal fraternity has many responsibilities and obligations to fulfil. You must, however, create primarily and essentially, a culture for justice, because it is only by the creation of that culture of tolerance and justice that rule of law, which must be rule of reason, be established. Then and then only can free men and women live happily.

The credit in significant proportion for emergence of India not only as one of the largest but also as one of the greatest adherents to principles of Democracy and Rule of Law goes to the legal fraternity. It is indeed uncontroverted that the members of the legal profession had occupied a vantage position in freedom movement. Members of this profession during that period acquired the respectability of being leaders of thought and society.

After achieving political independence, the goal we set before us was of transforming India into a nation where there was no place for hunger, illiteracy or exploitation in any form. The dedication with which the legal profession has contributed in laying foundation for achieving that goal is commendable. You are now part of that revered profession.

The members of our profession were previously looked upon as natural leaders of the community, and with the passing of time, we have not yet been displaced from that respected position. However, our profession, at one time described as noble, is today losing its credibility and respectability very fast and doubts are being raised about the degree of utility and relevance legal profession has in the administration of justice.

Law and its practice mainly depend upon tradition. It is, therefore, essential that you look to your tradition to find your sustenance. Professional excellence for lawyers and persons trained in law, is absolutely essential for

creation of a society governed by the rule of law and for administration of justice.

It is axiomatic that an advocate has to burn the midnight oil for preparing his cases for being argued in the court next day. Advocates face examination every day when they appear in courts. It is not as if that after court hours an advocate has not to put in hard work on his study table in his chamber with or without the presence of his clients who may be available for consultation. To put forward his best performance as an advocate he is required to give wholehearted and full-time attention to his profession. Any flinching from such unstinted attention to his legal profession would certainly have an impact on his professional ability and expertise.

It is, further, essential that legal education must receive your constant attention and high priority. Legal education in India today must be a comprehensive education. It must tell you the urgent need for a new set of laws for adjusting to changed patterns of personal, social, political and economic relationship. Legal education must tell you of history of man, of nature and different attempts made to solve these problems. Such education must teach us a language which is eloquent, manifest and clear. Such language must give us grace and bridge the gap between thought and expression. We must understand our nature and environment. The changing society can come to terms with the existing realities by understanding and by imbibing rational ideas, which understand the present and anticipate the future. We require a new value orientation and comprehend the purpose of law.

Access to Justice and the Rule of Law are perhaps two of the noblest concepts evolved by man. To the Romans *Justice* was a goddess whose symbols were a throne that tempests could not shake, a pulse that passion could not stir, eyes that were blind to any feeling of favour or ill-will, and the sword that fell on all offenders with equal certainty and with impartial strength. It was said that the Almighty is more palpably present in a Court of Justice than in a monastery. Ancient Indian culture pays a similar tribute to dispensers of justice. In that sense, I must appreciate one of the objectives of this University- "*To create a temple of learning.*"

However, in our own times there appears to have been a sudden decrease of this universal admiration and sharp erosion of the values which ought to actuate the administration of justice. A part of the blame for this has to be shared by the legal profession. Chief Justice Warren Burger, former Chief Justice of the United States Supreme Court, in this context stated:

> "*The harsh truth is that we may be on our way to a society overrun by hordes of lawyers, hungry as locusts, and brigades of Judges in numbers never before contemplated.*

> *The notion that ordinary people want black-robed judges, well dressed lawyers and fine panelled courtrooms as the setting to resolve their disputes is not correct. People with legal problems, like people with pain, want relief and they want it as quickly and inexpensively as possible.*"

In India, the statement as quoted above, may also be wholly applicable. This is a matter that must engage our serious attention and we must do all in our reach to remove the causes responsible for the same.

One of the major causes for profession's loss of credibility is the high cost of legal service to the litigants. I do not believe our profession was ever so expensive as it is today. The feeling, amongst the common man, is that the amount required for pursuing a legal remedy or defending a claim is much too exorbitant which most citizens can ill afford to pay, whatever may be the justice of the matter. To get involved in litigation for a good many results in getting steeped in indebtedness. It would not be inappropriate in the above context, to emphasize that justice is not a commodity to be sold or auctioned to the highest bidder having a preferential claim.

Shri Nani Palkhivala, one of the greatest members of our fraternity, had once lamented that the "*Bar is more commercialized than ever before. Today the law is looked upon, not as a learned profession but as a lucrative one.*" Legal education ought not to produce unethical literates in our society, who have no notion of what public good is.

One should not forget that legal profession is service oriented. It cannot survive unless it is seen to be of service to those who need it. Let us remember what Roscoe Pound said while defining our profession:

> "*There is much more in a profession than a traditionally dignified calling. The term refers to a group of men pursuing a learned art as a common calling in the spirit of public service — no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose. Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose.*"

The legal profession is an occupation in which test of success is not material success rather the test is accessibility to all those who need you regardless of their financial prowess.

Today legal aid to the needy is imperative if administration of justice is to have meaning and purpose. The Constitution of India, itself, takes note of

the conscience of the lawyers and the responsibility of the legal fraternity in making legal aid meaningful and effective. As a lawyer you occupy a very peculiar position in human affairs. Your sphere is swept by all the currents of life, especially its crosscurrents. You will be brought into contact with all kinds of people. The boundaries of your influence will overlap the boundaries of all classes, all trades, and all professions. In some ways you are like a doctor and priest, yet in the same breath you will be necessarily more of a philosopher than the doctor of medicine and more of a scientist than the priest of religion. You must always strive to be the champions of society.

In addition to the problem of expensive nature of our profession, there is the problem of falling ethical standards. It is unquestionable that in any organised profession, there are bound to be some persons who are unable to maintain the high standards of profession. In some cases evidence reveals a sordid state of affairs in lawyer-client relationship. It is here the question of accountability of the profession to the litigant and system comes to fore. It is for the profession to provide a self regulating mechanism whereby it takes notice of an errant lawyer and deals with him without anyone coming forward to lay a complaint. This would be its first and foremost task, namely, to perform its duties both towards the profession and under the society.

The other problem that must concern each one belonging to the legal profession is the problem of long delay in the disposal of cases. This delay is causing a serious threat to the functioning of the whole system and to the very survival of Rule of Law. It is imperative if we are serious about curing the problem of delay, we must strive to develop a more concise style of advocacy where you, as the guardian of justice, yourselves discriminate between strong and weak points of the case. In short, every step has to be taken to restore the respectability and the credibility of the profession not only in the eyes of the society but even the litigating public.

It is imperative that each lawyer and Judge endeavour to make justice meaningful, expeditious and inexpensive. It is the need of the hour to reduce the accumulated arrears in courts and evolve a method of quick disposal of disputes. We must, therefore, adapt ourselves with changing situation both national and international. It is essential for the men and women of the law to ensure that the present state of affairs, of undisposed cases, and unresolved disputes change and change quickly. You, as future Judges, advocates, scholars and jurists, must restore our old faith and rekindle new hopes.

Before I conclude, I wish to digress a little to an event that captured my mind and sprung an emotion of immense pride within. With your kind indulgence I wanted to share that moment and that feeling with you. This year when our Nation celebrated its 66$^{th}$ year as a Republic, one got to

see for the first time in the history of India's Republic Day, an all-women contingent from the three forces- Army, Air Force and Navy, marching down the majestic Rajpath. The event was long overdue in the light of the numerous achievements and heights attained by women in our Country. In the words of Kofi Anan, former Secretary General to the United Nations, "*There is no tool more effective for development than the empowerment of women*." Women are the primary agents for empowering individuals to transform society.

The great Nelson Mandela had once said, "*Education is the most powerful weapon which you can use to change the world*." Imparting education and creating awareness- these are and should be the foundation to the solution we try to mould. An educated human understands the value of each individual regardless of gender. A well-aware human would understand the multi-faceted role of a woman without which no society can function.

No nation can achieve success unless education and equality are accorded to all its citizens. On 26th January, 2015, the whole world has taken note the prowess of Indian women- it is time that the same is not only encouraged, but utilized as a catalyst to take our great Nation forward. We must not let down our guard for we are at a crucial juncture in life. To quote Pandit Jawaharlal Nehru, the first Prime Minister of India: "*When women move forward, the family moves, the village moves and the nation moves*." What we do today will go down in history books as the turning point of human-kind.

Socrates had once stated, "*The secret of change is to focus all your energy, not on fighting the old, but on building the new*." So I would give a rest to talking about the issues plaguing our fraternity and our society. We must look ahead towards brighter days- we must focus our energies on finding solutions.

A convocation is not a day meant for preaching words of wisdom, it is a moment to reflect upon the past, take pride in the present and think about the future. To borrow the words of Socrates once again, "*I cannot teach anybody anything, I can only make them think*." I have not come here to preach some great words of wisdom or impart the secrets of success. I am before you to make you think; to maybe light that spark within you that will drive you, along with our Country, to greatness.

In the Domain of Law, the stir and the cold lethargy of yesterday is nearly shaken off and we are sensing the rosy hue of an approaching Dawn—a Dawn that is full of promise and hope for our noble profession—the profession that has never held back in sending forth her brave and stalwart soldiers, who have proved themselves as pioneers, in all the marches

calculated for the advancement and betterment of national interests, in all fields of beneficent activity, educational, industrial, social, religious and political alike. I can already see the passion light up in your eager eyes.

Therefore, together, on this momentous occasion, we must undertake a mission, to launch a movement for the regeneration of our great values and traditions; to work towards maintaining and reviving idealism in the youth of our country. You are that youth- you are the ones we look towards for taking our Nation to the great heights it is capable of.

With these few words, I wish to thank you for your kind patience in hearing my thoughts. I extend my heartiest congratulations to each young Lawyer before me today. You have received your degrees from one of the most prestigious University's in the Country. The Nation looks to you with high expectations. Looking around at your bright faces brimming with energy and purpose, I feel that you would live up to the expectations placed on your strong and able shoulders.

Thank You.

# REPUBLIC DAY SPEECH

*—Former Chief Justice L. Narasimha Reddy**

Esteemed sister and brother Judges and their family members, learned Advocate General, learned Additional Advocates General, learned Public Prosecutors, Law Officers, Presidents of the Bar Association, Advocates" Association, Lawyers" Association, learned Assistant Solicitor General of India, learned Senior members, lady advocates, advocate friends, Registrars of the High Court and officers and staff of the High Court Pranam to all of you.

At the outset, let us pay our reverential tributes to the Martyrs, who laid their lives to procure and preserve our freedom. It is indeed my fortune that I am associated with this great institution and has an opportunity to address you all here. In the context of celebrating the Republic Day, no other State can feel more proud than the State of Bihar and no other legal fraternity of lawyers can feel more associated than that of this High Court. The reason is known to all. The very birth of the constituent assembly took place on 09.12.1946 in the hands of Dr. Sachidanand Sinha, from this State, as its provisional Chairman. He was succeeded by Dr. Rajendra Prasad as the regular Chairman of the Assembly shortly thereafter. What can be matter of great ecstasy than the fact that Dr. Rajendra Prasad was member of the Advocates Association of Patna High Court.

This year is special for Patna High Court. All of you are aware that we are going to celebrate 100th year of the formation of the Patna High Court. I request you all to take part in it. The Court has a glorious past. What all we have to do is to make a small effort, to make its glory visible to the contemporary society.

Bihar is a State which has its glory during the Vedic era and all subsequent times thereafter. Treta Yuga is incomplete without Mithila. Subsequent era is symbolized through Vaishali. Buddhism, which is flourishing since last more than two millennia, and is practiced almost in all south-eastern countries, took its origin here. Lord Chaitainya, got emancipation at Gaya about six hundred years ago. In the historic era also Bihar retained its glory and had presented Magadh and other dynasties and great

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* Hon'ble Chief Justice, Patna High Court.

strategist and economist, Chanakya. At a time when the present advanced countries were not even at their basics of culture, Nalanda was the seat for highest learning. In the field of science it presented mathematician of the highest order, even up to date, Aryabhatta. Right from first freedom struggle in 1857, the role, which this State has played, is phenomenal. To the independent India also, it presented great leaders like Dr. Rajendra Prasad, Jay Prakash Narayan, Ram Manohar Lohiya, Karpuri Thakur and the like.

> मां गंगा का संपूर्ण साक्षात्कार पाटलीपुत्र मे ही होती है। हो सकता है इतनी लम्बी किर्ती के बाद थोडा बुरा नजर लगा, कि हाल का स्थिति उतना हर्षनीय नही है। उम्मीद करते है कि स्थिति सुधर जाए गी।

All of us are indeed fortunate to be citizens of this great country. Though we may feel some what discomfortable on noticing some disturbances, now and then, we can get relieved if we just note some part its past glory. In his inaugural address, Dr. Sachidanand Sinha recounted the glory of the Nation by referring to a Poem written by great Indian poet "Ikbal"

> युनानो, मिश्रो, रोमोसबमिट गए जहां से,
> बाकी अभीतलक है नामों निशान हमारा।
> कुछ बात है कि हस्ती मिटती नही हमारी,
> सदियों रहा है दुश्मन-ए -जमन हमारा।

Sri Sinha himself gave the translation and it reads, "Greece, Egypt and Rome have all disappeared from the surface of Earth; but the name and fame of India, our country, has survived the ravages of time and cataclysms of age. Surely, there is an internal element in us which had frustrated all attempts of our obliteration, in spite of the fat that heavens themselves had rolled and revolved for centuries and centuries in a spirit of hostility and enmity towards us.

The glory of our country was summarized by Netaji Subhash Chandra Bose as under, and I quote, "What is our mother country? It is not a part ***of art, nor a form of speech, nor a fiction of mind? It is a mighty Sakti collected of all the Saktis of all the millions of units that structure the nature just as Bhavani Mahisha Mardini sprang into being from the Sakti of all millions of gods and wielded into unity."***

No other country in the world can boast of such glory. However, we remained subjugated for centuries together by one or the other invaders. It

is on account of sacrifice by hundreds and thousands of our forefathers, that the country became independent.

We framed a Constitution for ourselves, with a view to provide mechanism for perfect governance. Highly learned people; under the leadership of Dr. Rajendra Prasad and with the participation of legal luminaries like Dr. B.R. Ambedkar, Sri B.N. Rao, Sri Alladi Krishnaswamy Iyer, have presented a great document to the Nation. On November 26, 1949, the day on which the constitution was unveiled, Dr. Rajendra Prasad delivered an extensive lecture. Some of the extracts from his speech reads as under and I quote,

> *"The welfare of the country will depend upon the way in which the country is administered. That will depend upon the men who administer it. It is a trite saying that a country can have only the Government it deserves (....) If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution like a machine is a lifeless thin. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them."*

By and large, our Constitution worked well and the very fact that it continues to guide the course of the nation, even while the systems, brought into existence through the Constitutions, in the neighbouring countries, failed; is a proof positive, of its efficiency. However, we cannot take the things to remain constant.

If at all, there is failure in the working of the constitution, it is in matters such as, not promoting fraternity and eradicating corruption, which has percolated to various levels. The resources of livelihood which are adequate for the entire population to lead a respectable life, have been appropriated by some greedy and uncultured people. With each passing day, corruption is assuming new dimensions and proportions. Few days ago, I read a news item in an English daily. It is to the effect that in a village in the State of Karnataka, the husband of a woman died, and for necessary mutation in the revenue records as regards her land, she approached the Village Officer with an application. He demanded considerable amount as bribe for that. Unable to get the amount from anywhere, she sold one of her kidneys, for eight thousand rupees and paid that amount to the Village Officer. Such incidents are galore all over the country.

Without fear of contradiction, I can say that corruption is a phenomena which is brought into existence and nurtured by the so called educated and elite and they acquired shameful place for our country in the transparency index in the world. In contrast, it is from our villages of illiterate men and women, who brought respectable place globally in the field of food production and milk production.

Most of us gloss over corruption of various kinds as a matter pertaining to few individuals. The extent to that which that social evil can go, was exemplified by Dr. B.R. Ambedkar in his speech on the eve of adoption of the Constitution. He stated and I quote,

> *"On 26th January, 1950, India will be in an independent country. What would happen to her independence? Will she maintain her independence or will she lose it again? This is the first though that comes to my mind. It is not that India was never an independent country. The point is that she once lost the independence she had. Will she lose it a second time? It is this thought which makes me most anxious for the future. What perturbs me greatly is the fact that not only India had once before lost her independence., but she lost it by the infidelity and treachery of some of her own people. In the invasion of Sindh by Mohammed-Bin-Kasim, the military commander of King Dahar accepted bribes from the agents of Mohammed-Bin-Kasim and refused to fight on the side of their king. It was Jaychand who invited Md. Ghori to invade India and fight against Prithviraj and promised the help of himself and the Solanki Kings. When Shivaji was fighting for the liberation of Hindus, the other Maratha noblemen and the Rajput kings were fighting the battle on the side of Mughal emperors. When the British were trying to destroy the Sikh Rulers, Gulab Singh, their principal commander sat silent and did not help to save the Sikh kingdom. In 1857, when a large part of India has declared a war of independence against the British, the Sikh stood and watched the event as silent spectators."*

I do not intend to increase the length of the speech by referring to the solutions indicated by Dr. Ambedkar, which are relevant for all times to come.

Increase in the crime rate is another matter of concern. This much however can be said that promotion of fraternity among citizens and inculcation

of moral and spiritual values in them, would help to contain the evil to a large extent.

There is need to strengthen the judiciary at every level. Though our Judges are striving a lot to adjudicate the matters pending in the Courts, the proportion between filing and disposal is not to the level of satisfaction. The Courts are over burdened. Two reasons are contributing for this. First is that no exercise, similar to the one of assessment of judicial impact, is undertaken whenever any new legislation is brought into existence. Though hundreds of enactments are made by the concerned legislatures, there is no corresponding increase in the Courts to deal with the disputes that arise out of them. The second is the absence of proper infrastructure and distribution of the Courts. This problem is predominant in the State of Bihar, than anywhere else. It is so acute that there are certain districts, without there being a District Court. In almost all the districts, the Courts are concentrated in the headquarters. When "justice at the door step" is the slogan of the day, we do not find Courts even in sub-divisions, let alone, Block (Taluk) levels.

It is unfortunate that an incident of blasting occurred recently right in the Court premises at Ara. One of the factors that contributed to the recent unfortunate incident at Ara is the excessive congestion of the Courts in a building which was constructed about 100 years ago. The sad state of affairs is that not only there was no expansion over past 100 years, but the open space around it was snatched by the Government or encroached by the public. The situation at other places is not different.

One of the signs of civilization and development is availability of a mechanism of adjudication, at the nearest possible place. Absence of such a facility would only contribute to the increase in the crime rate. Musclemen assume the role of adjudicators and occupy that space. The result is not difficult to imagine. That I think, is what is happening in the State of Bihar.

I appeal not only to the State Government, but also to the philanthropic individuals and institutions, to make available, adequate land for the Courts and accommodation of Judges at a subdivisional or Block levels. If they provide land of not less than three acres, at such places, the High Court is ready to establish the Courts of appropriate level at that place, in a matter of few months.

My stay here is hardly one month. Within this period I noticed that almost all the people of Bihar are hardworking and they do not know cunning tactics. With the profound water resources and fertile land, they could have made the State a wonderful place. However, they became the victims of the exploitation by few. On account of unlawful activities undertaken by small fraction of the society, the lives of people, particularly, poorer

sections are made miserable, and the entire State is projected in a different manner, in the society at large. I am confident that the people will acquire strength to resist such forces with the help of judiciary and other respectable organizations, in the days to come and become successful.

I received immense cooperation from my esteemed Sister and brother Judges and the entire advocate community. If you find that the administration of the Court requires any improvement you are most welcome to give any constructive suggestions. I extend my warm greetings to all of you on this occasion. Thanking you. Jai Hind.

# FROM HUMAN RIGHTS TO HUMAN DIGNITY – AN UNENDING STORY

*—Prof. Dr. A. Lakshminath*[*] *& Dr. Mukund Sarda*[**]

The story of Human Rights is an unending story of human kinds search for absolute values and its failure. The twenty five hundred years of struggle for Human Rights can be summed up as follows:

*From exploitation to exploration*

*From exploration to proclamation*

*From proclamation to Declaration*

*From declaration to protection*

*From protection to perfection*

The expression human rights is a usage that emerged during the post second world war period from international Charters and Conventions. The first documentary use of the expression 'human rights' is found in the Charter of the United Nations, which was adopted after the Second World War at San Francisco on June 25, 1945. The Preamble of this Charter declared its object to reaffirm faith in 'fundamental human rights'. It was not a binding instrument. The first concrete step in formulation of human rights is the UN Declaration of Human Rights, which was proclaimed in 1948 as a common standard of achievement for all peoples and all nations.

Broadly this document deals with a wide range of civil, political, social, economic, and cultural rights. The Declaration is now accompanied by the two international covenants (The Covenant on Civil and Political Rights, The Covenant on Economic, Social and Cultural Rights)

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of 1966, which in dealing with civil and political rights and with economic, social, and cultural rights, in a sense linked the opposing ideologies in the world over. The two covenants

Two covenants came into force in December 1976, after requisite number of members States (35) ratified them. These covenants are legally binding on all member States who ratified them. In 1950 a group of States who were members of the Council of Europe adopted a European Convention for the Protection of Human Rights. It is binding on 18 States which ratified it. It came into force in 1953. The Convention also set up a European Court of Human Rights in 1959, to determine disputes arising from the enforcement of the Convention and its decisions involve interpretation of the text of Convention and pronounced in the form of legal judgments. The European Court contributed towards affirming and implementing Human Rights in a large variety of cases including; Detention and Pre-detention trial; sex discrimination; Abolition of Capital Punishment; Fair Trial; Freedom of Expression, Freedom of Association; Against degrading treatment; Property Rights; Respect for family life; Respect for private life; Right to life and many more areas of its application. The UK has changed its 11 primary legislations in response to adverse findings of Courts while implementing the Human Rights under the European Convention.

In 1969 the Organization of American States adopted the Convention on Human Rights, a legally binding convention. It also has set up Inter-American Commission on Human Rights. The Heads of the Governments of Commonwealth Countries met at Singapore in January 1971 and declared certain human rights fighting against racial prejudice, colonial domination and racial oppression. The Lusaka Declaration 1979, emerging from meeting of Commonwealth Heads of Government rejected 'apartheid' in South Africa.

The 1948 Declaration and the 1966 covenants, according to Sieghart, (1986), may be said to be the core instruments of the international human rights code, which demonstrates a clear bias in favour of the kind of society that displays a specific coherent set of civilized values;

> tolerance of diversity; plurality of belief, ideas, and culture; reasonableness and rationality; the peaceable resolution of conflicts under the rule of law; and above all, respect for the dignity, autonomy, and integrity of every single one of its individual members.

Human Rights as we understand today, are the rights, which apply to every individual exclusively from the fact of one's being human irrespective of nationality, sex, marital or material status, occupation or any particular social or cultural characteristics. The evolution of human rights can be divided into four stages namely, the first generation rights of civil and political rights, the second generation of social and economic rights, the third generation of solidarity rights as demanded by various groups on the basis of age, ability, community, gender, etc. and the fourth generation rights are the rights of self-determination demanded by indigenous populations or specific groups.

## A. First generation rights

By virtue of being a member of the human family, the persons should have certain minimum rights. They are generally available and enforceable against the state or any other public authority. There exist certain inherent, inalienable, immutable and unavoidable freedoms and rights of man. This recognition is the basis of the origin of Fundamental Rights. The civil and political rights also have evolved out of this view.

## B. Second generation rights

Then the scope of human rights gradually expanded to make living a better affair. As the human rights are derived from the inherent dignity of human person, they are expected to cover every aspect of life and not just a small number of guaranteed freedoms against the state. These civil and political rights are undoubtedly precious and indispensable but they are not within the reach of the poor, downtrodden and economically backward classes of the people who constitute the majority of the population in the developing countries. It is only through the realization of social and economic rights the civil and political rights can become meaningful to the large masses of people. These are regarded as second generation rights.

## C. Third generation rights

Third generation rights include right to self-determination, right against apartheid, right to environment, right to immunity from nuclear

proliferation, immunity against genocide, right to peace and the recent declarations of rights of people to development.

## D. Fourth generation rights

The Fourth generation rights are the rights of self-determination demanded by indigenous populations.

One thousand years of history of human rights development has centered on the stage of Sovereign States where governments and citizens pulled and pushed each other. What we need at this juncture is the re-institutionalization of human rights protection to adopt to the more and more differentiated and complicated post modern social frame work, which includes identification of judicially accountable objects of human rights, recognition and facilitation of access right to social net work of all kind and strengthening of international Co-operation on this subject.

The human rights as an expression refers to a wide range of rights some of them directly guaranteed by the Constitution of India, some of them inferred through the elaboration of legal and constitutional provisions by the higher courts, and some exist only as an ambition, dream, ideal or concept.

They include

(a) fundamental rights pertaining to life and liberty, which are civic, political and religious rights,

(b) the right of children against abuse of their tender age in hazardous employment

(c) the right against untouchability and forced labour,

(d) protection to minorities and socially disadvantageous sections like dalits, women and tribals,

(e) the rights in criminal law that ensure protection against forcible extraction of confessions and a fair and reasonable procedure for the investigation and trial of criminal offences,

(f) the rights of workers elaborated in labour and industrial legislation,

(g) the rights of women to maintenance and protection from marital harassment and physical abuse at the hands of men;

(h) the rights of dalits and adivasis against mental and physical abuse by dominant sections,

(i) the right to a clean and pollution-free environment;

The list is unending. Rights do emerge out of life, for, to live is a right and life includes innumerable varieties of aspects required for living. Some of these rights are guaranteed under Part III of the Indian Constitution The rights recognized and guaranteed by the Constitution clothes them with constitutional status. Some of them are guaranteed by different law and such rights are legal rights. Most of them or all of them are abused, violated, ignored or infringed upon by those with power, muscle, money and influence.

The rights, which are required for ordinary living of human beings, are the human rights. Human rights include natural rights, and legally or constitutionally recognized rights.

Personal and political rights form important parts of human rights. Certain personal human rights are basic like life and personal liberty, which include-

1. Right to freedom from detention without trial,
2. Right to freedom from torture,
3. Right to freedom from extra-judicial execution, and
4. Right to subsistence.

It is the experience of the people were prosecuted and met with repression from different regimes. A wave of killing and disappearance followed by large numbers of people being arbitrarily detained or tortured by paramilitary forces and death squads, which the authority always uses in any political struggle. Every political oppression results in en mass violation of human rights. Thus all those fundamental rights, which are essential for life and existence of civil society, emanate from human rights. As the civilized society or the State recognizes them they get positivised and thus become enforceable fundamental Rights enshrined in Higher law i.e. constitutional law and the source of such, as Monists believe, are the International Instruments drawing their force from United Nations Charter.

Commentators such as Weissbroadt and Vasak state unequivocally that human rights have become a universal ideology. A pertinent question in this regard is whether the Chinese or Indian or Hindu concept of human rights the same as Western, Islamic or African concepts. The question whether economic, social and cultural rights are true rights or simply aspirational targets. In case of latter the government is under no obligation to accord those rights through a programme of progressive implementation.

Human Rights represent a powerful discourse that seeks to overcome divisiveness and sectarianism and to unite people of different cultural and

religious traditions in a single movement asserting human values and the universality of humanity, at a time when such values are seen to be under threat from the forces of economic globalization. The idea of human rights, by its very appeal to universally applicable ideas of the values of humanity, seems to resonate across cultures and traditions and represents an important rallying cry for those seeking to bring about a more just, peaceful and sustainable world. The idea of human rights readily endorsed by people from many different cultural and ideological backgrounds and it is used rhetorically in support of a large number of different and sometimes conflicting causes. Because of its strong appeal and its rhetorical power, it is often used loosely and can have different meanings in different contexts.

The idea of human rights is largely a product of Enlightenment thinking and is therefore inevitably contextualised within an essentially western and modernistic frame-work. This has led to the criticism that human rights thinking and rhetoric are simply another manifestation of colonialist western domination, and to the suggestion that the concept of human rights should not be used. While it is true that much of the contemporary understanding of human rights has been shaped by western Enlightenment thinking, the same can be said of many other concepts that are frequently used in political debate, such as democracy, justice, freedom, equality and human dignity. To stop using such words simply because of their western enlightenment associations would be to deny their power and importance across cultures and would lead to sterile and limited political debate. The task therefore should be to loosen them from the shackles of western modernism and to reconstruct them in more dynamic, inclusive and cross cultural terms. Sometimes human rights become nothing more than a new language for consumerism and self indulgence. The other criticism is that claims of human rights can conflict with each other and therefore one is left with the problem of reconciling competing claims. The universality of human rights must not be confused with a static and unchangeable notion of human rights. Human rights must be seen as constructed, rather than objectively existing, the important thing is the process of dialogue, discussion and exchange that seeks to articulate such universal values.

## I. HUMAN RIGHTS AND GLOBALISATION

The current experience of globalization is very one sided. It is to do largely with economics and in fact is little more than the imposition on a global scale of the kind of economic fundamentalism that has dominated western economic policies since the early 1980s. The identification of this economic fundamentalism behind the current experience of globalization is critically important. Much of the reaction against globalization, including the activism of many consumer groups, human rights groups and other

internationalist bodies, has been a reaction not so much against globalization that brings the world closer together, but against the economic fundamentalist form of globalization that has so dominated the international agenda for the last two decades. The idea of human rights has been an important rallying cry for those who oppose the current processes of economic globalization. Human rights are commonly regarded as universal, and hence represent an alternative formulation of a universal ideal of humanity that rejects economic fundamentalism and asserts that human values, some idea of a common shared humanity and a construction of global citizenship (implying both rights and responsibilities) should occupy the core of a "new world order" brought about by new communications and information technologies. This resonates with the idea of "globalization from below" as distinguished from the globalization as currently experienced which is characterised as "Globalization from above" which is in the interests of rich and powerful and with little or no democratic accountability. The field of human rights is fraught with conceptual ambiguity: it raises some of the most fundamental questions of social and political philosophy.

In contemporary society, fundamental and human rights are directed not only against state action, but also against the intrusion of other expansive social systems, such as economy, mass media and religion. Historical and sociological processes make human rights emerge as a central feature of modern society. Fundamental freedoms and human rights are not merely to be considered transhistorically but to be related to the specific and dominant structure of modern society. By institutionalising fundamental freedoms and human rights, the modern society protects its own structure against self-destructive tendencies towards dedifferentiation. At the same time human rights protect the fragile position of the individual within societies like modern India. Without institutional mechanisms that enable and fortify the co-existence of highly individualised persons and autonomous function systems, the risk of regression or dedifferentiation is real. Human Rights protect and strengthen modern individuality, which is no longer constituted by "total inclusion", in a family, corporation or state. Human rights constitute a socio-economic institution which protects functional differentiation against its self-destructive tendencies thus guaranteeing a decent life and equality of access to all state and social institutions.

Structural adjustment and policies implemented in India since 1991, have had far reaching consequences to the basic human rights of the poor in India. Structural adjustment policies essentially implied liberalising the economy in favour of free market and free trade. It has involved restructuring in the form of shift from an economic organisation dominated by Private sector towards the primacy of the Private sector. In the production sector the structural adjustment policies implied a movement from capital goods production to that of consumer goods. In the process of structural

adjustment and globalisation large scale privatization of public sector took place resulting in casualisation of employment and increase in the incidence of unemployment.

The realisation and the protection of human rights will not be achieved without a struggle. Despite an apparent consensus on the importance of human rights (who would argue against them?), it is nevertheless true that there are powerful forces with an interest in not following a human rights agenda too closely, and indeed considerable profits are being made because of the denial or violation of the human rights of large numbers of people, particularly in poorer countries. It is not simply a case of moral suasion. The history of human rights has been a struggle, often against the odds, by people who have stood firmly and courageously on the side of humanity and dared to resist the forces of oppression and domination. The struggle, inevitably, will continue. Human rights are not simply defined, they have to be struggled for and are hard won. Then once won, there is a continuing struggle to protect them. The human rights struggle is one that, in all probability, will never end.

A human rights discourse is, by nature, a discourse of hope. It concentrates not only on what is wrong (characteristic of so much social and political analysis) but also articulates a vision of what is right, of where we can be heading, of the human ideal. We may never get there, but that should not diminish the strength of the vision. Such a discourse of hope is significantly lacking in the social and political discourse at the dawn of the twenty-first century. The only optimistic vision in the general public domain seems to be the naïve and simplistic 'get rich quick' consumerist ideology of the free market, which has been shown to be both fundamentally inequitable and fatally unsustainable. Whether a discourse of human rights can provide a more tenable and sustainable hope remains to be seen, but the promise is certainly there. Law profession is, arguably, the core human rights profession, given its value base and its encompassing of all four generations of human rights within its practice.

## II. DIMINISHING STATES

An activist state is one which takes interest in all forms of the activities of their subjects sometimes leading to undue interference. Presently most of the countries are very conscious of the crises of 'ungovernability'. To adopt to the new structure of Societies governments have chosen to delegalise and deregulate and often transfer most of the State's dominant sphere to the private. The old sovereign States shrunk largely in the process of regionalisation as well as globalization. These in total give a picture of diminishing state. What we should learn from this unanticipated paradigm shift at the

beginning of the millennium, especially developing countries, endeavouring to achieve better levels of economic and political living without repeating the whole dialectic process?

While constitution is the process by which the governmental action is effectively restrained and is understood as the process of the function of which it is not only to organise but to restrain, Constitutionalism refers to limits on majority decisions, more specifically to limits that are in some sense self-imposed. Constitutionalism is an end and means. It is both value-free and value-loaded. It has both normative and empirical dimensions.

Because of globalization, besides the increase of massive Trans-border exchange and interactive relations in economic, cultural and information exchange processes including Cross-border transmission of pollutants, more and more non-governmental factors are operating at a transnational level quite independently of sovereign states. This is followed by the progressive loss of power of those states in the process of becoming democratic. Decisions involving states future are taken outside governmental institutions which ultimately lead to national deregulation and Privatization. The interaction of the outside and inside elements accelerates the diminishing of State.

## III. CHALLENGE TO BASIC HUMAN RIGHTS

Last century witnessed genocide and atrocities. The recognition of humanity is never fully guaranteed. The fundamental rights are not just constitutionally 'proclaimed' but also 'protected'. The normative context of some liberty-rights, going beyond the 'subjective' right includes institutional guarantee. The constitutional rights can be jeopardised if proclaimed rights like dignified existence, Medicare, Education, livable environment etc., are not properly met or resources adequately distributed.

The thesis of 'more market, less state' and the anti-thesis of the Constitutional call for Social Solidarity and Welfare seem to merge into a synthesis. The object of fundamental rights should expand to all those who share the State's responsibility either this way or that way.

The Government is small but clever. It gives up costly micro social intervention, but in its place promotes macro-social stability and progress. Its success relies very much on the experience of regulation, knowing exactly when and where it should abstain from intervention. Communities must be strong and willing to share States responsibility. In short, this synthesis pre-supposes practising experience of both liberal and social democracy. If

the State has never been strong further shrinkage of Government will only make it weaker.

Emerging human rights problems are becoming big. The term human rights is vague and ill defined. Human Rights are those minimal rights which every individual should have by virtue of his being ‘ a member of human family’. The desirability of human rights overlooks the fact that rights are not fundamental by nature. It is relative. What appears fundamental in one historical epoch is not so in another time and place. Kant’s prophetic concept of History and Mainers ‘status to contract’ emphasise transformation of ideas from society to individual. From Locke onwards the doctrine of natural rights presupposed an individualist concept of society and, therefore, of the state. This is in opposition to the much more solid and ancient concept of society as an organic whole more important than the constituent part (GESTALT).

## IV. INTERNATIONALISATION OF HUMAN RIGHTS

Human Rights are not invented today. Sophocles wrote about them some 2500 years ago when he had Antigone declare that there were ethical laws higher than the laws of Theban Kings. P.C. Chang, who helped draft the Universal Declaration, pointed out that Confucius articulated them in ancient China. The belief that we must respect our neighbours as we would respect ourselves resides at the core of all the major religious faiths of the world. These values in the Universal Declaration are not constructed but they are revealed.

The seven provisions relating to Human Rights became a central feature of the United Nations Charter. In an authoritative interpretation of the UN Charter, U. Thant said it was the Magna Carta of mankind. NGOs played a crucial role in getting the Human Rights incorporated in the UN Charter. “Human Rights movement is the result of world war II and 50 million deaths led to UN Commission on Human Rights headed by Elanaur Roosevelt, to draft the Universal Declaration. Within ten days they did it. With the end of 20th century began the active involvement of NGOs and in every aspect of Human Rights it has grown extraordinarily. Some are risking their lives and livelihood. Still others are working to influence international financial institutions, limit child labour, promote development, ban landmines and eliminate trafficking in women and girls. In 1948, when the Universal Declaration was adopted vast number of people believed in autocratic ideologies; colonialism was prevalent, racism endemic and sexism barely challenged. That all these evils are now questioned by increasing numbers of people around the world is testimony as to how far we all have come.

The European Court of Human Rights established under European convention on Human Rights 1953, played an important role during 60's and 70's. The Court has become the constitutional Court of Europe with the collapse of the Soviet Union. Vienna Declaration 14-25 June, 1993 succeeded for the first time in the recognition and reaffirmation of the interdependence between democracy, development and human rights and human rights and the universality, indivisibility and interdependence of human rights.

## V. LIMITATIONS OF LIBERAL DEMOCRACY

It is within the discourse on rights, that responsibility of the individuals towards other individuals and perhaps towards the State are a new challenge. With the universal proclamation of human rights in the 20th century, the evolution of idea of human rights seems to have been completed. Human rights have evolved into universally applicable norms, the self evident status of human rights seems to have come to an end. The belief that human beings not only have human rights but also duties and responsibilities deserve more attention from scholars.

Constitutionalism or Rule of Law and democracy are the central pillars of Government. Liberalism has become the triumphant ideology which is no longer challenged by rival ideologies. Most of the former communist countries have adopted constitutions based on democracy and rule of law. A consequent increasing globalization coupled with decreasing attention to the national sovereign State has taken place. Later half of last century demonstrated universal acceptance of Constitutionalism and democracy. Constitutional law is based on theories of rights. The declaration of human responsibilities focuses attention on alternative moral perspectives which may lead to a reconsideration of the place of duties and responsibilities in constitutional law. While liberalism stresses the idea of individual liberty and entailing rights, Communitarians underline the importance of community, solidarity and responsibility. Communitarians are a group of ethical scholars, social philosophers and social scientists who came together in Washington DC in 1990 for the first time.

## VI. NON-STATE ACTORS AND TRANSNATIONAL NETWORKS

The shape, direction and nature of state responses to human rights problems have dramatically altered. Non-state actors and transnational networks now play an important role in the promotion and protection of human rights in local, regional and international arenas. The increase in non-state participants (Northern Alliance in Afghanistan) and the emergence of transnational civil society have opened a new domain within which the rights

enumerated in the Universal Declaration and other International Human Rights documents may be realized.

***Transnational Civil Society: The Fifth Estate:***

Transnational Civil Society refers to 'a set of interactions among an imagined community to shape collective life that are not confined to the territorial and institutional spaces of state'. Law plays a central role in civil society which cannot flourish where there are inadequate legal assurances of their ability to operate autonomously from government. Legal associations play a central role in the development of civil society by supporting rule of law mechanisms that permit the independent existence of non-governmental entities and by encouraging the development of institutions that foster their growth. A strong civil society also demands and oversees legal constraints on state power and the accountability of state actors. The words 'civil society' means the space of uncovered human association and also the set of relational networks-formed for the sake of family, faith, interest and ideology- that fill this space. Ideally the associational life of civil society is its capacity simultaneously to resist subordination to state authority and to demand inclusion into state political structures. Human Rights advocates argue that civil society creates a 'setting of settings'. The risk of civil society presents a paradox to human rights advocates. On the other hand, civil society can promote human rights norms and raise the concerns of unheard voices, including those of people oppressed through violation of core principles of international human rights. The inclusive and pluralistic nature of associational groups promotes what is seen as the 'emerging right of democratic governance. Some view the very existence of a robust civil society as a pre-condition to democratic governance and to the realization of human rights. On the other hand, transnational civil societies may undermine this norm of democratic governance since voluntary associations are wholly unaccountable to any sovereign, and thus, may act in a manner contrary to democratic principles.

## VII. TERRORISM GLOBALISED

In the context of globalization, the status of 'diminishing state' became glaringly visible as terrorism grew its tentacles beyond borders, cutting across all the political and geographical limitations. Besides the symbols of sovereignty like WTC towers in United States on September 11, 2001 and the Parliament of India on December 13, the human rights are gullible victims of this terrorism of international dimensions. The role of non-state entities is obvious in growing influence of terrorism, besides sponsoring by some states in Asia. Whether the transnational civil society is united or not, the transnational underworld had developed the strong unison roots

challenging the state-hood anywhere or everywhere. If not, the superpowers (US and UK) would have never been in an international conflict with a non-state terrorist power (Osama Bin Laden), sheltered under a meek Government (Taliban). The entire equilibrium of inter-state-conflict or possibility of application of humanitarian law or any other international convention had been upset with this new equation, raising fundamental questions like, how does Muttawakil, surrendered foreign minister of fallen Taliban regime, would be treated- is he a prisoner of war, or criminal wanted by US?

This new development has changed the very concept of human rights and advocacy for livable conditions for human beings. With states getting diminished in their hold and status, and non emergence of strongly matching international regulatory regime, the 'Human Responsibilities (in contrast to Human Rights) concept' assumes greater significance and necessitates much stronger transnational civil society as the "Fifth Estate". International Terrorism is the result of unprecedented unity of non-state entities with homogenous society with common aim of destruction of human rights and humanity, and thus poses a very serious challenge to fifth estate to be more responsible in protecting its own existence.

Whether supported by underworld, or cross-border state sponsors or intra-state ideological sporadic groups, the terrorism poses a grave threat to human rights as a whole, and humanity as such. If the world community cannot visualise the need of duty to protect rights, the victims are themselves. The effort to infuse the sensitivity of duties by inserting Article 51-A in Indian Constitution, though out of democratic crisis created by an autocratic rule, was gradually diffused by over-enthusiastic judicial interpretations of religious norms giving supremacy over proclaimed national responsibilities. This again emphasizes the need for emancipation of duty bound fifth estate. At least now, the Charter of Human Responsibilities has to synchronize with the fifty four year old Declaration of Human Rights, through Fifth Estate.

Human Rights can be divided into two categories viz. subjective and institutional. (See generally Costas Douzinas - The end of human rights). Institutional human rights serve the self-interest of sovereign states and help constitute the legal subject as both free and subjected to law. They can produce just results but tend to serve the status quo rather than the claimants of right - such as refugees and stateless persons - whose very existence puts the status quo in question; thus, human rights are always in danger of becoming merely rights that is, transfigured by politics into a liberal conception of legalised rights. Subjective human rights, however, are the peoples utopian hope; they are a standard of right outside of institutions and

they fuel the political experience of freedom, the expression of the battle to free individuals from external constraints and allow their self-realisation.

At the time of their birth, human rights, were a transcendent ground of critique against the oppressive and commonsensical. It is a historic shift from transcendence to immanence or in less philosophical terms from Natural Law's external standards to positivism's self founding man-made laws. Natural law was replaced by liberalism. The impact of this shift can be discerned in the move from the view that law as a mode of living together to law as a set of rules posited by the state.

The weighty human rights paradox is that the state is set up in order to guarantee human rights and yet often the idea of 'human rights' is called upon to justify resistance to or request from that very state. Human rights function as a telos of sorts, a possibility of a world of justice and an idea of absolute good.

Douzinas emphasises that Utopia is impossible because it is an ideal and it is necessary because it is an ideal. Debates from Hobbes and Aristotle/ Acquinas to Hart and Fuller or Rawls and Dworkin, show that the conflict between origins and ends has never ceased to be a contentious one in theories of justice. Liberal theories of rights and of a law to which its subjects consent at its origin have largely replaced natural law and its telos in the modern world. Natural right was written out of law because of its critical potential.

Neither natural law - even a reformulated 'radical natural law' nor liberal theory can make human rights, a transcendent principle capable of both guiding behaviour and changing over time to accommodate the evolving demands of justice. Emmanuel Levinas, the contemporary (perhaps post-modern) philosopher par excellence of transcendence, would be the first to tell us that transcendence, if it is to have any meaning, requires a positive principle, something with content, in order that content be the measure of the injustice it results. That is what is at stake in transcendent standards, and they become monoliths just as easily as can liberal ideologies and positivist systems. Subjective human rights must be saved from their destruction by institutional use.

Transcendence in the form of 'subjective human rights' must have some content if it is to have any meaning. Yet the debates between origins and ends will continue. Natural law ideas have never completely left the scene of law under positivism nor has transcendence disappeared. If Natural law, transcendence, and teleology were somehow to regain hegemonic power liberalism, immanence, and concern with law's origin would not disappear either. The discourse of rights has lost its earlier coherence and

universalism. The post modern writers like Jill Stauffer somehow do not agree with Douzinas, when he emphasises that "reason and human rights are universal, they are supposed to transcend geographical and historical differences" since post modernism does not believe in the universality of anything.

The Universal Declaration is intended as a minimum standard which should find universal acceptance in order to prevent the expected "clash of cultures and civilizations". One of the consequences of rights being the point of departure for constitutional law is that phenomenon like social rights (which are in fact duties or responsibilities of the states) have been drafted as individual claims in national constitutions despite their non-justiciability (e.g. Directive Principles and Fundamental Rights) Hardly two decades later, the Universal declaration gained the status of an obligatory (albeit non-justiciable) document for all the countries of the world.

Brian Berry has ably demonstrated why Rawls theory of "justice as mutual advantage", being inadequate to consider the intergenerational question, must be expanded to include the notion of "Justice as Impartiality". Prof. Amartya Sen acknowledges the influence of Theory of Justice had extended by the early 1980's, beyond the realm of political philosophy to that of welfare economics. Rawls' conception of justice should include the internal justice of the family and the individual, assuring adequate protection of Human Rights, in his wider conception of moral development. The irony of the Rawlsian legacy is that the difference principle and the pragmatic conception of 'overlapping consensus' aroused maximum interest in countries where social welfare policies and human rights protection have been the most developed - whereas in developing countries like India this aspect of Rawls' early work has been virtually ignored.

Prof. Amartya Sen emphasizes on Content and viability for the assertion of Human Rights. He further says:

1. Ethical assertion is about the critical importance of certain freedoms freedom from (torture) and correspondingly about need to accept some social obligation to promote or safeguard these freedoms.
2. Open impartiality – open and informed scrutiny.

Viability in impartial reasoning is central to the vindication of Human Rights even if such reasoning is ambiguous or dissonant as in the case of American declaration, French Declaration, Universal Declaration of Human Rights. The focus is on fresh legislation.

The acceptance of a class of human rights will still leave room for further discussion, disputation and argument that is indeed that nature of

discipline. The validity is ultimately dependent on the presumption of the claims survivability in unobstructed discussion. It is extremely important, as Prof. Sen puts to understand this connection between human rights and public reasoning especially in relation to demands of objectivity.

'Je Suis Charlie' and 'Je Suis Perumal Murugan' are two recent instances where freedom of expression as a human rights was put to test and the authors were punished for exercising the same. Arguments can be advanced from both sides but to balance them is a difficult task indeed.

Freedom is important; Happiness is important; Autonomy is important are all ethical assertions. Assessment of viability depends on public scrutiny – validation of ethical claims from other types –utilitarian, Rawlsian or Nozickian. People speak of moral rights while advocating their incorporation in a legal system. Self-legislative will of Kant comes as justification for such limitation. Uncurbed critical scrutiny is essential for dismissal as well as for justification. Individual voice vs. social choice of Prof. Sen and Martha Nussbaum's – capabilities approach assured significance in modern context. Hindu philosophy of karma denies *defacto* recognition of Human Rights.

Sophocle's Antegone and Confucius principle of neighbour as Human Rights were conceived 2500 years ago and were later articulated by subsequent philosophers.

Martha Nussbaum's approach addressed to Constitution makers offers a most versatile conception of constitutionalism. She offers us a rather thick (as compared with the thin Rawlsian) version of the original position from which the basic structure of the Constitution stands derived. Constitutions ought to deliver (….) the social basics of these capabilities (Women and Human Development). Martha insists that constitution ought to espouse capabilities as a "Central goal" such that citizens stand endowed with choice whether to pursue the relevant function or not to pursue it. Constitutional design ought to respect "citizen's power of choice" and traditional, civil and political liberties. The principle of 'Multiple realizability' of Central human capabilities is exposed to a whole variety of individual tastes, local circumstances and traditions. Implementation of the capabilities principles must be left, for the most part, to the internal politics of the nation. Nussbaum further states that International agencies and other governments are justified in using persuasion - and in grave cases of economic and political sanctions to promote such, developments which must presuppose a theory of global justice.

The twin ideas viz. multiple realizability and constraints on implementation combined together justify constitutional arrangements that, for example,

employ all kinds of trade-offs between civil and political rights on the one hand and social and economic rights on the other hand. Prof Upendra Baxi maintains that the trade off that the Indian Constitution sculpts by its distinction in Part III (enshrining fundamental rights enforceable by courts) and part IV (the Directive Principles of State Policy that cast obligations, not so enforceable, on the legislature and the executive) violates, centrally, the list of central human capabilities. While we may all applaud with Nussbaum the rare examples of public policy that have developed political action to fulfil some Directive Principles, this is beside the point; the point being the justification of constitutional design that legitimates such trade offs in the first place. The multiple realizability principle does not navigate Constitution making to any safe harbour; but obviously, what Nussbaum has in view is more substantive than a wish list.

Constitutions, on Martha Nussbaum's approach, are all about the delivery of basic human capabilities; if so, the two principles she advances give away far too much, despite the well-meant insistence that the 'political implementation must remain to a large extent the job of the citizens. The 'irreducible plurality' of her list is a justified response to 'worries about universalism. But when this principle addresses the goal of limiting trade-offs among capabilities, its runaway generality becomes problematic. The constitution is the process by which the governmental action is effectively restrained and is understood as the process of the function of which it is not only to organize but to restrain.

Indian experience can be viewed as a conflict resulting from a search for a balance between the use of law by elites for purposes of domination and the use of law to moderate elite domination by providing avenues of participation for the disadvantaged. The existence of this duality is perhaps the result of the failure of the masses to understand their legal rights, the restricted access of the masses to the legal system in terms of time and/or financial constraints. The 'civic revolution' as a model of social transformation would make it a logical necessity that law as an instrument of social change is held under constant review (Prof. Yogendra Singh). The efforts of the three wings of the State, viz., Legislature, Executive and Judiciary and the efforts of the public organisations and enterprises working to advance the movement of democratic law and social change must be linked for more effective implementation.

The Universal Declaration is intended as a minimum standard which should find universal acceptance in order to prevent the expected "clash of cultures and civilizations". One of the consequences of rights being the point of departure for constitutional law is that phenomenon like social rights (which are in fact duties or responsibilities of the states) have been drafted as individual claims in national constitutions despite their

non-justiciability (e.g. Directive Principles and Fundamental Rights) Hardly two decades later, the Universal declaration gained the status of an obligatory (albeit non-justiciable) document for all the countries of the world.

The two discursive traditions unite on human aspiration towards human justice. In his characteristic way Prof. Baxi concludes his lecture on Human Flourishings saying - that these aspirations are simply stated: Make Power (in all its manifestations) accountable, governance just, and state ethical. Not to strive towards this is to encode constitutions and laws as massive restatements of adaptive preferences. Justice, as Rawls says is a way of distributing the rights, duties benefits and burdens among individuals within society. This form of distributive justice should be implemented to empower the people through Rights to make them human.

## VIII. HUMAN RIGHTS IN 21ST CENTURY

The developments of new technologies press us with the urgency of ethical thought (trans-biology – signifies biology that is not only born and bred or born and made but made and born is indeed today more a norm than an exception. We are observing a shift away from "the translation of the world into a problem of coding" and toward translation of the problem of coding into one of context. We are theorized and fabricated hybrids of machine and organism –Cyborgs.

Both the wars – war of and war on terror prefigure a new International Law now in the making. The new terror wars herald future histories of terrorism (both insurgent and state terrorism and an epoch of endless reproduction of human suffering and rightlessness. How international proponents of Human Rights make sense of the relationship between terror and Human Rights is raised by proponents of both wars. Is deliberate infliction of indiscriminate violence by insurgent non-state actors against civilian populations and sites ever justified as a means of restoration of their Human Rights and making these secure for the future [See *Nandini Sundar* v. *State of Chhattisgarh*[1] - July 5th 2011] - (Salva Judum) and autonomy logic of statehood for Gorkhaland, Greater Cooch Behar, Kamtapuris, Tripura etc. Right to development, reasoned arguments have their place but only when other side is reasonable. Sentiments like once upon time logic, may come for Greater Jharkhand – tribals and ethnicity, again as human rights with incredible advances in techno-science we are moving away from Homo-sapiens to robo-sapiens.

The 'constitutive partnership' amongst 'companion species' or implicated frameworks of 'cognisphere' distributed intelligence invite on the part

[1] (2011) 7 SCC 547.

of the human rights theory and movement some further engagement with the question of rights, entitlements and obligations of artificial intelligence (AI) or intelligent machines, or more generally artificial forms of life (AL). Artificial Intelligence replaces all Human Rights since human being ceases to be theological and cosmic entity. From a human rights perspective, the question is whether certain kinds of human rights and responsibilities may extend to such entities/beings. Already, in technical legal terms, AI/AL thrive under the WTO/TRIPS regimes which authorize endless intellectual property protection for their 'capabilities' and 'flourishings'.

It remains tolerably clear that some recent movements concerning the human rights of robots, and the prevention of cruelty to artificial forms of life, begin to make sense only on a post human landscape. Already the American Society for the Prevention of Cruelty to Robots (ASPCR) founded in 1999, is urging on the platform, however hastily assembled, of a new global social movement urging that 'any sentient being (artificially created or not) has certain unalienable rights endowed by its CREATION (not by its Creator), and that those rights include the right to Existence, Independence, ' and the 'Pursuit of Greater Cognition'. For the Association's purposes, a robot is one that 'actually has intelligence, not just the appearance of such'. A robot (here inclusive of nanobot progeny) need not, as already noted, incarnate itself (and actually do not) in a 'humanoid form, or even in physical form at all…' It remains the agendum of ASPCR to provide protection for all artificially created intelligences, whether they reside in a metallic humanoid form (the classic robot), in a non-humanoid form (self-aware space stations, for instance), or in non-physical form (a non-localised neural net, for example)'. On this view, [R]obots, and all Created Intelligences, will most likely go through an initial period of being considered "property" before they are recognized as fully sentient beings, with all attendant rights. [**Prof. U. Baxi**).

## IX. HUMAN DIGNITY – CONTEMPORARY CONSPECTUS

Answering certain questions posed by him which Human Rights theory should address, Prof. Amartya Sen focuses on *inter alia* "the universsability of human rights relates to the ideas of survivability in unobstructed discussion - open to participation by persons across national boundaries. Partisanship is avoided not so much by taking either a *conjunction*, or an *intersection*, of the views respectively held by dominant voices in different societies across the world… but through an *interactive* process, in particular by examining what would survive in public discussion, given a reasonably free flow of information and uncurbed opportunity to discuss differing points of view".

Human Rights are seen by Sen as "pronouncements in social ethics, sustainable by open public reasoning". And he emphasizes that "the understanding and viability of human rights are….. intimately linked with the reach of public discussion, between persons and across borders". (Philosophy and public affairs (2004). In hard cases viz. embryo research, abortion and euthanasia, Sen says it is difficult to make ethical judgments.

For Kant the core of what makes judgment possible is our "common sense" shared by other judging subjects. Common sense that shared understanding – is not static. It is this shared sense that allows us to exercise on 'enlarged mentality' by imagining judgments from the stand-point of others which is similar to his concept of 'categorical imperative'. Think of the way "common sense" about slavery, about black people, women, children and the disabled has changed. In each case it has taken the efforts of moral entrepreneurs to create new common senses.

Human Rights must not be seen as a gift of the west to rest, a tool of power: rather as an element of shared common sense. It is necessary to participate in dialogue that seriously engages local perspectives. It is necessary to pen channels of communication.

The Right to health is fundamental human right but not to a right to be healthy. The state cannot be expected to provide people with protection against every possible case of ill-health or disability, such as the adverse consequences of genetic diseases, individual susceptibility, and the excess of free will by individuals who voluntarily take unnecessary risks, including the adoption of unhealthy lifestyles (smoking, for example). The right to health contains both freedoms and entitlements. Freedom includes the rights to control of one's own body and the right to be free from non-consensual medical treatment and experimentation.

Today freedom of speech and expression are recognized as international and regional human rights law. When a Danish cartoonist drew a cartoon of the prophet Mohammed with a bomb to his turban there were violent reactions from Muslims worldwide. A similar fate greeted Salman Rushdie when he published his Satanic Verses. Should such publications be permitted or banned? (Charlie Hebdo and Perumal Murugan – An author is dead)

Liberals defend pornography. Thus, Ronald Dworkin has maintained that negative liberty is "freedom to offend" and this applies to the "tawdry as well as the heroic". Liberals defend pornography even though they despise it. They follow a dictum attributed to Voltaire: "I despise what you write: but will defend to the death your right to write it. Holocaust denial was criminalised in several European countries. Some argue that "Hate Speech" degrades people because of their race and religion targeting minorities

intended to compromise the dignity of those who are targeted. It can only be countered by more speech citing Nazi march in Chicago which was held as protected under 1st amendment freedom. Some liberals believe that this is price to be paid to uphold the cherished principle of free speech.

Human Rights developed as a concept mainly within Western societies. But Beitz emphasises that justification needs to be "valid across the religious, moral and political societies in today's pluralistic world". (C. Beitz 2009)

## X. HUMAN DIGNITY IN POST-MODERNITY

James Griffins personhood-based justification for human rights emphasises "deliberating, assessing, choosing, and acting to make what we see as a good life for ourselves". If we accept his premise that people are moral "persons", that is they have normative agency, then we shall appreciate that his moral personhood needs to be protected. As Griffin understands freedom is made up of autonomy and liberty which are the only interests capable of grounding human rights. It is by reference to these interests that we should make sense of human dignity. (Cf. J. Tasouilas- 2012).

There are two main approaches to the question: why are human rights valid?

Much discussion of dignity goes back to Kant, but between his day and ours there was very little discussion of "dignity", until recently. Several books have been published in the last few years, and the relationship (if any) between human rights and dignity has emerged as a subject for discussion. Tobin argues that human rights protect human dignity (2013). Klug believes that concept of dignity has replaced "the idea of god or nature as the foundation of 'inalienable rights'". Dworkin in Taking Rights Seriously referred to the "vague but powerful idea of human dignity". There is "pious lip-service to slogans that have dignity. There is also uncertainty of its relevance to practical issues, for example in medical care and in bioethics.

Human dignity raises many issues such as whether human dignity be understood in purely secular terms or is it "ineliminably religious"; whether it is subjective or objective; can there be shared meaning of human dignity when there is religious and ideological pluralism; does human dignity attach to some rights more than others; is human dignity absolute or can it be balanced against other values; does human dignity apply essentially only to humans, or can it apply to animals, fetuses; can a person waive his/her dignity. A Delhi High Court judgment declared that Birds also do have

fundamental Rights (18.05.2015 Hindustan Times). A whole jurisprudence syllabus could be created just on "dignity". (Mann)

The Child Rights Charter which recognized many legal rights for children lacked a coherent philosophy. Guggenheim says children's rights have no "intellectual foundation". The most common reason posited for denying children rights is the will or choice theory. Thus, Brighouse argues that the "further an agent departs from the liberal model of the competent rational person, the less appropriate it seemed to attribute rights". And, in his view, children (certainly young children) do depart from this model. Griffin too denies "infants" human rights because they are "not normative agents". They are "potential" agents, not actual agents. Children's vulnerability does not justify rights, but imposes "substantial obligations on us not imposed by those able to look after themselves". To recognise human rights only for agents may be thought wrong for several reasons. Children are entitled to human rights, whether or not they are capable of exercising them. As Tobin explains, "it is their *interests*, not their *capacity*, which form the foundation of rights under an interest theory".

He does not seek "a uniform ethical system", but a "necessary minimum of shared ethical values". "When a state utterly or egregiously fails to protect the rights of the people residing within its jurisdiction the rest of humanity must have capacities to do more than sit idly by until the slaughter is finished or merely assist the victims after they are violated……."

Others committed to moral cosmopolitanism also explore its implications such as the institutions which will result in world government and the states being given only "conditional sovereignty". Pogge offers us the fullest exploration of institutional cosmopolitanism, Falk presents the most convincing case for international humane governance.

James Nickel in making sense of Human Rights defines Human Rights as basic moral guarantees that people in all countries and cultures have simply because they are humans. Tobin says Human Rights protect Human Dignity. Human Rights are interdependent and indivisible.

As Camus suggested there does not seem to be an absolute meaning to life, for human beings, to find something useful to do and some reason to live. The post-modern future will be one in which our idea of justice will be reformed so as to reflect a world of 'small contingent facts' rather than an ephemeral illusion of large necessary truths (Rorty). Rorty's post-post modernism or post-Nietzschean world will not be quite so ironic or whimsical or playful as its post-modern predecessor. The stakes in terms of human sufferings are too high and too immediate as can be seen with the rising of 'ethnocentrism. Rejection of absolute contingency of Neitzschean

post-modernism leaves one with either Kantian universalism or some kind of murky middle ground. Ethnocentrism represents privileging of localized group moralities and political values which is dangerously anti-liberal and liable to justify any number of undesirable and un-liberal ethnocentrism forms of exclusionary politics. However, both Unger and Rawls seem to support ethnocentrism. But such danger can be avoided, as Rorty suggests, by employing strong liberal political institutions which can preserve procedural justice and thereby prevent the state from slipping into a kind of modernist liberalism of Kant.

But ethnocentrism offers the best hope for pragmatic liberalism because it redefines freedom as 'interdependence' and as constituent of 'solidarity'. This idea of pragmatic or relative solidarity, Rorty uses as a model with which to describe a non-foundational idea of human rights – one that bears a striking resemblance to that advocated by the likes of Douzinas. One feels clearly the pull of contemporary anxieties regarding the need to devise some kind of philosophy for the emergent 'new world order'. Such a non-foundational human rights is a human rights of consciousness a response to hearing sad and sentimental stories rather human rights founded on moral knowledge or any other illusion. It is, Rorty adds, a human rights that might be Kantian in spirit, but which is Derridean in execution. What matters to for pragmatists is devising ways of diminishing human suffering and increasing human equality increasing ability of all human children to start life with dignity.

In the 'End of Human Rights', Douzinas impressed the natural progression from the politics of critical legal studies to the aesthetics of post-modern legal thought. The problem with jurisprudential conceptions of human rights, at least in the modernist tradition, is their overzealous interest in 'rights' at the expense of the human. While the identity, the social imaginary supports a social organization in which human relationships will respect and promote the uniqueness of the participants. The idea of a 'human rights imaginary' impresses the non-essential nature of rights. Rights are merely instruments.

What has essence is humanity, the mutually determining relations of 'self' and 'other'. The Derridian resonance is obvious, perhaps never more so when Douzinas acknowledges that such a humanism must focus once again on the nature of love and affection, 'pity and friendship' as political concepts (Eg. in cases of Iraq, Afghanistan, Syria, Libya, Yemen and recently abandoned Rohingya Muslims, Minorities etc.).

Aruna Shaunbaug, lying in a Permanent Vegetative State (PVS) for 42 years, since a brutal sexual assault in 1973 who became the face of India's Debate on passive euthanasia passed away on 18th May, 2015. With no

statutory provisions in India on withdrawing life support to patients on PVS, the Supreme Court said passive euthanasia may be permitted in certain situations defining what will be seen as Aruna's biggest legacy to Indian Medico, legal practice. Justices Markandey Katzu and Gyan Sudha Mishra, taking a middle path ruled "it cannot be said that Aruna is dead. Her brain stem is certainly alive'. 42 years of Vegetative State raises the question of living with 'human dignity' as right to life or right to die as a human right brings into focus. A popular but controversial Australian Medical practitioner Philip Nitsechke continues to lead the debate on human dignity and right to die. Though love, compassion, sympathy and empathy are humane but have little to do with decades of suffering with no sight of cure under permanently vegetative state and compromised Aruna's human dignity by a crucial fact of socialization. Right to human dignity shall include right to die with dignity. In Switzerland assisted suicide is not illegal and public opinion does not favour its banning or criminalization thus keeping in conformity with the acknowledgement of right to die with dignity as a human right.

The last century, despite its extra-ordinary scientific and technological achievements has been one of the most lethal in human rights performance. A disturbing feature of the contemporary times is the revival of religious fanaticism which is posing a major threat to the humanity. It is therefore necessary to reinvent, to rearticulate the foundational principles to save the world from holocaust. It may not be out of place to reinvent the principles of Vedanta of Hindu philosophy which suggest some fundamental and foundational principles for preservation and ensuring Human Dignity by injecting the following universal truths into the human minds.

i) अमृतास्य शिशुः - 'Amrutasya Sishu'- children of immortality.

ii) वसुधैव कुटुम्बकम - 'Vasudhaiva Kutumbakam' – The entire world is a family

iii) सर्वेजनाः सुखिनो भवंतुः - 'Sarve Janah Sukhinobhavantuh' – Welfare of all beings.

# ADVANCE DECREE—A DIAGNOSTIC VENTILATOR

*—Justice Abhijit Sinha*[1] *and Prof. A. Lakshminath*[2]

Lord Curzon, the then Viceroy of India, is said to have, with sarcastic impudence, depicted the paper-choked do-nothing administration in India as a strange immobile animal. However, the then justice delivery system, curiously, remained spared of such caustic vituperation presumably because the System was neither immobile nor acted injudiciously or contravened the permissible parameters as also due to its character and commitment towards the judicial process.

Post-independence, notwithstanding the uncontentious ouster of the British Regime from Indian soil, the old order of British-India's legal system including its substantive and procedural features, with minor modifications and alterations, remained preserved. Axiomatically, however, with passage of time and escalation of litigation *sans* corresponding increase in judge-strength and essential infrastructural paraphernalia, the present day justice delivery system is in a precarious crisis buoyed down and dehumanized by dysfunctionalism. The arrears of pending cases are astronomical and escalating rapidly day by day. Today, litigation instead of being people-friendly and a means of efficacious dispute resolving mechanism stands as a disguised source of tyranny and horror. The appalling figures of cases pending adjudication in court rooms, the exasperating wait for the finality of adjudication are a shocking revelation of the gravity of the matter triggering off a premonitory apprehension of the Judiciary losing its credibility and the additional danger of forfeiting its claim of nobility of profession.

The ground realities can neither be ignored nor dumped in cold storage. The ever-escalating figure of pending cases is an authoritative indicator of

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The authors acknowledge with thanks the contribution of Sri T. V. S. K. Kanaka Raju, Senior Lawyer, Visakhapatnam (AP) for initiating the concept of "Advance Decree" and its application to civil matters.

how acute the crisis is. The causative factors responsible for such degeneration of the Judicial System including the credibility, faith, trust and tradition associated therewith are multifarious and to particularize any one of those as the implicit cause would indeed be fool-hardy. Yet, one cannot be remiss of the fact that an overwhelming majority are inclined to attribute the primal cause to the ideological and psychological over-dependence upon the British propagated Legal System and precedents of English Law Courts. Axiomatically, notwithstanding the long passage of time since the British were jettisoned, the Judiciary in India, alas, continues to smoulder under the bondage of the British legal system. To be effective, the legal system in India needs to be overhauled and liberated from its British bondage and rejuvenated through a comprehensive national scheme and creative and curial measures attuned to the socio-economic and cultural milieu prevailing in the country as admittedly, theories of justice and enactments vary from country to country, culture to culture. At the same time the case flow management to usher in speedy justice is also required to be modernized with introduction of new technology and resorting to the electronic gadgets.

The gloomy scenario and macroscopic alarm radiated by the stupendous volumes of cases languishing for adjudication in the court-rooms at all segments of the pyramidal judicial hierarchy and matters connected therewith or incidental thereto fortuitously navigated into unchartered territory thereby inviting the anxious concern of important Constitutional entities and instrumentalities stirring up the urgent desirability of immediate transformation and resurgence of the Judiciary from its position of damnation to which it had relegated itself. Jurisprudential projects and policies were resorted to in order to identify and assess the causative factors and impediments responsible for the malfunctioning of the Judicial System and chartering strategic regulatory measures for restoration of the judiciary and the judicial system to its original position of a revered and respected sentinel of people's rights, trust, faith and safety. It is manifest from the individual and conjoint activities of the concerned authorities that as a result of their conscientious efforts several remedial measures have already been adopted and enforced to at least reduce, if not eradicate, the pendency and re-impose the fast-receding trust and faith in the judicial system. That apart effective methods and methodology have been mooted to usher in law reforms so as to cure and liberate the judiciary from its malady, to ameliorate the plight of the litigating public and to ensure speedy disposal of *lis* pending adjudication in consonance with justice, equity and fair play.

There possibly can be no denial that for realization of the cherished goal of rejuvenation and transformation of the judiciary and the judicial system wholesale, liberty thereof from the outrageous vice of British bondage, re-kindling self-confidence in the Judicial fraternity and providing for swiftness in the decision making process several jurisprudential

innovations, policies, safe-guards and reformatory parameters were scripted and enforced. New enactments aligned to prevailing socio-economic milieu have found their way in the statute books, many of the obsolete laws of British vintage and post-independence period have either been repealed or modified in conformity with the prevalent era, procedural and substantive principles of law have been simplified and provisions incorporated to curtail disputes through preliminary hearings and offering scope for reasonable settlement, new vistas of jurisdiction and jurisprudence have provided for Fast Track Courts to try old pending cases, Tribunals and Courts for trail of cases under special statutes. Provisions have also been made for providing free legal aid through Legal Services Authorities. Also, suggestions for substantial increase in strength of judges coupled with consequential increase of court-staff have been provided. Improvements are also reflected in the infrastructural paraphernalia with introduction of new technology and reliance on electronic gadgets. However, alas, notwithstanding the introduction of a plethora of benevolent measures the performance of the Judiciary, in general, continues to remain in a coma in "the age of darkness" haunted by "the spring of hope" and "winter of despair".

There is no gainsaying that transformation of the judiciary and the judicial system is an on-going process and reformative parameters and policies by way of suggestions are evolved some of which find acceptance. Apart from the Constitutional entities and instrumentalities, the Law Commission of India has continued to play the stellar role. Several other bodies and individuals have expressed similar concern and have volunteered lucrative and valuable contributions formulating curial measures. One such valuable contributor is Sri T.V.S.K. Kanaka Raju, a Senior Advocate in Vishakhapatnam, who propounded an innovative concept of **"Advance Decree"** as one of the possible efficacious means of resolving the persisting problem of pending cases escalating day by day.

The initial response to the concept of **"Advance Decree"** was the quizzical raising of suspicious eyebrows on an ostensible preliminary understanding of the same being utopian, conceptually controversial, lacking utilitarian value and possibly a self-proclaimed figment of imagination to garner glory by way of sensationalism through exaggerated and fictitious concoctions. However, on an in-depth reading and understanding of the contents of the recommendations the manifestation stands otherwise. The presentation, dynamic and radical as it is, happens to be thoughtful and oriented by unconventional views which travels to the heart of the matter with professional expertise and provides for simplification of procedure in an effort to curtail the exasperating wait for the dispute to reach finality and thereby provide an avenue to overcome the menace of docket explosion.

"Advance Decree" has been introduced by the contributor as a necessity in the context of judicial reforms. The concept does not appear to be a new concept as similar provisions are in use in the field governing fiscal legislations like the Customs Act, Service Tax, Central Excise Act wherein provisions are available for Advance Rulings. It may also be noticed that in exercise of powers conferred under the Finance Act, the Central Government has framed Service Tax (Advance Rulings) Rules 2003. It is this very concept which is sought to be utilized in a modified jacket in certain litigations primarily of civil origin.

The concept of "Advance Decree" is a sure, simple method of solving the formidable problem of laws delays and mounting arrears in trial courts effectively with comfortable ease. Unfortunately there has not been enough focus in resolving this problem. This concept in its application ensures that judgments are delivered in advance without any loss of time in certain situations.

If the concept of "Advance Decree" can be introduced in the Civil Procedure Code, 1908 (hereinafter referred to as "CPC"), and the provisions of the Legal Services Authorities Act, 1987 by amending them suitably, seventy percent of the cases at the level of the trial court itself could be settled once for all. On a trial basis, this concept can be applied to Eviction Suits, Money Recovery Suits and all other Summary Suits which consume at least about fifty percent of the trial court work. An Eviction Suit takes not less than 2 to 3 years and even Money Recovery Suit consumes about three years of precious time of the Court. Precious time cannot be wasted over such non-serious matters.

At the very outset, it would be gainful to examine the nature of cases that are filed in the trial court which can be classified as hereunder:-

(i) Suits based on documents;

  (a) Suits arising out of Promissory Notes;

  (b) Suits for specific performance entitlement whereof happens to be based on registered written agreement;

  (c) Suits for recovery of money arising out of registered mortgage deeds or other documents;

(ii) Suits for eviction based on registered written agreement;

(iii) Injunction Suits/Declaratory Suits; and

(iv) Torts cases.

Now, what calls for pointed attention is that except for Injunction Suits, Declaratory Suits and Tort Cases, the remaining litigations filed every year can straight away be settled by adopting the scheme of ''Advance Decree''. The conclusive undertakings prepared with the consent of parties become operative after expiry of the period of contract and shall be the "Advance Decree".

## I. SOME ILLUSTRATIONS WHERE "ADVANCE DECREE" PERMISSIBLE

1. **Money Suit:-** 'A' wants to lend money to 'B'. At the same time 'A' wants to be sure that he gets back the money he proposes to lend together with interest without laws delays. Therefore 'A' will insist that he would lend money only to someone, who is willing to suffer an "Advance Decree". 'B' the borrower is in need of money and naturally he will be willing to follow whatever procedure that 'A' would adopt. Both 'A' and 'B' can opt for an "Advance Decree" which works out thus:-

   (i) 'A' and 'B' will execute a written document evidencing the loan and necessary conditions that govern the repayment.

   (ii) Immediately 'A' files a suit seeking an "Advance Decree" on the strength of the said written instrument. 'B' admits the suit claim and agrees to suffer a decree. The matter is immediately referred to the *Lok Adalat* and a decree is drawn up clearly mentioning that 'A' will have the right to execute the decree in case 'B' fails to return the money within the stipulated time. A conditional decree would be passed and the enforceability of the decree will be deferred till such time the condition is complied with. In other words, the decree becomes enforceable and begins to operate upon contravention of the condition imposed. Necessary legal fiction can be introduced by amending the relevant statute deeming that the decree is passed only on the date when it becomes enforceable.

Therefore here is the case where at or around the time of borrowing money itself a decree is passed conditionally. If the parties feel that there should be some security for repayment, the same thing can be incorporated in the terms of the decree.

2. **Eviction Suit:-** In case of an eviction suit, at the time of giving the property on lease or while entering into written lease agreement or may be during the pendency of a lease, the lessor and lessee can together seek an "Advance Decree". Where 'O', the owner wants to lease his property to 'L', the lessee, both of them will enter

into a lease deed complying legal requirements. Thereafter, 'O' files a suit seeking "Advance Decree" of eviction. The matter can also be referred to the *Lok Adalat* where an award can be passed immediately.

3. **Other situations:-**

   a. Whenever two parties assisted by able counsel enter into written agreements either for purchase or sale of property, this concept can be made use of profitably. What one needs is a fertile imagination to make best use of this concept.

   b. Similarly, this concept can also be used by bankers and other financial institutions disbursing loans on a large scale.

To espouse and advance the concept of "Advance Decree", a few amendments will necessarily have to be introduced in the Code of Civil Procedure, 1988, as hereunder:-

1. A new section 2 (2-A) needs to be incorporated after section 2 (2) CPC in the terms following:

> "2 (2-A) Advance Decree- "Advance Decree" means formal expression of the parties in writing which determines the conclusive rights of the parties without adjudication for its direct implementation between/amongst the parties and is in the form of registered document."

Relief of Advance Decree must necessarily be mentioned in every such agreement for which requisite changes are necessary in the Contract Act, 1872 and the Arbitration and Conciliation Act, 1996.

2. A new section 2(9-A) needs to be inserted after section 2(9) CPC in the following manner :

> "2 (9-A)- Advance Judgment- "Advance Judgment" means the consented statements given/prepared by the parties on the grounds of an advance decree."

3. A new Rule 4 (A) to Order XX needs to be incorporated after Rule (4) of Order XX thus:

> "Notwithstanding anything contained hereinabove, the parties to the suit shall be at liberty to invite a judgment in advance consensually in terms of section 2 (9-A)".

4. Corresponding amendments will consequently be required to be inserted in the Legal Services Authorities Act, 1987 empowering the *Lok Adalats* to pass an award pursuant to an "Advance Decree" and "judgment". In such cases care will have to be taken to pre-empt the facility of refund of court fees in cases disposed of by "Advance Decree". Conversely exorbitant court fees can be collected from the parties choosing to be bound by "Advance Decree". This will generate substantial revenue for the Government.

5. A penal clause should also be inserted in the Legal Services Authorities Act, 1987 empowering the *Lok Adalats* to levy and collect five times amount of the value of the suit in case of monetary claims and several lacs of rupees in other claims, in the event of misuse of the provisions of Advance Decree. It is also desirable to take affidavits to this effect from parties choosing the option of Advance Decree.

Major amendments in the Code of Civil Procedure, 1908- Insertion of a new Order, being Order XX-AB:

i. A separate Order, being Order XX-AB is required to be inserted in the C.P.C. for the purpose of dealing with "Advance Decree" and "Judgment".

ii Essentially Order XX-AB shall contain provisions relating to the passing of "Advance Decree" and "Judgment" based on mutual consent of the parties.

iii. The jurisdiction of the Court to grant "Advance Decree" should be made discretionary under the proposed Order XX-AB. The Court need not pass an "Advance Decree" in all cases merely on the ground of there existing a mutual consent between the parties. The *Lok Adalat* can also be clothed with the power and competence to pass an "Advance Decree" and "Judgment" which would be final.

iv. It should be made mandatory under Order XX-AB C.P.C. that only when the Court is satisfied that there is no extraneous inducement, threat or promise to the defendant and where the situation does not give rise to any inference to any reasonable prudent man that there is extraneous pressure against the consenting defendant, then only an "Advance Decree" should be passed.

v. The Judge passing the "Advance Decree" should also have the authority and competence to insist and include the presence of family members and probable legal representatives in the decree and only if all these persons have given their consent the decree shall be passed.

As noticed earlier, the Judiciary and the Judicial System in India are in the throes of a crisis of sorts. Truly speaking, revolutionary transformation is the supreme necessity of the hour. The scheme of "Advance Decree" as has been envisaged in the foregoing paragraphs, if and when implemented, would positively diffuse the chaotic situation to a conveniently large extent for it would act as a monitoring tool to ameliorate the anguish and sorrow of the depressed and disillusioned litigants. It is manifest from the proposed scheme that the disadvantages in adopting the proposed concept of "Advance Decree" is absolutely nil or at the best negligible. To the contrary the advantages thereof are manifold, rewarding and hassle-free. Many of the tedious and technical requirements associated with the trial such as framing of issues, prolonged examination and cross-examination of witnesses, moving in revision or miscellaneous appeals before a superior forum, costly waste of precious time in leisurely hearing of long-drawn arguments and the indefinite wait for the Judgment can conveniently be avoided.

This is preventive litigation. Preventive litigation or preventive law is a very important subject in the Indian context. In view of the fact that a law suit is viewed as most dreadful and dishonorable, preventive law or preventive litigation assumes a great degree of significance and discussion. The concept of "Advance Decree" provides a win-win situation to both parties. It is an exception to the adversarial system. There is no loser in the court room! All are gainers, including the lawyer. No emotional traumas. No loss of time and on the other hand there is certainty and definiteness in this system. The revenue generation from courts will increase by leaps and bounds. The rigours created by the hierarchy of appeals, first appeal, second appeal, special leave, etc. are conveniently avoided. In resorting to the concept of "Advance Decree" it is possible and practicable to see the elusive finished product. Lawyers will have great contentment as there will be a finality and closing of litigation forever. In fact, lawyers transform themselves into judges while drafting the "Advance Decree" and they can by using all their skills draft the decrees in the best possible manner. Inartistic drafting of such a decree, inability to visualize future contingencies would give rise to serious problems to clientele and the system will ensure that clients elect only the skilled lawyer for this purpose.

The fees of the lawyers are also assured. In fact, clients will be willing to pay the Advocate fee with satisfaction. There can be no scope for malpractice, no scope for fabrication of documents, no scope for false or frivolous defence no grumblings about inadequate hearings. Dishonesty in any quarter will have no room in a fool proof system like this. Admittedly, this system is not a substitute for the existing system. In fact, this system will supplement but not supplant the existing system. It will run parallel. As a matter of fact the litigation ends even before it starts. Rather, it starts with a view to end quickly and finally by preliminary negotiations and adjusting

issues by narrowing the controversy to the accepted claims in the agreement between the parties to the *lis*. In certain situations the right to avoid laws delays becomes an enforceable right. Under this system, the plaintiff will have the right to pick and choose only a law-abiding person as the defendant. It is only when the defendant consents to suffer a decree the implementation of this procedure would be possible. Once the concept is implemented over a period of time, each and every plaintiff will naturally insist for an "Advance Decree" and the defendant will then have no option except to become law-abiding and suffer a decree. Hopefully, upon continuous use and application of this concept, all landlords and all money lenders will definitely choose this system and consequently all lessees and all borrowers will transform themselves into law abiding persons by consenting to such decrees.

In the Indian context there are many financial institutions as well as people who by way of their business acumen have the propensity to advance huge amounts to the needy entrepreneurs but they are not willing to come forward on account of the failure of the Justice Delivery System in the matter of recoveries. This concept can very will bridge the gap and restore the confidence of such financial institutions and people.

In view of the humanitarian, people-friendly methodology reflected in the recipes of the concept of "Advance Decree" with its attendant consequential hassle-free litigation is the best remedy to curtail the docket explosion as also the exasperating wait for *lis* to reach finality.

Thus "Advance Decree" effectively and efficaciously eradicating the appalling docket arrears in court rooms and enabling methodology accelerates the finality to pending adjudications.

# NOTA–A PROGRESS OR REGRESS TO SOCIETY?

—*Alwyn Sebastian*[*]

*Abstract India has become agitated with the government in light of the numerous scams that have damaged the economy. The quality of candidates that are contesting for elections has deteriorated to the bare minimum. There is a need to allow voters the right to differ from the standing candidates. Although the law allowed NOTA, the confidentiality of the voter was lost. The apex court decision that introduced NOTA as an option in electronic vending machines, is a great step towards expressing one's discontent with the government without such violation. However, the law is still at its nascent stage and has left a lot of space for ambiguity. The article aims at addressing this ambiguity and laying down the true purpose and intent of the judiciary. India being a fast growing democracy needs a minimum government with maximum governance. For this, the incompetent leaders need to take a back seat and efficient leadership should take over. This article will prove how NOTA will help establish this in the long run.*

## I. INTRODUCTION

Free speech plays two vital roles. The first is well recognized. It is to shape public opinion and to influence elections that, in turn, determine the social climate and steer government (….) Free speech's second function is less understood. It buttresses the political system's legitimacy. It helps losers, in the struggle for public opinion and electoral success, to accept their fates. It helps keep them loyal to the system, even though it

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has disappointed them. They will accept the outcomes, because they believe they've had a fair opportunity to express and advance their views.[1]

Every right has its exceptions and limitations. In case of the right to freedom of speech and expression, theorists believe that the only means of correcting mischief is not by restricting speech but by allowing more speech.[2] American school of thought follows the ideal of absolute rights in regard to free speech.[3] The United States Supreme Court[4] believes that a right has to be construed in a manner that most befits the interest that it sought to achieve. The freedom of speech and expression is conferred with a view to keep the government on its toes and as long as a speech is not directed towards affecting the security of the nation, it must be protected by law.[5] After all, all rights are legally protected interests.[6] Every responsible citizen has an interest in the functioning of the state. The right to free speech is given in order to encourage the masses to take all necessary measures to assert their interests within legally permitted boundaries.[7] However these permissible boundaries can be stretched or constricted from country to country.

The concept of rights has been thoroughly debated and modified to suit the needs of the country whose constitution confers them.[8] The role of the state has to be interpreted in consonance with the rights that the citizens of the country possess. And these rights substantially depend on the political history of the country.[9] While some countries believe that the state's power vests in the ruler, others believe that it vests in its people.[10] With the

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1 Robert J. Samuelson, In Politics, Money is Speech, available at <http://www.washingtonpost.com/opinions/robert-j-samuelson-in-politics-money-is-speech/2014/04/04/075df4ec-bc18-11e3-9a05-c739f29ccb08_story.html> (visited on 9-3-2014).

2 J.S. Mill, On Liberty 23 (1869); See Louis Brandeis J., Whitney v. California, 71 L Ed 1095 : 274 US 357 (1927). He famously stated, "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular Government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

3 1st Amendment, Bill of Rights.

4 Schenck v. United States, 63 L Ed 470 : 249 US 47 (1919); Abrams v. United States, 63 L Ed 1173 : 250 US 616 (1919).

5 Schenck v. United States, 63 L Ed 470 : 249 US 47 (1919).

6 Serge L. Levitsky, Copyright, Defamation, and Privacy in Soviet Civil Law, Vol. 22, 429 (1979).

7 *Id*.

8 West Virginia State Board of Education v. Barnette, 87 L Ed 1628 : 319 US 624 (1943).

9 *Id*.

10 Citizens' participation has many functions in developing a strong system of local self-governance, as it is a central way to build awareness of the importance of the local structures

abrogation of colonialism, political leaders and freedom fighters realized the importance of freedom and independence and wanted to give back to the people, what they have been deprived of for centuries. This led to the introduction of a system of election.[11] The people of the country were given the right to choose their own leader. States turned into Republics, where the head of the state is elected by the people through universal adult franchise.

Various nations all over the world understood the importance of having a democratically elected representative to head the state instead of being controlled by someone who yields power on his own.[12] India got independence in the year 1947 from the British crown. In the process, India drafted its own constitution which came into force on the 26th of November, 1949. However, what is important to note is that a few of the drafters believed that given 70% of the population were illiterate, voting should be made a privilege and not a fundamental right.[13] They believed that only the educated masses were capable of making the right choice and therefore the right to vote should be reserved for them alone. They believed that if the uneducated mass were allowed to vote, they may not choose the best candidate as his ability to make a value judgment is relatively weak.[14] Not only will such a candidate fail to understand the efficacy of the standing candidate but will not be able to understand the purpose and responsibility of an elected candidate.[15] More importantly, such a voter may not even be aware of the structure and functions of the government and the Election Commission.[16]

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and a means of understanding the concerns and desires of the community. See Igor Koryakov & Timothy D. Sisk, A Guide for the South Caucasus: Participatory Democracy, available at <http://www.idea.int/publications/dll_caucasus/upload/english_paricipatory%20democracy.pdf> . (visited on 2-4-2014).

11 The modern "election", which consists of public elections of government officials, didn't emerge until the beginning of the 17th century when the idea of representative Government took hold in North America and Europe.

12 *Supra* note 10.

13 World Population Ageing, 1950 to 2050, United Nations Department on Economic and Social Affairs, available at <http://www.un.org/esa/population/publications/worldageing19502050/pdf/111india.pdf> (visited on 9-4-2014).

14 Pandit Thakur Dass Bhargava, Constituent Assembly Debates, Constituent Assembly of India (4-1-1949), Vol. VII, "In regard to the rest, I also wanted to propose an amendment to clause (6) that illiteracy should also be regarded as one of the grounds for not giving a vote on the basis of adult suffrage. If a person is illiterate, he should not be granted the right to vote. As a matter of fact my idea in moving this amendment was not to deprive any persons of their right of voting, because I am very much in favour of adult suffrage. I wanted that as the elections are not coming on before another two years or one year, by that time, every elector should educate himself and could at least know how to read and write, as in my opinion reading and writing can be acquired by any person in three months. It will give a great fillip to the drive for adult education and to the electors to make an attempt to know how to read and write if we condition the exercise of the right of voting to literacy."

15 *Id*.

16 *Id*.

Back in the early 1950s, voter awareness was also very poor.[17] The people did not even know the profile of the candidate for whom they are voting for. Votes were granted purely based on the party principles and not based on whether the candidate truly represents those principles or not. The drafters believed that the right to choose makes no sense if it is not informed.

Yet, there were many others who believed that irrespective of illiteracy, all citizens of the country had the right to vote. This discrepancy led to the Constituent Assembly omitting to include the right to vote as a fundamental right. This was left open for the next ruling government to evaluate the needs of the society and pass a law accordingly. The Constitution under Article 326 lays down that voting shall be done in accordance to the principle of adult suffrage.[18] The Constitution conferred upon the appropriate government, the right to frame additional restrictions to disqualify voters. This was done through the Representation of Peoples Act, 1951. The Act conferred on every citizen the right to vote and also laid down other restrictions such as unsound mind, corruption, lawful confinement, etc.[19] However, no such restriction was based on grounds of illiteracy. Pandit Jawaharlal Nehru was highly criticized in 1952 for his decision to conduct a general election based on the principle of adult franchise.[20] Yet the gamble worked and India had a democratically elected head.

## II. VOTING: A DYING VIRTUE

Given our country is a participatory democracy, we owe it to ourselves to take part in the polity of this country. Voting is the only mechanism to bring about a change in the country. India is one of the few countries that confers such a right to its citizens to vote from amongst a variety of political parties to form the government. Every member of the government is directly or indirectly a product of a citizen's vote. Yet today we see that the people of this country still fail to exercise their rights. The voter turnout in

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[17] Per person expense on LS polls rises 20 times since 1952, Zee news, available at <zeenews.india.com/news/nation/per-person-expense-on-ls-polls-rises-20-times-since-1952_917285.html> (visited on 22-2-2014).

[18] The Constitution of India, Art. 326 "Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage.—The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than eighteen years of age on such date as may be fixed in that behalf by or under any law made by the appropriate legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice shall be entitled to be registered as a voter at any such election."

[19] Representation of the People Act, 1951, S. 62.

[20] Report on the First General Elections in India, 1951-52, Election Commission of India, Vol. 1, p. 10, available at <http://eci.nic.in/eci_main/eci_publications/books/genr/FirstGenElection-51-52.pdf> (visited on 30-3-2014).

the past has been miserable. In fact, the highest turnout in the history of our country has been in the 1984 general elections, where 63.56% electors voted.[21] The last election in 2009 saw only 58.17% of electors exercising their right. Thus the majority government would represent only thirty to forty percent of the electors. Ultimately we see that the majority party that comes to power does not represent the concrete majority of the country. This situation is further worsened in case of o coalition government.

Why don't all the people of this country vote? Most of these electors don't vote because they are disappointed with the candidates that are contesting from their respective constituencies.[22] They believe that they rather not vote than to vote for a person who doesn't deserve their vote. It is a pseudo notion that responsible citizens vote. If a candidate does not fit into the profile of a true representative, it is rather more responsible for a voter to refrain from voting than to vote for such a representative. This is precisely why voting is not made compulsory in India.

## III. IMPORTANCE OF EDUCATION

Being the second fastest growing economy in the world[23], the educational requirements of Indian lawmakers have to be amended. The Constitution lays absolutely no restrictions with respect to educational requirements. This had resulted in poorly educated lawmakers taking national and international policy decisions in the Parliament. It is rather surprising to see that even senior leaders are poorly educated. For example, Karnataka's ex Chief Minister, Mr. B.S. Yeddyurappa has not even completed his bachelor's degree.[24] Astonishingly, 66.11% of the sitting Lok Sabha members are not even graduates.[25] This raises crucial questions with regard to the educational qualifications of members of the Parliament and State Legislatures. The educated voters are definitely not going to be incentivized to vote for a candidate whose educational qualification is far below par compared to his. Even illiterate voters strive to have qualified candidates representing their interests are the centre or state. Although it is unfair to generalize that all

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[21] Voter Turnout in India, International Institute for Democratic and Electoral Assistance, available at <http://www.idea.int/vt/countryview.cfm?CountryCode=IN> (visited on 9-4-2014).

[22] R. Michael Alvarez, Why Don't People Vote: Is Voter Participation at a new law? (21-12-2011) available at <http://www.psychologytoday.com/blog/the-psychology-behind-political-debate/201112/why-dont-people-vote> (visited on 9-4-2014).

[23] India still second fastest growing economy: Chidambaram, The Hindu, (27-7-2013), available at <http://www.thehindu.com/business/Economy/india-still-second-fastest-growing-economy-chidambaram/article4959820.ece> (visited on 10-4-2014).

[24] BJP: Know the Educational Background of Your Lok Sabha Candidates, India Today, available at <indiatoday.intoday.in/education/story/bjp-know-the-educational-background-of-lok-sabha-candidates/1/349561.html> (visited on 9-4-2014).

[25] Members of the XII Lok Sabha (Education Wise), Parliament of India, available at <parliamentofindia.nic.in/ls/stat/edu.htm> (visited on 9-4-2014).

members who have not graduated are incapable of making policy decisions, it is definitely presumable that a majority of them would find it challenging to debate on technical bills. Further education is the only objective and transparent method of determining the meritocracy of the candidate. In order to develop a minimum standard of understanding and comprehending, it is important that a candidate be educationally qualified.

One may argue that an illiterate candidate may still be aware of the problems of his constituency and such awareness may not necessarily be an offshoot of education. Nevertheless it is not only important for a candidate to know the problems of the people, but he must also be capable of understanding whether a proposed policy decision is the best suited mechanism to address that problem. It is in this respect that the current candidates lag behind. This is one of the reasons why candidates express their disinterest to vote.

## IV. CRIMINAL RECORD

Political parties that don't have a legitimate power control in the constituency usually resort to gaining the support of influential rowdies who yield coercive power in that constituency. These rowdies gain support through force and not through service. Hence, the people vote for such leaders fearing the consequences of them not coming to power. In the current Lok Sabha, nearly one third of the members have criminal records against them.[26] Not only have cases been registered against them but they have been convicted of offences in the past.[27] The main reason why this situation persists is due to the loop hole present in Section 8(4) of the Representation of Peoples Act, 1951.[28] The provision provides protection from disqualification for those convicted members who appeal against the court order within a period of three months from the date of conviction. This defect was however prospectively remedied on 12th July, 2013 through the Supreme Court

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[26] One third of Lok Sabha members are facing criminal charges: Association of Democratic Reforms, Live Mint & the Wall Street Journal, (3-9-2013) available at <http://www.livemint.com/Politics/r8aFm4hJfqQD9gAkZf46MN/Onethird-of-Lok-Sabha-members-are-facing-criminal-charges.html> (visited on 11-4-2014).

[27] *Id*.

[28] Disqualification on conviction for certain offences- (1)xxxx, (2)xxxx, (3)xxxx, (4) Notwithstanding anything in sub-section (1), sub-section (2) or sub-section (3), a disqualification under either sub-section shall not, in the case of a person who on the date of the conviction is a member of Parliament or the legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court. Also see Law breakers cannot be Law makers anymore; Supreme Court declares Section 8(4) of the Representation of the People Act unconstitutional, Live Mint, (10-7-2013), available at <http://www.livelaw.in/law-breakers-cannot-be-law-makers-anymore-supreme-court-declares-section-84-of-the-representation-of-the-people-act-unconstitutional/> (visited on 11-4-2014).

judgment in Lily Thomas v. Union of India[29] where the aforementioned provision was held unconstitutional as it was in violation of Article 14 and 21.[30]

The court held that the provision discriminates between sitting members and contesting candidates.[31] Although the ground of unconstitutionality was not based on moral standards, it was held unconstitutional nevertheless. Therefore from then on hence, any member who is convicted of an offence would be immediately disqualified from the parliament and will not be able to contest for a period of six years after the completion of his term of punishment.[32] In spite of this progressive judgment, efforts were made to annul the judgment of the Supreme Court and reinstate the aforementioned provision. The need of the hour is to cleanse the Parliament from such defective candidates. This way, people will be incentivised to vote, not out of force but out of hope and purpose.

## V. THE JUDICIAL REMEDY

The role of the judiciary is extremely criticized for being activist. But it is undeniable that the judiciary has uplifted the position of this country and upheld the rule of law through Public Interest Litigations (PIL) filed by public spirited persons and organizations like the Association for Democratic Reforms, Common Cause Society and People's Union for Civil Liberties. Similarly, the PUCL have filed yet another PIL in 2004 seeking to remedy the situation of poor turnouts during elections.[33] The petition was filed with a view to include a 'None of the Above' (NOTA) option in the electoral ballot.[34] The Supreme Court overruled its previous decisions in Union of India v. Assn. for Democratic Reforms[35] and People's Union for Civil Liberties (PUCL) v. Union of India[36], and held that the right to vote, although a statutory right; can be tested by constitutional principles.[37] Hence, the right to vote, not only includes the right to not vote, but also includes protection of secrecy of those electors who fail to exercise their vote.

Rules 41(2) & (3) and 49-O of the Conduct of Election Rules, 1961 were held unconstitutional as it required the presiding officer to record the thumb imprint or signature of those electors who do not vote in Form 17-A of the Rules. This in turn is in violation of the secrecy of voting which is fundamental to free and fair elections which is required to be maintained as

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29 (*2013*) 7 SCC 653.
30 *Id*. at 654.
31 *Id*. at 663.
32 *Id*.
33 *People's Union for Civil Liberties* v. *Union of India*, (2013) 10 SCC 1.
34 *Id*.
35 (2002) 5 SCC 294.
36 (2003) 4 SCC 399.
37 *Kuldip Nayar* v. *Union of India*, (2006) 7 SCC 1.

per Section 128 of the Representation of People Act, 1951 and Rules 39 and 49-M of the Conduct of Election Rules, 1961.[38] This also runs in contrary to international conventions such as the Universal Declaration of Human Rights[39] (UDHR) and the International Covenant on Civil and Political Rights[40] (ICCPR), both of which India has signed and ratified.

What is of consequence here is that from now on hence, voters who don't cast their vote will not be discriminated against. The state cannot force a citizen to vote by choosing from a limited number of prospectively incompetent candidates. A choice to refrain from extending support is also an expression of some sort. In cases where seventy percent of the voter population turns out, it is naturally assumed that those who did not turn out were either too lazy or were dissatisfied with the nominations. In case of people who are lazy, the State cannot and should not lend any support apart from spreading awareness. Nevertheless, in regard to the section of people who are dissatisfied with the candidates, it is important that the Election Commission be made aware of the voice of the people. Thus the court introduced the concept of NOTA. However the court did not lay down the consequence if NOTA receives the majority vote. Nevertheless, policy considerations propose that in case where all votes are reserved in the NOTA category, new candidates will be nominated and re-election will take place for that particular constituency.[41]

## VI. RIGHT TO EXPRESS DISCONTENT

The court examined the importance of Article 19(1) (a) of the Constitution in respect of the freedom of a citizen to refrain from expressing his support for a candidate. Since the freedom of speech and expression includes the 'right not to speak'[42], no citizen can be compelled to vote for a candidate against his will.[43] Therefore a citizen who exercises his 'right not

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38 *People's Union for Civil Liberties* v. *Union of India*, (2013) 10 SCC 1.

39 The will of the people shall be the basis of the authority of Government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. See Universal Declaration of Human Rights, 1948, Article 21(3).

40 Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) *** *** ***; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors. See International Covenant on Civil and Political Rights, Article 25(b).

41 Re-election if NOTA gets more votes, The New Indian Express, (25-10-2013) available at <http://www.newindianexpress.com/cities/hyderabad/Re-election-if-NOTA-gets-more-votes/2013/10/25/article1854486.ece#.U0eC4fmSz4I> (visited on 9-4-2014).

42 A.M. Taruschio, The First Amendment, The Right not to Speak, available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2018&context=ulj> (visited on 17-4-2014).

43 *Id*.

to speak' cannot be alienated of his right to secrecy enshrined under Article 21.[44]

However, writ lager the free speech argument has a much greater connotation. A voter that does not exercise his vote is not exercising his 'right not to speak' but is inadvertently expressing his discontent for the system. And by introducing the NOTA option, such an expression will be officially recorded without violation of confidentiality. Hence when the votes are counted, a specific percentage of votes under the NOTA option are recorded and disclosed. This way the people can express their discontent on a larger scale. This is definitely an incentivizing factor that will increase the voter turnout in the long run.

The right to express discontent does not mean the right to reject.[45] Even if one vote is cast in support of a candidate, that candidate is deemed to have won from that constituency. The policy is very ambiguous with respect to what would happen if NOTA receives the majority vote. Therefore, the Election Commission must take proactive measures in order to make NOTA an effective mechanism in the hands of the voters. Otherwise, NOTA will just remain a tool to alter the margin of victory. Further, NOTA was already implemented in the State elections of Rajasthan, Chhattisgarh, Delhi and Madhya Pradesh and has not proved to alter the result to a great extent.[46] Thus, immediate policy considerations will help prove the efficacy of the Supreme Court verdict. However, political parties like the Aam Aadmi Party (AAP) are advocating fresh elections if NOTA gets the majority in that constituency.[47] This step may propel their chances in the 2014 general elections.

## VII. THE 2014 GENERAL ELECTIONS

The 2014 parliamentary elections is clear and visible proof of the improvement in the voter turnout. Many constituencies have seen a dramatic improvement in the total number of voters as compared to the 2009 elections.[48] States and Union Territories like Delhi, Jammu and Kashmir,

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44 *R. Rajagopal* v. *State of T.N.*, (1994) 6 SCC 632.

45 Sunil Garodia, Why NOTA is not an Answer for your Anger, The Indian Republic, (9-4-2014) available at <http://www.theindianrepublic.com/tbp/nota-answer-anger-100031947.html> (visited on 9-4-2014).

46 *Id*.

47 To vote for None of the Above – Why and Now What?, You Speak India, available at <http://www.youspeakindia.org/to-vote-for-none-of-the-above-why-and-now-what/> (visited on 10-4-2013).

48 Ambika Pandit, Lok Sabha Polls, 2014: Delhi Electoral Turnout up by 25% over 2009 figures, Economic Times, available at <http://economictimes.indiatimes.com/news/politics-and-nation/lok-sabha-polls-2014-delhi-electoral-turnout-up-by-25-over-2009-figures/articleshow/33646858.cms> (visited on 10-2-2014).

Tripura, Mizoram, Uttar Pradesh, Kerala, Chhattisgarh, Karnataka, Haryana and Uttar Pradesh has seen more than ten percent rise in the total turnout in the elections.[49] This dramatic improvement may not however be solely attributed to the inclusion of the NOTA option. However the root of the issue is that voters have stopped hoping for change. Anger has replaced hope and faith and this is what drives people to the polling booths.

The rise in corruption, communalism and anti incumbency activities have irritated the people of the country. The voters have become politicized due to media exposure and this has encouraged participatory democracy. After all, only one day in five years do the people of this country have the power in their hands, both literally and metaphorically, to decide the fate of the Government. Only one day can they decide who they wish to be governed by. Only one day can they express their support or disappointment for standing candidates. The power of a democracy is best expressed when the country upholds the 'one man, one vote' notion.[50] A part of this progressive step is owing to the fact that from now on hence the voters can come to the polling booths and exercise their voting rights and yet not vote for a candidate. One must really appreciate this democratic leap in the electoral future of this country.

## VIII. AN INTERNATIONAL PERSPECTIVE

India has progressed gradually over the years and has made democratic inroads into the electoral system in the country. Many laws have been enacted by the centre to regulate unlawful election practices and reform the system. From granting greater powers to the Election Commission[51] in 1968 to maintaining strict auditing and accounting standards in election expenditure in 1996[52] to strengthening the grounds for disqualification of criminal politicians in 2013[53], the judiciary has helped establish accountability standards both during and after elections. In a world where many countries don't even recognize the concept of a democratically elected representative, India had globally advanced over the past six decades. India has successfully been able to conduct its fifteenth general elections and this indicates a great accomplishment.

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[49] Sneha Mary Koshy, Election 2014: Kerala Records 73.6% Voter Turnout, Highest since 1991, available at <http://www.ndtv.com/elections/article/election-2014/election-2014-kerala-records-73-6-per-cent-voter-turnout-highest-since-1991-506959> (visited on 12-4-2014).

[50] The Supreme Court: One-Man, One-Vote, TIME, available at <http://content.time.com/time/mag azine/article/0, 9171, 838157, 00.html> (visited on 11-4-2014).

[51] *R. Sivasankara Mehta* v. *Election Commission* of *India*, AIR 1968 Mad 234.

[52] *Common Cause* v. *Union of India*, (1996) 4 SCC 33.

[53] *Lily Thomas* v. *Union of India*, (*2013*) 7 SCC 653.

As far as the system of NOTA is concerned, India is one of the few countries that provides for such an option. Countries like Columbia, Ukraine, Spain and Bangladesh have all introduced this option. Although it hasn't been of marked significance, NOTA has been able to alter the margin of votes to a great extent against incompetent voters. India is definitely going to benefit out of this step in the long run.

## IX. NOTA – IN THE LONG RUN

The NOTA option in electoral booths may, as aforementioned, be a strong incentive for a good voter turnout and also act as a platform for the exposure of incompetent candidates. The nation needs to realize that good governance is an offshoot of suitable candidates. NOTA will help weed out these incompetent personalities in the long run. Even Mr. Anna Hazare, anti-corruption crusader, has vouched all voters to choose the NOTA option when there isn't a decent candidate.[54] When political parties realize that the people of this country have lost confidence in certain candidates, they will automatically deny giving a ticket to these candidates. Since political parties always seek for majority at the parliament, they will ensure that the candidates who represent their party fits into the profile of candidates that will make people cast their vote in favour of a candidate and not cast NOTA instead.

Therefore, the introduction of NOTA is only going to ensure a competent group of leaders at the centre of state. Political parties will now make a conscious effort to understand what kind of candidates, the people are looking for. With growing voter awareness measures and a steady increase in literacy rate, corrupt and uneducated politicians will no longer find a place in the polity of this country. NOTA will further catalyse this process and ensure a clean government in the long run.

## X. NOTA – A WASTED VOTE?

No vote is a waste and NOTA certainly does not make a wasted vote, official. Many believe that NOTA is not going to be of much use, as it does not give the voter the right to recall a candidate who does not perform according to expectations.[55] They are under the impression that one rather not exercise his vote than to take the effort of heading to the poll

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[54] Use NOTA Button if there is no Right Candidate: Hazare, Times of India, available at <http://timesofindia.indiatimes.com/home/lok-sabha-elections-2014/news/Use-NOTA-button-if-there-is-no-right-candidate-Hazare/articleshow/32209901.cms?> (visited on 9-4-2014).

[55] Sunil Garodia, Why NOTA is not an Answer for your Anger, The Indian Republic, (9-4-2014) available at <http://www.theindianrepublic.com/tbp/nota-answer-anger-100031947.html> (visited on 9-4-2014).

booth and technically not vote for any candidate. Further, most people think that NOTA would not make much of a difference as majority voters, over the past decades have come out to vote only when they are certain that a particular candidate supports their interest. There is also a certain sect of voters that are ardent supporters off certain political parties. These voters are going to support a candidature irrespective of his/her ability. NOTA can help the first category of voters who are not affected by predetermined notions.

For those majority voters who weigh out their candidates before choosing them, will have the opportunity to express their discontent if they are not satisfied with the candidature. It is a pseudo notion that a NOTA vote goes for waste. What they fail to understand is that NOTA gives them the leverage to exercise their right to vote and yet not support a candidature. It is a democratic expression of ill will towards the polity.[56] If the prospective members of the government are not good enough, the people should have the right to stop them. NOTA gives them this right. Therefore, NOTA is not a wasted vote but exposes as wasted candidature.

## XI. SECRECY OF VOTERS

The primary reason why the Supreme Court of India allowed the introduction of NOTA was to undo the violation of privacy that would exist under the old law.[57] However, the secrecy argument is a façade that conceals the free speech argument. Although the court was not proactive in accepting that the right to express discontent through voting is enshrined under Article 19(1)(a), it actively declared the unconstitutionality of certain Sections of the Representation of Peoples Act, 1951 and the Conduct of Elections Rules, 1961.[58] Yet, it is true that a non-voter's right to privacy should not be infringed merely because he did not wish to extend his support to any candidate.

The main reason why voting was not made compulsory is because it allowed the people of country to make a choice in case of dissatisfaction.[59] Voting is considered more of a civil duty than a right.[60] However by exposing a voter who exercises this choice, the State is defeating the whole

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[56] S.Y. Qurashi, NOTA option does not mean right to reject and won't affect election results, India Today, available at <http://indiatoday.intoday.in/story/nota-does-not-mean-right-to-reject-voter-election-evm/1/312960.html> (visited on 13-4-2014).

[57] Conduct of Election Rules, 1961, Rules 41(2) & (3) and 49-O.

[58] *People's Union for Civil Liberties* v. *Union of India*, (2013) 10 SCC 1.

[59] How can Voting be a duty?, available at <http://www.compulsoryvoting.org/duty.html> (visited on 9-4-2014).

[60] *Id*.

purpose of the right. Therefore a responsible voter's secrecy being maintained will always help democracy flourish in the long run.

## XII. WRIT LAGER DIMENSIONS – A FUNDAMENTAL RIGHT?

The whole concept of NOTA grew from the fact that voter population has become more proactive. The Peoples Union for Civil Liberties have filed this writ petition mainly in order to question the poor voter turnout in the 2009 general elections. The people of this country are refusing to make an effort to come out to vote. Irrespective of who they vote for, the same kind of atrocities continue. Corruption has grown at all levels. Election day has become the day where the public chooses who is going to drain their tax payers money. Since this anger and frustration cannot be expressed legitimately, it has manifested in the form of ignorance and indifference. NOTA will help undo this indifference by providing a platform where a discontent voter can express his frustration with the polity without compromising his right to vote.

In a larger sense, voting can now be made a fundamental right. Every citizen should be able to approach the Supreme Court in case there is a violation of one's right to vote. Further, any law that violates one's right to vote must be held unconstitutional as such a law cannot exist in a democratic set up. Now there is no reason why a voter would refuse to cast his vote. Therefore voting can now be made compulsory, notwithstanding exceptional circumstances involving health. Making voting compulsory does not take away the democratic nature of the country. Countries like Singapore, Belgium and Australia require compulsory voting.[61] This will help neutralize the inequalities of the marginalized sector. This step will help overcome many issues that results from complacency. When India as a whole votes, the true essence of participatory democracy that our forefathers dreamt off, will come true.

## XIII. CONCLUDING REMARKS

Voting has always been seen as a means to an end; the end being good governance. However, the end has not been reached through the current means. Therefore, NOTA provides for a platform wherein the people of this country can use the same means to achieve a desirable end. Therefore NOTA must be welcomed with both hands so that the country can see better days in the long run.

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[61] *Supra* note 54.

# CHALLENGES TO CYBER CRIME INVESTIGATION: A NEED FOR STATUTORY AND INFRASTRUCTURAL REFORMS

—*Raveena Rai*[*]

*Abstract The realm of cyber crimes is a relatively new complication to deal with in respect of substantive as well as procedural laws. The incessant rise in the number as well as type of cyber crimes has raised concerns over what laws are to govern these crimes. Investigation on the other hand is one of the biggest part of a criminal trial and goes a long way in proving the guilt of an accused. In India, with the introduction of the IT Act, 2000, numerous cyber crimes are enlisted and dealt with. However, the Act merely provides that the investigative agencies have the same powers as enshrined under the Cr.P.C. These powers, generally, are not enough considering the unique nature of cyber crimes. Cyber crimes investigation faces certain peculiar problems like the question of geographical determinancy, issue of jurisdiction, inadequacy of laws, breach of privacy during investigation, and lack of adequate investigative infrastructure. These are issues which are the concern of almost all investigative agencies all over the world. The aim of the paper is to highlight the challenges faced during cybercrime investigation. The paper analyses the jurisdictional issue, issue of privacy, investigative technologies, the collection and validity of evidence from a computer and similar challenges faced during investigating cybercrimes. The paper would also draw comparatives from all over the world, to suggest the reforms needed in the Indian cyber investigation system.*

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**Keywords:** Cyber Crimes, Investigation, Technology, Privacy, Jurisdiction, challenges, evidence, forensics, evidence.

## I. INTRODUCTION

As we are moving towards a life that is completely functioning through digital interfaces, and we become more and more dependent on the Internet and digital networks, there is a simultaneous rise of new vulnerabilities and new susceptibilities to crimes. Not only the conventional crimes can be replicated in the online world, also there is rise in novel crimes that exploit peculiar features of the digital world.[1] The growth of the digital era, has thus led to equal number of complications and challenges to the existing criminal law principles as much as it has rendered convenience to life.

The growth of the Internet has provided unmatched access to information all over the world. As computer - crimes greatly differ from traditional crimes, it is difficult to investigate them by conventional means. There are mainly three components to criminal investigations namely: information, instrumentation and interviewing.[2] However, such a bifurcation of components also fails to remain comprehensible in cases of cyber crimes.[3] This is mainly because unlike traditional crimes there is no bulk of physical evidence available for agencies to investigate upon, the crime scene is not confined to a small place, and there is also a requirement for technical skills to investigate the crime[4] since cybercrimes are more technical in nature. The growth of more complex hardware as well as software has led to further complications.[5]

The biggest problem faced is that majority of cybercrime cases go unreported.[6] One survey conducted by a private sector organization suggests that 80 per cent of individual victims of core cybercrime acts do not report the crime to the police.[7] Further, Internet crimes in cyberspace do not have any geographical or spatial restrictions given the ubiquitous nature of the Internet. There is cooperation required at various levels when different

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1 (New York University Press, 2007).

2 (5th Edn., Springfield, IL, 1980).

3 Sameer Hinduja, *Computer Crime Investigations in the United States: Leveraging Knowledge from the Past to Address the Future* 1 (2007).

4 Minny Narang and Gunjan Jain, *Cyber Crimes: Problems of Investigation and Solution*, 3 (2013).

5 (Charles River Media Inc., 2002).

6 Vineet Gill, *97% cyber crime cases in city go unreported: Cops*, , 30-10-2010, (28-10-2014, 10:04 a.m.), <http://timesofindia.indiatimes.com/city/gurgaon/97-cyber-crime-cases-in-city-go-unreported-Cops/articleshow/6838031.cms>.

7 Symantec, 2012 *Norton Cybercrime Report*, (28-10-2014, 10:05 a.m.), <http://now-static.norton.com/now/en/pu/images/Promotions/2012/cybercrimeReport/2012_Norton_Cybercrime_Report_Master_FINAL_050912.pdf>.

nations are involved.[8] Further, the difficulty also arises in criminal identification and securing of digital evidence.

Law enforcement investigation techniques are generally divided into coercive and covert techniques, the former involving powers of seizure and search, the latter involving interception and surveillance.[9] However, there are several problems that are encountered during employing these techniques when the question comes to cyber crimes. The issues that are generally raised are the determination of jurisdiction for trying the crime, getting and collecting all the evidence, the admissibility of such evidence in court, availability of specialized forces taking into account the technical nature of crime and evidence, the extent of search warrant, etc.

In India, the Information Technology Act, 2000 addresses the procedure to be followed in cybercrime investigations, and states that the provisions of the Code of Criminal Procedure, 1973, shall be followed in respect of entry, search and arrest made under the Act.[10] India has taken the initiative to counter the challenge of cybercrime investigation by setting up a Cybercrime Investigation Cell in Mumbai in 2000.

However, the field of cyber forensics is very nascent in India.[11] India is not even a signatory to the Cybercrime Convention, which renders the investigative processes that take place with respect to cybercrime, unclear and ambiguous. A lot is left to the discretion of the investigative agencies. The paper delves into the question whether the existing legal framework in India is sufficient to govern cybercrime investigations.

## II. JURISDICTIONAL ISSUES

Jurisdiction is one of the most preliminary questions that are raised in the court of law. The development of cyberspace has also affected the concepts of territorial sovereignty, non-interference, and relations among nations.[12] The case of cybercrimes is complex in terms of jurisdiction as the victim and the perpetrator may be situated in different jurisdictions, the server may be in a different jurisdiction, the state where the perpetrator is located might not even recognize that act as a crime etc. Thus, it is possible for a criminal in one country to perpetrate a crime against a person in another country, all the while using servers located in a third country.[13]

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8 22 (Nova Publishers, 2003).
9 (Kamal Law House, 2009).
10 Information Technology Act, 2000, S. 80.
11 239 (Select Publisher, 2001).
12 Prof. Atmaram Fakirba Shelke, *Jurisdictional Issues in Cyberspace and Its Implications*, 1 134, 135 (2012).
13 (2nd Edn., Academic Press, San Diego, 2000).

The traditional principles of sovereignty however are greatly challenged by the nature of cybercrimes, thus, jurisdictional and choice-of-law questions cannot be aptly solved by the 'settled principles' and 'traditional legal tools' developed for analogous problems in real space.[14]

Thus, in case of cybercrimes, impact is made on multiple jurisdictions at a time and various states can claim jurisdiction to try the offence. However, another pertinent question that is raised in the case of cyber crimes is that if one country tries the offender, other countries would not be able to provide remedy to their citizens.[15]

There are various instances where the courts have dealt with similar questions like in *R.* v. *Governor of Brixton Prison, , ex p Levin*[16], where there was massive fund transfer from the accounts of the customers to the perpetrators accounts in Citibank and one of the issues involved was whether the criminal act occurred in St. Petersburg, Russia, where the keys were pressed instigating the crime, or in Parsippany, US, where the changes in data occurred in the Citibank computers. It was held by the court that the crime occurred in the US on the basis of the communication link established between Levin and the Citibank computer meant that Levin's keystrokes were actually occurring on the Citibank computer.[17] This decision even went for an appeal to the House of Lords, where it was upheld.[18]

In another case where the act of gambling was legal in the state from which the online gambling site was maintained, and the online gaming company was brought under the jurisdiction of New York court and was prosecuted there on the basis that it has an office in New York.[19]

In the famous *Yahoo! case*[20], where a French Court issued orders against Yahoo! to take down certain contents that were available in France, Yahoo! challenged this order on grounds of lack of jurisdiction. However, the US Courts held that French Courts had jurisdiction in this matter going by the 'minimum contact rule'.

The Cybercrime Convention under Article 22(d) purports active nationality principle for determining jurisdiction in cases of cyber crimes, however

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[14] 99 (1st Edn., ICFAI University Press, Hyderabad, 2007).

[15] Prof. Atmaram Fakirba Shelke, *Jurisdictional Issues in Cyberspace and Its Implications*, 1 134, 138 (2012).

[16] 1997 QB 65 : (1996) 3 WLR 657 : (1996) 4 All ER 350.

[17] *Id*. at 363*a*.

[18] *R.* v. *Governor of Brixton Prison, ex p Levin*, 1997 AC 741 : (1997) 3 WLR 117 : (1997) 3 All ER 289.

[19] *People of New York* v. *World Interactive Gaming Corpn*., 714 NYS 2d 844.

[20] *Yahoo! Inc.* v. *La Ligue Contra Le Racisme et L'Antisemitisme*, 145 F Supp 2d 1168 (N.D. Cal. 2001).

it also leaves the principle for the determination of jurisdiction at the discretion of each state.

The approach followed in England for determining jurisdiction is where the 'last act took place in England or a substantial part of the crime was committed here'[21]. Computer Justice Act, 1993, Part I provides for jurisdiction on the basis of a 'relevant event'.[22] Thus, a court can seize jurisdiction if any 'relevant event' occurs in England and Wales even though all other such events may have occurred abroad.[23]

In the USA, the PATRIOT Act, 2001 amended the Computer Fraud and Abuse Act to extend the concept of a 'protected computer' to include 'a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States'.[24] Thus, even in US there is provision for extra-territorial jurisdiction in cases of cybercrimes, if the crime affects the state in the manner provided above.

For the purpose of cybercrime investigations, agencies often have to obtain access to data held on systems located in foreign jurisdictions.[25] Such instances are only addressed to in very few instruments[26] and legislations like in UK[27]. Even though the Convention on Cybercrime talks about investigation and surveillance and interception, but in international perspective it only contains vague terms like 'mutual cooperation'. Thus, cumulatively there is no special agreement between all countries regarding distinct jurisdiction for cyber-crimes, traditional jurisdictional standards have to be resorted to in order to resolve all Internet disputes.[28]

India also has a legislation that deals with the issue of cybercrime jurisdiction, i.e. Information Technology Act, 2000 under sections 1 and 75.

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[21] *R.* v. *Smith (Wallace Duncan) (No. 4)*, 2004 QB 1418 : (2004) 3 WLR 229 (CA).

[22] Computer Justice Act, 1993, S. 2(3).

[23] 303 (Oxford University Press, New York, 2007).

[24] 18 USC S. 1030(*e*)(2)(B).

[25] *Supra* note 23, at 310.

[26] Convention on Cybercrime, Budapest, November 2001, Articles 18-21; G8 Principles on Transborder Access to Stored Computer Data, adopted in Moscow, 1999, (15-10-2014) <http://www.coe.int/t/dghl/cooperation/economiccrime/cybercrime/Documents/Points%20of%20Contact/24%208%20Principles%20on%20Transborder%20Access%20to%20Stored%20Computer%20Data_en.pdf>; European Commission, "Proposal for a Council Framework Decision on the European Warrant for obtaining objects, documents and data for use in proceedings in criminal matters", COM (2003) 688 final, November 2003, Article 21.

[27] Regulation of Investigatory Powers Act, 2000, S. 27(3) and Intelligence Services Act, 1994 S. 7.

[28] Justice Surya Kant, "Cyberspace and Jurisdictional Concerns", *Uttarakhand Judicial and Legal Review*, p. 14, at p. 16.

Under the act, a person of any nationality can be booked if the crime is affecting a computer or computer system in India. However, the problems arise in the practical scenario when the evidence is to be obtained from systems that are present in other jurisdictions, as the evidence stored in computers is easy to impede. The process to be undertaken is as provided under sections 166A and 166B, and 188 of Cr.P.C, which is a cumbersome process and delays the investigation proceedings usually leading to destruction of evidence.[29]

Moreover, India is neither a signatory to the Cybercrime Convention, thus, it can not rightfully claim the 'mutual cooperation' as provided under the provision of the Convention, nor does India have any reciprocal arrangements with other states concerning cybercrime jurisdiction.

The example of ICANN[30] can be cited as a successful attempt to answer jurisdictional issues in domain name cases, however, the individuals have to accept the policy of ICANN to avail worldwide protection to their domain names.

Thus, the need of the hour is to establish an international arrangement to deal with jurisdictional issues of cybercrimes. Moreover, at the national level, the extra-territorial operation of cyber laws need to gain strength[31], and India also needs to enter into reciprocal arrangements with nations with respect to cybercrimes.

## III. SURVEILLANCE AND INTERCEPTION VERSUS PRIVACY

Intrusive surveillance and interception of communications are a major component in the investigation of cybercrimes.[32] On the other hand, the power of surveillance and interception by law enforcement agencies is an exception to right to privacy.[33] The right to privacy is a basic human right that is guaranteed in major international instruments[34], and various nations have also recognized this right either expressly through a legislation e.g.

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[29] Minny Narang & Gunjan Jain, *supra* note 4, at 74.

[30] Internet Corporation for Assigned Names and Numbers, a non-profit corporation, established in 1998, that is responsible and manages internet domain names at an international level, and also resolves issues of cybersquatting, and domain name ownership.

[31] Ashwani Kumar Bansal, *Reviewing Information Technology Legislation in India*, 1 JOLTI 1, 19 (2010).

[32] (Hart Publishing, Oregon, 2013).

[33] Lekshmi G.R., *Electronic Surveillance – A Tool for Invasion of Privacy*, 32, 224, 224, (2008).

[34] European Convention on Human Rights, Article 8; International Covenant on Civil and Political Rights, 1966, Article 17; Universal Declaration of Human Rights, Article 12.

Canada, New Zealand etc.; or implicitly through court decisions, e.g. in U.S.[35].

In India the method of interception was followed in compliance with the Indian Telegraph Act, 1885[36], under which authority was given to wiretap communications. Further the Indian Telegraph Rules, 1951[37] laid down the procedure to be followed for interception and surveillance. The question of breach of privacy arose in terms of these provisions in front of the Supreme Court, and the Court in its judgment[38] laid down certain guidelines to be followed while tapping by authorities and the tapping could only be done by the State and not private bodies.

With the increasing popularity of the Internet and the increasing rates of cybercrimes, law enforcement agencies have turned their attention to internet-communication interception and surveillance as a means of investigation of cybercrimes. The Information Technology Act, 2000 provides for interception of any information transmitted through a computer resource, and requires that users disclose encryption keys or face a jail sentence extending up to seven years.[39] The Act authorizes the Certifying Authorities to direct interception of any information transmitted through a computer resource if it is satisfied that it is necessary or expedient to do so in the interests of sovereignty or integrity of India, the security of the State, friendly relations with foreign states, public order, or for preventing incitement to the commission of any cognizable offence.

The Information Technology (Amendment) Act, 2008, gave power to the government to intercept any computer resource (mobile phones, computers, other communication devices), for the investigation of 'any offence'. Thus through this amendment, the government was given unlimited powers of interception.[40] The procedure to be followed during interception is laid down under the IT Procedure and Safeguards for Interception, Monitoring, and Decryption of Information Rules, 2009[41].

The Telegraph Act created two levels of circumstances that must be met before the interception of communications can take place; first, a public emergency must be in force or in the interest of public interest or safety; secondly, if the former is satisfied, interception may take place if it is found to be in the interests of the sovereignty and integrity of India, the security

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[35] *Munn* v. *Illinois*, 24 L Ed 77 : 94 US 113 (1876).
[36] Indian Telegraph Act, 1885, S. 5(2).
[37] Indian Telegraph Rules, 1951, Rule 419.
[38] *People's Union for Civil Liberties (PUCL)* v. *Union of India*, (1997) 1 SCC 301.
[39] Information Technology Act, 2000, S. 69.
[40] 226 (1st Ed., Nabhi Publication, New Delhi, 2010).
[41] IT Procedure and Safeguards for Interception, Monitoring, and Decryption of Information Rules, 2009, (25 Oct, 2014), http://cca.gov.in/cca/sites/default/files/files/gsr780.pdf.

of the State, friendly relations with foreign States or public order, or for preventing incitement to the commission of an offence. The Information Technology Act on the other hand, expands these powers by removing the condition of 'public emergency, public interest, public safety' and allowing for interception to additionally take place for the investigation of any offence. Thus, all emails and messages are open to the surveillance of the government. However, it would not be wrong to suggest that in absence of any regulations governing the implementation of section 69, the provision can be well abused by the regulating powers.[42]

In UK, a reasonable standards which are to be met before commencement of any interception are determined through internationally recognized standards like International User Requirements for the Lawful Interception of Communications[43] and standards developed by European Telecommunications Standards Institute[44]. US also recognizes similar standards through its legislations like CALEA[45]. The problem in India is that there is no standard set for the initiation of an interception, and this lead to a power to the authority to act arbitrarily. With this, the privacy of individuals is seriously under threat, which by way of court decisions has been included under Article 21 as an integral part of the Right to Life and Liberty[46].

There is a recently introduced Central Monitoring System (CMS) in India[47], where the agencies use keyword-based search to locate suspicious activities, which leaves millions of internet users in India vulnerable to surveillance by authorities. Under CMS, one government official will authorise interception and this will be reviewed and executed by other fellow officers in different agencies — but all within the government.[48] The Internet activities of India's roughly 160 million users are already being subjected to wide-ranging surveillance and monitoring, much of which is in violation

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[42] Lekshmi G.R., *supra* note 33, at 235.

[43] The International User Requirements were adopted by Member States of the European Union in the Council Resolution of January 1995, and have subsequently been adopted by the Governments of the USA, Canada, Australia and New Zealand.

[44] European Telecommunications Standards Institute, *Telecommunications Security; Lawful Interception; Handover Interface for the Lawful Interception of Telecommunications Traffic,* 2001.

[45] Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (Oct. 25, 1994), *codified at* 47 U.S.C. §§1001-10.

[46] *Kharak Singh v. State of U.P.,* AIR 1963 SC 1295; R. Rajagopal v. State of T.N.*,* (1994) 6 SCC 632.

[47] Phil Muncaster, *India Introduces Central Monitoring System*, , May 8, 2013, (October 26, 2014), http://www.theregister.co.uk/2013/05/08/india_privacy_woes_central_monitoringsystem.

[48] Shalini Singh, *Lethal Surveillance versus Privacy*, , June 22, 2013, (October 26, 2014), http://www.thehindu.com/opinion/lead/lethal-surveillance-versus-privacy/article4837932.ece.

of the government's own rules and notifications for ensuring "privacy of communications".[49]

At a time when concerns are being raised even in the UN General Assembly, where a consensus resolution strongly backing the right to privacy, calling on all countries take measures to end activities that violate this fundamental "tenet of a democratic society" was passed, India needs to take concrete steps ensuring privacy of computer communications.[50] The monitoring of communications through computer systems by investigative agencies, which is more or less unregulated, raises a huge area of concern, and needs to be regulated.

## IV. SEARCH AND SEIZURE ISSUES

Search and seizure constitutes a major part of crime investigation, in terms of information collection and gathering of evidence. The collection search and seizure of evidence in cases of cybercrimes is a little technical because there is involvement of electronic data. Moreover, it further involves storing of digital data.

### A. Search Warrants

Search warrants are essential to conduct search and seizure operations.[51] Investigating officers must obtain a warrant to search a cyber location and seize digital evidence.[52] In India, a search warrant is issued under section 93 of Cr.P.C., which lays down that a Disrict Magistrate or a Chief Judicial Magistrate on reasonable grounds as provided under the provision, issue search warrant, specifying the place or document to be searched.

There is no particular system or specific guidance for issuing cyber search warrant, a conventional search warrant may be obtained by a police officer to search for digital evidence. Thus, like a conventional search warrant, a cyber search warrant may be issued on the following grounds: First, that the Court has reason to believe that a person to whom summons have been issued would not present the document; Secondly, where it is not known in whose possession the document or evidence is; Thirdly, where the

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[49] Shalini Singh, *Government Violates Privacy Safeguards to Secretly Monitor Internet Traffic*, , September 9, 2013, (October 26, 2014), http://www.thehindu.com/news/national/govt-violates-privacy-safeguards-to-secretly-monitor-internet-traffic/article5107682.ece.

[50] United Nations General Assembly *The Right to Privacy in Digital Age*, (November, 2013), UN Doc A/C.3/68/L.45/Rev.1.

[51] *Supra* note 11, at 173.

[52] Alaeldin Mansour Safauq Maghaireh, *Jordanian cybercrime investigations: a comparative analysis of search for and seizure of digital evidence*, (2009) (October 26, 2014), http://ro.uow.edu.au/theses/3402>.

Court deems it appropriate to issue a search warrant for the purpose of any inquiry, trial or other proceeding.[53]

It is mandatory for a Magistrate issuing a search warrant to prescribe the offence and the scope of the search warrant, this is also known as the principle of specificity[54].[55] In cybercrime searches, particularity is more complicated and problematic; particularly in relation to the scope of data to be searched.[56] Investigators encounter incriminating data intermingled with thousands of files with no connection to the investigation and which cannot practicably be separated at the site of the search. This poses a great problem as computers store huge amount of information, and the evidence required is just like a needle hidden in a haystack[57], thus, any justification for search may justify an invasive look through computer files containing private information, or privileged files like lawyers files etc.

Such an incident took place in the U.S., where warrant was issued to find evidence of identity theft, and multiple media devices and computers were retrieved during the search. The investigator while searching for malicious files also ran a search for pornographic files on the media devices and computers and found child pornography on the accused persons computer. The person was now also charged with offence of possession of child pornography. However, the court in this case held that the search conducted using the forensic tools of child pornography on the computer systems was out of the scope of the search warrant.[58]

A solution to this problem can be that the investigators must focus on the scope of the original search warrant and if any other malicious matter is discovered during the search, which is not covered under the original search warrant, ask for a secondary warrant. Additionally, in case where the investigating officer finds something incriminating, which is out of the scope of the warrant, he must be in a position to prove that this was found during the routine procedures.[59]

Under the Cr.P.C., there is also a Deputy Superintendent of Police, or any other officer authorized by the Central Government, may also search and arrest without a warrant.[60] This section is generally used to target users of

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[53] Code of Criminal Procedure 1973, (CrPC), S. 93.

[54] Amy Evans and Martin F. Murphy, *The Fourth Amendment in Digital Age: Some Basics on Computer Searches*, 20, 1, 4 (2003).

[55] Code of Criminal Procedure, S. 93(2).

[56] Alaeldin Mansour Safauq Maghaireh, *supra* note 52, at 170.

[57] 238 (New York University Press, 2006).

[58] *United States* v. *Schlingloff*, 2012 US Dist. LEXIS 157272 (CD III 24-10-2012); *United States* v. *Carey*, 172 F 3d 1268.

[59] 259 (2nd Edn., Pearson, 2012).

[60] Code of Criminal Procedure, S. 80.

cybercafés.[61] This is another instance where the discretionary powers given to the investigative agencies are misused.

## B. Encryption

Encryption is the science of converting readable data into an unintelligible form, or turning plain text into cipher text, that cannot be read or understood by unauthorised persons, to protect the confidentiality, privacy and to prove integrity.[62] On one hand, it can be legitimately used to protect the fundamental human rights of both privacy and freedom of speech and to provide integrity, authentication, and confidentiality to electronic transactions.[63] On the other hand, even when the data or device has been lawfully seized by the investigative agencies, a lot of times the agencies face the problem that the data is protected by password or cryptography, which renders the data inaccessible. Thus, law enforcement officers investigating cybercrime often encounter an encrypted crime scene, which hinders the investigation process and criminal prosecution.[64]

In the case of the notorious hacker Kevin Mitnick, when he was arrested and his computer systems were seized, a lot of data in them was encrypted and the police could never access them.[65] This problem has been recognized and addressed by various jurisdictions. The UK law recognizes few modes of obtaining such protected information in intelligible form like, requiring the person himself to provide the protected data in intelligible form[66] or to provide his private key if special circumstances arise[67]. In the US, the question of obtaining the key from a suspect had always been a contentious issue, as these raised issues of self-incrimination etc.[68] Finally, Title 18 of the USA Code and the PATRIOT Act, gave no power to law enforcement agencies to obtain the encryption keys from a person on this very ground.[69] However, section 404 of the Domestic Security Enhancement Act, 2003 imposes penalties on those who knowingly and wilfully use encryption during commission of, or attempt to commit a federal felony.

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[61] Lekshmi G.R., *supra* note 33, at 234.

[62] 3 (Chapman and Hall, 2003).

[63] Simon A. Price, *Understanding Contemporary Cryptography and its Wider Impact upon the General Law*, 13 *International Review of Law Computers* 95, 95 (1999).

[64] 26 (Cambridge University Press, 2004).

[65] US DOJ Press Release, 9-8-1999, (28-10-2014) <http://www.ee.iastate.edu/~nsfweb/miller_modules/hazards/hack_mitnick.html>.

[66] Regulation of Investigatory Powers Act, 2000, (RIPA), S. 49(2)(*d*).

[67] RIPA, Sections 50(3)(*c*), 51.

[68] Amitai Etzioni, *Implications of Select New Technologies for Individual Rights and Public Safety*, 15, 258, 258 (2002).

[69] *Supra* note 64, at 67.

In India, there is no clarity on this issue apart from the power given to the Controller or Certifying Authority to ask any person to furnish any information.[70] Thus, the authorities have the power to issue directions to any person to render technical assistance or to extend any other facilities for the purpose of decrypting an encrypted file.[71]However, there is a conflict with the right against self incrimination[72], but considering the special nature of cybercrimes, the mandatory duty imposed on the holder of data does not seem to be unfair.

Law enforcement officers should be provided with the necessary power and defined procedure to deal with encrypted crime scenes.[73]

### C. Other Issues

Apart from these, the investigative agencies while conducting searches also must keep in mind that the electronic data is very sensitive, thus, it must be handled carefully and preferably in presence of an expert. Moreover, regard should be given to the storing, and preserving of data. The data must remain confidential and the chain of custody must also be kept in mind.[74]

## V. ELECTRONIC EVIDENCE ISSUES

Evidence is the means through which guilt or innocence is proven during trial. There is a peculiar problem that is faced by law enforcement agencies in the collection of electronic evidence, that is, electronic communications potentially relevant to a criminal act may include gigabytes of photographs, videos, emails, chat logs and system data. Locating relevant information within this data can be extremely time-consuming.[75] Evidence continuity is typically a question of fact and the chain-of-custody process is the mechanism applied for maintaining and documenting the chronological history of the evidence as it moves from one place to another.[76] Thus, while collecting digital evidence certain guidelines have been issued by the International Association of Computer Investigative Specialists, namely[77]:

1. Forensically sterile examination media must be used.

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[70] Information Technology Act, 2000, S. 69.
[71] *Supra* note 9, at 273.
[72] Constitution of India, Article 20(3).
[73] Alaeldin Mansour Safauq Maghaireh, *supra* note 52, at 169.
[74] *Supra* note 40, at 237; R.K. Tewari, *supra* note 11, at 198.
[75] UN Office on Drugs and Crimes, *Comprehensive Study on Cybercrime* 158 United Nations, Feb 2013, (28-10-2014), <http://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf>.
[76] *Supra* note 13.
[77] (Laxmi Publications, 2007).

2. The examination must maintain the integrity of the original media.
3. Printouts, copies of data and exhibits resulting from the examination must be properly marked, controlled and transmitted.

Moreover, considering the temporary nature of electronic evidence and the fact that it can be very easily modified[78], the admissibility of electronic evidence has always remained a contentious issue.

The United States has made the position clear on digital evidence recently, where the Supreme Court laid down certain criteria to ascertain which digital evidence would be admissible.[79]

In India, electronic evidences had the stature of documents and were treated as secondary evidences. The authenticity of the electronic evidences, were to be certified by a competent authority.[80] This procedure met the conditions of both sections 63 and 65 of the Evidence Act. In this manner, Indian courts simply adapted a law drafted over one century earlier in Victorian England. However, the coming of the amendments in the Information Technology Act, 2000 and the Evidence Act, 1872, has granted more significance and relevance to electronic records as evidences. For admissibility of electronic records, specific criteria have been made in the Evidence Act to satisfy the prime condition of authenticity and reliability of the evidence.[81] Sections 65A and 65B were added to the Evidence Act. Section 65B details this special procedure for adducing electronic records in evidence. It gives recognition to information printed on paper or stored in CD, or similar device.[82] Sub-section (4) of section 65B of the Evidence Act lists additional non-technical qualifying conditions to establish the authenticity of electronic evidence. This provision requires the production of a certificate by a senior person who was responsible for the computer on which the electronic record was created, or is stored. The certificate must uniquely identify the original electronic record, describe the manner of its creation, describe the device that created it, and certify compliance with the technological conditions of sub-section (2) of section 65B. Recently, the Supreme Court of India has given out a ruling[83] defining the scope of section 65B, where the court has laid down that section 65B is a special provision and is different from section 63 and 65 in respect of secondary evidence.

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[78] *United States* v. *Whitaker,* 127 F 3d 595, 602 (7th Cir 1997).
[79] *Lorraine* v. *Markel American Insurance Co.*, 241 FRD 534 (D. Md. 2007).
[80] *Bhairav Acharya, Anvar* v. *Basheer and the New (Old) Law of Electronic Evidence*, http://cis-india.org/internet-governance/blog/anvar-v-basheer-new-old-law-of-electronic-evidence>, (28-10-2014).
[81] 156 (Sweet and Maxwell, 2011).
[82] (McGraw Hill, 2008).
[83] *Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473.

## VI. COMPUTER FORENSICS

Digital forensics is the branch of forensic science concerned with the recovery and investigation of material found in digital and computer systems. To discover such traces digital forensics experts take advantage of the tendency of computers to store, log and record details of almost every action that they, and hence their users, perform.[84]

There is a huge backlog in the development of this field in India. Though there is the establishment of the Cyber Crime Investigation Cell, which has jurisdiction all over India, National Police Academy has prepared a handbook on procedures to handle digital evidence, and the establishment of the Indian Computer Emergency Response Team[85], the growth of systematic approach to cyber forensics is still missing. The instances have been seen where there have been huge blunders on part of cyber forensics like in the IPL Match Fixing case etc.

India needs a policy to promote skill development in digital forensics keeping in mind the rising number of cybercrimes every day.

## VII. CONCLUSION

According to Justice Yatindra Singh "regulating cyber space is daunting task of corpus juries of any country. Computer, internet and cyber - space- together known as Information Technology has posed new problems in jurisprudence. I have shown inadequacy of law while dealing with the information technology, changes induced by the information technology in the way we live, perceive and do business".[86] The existing laws were designed, having geographical location, tangible medium and physical environment in view. These laws are not suited to faceless, borderless and paperless cyberspace.[87] A Cyber penal code should be enacted which incorporates all these offences and an international treaty on cyber crime should be made and should be signed by the entire nations of the world in order to tackle the menace of cyber crime.

Thus, the evolution of the internet into something that is ubiquitous, has necessitated the need for review of already existing Criminal Procedure Code, as well as the training of skilled personnel to take up cybercrime

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[84] UN Office on Drugs and Crimes, *Comprehensive Study on Cybercrime,* 159 United Nations, Feb. 2013, (28-10-2014), <http://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf>. *Supra* note 13.

[85] *Supra* note 9, at 256.

[86] (5th Edn., Universal Law Publication, 2012).

[87] Minny Narang and Gunjan Jain, *supra* note 4.

investigation. The task of skill development has been listed as one of the main objectives of the National Cyber Security Policy, 2013[88].

There is also a need to raise awareness about the seriousness of cyber-crimes, so as to increase the reporting these crimes.

The National Cyber Security Policy, 2013 addresses the issue of building effective law enforcement capabilities. However, the implementation of the same needs to keep pace with the growing rate of the development of the Internet.

[88] Ministry of Communication and Information Technology, National Cyber Security Policy, 2013, File No. 2(35)/2011-CERT-In (29-10-2014), <http://deity.gov.in/sites/upload_files/dit/files/National%20Cyber%20Security%20Policy%20(1).pdf>.

# INTERNATIONAL TRADE LAW'S TRYST WITH INVESTMENT ARBITRATION – IMPLICATIONS ON THE MULTILATERAL TRADING SYSTEM AND THE ROAD AHEAD

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*Abstract This paper will primarily analyze the confluence between trade and investment. In particular this paper will focus on the various aspects under the WTO that also have a bearing on investment such as the GATS, TRIMS and TRIPS. This paper has gone on to analyze in specific, the issues related to wide ambit of BITs, with specific focus on umbrella clauses that allow for trade disputes to be subjected to investment arbitration. This becomes particularly problematic because now the multilateral trading system is seriously undermined, as even private parties can bring about trade disputes under the sphere of investment arbitration. This paper has further focussed on how trade remedies are used to enforce trade obligations, and how unilaterally GSP benefits accorded to developing members are removed, in order to coerce them to meet their obligations under the arbitral awards. In this regard, the paper will also analyze the on-going dispute between USA and Argentina, and determine the legality of US's actions with regard to coercing Argentina to meet their obligations under arbitral awards by removing GSP benefits granted to them. Finally, this paper will then go on to analyze the viability of these measures under the WTO system and comment on the consequences of such precedents to the multilateral trading system at large.*

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## I. OVERLAPPING ASPECTS OF INVESTMENT LAW UNDER THE WTO : AN INTRODUCTION

In the last half a century, there is no area of international law that has grown in terms of substantial scope as international economic law. In today's international business world, both international trade and cross-border investment rules and frameworks play an increasingly central role.[1] In the mid-twentieth century about 20 countries promoted the creation of the International Trade Organization (ITO) – an international institution with the intention to monitor and govern all central aspects of international economic relationships, including international commerce, flow of international investment, and the movement of workers across borders. The ITO however never came into being. The countries saved what they could from it in an instrument that set out a framework for negotiating trade concessions and, importantly, a set of rules that barred governments from raising barriers to the other members of the privileged club. Within a few years the membership to such an instrument, the General Agreement on Tariffs and Trade (GATT), had multiplied. Today, over 150 countries, totalling over 95% of the global GDP, are governed by those rules.[2]

A decade later, another trend emerged to fill yet another part of the void: the conclusion of bilateral investment treaties (BITs) designed to protect investors and attract investment flows into locations of comparatively low international standing. Those instruments proved extremely popular. In about 50 years, investment treaties have exceeded the mind-boggling figure of 2, 600 treaties, reaching virtually every corner of the globe.[3]

While the history of international economic agreements develops from one common trunk, there is to date no concept of 'international economic law' as a field of study that observes and analyses these international rules from a single, coherent standpoint. Following the failure of the Havana Charter which sought to regulate all key matters of international economic relationships under one single organization, international economic relations have followed at least two separate tracks that have led to the current existence of two distinct bodies of international law: *international investment law* and *international trade law*. Both of these two fields have grown and flourished separately from one another. Indeed, 'international economic law' does not seem to exist other than as shorter way to refer to two independent

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1 Martín Molinuevo, Protecting Investment in Services: Investor-State Arbitration versus WTO Dispute Settlement 3 (Kluwer Law International, 2011).

2 Jackson, John H., The World Trading System - Law and Policy of International Economic Relations 47 (2nd Edn., October 1997).

3 Sornarajah, M., The International Law on Foreign Investment 18-34, 204-18 (2004); Newcombe, A. and L. Paradell, Law and Practice of Investment Treaties, Standards of Treatment 8-50 (2009).

fields at once, avoiding the redundancy of the expression 'international trade law *plus* international investment law'.[4]

The WTO Agreement includes as an integral part a number of Annexes that contain Multilateral Agreements on Trade in Goods, a General Agreement on Trade in Services and an Agreement on Trade-Related Aspects of Intellectual Property Rights. Although the WTO Agreement does not include a separate legal instrument on foreign investment, some of the agreements annexed to the WTO Agreement pertain directly or indirectly to foreign investment.[5] In some cases such agreements provide for obligations of WTO members with respect to entry and treatment of foreign persons and enterprises or to the protections of certain property rights of foreign persons.

The General Agreement on Trade in Services (GATS) is the most prominent example of the incorporation of foreign investment in the WTO. The GATS essentially treats the supply of Services through foreign investment as a form of trade in services.[6] Although the GATS constitutes a multilateral framework covering foreign investment in service sectors, it differs significantly in its scope and architecture from other international agreements on foreign investment. Detailed analyses of the specific commitments scheduled under the GATS have demonstrated that the vast majority of such commitments do not provide for the elimination of existing restrictions to trade and investment in services.[7]

The Trade-Related Aspects of Intellectual Property Rights (TRIPS) requires WTO members to accord within their territories, a certain standard of protection to the intellectual property of the nationals of other WTO members. In respect of each category of intellectual property covered by the Agreement, it lays down the minimum standard of substantive protection that must be available in the national laws of each member.[8] The relationship between TRIPS agreement and foreign investment is evident from the fact that virtually all modern investment agreements which lay down the standards for the promotion and protection of foreign investment include

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4 Jorge A. Huerta-Goldman, Antoine Romanetti, WTO Litigation, Investment Arbitration, and Commercial Arbitration 49 (Kluwer Law International, 2013).

5 T. Brewer and S. Young, *Investment Issues at the WTO : The Architecture of Rules and Settlement of Disputes*, 1 J Int Economic Law 457 (1998); P. Sauce, *A First look at Investment in the Final Act of Uruguay Round*, 28 J World Trade 5, 5-16 (1994).

6 W. Zdouc, *WTO Dispute Settlement Practice Relating to GATS*, 2 J Int Economic Law 295, 297-299 (1999).

7 B. Hoekman, Assessing the General Agreement on Trade in Services, The Uruguay Round and the Developing Countries 116 [W. Martin and L. Winters (Eds.] 1996.

8 A.M. Wimmer, *The Impact of the General Agreement on Trade in Services on the OECD Multilateral Agreement on Investment*, 19 World Competition 109, 111-115 (1996).

intellectual property within the definition of investment.[9] As a result, the question arises as to the relationship between the application to intellectual property of rules contained in international investment agreements, on the one hand, and rights and obligations contained in international agreements of intellectual property rights, such as the TRIPS Agreement, on the other. An example of the interrelationship of TRIPS and investment agreements can be seen in the fact that the wide definition of the term expropriation in international investment agreements could be considered to prohibit certain measures that governments are explicitly permitted to take under the TRIPS Agreement, such as compulsory licensing.[10]

The Trade-Related Investment Measures (TRIMS) were negotiated during the Uruguay round on the basis of a mandate that focused on the trade effects of investment measures and precluded consideration of possible disciplines on investment measures per se. Article 2 of this agreement requires members not to apply trade related investment measures that are inconsistent with Article III or XI of the GATT 1994.[11] Thus the TRIMS Agreement does not go beyond the rules of GATS 1994 but essentially reaffirms and clarifies the applicability to trade-related investment measures of certain obligations of GATT 1994. The TRIMS agreement applies only to trade in goods and not to trade in services.

While relevant to foreign investment, the TRIMS Agreement focuses on measures that involve discriminatory treatment of products and does not govern the entry and treatment of foreign investment as such.[12] It is relevant to foreign investment in that it contains a mandate for future consideration of investment issues in the WTO.

Since there is considerable mention of investment related principles in the WTO Agreements there is a definitive overlap in the substantive rules in both the regimes. Concepts such as National Treatment and Non-Discrimination appear in both and there are numerous situations, where the same fact pattern may lead to a violation of either WTO or other trade rules, and one or more BITs.[13] Violations of WTO law themselves may play

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9 Bilateral Investment Agreement between the Government of Chile and the Government of Egypt for the Protection and Promotion of Investments.

10 A. Hertz, *Shaping the Trident: Intellectual Property under NAFTA, Investment Protection Agreements and the World Trade Organization*, 23 Canada- United States Law Journal 261, 261-325 (1997).

11 Panel Report, *European Communities — Regime for Importation, Sale and Distribution of Bananas*, WT/DS27/R/ECU (22-5-1997), ¶ 7.185.

12 Panel Report, *Indonesia — Certain Measures Affecting the Automobile Industry*, WT/DS54/R (2-7-1998), ¶ 14.73.

13 Pauwelyn, in Panel discussion on Trade and Investment Disputes (contributions by Ehring, Pauwelyn, Verhoosel, Barutciski and Odumosu) in F. Ortino & S. Ripinsky (Eds.); WTO Law and Process: Proceedings of the 2005 and 2006 Annual WTO Conferences 315 (London: British Institute of International and Comparative Law 2007).

a role or even form a basis for an investor-State dispute. Some BITs, for example, may include a standard of regulatory treatment that is defined by reference to existing or future rules of international law applicable between the Parties.[14] Moreover, even if such provisions 'incorporating' WTO law into the BIT do not exist, relevant or parallel provisions of WTO law may, in certain instances, play a role in the interpretation of the regulatory treatment obligations in the BIT.[15]

In a similar vein, the WTO Appellate Body has cited arbitral decisions on a few occasions, the key examples being *US- Final Antidumping Measures on Stainless Steel from Mexico*, an important and much discussed WTO Appellate Body report on the questions of past precedent. There, the Appellate Body notes that:

"*Dispute Settlement practice demonstrates that WTO members attach significance to reasoning provided in previous panel and Appellate Body reports. The legal interpretation embodied in these reports have come part and parcel of the acquis of the WTO settlement system. Ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent ase.*"[16]

To support its finding, the Appellate Body cited, *inter alia*:

"*The Decision of the ICSID Tribunal in Saipem S.p.A. v. The People's Republic of Bangladesh, [17] which states that 'the Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.*"

There are also examples where arbitral tribunals and the WTO have taken different approaches to a similar legal standard. One key example,

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[14] G. Verhoosel, *The Use of Investor—State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law*, 6(2) J Int Economic Law 493, 496 (2003).

[15] Vienna Convention on the Law of Treaties, *entered into force* 27-1-1980, Art. 31(3), 25 I.L.M. 543 (1986).

[16] Appellate Body Report, *US – Final Antidumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (20-5-2008), ¶ 160.

[17] *Saipem SpA* v. *People's Republic of Bangladesh*, (ICSID Case No. ARB/05/07) (2007), para 67.

of course, is the NAFTA Chapter 11 Panel in *Methanex* v. *United States*.[18] There, the tribunal justified a more narrow reading of the applicable NAFTA National Treatment rule by comparing the specific language of the NAFTA National Treatment test with that applied in GATT and the WTO, as well as based on a more teleological interpretation noting the '*rather precise criteria [allowing] the importing or receiving state relatively little discretionary scope with respect to the goods entitled to national treatment [under WTO law]'*.[19]

Though there are certain commonalities between both the regimes, they are inherently different. One of the key differences between International Trade and Investment regime is that trade regimes are state centric whereas investment regimes recognize the rights of individual investors who are allowed to invoke the arbitration clause in the BIT between two states. The WTO specifically recognizes the relevance and role of private actors affected by its rules, but it does not allow these private actors to bring a case before the WTO. The importance of this difference can be seen by the fact that an investor under investment arbitration has direct access whereas by contrast for an investor to bring an action under the WTO has to first try and convince his home government that bringing a case before the WTO would be in its interest.

Largely as a result of their more State-centric nature, WTO disputes (as opposed to the WTO dispute settlement mechanism itself)[20] continue to be characterized by the substantial role politics and international diplomatic and high level political relations play. Thus, for example, a government's decision or willingness to bring disputes against a particular other State, may depend at least in part on political and diplomatic considerations. The substance of a particular dispute may also be influenced, in part, by other, ongoing negotiations, or vice-versa and once a dispute has ended, the compliance phase will often see a return of politics and negotiation, for example in the form of retaliatory measures that are often heavily focused on imposing political pressure on relevant political constituencies within the responding government's borders.

This is not the case in investment arbitration which is based on Bilateral Investment Treaties entered into between two nations. Though the treaty is entered into between two sovereign nations, the dispute is brought before

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[18] *Methanex Corpn*. v. *United States of America* (UNCITRAL) (1976).

[19] J. Kurtz, *The Merits and Limits of Comparativism in International Investment Law and the WTO*, INTERNATIONAL Investment Law and Comparative Public Law 243, 259-260, 2010 [S. Schill (Ed.), Oxford: Oxford University Press 2010].

[20] N. Van Den Broek, *Power Paradoxes in Enforcement and Implementation of World Trade Organisation Dispute Settlement Reports Interdisciplinary Approaches and New Proposals*, 37 J World Trade 127, 140-162 (2003).

an arbitral tribunal by an individual investor against a host state by invoking the arbitration clause in the BIT. Therefore, there is little or no scope for politics or diplomacy to play a role in seeking recourse to investment arbitration.

The direct result of the difference in approach is the difference in the remedies available under both the regimes. The WTO system is focused on compliance, retaliation and on temporary solutions only. On the other hand, investment treaties recognize monetary compensation of the investor who has suffered the harm as a specific remedy.

Having seen the overlapping jurisprudence in the International Trade law and Investment regimes and some inherent differences, this paper will go on to analyze situations where each regime has been used to enforce the obligation under the other and the implications that follow as a result of this convergence.

## II. ENFORCING INVESTMENT ARBITRAL AWARDS THROUGH THE WTO SYSTEM

An investment arbitral award, is binding on the parties to a dispute. However, it often happens that there is no enforcement of arbitral awards. For the first time in history, the United States has withdrawn GSP benefits accorded to Argentina under the enabling clause of the WTO in response to Argentina's non fulfilment of obligations under an arbitral award, thus successfully coercing Argentina to meet its obligations under the arbitral award.

This section will firstly, analyze the aspects of the "Enabling clause" under the WTO and then go on to analyze as to the consequences of arbitral awards being used by member states in order to remove the preferences that they grant to developing countries under the mandate of the "Enabling clause".

The "Enabling clause"[21] stems from Article XXIV of the GATT. Article XXIV essentially acts as an exception to the Most Favoured Nation (MFN) principle as enshrined in Article 1 of the GATT. It is a regional integration exception[22]. The provision allows for countries to enter into preferential

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[21] The Enabling Clause is one of the "other decisions of the CONTRACTING PARTIES' within the meaning of Para 1(*b*)(IV) of Annex 1-A incorporating the GATT 1994 into the WTO Agreement; Appellate Body Report; *EC – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (7-4-2004), para 90 (hereinafter "EC-Tariff Preferences").

[22] Van der Bossche, Peter., The Law and Policy of World Trade Organization, Text, Cases and Materials 392 (2nd Edn., Cambridge University Press 2008).

trade agreements, customs unions or free trade areas, in order to foster and promote trade. The provision allows member states to negotiate the terms under which trade will flow between the nations in question, and no other member state can bring about an action for a violation of the MFN principle.

The Decision of the GATT Contracting Parties of 28 November 1979 on *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, commonly referred to as the 'Enabling Clause'[23], provides, in relevant part:

> "*1. Notwithstanding the provisions of Article I of the General Agreement, [Members] may accord differential and more favourable treatment to developing countries, without according such treatment to other [Members].*
>
> *2. The provisions of paragraph 1 apply to the following:*
>
> *a. Regional or global arrangements entered into amongst less-developed [Members] for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the [Ministerial Conference], for the mutual reduction or elimination of non-tariff measures, on products imported from one another.*"[24]

The threshold for the enabling clause is a lot less than Art XXIV, as complete reciprocity need not exist. In fact, paragraph 3 of the Enabling Clause 'merely' requires that: *"Any differential and more favourable treatment provided under this clause: a. Shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other [Members].*"

The Enabling Clause authorizes developed-country Members to grant enhanced market access to products from developing countries extending beyond the access granted to like products from developed countries.[25] Therefore it essentially provides for not just advantageous treatment in comparison to developed nations, it also gives the option to developing nations to refrain from reciprocity of obligations.

When negotiating the generalized system of preferences, the developed world, always has an upper hand. Countries such as the United States, the European Union, all include several conditions such as environmental

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[23] *Ibid*., Understanding on Article XXIV, pp. 393-4.

[24] See BISD 26S/203.

[25] Appellate Body Report, *EC – Tariff Preferences*, WT/DS246/AB/R (7-4-2004), para 99. On this point, the appellate body upheld the finding of the Panel; Panel Report, *EC – Tariff Preferences*, para 7.53.

protection, human rights, regulation of drug trafficking, international terrorism etc:-[26] Developing countries are forced to accept these conditions, in order to foster economic growth and development, as the tariff benefits they would get from the developing world, would outweigh the disadvantages. So, in a way, this becomes a backdoor entry for those obligations that otherwise cannot be included in the multilateral trading system as mandatory.

This has become particularly problematic as far as the United States is concerned. The United States has passed an amendment to the Trade Act, 1974[27], which stipulates that any developing country that wishes to obtain GSP benefits, must comply with all arbitral awards against the United States or American parties. Therefore if any country shows unwillingness towards the meeting of its obligations under an arbitral award, then GSP benefits may be denied.

The United States has actually used this recently against Argentina, which in turn has opened doors to enforcing arbitral awards using trade remedies. USA has alleged that Argentina has not acted in good faith in enforcing arbitral awards, and thus has withdrawn all GSP benefits provided to them, causing a net loss of about eighteen million dollars to the government of Argentina. Though this is nothing in comparison to the 300 million dollars that the government of Argentina owes to American corporations, it has reasonably succeeded in coercing Argentina to meet some of its obligations under the arbitral award as when the trade sanctions are considered in the context of other measures—such as limiting access to World Bank and Inter-American Development Bank credit and loan facilities or refusing to support the restructuring of Argentina's $7 billion Paris Club debt—the combined result may nudge Argentina toward compliance, or at least a post-award settlement.[28] The combined approach exposes Argentina to substantial risks, such as limiting its access to credit, altering its credit rating, constricting its export market, and discouraging foreign investment.[29]

The US is now actively pursuing claims against other countries as well. Chevron, in particular, is lobbying the United States Trade Representative to suspend Ecuador's preferential trade status under the Andean Trade Preference Act ("ATPA")[30] because of that country's failure to honour arbitration awards in Chevron's favour. USTR has warned that Ecuadorian President Rafael Correa that he is in jeopardy of losing ATPA beneficiary

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[26] See Trade Act of 1974, S. 502; 19 U.S.C. S. 2462 (2006).

[27] *Ibid*.

[28] Jorge E. Viñuales & Dolores Bentolila, The Use of Alternative (Non-Judicial Means) to Enforce Investment Awards Against States, in Diplomatic and Judicial Means of Dispute Settlement 76 [L. Boisson de Chazournes, et al. (Eds.), 2012].

[29] Roger Alford, *The Convergence of International trade and Investment Arbitration*, 12 Santa Clara journal of international law 35, (2013).

[30] See Andean Trade Preference Act, 19 U.S.C. Ss. 3201-3206.

status.[31] Ecuador is particularly vulnerable to losing its beneficiary status because the other three ATPA beneficiary countries have already, or soon will no longer be part of the program.[32]

Now, that it has been established that there is some amount of state practice which exists as far as enforcing arbitral awards through the WTO system, the viability of these measures needs to be examined.

The United States could take the defense that the exception under Art XX (d) of the GATT. This allows for member states to take measures that are necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the agreement.[33] The laws and regulations referred to here, represent rules that form a part of the domestic legal system, they do not cover obligations under an international agreement.[34] However ICSID awards are enforceable in the US domestic courts[35] and thus, by virtue of that right, they do form a part of rules that form a domestic system and hence the exception could be held to be a valid defense.

The second question that naturally follows is, whether GSP benefits are by themselves subject to MFN treatment, with respect to all countries that are similarly placed? This question was analyzed and answered in the EC-Tariff preferences[36] case.

In EC – Tariff Preferences, the question arose as to whether the European Communities could grant additional preferential tariff treatment to certain developing countries to the exclusion of others. Council Regulation (EC) No. 2501/2001 of 10 December 2001, the EC's Generalised System of Preferences Regulation[37], provides for five preferential tariff 'arrangements', namely:

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31 See *Sixth Report to the Congress on the Operation of the Andean Trade Preferences Act as Amended*, Office of United States Trade Representative (30-6-2012), available at <http://www.ustr.gov/webfm_send/3488.> last accessed on 15-9-2014.

32 *See* Proclamation No. 8323, 73 Fed. Reg. 72, 677 (25-11-2008) (removing Bolivia as an ATPA beneficiary country); Andean Trade Preference Act (ATPA): Notice Regarding the 2012 Annual Review, 77 Fed. Reg. 47, 910 (10-8-2012) ("[a]s of 15-5-2012, with the entry into force of the CTPA (United States-Colombia Trade Program Agreement Implementation Act), only Ecuador remained eligible for benefits under the program"); *See* Rosenberg at 528-29.

33 Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled, and Frozen Beef* WT/DS161/AB/R (11-12-2000).

34 Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308 /AB/R (6-3-2006).

35 See 22 U.S.C. S. 1650*a*.

36 Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, (20 Apr 2004).

37 See OJ 2001, L346, 1.

* The 'General Arrangements';
* Special incentive arrangements for the protection of labour rights;
* Special incentive arrangements for the protection of the environment;
* Special arrangements for least-developed countries; and
* Special arrangements to combat drug production and trafficking.

In the EC Tariff preferences case, the treatment is question was pertaining to drug trafficking. As the Drugs Arrangements did not provide identical tariff preferences to all developing countries, the Panel concluded that the Drugs Arrangements are inconsistent with paragraph 2(a) of the Enabling Clause and, in particular, the requirement of non-discrimination in footnote 3 thereto.[38] According to the Panel, the term 'non-discriminatory' in footnote 3 requires that identical tariff preferences under GSP schemes be provided to all developing countries without differentiation.[39]

On appeal, the Appellate Body reversed this finding.[40] After a careful examination of the text and context of footnote 3 to paragraph 2(a) of the Enabling Clause, and the object and purpose of the WTO Agreement and the Enabling Clause, the Appellate Body came to the conclusion that: "*the term 'non-discriminatory' in footnote 3 does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause. In granting such differential tariff treatment, however, preference-granting countries are required, by virtue of the term 'non-discriminatory', to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the 'development, financial and trade needs' to which the treatment in question is intended to respond.*"[41]

So from the above, it can be reasonably deduced that GSPs must be uniformly given to those countries that are similarly placed. Further, the whole purpose of the enabling clause is to promote development and to help the developing world in fulfilling their trade needs. So, the providing of GSPs by themselves is voluntary, but to provide them and remove them for the sake of enforcement of arbitral awards, truly seems against the purpose of promotion of development.

It can become difficult if this precedent is followed by more countries in the future, as this would greatly endanger the purpose of GSPs and would

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38 Panel Report, *EC – Tariff Preferences*, para 7.177.
39 *Ibid*., paras 7.161 and 7.176.
40 Appellate Body Report, *EC – Tariff Preferences*, para 174.
41 *Ibid*., para 173.

put developed countries on a high pedestal and would provide them with greater bargaining power as well.

## III. USING INVESTMENT ARBITRATION TO ENFORCE INTERNATIONAL TRADE RIGHTS

This section will deal with the possibility of using investment arbitration as a tool for enforcing rights under the WTO regime. The umbrella clause in bilateral investment treaties is the most plausible way of achieving this. Much has been written on whether the umbrella clause can be interpreted to include contractual rights under investment claims. However, the concept of including a state's other commitments (unilateral and multilateral) including WTO commitments under TRIPS, GATS, TRIMS to constitute an investment obligation within the meaning of the BIT umbrella clause is fairly new.

There is no one way of interpreting or understanding umbrella clauses. Their scope and ambit differ from one BIT to another depending upon the language used. Narrowly worded umbrella clauses are unlikely to include a state's contractual or trade obligation under an investment claim. In *SGS* v. *Philippines* an ICSID tribunal interpreted the language of the Switzerland-Philippines BIT, which required each Contracting Party to "*observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party*, " as limited to specific contractual commitments rather than legal obligations of a general character.[42]

Broad umbrella clauses, by contrast, committing a Contracting Party to observe *any obligation* it may have entered into with regard to investments can be interpreted to include non-investment obligations undertaken by the state for the purpose of protecting or promoting the investment. In *Noble Ventures Inc.* v. *Romania*[43] the ICSID tribunal interpreted the United States-Romania BIT, which provides that "*[e]ach Party shall observe any obligation it may have entered into with regard to investment*s." The Tribunals interpreted the broad umbrella clause to give investors treaty rights with respect to unilateral undertakings of the State embodied in municipal law.

In *CMS Gas Transmission Co.* v. *Argentina*, the tribunal concluded that utility tariffs designed to attract foreign investment were "*legal ... obligations pertinent to the investment.*"[44] In *LG&E* v. *Argentina*, the tribunal

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[42] *SGS Société Général de Surveillance SA* v. *Philippines, Decision of the Tribunal on Objections to Jurisdiction*, (ICSID Case No. ARB/02/6 ) (2004), paras 115-126.

[43] (ICSID Case No. ARB/01/11) (2005).

[44] *CMS Gas Transmission Co.* v. *Argentina*, Award, (12-5-2005), para 303.

concluded that abrogation of guarantees made to investors in a statutory framework gave rise to liability under the umbrella clause.[45]

In *Enron* v. *Argentine Republic*, another tribunal concluded that the umbrella clause referred to "*any obligations regardless of their nature*." This included not only contractual obligations, but also "obligations assumed through law or regulation" that are "*with regard to investments*."[46] In *Sempra Energy International* v. *Argentine Republic*, a tribunal found that major legal and regulatory changes introduced by the State as part of its public function constituted treaty violations under the umbrella clause.[47] Finally, in *SGS* v. *Paraguay*, a tribunal interpreted a broad umbrella clause as creating "*an obligation for the State to constantly guarantee observance of its commitments entered into with respect to investments of investors of the other party. The obligation has no limitations on its face—it apparently applies to all such commitments, whether established by contract or by law, unilaterally or bilaterally*."[48]

These adjudications by a tribunal establish that a state does not necessarily have to enter into an investment treaty or a contract pursuant to the investment to be bound by the obligations under the umbrella clause. Any legislative or executive measure undertaken by the state in relation to the protection, promotion and regulation of investments constitute unilateral undertakings which are covered by a broad umbrella clause.[49] This current tide of jurisprudence concerning umbrella clauses is in favour of such clauses encompassing host State commitments of all kinds.[50]

This line of interpretation by the tribunal can have wide implications on the WTO. If the WTO obligations are subject to investment arbitration it would enable private parties to initiate trade cases. These private actions through investment arbitration would render the whole idea of diplomatic protection under WTO mechanism pointless.

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[45] *LG&E Energy Corpn., LG&E Capital Corpn. and LG&E International Inc*. v. *Argentina* (ICSID Case No. ARB/02/1) (2006), para 175.

[46] *Enron Corpn. and Ponderosa Assets, LP* v. *Argentine Republic* (ICSID Case No. ARB/01/3 (2007), para 274.

[47] *Sempra Energy International* v. *Argentine Republic* (ICSID Case No. ARB/02/16) (2007) paras 310-313.

[48] *SGS Société Générale de Surveillance SA* v. *Paraguay* (ICSID Case No. ARB/07/29) (2010) para 72.

[49] Maria Cristina Griton Salias, Do Umbrella Clauses Apply to Unilateral Undertakings, in international investment law for the 21st century: essays in honour of christoph schreur 495 [Christina Binder, Ursula Kriebaum August Reinisch, and Stephan Wittich, (Eds.) 2009].

[50] Darius Chan, The High-Water Mark of an Umbrella Clause: SGS v. Paraguay, Kluwer Arbitration Blog (18-4-2012), Available at <http://kluwerarbitrationblog.com/blog/2012/04/18/the-high-water-mark-of-an-umbrella-clause-sgs-v-paraguay/>, last accessed on 16-9-2014.

This is the situation which has come up wherein a Hong Kong investor has brought in a WTO violation before an investment tribunal claiming it to be a breach of obligation under the umbrella clause. The dispute is with regard to Australia's plain- packaging laws. On November 21, 2011, Philip Morris Asia Ltd. filed an investment arbitration claim against Australia pursuant to the Hong Kong-Australia Bilateral Investment Treaty. The central contention of Philip Morris is that Australia's plain packaging legislation violated various international obligations. Among the claims it filed is one under the broad "umbrella clause" in the BIT, which provides that *"[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party."*[51] According to the Notice of Arbitration:

This [umbrella clause] obligation is broader than specific obligations … made by the host State to investors…. It also encompasses other international obligations binding on the host State that affect the way in which property is treated in Australia…. [T]he relevant obligations are those enshrined in TRIPS, the Paris Convention, and TBT. [Claimant] as an owner of the investments is entitled to expect Australia to comply with its obligations pursuant to those treaties. By adopting and implementing plain packaging legislation, Australia has failed to observe and abide by those obligations."[52]

In response, Australia argued that:

The meaning and scope of such provisions is a matter of great controversy. The umbrella clause in Article 2(2) cannot be understood a encompassing general obligations in multilateral treaties. It should be understood in such a way which restricts it to the commitments entered into by the Host State with regard to the specific investments. The obligations under the multilateral treaties … are not "obligations" which have been entered into with regard to investments of investors" of Hong Kong, but are rather obligations that operate on the inter-State level, with their own particular inter-State dispute resolution procedures.[53]

At this stage the dispute is ongoing and to say the least the claims made by the Hong Kong investor under the BIT umbrella clause seems to be

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[51] See Article 2(1) of the Agreement between the Government of Australia and the Government of Hong Kong for the Protection and Promotion of Investments, available at <http://www.legislation.gov.hk/IPPAAustraliae.PDF>, last accessed on 17-9-2014.

[52] *See* the Philip Morris Asia Ltd. Notice of Arbitration, paras 7.15-7.17 (21-11-2011), available at <http://italaw.com/sites/default/files/case-documents/ita0665.pdf.>, last accessed on 15-9-2014.

[53] *See* Australia's Response to the Notice of Arbitration, paras 57-58 (21-12-2011), available at <http://italaw.com/sites/default/files/case-documents/ita0666.pdf.>, last accessed on 14-9-2014.

colourable given the current jurisprudence on umbrella clauses. The question to decide is whether WTO commitments are obligations with regard to investments. The entire WTO regime is intended, according to the Marrakesh Declaration, to "lead to more … investment … throughout the world."[54] Therefore virtually all WTO commitments will influence investment climates and investor decisions in some form.[55] Also one can identify specific WTO commitments in TRIMs, TRIPs, and GATs, that provide significant investment protections. To the extent that umbrella clause commitments extend to unilateral investment undertakings, it would seem that at least some WTO commitments implemented in domestic legislation would satisfy the investment nexus. This potential convergence of trade and arbitration has profound implications for the resolution of WTO violations.[56] An arbitration panel liberally construing a broad umbrella clause could truly transform how WTO obligations will be adjudicated in the future.

Umbrella clauses in BITs create a private right of action and provide an easy path for unmeritorious claims to be initiated. This process circumvents the tedious procedure adopted by the WTO dispute settlement mechanism. The WTO, with limited exceptions, prohibits unilateral trade remedies. Article 23 of the DSU provides that Member States "*shall not make a determination to the effect that a violation has occurred ... except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding*." Investment arbitration is not a unilateral remedy imposed in response to a WTO violation, but it provides for a vehicle for compensating or attenuating the harm caused to investors without offending the WTO restrictions on unilateral trade remedies.

The goal of the WTO adjudication is to bring Member States into conformity with their trade obligations. The goal of investment arbitration is, consistent with traditional understandings of state responsibility, to "*wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*." Liberal interpretations of broad umbrella clauses that encompass investment commitments in WTO undertakings may prove to be an attractive avenue for future investors to circumvent the WTO procedure and bring their claims before an arbitral tribunal.

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[54] Marrakesh Declaration, 15-4-1994, Article 1.

[55] Pierre sauve, A First Look at Investment in the Final Act of the Uruguay Round, in globalisation and international investment 242 [Fiona Beveridge, (Ed.) 2005].

[56] Roger Alford, *The Convergence of International trade and Investment Arbitration*, 12 Santa Clara journal of international law 35, (2013).

## IV. CONCLUSION

The WTO system is the only system in the world that is successfully managing a compulsory jurisdiction system. The system works because the dispute settlement body of the WTO consists of WTO members, who have the authority to approve of measures, adopted panel reports etc.:- It is because the system is reasonably democratic, that the multilateral trading system isn't chaotic. Enforcement of arbitration awards through trade remedies, or using umbrella clauses to take trade disputes outside the WTO are both dangerous precedents. Using the umbrella clause to enforce trade obligations enables a private investor to avail WTO remedies without resorting to the Dispute Settlement Mechanism. The recent jurisprudence on the interpretation of the umbrella clause provides such opportunities to the investor. The GSPs being withdrawn for the purpose of enforcing arbitral awards becomes problematic if and when more developed nations continue to do so, which will put them in an advantageous position as compared to developing nations and would go against the purpose of providing GSPs in the first place. Both of these can be compared to unilateral measures and sanctions that are not taken under the auspice of the WTO. A member is always required to take a measure that is inconsistent with trade obligations, only after notifying it to the WTO and if they strictly fall within the exceptions so provided for. The dispute settlement process, being democratic, allows for a perfect blend of expertise as far as the panel and Appellate body go, but at the same time respects the will of all member states. This integrity of the trading system must be maintained and must not be encroached upon. There is definitely a great need to analyze more deeply with respect to the confluence of trade and investment in the WTO. It is only with greater dialogue, transparency and negotiation can some sort of multilateral solution to such cases and disputes be brought about.

# AN ANALYSIS OF THE JUXTAPOSITION OF THE INTERNATIONAL TRADE LAW AND INTERNATIONAL TAX LAW WITH REFERENCE TO DIRECT TAXATION

—*Namit Bafna*[*]

*Abstract—The article gives an earnest attempt to analyze the inter-dependence and overtones of trade law and tax law with reference to direct taxation. It looks into how the World Trade Organization keeps a check on the domestic direct taxation policies of the member states. The paper provides an overview of the Internal Tax Law regime which would be then examined in the backdrop of various provisions of WTO agreements; forming a relationship between Taxation and International Trade. After establishing the relationship, the paper will look into various WTO disputes regarding the direct taxation, which will lead to the further scope of analyzing the how WTO keeps a check on the domestic policies of its members and how members tend to divert from the same for their national interest.*

**Keywords:** WTO, Direct Tax, FSC/ETI, Discrimination.

## I. INTRODUCTION

Removal of obstacles to the cross-border movements of goods, services, labour, technology and capital has always been the ultimate goal of both, International trade law and International taxation. The rules concerning movements of goods and services are governed by the international rules concerning trade, while that of factors of production like capital and labour

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are governed by the rules regarding direct taxation. This combination of similar goals and analytical equivalence[1] between cross-border flow of productions and flows of factors make trade and direct taxation interrelated and interdependent.

It is interesting to note that despite having broad similar goals, both the trade law and tax law have evolved quite differently, both in terms of nature and timing. Rules concerning tariffs and non-tariff barriers have been negotiated multilaterally under GATT and WTO while those concerning direct taxation have been either decided unilaterally, to eliminate double taxation or negotiated bilaterally to adjust cross-border income flows. These bilateral negotiations have been based to a large extend on the OECD *Model Tax Convention on Income and Capital* (OECD model), which was result of working group established by the International Chamber of Commerce and the League of Nations in 1920's.[2]

Trade law jurisprudence recognizes effect of domestic taxation (especially direct tax) on the international flow of factors such as capital and labour. This has lead to the shift in focus of the multilateral trade negotiations to non-tariff barriers like internal taxations. This recognition of the potential effects of the taxation on trade has lead greater scrutiny of taxation under WTO. This recognition is reflected and enunciated in several of the multilateral agreements concluded at the Uruguay Rounds in 1993. These agreements reflects the growing realization on the part of governments all around the world, that multilateral rules need to play an increasingly central role in regulating the use of tax measures, especially for the international movement of goods, services, capital, persons and technology.

Apart from the provisions in the relevant agreements, WTO also closely monitors the tax policies, practices and measures of the members under its Trade Policy Review mechanism (TPRM).

This paper is organized as follows. Next section of the paper will provide an overview of the Internal Tax Law regime. It will cover evolution of international tax, division of tax base, problem of double taxation and international tax avoidance. Section *three* will examine various provisions of WTO agreements which deals with direct taxation; forming a relationship between Taxation and International Trade. Also, the paper will look into various common rationale and principles underlying international trade

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[1] This equivalence is explained by the Heckscher-Ohlin model. It basically shows how commodity movement and factor movements are substitutes for each other. For more discussion, *see* Robert A. Mundell, *International Trade and Factor Mobility*, 47 American Economic Review 321-335 (1957), <http://www.columbia.edu/~ram15/ie/ie-06.html> (last visited 16-9-2014).

[2] Michael Daly, The WTO and Direct Taxation (2005).

law and international tax law. After which, the paper will examine various methods adopted by domestic taxation regime to discriminate against international flow of goods and services. Section *four* will examine various WTO disputes regarding direct taxation. Main focus would be on dispute between EU and USA over USA's FSC/ETI schemes. Section *five* will give concluding remarks.

## II. INTERNATIONAL TAXATION

The latter half of the last century saw a major diplomatic achievement in terms of progressive reduction of economic barriers to international commerce cumulating into the establishment of World Trade Organization.[3] During the same time, domestic taxation was transformed due to integration of individual and corporate taxes. It is important to understand that, the Income tax regime has remained unchanged since 1920s. This combination of vicissitude in corporate and individual taxes and stagnation of the fundamental principles of International income tax regime has profoundly affected the extent to which a nation's income tax can discriminate against international commerce.[4]

With the growth of Internationalization and multilateral trading system, a check and balance system has been developed to limit the extent of such discrimination. International tax law and International trade law are two major but separate legal regimes which constitute the foremost international constraints on domestic income tax system from discriminating against international commerce and free flow of goods and services.

International Trade Law studies the international trade. International trade is the extension of commercial exchange outside a country's border to the international arena; it is as old as the system of nation-states.[5] 'World Trading System' refers to the various contemporary arrangements of trading relations between countries, and particularly the system of multilateral rules initiated at mid-twentieth century following two great wars and a worldwide economic depression.[6]

International tax law has been defined to combination of customary international law and international agreement. It covers right of a state to

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3 For discussion on evolution of International Trade regime, see International Trade and economic relations in a nutshell – Ralph H. Folsom, Michael Wallace Gordon, John A. Spanagole by Thomson West. For discussion on the evolution of free trade, see International Trade Law: Theory and Practice – Raj Bhala – 2001 – 2nd Ed.– Lexis Nexis.

4 Alvin C Warren Jr, *Income tax discrimination against international commerce*, 54 Tax L. Rev. 131 (2000).

5 Daniel Bethlehem, Donald McRare, Rodney Neufeld, Isabelle Van Damme – The oxford handbook of International Trade Law – 2009 – Oxford University Press, New York.

6 *Id.*

tax, tax treaties and dispute settlement where it is unclear what the respective taxing rights of two states are. It may extend to protocols for exchange of information on taxpayers.[7]

## A. International Tax Law

International tax regime is based on the distinction between the country of *source*, the country of *residence*. The division of the income tax base between two countries each of which has been thought to have a rightful basis for asserting jurisdiction to tax is a principal function of the international income tax system. The distinction between the tax base of residence and source country is said to be the basic task of the international taxation.[8]

Such division of the taxing jurisdiction originated in the working groups established by the International Chamber of Commerce and The League of Nation in the 1920's.[9] The aim of these groups was diminution of the International double taxation of income in order to reduce impediments to international commerce. The idea developed by these groups was implemented in series of bilateral tax treaties that ultimately evolved into the Model Convention promulgated by the Organization for Economic Cooperation and Development (OECD).[10] There are various other models like the U.S. Model Income Tax Convention and UN Double Taxation Convention between Developed and Developing Countries.

Apart from the *source-residence* tax base (popularly known as the traditional division of the Tax Base), various other alternatives division are used by the countries like on the basis of type of tax, level of tax, benefit financed, or location of consumption.[11]

## B. Understanding the traditional division of tax base

For several years, the standard developed – country division of the income tax base between these two taxing jurisdiction has been following:[12] The source country is given primary and exclusive jurisdiction to tax *corporate business* income, while the residence country is given primary and exclusive jurisdiction to tax *investment income*, such as interest, dividends,

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7 QURESHI, A. H. (1994). The public international law of taxation: text, cases and materials. London, Graham & Trotman.

8 Michael J. Graetz and Michael M. O' Hear, The "original intent" of US International Taxation, 46 Duke Law Journal – 1997.

9 *Id*., at 1066-89.

10 http://www.oecd.org/tax/treaties/1914467.pdf - CITE OECD MODEL

11 *Supra* at 4.

12 *Id*.

and royalties, received from corporations.[13] The source country taxes the business income because the country of residence either forgoes taxing such income or taxes only to the extent to tax rate exceeds that of the source country.[14]

Such a division is consummated by a fine combination of domestic tax law and bilateral tax treaties. The domestic law of the source country typically taxes incomes of business arising within its borders, irrespective of who produces it; the residence country typically either exempts foreign business incomes or provides a credit for foreign incomes taxes, limited to the amount of the residence – country tax on the foreign income. Wherein there are several producing or source countries, the division of such countries follows from the price charged by the parties. The rationale invokes of the use of such traditional division are the norms of reciprocity, non discrimination and neutrality.[15]

## C. International Double Taxation

The problem of double taxation is as old as the First World War. Many countries began to levy income/profit tax for the first time. As each country was developing its own tax system independently, there emerged a difference in approach to relieving international double taxation. Various treaties were negotiated at Central Europe, British Europe and United States to come to a harmonized solution for the problem of double taxation.

The problem of double taxation arises when a country or an individual understates activities in another country, which exposes them to more than one set of tax rules which leads to chances of being taxed twice on the same profit or income. This is known as double taxation. There are two types of double taxation, economic and juridical.[16]

Economic double taxation includes any situation where an amount of income or profit is taxed twice. For e.g. when shareholders are taxed on the dividends they receive which is paid out of post-tax profits. Juridical double taxation occurs when more than one country attempts to tax the same income or profit. It is result of 'jurisdictional' conflict in the rules that are used to determine source or residence.[17]

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[13] For discussion on the debate for the greater allocation of the tax base to the source countries, *See* Klaus Vogel on Double Taxation Conventions, Third Edition- Wolter Kluwer - 1997.

[14] For better understanding on the division of tax bases, see Boris I. Bittker – A "COMPREHENSIVE TAX BASE" as a goal of Income Tax Reform – Harvard Law Review- 1967 of volume 80 – umber 5.

[15] *Supra* at 4.

[16] Angharad Miller & Lynne Oats, Principles of International Taxation 69 (2nd Edn., 2009).

[17] *Id.*

Double tax reliefs are used to avoid the problem of international double taxation. The country of residence acts to prevent or reduce the extent to which its residents are taxed more than once. As no two countries have exactly same tax systems, they enter into double tax treaties to avoid the differences in their respective tax systems. They decide how their tax system will interact, so as to ensure that residents of each country get the double tax relief to which they are entitled. The general rule is that the provisions contained within treaties override those of domestic law; this is also coupled with the international interpretations of the common terms use in the treaties. For instance, the interpretation of the term 'beneficial ownership' as provided in *Indofood International Finance Ltd.* v. *JP Morgan Chase Bank NA*[18] is now internationally accepted.

## D. International Tax Avoidance

International Tax Avoidance refers to the use of legal methods to lower the amount of income tax.[19] This is mainly done through two methods: tax havens and transfer pricing. Laws to curb such practices are very dynamic and are not obsolete hence keeping a tight check on such practice of tax avoidance.[20]

### *Tax Havens*

When providing its tax residents with relief from double taxation, a country will want to ensure that its residents are not avoiding tax entirely, If a country chooses the exemption method in its simple form, this could lead to no tax at all being paid on income arising outside the country of residence in a tax haven.[21] Some Multinationals set up wholly owned tax – haven affiliates in countries with low tax rates.[22]

Tax havens are said to have low or nil tax, secrecy in banking and commercial transactions, good communications facilities, political stability favourable disporting for multilateral tax planning and a handy location.[23] Anti- Haven legislations keep a check on such practice.

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[18] 2006 STC 1195.

[19] Investopedia, Tax Avoidance Definition Investopedia (2009), available at <http://www.investopedia.com/terms/t/tax_avoidance.asp> (last visited 16-9-2014).

[20] For instance, OECD is coming up with a single set of tax rules to curb such practices. *See* Colm Kelpie, *OECD planning big crackdown on multinational tax avoidance – See more at* <http://www.independent.ie/business/irish/oecd-planning-big-crackdown-on-multinational-tax-avoidance-30590681.html#sthash.gjaBIZnz.dpuf>, Independent.Ie, 2014, <http://www.independent.ie/business/irish/oecd-planning-big-crackdown-on-multinational-tax-avoidance-30590681.html> (last visited 16-9-2014).

[21] *Supra* at 7.256.

[22] Kirt Charles Butler, Multinational Finance (1st Edn., 2012).

[23] Gordan R.A. (1981) Tax havens and their use by the US Taxpayers – An Overview.

### *Transfer Pricing*

Transfer pricing is one the principal problem in international tax law. The term refers to prices in transactions between associated enterprises.[24] Tax law regulation of transfer pricing can be categorized as rules on: (1) allocation norms (2) enforcement, and (3) dispute resolution.[25] Allocation norms cover the substantive rules on the allocation of income between associated enterprises through the arm's length principal.[26] Enforcement rules cover the procedural rules which are intended to improve the ability of the tax authorities to enforce – and encourage tax payers to comply with – the arms length principle. Dispute settlement covers procedural rules intended to prevent and help resolve problems of double taxation that arise from the application of arm's length principle.

## III. RELATIONSHIP BETWEEN INTERNATIONAL TRADE LAW AND INTERNATIONAL TAXATION LAW

Despite the fact that, both legal regimes have developed severally, there are many corollaries and overlaps between international trade and taxation. The relationship between both the regimes are analogous are various levels and instances, which can be exemplified in both theory and practice.

Primarily, there is a close relationship between a country's trade deficit or surplus and its net foreign investment. A country with trade deficit is likely to finance its trade deficit by attracting more foreign investment. This will require harmonization between trade policies affecting imports and tax policies affecting international investments.[27] Another perspective to it could be examining the relationship between liberal trade and flow of capital. There is a win-win situation when a country with high return on investment imports capital from a country with a low return on investment. Capital mobility also creates opportunity for portfolio diversification, risk – sharing and specialization in the provision of financial services.[28]

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[24] Jens Wittendorff, Transfer Pricing and the Arm's Length Principle in International Tax Law (1st Edn., 2010).

[25] *Id.,* at 10.

[26] Arm's length principle states that the prices charged within multinational groups of companies or between companies and their permanent establishments must be comparable to those that would be charged between independent enterprises.

[27] Hans-Werner Sinn, *US tax reform 1981 and 1986: Impact on international capital markets and capital flows*, National Tax Journal 327-340 (1988).

[28] Michael Mussa et al., Capital Account Liberalisation: Theoretical and Practical Aspects 12 (1998).

There are various other analogies among both the legal regimes. One of such is that of *distortionary tariffs – taxes*.[29] It is a general rule in trade jurisprudence, that import tariffs should not lead the exporting country to respond with export subsidies, because the importing country is harming itself by taxing imports. Applying this reasoning to taxation could lead to the conclusion that a capital – exporting country should not respond to tax-arguably ruling out the standard practice of exempting foreign income or crediting foreign taxes.[30]

Another equivalence would be between a consumption tax and tariff added with production subsidy.[31] Another possible equivalence could be between general tax on consumption and a tariff plus a tax on domestic production.[32] Therefore to understand how a free country uses its income tax or direct tax regime to discriminate against international commerce requires consideration of both legal regimes.

## A. WTO Agreements and Taxation

### *The General Agreement on Tariffs and Trade (GATT), 1944*

A member is not allowed to raise border tax above rates (bound rates) agreed at GATT.[33] The principle of Non-discrimination; Most favoured Nations and National Treatment imposes concern over the import barrier on goods only. Until recently before the FSC/ETI decision, it was believed that GATT should only be interpreted to include indirect tax.[34]

### *Agreement on Trade-Related Investment Measures (TRIMs)*

Sovereigns provide various incentives to attract foreign investment, ranging from tax to various non-tax incentives. Such incentives might come with various prerequisites such as national priorities, use of local content

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[29] Distortionary taxes are taxes that affect the prices of items in a market. For example, a tax on pen might convince people to switch to pencil as a substitute. An overlap could be substitutability of production subsidies and tax incentives – both governed under the WTO subsidy code.

[30] Joel B. Slemrod, *Free trade taxation and protectionist taxation*, 2 International Tax and Public Finance 471-489 (1995).

[31] Michael Keen, *The welfare economics of tax coordination in the European Community: a survey*, 14 Fiscal Studies 15-36 (1993).

[32] Joel Slemrod, *Tax Cacophony and the Benefits of Free Trade*, *in* Fair Trade and Harmonisation: Prerequisites for Free Trade? 283 (Jagdish N. Bhagwati & Robert E. Hudec, 1st Edn., 1996).

[33] GATT 1994: General Agreement on Tariffs and Trade 1994, 15-4-1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1-A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

[34] John H. Jackson, World trade and the law of GATT 297 (1st Edn., 1969).

and labour and export performance requirements etc. Such conditions have tendencies to distort trade just like quantitative restrictions and export subsidies. Conditions of such a nature are known as trade related investment measures (TRIMs).

The TRIMs agreement[35] keeps a check on the WTO members for not applying TRIM that is inconsistent with Articles III and XI of GATT, which are National treatment and General Elimination of Quantitative restrictions respectively. The agreement divides the TRIMs into four categories. They being, benefit that are conditional upon local content requirement, the conditioning of a firm's ability to import on its export performance, foreign exchange balancing requirements or restrictions and domestic sales requirements involving restrictions on exports. Therefore, any measure whose compliance comes with an a*dvantage* shall be prohibited TRIMs. The advantage has been interpreted to include tax reliefs.[36]

Nevertheless, the scope of the agreements is limited as it does not prevent countries from attaching export performance requirements to tax or non-tax incentives for investment. Nor does it prevent them from requiring that a minimum percentage of equity be held by local investors or that the foreign investor must be bring it the most up-to date technology or must conduct a certain amount or type of R & D locally.[37]

***Agreement on Subsidies and Countervailing Measures (SCM)***

This agreement oversees the provisions of WTO members in respect of goods and subsides. It enunciate the meaning of term 'subsidy' as a financial contribution by a member of the WTO or by an public body within the territory of a member which confers a benefit. Such contribution include revenue forgone as consequences of tax incentives, transfer of funds, actual or potential provisions of goods and services other general infrastructure, purchases of goods and price support.[38]

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[35] TRIMS Agreement: Agreement on Trade-Related Investment Measures, 15-4-1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1-A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 143 (1999), 1868 U.N.T.S. 186 [hereinafter "TRIMS Agreement"].

[36] Indonesia — Certain Measures Affecting the Automobile Industry (7-12-1998) WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R.

[37] *Supra* at 2, 6.

[38] Agreement on Subsidies and Countervailing Measures, 15-4-1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1-A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 231 (1999), 1869 U.N.T.S. 14. Article 1.

The SCM agreement divides subsides into *prohibited* and *permissible* subsidies. Subsidies contingent in export performance i.e. export subsidies and on the use of domestic goods over imported goods are prohibited. Permissible subsides are divided into actionable and non-actionable. Export subsidies are illustrated in the list mentioned in Annex 1 of the agreement. Items (e)[39] and (f)[40] in the list has reflections of direct taxation.

## IV. AGREEMENT ON AGRICULTURE (AOA)

The WTO Agreement on Agriculture established the framework of new rules and disciplines on market access, domestic support, and export competition, also known as three pillars of agricultural support.[41] The AoA establishes subsidy disciplines in accordance with commitments to a progressive reduction in levels of subsidization which is achieved through reduction in aggregate levels of support. The agreement segregates the subsidies provided. Various subsidization which is acceptable is put under "green box" measures while those not acceptable are put under "amber box". *Green* subsides are those that have no or minimal trade distorting effects or effects on production and does not have the effect of providing price support to producers. *Amber* subsidies include direct payments under production – limiting programs.

## V. GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

GATS is the first ever attempt to liberalize trade in services.[42] The principles of most favoured nation and National treatment are as important in GATS as for other WTO agreement. Foreign Direct Investment (as it involves commercial presence for the delivery of service) is also covered under GATS as the principle of national treatment applies not only on the basis of origin of services but also to the service providers.

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[39] "Full or partial exemption, remission, or deferral specifically related to exports, of direct taxes". Direct tax for the agreement refers to taxes on wages, profits, interest rents, royalties and all other forms of income and taxes in the ownership of real property. *Id.*

[40] Export subsidy is defined as a special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

[41] Agreement on Agriculture, 15-4-1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1-A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 33 (1999), 1867 U.N.T.S. 410.

[42] General Agreement on Trade in Services, 15-4-1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1-B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

## VI. TRADE POLICY REVIEW MECHANISM (TPRM)

TPRM aims at smoother functioning of the multilateral trading system by improving adherence by all members to rules, disciplines and commitments made under the WTO agreement. This result in achieving greater transparency. Under the TPRM, the trade policies and practices of all members are subject to periodic review, frequency of which is determined by the each member's share in the world trade.[43]

Such review also covers review of member's tax policies. Transparency in terms of tax are judged on the basis of four main elements, that being, nature of tax measures, rationale and objective, economic evaluation and the cost and benefit of the tax policy. Therefore the working of TPRM put national taxation policies of the members under direct scrutiny of the WTO.

### A. Common Principles

The WTO agreements and international taxation have broadly similar primary goals. The Marrakesh Agreement[44] states that trade and economic relations "*should be conducted with a view to raising standards of livings, … and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resour*ces*…. and to eliminate discriminatory treatment in international relations"* Similarly, the introduction to the OECD's Model tax treaty states that the primary goal of treaty formation is "*removing the obstacles that double taxation presents"*, and thus reducing its *"harmful effects in the exchange of goods and services and movements of capital technology, and persons"*. Therefore, both of them have a broad similar aims of reducing the obstacles to flow of goods and services.

Apart from this, both of them share the same implications of the principle of Reciprocity. The mutual adjustments in trade policy conform to the principle of reciprocity if these policy adjustments result in roughly similar changes in a country's import and export volumes. In this way, reciprocity tends to neutralize externalities transmitted through world prices. Insofar as countries are able to use trade barriers in their favour, multilateral trade liberalization in accordance with the principle of reciprocity is especially important, as such countries will be less inclined to reduce trade barriers if other countries were unwilling to do so as well. The principle of reciprocity

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[43] Peter van den Bossche & Wener Zdouc, Law and Policy of the World Trade Organisation 95 (3rd Edn., 2013).

[44] WTO Agreement: Marrakesh Agreement Establishing the World Trade Organisation, 15-4-1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

us also a fundamental aspect of bilateral tax treaties, It is manifest un the mutual reduction of source country without holding taxes on income.

## B. Manner in which tax law and act as hindrance to free flow of trade and service

The objective of trade liberalization can be achieved only in the case of free flow of goods and services irrespective of its origins, characteristics or any other thing which defines it. Though trade liberalization comes with many benefits like better choices to consumers, alleviation of poverty and overall economic prosperity, it also leads to high level of competition. Many countries fear the inability of the domestic producers to compete with foreign goods and services. Such fear leads the governments to use various methods to protect their own domestic producers. One of the methods to evade high level of competition is use of tax, which though be allowed when it doesn't aim at discriminating to the international commerce.

Fundamentally, there are three ways in which a country might discriminate against international commerce with the aid of taxation. It could be favouring domestic producers over foreign producers, domestic production over foreign productions or domestic products over imported foreign products.

***Discrimination against foreign producers***

The OECD model's antidiscrimination provision (Article 24) incorporates four specific constraints on taxation by a source country. *First*, Foreign nationals may not be subject to more burdensome taxation than domestic nationals "in the same circumstances". *Second*, a permanent establishment of a foreign resident may not be subject to higher taxes than domestic resident enterprise "carrying same activities". *Third*, Income earned by a domestic enterprise owned by foreign nationals may not be taxed more heavily than similar enterprises owned by domestic nationals. *Fourth*, payments, such as interest and royalties, by domestic taxpayers made to foreign residents must be deductible under the same condition as those paid to domestic residents.

The non-discrimination provisions of the tax treaties generally have been interpreted to permit differences in taxation of resident and non-resident portfolio investors, on the ground that they are not in similar circumstances.[45]

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[45] Commentary on Article 24: Concerning non-discrimination, Model Tax Convention on Income and on Capital: Condensed Version 349-370 (2014), <http://dx.doi.org/10.1787/mtc_cond-2014-58-en> (last visited 18-9-2014).

It is also important to note that such discrimination could be implemented outside the tax law. For instance, the domestic country might limit licenses to operate wholesale business on its own territory to its own nationals or provision for supply of electricity at lower prices to the domestic producers.

Countries should avoid discrimination against foreign producers as it might lead to distort location decisions and discourage source countries from using low rates to attract international income tax base.

***Discrimination against Foreign Production***

One of the primary objectives of the tax and trade treaties is to preclude a residence country from discriminating against foreign production. This is done by selecting the appropriate method to reduce double taxation which limits a country's ability to discriminate against foreign production. Classic example of residence country discriminating against foreign production is the denial under integration systems of shareholders tax credits for dividends paid from origin corporate income.

Similar to discrimination against foreign producer, discrimination against foreign production can also be implemented outside the scope of tax law. The domestic country can grant subsidy for domestic production, which would be tested under the WTO Subsidies code.

***Discrimination against Foreign Products***

Countries may also attempt to discriminate on the basis of whether the products are produced at home or imported from abroad. Although, nothing in the tax treaties prevents a country from exempting taxation income from domestic production of exported products, however, such a tax provision would run in violation of GATT and other agreements.

Therefore, it can be safely concluded that three types of discriminations against international commence are in principle prohibited by the international tax and trade law. Discrimination on basis of taxpayer's identity by requiring national treatment of foreign producers. International tax and trade law permits discrimination on basis of production location but then, there is less consistency within and across the two legal domains than with respect to discrimination on the basis of producer identity.

This leads to an important question, what can be inferred by the constraints on income tax discrimination against international commerce? One way to look at this is that, both of them are simply the inconsistent consequences of the separate historical development of the international tax and

trade regime. Another way to look at this is that they are simply result of difference in political power.

Therefore, the prohibition of tax discrimination against free flow of goods and services is directly related to full the *equality* obligation. The equality obligation requires equal treatment of both, domestic and international commerce.[46]

In *Complete Auto Transit Inc.* v. *R. Brady*[47] the court stated that a state tax will pass commerce clause[48] scrutiny if it is applied to an activity with a substantial nexus with the taxing state, is fairly appropriate, does not discriminate against interstate commerce, and is fairly related to the services provided by the state". A leading commentator has summarized this decision as "A tax which by its terms or operation imposes greater burden on out-of-state goods, activities, or enterprises than in competing in –state goods, activities, or enterprises will be struck down as discriminatory under the Commerce Clause"[49] This case has clearly enunciated the non-discriminatory obligation of the taxing authorities.

Another landmark case in this regard is the European case of *Commission* v. *France*[50], France's denial of integration credits to the French branch of a foreign insurance company that held shares of French companies was held to violate the freedom of establishment.

## VII. DISPUTES REGARDING DIRECT TAXATION

Disputes (altercations, sometimes) at WTO insinuate and connote inconsistency between WTO rules and tax laws, both national and international. There have been about thirty four disputes over taxation, out of which ten are related to direct tax.[51] Thought not many have gone beyond consultation or have been sorted out mutually but examining them will help in understanding the interplay between tax and trade in a more efficient way.

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46 *See* Boris I. Bittker, *Equity, Efficiency, and Income Tax Theory: Do Misallocations Drive Out Inequities*, 16 San Diego Law Review (1979).

47 51 L Ed 2d 326 : 430 US 274 (1977).

48 US Constitution gives exclusive power to regulate commerce among the States, with foreign nations, and with Indian tribes. *Black's Law Dictionary* 285 (8th Edn., 2004).

49 Walter Hellerstein, *Commerce clause restraints on state tax incentives*, 82 Minnesota Law Review 413 (1997).

50 1986 ECR 273.

51 *Supra* at 2.

## A. Income Tax Measures used by the member states of European Communities

The United States of America filed various complains against France, [52] Greece, [53] Ireland[54], Netherlands[55] and Belgium[56] against certain income tax measures constituting subsidies. In the case of France, the measures in question involve the temporary deduction under French Income Tax law for certain start-up expenses of a French company's foreign operation through a tax-deductible reserve account and a special reserve equal to ten percent of the company; receivable position at year end for medium – term credit risks in connection with export sales. The US contended that each of these measures constitutes an export subsidy, and that the deduction for start –up expenses continues an import substitution subsidy.

The complaint by the US against Ireland is with regard to "special trading houses" was with regards to special trading houses, which qualified for a special tax rate in respect of trading income from the export sale of goods manufactured in Ireland. Under section 39 of the Irish Finance Act, 1980, the special ten percent rate of corporation tax is available to "special trading houses, " which are companies that act as an access mechanism and marketing agent for Irish-manufactured products in foreign markets. Following the suit, the Irish Government announced for the termination of the scheme "at the earliest opportunity.[57]

In the case of Greece, the complaint concerns Greek exporters' entitlement under Greek income tax law to a special annual tax deduction calculated as a percentage of export income.[58] As of against the Netherlands, the dispute was regarding the special export reserve which the exporters could maintain from the income derived from export sales, under the Dutch income tax law. This was done to assist the small entrepreneurs.[59] For Belgium, it was regarding recruitment of export manager.

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[52] France — Certain Income Tax Measures Constituting Subsidies (5-5-1998) DS 131.
[53] Greece —Certain Income Tax Measures Constituting Subsidies (5-5-1998) DS 129.
[54] Ireland — Certain Income Tax Measures Constituting Subsidies (5-5-1998) DS 130.
[55] Netherlands — Certain Income Tax Measures Constituting Subsidies (5-5-1998) DS 128.
[56] Belgium — Ireland — Certain Income Tax Measures Constituting Subsidies (5-5-1998) DS 127.
[57] 1997-2001.state.gov, Ireland: 1998 Country Report on Economic Policy and Trade Practices (1999), available at <http://1997-2001.state.gov/www/issues/economic/trade_reports/europe98/ireland98.html> (last visited 20-9-2014).
[58] *Supra* at 2, 12.
[59] Michael Lang, Judith Herdin & Ines Hofbauer, WTO and direct taxation 510-511 (1st Edn., 2005).

## B. Canadian exemption for Civilian aircrafts

The dispute concerned various Canadian Government measures alleged by Brazil to be export subsidies.[60] There was the TPC Program, i.e. funds provided to the civil aircraft industry by the Technology Partnerships Canada (TPC) which lead to exemption of the Export Development Corporation (ECD) from corporate income tax, which gave it an advantage over other market players. However, this matter of direct taxation was rejected by the panel.[61]

## C. Turkey's Taxation on Foreign Films

Turkey introduced tax scheme which aimed at collecting revenue from the showcase of foreign films. This method of direct taxation clearly violated the principle of non-discrimination. However, US took back its complaint as a mutual solution was agreed.[62]

The principle of non-discrimination is one of the thresholds of the WTO laws and it cannot be violated in any circumstances. The countries are expected to take precautions before drafting laws to make sure the non-discrimination requirement. Recent withdrawal of bill, which provided for taxing and limiting the showcase of foreign films was withdrawn.[63]

## D. United States discriminatory tax schemes – FSC and ETI

This dispute was effect of complaint filed by the European Community against the United State's Foreign Sales Corporation (FSC) and Extraterritorial Income (ETI).[64] The European Communities requested consultations with the United States in respect of Sections 921-927 of the US Internal Revenue Code.[65] FSC/ETI regime intended to counteract the seem-

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[60] Canada — Measures Affecting the Export of Civilian Aircraft (14-4-1990) WT/DS70/R.

[61] *See* Philippe De Baere & Clotilde Du Parc, Export promotion and the WTO (1st Edn., 2009).

[62] For more details see, Li Y. Wang, Entertainment Lawyer, Entertainment Lawyer Services — Film Foreign Trade Barriers Filmtvquarterly.com (2006), <http://www.filmtvquarterly.com/filmexports_lawyer.htm> (last visited 27-9-2014).

[63] The Moscow Times, *Bill to Tax Foreign Films Withdrawn*, 2013, <http://www.themoscowtimes.com/article/486966.html> (last visited 27-9-2014).

[64] United States — Tax Treatment for "Foreign Sales Corporations" (17-5-2006) DS10.

[65] Sections 921-927 established special treatment for the "Foreign Sale Corporation". It stands repealed by the effect of FSC Repeal and Extraterritorial Income Exclusion Act, 2000 and the American Job Creation Act, 2004 (26 USC) (FSC allowed for reduction in the rate of tax for the income derived from the sale of exported goods, while such sale should be through a subsidiary entity in a foreign country. It also contained "administrative" income allocation rule that assigned more income to the tax-favoured FSC subsidiary that could be allocated under "arm's length" pricing method, though it was left at the choice made by the firm). For discussion on the advantage of FSC, See, Chris Atkins,

ingly tax disadvantage encountered by US producers in respect of their exports.[66]

It was argued that the FSC violated The General Agreement on Trade and Tariff[67] the Agreement on Subsidies and Countervailing Measures (SCM)[68] and the Agreement on Agriculture (AOA)[69] as it created an export subsidy, which is in violation to the WTO rules.

The panel found substance in the argument furthered by the EU and rejected the US's analogy between FSC and "Territorial'' taxation. The US appealed the panel's decision, arguing that the WTO rules hold that a country need not tax income from foreign economic processes and that FSC was therefore permissible. However the Appellate body upheld the panel's finding and held that FCS involved "subsidies contingent to export performance". This lead US into a difficult question, either to make some adjustments to the FCS scheme or to undertake broad reform of its income tax system, confronted with the dilemma of choosing broad – based "consumption tax" or "territorial tax". USA instead chose a narrow approach, and enacted ETI provision, which was again rejected by the WTO as it again constituted an export subsidy and was much more than just avoiding double taxation.[70]

## VIII. CONCLUSION

Until now, the rules concerning international trade and taxation evolved quite independently. The GATT/WTO agreements are multilateral, requiring MFN, national treatment and binding dispute settlement procedure. While, international taxation is agreed bilaterally, requiring national treatment and non-binding dispute settlement. This separate evolution of the two set of rules is to a certain extent astonishing in view of many parallels and overlaps between international trade and taxation and the evident analytical equivalence between cross-border flows of products and flows of factors.

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*Trade body may force more rapid abolition of FCS/ETI*, 3 International Tax Review (2005), <http://www.internationaltaxreview.com/Article/2608916/Trade-body-may-force-more-rapid-abolition-of-FSCETI.html> (last visited 7-10-2014). For discussion on the Jobs Act, See, what you should know about the Jobs Act?, International Tax Review (2005).

66 The USA argued that, the disadvantage is two-folded. First, the USA uses "worldwide" system of direct taxation, wherein, the US Government taxes its resident all over the world, while the European Nations used the "territorial" system of direct taxation, wherein, the European Government taxes only the income which is earned domestically. Second, the US exports to EU are subject to VAT while, so is not the case with EU exports to US because EU excludes its own imports.

67 *Supra* at 33.

68 *Supra* at 36.

69 *Supra* at 39.

70 Stanley I. Langbein, *United States—Tax Treatment for "Foreign Sales Corporations." WTO Doc. WT/DS108/AB/R*, American Journal of International Law 546-555 (2000).

Nevertheless, the widely-followed ruling by the WTO's dispute settlement body against the United States concerning the it's FSC/ETI scheme, which lead to the largest retaliation award ever authorized a dispute at the WTO[71], inveterate the fact that direct taxes like indirect taxes are subject to the multilateral rules of the WTO, despite the efforts by the tax authorities to secure specific exemptions for certain direct tax measures in these agreements. The ruling against US reconfirmed the traditional distinction under international trade rules between direct and indirect taxes, particularly with respect to how such taxes should be treated under the subsidy and border tax adjustment rules of the WTO.[72] The ruling against the FSC/ETI scheme incited the US congress finally to pass legislation in 2004 to repeal the scheme as part of a larger refurbish of the US corporate tax system.

WTO rules can therefore be anticipated to continue to be a significant factor in determining the manner in which the members frame their tax policy as they certainly will avoid having their tax policies successfully challenged in the WTO.

Although, WTO has played a very significant role, the countries nevertheless find a loophole. For instance, after passing the Job Creation Act, 2004[73] it was believed that the regime of discriminatory tax practices would be siphoned off but it instead provided for transition relief and the benefits to long-term contracts for lease and delivery of goods entered by the US exported on account of available benefits under the ETI tax regime. It also reflects the need to provide for transition relief under SCM Agreement.[74]

Also, the recent request for consultation by European Union (later joined by Japan, Argentina and United States) against Brazil for taxation and charges in the automotive sector, electronics and technology industry and tax advantages for exporters shows the ever continuing dispute between tax law and trade law.[75]

Therefore, the relationship between direct tax and trade laws is very significant for understanding how each and every action of the government can have effect on the "freedom of trade" of the individuals and corporations. This means that, more and more issues will come to WTO as the interconnections between both the fields is directly proportional to the increase in interstate commerce and globalization.

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71 Brendan McGivern, *WTO Finds that the US Remains in Violation of Decision*, 3 Financial Services Advisory Update (2006), available at <http://www.whitecase.com/Publications/Detail.aspx?publicatio n=832#.VC_9dvmSxQ8> (last visited 4-10-2014).

72 *Supra* at 2, 25.

73 26 U.S.C. (2004).

74 Chris Atkins, *Trade body may force more rapid abolition of FSC/ETI*, 3 International Tax Review (2005), available at <http://www.internationaltaxreview.com/Article/2608916/Trade-body-may-force-more-rapid-abolition-of-FSCETI.html> (last visited 7-10-2014).

75 Brazil – Certain measures concerning taxation and charges (19-12-2013) DS472.

# TUSSLE OF STATE AND NON STATE: BCCI AND RTI, A FIGHT FOR TRANSPARENCY

—*Ashima Jain*[*]

*Abstract* *"The very word 'secrecy' is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings, "*

Pres. John F. Kennedy, 1961

*Is the information available on internet about BCCI is sufficient to address the questions in one's mind with respect to its activities or there should be again a proposed bill for the same. Right to know is a constitutional provision mandated in the constitution. Being a public consortium, the BCCI is fighting not to be under the transparency.*

*The question not to include BCCI under ambit of RTI on reason that it is not a state under Article 12 of Indian Constitution seems to say that it is a monopoly sector without any accountability. The paper analyses;*

*(a) The politics that is prevalent and administrators being powerful bureaucrats and industrialists being insensitive.*

*(b) The concealing of information's like grant of TV rights, Annual Report, how much earning is being ploughed into the promotion of cricket.*

*(c) Analysis of Indian Olympic Assn. v. Veeresh Malik, ILR (2010) 4 Del 1 : 2010 Indlaw Del 489.*

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*(d) Section 2(h) RTI Act with analysis that non-state actors are also responsible for disclosing information which is useful for assuring transparency.*

*(e) Do BCCI get indirect funds from the government and that makes reason for it to be under RTI.*

*(f) IPL and cooked up balance sheets, benami equity, tax dodges.*

*It is clear that the BCCI is not required to pay any entertainment tax; they don't pay for the security provided during matches or even for the lands for the stadiums. So the question remains, should in these situations also BCCI not be included under RTI, ensuring transparency. The word Public Authority is not to be confused with definition of State under Article 12 of Constitution of India as it is much wider.*[1]

**Keywords**: information, transparency, BCCI, RTI, State

## I. INTRODUCTION

The Right to Information act is the result of favorable interpretation of legal regulation by judiciary and fierce struggle by the people.[2] It is absolute and becomes essential even that all people in society and its environment given the opportunity to think for new ideas and thereby must be able to learn with a decisive step towards democracy. The free flow of information has been halted by legislations like Official Secrets Act, 1923. Article 19(1) (a) enforces freedom of specific and expression including right to know. And if these sections are not obliged then right to know and the violation of one leaves the sections merely as ornamental. In *State of U.P.* v. *Raj Narain*[3], it was held that in a government all agents of the public must be responsible for their conduct, and there can be few secrets. The people of the country have a right to know every public act, everything done in a public way, by their public functionaries. To cover with veil of secrecy, the common routine business is not in the interest of public.

Several contentions in many cases have been raised regarding BCCI to be public authority[4] wherein contentions were raised that it is essential to satisfy the requirements of section 2(f) and (h) of RTI Act, 2005. The right

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1 DEWAN, RIGHT TO INFORMATION ACT, 2005 (2010 Edition).

2 DR. MADABHUSHI SRIDHAR, RIGHT TO INFORMATION, LAW AND PRACTICE 3 (1st Edn., 2007).

3 (1975) 4 SCC 428 : AIR 1975 SC 865.

4 *Om Prakash Kashiram* v. *BCCI*, 2011 SCC Online CIC 10131: 2011 CIC 10134

to information has its own significance as it is under the control of Public Authorities and promotes transparency and accountability. It encourages the society at large to question the affairs and keep a powerful check on corrupt practices. Information is required for the advancement of society and crucial for right implementation of policy.

Board of Cricket for India, formed in December 1928 with its head-quarters in Mumbai, is the national body for cricket registered under Tamil Nadu Societies Registration Act and a member of ICI i.e. International Cricket Council. It can be said to be the right time when the disclosure of information which could prove to be fatal in near future needs to be disclosed. The well-known scandals one could mark are; A Raja 2-G spectrum issue, subsequently even the IPL and other unethical allocations have led the country into doom. Also the International Covenant on Civil and Political rights 1966 says that "Everyone shall have the right to freedom of expression, the freedom to seek and impart information and ideas of all kind, regardless of frontiers".[5]

The sports and its fans have increased wide far, and there is no count to it. It owes to promote and responsibility to various sponsors, players and fans and therefore restricting its information will lead to illegality. There are many instances wherein the question of illegality could be put forth on BCCI, in the manner and its governance specially. A flurry of inquiries related to administration of BCCI, team processes and their selection, sponsorship agreements, can only be understood if RTI Act has the ability to dissect and disrupt. But again the question arises how to disclose the information, what can be the possible ways because sports attorneys have a constructive innovative clauses protecting their clients, commonly known as non-disclosure agreements and if these information's are revealed thereby the large corporate houses would shirk backwards to invest in or to sponsor cricket events. Indian Government needs to enact and make a provision for the inclusion of BCCI into the ambit of RTI.

## II. REASONS FOR BCCI TO BE UNDER RTI

The dwindling IPL money and dubious trials, the fact remains that the BCCI do not get direct funding from government, but there are instance which substantially proves it is akin to it wherein it receives funding indirectly. For e.g.:

1. There is no doubt it utilizes revenue like that of concession in income- tax, land for the stadiums at concessional rates.

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[5] Article 19(2), the International Covenant on Civil and Political Rights, 1966, available at <http://www2.ohchr.org> (retrieved on 12-12-2010).

2. BCCI does not have to pay entertainment tax, and not even for the security during the matches.
3. BCCI had avoided taxes on its income, claiming exemption as a charitable organization.[6]
4. Although the Income Tax Department withdrew this exemption in 2007-08, BCCI only paid tax amounting to □41.91 crore (US$7.63 million) against its tax liability of □413 crore (US$75.17 million) in the 2009-10 financial year[7]
5. It selects National Teams and represents India in international events.
6. Even in BCCI then the fact it uses the India should also be removed according to the Emblems and Names (Prevention of Improper Use) Act in order to work as private body and regulate itself.
7. Section 2(h) of the RTI Act also talks about a non-government organization coming under the ambit of transparency if they are directly or indirectly supported by the appropriate Government and thereby there need to clear the route for Sports Development Bill.

Moreover[8] it has been marked that the Government has given a tax exemption of Rs 365 crore to the BCCI and thereby everyone want to count this institution as National Sports Federation (NSF) and would automatically come under ambit of NADA and WADA.

Article 12 extends to the significance to the term State. It is a general preposition that a body whether statutory or non-statutory, exercising functions of commercial or noncommercial nature will be regarded as state.[9] In many landmark cases the importance of right of information has been analyzed, such as in *State of U.P.* v. *Raj Narain*.[10]

*The Supreme Court held under Article 19(1) (a), it is not only guarantee to freedom of speech and expression but also right of the citizen to know, right to receive information regarding matters of public concerns. In a government of responsibility like ours, where all agents of the public must be responsible for their conduct, there can be but few secrets. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.*

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6 Sandeep Joshi, *BCCI Not A Charitable Organisation*, THE HINDU, 19-2-2012.

7 *BCCI Owes Rs 373 Crores to Income Tax Dept*., THE NEW INDIAN EXPRESS, 20-2-2012.

8 *Sports Ministry Appeals to CIC to Bring BCCI Under RTI*, available at <http://articles.timesofindia.indiatimes.com/2012-05-31/others/31920211_1_bcci-indian-cricket-boardnationalsports-federation> (retrieved on 31-5-2012).

9 RODNEY D. RYDER, RIGHT TO INFORMATION (1st Edn., 2006).

10 *Supra* note 134.

In *Dinesh Trivedi case*[11] the SC held and observed that right to freedom of information in modern constitutional democracies, it is axiomatic that citizens have their right to know about the affairs of the government.

Democracy expects openness and openness is a concomitant of a free society and sunlight is the best disinfectant. The right to know is implicit in the right of free speech and expression.[12] Government information is a resource which ought to be known albeit not in exceptional circumstances and the information relates to the legitimate discharge of their duties. It establishes a relation of government and officials as trustees of the information for the people. India adopts the parliamentary system of right to information, is expected to create quality of decision-making by public authorities by removing the secrecy. A free flow of information is restricted to pervasive culture of secrecy and the arrogance of the bureaucracy. Poor record keeping and low levels of literacy and awareness of rights among the general masses are considered to be the reasons for the continuation of secrecy and corruption. A government office is a picture of stacks of dusty files on shelves and floor. Not having the Government nominee in the management cannot be the sole criteria to hole not to include BCCI under RTI. As BCCI is registered under Societies Registration Act, 1960 and get direct and indirect funds and exemptions from the Government.

## III. QUESTION FOR STATE AND NON STATE:

The question of interpreting the definition of State has been relied on various decisions as in *Pradeep Biswas*[13] and *R.D. Shetty case*[14]: The Supreme Court laid down:

1. The share capital of the corporation to be held by the Government indicating the corporation as an instrumentality or Agency of Government.
2. The financial assistance of State is much to indication towards that the corporation is impregnated with Government character.
3. Corporation enjoys monopoly which is state conferred and protected.
4. The functions of the corporation are of public importance and relate to the Government functions.
5. Deep and pervasive State control.

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[11] *Dinesh Trivedi* v. *Union of India*, (1997) 4 SCC 306.
[12] *S.P. Gupta* v.*Union of India*, 1981 Supp SCC 87.
[13] *Pradeep Kumar Biswas* v. *Indian Institute of Chemical Biology*, (2002) 5 SCC 111.
[14] *Ramana Dayaram Shetty* v. *International Airport Authority of India*, (1979) 3 SCC 489 : AIR 1979 SC 1628 : (1979) 3 SCR 1014.

6. And if the department is transferred to a corporation, which itself proves the corporation is an agency/ instrumentality of the Government.

But the court in *Indian Olympic Assn. case*[15] they laid that the tests formulated under *Ajay Hasia case*[16] is not rigid principles. Even same with *Pradeep Biswas case*[17] should not be. The question in each case would be to see in the cumulative facts whether the body is financially, functionally and administratively dominated by the Government. Section 2(h) of the Right to Information Act, it is defined whether the body is owned and controlled or substantially financed by the Government. And even includes body indirectly financed by the Government. Section 4 obliges public authorities to publish various specified classes of information. The information provider is obliged to decide the applications, of information seekers, within prescribed time limits. And thereby the researcher contends that the BCCI inclusion will solve most problems related with IPL wherein most of the funds are not known to be known where it is being invested. Even the role of access to information cannot be undermined and Section 2(h) recognizes that non-state actors will also have responsibility of disclosing information proving to be useful and necessary ensuring the transparency and making a democratic place.

Relating in the present situation it has also been substantiated how BCCI is indirectly funded by the Government and needs inclusion under RTI.

In *People's Union for Civil Liberties (PUCL)* v. *Union of India*[18] it was laid down that as per Article 19(1) (a) provides that all citizens of this country would have fundamental right to freedom of speech and expression and thereby it could be construed that the citizens of the country can have relevant information regarding the facts and matters of BCCI. The foundation of the healthy democracy is to have well informed citizens.[19]

Right to Information Act, 2005 empowers every citizen to:

a) Ask any questions from the Government or seek any information.

b) Take copies of any Government Documents.

c) Inspect any Government Documents.

*The Great democratizing power of information has haven us all the chance and alleviate poverty in ways we cannot even imagine today. Our*

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15 *Indian Olympic Assn.* v. *Veeresh Malik*, ILR (2010) 4 Del 1.
16 *Ajay Hasia* v. *Khalid Mujib Sehravardi*, (1981) 1 SCC 722.
17 (2002) 5 SCC 111.
18 (2003) 4 SCC 399 : AIR 2003 SC 2363.
19 P.K. DAS, THE RIGHT TO INFORMATION ACT (2nd Edn., 2008).

*task is to make that change real for those in needs, wherever they may be. With information on our side, with knowledge a potential for all, the path to poverty can be reserved.*[20]

*Right to inspect works, documents, records, etc.* are the part of right to information.

## IV. AN ANALYSIS OF BCCI AND ITS INTERNAL MATTERS.

The researchers would rather favour the dissenting opinion in the landmark judgment of *Zee Telefilms*[21] wherein the majority held that BCCI is not the state. But rather Justice Sinha has dissented and thereby BCCI's actions of promoting the sport, making laws for cricket for the entire country, representing country in international forum, appointing Indian representatives and pervasive control over players, managers and umpires are said as state actions. It also enjoys enormous powers which can make or mar a player's career. A body even though self-regulating if it performs public duty, a judicial review must lie against it. So if the action of the board anytime impinges the fundamental rights of the citizens thereby the same will be said to be ultra vires and judicial review must lie with it. Certain results were shown with respect to IPL wherein the BCCI has found itself in midst of conflicts with a suspension of Lalit Modi for alleged acts of misdemeanors ad some spot fixing case. The organization deals in cartloads of money and is responsible for whole of the country. So again the question remains where does the amount of money go earned from the cricket.

The citizens don't want to be in dark about cricket which is known as religion. Democratization is a journey, a process; it is not a condition.[22]

Justice Sinha also pointed out with respect that the traditional tests of a body controlled financially, functionally, and administratively by the Government as laid in *Pradeep Biswas case*[23] would have application only when the body is created by state itself for different purposes but incorporated under Indian Companies Act and Societies Registration Act and applicable to Board like BCCI. The nature of function of such a body becomes such that having regard to the enormity thereof it acquires the status of monopoly for all purposes regulating and controlling the fundamental rights

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[20] Kofi Anan, Secretary General, United Nations, Address to the World Bank Conference, *Global Knowledge "97"*, Toronto, Canada (June 22), <http:// www, ctcnet.org.kannan. html>.

[21] *Zee Telefilms Ltd.* v. *Union of India*, (2005) 4 SCC 649 : AIR 2005 SC 2677.

[22] Schnabel Albrecht, *A Rough Journey: Nascent Democratisation In The Middle* East (12-12-2010), <http://www.unu.edu>.

[23] (2002) 5 SCC 111.

as regards his speech or right of occupation, becomes representative of the country and has final say in the registration of members and umpires. The organizers of competitive Test cricket between one organizations having the status of state are allowed to make laws on subject essentially a state function in terms of Entry 33 List II of the Seventh schedule of the Constitution and there of different tests have to be applied.

A body carrying on the monopolistic function of selecting team to represent the nation and core function to promote sport that has become a symbol of national identity and medium of expression of national pride, must be held as carrying out state functions. And BCCI itself acts as a representative in the international fora. It was also said that the monopoly status enjoyed need not be a statutory and can be de facto. The Board represents a nation and a sovereign country promoting good relations and at the domestic level the citizens can invoke the writ jurisdiction of the courts.

Therefore the main thing which requires to be find out is whether the functions of the body are identifiable with the state functions, they would be considered as state actors and it would be necessary to find out the nature of its activities, the functions of the board as whether public functions or not. Even it is said that they are to be other authorities under Article 12 wherein the Board has final say in the disciplinary matters responsible for making a player's career. The sportsmen have a right under Article 19(1)(g) to be considered as for participation in the game and BCCI claims to debar players from playing cricket in exercise of disciplinary powers. And by virtue of this it constitute as an authority. And therefore the regulatory body controlling solely and exclusion to others in the case was contended as public function. Several issues in the dissenting opinion has been discussed which in the present era needs recognition and more deliberations like on:

1) Body has recognition from the Union of India.
2) Held any match held even between India and Pakistan only with permission of Union of India.
3) Board is a state according to senior counsel Harish Slave due to ;
    a) it regulates cricket;
    b) It has a virtual monopoly;
    c) it seeks to put restrictions on the fundamental rights of the players and umpires to earn their livelihood as envisaged under Article 19(1)(g) of the Constitution of India;
    d) The cricket events managed by the third Respondent have a definite concept, connotation and significance which have a bearing on the performance of individual players as also the

team as a national team representing the country in the entire field of cricket.

4. The functions of the Board are of public importance controlling free speech rights of citizens within a public forum.[24]
5. Theatres and dramatic performances are part of entry 60 List I.
6. Sport is a part of Human Resource Development as part of education.

Article 12 defines the term State in Part III and includes:

a) The Government and Parliament of India, i.e. Executive and legislature of Union.

b) The Government and the Legislature of the State, i.e. executive and legislature of states.

c) All local and other authorities within the territory of India.

d) All local and other authorities under the control of Government of India.

But in the present case the researcher want to opine that even the BCCI is not a state though it should be considered so, even then under Section 2(h) if it is considered rather is considered as public authority so as to disclose the information to public. The common belief that only with Government authorities the information could be requested is incorrect.

It has been substantiated with multiple factors that:

1) If there is an organization which is not a Government and is financed substantially by Government either directly or indirectly, then the organization would be considered as public authority par with organization of Governance under Section 2(h) (d) (ii).[25]

2) Substantial mean large in number and one needs to look out whether the funding of organization has indirect nexus with the Government and thereby indirect funding constitutes providing land at concessional rates, tax concessions.

3) Information which is held by or under control of any public authority can be requested under Section 2(j).And even the citizen can request for obtaining the information from the Government Department in respect to any private organization under Section 2(f).

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[24] *Daniel Lee* v. *Vera Katz*, 276 F 3d 550.

[25] DR. R.K.VERMA, RIGHT TO INFORMATION LAW AND PRACTICE 1.24-1.26.

4) Even the information which can be sought by the citizen when asking to disclose information relating to BCCI and its work is not under any exemptions of Section 8 of RTI Act 2005.

5) Right of information is a facet of speech and expression as defined under Article 19(1) (a) of Constitution of India and is a fundamental right. Therefore the citizens in order to take in a participatory development in the industrial life and democracy has to know and broaden his horizons and puts great responsibility on those who take the same to inform.[26]

6) The true democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on the all side of the issues, in respect of which they are called upon to express their views.

7) The National Sports Bill is therefore needed not be opposed with respect to its measures to bring bodies as National Sporting Federations.

8) The Indian Premier League has changed the nature of BCCI from body promoting game to one in business, which now requires accountability and good governance.

## V. CONCLUSION

Successful access to information policy includes an independent judiciary, effective systems of mass communication and freedom of Press. A democratic country is survived accepting new idea and essential that whatever ideas the Government or its members hold must be freely placed before public and transparency to be enhanced.

The real Swaraj will come not by acquisition of authority by a few, but by the acquisition of the capacity by all to resist authority, when abused. ~ James Madison, 1882

It has been said secrecy in governance in tantamount to abuse of authority. But the capacity to resist secrecy has arrived, in the form of Right to information Act, 2005.

Right to information and Good Governance move hand in hand that maximizes the common good of a country. The major attributes of Good Governance are;

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[26] *Reliance Petrochemicals Ltd.* v. *Indian Express Newspapers Bombay (P) Ltd.*, (1988) 4 SCC 592 : AIR 1989 SC 190.

a) Participating of citizens in the decision making process of the country.

b) Respect for the Rule of Law, which is the extent to which legal frameworks are fair and impartially administered.

c) Transparency, with the flow of information as its linchpin.[27]

The researcher analyses that there is an indirect funding from the side of the Government and thereby it should be bracketed as National Sports Federation. BCCI also take custom duty exemption. Thus, BCCI has to be included as a state and considered as a public authority and be included under RTI. BCCI has to be included as to bring out the transparency so as to be democratic and sovereign. It is the right under the supreme authority i.e. the Constitution that envisages under Article 19 of The Constitution of India to have free speech and expression and also right to know as set also by the precedents. Right to Information needs to be expressly stated even though it is imbibed within Article 19.

Under Section 2(f) of RTI Act, 2005 information includes any information relating to any private body which can be accessible by a public authority under any other law for time being in force and thereby the researcher suggests that as Ministry is already controlling BCCI one should be able to file for the information and even under Section 8(j) of same information should not be denied to anyone if it cannot be to Parliament. But the question remains unanswered until the BCCI come under the purview of RTI that if BCCI is a private body, then how the cricket team it selects can be a national cricket team.

## VI. SUGGESTIONS

1) There is a requirement of proactive distribution of information.

2) Right to information to be in actual considered to be the basic right.

3) Open government in the direct emanation from the right to know.

4) Union of India in exercise of its legislative function frame rules under Article 77 and create Ministry of Youth Affairs and Sports so to be considered as BCCI part of authority.

5) Necessary to note the functions of the body under Article 12.

6) It is not the functions of the Government alone enabling a body to become a state but when a body performs governmental functions or

[27] P.K. SAINI & R.K. GUPTA, RIGHT TO INFORMATION ACT, 2005: IMPLEMENTATION AND CHALLENGES (2006).

quasi-governmental functions when its business is of public importance and fundamental to people.[28]

7) Statutory bodies and local bodies in actual to be treated as states.[29]

8) The expansion of definition of state to be extended in terms of Article 298 directly influencing the citizens.

9) Even in *Zee Telefilms case*[30] it was concluded that in America, infact, corporations or associations, private but dealing with public rights have been subject to constitutional standards, same standards could be seemed as persuasive.

10) Public authority is bound by human rights and Article 19 of the Constitution of India.

11) The traditional tests laid in *Pradeep Biswas case*[31] needs reconsideration as may not have application for private bodies like BCCI.

12) Organizers are allowed to make laws on subject of a state function under Entry 33 List II of the Seventh Schedule.

13) Even funding is not the sole criteria for being a state and also to look on for functions.

14) Expansion of the definition of State so as to include not only the funding criteria but also the functions criteria and more enhanced criteria to be adopted.

15) More specific generalization on definition of Section 2(h) under RTI Act, 2005.

16) National Sports Bill to be supported therewith.

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[28] *Sukhdev Singh* v. *Bhagatram Sardar Singh Raghuvanshi*, (1975) 1 SCC 421.
[29] *Rajasthan SEB* v. *Mohan Lal*, AIR 1967 SC 1857 : (1967) 3 SCR 377.
[30] (2005) 4 SCC 649.
[31] (2002) 5 SCC 111.

# 'REVEALING' THE JUDICIAL AMBIVALENCE ON OBSCENITY: A CASE COMMENT ON AVEEK SARKAR V. STATE OF WEST BENGAL

*—Pratiek Sparsh Samantara & R. Srimukundan*[*]

*Abstract* *Earlier in 2014, the controversy surrounding the withdrawal of a certain book by its publishing house had called into question the debate on artistic license against 'reasonable restrictions' on the Freedom of Speech and Expression. In this scenario, it has become particularly important to develop a fresh outlook on an element that has always been capable of overturning creative liberty: Obscenity. This is why the judgment of* Aveek Sarkar *v.* State of W.B.*, delivered by the Supreme Court of India on the 3rd of February 2014, assumes great relevance and deserves to be studied. The researchers contributing to this case comment have attempted to dissect the judgment and develop a comparative analysis vis-à-vis the judicial wisdom on the legal facets of Obscenity in India, as well as abroad. With regard to the former, the evolution of juridical thought over various cases is charted, and for the latter, highly influential decisions established by English and American courts is examined. The derived thought from foreign cases in* Aveek Sarkar *judgment, which contributed to the adoption of a 'contemporary community standards' test is particularly considered and critiqued. This is finally culminated in the evocation and appraisal of the concepts of Legal Moralism and Legal Paternalism, with respect to the ideas of legal luminaries such as Lord Devlin, Ronald Dworkin and H.L.A. Hart. Through this evaluation, the researchers respectfully present shortcomings in* Aveek Sarkar, *and*

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*inconsistencies in judicial standards, in the hope of a better-defined and more definite legal understanding of Obscenity as a reasonable restriction against the exercise of Article 19 (1) (a) of the Indian Constitution.*

## I. INTRODUCTION

*"Obscenity is a function of culture - a function in the mathematical sense, I mean, its value changing with that of the variables on which it depends."*

—A.P. Sabine

Obscenity as defined by the law has been modified over a period of time. To pinpoint obscenity, various tests have been propounded, used and later discarded. "What constitutes obscenity" is a question that cannot be answered definitively, and which has seen to have become liberalized over time. This case comment comes in the light of the Supreme Court's decision in *Aveek Sarkar* v. *State of W.B.*[1], which has added to the liberalization and modified the test to ascertain obscenity. In this paper, *first*, we deal with the facts, procedural history and judgment in *Aveek Sarkar* decision. *Second*, we analyse and critique the decision in light of American and Canadian jurisprudence. *Third*, we evaluate the legal norms underlying obscenity and the contribution of concepts such as legal paternalism and legal moralism to these norms. *Fourth*, we analyse and critique the position in law regarding obscenity post the *Aveek Sarkar* decision.

## II. CASE BRIEF

### A. Facts of the Case

The facts of the case are as follows: "*Stern*", a weekly German news magazine, published an article with the picture of the tennis star Boris Becker posing nude with his dark-skinned fiancée and actor Barbara Feltus. The photographer was Feltus's father himself. The purposes of the article and the photograph were to portray Becker as a person not approving of 'apartheid' and to demonstrate to the readers that love champions over hatred. '*Sports World'*, a popular Indian magazine, in its issue Number 15 dated 5/5/1993, reproduced the picture and the article. Amrit Bazar Patrika reproduced the same, a widely read Calcutta based newspaper in its 6/5/1993 issue.

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[1] (2014) 4 SCC 257 (hereinafter "*Aveek Sarkar*").

### B. Procedural History

A lawyer practising out of Alipore filed a complaint under Section 292[2] of the IPC before the Sub-divisional Magistrate (Alipore), against Mr. Aveek Sarkar, the Editor, the Publisher and the Printer of 'Amrit Bazar Patrika', the Editor of 'Sports World', former Indian Cricket Team Captain Mansoor Ali Khan Pataudi. He believed that the publications would corrupt and deprave young minds and that they were against the cultural and moral values of the society.

The Alipore Sub-divisional Magistrate ordered that the accused would be put to trial for committing an offence under Section 292 of the IPC. The appellants (accused) preferred a criminal revision before the Calcutta High Court under Section 482 of the CrPC. The High Court did not appreciate the contentions put forward by the appellants and did not quash the proceedings under Section 483 of the CrPC. Against the decision of the High Court, the appellants preferred an appeal before the Supreme Court. The Supreme Court held that the publication in question did not qualify as obscene material, and set aside the criminal proceedings against the appellants.

## III. POSITIONS IN INDIAN LAW REGARDING OBSCENITY: EVOLVING STANDARDS AND REASONABLE MEN

One of the earliest and most prolific cases on Obscenity in India was *Ranjit D. Udeshi* v. *State of Maharashtra* (1965)[3], where the Supreme Court sat in judgment over the sale and publication of unexpurgated copies of DH Lawrence's Lady Chatterley's Lover. Four years prior to this case, the Central Criminal Court of England and Wales had allowed printing of the controversial book.[4] However, the verdict in India was far more conservative as the Court found the Appellant (a bookseller) guilty of the offence of Sale of Obscene Books as defined in section 292 of the Indian Penal Code, which was seen to be a reasonable restriction of the fundamental right to Freedom of Speech and Expression granted by the Indian Constitution.[5] The bench relied upon the antiquated Hicklin test to justify its stance – that any creative medium is obscene, when it has a "*tendency to deprave and corrupt those whose minds are open to such immoral influences and into whose*

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[2] Sale, etc., of obscene books, etc.
[3] AIR 1965 SC 881.
[4] *R.* v. *Penguin Books Ltd.*, 1961 Crim LR 176.
[5] *Supra* note 163, at para 9.

*hands a publication of this sort may fall*", regardless of any literary or artistic value.[6]

The judicial bench in the English case had done well to pay heed to the requisite significance to the multiplicity of themes and ideas in Lady Chatterley's Lover. But the Supreme Court of India in *Ranjit Udeshi* ignored literary merit and downplayed the novel's criticism of industrialization, war, class relationships, and dubious sexual morality.[7] It is the researchers' contention that if we are to reach a balance and have 'reasonable' restrictions, the novel must be considered in its whole, or rather, the effect of the novel in its entirety to reasonable persons must be the standard. Furthermore, even if we are to consider 'objectionable' words and passages in any work, they must be studied keeping in mind (amongst other things) true authorial intent, and not the purposively loaded version that has been the stated idea behind the Indian ruling.[8] The *Aveek Sarkar*[9] judgment of the Supreme Court did better on this front as it does protect publications from accusations based on an archaic notion of Indian culture and values, by assessing creative works on the basis of its impact on an average person rather than from the perspective of a vulnerable person.

The repercussion of this was that in *Aveek Sarkar*, the Supreme Court did away with the Hicklin test and in its place affirmed the 'community standards test' (hereinafter CST) as the sole test to determine obscenity.[10] It was established in this case, that the CST would determine if a publication were obscene or not on the basis of an average person's response to contemporary community standards of tolerance towards such publications. With the Hicklin Test overruled, a publication would not be deemed to be obscene because of isolated lines and passages, or pictures. In support of this rationale, the researchers reiterate their contention that in reaching a rightful balance between Freedom of Speech, and Reasonable Restrictions, the Court must take into consideration the literary merits of the entire work as a whole and not cherry-pick those parts that, when read out of context, seem pornographic and lacking any value whatsoever.

The Supreme Court in *Ranjit Udeshi*[11] *case* had placed a very low threshold than is applicable for S. 292. The standard rightfully applicable here been succinctly expounded upon in *K.A. Abbas* v. *Union of India* which held that: "*The line is to be drawn where the average moral*

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6 *R.* v. *Hicklin*, (1868) LR 3 QB 360.

7 *Supra* note 165 at para 68 (author's interpretation).

8 Leo M. Alpert, *Judicial Censorship of Obscene Literature*, p. 54, Harvard Law Review, Vol. 52, No. 1 (Nov. 1938).

9 (2014) 4 SCC 257.

10 *Supra* note 163 at para 24.

11 AIR 1965 SC 881.

*man begins to feel embarrassed or disgusted at a naked portrayal of life without the redeeming touch of art or genius or social value*."[12] Chief Justice Hidayatullah impassionedly argued that that sex cannot be equated to obscenity or indecency and that the most depraved or least capable of persons must not be allowed to determine what the rest of the country may be allowed to read or watch.[13] Thus, those who are particularly sensitive or susceptible cannot be said to be the 'reasonable persons' who lay down the standard.[14]

## IV. FOREIGN JURISPRUDENCE AND ITS MISUSE IN AVEEK SARKAR

The American law on the matter and its subsequent criticism is highly relevant in this context to show just how ambiguous the legal regime surrounding Obscenity is, and how muddled-up it is when offered up as an excuse for judicial restriction. In the seminal case of *Roth* v. *United States*[15], it was held that, "*all ideas having even the slightest redeeming social importance - unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion have the full protection of the guaranties*".[16] But in the very next paragraph, it was stated that any work categorized as obscene would not be covered under the First Amendment's protection of Speech and Expression, as it would then be bereft of social value and outside the scope of constitutionally protected speech and press.[17] It is not hard to see the probable overlaps between the two paragraphs. If we are unsure as to where the line is to be drawn with regard to the restriction of speech and expression, then the only measure to tip the scales in favour of complete censorship is found in provable harm. But there have been multiple studies, including one conducted by the Butler Committee on Obscenity and Film Censorship, that concluded that watching or reading assuredly obscene content can hardly lead to resultant depravity in conduct.[18]

The Supreme Court in *Aveek Sarkar*[19] relied on *Roth*[20] to overrule the Hicklin test, but failed to consider its implications. The case has been superseded in the Supreme Court of United States in two subsequent decisions,

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12 (1970) 2 SCC 780 : AIR 1971 SC 481.
13 *Ibid* at para 50.
14 *Hamling* v. *United States*, 41 L Ed 2d 590 : 418 US 87 (1974).
15 1 L Ed 2d 1498 : 354 US 476 (1957).
16 *Ibid* at para 2.
17 L.M. Singhvi, Jagdish Swarup: Constitution of India, p. 739, Vol. 1 (2nd Edn., 2006).
18 William Butler, Report of the Committee on Obscenity and Film Censorship (Cmnd. 7772), HO 265/9, (1977 Nov.); (hereinafter "Obscenity Report").
19 (2014) 4 SCC 257.
20 1 L Ed 2d 1498 : 354 US 476 (1957).

with the most recent one being that of *Miller* v. *California*.[21] The reason for this was that *Roth*[22] had been far too vague and inadequate in setting a judicial yardstick for Obscenity. The test recommended by the court was, "*whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeal to prurient interest*".[23] The standard given here is blatantly relative, and it would be chaotic to apply it in a country like India, where community standards would vary by the kilometer. The United States Commission on Obscenity and Pornography had reiterated that the standard was a vague and greatly subjective moral test that provided little guidance to law enforcement officials, juries and courts.[24] The *Miller*[25] decision did retain the test, but added two further prongs to the test of obscenity: (a) whether the work depicts or describes, in a patently offensive way, sexual conduct *specifically defined by applicable state law*; and (b) whether the work, *taken as a whole, lacks* serious literary, artistic, political, or scientific value.[26] These criteria have not been discussed in *Aveek Sarkar*[27] decision. What would be helpful perhaps is an open-ended definition of obscenity and its criteria in law. But in more and more decisions, we find that judges tend to go about the matter in an intuitive manner, thereby violating ideals of due process - as artists, writers, filmmakers and others have no idea as to what would constitute obscenity.[28] This amounts to *ex-post facto* law making.[29]

The "community standard of tolerance" test, as developed in *Roth* v. *United States*[30], was taken a step forward by the Canadian Supreme Court in *R.* v. *Butler*[31]. The Court attributed to the test a necessary element of harm or substantial risk of harm.[32] The stance in *Butler*[33] marks the shift from the community standard test, which hinged on the kind of material that the majority would tolerate rather than the harm or the negative effects that the material would have on the community. In the words of Gothier J., "*while degrading or dehumanizing materials are likely to cause harm*

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21 37 L Ed 2d 419 : 413 US 15 (1973). The other decision superseding *Roth* was *Memoirs* v. *Massachusetts*, 16 L Ed 2d 1 : 383 US 413 (1966).

22 1 L Ed 2d 1498 : 354 US 476 (1957).

23 *Supra* note 183 at para 8.

24 Obscenity Report at p. 53; *Miller* v. *California*, 37 L Ed 2d 419 : 413 US 15 (1973) (hereinafter "*Miller*").

25 37 L Ed 2d 419 : 413 US 15 (1973).

26 *Miller* at paras 25-29.

27 (2014) 4 SCC 257.

28 Craig R. Ducat, Constitutional Interpretation: Rights of the Individual, p. 982, (Vol. 2, 2003).

29 *Ibid*.

30 1 L Ed 2d 1498 : 354 US 476 (1957).

31 (1992) 1 SCR 452.

32 Richard Kramer, "*R. v. Butler: A New Approach to Obscenity Law or Return to the Morality Play?*", p. 78, 35 Crim LQ 77 (1992-1993).

33 (1992) 1 SCR 452.

*regardless of whether the community may be ready to tolerate such harm, materials which show no violence, no degradation or dehumanization are less likely to cause harm*". The court held that to qualify as 'obscene', the exploitation of sex must be 'undue'. The reliance on *Butler* decision in this case is problematic as, unlike the decision in *Aveek Sarkar*[34], it did not make the community standards test the sole criterion, and made actual harm a mandatory requirement for a material to be classified as obscene.

## V. LEGAL MORALISM AND PATERNALISM: INTERPLAY IN TERMS OF OBSCENITY

Though the decision in *Aveek Sarkar*[35] has done away with the Hicklin test, the Supreme Court's justifications for curtailing the freedom of speech and expression in *Ranjit Udeshi*[36] still hold good. *First*, enforcement of public morality was invoked to uphold the constitutionality of Section 292. *Second*, community mores and a lack of an overriding social purpose (i.e. a need to protect[37] individuals from moral depravity) led to *Lady Chatterley's Lover* being held to be an obscene publication. Legal moralism and legal paternalism are the concepts underlying these justifications respectively. Now, we shall discuss these two concepts, the accompanying theories and debates, and shall demonstrate how they cannot override protection given to free speech.

Legal moralism provides legitimation for a law to prohibit acts that violate a society's collective moral judgments, irrespective of the harm caused.[38] Lord Devlin, in his essay "*Morals and the Criminal Law*", believed that a society had the right to protect its existence, and that the majority could follow its moral convictions to protect the society from the changes that threaten its existence.[39] Accurately descriptive of legal moralism, this stance would allow the enactment of laws, which are representative of the majority's opinions. We would disagree with Devlin's logic[40]

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[34] (2014) 4 SCC 257.

[35] (2014) 4 SCC 257.

[36] AIR 1965 SC 881.

[37] *Supra* note 165 at para 28: "*The law seeks to protect not those who can protect themselves but those whose prurient minds take delight and secret sexual pleasure from erotic writings.*"

[38] *Philosophy — On Liberty: Moralism and Paternalism*, Sevenoaksphilosophy.org., <http://www.sevenoaksphilosophy.org/on-liberty/moralism.html> (last accessed 12-3-2014).

[39] Devlin, Patrick, "*Morals and the Criminal Law*" 179, Faculty at Berea College, <http://faculty.berea.edu/butlerj/Devlin.pdf> (last accessed 12-3-2014). Devlin's essay was written in light of the Wolfenden Committee Report that recommended the decriminalisation of homosexuality; Dworkin, Ronald. "*Lord Devlin And The Enforcement Of Morals*", YALE LJ 75 at p. 988 (1965).

[40] An illustration would be: 1. Activity X is wrong. 2. Activity X is detrimental to the persistence of the society. 3. Society S has to do whatever is necessary to protect its existence, that is, to rule out Activity X.

here, and we would mention a number of examples where morals that have encouraged practices such as apartheid and casteism have now been shown to be misguided and wrong. Hart, in his criticism of Devlin's stance, was not convinced as to how a 'mere' deviation from the accepted sexual norms threatens the existence of the society.[41] Further, if the shared ideas on which a society is built were constantly shifting, he argued that Devlin was wrong, in principle, for allowing the majority of a moment to assume the power to establish morals permanently.[42] Ronald Dworkin, though supportive of public morality, envisaged a 'rational sieve'[43] and the need to provide reasons, to distinguish a moral position from a mere emotional feeling.[44] H.L.A. Hart's example of Emperor Justinian would serve an illustrative purpose here. "*As a proposition of fact it is entitled to nor more respect than the Emperor Justinian's statement that homosexuality was the cause of earthquakes*."[45] Emperor Justinian's view could not be said to constitute a moral position, as there is no factual evidence upon which his view could have been placed. It is to be noted that both Hart and Dworkin do not intend to reject any imposition of public morality; their intentions are only to set a high threshold upon the use of morality to proscribe other acts such as writing what is not straitlaced in its entirety.

Legal paternalism provides for the law's interference with a person's freedom if it is in his or her best interests.[46] Actions on the basis of this concept give rise to a conflict between the value ascribed to an individual's freedom and the value ascribed to the well-being of others.[47] A number of arguments have been made against this concept by J.S. Mill, Ronald Dworkin, Immanuel Kant, etc. Dworkin proposed the endorsement thesis[48] to criticize paternalism i.e. nothing would contribute to an individual's life without his or her endorsement. We would subscribe to Dworkin's endorsement thesis here, as an obscenity law that attacks individuals' freedom and agency to distinguish for themselves between obscene and acceptable

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41 Hart, H.L.A. *Law, Liberty, And Morality*. Stanford, Calif.: Stanford University Press, 1963.

42 *Ibid*.

43 This arises due to the means that Lord Devlin adopted to discern a "common morality". He proposed the "man in the jury box" test i.e. common morality consisted of all that was acceptable to an ordinary man who could be seen as the man in the jury box. The "man in the jury box" was chosen because: (*a*) the verdict of a jury (twelve men and women) must be unanimous (at the time he was writing); (*b*) the jury will only reach its verdict after the issue has been fully examined and deliberated; and (*c*) the jury box is the place where the ordinary person's conception of morality is enforced.

44 Guest, Stephen, *Ronald Dworkin*, Edinburgh: Edinburgh University Press, 1997; *Supra* note 201 at p. 1001.

45 *Supra* note 203 at 50.

46 *Supra* note 200.

47 Claire Andre and Manuel Velasquez, "*Paternalism and Freedom of Choice*", Santa Clara University's Applied Ethics Centre Website, <https://www.scu.edu/ethics/publications/iie/v4n2/owngood.html> (last accessed 12-3-2014).

48 Dworkin, Gerald, "*Moral paternalism*", Law and Philosophy, pp. 305-319, Vol. 24, No. 3 (May 2005).

content is inherently paternalistic and supportive of a fixed, certain set of 'good' values.

## VI. POST AVEEK SARKAR: CRITICISMS AND THE WAY FORWARD

We believe that the current position in law regarding 'obscenity' is heavily predicated on judicial discretion and cannot form a capable governing standard. The vagueness in defining obscenity that arises out of the community standards test, i.e. setting the standard on the basis of a community's standards would force the writers and publishers to meet the standards of the most conservative society as well, thereby leading to a reduction in legitimate, even if radical, content that can be published. Therefore, the arguments against paternalism and moralism must be taken into consideration while making and applying laws to preserve public morality and prevent the moral corruption of individuals. We also argue for the author's intention to be considered while judging a work of literature. This would help distinguish works that are written solely to arouse sexual excitement in individuals from the realist works that are depictive of sex solely as one of the realities of human existence.[49]

## VII. CONCLUSION

> *"As to the evil which results from censorship, it is impossible to measure it, because it is impossible to tell where it ends."*
>
> —Jeremy Bentham[50]

This paper has been an endeavour in trying to expose the whimsical nature and application of Anti-Obscenity laws, and its variable standards set. The banning of any book or other creative works in today's environment, where technology has ensured that what is proscribed is actually popularized, may be considered a moot point practically. But the thesis here is principle-based. Given that the world has long since distanced itself from Victorian morality, how high-up or low-down can standards be set when deciding upon a reasonable restriction? The answer must obviously be divined through a particular case-by-case approach. But as the criticisms of the American laws show, there has to be a certain degree of objectivity in general rules defining obscenity. For this, the judiciary has to be well in touch with the morality that actually prevails in any country at any point of time, and not manufacture public morals to reinforce a certain prejudice.

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[49] *Samaresh Bose* v. *Amal Mitra*, (1985) 4 SCC 289.

[50] Susan Ratcliffe, Oxford Treasury of Sayings and Quotations, p. 61, Oxford University Press, 2011.

It is true that the Constitution does accommodate restrictions to be made to freedoms of speech and expression, but these restrictions have to be judiciously extended to strike a balance between creative liberty and what can only be seen as puritanical notions of public morality. These notions can also not be allowed to perpetuate in the form of the non-contemporaneous ideas like the Hicklin test, which is excessively based on judicial discretion and cannot certainly be said to be a true representation of what the generality of public sees as corrupting or degrading.[51] Even the so called 'contemporary community standards' test, as depicted above, does not make for judicially sound assessments.[52] Given this, an outright ban on literary work based on antiquated standards and selective examination can hardly be called a fair restriction of free speech, the provision of which is perhaps the primary duty of a democratic state.

[51] Stephen Gillers, *A Tendency to Deprave and Corrupt: The Transformation of American Obscenity Law from Hicklin to Ulysses II*, p. 219, Washington University Law Review, Vol. 85, Issue 2 (2007).

[52] *Supra* note 178.

# DASHRATH RUPSINGH RATHOD V. STATE OF MAHARASHTRA: THE SUPREME COURT RULING THAT WAS LONG DUE

—*Unanza Gulzar*[*] *& Burhan Majid*[**]

*Abstract* *Section 138 of the Negotiable Instruments Act, 1881 is a fairly potent provision of law in that it has largely helped prevent fraudulent conduct on part of the drawer of a cheque, ever since its inception. But, it took just one ruling of India's Supreme Court, in* K. Bhaskaran v. Sankaran Vaidhyan Balan[1] *to eat up the larger intent behind this provision of law. The* Bhaskaran *ruling, in fact, liberalized the territorial jurisdiction vis-à-vis the offences under the said provision of law, leaving it open for the payee, or the holder, as the case may be, to file the complaint at any of the different places where the ingredients of section 138 are fulfilled. This ensued in the recurring and manipulative exploitation of the provision by the complainants, over the years now. In August 2014, however,* the Supreme Court in Dashrath Rupsingh Rathod v. State of Maharashtra[2], woke up and finally overruled Bhaskaran. The Court ruled that the complaint of a dishonour of a cheque can be filed only to the Court within whose local jurisdiction the cheque is dishonoured. This paper critically analyses this 2014 judgment of the Supreme Court, and argues that the Court's narrowing down of the territorial jurisdiction, inter alia, under Section 138 of the Negotiable Instruments Act, 1881, in this case is laudable.

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1. (1999) 7 SCC 510.
2 (2014) 9 SCC 129.

## I. INTRODUCTION

Without embellishing this Article any further, it must be noted at the outset that the primary object of "The Negotiable Instruments Act, 1881"[3] (hereinafter, called NI Act) is to ensure faith in the effectiveness of banking operations and credibility in transacting business through 'negotiable instruments.' Section 138, which deals with the dishonour of cheque, happens to be one of the most fundamental provisions in the larger scheme of the law on negotiable instruments in India. Section 138 is, in fact, intended to prevent dishonesty on part of the drawer of a cheque to draw it without sufficient funds in a bank account maintained by him, and thereby induces the payee or holder in due course to act upon it.

There is no doubt about the efficacy of the provision of law under section 138 of the NI Act. Down the line of now more than a century, the Act in whole and section 138 in particular has done a tremendous job in preventing unscrupulous people from misusing negotiable instruments. This is substantiated by the huge bulk of judgments, courts in India, both at the higher and lower level, have passed, from time to time.

Yet, a little more than a decade before, a Supreme Court ruling in K. Bhaskaran v. Sankaran Vaidhyan Balan[4], created tensions around the interpretation of section 138. The Supreme Court had in this case held that offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. Following are the acts which are components of the said offence. (1) The drawing of cheque, (2) The presentation of cheque to the bank, (3) The returning of the cheque unpaid by the drawee bank, (4) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, and (5) failure of the drawer to make payment within 15 days of the receipt of the notice. These are all the components that make the offence of dishonour of cheques. The Court observed that it was not necessary that all these above five acts should have perpetrated at the same locality. But a concatenation of all five is sine qua non for completion of the offence under Sec. 138 of the code. The Court said that, therefore, that under the principles of law on procedure of administration of substantive criminal law, the complainant can choose any one of the courts having jurisdiction over any one of local areas within the territorial limits of which anyone of those five acts was done. The court further held that the court having jurisdiction over the place of residence of the payer and the payee can have territorial jurisdiction to inquire and try the complaint.

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[3] The Negotiable Instruments Act, 1881 is an Act of Indian Parliament that defines and amends the law relating to promissory notes, bills of exchange and cheques.

[4] (1999) 7 SCC 510.

Therefore, what Bhaskaran case did, it simply permitted prosecution at any one of the five different places indicated therein. However, this liberal approach preferred in Bhaskaran led to recurring manipulation and abuse of territorial jurisdiction by the complainants, thereby resulting in hardship, harassment and inconvenience to the accused persons. Interestingly, particularly post-Bhaskaran era, a flood of cases involving dishonour of cheques has come before the Courts in India. "The number of such cases was estimated to be more than 38 lakhs in 2008. More than five lakh such cases were pending in criminal courts in Delhi alone as of 1st June 2008. The position is no different in other cities."[5] This huge burden of such cases has a choking effect on the criminal justice system at the lower level.

Taking note of this situation, the Supreme Court, in August 2014, in Dashrath Rupsingh Rathod v. State of Maharashtra[6], woke up and finally overruled Bhaskaran[7]. The Court ruled that the complaint of a dishonour of a cheque can be filed only to the Court within whose local jurisdiction the cheque is dishonoured. That is, only those courts within whose territorial limits the drawee bank is situated would have the jurisdiction to try the case. The judgment in Dashrath Rupsingh Rathod[8] is landmark in the whole range of judgements on the subject, thus laudable because it attempts to clear all the doubts which had previously crept around the interpretation of section 138 of NI Act. What the judgment in Dashrath Rupsingh Rathod[9], in fact, does is the object of this brief "Comment."

## II. TERRITORIAL JURISDICTION: GROUND CLEARED

The first and foremost thing the judgment under question does is that it clears the dust that had gathered around the point of territorial jurisdiction since Bhaskaran, as also pointed above. Acknowledging the fact that it had become commonplace for the courts to encounter a notice issued under Section 138 of the NI Act from a place that had no connection with the accused or with any facet of the transaction, the Court stated that misemployment with respect to the choice of place of suing calls for a stricter interpretation of the statute. In light of this, the Court reconsidered the issue - "which court would have the territorial jurisdiction to try a case of dishonour of cheque under Section 138 of the NI Act, " - and accordingly, held that "in cases of dishonour of cheque, only those courts within whose territorial limits the drawee bank is situated would have the jurisdiction to try

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5 Law Commission of India, 213th Report.
6 (2014) 9 SCC 129.
7 (1999) 7 SCC 510.
8 (2014) 9 SCC 129.
9 (2014) 9 SCC 129.

the case." This was due, however, way back, in wake of the hardships and injustices that ensued from the liberal interpretation Bhaskaran case[10] gave to section 138. Yet, the ruling is timely and appreciable. Interestingly, earlier also, Dashrath Rupsingh Rathod v. State of Maharashtra[11], the Supreme Court had highlighted the reality of Section 138 being rampantly misused for applicability of territorial jurisdiction for trial of the complaints regarding dishonour of cheque.

Another important question that hovered in the mind of everyone was that whether it is the concepts of civil law or criminal law which will be determinative of the territorial jurisdiction vis-a-vis the filing of a complaint under section 138 of NI Act. Thus, the Supreme Court also took note of this question in paragraph 14 of the judgment in the instant case, and cautioned against extrapolation of the civil law concepts like "cause of action". The Court relied on Section 177 of the Code of Criminal Procedure, 1973 which unambiguously states that every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.

## III. COMMISSION AND COGNIZANCE: NOT ONE AND THE SAME THING

In the instant judgment, the Court moves a step forward while making a distinction between the commission of an offence under section 138 of the NI Act and taking cognizance of it. The Court observes, "that an offence under Section 138 of the NI Act is committed no sooner a cheque drawn by the accused on an account being maintained by him in a bank for discharge of debt/liability is returned unpaid for insufficiency of funds or for the reason that the amount exceeds the arrangement made with the bank." The Court explained, "that it is the main provision of Section 138 that constitutes an offence. The proviso appended thereto simply imposed certain further conditions which must be fulfilled for taking cognizance of the offence." And, the Court said, "it is one thing to say that sending of a notice is one of the ingredients for maintaining the complaint but it is another thing to say that dishonour of a cheque by itself constitutes an offence." Then, taking help from Harman[12], the Court makes a beautiful observation in this context:

> "We respectfully agree with this statement of law and underscore that in criminal jurisprudence there is a discernibly demarcated difference between the commission of an offence and its cognizance leading to prosecution. The

[10] (1999) 7 SCC 510.
[11] (2009) 1 SCC 720.
[12] *Harman Electronics (P) Ltd.* v. *National Panasonic India (P) Ltd.*, (2009) 1 SCC 720.

> Harman approach is significant and sounds a discordant note to the Bhaskaran ratio. Harman also highlights the reality that Section 138 of the NI Act is being rampantly misused so far as territorial jurisdiction for trial of the Complaint is concerned. With the passage of time equities have therefore transferred from one end of the pendulum to the other. It is now not uncommon for the Courts to encounter the issuance of a notice in compliance with clause (b) of the proviso to Section 138 of the NI Act from a situs which bears no connection with the Accused or with any facet of the transaction between the parties, leave aside the place where the dishonour of the cheque has taken place."

Accordingly, the Court sums up:

(i) An offence under Section 138 of the Negotiable Instruments Act, 1881 is committed no sooner a cheque drawn by the accused on an account being maintained by him in a bank for discharge of debt/liability is returned unpaid for insufficiency of funds or for the reason that the amount exceeds the arrangement made with the bank.

(ii) Cognizance of any such offence is however forbidden under Section 142 of the Act except upon a complaint in writing made by the payee or holder of the cheque in due course within a period of one month from the date the cause of action accrues to such payee or holder under clause (c) of proviso to Section 138.

(iii) The cause of action to file a complaint accrues to a complainant/payee/holder of a cheque in due course if

(a) the dishonoured cheque is presented to the drawee bank within a period of six months from the date of its issue.

(b) If the complainant has demanded payment of cheque amount within thirty days of receipt of information by him from the bank regarding the dishonour of the cheque and

(c) If the drawer has failed to pay the cheque amount within fifteen days of receipt of such notice.

(iv) The facts constituting cause of action do not constitute the ingredients of the offence under Section 138 of the Act.

(v) The proviso to Section 138 simply postpones/defers institution of criminal proceedings and taking of cognizance by the Court till such time cause of action in terms of clause (c) of proviso accrues to the complainant.

(vi) Once the cause of action accrues to the complainant, the jurisdiction of the Court to try the case will be determined by reference to the place where the cheque is dishonoured.

## IV. PENDING CASES

Now with the issue of appropriate territorial jurisdiction settled, the Court was confounded with the question of cases that are pending before the various Courts in India. After considering various options available, the Court made two distinctions for this purpose. That is, in case of the proceedings which had progressed to the stage of recording of evidence or beyond, the Court held that they shall continue before the same courts and it would be deemed that the Court had transferred the case from the court of proper jurisdiction to the court where such case was pending. And, in the remaining cases, including where the accused had not been properly served, the complaints would be returned to the complainants for filing in the proper court. If such complaints are filed within 30 days of their return, they shall be deemed to have been filed within the limitation period (unless the initial complaint was itself time barred).

However, it's feared that the return of proceedings may result in further procedural red-tape and consequential delays. Yet, the Court's move is appreciable, in the larger interest of reducing the disproportionate burden Courts in few cities are beset with.

## V. CONCLUSIONS

Despite criticism from certain quarters, the ruling in Dashrath Rupsingh Rathod[13] is a timely intervention from the country's Apex Court on the interpretation of Section 138 of NI Act, given the hardships and inconvenience caused by the Bhaskaran ruling of same Court in 2009. The ruling sounds appreciable when it clears the cloud around the point of territorial jurisdiction of the Courts vis-a-vis the offence Section 138 creates. Remember, besides being lopsided, the Bhaskaran ruling led to disproportionate filing of cases before the Courts which had a severe impact on criminal justice system in India.

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[13] (2014) 9 SCC 129.

Besides, the Court's attempt, for instance, to draw a line between the commission of an offence under Section 138 of NI Act and taking cognizance of it, or to interpret the relevance of criminal law principles rather than the civil law principles on territorial jurisdiction to the offence under section 138 of NI Act is laudable.

# NALSA VERSUS UNION OF INDIA: THE SUPREME COURT HAS STARTED THE BALL ROLLING

—*Anand Swaroop Das*[*]

## I. INTRODUCTION

The first reaction to the recent judgment of the Supreme Court of India in the case of *National Legal Services Authority* v. *Union of India*[1] on the transgender persons would be that, *"it was high time"*. The decision is laudable despite lack of originality being left far behind on the score even by Pakistan and Nepal Courts. The problems of transgenders in India are as old and as ubiquitous as in the countries world over because it is a problem of the human kind and not of any specific region. While other countries in the world have gone ahead in recognizing the reality of the problems of transgenders and providing in their own legal, political and social ways, to address the problems of the transgenders, in India, the issue was never recognized as such and never addressed politically, socially or legally. Therefore, this judgement can be considered as path-breaking because the rights of transgenders in India are addressed here for the first time.

## II. THE NALSA CASE: A TOPICAL BACKGROUND

The gender-variant males or *hijras* are in existence in Indian sub-continent from the ancient times. In 'Kama Sutra' there is reference to gender-variant males as persons with 'third nature' or 'tritiya prakriti'. Stories relating to hijras are found spun into the epics like Ramayana and Mahabharata which have immense relevance to hijras as they tend to derive their religiosity, identity and genetic link from these epics. The hijras have, over the centuries, lived in close knit communities having usually a clan head at the helm of the affairs of the community. They follow their own tradition and culture and have strong social ties within their communities. They are variously known as Aravanis, Kothis, Jogats, Kinnars and Shiv-Shakthis etc. in different parts of the country. The hijras or eunuchs are

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1. (2014) 5 SCC 438.

feared, looked down upon, and sexually exploited. They have always lived in the fringe of the society and have never integrated into it. They have been subjected to social segregation, stigma, ridicule, harassment, apathy and exploitation for centuries just because they do not identify as either of the sexes and are considered as queers, a situation of their natural beingness and gender dysphoria, over which they have no control. Propagation of universal human rights concept in the later part of the twentieth century gave some fillip to the demand of transgenders for equal rights and recognition as separate sex in western countries. In India barring some work, mainly for HIV/AIDS prevention, done for the benefit of transgenders by some NGOs and some recent efforts by a few state governments like Tamil Nadu, Karnataka and Gujarat for the benefit of transgenders; there is precious little done to lift the transgenders from the hellhole to which society has pushed them for centuries. The term 'transgender' is a generic term which in its sweep includes all shades of gender-variant people, viz. eunuchs or hijras, gays, lesbians, hermaphrodites, cross-dressers etc. The population of transgenders in India is officially estimated to be around half million though the unofficial figure may be much more. They may be a miniscule of the total population, but the fact remains that they are the most neglected, lacking proper identities, excluded from social, cultural, political and economic participation, and discriminated at every stage and place. Albeit belated, it is a pioneering step by the National Legal Services Authority to bring the plight of transgenders to the limelight by seeking gender rights, legal and constitutional rights and equality for them.

The writ petition[2] was filed by the National Legal Services Authority, constituted under the Legal Services Authority Act, 1997, to provide free legal services to the weaker and marginalized sections of the society. Another registered association, Poojaya Mata Nasib Kaur Ji Women Welfare Society has also filed a writ petition[3] seeking similar reliefs in respect of a transgender community called Kinnars. Laxmi Narayan Tripathy, who claims to be a Hijra, has also been impleaded in this case so as to put across effectively the cause of the transgender community members. The petition was filed on the ground that non-recognition of the transgender community as a third gender denies them the right to equality before the law and equal protection of the law guaranteed under Article 14 and the rights to life and personal liberty guaranteed under Article 21 of the Constitution of India.

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2 (2014) 5 SCC 438.

3 *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438.

## III. THE JUDGEMENT: A PERSPECTIVAL EVALUATION

Judges K.S. Radhakrishnan and A.K. Sikri on April 15, 2014 pronounced their verdict in *National Legal Services Authority* v. *Union of India*[4]. They declared that the Hijras, Eunuchs should be treated as 'third gender' for the purpose of protecting their rights under Part III of the Constitution. The Central and State Governments were directed to grant legal recognition of the gender identity of transgenders as male, female or as third gender. The governments at the Centre and the States were also directed to extend all the social, medical and educational benefits to the transgender community as they have been neglected and discriminated against throughout their lives. Steps were directed to be taken towards framing of social welfare schemes, increasing the public awareness etc for the betterment of the community as a whole.

### A. LAUDABLE HIGH SPOTS

The pinnacle in the judgment is undoubtedly declaration of the transgenders as a 'third gender'. This is a progressive step based on human rights which only a handful of countries of the world have taken so far.

The Supreme Court thankfully transgressed into the legislative arena again to give recognition to the legal and constitutional rights of the transgender persons, which includes the rights of the hijra community as the third gender.

The Court brings all gender variants into the third gender by accepting the contemporary usage of the word 'transgender' which is seen as an umbrella category that includes those who identify as male to female, female to male, intersexed, and transsexual persons as well as those who identify as hijras, kothis, kinnars, aravanis/thirunangis, jogappas/jogta, shivshakthis and eunuchs[5].

Quite significantly, the Apex Court broadens the term transgender to include 'pre-operative, post-operative and non-operative' transsexuals who strongly identify with persons of the opposite sex[6]. The court thus, does not confine its judgment to only post-operative transsexuals i.e. on biological identity but also emphasizes that such limitation is unacceptable.

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4 (2014) 5 SCC 438.

5 *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438, paras 12, 44.

6 *Id.*, para 13.

The court clarifies the distinction between sexual orientation and gender identity by relying on the definition provided in the 'Yogyakarta Principles'. Even though the court discusses the two concepts, it emphasizes more on the gender identity. Justice Radhakrishnan in a chapter titled "Gender Identity and Sexual Orientation", notes that "*gender identity is one of the most fundamental aspects of life... it refers to each person's deeply felt internal and individual experience of gender... including the personal sense of the body which may involve a freely chosen modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms.*"[7]. He further observes that, "*each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom*"[8]. This virtually underlined the tone of the judgment in expanding the horizons of some fundamental rights of the Constitution.

The court on the issue of 'third gender as a separate identity' makes a tough move to elucidate better the legal rights of the people who do not fall within the male/female binary. This act of the court is a departure from most of the pre-existing legislations.

The pioneering change that the judgement seeks to bring about is that of prohibition of discrimination against transgenders in public places like restaurants, roads, hotels, shops and places of public entertainment. In the same light, the court also directed that the transgenders being socially and educationally backward are entitled to reservations in public offices and educational institutions. Direction was also given to the Central and State Governments to provide healthcare access to transgenders and also provide public toilets for them.

## B. EMPHASIS ON FUNDAMENTAL RIGHTS OF TRANSGENDERS

In Para 53 of the judgment the court says that if an international convention is not inconsistent with the fundamental rights enshrined in our constitution, it must be read into the provisions of Articles 14, 15, 19 and 21 to expand the meaning and promote the object of our Constitution. Herein, the Yogyakarta principles have been extensively discussed which the judgement deems should be recognized and followed as it does not stand in breach of any fundamental right provided under the Constitution. This ruling is in stark contrast with the 'Naz Foundation pronouncement', wherein the

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7 *Id.*, para 21.
8 *Id.*, para 25.

coordinate bench had not relied extensively on international human rights codes and principles and comparative law.

A very conscious and considered expansive interpretation of fundamental rights enshrined in the Constitution of India is given in this judgment to suit the cause of the third gender. Proceeding in line with such intent the Court holds that "*Article 19(1)(a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender.*"[9] In para 66, Justice K.S. Radhakrishnan proceeds to explain why gender identity should be protected under Article 19(1)(a). He holds that at the core of one's own personal identity lies gender identity and that a transgender's personality could be expressed by the transgender's behaviour and presentation and expression of such inherent personality cannot be curtailed by the State. The logic imbedded in the judgment pronounced in this case is that, s. 377 of IPC, by criminalizing conduct, also criminalizes the homosexual identity expression and therefore violates Article 19(1)(a). Thus now, a person has the right to cross-dress under Article 19(2) except in cases where it is violative of public order, decency and morality. This move of the Supreme Court draws a nexus between the gender identity and dressing style of a person which previously, had been stereotyped into the binary forms of male and female dressing only.

The Court opines that gender identity is protected under Article 21 as it is "*integral to the dignity of an individual and is at the core of "personal autonomy" and "self-determination*"[10]. The notions of individual autonomy, positive freedom, human dignity and self-determination are the basis of Article 21 as held by the Apex Court in this case. Article 21 does not merely imply freedom from the unjust interference of the State. With the help of a long line of judicial pronouncements on Article 21, the Court stresses on the ambit of 'right to life' to include the right to human development and dignity. In the eyes of the court, Article 21 provides a right to the transgender community to live a life with dignity and respect, which has to be ensured by the State. This can be linked to the Court's larger idea of social justice as one of the prevailing dharmas of the Constitution as reflected in para 119, "*Our Constitution, like the law of society, is a living organism. It is based on a factual and social reality that is constantly changing. Sometimes a change in the law precedes societal change and is even intended to stimulate it. ...When we discuss about the rights of TGs in the constitutional context, we find that in order to bring about complete paradigm shift, law has to play a more predominant role.*"[11]

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[9] *Id*., para 69.
[10] *Supra* note 3, para 80.
[11] *Id*., para 125.

After assigning the third gender to the transgenders the Court holds transgenders to be a socially and educationally backward class falling under Article 15(4). The court further holds that the term 'sex' in the non-discrimination clauses of Articles 15 and 16, includes 'gender identity'. The Court justifies its comprehensive interpretation as the intent of the legislature to prevent the differential treating of people for non-conformity with the stereotypical generalizations of male/female binary genders.

## C. COMPARATIVE LAWS NOTED

In taking note of comparative laws the Court referred to the judicial pronouncements by the Pakistan and the Nepal courts in *Mohd. Aslam Khaki* v. *Supt. of Police*[12] and *Sunil Babu Pant* v. *Nepal Govt.*[13] respectively wherein those courts have commonly recognized a third category of gender under law[14]. In its discourse on comparative law regarding the recognition of transgender identity, the judgement talks about the emphasis on biological sex in the controversial *Corbett* v. *Corbett*[15] case and also the *Attorney General* v. *Otahuhu Family Court*[16] case of New Zealand wherein stress was on surgical and medical procedures to effect a transformation. The Court was however, disinclined to accept the primacy of biological sex holding that the test to be applied should be a psychological one: "psychological factor and thinking of transsexual has to be given primacy".

This judgment recognizes the fact that an easily accessible right to recognition is meaningful in a country like India where transgenders face many kinds of impediments on their road to recognition like absence of uniform procedures and necessity of certification with Gender Dysphoria. In the light of this scenario, the judgment looks up to the Argentinean law in place, where a gender identity is totally based on self-recognition i.e. it is not required from the individual to prove that a hormonal therapy or surgical procedure had taken place[17].

## D. VIS-A-VIS KOUSAL V. NAZ FOUNDATION CASE

In *Koushal* v. *Naz*, the coordinate bench of the Supreme Court had held that criminalization of same-sex intercourse under S. 377 of IPC does not violate the rights under Articles 14 and 15[18]. Article 14 talks about reasonable classification and the requirement of a nexus between the purpose of

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12 2013 SCMR 187.
13 (2008) 2 NJA LJ 261-286.
14 *Supra* note 3, paras 71-72.
15 1971 P 83 : (1970) 2 WLR 1306 : (1970) 2 All ER 33.
16 (1994) 1 NZLR 603.
17 *Supra* note 3, para 40.
18 *Suresh Kumar Koushal* v. *Naz Foundation*, (2014) 1 SCC 1, para 42.

its enactment and the purpose of the State. However, in *NALSA*[19] judgment the Court had dismissed the same by holding that s. 377 of IPC classified 'acts' (those acts against the order of nature) and not 'persons'. Such a glaring flaw in *Naz Foundation* judgment has been brought to light in the present NALSA pronouncement. On the issue of sexual orientation, one's identity becomes meaningless if the person can't express it. A law which curbs 'conduct' of a person, curbs his/her 'identity'. Thus, s. 377 of IPC not only criminalizes same-sex intercourse but it also criminalizes sexuality and eventually, identity. However, in the present case, it is held that such reasoning is unconstitutional.

This judgment upsets the rulings in *Naz Foundation case* and the court acknowledges that the judgment seems ironical since it departs from the *Naz Foundation case* and though it leaves the *Naz Foundation case* undisturbed, it in effect demolishes the foundation of the same case. The constrained judgment in *Naz Foundation case* stands in stark contrast with the *NALSA* judgment, which is more empathically pronounced, with almost no holds barred.

## E. SHORTCOMINGS

Notwithstanding the path breaking effort of the Court in this judgment, there remain several shortcomings and misses in addressing the issue holistically.

The aspect of the judgement that needs careful deliberation is the grant of remedies to the transgenders. The court gives certain orders of a specific nature like the establishment of HIV care centres and separate toilets for transgenders. Then the court gives certain broader directions like steps for creation of public awareness schemes to ensure social inclusion of transgenders, social welfare schemes for the betterment of the community etc. However, apart from these implementable orders given by the Court, there were certain directions which were of a very vague nature like taking measures towards the transgender community to ensure a better place for them in the society and seriously addressing the issues faced by them. The consequence of granting such vague and expansive orders is that it creates little scope for accountability in case of failure to implement the same. The Court also fails to mention the findings of the 'Expert Committee' which was constituted to look into the problems faced by the transpersons and had submitted its report in January, 2014. The fact that the Court ordered the Executive to implement the findings of the aforementioned Committee without even discussing the findings is devoid of logic.

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[19] (2014) 5 SCC 438.

Though as already stated the Court thankfully forayed into the arena of legislation to give recognition to the transgenders as the third gender and of their constitutional rights which was long due. Was the Court right to issue a cascade of directions virtually in vacuum, without a legislation and a set of rules and sanctions for violations in place, to get the same implemented properly in a legal framework? Although the Court cannot direct for enactment of a legislation, in this case considering that the directions of the Court are nothing short of virtual legislation, an advice for a prompt legislation was definitely in order.

Court's total reliance on psychological test for categorisation of transgenders in complete exclusion of the biological test appears erroneous. Sometimes psychological tests can be doctored and psyche can be feigned in order to avail the benefit of reservation etc. Therefore, in appropriate cases biological test may become the determinant of true identity.

Blanket reservation and other benefits for the third gender by categorising them generally to be backwards are not appropriate. There are transgender persons in well-to-do families also. Therefore, identification of backwardness is necessary through some parameters.

Despite taking a diametrically different view from *Naz Foundation case* particularly on the issue of criminality under section 377 of IPC, the matter has not been referred to a larger bench for resolution.

Although transpersons have been given right to choose to being male, female or belong to the third gender, there is no mention about their right to choose sexual partner, which is important because of continuance of section 377 of IPC, the Damocles Sword hanging over their heads.

Court took note of the expert committee formed by the government to study the problems faced by the transpersons and right away directs the executive to implement the recommendations of the committee within six months without specifying the findings or the recommendations of the committee.

## IV. CONCLUDING REMARKS

It can be concluded that the case being India's first landmark ruling on the transgender community has definitely raised various questions and debates more so, because it upsets the socio-cultural status quo in respect of the transgenders. The entitlement of rights of the transgenders was never under dispute but they were deprived of their legitimate rights because of the social stigma and discrimination. The major part of the judgment deals

with the rights of the transgenders under the Constitution and various other international human rights principles when the same are never really in doubt. The issue is the deprivation of such inherent rights because of indeterminate gender identification which has also been sought to be redressed by the Supreme Court. But the question remains as to whether in absence of a legislation, rights, benefits and amenities for the third gender will materialise by virtue of this judgment. The more important issue that remains to be addressed is that whether this judgment and legislation, if any, that entails, will be enough to assimilate the transgenders with the main stream of the society, conservative as it still is, and the age old socio-cultural stigma against transgenders being still strong, without a change being brought about in the mindset and outlook of the people in the society. We cannot forget that even with Constitutional guarantees against discrimination, reservations, all the legislations and beneficial schemes, the assimilation of scheduled castes and scheduled tribes in the mainstream has not been achieved. In the case of transgenders there is hope because their numbers are comparatively much smaller. No doubt, the transgenders are euphoric about *NALSA* judgment, and rightly so. Although, it is yet to be seen how the things turn out for them by virtue of this judgment, there is no mistaking the fact that the Supreme Court has started the ball rolling for them.

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