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FROM THE EDITORIAL BOARD

Books form the bedrock of all civilizations. In the field of law, a Law Journal is a significant pedagogical tool which introduces law students to judicial processes and their plausible outcomes. Legal issues are often intertwined with their social and economic counterparts, and it is only through a Law Journal that a student of law is able to appreciate the differences and discern the fine line between legal issues and other socio-economic considerations. You have in your hands, the sixth edition of the CNLU Law Journal, a literary endeavour of Chanakya National Law University, Patna. With the last five volumes, the benchmark that we have set for ourselves is already very high, and with this edition, we only hope to match the high standard that we have set for ourselves. This journal is a holistic compilation of ideas and thoughts contributed by scholars, academicians and students of our esteemed legal fraternity.

The Article '*Dialectics of Freedom of Expression'* contributed by Prof. Dr. A. Lakshminath and Dr. Mukund Sarada in this journal is thought-provoking and enlightening. The authors have discussed and analyzed the jurisprudential point of view of the right of Freedom and Expression in depth by referring to literature and various aspects of modern and post modern view of human right and human dignity. They have also referred to the practice/approach of courts and contribution from the different Quarters of fourth estate. The authors have pointed out the disturbing features of the contemporary times relating to religious conservatism, advanced communication technology which threatens the humanity and individual freedom. The authors have stressed on the need of reinvention and re-articulation of the foundational principles to save the world from holocaust and suggested reinvention of the principles of Hindu philosophy for preservation and ensuring human dignity while asserting or guaranteeing or enforcing freedom of speech and expression.

In the article "*Trademark Infringement through Cybersquatting: Law and Policy: A Study of UDRP and Indian System*", the author has analyzed the issue of trademark infringement through cybersquatting and examined the efficacy of relevant laws and policies and scrutinized the legal standards evolved by WIPO'S ICANN to combat cyber-squatting. The author has also discussed the Indian judicial and legal position in trademark infringement by referring to important case law involving cybersquatting. After extensive discussion on the issues, domain name and Cyber-squatting and the existing laws, the author has opined that most crucial issues surrounding trademark

infringement through cyber-squatting is the lack of specific legislation to settle the disputes and prevent the cyber squatters and the absence of a clear-cut regulatory framework worldwide and has also expressed the need of bringing of a flexible regulation in this regard.

The article titled '*Imposing Insider Trading Regulations, 2015 On Private Companies: Warranted?*' intends to scrutinize the applicability of the Insider Trading Regulations, 2015 which has brought under its umbrella the private and public unlisted companies and has raised criticisms due to lack of clarity and prior jurisprudence. The authors have analyzed the applicability of S. 195 of the Companies Act, 2013 with respect to private companies and have pointed out the failure of the Ministry of Corporate Affairs to evade any confusion for including private companies under the ambit of insider trading regulations. The authors have meticulously presented reasons for including as well as excluding private companies from the applicability of 2015 regulations. The authors have touched upon the best practices around the world, with respect to insider trading regulation, and have presented a critical comparison between the "Abstain or Disclose" method and the "Abstain or Pay Fair Value" method. The authors have fairly concluded with the possible difficulties that would arise in imposing the stringent regulations on the private companies and have urged the MCA to come up with clarifications regarding the same.

Dr. Caesar Roy, in the article titled '*Shared Parenting System vis-à-vis Custody Of Child - Is India In Need of Legislation for Caring Children?*', discusses the concept of shared parenting under custody jurisprudence. The author has elaborated on the concept by highlighting the aspect of "best interest of the child" in case of shared parenting. An international perspective has been presented by the author through the discussion on ICSP Conferences and UNCRC. The provisions of the Guardians and Wards, Act, 1890 and the Hindu Minority and Guardianship Act, 1956 has been discussed to study the laws of custody in India and subsequently, an international practice has been presented by discussing custody laws of countries like USA, UK, Thailand, South Africa etc. Judicial decisions and law commission reports have been referred to by the author to paint the true picture of shared parenting in India and some criticisms of the present judicial scenario has been well-presented. The author has successfully presented arguments in favour of shared parenting in India and has also provided suggestions, which include reference to K.M.Vinaya case as well as amending certain existing legal provisions, for the establishment of an efficient shared parenting mechanism in the country.

In the Article *'Health Security and National strategy under the Patents Regime : Issues and Concern*', the author has discussed at length the possibilities of health security in India due to poverty, malnutrition, lack of pure drinking water, lack of health and hygiene education, patenting of drugs

and uncontrolled pricing. The author has touched on areas like compulsory licensing provision of Patent Act, 1970, the Doha strategy and India's initiatives and Directive Principles of State Policy etc. as tools to achieve health security.

In '*Critique Of The Constitution (One Hundred And Twenty-Second Amendment) Bill, 2014 / GST'*, it is laid down that the main objective of the Bill is to bring indirect taxation fall under a single regime. The article meticulously analyzes the features of the Bill and shows how the Centre and the states both shall benefit from the Bill. The authors have further elaborated the inclusion of articles 246A, 269A, 279A in the constitution as part of the Bill and have also highlighted the alterations to some of the existing provisions. The article critically examines the advantages of the Bill and also provides a comparison of the present Bill with the 2011 Bill. The anomalies in the 2014 Bill has been well elucidated with appropriate suggestions to meliorate them.

In the article '*The Whistleblowing Regime In The US And UK: The Way Ahead For India',* the authors have made an attempt to present a detailed scenario of the whistle blowing regimes in the UK and USA. The common law system (UK) has been elaborated discussed with help of judicial decisions, FCA requirements, U.K. Bribery Act of 2010 and U.K. Employments Rights Act of 1996. The authors have not failed to point out the practical problems as well as highlight the developments proposed by FCA. The Federal regime is marked by the Dodd Frank Act and S.21 F of the Securities Exchange Act. The whistle blower under the federal regime is entitled to an award, the requirements of which have been elaborately dealt with by the authors. An attempt has been made to discuss the concept of "Protected Activity" as well the extraterritorial application of the whistleblowers protection. While discussing the Indian perspective, the authors have elaborated upon various provisions of the Whistleblowers Protection Act, 2011 and other statutes and regulations like, Competition Act, 2002, SEBI Act, 1992, Companies Act, 2013. A comparison has been drawn and methods have been suggested to implement an effective whistleblower regime in India.

In the Article "*Spurious Seeds: Liability and Compensation*", the author has discussed the law relating to seeds and the amendments that were made to the Seeds Bill of 2004 and 2010 and has pointed out the issue relating to liability of companies and payment of compensation in case of failure of seeds. The law and the judicial response in this regard with inconvenient and unclear forums for redressal of compensation issues are comprehensively highlighted. The author is very critical about the role of the government in controlling the seed companies and its withdrawal of responsibility towards poor farmers.

In the article '*Patenting of Living Organisms: Policy Issues and Concerns — International Trends',* the author deals with the patenting of living organisms and related issues. The author has dealt with the history of the patentability of life forms in TRIPS. The matter relating to patenting of living organisms is dealt under Article 27 of the TRIPS. Article 27 lays down the patentable subject matter and exceptions to it. The exception does not include microorganisms. Patentability of life in various countries is varied as per their domestic laws and judicial pronouncements. The author has tried to examine the patent policy of life forms followed in USA, European Union and India. Allowing patents to living organisms has given rise to social and ethical concerns. The author wishes to take a strong view against patenting of life forms altogether without making a distinction between micro-organisms and higher living forms. There is a necessity to bring harmony between the policies relating to patenting of living organisms in various jurisdictions. The author proposes this change to happen through the built in review of Article 27.3(b) of TRIPS. This will ensure enforcement of the provision through WTO and thereby bring uniformity in the laws of all member countries.

In the article titled '*Comment on Validity of Discharge Vouchers in India',* the authors write that the practice of the insurance companies to insist on the discharge voucher before paying the liability under an insurance claim has been condemned and criticized in various judicial pronouncements. The Courts have held that such a practice is unfair and the concurrence obtained for the final settlement is not voluntary but is given under duress or coercion. The judgment of the Delhi High Court in *Worldfa Exports Pvt. Ltd. v. United India Insurance* has highlighted that this practice is still widely employed by the insurance companies. The Court held that the practice of the insurance companies to demand for the discharge voucher for a condition precedent to payment of claimed amount is not allowed by law. The article discusses this case law discussing the validity of discharge vouchers and also highlights how the present IRDA Guidelines and Regulations are insufficient to deal with such a malpractice. The article also highlights the regulations in other countries which deal and curb such malpractice in order to ensure the rights of the policyholders are protected.

In the article '*Drone Strikes: A New Form Of American Imperialism',* the authors seek to establish that drone program, entailing the targeted killing of the militant groups and consequential indiscriminate assassination of civilians without the consent of the concerned states, is 'U.S imperialism' in the real sense. The author has dealt with issues such as the legal status of CIA as a 'non-combatant enemy' and politics of its stealthy targeted killing; the inconsistency of drone strikes with the sovereignty of Pakistan; the shallowness of the plea of 'self-defense in the armed conflict' with al-Qaeda, in view of scant adherence to principles of International Humanitarian Law and drone strikes resulting in extrajudicial killing in violation of Human Rights

Law. The paper concludes that drone strikes need concerted international unified efforts, and strict adherence to international law to be an effective weapon of counterterrorism.

The author Owais Hasan Khan in the article titled '*International Anti-Money Laundering Regime and India',* the author writes that an effective and meaningful international money laundering regime requires three basic ingredients: international norms building, putting in place firm legal and enforcement foundation and creating close interrelations with different national systems so that international norms are incorporated into domestic legal system. In this paper, third ingredient to the building of effective international money laundering regime has been analysed with reference to India. The author believes that although India has responded well and incorporated and harmonised international money laundering regime into its domestic legal system; still lot has to be done in its proper implementation. The author concludes with the remark that huge amount of illegal money is laundered every year in Indian economy because of weak enforcement mechanism and failure of existing regime to curb the menace. He remarks that a lot has to be done so that crime of money laundering can be completely checked.

In the paper titled '*A Decade Of The Right To Information Act, 2005''-Critical Exploration Of The Scope And Impact Of The Act',* the authors write that The Right to Information Act (RTI) came into existence in the year 2005, for the sole reason to provide a legal right to have access to government-held information in order to strengthen democracy by ensuring transparency and accountability in the actions of public bodies. This paper discusses the reason behind the evolution of right to information in India which includes the need for effective systemic check on corruption where the citizen herself or himself has the right to take the initiative to seek information from the state, and thereby to enforce transparency and accountability. It also discusses about MKSS and their struggle and how it paved way for the RTI Act. Thereafter this paper examines the impact and engagement of the RTI Act for a decade after its implementation which includes scope analysis of the act, role of CIC, Judiciary and the RTI, limitations of the act, implementation issues which includes the *mode of request* or filing an application, lack of infrastructure etc. The impact examination part further includes exclusion from the scope of RTI and appropriateness of the amendment bill, 2013 with respect to the objective of the RTI Act. After analysis of its impact after a decade, the paper discusses about the path ahead which includes raising the awareness, promotion of summary procedures, effective training, pro-active disclosure of information, computerization and digitalization, and judicial power to the appellate authority.

In the article '*Victimology and India: Counterbalancing the Retributive Tilt'*, Neha Sharma argues that India follows an adversarial form of criminal justice system where victimology has been a narrowly addressed or even neglected field of criminal jurisprudence. The author believes that the victim

also has no role to play in the trial except as a witness. There has been plenty of focus on human rights of accused but not of the victim. The criminal jurisprudence, places the accused at an advantageous position compared with the victim. The Indian criminal justice system presumes the accused to be innocent till proven guilty. In the opinion of the author, the concept of victimology specifically in India can be analysed through the Code of Criminal Procedure and various amendments made to it more specifically the Criminal Amendment Act, 2013 that has taken some significant strides towards the victim. The author writes that it is high time to act, and there are measures that need to be taken urgently to address the victims' plight.

CASE COMMENT

In the case comment titled '*Critical Analysis of People's Union for Civil Liberties* v. *Union of India in the light of Electoral Reforms',* the author discusses the pros and cons of NOTA and the key issues faced in conducting free and fair elections. The author seeks to discuss feasible and implementable solutions to the issue of electoral reforms. Elections in India continue to suffer from several defects and loopholes and the author feels that a lot has to be done to make elections free and fair.

ACKNOWLEDGMENT

We, at Chanakya National Law University, are jubilant, and at the same time humbled by the growth and augmentation of the CNLU Law Journal which attracts contributions from the legal luminaries stationed in different parts of the country and is now a storehouse of a number of enlightening articles on law and legal issues. It is only through discussion, deliberation and debate that law grows and develops, and the sixth volume of the CNLU Law Journal celebrates this spirit of enquiry and the faculty of critical thinking which has been amply exhibited by our contributing scholars and students.

No good work is the result of an endeavour of a sole entity. Hard work of a lot of people has gone into the making of this illustrious journal. We extend our gratitude to our faculty advisors Dr. B.R.N. Sharma, Dr. P.P. Rao and Dr. Manoranjan Kumar for their invaluable insight and participation which made the making of this journal very smooth. We owe a lot to our Hon'ble Vice Chancellor, Prof. Dr. A. Lakshminath, for his indispensable guidance and encouragement.

We believe that the only purpose of this journal is to sow a seed of curiosity into the minds of our readers young and old, so that they exert themselves to discover some new facets of our legal culture and add to the legal comprehension of the society we live in. Happy Reading!

DIALECTICS OF FREEDOM OF EXPRESSION

—*Prof. Dr. A. Lakshminath*[1] *& Dr. Mukund Sarda*[2]

'आनोभद्राः क्रतवो यन्तुविष्वतः'।
(Let noble thoughts come to us from the universe)

Writing in 1859 J.S. Mill in "on liberty" emphasized that 'the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm'… In the part which merely concerns himself, his independence is of right absolute over himself, over his own body and mind, the individual is sovereign. Yet whatever mischief arises from their use, is greatest when they are employed against the comparatively defenceless; and whatever unfair advantage can be derived by any opinion from this mode of asserting it, accrues almost exclusively to received opinions.

Content and viability are essential for the assertion of Right in the wider sense. Content includes Ethical assertion which forms the critical importance of certain freedoms viz. freedom from (torture) and correspondingly about need to accept some social obligation to promote or safeguard these freedoms. Viability includes Open impartiality or open and informed scrutiny. Viability in impartial reasoning is central to the vindication of 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 of 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.

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[2] Dean & Principal of New Law College, Bharati Vidyapeeth University, Pune.

The universability 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 thus 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". For Kant the core of what makes judgment possible is our "common sense" shared by other judging subjects. It is this shared sense that allows us to exercise an "enlarged mentality" by imagining judgments from the standpoints of others. For Kant the ground for our "common sense" is the identical cognitive faculties of imagination and understanding that all human beings share.

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.

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.

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.

This includes any act of seeking, receiving and imparting information or ideas, regardless of the medium used. In practice, the right to freedom of speech is not absolute and is commonly subject to limitations such as libel, slander, obscenity, sedition (including, for example inciting racial hatred), copyright violation, revelation of information that is classified.

Alas! You do not have freedom even to sing a Happy Birthday song without paying licence fee of 455 U.S.D. to Warner Music, a giant MNC which earns 2 Million U.S.D. in a year towards licence fee for owning the copyright which in fact it does not have. A California Court on 23rd September, 2015 ruled as invalid a copyright claim by Warner music, a giant corporation on "Happy Birthday to you", charging license fee of approximately 455 U.S.D. for each rendering. U.S. District Judge George H. King of Los Angeles federal court examined the history of the song and its lyrics, traced back to the 1890s and ruled that Warner could not own the copyright it had claimed. Patty and Mildred Hill pencilled an original version with the lyrics "Good morning to you". But Warner bought the copyright in 1988. No one has ever sought to adjudication of the validity of its

copyright. The petitioner Rupa Marya successfully contested and wants to continue the crusade against the giant MNCs for such exploitation.

The right to freedom of expression is recognized as a Bill of Rights under Article 19 of the Universal Declaration of Human Rights and is recognized in international human rights law in the International Covenant on Civil and Political Rights. Article 19 of this states that "[e]veryone shall have the right to hold opinions without interference", and "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". Article 19 of Indian Constitution adds that the exercise of these rights carries "special duties and responsibilities" and may "therefore be subject to certain restrictions" when necessary "[f] or respect of the rights or reputation of others: or "[f]or the protection of national security or of public order (ordre public), or of public health or morals".

Concepts of freedom of speech can be found in early human rights documents. England's Bill of Rights in 1689 granted "freedom of speech in Parliament". The Declaration of the Rights of man and of the Citizen, adopted during the French Revolution in 1789, specifically affirmed freedom of speech as an inalienable right.

The defining role played in absentia by Bhagat Singh, in the hours and days after his hanging,[3] a role that history has not recognized, acknowledged or learnt from. He wrote "the day shall usher in a new era of liberty when a large number of men and women, taking courage from the idea of serving humanity… will wage a war against their oppressors, tyrants or exploiters…. to establish liberty and peace". (Why I am an Atheist October 5-6, 1930 Bhagat Singh).

Quite incredibly, Bhagat Singh's became the most important ideational presence at the Karachi Congress, virtually dictating its agenda and defining the draft resolution which Nehru put together and Gandhi edited which was a major "Karachi congress formulation" of 1931 which read "Every citizen of India has the right of free expression of opinion, the right of free association and combination and the right to assemble peacefully and without arms, for a purpose not opposed to law or morality." Karachi resolutions refracted themselves into the Preamble and Part-III of the Constitution of India.

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[3] Sardar Bhagat Singh was hanged on midnight of 23rd March 1931, thus advancing it from the dawn of 24th March, 1931. Martyr Bhagat Singh was 23 years at the time where he kissed the noose as it was lowered to his head.

Article 19 of the Universal Declaration of Human Rights, adopted in 1948, states that:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

International, regional and national standards also recognize that freedom of speech, as the freedom of expression, includes any medium, be it orally, in written, in print, through the internet or through art forms. This means that the protection of freedom of speech as a right extends to not only the content, but also its means of expression. The English poet, John Milton offered one of the earliest defences of free speech (in early modern times). His essay on the right to divorce had been refused a licence for publication. He then published in 1644 *Areopagetica*, which is one among history's most influential and impassioned philosophical defences of the principle of a right to freedom of speech and expression, without a licence.

Today, we find two main arguments used to defend free speech. There are instrumental arguments that free speech results in tangible benefits. A good example is Meiklejohn's argument that it promotes the sort of discussion that is a precondition to the functioning of democracy. This argument appeals to consequences and is, theoretically, testable by reference to empirical evidence. More commonly today, moral arguments are preferred in defence of free speech. Some arguments tend to move from what it is to be a person to the idea that it is an infringement of autonomy or dignity to remove or restrict speech.

There are many examples today when freedom of expression has been questioned. Pornography is one test case. It may be doubted whether hard core pornography is speech at all. As Schauer argues, it is a sex aid like a vibrator. MacKinnon sees hard core pornography as an act designed to subordinate women. If there is a casual relationship between pornography and domestic violence and rape, can it still be defended? MacKinnon's argument against is:

> "Sooner or later… the consumers want to live out the pornography further in three dimensions. Sooner or later… they do. It makes them want to, when they believe they can, when they feel they can get away with it, they do."

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. "

One of the most interesting challenges to free speech today is Holocaust denial. It is particularly useful to test out Mill, who we saw emphasized the truth/falsehood of statements. The Holocaust – the planned and systematic extermination of European Jews by the Nazis – is a "fact" – it is, however, one beset by controversy. There are "Holocaust deniers" (they prefer the term "revisionists") who doubt that it happened or who see the orthodox view that 6 million perished as a gross exaggeration (an MEP elected in 2014 is on record as saying it was "merely" 340,000). Some deny there was gas chambers in Auschwitz (a common allegation is that Jews put them there after the war to assist in the creation of the state of Israel). Like those who believe the sun goes round the earth and those who believe the earth is flat and those who believe the world was created in six days, Holocaust deniers are wrong. It is not even a subject worthy of debate. The Holocaust is an incontestable fact. A number of countries have criminalized Holocaust denial. The UK has not done so.

What then of hate speech? This typically degrades people because of their race, religion or sexual orientation. It targets minorities. Hate speech is intended to "compromise the dignity of those at whom it is targeted… it aims to besmirch the basics of their reputation, by associating descriptive characteristics like ethnicity or race, or religion with conduct or attributes that should disqualify someone from being treated as a number of society in good standing". It invariably involves acts of extreme racism delivered provocatively.

It is questionable whether protecting hate speech protects the wrong people: those with the power of communication at the expense of the vulnerable. But some liberals believe this is a price to be paid to uphold their cherished principle of free speech. 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 Beitzemphasises that justification needs to be "valid across the religious, moral and political societies in today's pluralistic world". (C. Beitz 2009)

I. HUMAN DIGNITY IN POST-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. Can human dignity be understood in purely secular terms or is it "ineliminably religious"? Is it 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, foetuses? A Delhi High Court judgment declared that Birds also do have fundamental Rights (18.05.2015 Hindustan Times). Can a person waive his/her dignity? Should Free Speech be not in conformity with human dignity? And many more. A whole jurisprudence syllabus could be created just on "dignity". (Mann)

Catharine A. Mackinnon asserts that the law of equality and the law of freedom of speech are on a collision course. In the United States, the law of freedom of expression has grown as if a commitment to speech were no part of a commitment to equality and as if a commitment to equality had no implications for the law of speech. Issues at the equality–speech interface are not framed as problems of balance between two cherished constitutional goals, or as problems of meaningful access to either right in the absence of the other, but as whether the right to free speech is infringed acceptably or

unacceptably, whether what is called freedom will give way to an imposed equality. Equality–promoting provisions in the United States concerning hate crimes, campus harassment, and pornography, […] for example, tend to be attacked and defended solely in terms of the damage they do, or do not do, to speech. At the same time, issues such as racial segregation in education, with its accompanying illiteracy and silence, are framed solely in equality terms, rather than also as official barriers to speech and therefore as violations of the First Amendment Freedoms.

When pornography and hate propaganda explode, as they are in what Yugoslavia was and elsewhere in Eastern Europe, they tend to be met with indifference or affirmatively embraced as freedom under US-style speech theory. As pornography and its defense as 'speech' take over more of the world, pervading law and consciousness, desensitizing whole populations to inhumanity, and sexualizing inequality, legal attempts to reverse rising racial, ethnic, and religious discrimination, harassment, and aggression – often ending, as in Croatia and Bosnia-Herzegovina, in genocide – may be disabled. The official history of speech in the United States is not a history of inequality – unlike in Europe, where the role of hate propaganda in the Holocaust has not been forgotten.

The evil to be avoided is government restricting ideas because it disagrees with the content of their political point of view. The terrain of struggle is the mind; the dynamic at work is intellectual persuasion; the risk is that marginal, powerless, and relatively voiceless dissenters, with ideas we will never hear, will be crushed by governmental power. This has become the 'speech you hate' test: the more you disagree with content, the more important it becomes to protect it. The marketplace becomes the battlefield when we are assured that truth will prevail while grappling in open encounter with falsehood, as Milton is often paraphrased.

The existing law against pornography was not designed to see harm to women in the first place. It is further weakened as pornography spreads, expanding into new markets (such as video and computers) and more legitimate forums and making abuse of women more and more invisible as abuse, as that abuse becomes more and more visible as sex. So the Court becomes increasingly *unable to tell* what is pornography and what is not, a failing it laments not as a consequence of the saturation of society by pornography, but as a specifically judicial failure and, finally, as an area in which lines cannot be drawn. The stage is thus set for the transformation of pornography into political speech: the excluded and stigmatized 'ideas' we love to hate. The way this protects what pornography says and ignores what it does – or, alternatively, protects what pornography says as a means of protecting what it does – is obscured. Thus can a law develop which

prohibits restricting a film because it advocates adultery, but does not even notice a film that is made from a rape.

Child pornography is not considered the speech of a sexually dissident minority, which it is, advocating 'ideas' about children and sex, which it does. Perhaps the fact that boys were used in the film in the test case has something to do with it. The ability to see that child pornography is harmful has everything to do with a visceral sense of the inequality in power between children and adults, yet inequality is never mentioned.

A new principle can be defined in terms of specific experiences, the particularity of history, substantively rather than abstractly. It will notice who is being hurt and never forget who they are. The state will have as great a role in providing relief from injury to equality through speech and in giving equal access to speech, as it now has in disciplining its power to intervene in that speech which manages to get expressed.

No one seeks "a uniform ethical system", but everyone wants "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. What institutions will result world government? 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.

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.

II. JE SUIS CHARLIE, HELL YES. JE SUIS PERUMAL.ANYONE?

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?

Following 7th January, 2015 killings at the editorial offices of the satirical magazine, *Charlie Hebdo*, it's clear even that one small freedom is at peril. Like all other democracies, India's government and people will have to negotiate this challenge with care. Ever since 1989, when India banned The Satanic Verses, threats of violence from a wide range of religious groups have led governments to ban more books than any other major democracy. This has poisoned our cultural and intellectual life — and there's no sign of the political maturity needed to address the problem. "It's hard to be loved by jerks," Charlie had the Prophet saying on the February 2006 cover cartoon. It's hard to be hated by them, too. But the killings in Paris make it necessary for us all to consider how this challenge can be best met — while denying the violent veto power over liberal civilisation, while protecting the right to free speech that necessarily includes the right to offend.

Good satire, the argument goes, must take on the powerful, not regular people. This assumes that believers, who constitute most of humanity, are the weak. It is a daft assumption. Humanity has demonstrated many times that nothing on earth is more powerful and terrifying than the fellowship of believers. In fact, the powerful, including violent dictators, are merely

effigies breathed into life by the collective imagination of the masses. A measure of a person's power is how many people he derives it from. Charlie Hebdo did ridicule the most powerful people of Europe and their private parts, too. It overreached when it attempted to take on something that was far deadlier than mere politicians. Charlie Hebdo has been attacked before, threatened often. Charlie Hebdo was brave because it knew fear. (Manu Joseph)

While outwardly, India subscribes to the same liberal values as most Western democracies, the reality is a little more complex. Modern Western liberal democracy is founded on the notion that individual liberty is an absolute value. Hence the dedication to the preservation of freedom of speech, the uproar over any wrongful confinement, the reluctance to countenance any form of preventive detention, and the protests over the use of torture. The problem with this approach, however, is that not only does it turn electoral politics into a vote-bank exercise — you appeal to groups rather than individuals — but that it may also foster a sense of unfairness. Many of the debates we have seen over the last two or three decades stem from dissatisfaction with this approach: Why should Dalits get reservation? Should Muslims be allowed to retain their own Personal Law? Why should we implement the Mandal recommendations? And so on. So the final lesson for us from the Charlie Hebdo affair is this: Even if Indian liberalism is a balancing act between groups, there are times when we must speak up for individual freedom. Otherwise it is the fanatics within the groups who will always set the agenda. (Vir Sanghvi)

For 25 years Murugan has written poetry, short stories and novels and single-handedly compiled a dictionary of the Kongu dialect. But it was his 2010 novel, *Madhurobhagan* (*One Part Woman*), set 100 years ago about a childless couple who attend a religious festival in the author's hometown of Tiruchengode where women have consensual sex with men other than their husbands in the hope of conceiving, that has earned the ire of the RSS and organisations like the Hindu Munnani. The stark announcement on his Facebook on January 13 was not unexpected: "Perumal Murugan the writer is dead." In an earlier interview to The Hindu, the writer said: "I wonder if I can think independently [again]. This was perhaps the intention of the opposing forces." Suchitra Vijayan in her article on "The death of the Author Perumal Murugan" laments that a society that allows for its storytellers to be silenced is one in need of ethical and political introspection. The travesty of the Perumal Murugan is not just a matter of freedom of expression. It is the imposition of a narrative tyranny and the state's abdication of its responsibility to protect our rights.

However recently the Madras High Court delivered a decision that was remarkable for its eloquence on the right to freedom of expression, on the

centrality of this right to our democracy and on the state's duty to protect it in this case. This decision sends a strong message at a time when freedom of expression is under threat from self-appointed morality enforcers affiliated with conservative groups.

Mr. Murugan's novel, published in English translation in 2014 as "One Part Woman," tells the story of a woman who plans to take part in a local religious ritual in which childless women have sex with strangers in order to conceive. Justice Kaul dismissed the idea that Mr. Murugan's book be censored: "All writings, unpalatable for one section of the society, cannot be labelled as obscene, vulgar, depraving, prurient and immoral." The Judge underscored that, "One of the most cherished rights under our Constitution is to speak one's mind and write what one thinks." Finally, he chided the book's detractors with simple advice: "If you do not like a book, throw it away" and concluded "Let the author be resurrected to what he is best at. Write." A buoyed Mr. Murugan vowed, "I will get up."

In May, Human Rights Watch issued a scathing report on the many threats to free speech in India, including vaguely worded laws that criminalize speech on grounds of sedition or defamation, the use of the police to arrest people for free-speech offences - rather than to protect citizens' right to freedom of expression - and an alarming official tolerance for mob violence in pursuit of censorship. (See Editorial in International New York Times, Monday, July 11, 2016)

The General drift in Society (Orwell) in our age is that the troubled intellectual in India today is being asked to choose between Freedom of Expression that can lead to intellectual murder or a silence that can end in intellectual suicide (Gopal Krishna Gandhi).

There is no censorship tool as sharp as the threat of violence, and this threat is now a well-established principle especially with regard to works that apparently offend religion. Movie halls that show a film depicting a character playing the role of God Shiva are vandalised. A bounty is announced on an artist who paints Hindu Gods and Goddesses in the nude. Rationalist Sanal Edamaruku remains in exile in Finland after he upset Catholic groups for exposing a supposed miracle. Islamic groups succeed in cancelling a planned visit of Salman Rushdie to a literature festival. (Namita Bhandare)

We lag noticeably behind. One such area is the freedom of expression. Many chief ministers and a few prime ministers have actively taken the side of fanatics who wish to have books or works of art banned. A Prime Minister was instrumental in banning Salman Rushdie's *The Satanic Verses.* The Left Front in West Bengal banned the works of Taslima Nasreen and

then refused to let her even live in the state. A Chief Minister had formal or informal bans placed on books, films and exhibitions of paintings. The recent silencing of the Tamil writer, Perumal Murugan, is illustrative here. No major political party in Tamil Nadu was willing to stand by Murugan's right to free expression. The local administration played an even more pernicious role - rather than protect Murugan, it coerced him into issuing an "unconditional apology" to the mob that sought to hound him. Threats to free expression eat away at the moral and institutional foundations of Indian democracy. To be sure, our writers, artists and film-makers enjoy greater freedom than their counterparts in semi-totalitarian countries like China or Russia. Yet, they are distinctly unfree when compared to their counterparts in thoroughbred democracies like Sweden or Canada. (Ramachandra Guha)

This is the logic of violence against freedom of expression. Think of a narrative history, not unrelated to the Paris attacks, of the original *Rangeela Rasool* case in India. This awful pamphlet on Muhammad, ostensibly written in response to a derogatory representation of Sita, arguably changed the course of Indian history more than any other event. It led to massive public mobilisations, the publisher of the pamphlet was assassinated and we had a far-reaching transformation in our laws with the introduction of Section 295A of the penal code. It also, in turn, unleashed a politics of competitive intolerance and double standards. All groups, except partisans for liberal democracy, achieved their objectives, by linking the taking of offence and violence in one chain. Implicit in the thought is the idea that your religion ceases to matter enough, at least in public, that you don't get provoked. Modernity is rife with all kinds of experiments — from the genocidal to the farcical — that promise such an escape. The real challenge for liberal democracies is not fighting the bad guys to the end of the earth; it is understanding why some fall under such murderous spells in the first place. (Pratap Bhanu Mehta)

Anyone who can reach Wikipedia enters a digital haven of freedom of expression. Curbs on free speech are growing tighter. Without the contest of ideas the world is timid and ignorant. Free speech is under attack by Governments, non-State actors and by some people and groups asserting that they have right not to be offended. Repression by governments has increased in several countries like Russia, China, Middle East particularly after the overthrow of despots during the Arab spring.

In some cases non-State actors are enforcing censorship of assassination as was done to Reporters in Mexico who investigated crime or corruption were tortured and murdered. Secular bloggers in Bangladesh are hacked to death in the street. The offence of violating the groups such as ethnic and religious groups and even people holding political beliefs being subjective, the power to police it is both vast and arbitrary. It is unfortunate that the

University of California suggests that it is racist "micro-aggression" to say that "America is a land of opportunity". Hate speech is another inroad into the freedom of expression. China locks up campaigners for Tibetan independence for "inciting ethnic hatred"; Saudi Arabia flogs blasphemers; Indians can be jailed for up to three years for promoting disharmony "on grounds of religion, race, caste etc. Germany and other 10 countries bar insults against their own heads of State. In many countries free speech is lukewarm and conditional. A group of Islamic countries are lobbying to make insulting religion a crime under International Law.

Laws against hate speech are unworkable, subjective and widely abused. Banning words or arguments which one group finds offensive does not lead to social harmony. On the contrary it gives everyone an incentive to take offence - a fact that opportunistic politicians with caste based support are quick to exploit as is happening in India in recent times. It's better not to try silence views with which you disagree and answer all objectionable speech with more speech which alone ensures greater freedom.

Many countries have introduced "defence of terrorism" etc. recently that are often very broad and vague. Such laws are handy tools for those in power to harass their enemies and particularly become dangerous when cynical politicians who rely on votes from certain group often find it useful to demand the punishment of someone who has allegedly insulted its members before elections as it has happened in the case of Ashis Nandi, an intellectual who made a subtle point at a literary festival in 2013 where local politicians preferred outrage and he was charged under Prevention of Atrocities Act. (The Economist June, 4th to 10th, 2016).

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 right of consciousness a response to hearing sad and sentimental stories rather human right 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 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.).

It is not necessary to believe in God to be a good person. In a way, the traditional notion of God is outdated. One can be spiritual but not religious… Some of the best people in history did not believe in God, while some of the worst deeds were committed in His name." These are not the words of a free-thinking rationalist that religious fanatics are gunning for. They are the words of Pope Francis. The backlash against religion has been spearheaded by scientists like Richard Dawkins and Sam Harris who have cogently and eloquently argued that far from being a negation of moral codes and an ethical life, atheism as a form of consciousness-raising is an affirmation of spiritual transcendence. When the French philosopher-mathematician Pierre-Simon Laplace presented a copy of his monumental work on the creation of the universe, Mecanique Celeste, to Napoleon, the soldier-emperor asked, why there was no mention of God in the book. Laplace replied "I had no need of that hypothesis." Is it time we outgrew that 'needless hypothesis'? Those who say it is, can do so with the blessing of Pope Francis. More than a century after Nietzsche proclaimed his demise, is humankind beginning to feel that – like an adolescent who outgrows childish clothes – we have outgrown the psychological, emotional and spiritual need of God?

J. S. Mill made three main arguments on freedom of speech: the argument from Truth, the argument from Democracy, and the argument from Autonomy or Self-Expression. John Stuart Mill's celebrated study *On Liberty* also sustained with the traditional liberal arguments on the benefits of freedom of speech and the press on the breakthrough of truth. Mill extended the liberal tradition commenced by Milton and Locke ideas in the course of a broader notion of freedom of the press. Wellington states that freedom of the press derived from his concept of individual liberty when Mill illustrated 'liberty of thought, from which it is impossible to separate the cognate liberty of speaking and writing'. Mill pursued the track of Milton and had an immense influence on the deliberation on press freedom.

However, it was criticised that Milton's views in favour of freedom of press from state or any other structure to manage were based on the idea that censorship of ideas inevitably resulted in a loss of an element of truth. Kathleen M. Sullivan stated that speech is embodied in a kind of ideological hierarchy in which mainstream ideas held widely at any given time by majorities or the socially powerful predominate over the systematically subordinated voices of dissent. Thus, protecting speech by dissidents and dissenters from regulation serves to equalize the relative opportunities.

The freedom of expression is considered as an integral part of a democratic regime, i.e. one based on some form of institutional arrangements designed to ensure significant responsiveness of government to the wishes of the governed. Members of the public in general, be the infants or convicts without the vote, or without a right to free expression, have an interest in the prosperity of democracy, hence, its existence is, in part, the existence of the right to free public political expression. The dilemma arises as to what level are there general principles of freedom of expression, and to what amount is freedom of expression category-dependent? It is stated that interference by government to discontinue the publication of what it regards as a false or misleading view seems contrary to freedom of expression whether the view concerns anything such as politics, religion, sex, health or the relative desirability of two kinds of automobile. Freedom of expression, as a philosophical crisis, is an example of a more general crisis about the nature and status of rights is to be tested. The interests with which freedom of expression is concerned especially deals with the interests that are the basis of special concern with expression.

There are three important justifications for freedom of expression:-

1) It helps in sighting of truth by open discussion. That is to say, it helps out in the detection of truth.
2) Free speech is a phase of self-realization and progress. Freedom of expression is a central part of each individual's right to self-advancement and self-fulfilment.
3) Freedom of expression shields the right of all citizens to identify with political issues so that they can partake in better working of democracy. Freedom of speech therefore fortifies the competence of an individual in taking part in decision-making.

III. MEDIA

The media plays a critical role in stimulating debate about important issues, presenting facts and reporting news, uncovering corruption and misconduct and providing a vehicle for diverse perspectives. Therefore,

it is considered as a lynchpin of democracy. This freedom carries with it the right to receive and communicate ideas orally or written through any medium. Regarding the justification for press freedom, it is observed by Jennifer Whitten-Woodring that free media will act as a *watchdog* over the government. Speech serves as a central means of potentially cooperative and presumptively nonviolent human interaction. It generates influence and commune. Press and the electronic media have obligations different from those that pertain to individuals and the freedom of speech with regard to individual may have an objective such as personal development or promotion of autonomous decision making. Such an objective has no direct relevance to Press. Think hard, work harder. If you dream of making a difference to the lives of the underprivileged, can retain your cool under stress, are willing to be non-judgmental and are amiable with different kinds of people, then Free Press is an option to explore. "One World is a product of journalism". Today the stress is not only on information but 'credible' information. The onus is much more on broadcast journalist. The right of Free Expression, once the province of intellectuals, now becomes a matter of concern to all who favour socio-economic advances like adequate education, social justice and access to the news media. Freedom of Expression is no longer a political nicety but a precondition for social competitiveness. This lays down the foundation for an unusual political condition of the future of intellectuals, scientists, promoters of social justice and advanced managers of power, all of whom will now find that their interest depends on revolutionising the education system, widening the access of the entire population to computers and other news media, and protecting even extending freedom of expression. Such a coalition is the best guarantee of both intellectual and social advances in the economics of 21st Century. For Marx freedom was the recognition of necessity. 21st Century social structures can be built on media's commitment to social Justice. Necessity is the mother of such commitment of a free and fearless media to secure the ends of social Justice and Liberty.

The Print and Electronic media are essential ingredients of Democratic dialogue. They are participants and not referees in the realisation of Constitutional ideals and aspirations. They need constant feedback. Their myopia amuses. Their size worries. Their errors hurt. Their arrogance angers. Like other institutions they profess ideals that exceed their very human capacities (Justice Iyer, K.). Gwynne Dyer while writing on "Free to Lie" laments that India is one of five most ignorant countries in the world. He further states that in the century and a half when there have been free mass media (and now social media as well), nobody has come up with a solution for this problem. "Free" includes free to make mistakes, and free to distort facts and tell outright lies. Are the media just pandering to existing popular fears, or are they actually creating them? The unsatisfactory but inevitable answer is: a bit of both.

IV. COURTS

Constitutional courts may be regarded as 'go-between', as intermediaries between majority rule and minority rights. In this respect, constitutional justice is a necessary correlate of the principle of decision-making based upon majority rule. Only when the process of democratic government takes place within constitutional boundaries, can minorities accept the decisions of the majority. Constitutional courts fulfil the role of inspiring consensus about the interpretation of the Constitution. That is perhaps the main reason why they are generally accepted in society – despite the fact they are nominated, not democratically elected. It is their function as judicial organs, which lies at the heart of this role. It is also this aspect of the court's function which is often compared with that of the referee, who controls the rules of the game, not the results.

Very position in constitutional democracies places severe requirements upon the courts. The question is to what extent their decisions are still considered legitimate and when they are thought to overstep their power and become a threat to constitutional democracy and the media liberty. Courts and the Constitution ensure and define the parameters of the liberty of the Media. Every good and excellent thing in the World stands moment by moment on the razor-edge or danger and must be fought for whether it is field, or home or a Country". Pollsters repeatedly tell us press credibility varies. If it did not vary, the print media would be doing the job. Its job and its performance cannot be rendered immune from criticism. The Constitution supports an informed public, creating a responsible representative Democracy, reflecting a common good and being ultimately respectful to the needs of all. The disclosure and wide publicity given to the officials facing corruption charges through print media by the Central Vigilance Commission is a very important and significant step in the right direction of open -- government and consequent recognition of citizen's right to know.

The Midday journalists who broke the story have done an important and courageous job. Some newspapers acting in solidarity have followed up story. A number of people have come together and made a public statement further bolstering that support. There are online petitions asking for a criminal investigation. If either the government or the courts do not order a credible investigation into the scandal, then a group of senior lawyers and former Supreme and High Court judges will hold a public hearing to examine the evidence that is placed before them. It's happening.

V. CONTEMPT PROCEEDINGS

It is felt by the media that the courts are expected to be more sensitive to the duties and functions of the press and before taking any view it might be considered whether the criticism *per se* undermined the functioning of the courts in the estimation of the public by demeaning judges. In a democratic set-up, all institutions are open to bonafide critical evaluation of their functioning and such criticism in the public interest only strengthens the quality of their functioning. The dignity of the court can always be maintained more by restraint and magnanimity.

"Truth forming the basis of the media information has now been protected under the amended provisions of the Contempt of Courts Act; Therefore, media information based on truth and published in the public interest constitutes defence in contempt proceedings," the Press Council observed recently. "The readers' right to know all sides of any issue of public importance is a natural corollary of the freedom enjoyed by the press in a democracy." Expressing unhappiness over what he called "trivialisation, corporatisation and tampering of news taking place everywhere," the Chairman of the Press Council of India (PCI) Justice (retd.) G.N. Ray, has advocated the setting up a common and independent media commission to regulate the functioning of the entire media, including the fast-growing electronic media which is now beyond the purview of the PCI.

VI. BALANCING FREEDOM AND SOCIAL RESPONSIBILITY

"The Indian law of contempt of court is perhaps the most restrictive among the constitutional democracies" and also that there is a "built in unfairness in a contempt case where the court acts as judge, jury and hangman rolled into one, and judges are judging their own cause." Frequent use of the contempt power had exposed intolerance among certain sections of the judiciary. One must however appreciate the just relief journalists, have got from the higher judiciary particularly in 2003 whenever they encountered high-handedness from legislatures.

Since media became very big player, issues of freedom, accountability, and social responsibility had become more important than ever before. Media growth in India was buoyant and dynamic, contrasting with the difficult, even gloomy situation faced by newspapers and also broadcast television in "many mature media markets, that is in many developed countries."

It was unfortunate that the Article 19 freedom of speech and expression made available to a virtually privileged press through judicial interpretation

was not available to the broadcast media, on account of arguments that are now clearly outmoded. They wanted the same degree of freedom must be made available to television and radio. But the paradox of the Indian situation was that while terrestrial television and also radio (with the exception of FM radio, which was not allowed to do news and current affairs) continued to be a state monopoly, television broadcasts that came via satellite and cable were functioning with no broadcast law, no regulatory framework, and "no clear rules of the game," which contrasted with the situation of virtually all developed countries. A liberal broadcast law and a liberal broadcast regulatory framework are very much essential against the growing negative tendencies of sensationalism, tabloidisation, trivialisation, celebrity-worship and the unchecked use of hidden cameras, in the Indian news media. In the absence of institutional mechanisms of self-regulation to give meaning to journalism's accountability and social responsibility, "the real challenge before the Fourth Estate," since harping on freedom without demonstrating accountability and social responsibility would weaken the position of the media in society. Historically the Indian press had won its special place because of the positive roles it played, can be identified as "the credible informational, the critical-investigative, the educational and the agenda-building functions."

The Guardian's exemplary model, now adopted by 'The Hindu', the institution of the Readers' Editor, an internal news ombudsman of independence and integrity with clear benefit to the newspaper and its readers. Institution of such mechanism by newspapers and media organisations will be self-corrective and self-regulating mechanisms. Dangerous business practices in the field of media have affected the fabric of Indian democracy. Big industrial conglomerates in the business of media have threatened the existence of pluralistic viewpoints. Post liberalisation, transnational media organisations have spread their wings in the Indian market with their own global interests. This has happened at the cost of the Indian media which was initially thought to be an agent of ushering in social change through developmental programs directed at the non-privileged and marginalised sections of the society. Media has at times successfully played the role of a watchdog of the government functionaries and has also aided in participatory communication. There is the threat of advertising revenues influencing media outputs. Those who control considerable wealth have the opportunity to sway public opinion in their favour with the help of mass media. In the 2G scam the Radia Tapes controversy brought in focus the journalist, politician and industrial conglomerate nexus which is a threat to democracy and undermines the media fraternity. Advertisements in newspapers, television, radio and at times the internet have become a part of the present day election campaigns. Candidates with better funds have the edge over others in being voted to office because they can buy newspaper space and considerable air time. Media organisations, whether in print, audio visual, radio or web have

to be more accountable to the general public. It should be monitored that professional integrity and ethical standards are not sacrificed for sensational practices.

It is also necessary to ensure that journalists are appraised of their rights around source protection, so that they are not pressurized to reveal confidential sources; appraise the media of the complexity of the questions around the use of journalists as witnesses; encourage the media to become freedom of expression advocates, and to appraise them of the avenues available to lobby on specific freedom of expression issues. The right of freedom of expression protects people's freedom to communicate in public.

Constitutional guarantees available to the press as an organization maintain the press's independence. The principal attribute of the press's institutional fortification is absolute editorial independence regarding both the structure and core of published material and, the function served by the press. The uniqueness of the institute classifies the capacity of security afforded by the approach of independence. The protection spans all stages of the publication process, including the gathering and investigation of news; its absorption and elucidation; its manner, set-up, and content; and its print and allocation. Additionally, the need to protect the foundation of a free press sanctions no general dissimilarity amid prior and successive restraints on publication or act of other press utility. In each occasion, legislative boundaries could breach the theory of independence.

Now a days, journalism persuades journalists and newspaper entrepreneurs to reconsider accepted ideas of newsworthiness, editorial policy, and professionalism. Broadcasters' should respect the public's right in broadcasting 'to receive suitable access to social, political, aesthetic, moral and other ideas and experiences'. This works on fairness regulation, that the public interest require opportunities for expression of contrasting viewpoints on issues of public importance, dates back more than half a century. Under this, the broadcasters retain discretion to "decide what issues are 'important,' how 'fully' to cover them, and what format, time and style of coverage are 'appropriate'. This poses the most potent threat to guarantees of free speech and press. Fairness regulation at its constitutional worst, therefore, creates gradations of speaking rights and restricts the speech of some members of society to magnify the relative voice of others.

Whether anonymity should come under the purview of free speech and expression? There are several reasons for placing anonymous political advertising within the category of the press rather than speech First, as a matter of technological necessity, during the founding era anonymity was predominantly a feature of the press rather than of speech. In US, press freedom protected commercial, scientific, artistic, and religious writings

every bit as much as it protected political writings, however, the legal doctrine of freedom of the press was never unlimited. There is widespread recognition that the press could be abused, and that the law should prescribe remedies for abuse. Thus, an author, and sometimes a printer, could face unpleasant legal consequences if responsible for breach of parliamentary privilege, defamation, blasphemy, obscenity, perjury, sedition, or treason. Whether anonymity is protected should not depend on a court's calculus of whether disclosure would suppress free expression in a particular case. The First Amendment of US Constitution protects an author's privacy for its own sake.

Internet allows for new means of communication and thus tracking a user's Internet activity seems intrusive because companies can exploit intimate information. The example is that of cookies, that are commonplace today because they can 'remember' log-in information, personal preferences, and can be used for security purposes. But cookies are capable of much more: they can store, and later transmit, personally identifiable or sensitive information. This data could include an individual's name, credit card number, health condition, social security number, or lifestyle preference. Cookies are, by design choice and not by coding constraints, largely invisible to consumers and encrypted to be unintelligible to any user wanting to know what the cookies are saying about him or her. Thus these encroachments seem even more dangerous because ISPs already have users' billing information in their database and could combine the data. It is all the more dangerous since smart phones take up all net banking facilities. This sort of behavioral advertising violate personal privacy and compromise personal autonomy because the consumer has no idea how he has been categorized and may be induced to act in ways he would not have chosen if he knew about his profile. To resolve this dilemma, some scholars argue that privacy should be enforced through civil litigation by creating a property right in personal data or by using tort law to remedy harms from exploited information. But it may be less effective than legislative and regulatory solutions in protecting personal privacy. Self-regulation provides flexibility and commercial success but seems to suffer from a poor incentive structure and inadequate enforcement. Legislation can provide enforcement and mandate nation-wide policies in the current political atmosphere which may get widespread support for a legislative remedy.

The defamation law apparently puts a ceiling on freedom of expression and the law should reconcile defamation law and freedom of expression. According to Sally Walker, any law which restricts freedom of expression should be made to satisfy three minimum standards:

1. The courts and the legislature, must be able to reconcile freedom of speech with defamation. Recently there is demand that the law of defamation needs a change;
2. The law should go no further than is indispensable to guard the interests justifying its subsistence; and
3. The law should be adequately obvious that those who are involved by it are proficient to resolve what is and what is not allowable by the law.

Cyberspace being the prospect of the information industry is a place where everybody is meeting, regardless of gender, age, race, or association. Since there is no regulatory body policing the Internet, the extent to which an individual is capable of acting without restriction is a mystery. Article 19 (1) (a) is a local provision in cyberspace, users all over the world often pray to its talismanic force against those endeavouring to hamper free and robust speech. The assumed needs of the budding mercantile area of the Internet and therefore it is making on governments is the furthermost menace to the active libertarian theory in cyberspace. The Communications Decency Act is one such hoofmarks that may in the process of protecting individuals in cyberspace obliterate free and vigorous speech. This shows that Governments already have the authority to standardize cyberspace that is coterminous with their geographical boundaries. But, it is not clear that they can effectively regulate that portion of cyberspace without denying their citizens its benefits. Therefore the need for today is a rule making, fact-finding, adjudication, and enforcement process that is accepted as legitimate and is enforceable both in cyberspace and in the real world. The major legal issues in cyber world are on access, distribution, contract and tort. As models of governance, three possible models for regulation exist: no regulation, government regulation, and self-regulation. The alternative is not between a tranquil state of no regulation, self-regulation, and government regulation, but the blend of the three.

The unique nature of the cyberspace requires a uniform global system of regulation should bar nation-states from enacting inconsistent national legislation. Considering each in turn and comparing different forms of rule-making that are least restrictive, most decentralized, and cost effective to those that are more centralized, restrictive, and cost inefficient. Through this process, we reach at the third model - private law, self-regulation, through a contract law paradigm which is best suited to govern cyberspace. The contract law model is most frequently offered as the governing paradigm for cyberspace. It is stated that for those threats from which technology and individual proposal do not present enough security, contract law or social enforcement methods endow with a good basis for generating a law of cyberspace. The users therefore need to submit their substantial

rights during contract to government; consequently, the contracts must be essentially just due to *consensus ad idem*. Hence, the current vogue of shrink-wrapping contracts in cyberspace must end. Contracting parties must take advantage of the technological options in cyberspace that reduce the transaction costs of negotiating contracts so that each contract represents the unique meeting of the minds - or at least a meeting of the electronic agents. About dealing with the dispute part it is stated that it should be resolved initially through negotiation, mediation and arbitration.

Social media differs in several important respects from conventional print or television ads, and even other websites. These distinctions bring social media outside the commercial speech realm, and as such, restrictions on their use will be more highly scrutinized than those on advertising. Thus regulation necessarily will be flexible, thereby allowing the technology to reach its potential within legal framework. It is a fact that Social media is not merely a marketing but is a human connection. To the lawyers and attorneys it is said to be all the more advantageous as it is virtually cost-free podium from which lawyers can express, speak, comment on legal news, law firm issues, and experiences in court. Attorneys can make contacts quickly, exchange information, and collaborate across jurisdictional boundaries. Moreover, publically commenting on the law requires that practitioners keep current with new developments. Social media provides a valuable way to interact within the community and build a network. For this reason social media is quickly replacing alumni contacts as an important source of referrals. There lies the real significance of social media.

Lawyers already operate in a highly-regulated environment, and there are several standing ethics rules that could be construed as ambiguous as to their applicability in the virtual world. Suddenly applying these rules to social media use without further clarification could implicate due process concerns. Ethics rules are drafted to govern the substance, not the medium, of attorney behaviour. The rules should be clear that the traditional behavioural restrictions apply equally to social media. Instead of blatantly bringing in regulations, there should be criteria on posting news on Confidentiality of information, duties to prospective clients, responsibilities regarding non-lawyer assistants, advertising etc. This approach presents the best balance between regulatory ends and attorneys' freedoms. It applies all the client protections already embodied in the current rules to the social media forum. The social media has a variety of benefits that attorneys can use to improve their practice and understanding of the law. These tools also give clients the ability to access information about the profession that was previously difficult to obtain. For all these reasons, any regulations placed on its use by lawyers should be reasonable and better serve social media to the legal profession.

VII. DIGITAL MEDIA

Social media being not simply the digital media, but the modern media, is considered as the best medium for bonding your lost associations, good opening to discover jobs, provides a podium of entertainment by posting pictures, sharing jokes, also partaking relevant articles on various aspects. With the proliferation of countless users and consumers, social media has become a platform to express opinions to a wider audience, ending the individual's and society's reliance on traditional media. With information flowing across networks and servers straddling several countries around the globe, there is a growing need to protect information pertaining to personal and national security. Unlike in the real world, where social etiquette and manners can sometimes seem restrictive and limiting, people feel they have a greater sense of freedom of expression and/or of speech when using online networks.

While traditional websites continue to exist, the robust and responsive utilisation of the tools that social media offers has improved their efficacy and visibility. The law in this area is still relatively unsettled and constantly changing, but some recent developments have created intriguing precedent, and the application of existing legislation promises to keep things interesting for the foreseeable future. Though the social media has global media platforms, the applicable legal systems are presently confined to national borders. If one is surfing on these sites and putting some personal details on it, there is a chance of misuse of information also. There is also a fear of hacking, stalking and online crime. There may be some people who are so much humorous; they may download your posted photos. There is no guarantee of such activities. Many people tend to go too far in sharing their lives and do not remember that the very real consequences that can occur. Thus in order to overcome these misuses in social networking sites, one should be aware about the legal implications i.e. what laws are there to get protection, if any misuses are occurred in social networking sites and what legal obligations are there both for the user and the site.

The main areas when users can get themselves into difficulty are through the posting of defamatory content or contents that infringes the intellectual property rights of someone. Since no statutory immunity exists to shield users, the standard laws pertaining to defamation and infringement apply. Likewise, if a user is found to have posted defamatory contents, the user will be liable, even if the sites can escape liability under section 230 of Communication Decency Act and Section 79 of Information Technology (Amendment Act), 2008. Similarly, if a user posts materials infringes on another's copyright, the user will face liability for the infringement. Several of the most prominent cases regarding user's liability for material posted on social networking sites have dealt with students suffering criminal charges

or adverse consequences at their schools as a result of allegedly defamatory, threatening or indecent messages posted on social networking sites.

Given the limited information *Facebook* provides and the absence of meaningful choice with regard to certain processing operations, it is highly questionable whether *Facebook'*s current approach satisfies these requirements. It is opined by Brendan Van Alsenoy and other researchers that *Facebook* combines data from an increasingly wide variety of sources (e.g., *Instagram, Whatsapp* etc). By combining information from these sources, *Facebook* gains a deeper and more detailed profile of its users. *Facebook* only offers an opt-out system for its users in relation to profiling for third-party advertising purposes. The current practice does not meet the requirements for legally valid consent. Likewise, *Facebook* has not made any changes to their privacy policy as part of its 2015 model. It's existing default settings with regards to behavioural profiling and marketing, in real meaning 'opt-out' stay beyond challenge.

Facebook's responsibilities as data controller, exist independently of the responsibilities of website operators. As a result, *Facebook* should design its social plug-ins in a way which is privacy-friendly by default, so that web-site operators are able to provide users with the convenience of social plug-ins, but without unnecessarily exposing data to *Facebook*. Thus the right to information, right of access, rights to object and erasure etc need to be precisely recognized.

Three predominant ethical duties must be defined in relation to informal discovery of social media data. They are: (1) the duty to affirmatively consider social media data when determining if claims or defenses are well-grounded in fact, or otherwise performing factual investigations; (2) the duty to refrain from contacting represented parties or from engaging in misleading or deceptive conduct to gain access to private social media content; and (3) the duty to consult clients on their own social media usage and to preserve evidence.

The ethical aspect even applies to what one writes in social media. Lyrissa Barnett Lidsky examines 'dangerous speech' issues as occurring around the world due to the handling of Facebook and various other social media sites. One such incident was an insulting tweet and YouTube video ended up in a hostile audience to riot and murder (the Terry Jones incident), and the other in which a blogger urged his unidentified, anonymous audience to murder federal judges (the Hal Turner incident). An assessment of these happenings discloses probable harms with Free speech theory. How spectators react to provocation, intimidation, or hostility expressions, are bewildered by the new reality social media create since unmediated character of social media speech also increases its potential for sparking violence.

Apart from that, the anonymity of many social media interactions also cultivates violent behavior, and the rate of communications authorize provocative speech to reach individual audience members at the point when they are most vulnerable to engaging in violent action.

Dealing with Indian aspect, the Internet has made an unimaginable impact on the fundamental right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution of India. The Internet democratizes Article 19(1)(a). Section 66A of the Information Technology Act penalises the misuse of Internet device and the Government can interfere in that, from such misuse danger is 'clear and present'. In the recent past the misuse has caused 70 deaths and mass migration of several people from North East from South India. Misuse of Internet created several law and order problems threatening social fabric and national security. The Government has justified in seeking the provision as a reasonable restriction on freedom of expression under Article 19 (1) (a). The Supreme Court, however, in Shreya case[4] invalidated Section 66A of the I.T. Act, though on different grounds.

The 'Clear and Present Danger Test', as stated by Holmes, "served to indicate the importance of freedom of speech to a free society but also to emphasize that its exercise must be compatible with the preservation of other freedoms essential to a democracy and guaranteed by our Constitution. When those other attributes of a democracy are threatened by speech, the Constitution does not deny power to the [government] to curb it." As characterized by Justice Brandies in a later case, the Holmes test "is a rule of reason. Correctly applied, it will preserve the right of free speech both from suppression by tyrannous, well-meaning majorities and from abuse by irresponsible, fanatical minorities." With information flowing across networks and servers straddling several countries around the globe, there is a growing need to protect information pertaining to personal and national security as they have a greater sense of freedom of expression and/or of speech when using online networks.

The distinctive nature of the new media technologies, principally the features that fuse the technologies under a sole umbrella can be summed up by the 5 C's: communication, collaboration, community, creativity, and convergence. Despite the easy entry into this field, many users of social media are not aware of the enormous legal risks involved in their online activities. These risks include violating state and federal advertising laws, copyright laws, privacy laws, securities laws, trademark laws, and tort laws such as defamation. Many people engaged in social media marketing are regularly posting on websites belonging to others without understanding

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4 *Shreya Singhal* v. *Union of India*, (2015) 5 SCC 1.

how such a website's terms of use could affect them. In addition to liability for their own posts, there is also the potential to become liable for third-party content posted to their own sites. The jurisdictional issues alone are mind-boggling.

Data protection and privacy laws aim to achieve a fair balance between the privacy rights of the individuals and the interests of data controllers such as banks, hospitals, e-mail service providers. These laws search for tackling the challenges to privacy caused by collecting, storing and transmitting data using new equipment. The ample range in types of data transfers across international borders that occur daily might give rise to different problems that require different solutions at different times. In the end, an approach to regulation based on careful attention to technology and business developments, coupled with genuine respect for cultural differences, is most likely to produce satisfactory, workable international solutions. Inaction, however, is not an option as the conflict has already manifested itself in the tensions that exist between the approach to regulation taken in the European Union and the approach taken in the United States.

As the greatest mode of forming associations through Facebook and other social networking websites, the Internet revolutionizes the fundamental right to freedom of forming associations under Article 19(1)(c) of the Constitution. But the necessity has arisen so as to ask 'whether social media needs regulation'? There is no need of any specific Regulations as they can be found in reasonable restrictions mentioned in Articles 19 (2) and (4). The Jurisprudence of the Court should strike a balance between demosprudence and legisprudence.

There is no yardstick to determine which are moral and which are immoral. H.L.A. Hart and Lord Devlin's debate was concluded with the shared morality which we require in society for balancing democracy as well as morality. It has to be left to Jurisprudence of the Court as it is more prudent to determine moral standards than the legisprudence.

New Communication Convergence Technology is being misused and abused by criminals in cyberspace. Cyber pornography, online child pornography, cyber spamming, cyber hacking, cyber fraud, cyber terrorism, flowing of viruses, phishing etc. are cybercrimes. These are proliferating at a lightening speed in the age of information technology uprising. There is a need to adopt uniform legal system and co-operation worldwide. There is need to adopt specific laws on jurisdiction at international level. To test online transaction or transmission Judiciary may use the community standards of the place where it is originated or the place where it is downloaded. There is need of international co-operation and active International Cyber Crime Cell. Spam is horrible and threatening act. We need Anti-spam law.

Cyber Cafes, ISPs and parents must use filter software, timer clock of internet protocol and firewall to prevent minors from viewing and using objectionable websites and images. Cyber cafes and ISPs must demand photo identity cards, and use biometric filtering machine to identify every user and to help investigations in realistic sense. There is a need to spread awareness among minors, parents, adults and institutions about misuse and abuse of new technology and effects on society. About social networking e-mail etc. if the contents are transmitted in private between two or more consenting adults without causing any harm to society or maintaining decency and morality then it should be allowed as freedom of speech and expression in the age of Communication Convergence Technology.

The fact that the law in India is yet to attain clarity in relation to the liability of intermediaries is true. Certain changes are required to be made to the law as well as additional changes must be bought in the system of working of the legal institutions as well as intermediaries. It is essential to balance the interests of ISPs and the public at large. This can be done by making laws imposing minimum mandatory fair obligations on ISPs by providing immunity for their actions taken in good faith. It is essential to ensure collective efforts of all legal enforcement authorities involving both public as well as private players including ISPs based on cooperative models.

VIII. ENCRYPTION

Encryption, a process in which digital messages are scrambled so that they cannot be accessed by anyone other than those to whom it is meant for, is a means to ensure freedom of expression and to keep information secure in the digital world. Encryption keeps intruders at bay. On 21st September, 2015 when the draft was released by the Government of India, experts and netizens could quickly figure out that the provisions had the real potential to undermine encryption. Another draft provision gives the government access to encrypted data that rest with government departments (save the sensitive ones), corporates and individuals. Another provision requires users to store all encrypted communications for a period of 90 days. The backlash had its effect; the draft was withdrawn the very next day. Most administrations have sought weaker encryption standards or backdoor access to Internet products. They present this as a public safety vs privacy issue. Administrations cite public safety as the reason for asking for encryption access. FBI Director James Comey complained to U.S. lawmakers recently: "We cannot break strong encryption." British Prime Minister David Cameron has called for a ban on strong encryption. Granting governments the power to tap into every message and item of information and store them, will have the potential to make the system extremely vulnerable. David Kaye, UN Special Rapporteur on freedom of expression, wrote

in a report in May: "It is a seemingly universal position among technologists that there is no special access that can be made available only to government authorities, even ones that, in principle, have the public interest in mind." Access to encrypted data should, therefore, be provided as an exception, not as a rule.

Cyber security expert Ms. Hathaway recently stated that it will be very difficult to get a common view of the (cyber security) law across 196 countries; because there are different approaches, cultures, history on how we think about freedom of speech; the right to privacy and freedom & security." No country should demand that the technology is weakened. Stating that "crimes happen too fast" on the internet, Ms Hathaway said "by definition international cooperation is too slow at the speed of the internet". "We should be able to work on machine speed on some of these things. And, not at the speed of the bureaucracy."

IX. JURISPRUDENCE OF THE COURT

Following the authors like Antonio Gramsci, Nickels Luhman and UpendraBaxi adjudicatory leadership can be studied under *three forms of prudence*, or bodies of thought which determine the province of constitutional hegemony: these are i) *legisprudence* viz. the principles or theory of legislation that take it beyond the contingency of politics, ii) *jurisprudence* i.e. that determines the principles, precepts, standards, doctrines, maxims of law and the concept of law and iii) *demosprudence* i.e. judicial review process and power that enhance life under a constitutional democracy. Put another way, it 'describes law-making or legal practices that inform', and are informed by 'democracy-enhancing jurisprudence', practices that inform and are informed by the 'wisdom of the people.'

While we think that lawpersons know best the second, we have to look at all the three forms working together to achieve some grasp of law in late modern society. As innovated by the Indian Supreme Court, demosprudence speaks to us severally. It serves as a marker of the emergence of a dialogic adjudicative leadership between/amidst the voices of human and social suffering. The Court not merely relaxes the concept of standing but radically democratizes it; no longer has one to show that one's fundamental rights are affected to move the Supreme Court or the High Courts, but it remains sufficient that one argues for the violations of the worst-off Indian citizens and persons within India's jurisdiction. Concern for human rights has now become the order of the day and this concern has prompted a creative partnership between active citizens inactive legislatures and activist justices. New human rights norms and standards not explicitly envisaged by the original constitutional text stand judicially invented through PIL, Basic Structure Doctrine, Ban on Bans etc.

In India, the most important statutory provisions under the ambit of Article 19(2) are Sections 153A, 295 and 295A of the Indian Penal Code. The purpose of Section 153A is to deal with hate speech promoting enmity between different groups on grounds like religion and race. Section 295 prohibits defilement of a place of worship or an object held sacred, with intent to insult a religion. Section 295A penalises blasphemy, which is outraging religious feelings. Clearly, many of these offences cannot be objectively defined. They are determined from the viewpoint of a "reasonable person". It is obvious then that the line will shift from one society to another, and over time, but it cannot be obliterated. While deciding reasonable restrictions the Court provided legisprudence in its adjudicatory role.

The Constitution does not define the expression "reasonable restrictions". Nor can the abstract standard or general pattern or reasonableness be laid down for all cases and situations. The test may vary under clause (1) from the right to right restricted by the impugned law (State of Madras v. V.G. Row[5]). The factors which should enter the judicial verdict are the underlying purpose of the restrictions imposed, the extent and urgency of the evils sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, and the duration of the restrictions. The standard is an elastic one: it varies with time, space and condition and from case to case (C. Golak Nath v. State of Punjab[6]).

> "In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and scale of values of the Judges participating in the decisions should play an important part, and the limit of their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for the people of their way of thinking, but for all, and that the majority of the elected representatives of the people have, in authorizing the imposition of the restriction, considered them to be reasonable." (State of Madras v. V.G. Row[7]) Reasonableness of restriction has to be viewed not only from the point of view of the citizen but also from the point of problem before the legislature and the object sought to be achieved. (From *Kesavananda Bharati* v. *State of Kerala*[8] cited in

[5] AIR 1952 SC 196.
[6] AIR 1967 SC 1643.
[7] AIR 1952 SC 196.
[8] (1973) 4 SCC 225.

> *State of Gujarat* v. *Mirzapur Moti Kureshi Kassab Jamat*[9]). Herein we find in the adjudicatory leadership of the Supreme Court's Jurisprudence the combination of demos-prudence and legisprudence.

The last century, despite its extra-ordinary scientific and technological achievements has been one of the most lethal in human rights performance. A disturbing features of the contemporary times are the revival of religious fanatism and the abuse of Advanced Communication Technology which are posing a major threat to the humanity and individual freedoms. 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 while asserting or guaranteeing or enforcing freedom of speech and expression by injecting the following universal truths into the human minds.

i) अमृतस्य शिशुः–'Amrutasya Sishu'- children of immortality.

ii) वसुधैवकुटुम्बकम–'Vasudhaiva Kutumbakam' – The entire world is a family

iii) सर्वेजना: सुखिनोभवंतु: –'SarveJanahSukhinobhavantuh' – Welfare of all beings.

Today, when "narrow domestic walls" and 'General Drift in Society' are emerging all over the globe, dividing people into ever smaller groups engaged in hating and fighting each other and encouraging intellectual murder or suicide, Gurudev's voice must resonate on the occasion of his 75th Death Anniversary

> "where the world has not been broken up into fragments
>
> By narrow domestic walls
>
> Where tireless striving stretches its arms towards perfection
>
> Into that heaven of freedom, my Father, let my country awake".

NOTE: Foot Notes omitted. Inputs from Lloyd's Introduction to Jurisprudence by Michael Freeman, Monograph by Meera Mathew and Editorials and Articles from Newspapers are gratefully acknowledged.

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[9] (2005) 8 SCC 534, 563.

TRADEMARK INFRINGEMENT THROUGH CYBERSQUATTING: LAW AND POLICY: A STUDY OF UDRP AND INDIAN SYSTEM

—Dr. Lisa P. Lukose[*]

Abstract Internet is a medium of unfathomable potential. Its multimedia potential makes it unique information exchange and information dissemination medium, it makes vital temporal, special barriers irrelevant and moreover it changes rapidly the paradigms of business. In the contemporary e-world, e-commerce is more significant than the traditional real space commerce. The market economy requires an identifier to distinguish the products. Trademarks and the domain names perform this function of identification in the cyberspace and in the real space respectively. To protect the consumers' interests and the trademark owners' rights, there are settled and effective legal mechanisms in the real space. However, where Internet meets the law, and specially, where domain names and the trademarks collide, the answer is totally different, uncertain and controversial. The inter-relationship between Intellectual Property (IP) and the Internet is evident at all levels and in all spheres. Ranging from the threat of copyright violation to trademark infringements, the Internet is viewed as a phenomenon requiring a rethinking of the entire system of Intellectual Property Rights (IPRs) and their protection. This article analyses the issue of trademark infringement through cybersquatting and examines the efficacy of relevant laws and policies. It also scrutinizes the legal standards evolved by WIPO'S ICANN to combat cybersquatting.

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I. INTRODUCTION

The most contemporary contentious issue between the IP and Internet is the cybersquatting. The trademark domain name disputes arise largely from the practice of cybersquatting. As long as the trademark owners were away from the Internet world, there were no trademark disputes on domain names. By deploying existing trademark for domain names, business started to attract potential customers to their websites. Cybersquatting not only violates trademark owners' right over their intellectual property, but also results in consumer deception and impairs e-commerce. Cybersquatters threaten the basic objectives of trademark law, by allowing competitors to benefit from the trademark holder's goodwill and reputation.

In an economy where most goods and services come from competing enterprises, trademark owners typically use their marks to distinguish their products and services from other on offer.[1] Trademark triggers off an association in consumer's mind between origin and good value. Trademark performs an important role by helping diminish informational asymmetry. A trademark may be used to indicate not only that the goods are of a particular maker but also to indicate that the goods are of a particular kind or quality. Three functions of trademarks in the modern economy can be distinguished:[2]

a) Origin Function: Marks operates as indicators of the trade source, from which goods or services come, or are in some other way connected.

b) Quality or Guarantee Function: Marks symbolise qualities associated by consumers with certain goods or services and guarantees that the goods or services measure up to expectations.

c) Investment or Advertisement Function: Marks are cyphers around which investment in the promotion of a product is built and that investment is a value which deserves protection as such, even when there is no abuse arising from misrepresentations either about origin or quality.

Hence, in the modern business market, trademarks are important in many aspects. The trademark law has undergone changes from time to time in tune with the changing pattern of business methods and practices. The very concepts of trademark and its functions have changed. Now days,

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1 W.R. Cornish, *Intellectual Property, Patents, Copyright, Trademarks and Allied Rights* 515 (3rd Ed., Universal Law Publishing Co. Pvt. Ltd., Delhi, 2001).

2 W.R. Cornish, *Intellectual Property, Patents, Copyright, Trademarks and Allied Rights* 527 (3rd Ed., Universal Law Publishing Co. Pvt. Ltd., Delhi, 2001).

this branch of commercial law involves the question and issues of domain names, and business advertisement on the Internet.

II. TRADEMARK VIS - A - VIS DOMAIN NAMES

Trademarks are vital aspects of trading on the Internet. In the new e-economy it is commercially prudent for a company to have an easily traceable address in the cyber-space. This requires registration of a particular domain name and web site under the domain name system (DNS). The new issue, which arises with the Internet, is the question of domain names. The term domain name is defined as a unique alphanumeric designation to facilitate reference to the sets of numbers that actually locate a particular computer connected to the global information network.[3] In very simple words, domain names can be described as the user-friendly addresses of computers connected to the Internet.[4] A domain name is a human comprehensible alternative to the string of numbers, e.g. .234. 532. 80. 69 called an IP (Internet Protocol) address, which web servers use to identify each other on the Internet.[5] The creation of the memorable domain names as an alternative to the numerical IP addresses has spawned a new industry and a trade in valuable domain names.[6] A domain name can be likened to an address on the global computer network, which both identifies and gives other information about a special Internet site.[7]

Domain names frequently represent a company's intellectual property in the form of trademarks, either registered or unregistered, or words and phrases associated with the company. Trademarks as domain names are not only contested by businesses, but also by individuals whose names have been used as trademarks. Consumers often perceive domain names as performing in electronic commerce much the same role as trademarks and trade names historically have played in more traditional modes of business. They can also be closely identified with the company itself in the sense that customers believe that a domain name should reflect the company name.

In one way, the domain name serves a duel purpose. It marks the location of the web site within cyberspace, much like a postal address in the

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3 Allen Rony & Peter Rony, *The Domain Name Handbook: High Stakes & Strategies in Cyberspace* in Robert A. Badgley*, Domain Name Disputes* 3 (1st Ed., Aspen Law & Business, New York, 2002).

4 V.K. Unni, *Trademarks & The Emerging Concepts of Cyber Property Rights* 16 (1st Ed., Eastern Law House Kolkata, 2002).

5 A protocol is, in essence an algorithm for recognising and dealing with a piece of information.

6 Michael Chissick & Alisteir Kelman, *Electronic Commerce, Law & Practice* 20-21 (3rd Ed., Sweet & Maxwell, London, 2002).

7 Diane Rowland & Elizebeth Macdonald, *Information technology Law* 520 (2nd Ed., Cavendish Publishing Ltd., London, 2002).

real world. It may also indicate to users some information as to the content of the site, and in instances of well-known trade names or trademarks may provide information as to the source of the contents of the site[8]. Domain names are relied to search for particular home pages on the web. Therefore, it is not only an address but also a specific identifier.[9] There are two categories of domain names such as *generic* and *country code*. Generic Top level Domains (gTLDs) are the most prized and are meant to indicate a global presence, for eg., .com, .org.[10] Any company with global ambitions can apply for a gTLDs registration. These names carry no indications of country of origin. Many companies operating on an international basis see value in possessing a non- country specific identifier.[11] These may be obtained by any one from anywhere in the world. Country Code Top Level Domains (ccTLDs) consist of two-letter denominator for every country in the world.[12]

For the administration of domain names a body called the ICANN[13] was established in October 1998. It is a non-profit private sector corporation formed by a board coalition of the Internet's business technical and academic communities. All domain name disputes are subject to the ICANN's 1999 Uniform Dispute Resolution Policy (UDRP). Under UDRP most types of trademark-based domain-name disputes must be resolved by agreement, court action or arbitration before a registrar cancels, suspends or transfers a domain name. Disputes alleged to arise from cybersquatting is addressed by expedited administrative proceedings initiated by the trademark holder by filing a complaint with an approved dispute-resolution service provider. In 2012, ICANN launched process to create new generic Top Level Domains. As part of the expansion of the domain name system, ICANN introduced a number of new brand protection mechanisms.

A. Similarities and differences

In essence, both trademark and domain name are identifiers or indicators. At the same time, there exist certain differences and conflicts between them. When trademark suggests the trade source, domain name serves the central function of facilitating user ability to navigate the Internet. A trademark may take a number of forms. In relation to domain names the only signs of relevance are those, which consist of the alphanumeric characters capable of constituting a domain name, in effect words. Domain names may be similar to the registered trademarks or unregistered trading names

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8 Graham J.H. Smith, Bird & Bird, (ed.)., *Internet Law & Regulations* 76-77 (2nd Ed., Sweet & Maxwell, London, 1999).

9 *Id*. at 47.

10 *Supra* note 6.

11 Ian J. Lloyd , *Information Technology Law* 20 (3rd Ed., Butterworths, London, 2000).

12 For eg. '.uk' for united Kingdoms, '.in' for India and '.fr' for France.

13 Internet Corporation for Assigned Names and Numbers.

of a commercial enterprise.[14] Unlike the traditional trademark environment where identical trademarks can co-exist in different markets, in the current domain name systems a trademark can only be used in a single commercial domain name (.com).[15]

In most of the cases, the registration of domain names is based on the principle of the 'first come, first served'. There is no relation or connection between the system for registering trademarks and the system for registering domain names. Governmental authority on territorial basis administers trademark registration. Domain name is administered usually by non-governmental organisation without any functional limitation.[16]

As more and more commercial enterprises trade or advertise their presence on the web, domain names have become more and more valuable.[17] A domain name is more than an Internet address and is entitled to the equal protection of trademark.[18] More over, e-commerce business has become the practice and routine of the day and as such Domain names have come to acquire a supplementary existence as business or personal identifiers. As commercial activities have increased on the Internet, domain names have become part of the standard communication apparatus used by business to identify themselves, their products and their activities.[19]

The use of a well-known trademark in a domain name can be an important source of visitors to a given web site. Disputes over registration of known trademarks as domain names have escalated in the past years. Indeed, the rapid growth of Internet has brought with it many conflicting controversies like domain name piracy, cybersquatting etc. One of the most problematic battles on the Internet is over the use of trademark as domain name and the resultant cybersquatting.

III. CYBERSQUATTING

The practice that's come to be known as cybersquatting originated at a time when most businesses were not savvy about the commercial

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[14] 'IBM' and 'Microsoft' are registered as trademarks in a number of jurisdictions and are closely matched by their domain names ibm.com and microsoft.com.

[15] There can, for instance, only be one 'www.apple.com' in cyberspace, but there could be trademarks used by Apple Computers, the Apple Grocery Store, Apple Clothing and Apple Records, and their separate products without creating consumer confusion as to source.

[16] *Supra* note 4 at 23.

[17] *Supra* note 7 at 521.

[18] *Rediff Communication Ltd.* v. *Cyberbooth*, 1999 SCC OnLine Bom 275 : AIR 2000 Bom 27.

[19] Christopher Reed, '*Internet Law', Text & Materials* 39 (1st Ed., Butterworths, London, 2000).

opportunities on the Internet. Some entrepreneurial souls registered the names of well-known companies as domain names, with the intent of selling the names back to the companies when they finally woke up.[20] The term cybersquatting covers a range of dubious actions. Cybersquatting involves the registration as domain names of well-known trademarks by non-trademark holders who then try to sell the domain names back to trademark holders.[21] It is the registration of domain names for "illegitimate" commercial gains.[22] Cybersquatting occurs when someone registers a domain name identical or confusingly similar to a well-known trademark with the hope of luring mistaken Internet users to his web site.[23] Registering, selling or using a domain name with the intent of profiting from the goodwill of someone else's trademark gives rise to cybersquatting. These practices include the deliberate bad faith registration as domain of well-known trademarks in the hope of being able to sell the domain to the owners of those marks (or rivals owners) or simply to take unfair advantage of the reputation attached to those marks and thus it involves the use of domain name by a person with neither trademark registration nor any inherent rights to the name.

A. Various Forms

There are different kinds of cybersquatting. It may occur at various levels, in different forms, and in different shapes. Its scope and magnitude may change from case to case. The most common types of cybersquatting are:

1) Speculative cybersquatting
2) Legitimate cybersquatting
3) Innocent cybersquatting
4) Concurrent cybersquatting
5) Active cybersquatting
6) Passive cybersquatting
7) Cross-character cybersquatting
8) Typo squatting
9) Classic cybersquatting and
10) Reverse cybersquatting.

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[20] "*Cybersquatting: What It Is and What Can Be Done About It*" available at {www.nolo.com/encyclopedia /articles/ilaw/cybersquatting.html},visited on November 1, 2014.

[21] *Marks & Spencer v. One In A Million*, 1998 FSR 265.

[22] Philip Clark*, Caveat: Cybersquatting* available at {http://ecommerce.wipo.int/databases/trademark/index.html} visited on November 20, 2015.

[23] Robert A. Badgley, *Domain Name Disputes* 1-4 (1st Ed., Aspen Law & Business, New York, 2002).

Cybersquatting, in some cases, may be "speculative" and "legitimate." Frequently, cybersquatters register words or phrases they hope will some day be sought after by new companies or new business divisions. A trademark is not infringed by a domain name unless the trademark existed at the time of domain name registration. This kind of cybersquatting is speculative and legitimate. There are "innocent cybersquatting" and "concurrent cybersquatting". "Innocent cybersquatting" is a kind of cybersquatting, whereby the registrant does infringe a trademark based on some unrelated interest in the word itself, without intending harm to a trademark owner and "concurrent cybersquatting"is a type of cybersquatting, whereby the registrant uses the same trademark as another commercial entity, but not within a competing industry.

A case of cybersquatting presupposes the dual requirements of bad-faith registration and bad-faith use. If both these requirements are present, i.e., the domain name has been registered in bad- faith and has been used in bad-faith, it is "active cybersquatting". In some cases the mere registering of domain name in bad-faith with no actual bad- faith use is treated as cybersquatting.[24] Even if, the cybersquatter has done nothing after registering it in bad- faith, this inactivity does not condone the abusive registration. Even inaction is within the concept of cybersquatting. This passive holding or passive use of domain name is "passive cybersquatting".[25] Domain name can be registered in certain Non-Roman characters. This gave rise to "cross-character cybersquatting."[26] In one case, it was held that the respondent's Chinese-character domain name to be identical to the complainant's tdctade.com.[27] In another case the complainant owned a trademark "dow chemical " and the respondent owned a domain name in Japanese Katakana letters, corresponded to "dowchemical.com".[28]

Many cybersquatters count on Internet users to make an errant keystroke in their search for a particular web site. Trolling for typo-driven hits, these chiselers register misspelled trademarks as domain name in the hope that a poor speller will land at their web site rather than the intended web site. If a domain name is comprised of a deliberate mis-spelling of a trademark, it is "typosquatting".[29] They are another genre of Internet squatters.

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[24] *Telstra* v. *Nuclear Marshmallows*, Case No. D2000-0003 (WIPO Feb. 18, 2000).

[25] *Supra* note 23 at 15.

[26] *Id*. at 6.

[27] *Hong Kong Trade Development Council* v. *Ting*, 2001 SCC OnLine WIPO 189.

[28] It was held as a cross character cybersqatting *Dow Chemical* v. *Irya Keiei Kenkyusho*, Case No. D2001-0098 (WIPO May 17, 2001).

[29] *Microsoft* v. *Microsof.com a/k/a Tarek Ahmed*, Case No. D 200-0548, (WIPO July 21, 2000); *Oxygen Media* v. *Primary Sourc*e, Case No. D2000-0362 (WIPO June 19, 2000), the first character being the number zero- was confusingly similar to the trademark "Oxygen". Another example is *Yahoo!* v. *Data Art*, Case No. D2000-0587 (WIPO Aug. 10, 2000).

Unlike cybersquatter who registers a domain name, which is identical to a popular or famous name with intent to transfer the domain name for an inflated price, the typosquatter takes advantage of web sites with heavy traffic and deliberately register several domain names slightly different from the already registered domain names to increase the chance of 'hits'. As a result, when an Internet user mis-spells the domain name or commits a typographical error while typing the company's name in the address bar, the browser directs the user to an entirely different web site.[30]

"Classic cybersqautting" refers to registering a company's trademark as a domain name and then initiating contact with that company to sell the domain name at a profit. Reverse cybersquatting or rReverse domain name hijacking occurs where a trademark owner tries to secure a domain name by making false cybersquatting claims against a domain name's rightful owner. Paragraph 15(e) of the UDRP rules defines reverse domain name hijacking as the filing of a complaint in bad faith, resulting in the abuse of the UDRP administrative process. Circumstances for a finding of reverse domain name hijacking includes: when the registration of the domain predates any trademark rights of the Complainant; or wWhen the complaint has provided no evidence of bad faith registration or use directed towards the Complainant; or where the Complainant has used the UDRP as a Plan "B" option to attempt to secure the domain after commercial negotiations have broken off or where the Complainant has attempted to deceive the domain owner or makes misrepresentations or fails to disclose material information to the panel.

IV. TRADEMARK INFRINGEMENT THROUGH CYBERSQUATTING

Cybersquatting is a clear violation of rights in the IP, i.e., trademark. Cybersquatting infringes trademark owner's right in several aspects. Any person or company who is not the trademark owner and registers the trademark as a domain is a cybersquatter and he engages in relatively straightforward trademark infringement. This, in many cases, takes the form of trademark dilution. Cybersquatting can also be invoked when a variant of a famous trademark is registered as domain for the registrant's own purpose. Cybersquatter thus breaches the fundamental rights of the trademark owner to use its trademark. The rulings in various cybersquatting cases affirm that 'traditional' trademark and trademark dilution laws are applicable to an extent in cyberspace. It is not only the 'unadulterated' trademark that can be protected but also any variation of it that is likely to confuse, deceive, or in some way dilute the distinctive quality of the mark. This significantly broadens the concept of trademark infringement through cybersquatting.

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[30] "*Typosqatter*" II (2) *ICFAI Journal of Cyber Law* (May 2003).

A. Various Tests

There are numerous tests to find out trademark infringement in cybersquatting cases. Because domain name disputes involve trademarks, courts have applied 'traditional' trademark law, as well unfair competition, defamation, misleading and deceptive practices, passing off, and similar laws. Some of the major tests are enumerated below.

i. Complainant's rights over the trademark

The first and foremost thing a complainant must prove is that he has "rights" in a trademark.[31] This is the standing requirement for an ICANN claim. Even though proof of exclusive registered trademark is not needed in cybersquatting cases, the complainant has to establish good faith basis for the complaint.[32] In one case,[33] the complainant sought the transfer of "knicks.com." The complainant was the exclusive licensee of several U.S. registered trademarks owned by the owner of the New York Knicks basketball team. The panel held that the complainant has failed to establish that, by virtue of its exclusive license, it actually held rights in the "Knicks" trademarks. The panel drew a distinction between rights in a trademark and rights with respect to a trademark. The panel concluded that an exclusive licensee does not have trade mark right to establish cybersquatting in respect of licensed mark. Finally, the panel observed that it does not have the discretion to infer the existence of rights for which there is insufficient evidence.[34]

Two co-complainants may jointly hold rights in a domain name that incorporates both complainants' names. In Williams case,[35] the respondent registered the domain name "venusandserenawilliams.com." The complainants, the world-famous tennis-star sisters Venus and Serena Williams, jointly sought transfer of the domain name. The Williams panel granted the complainant's request to transfer the domain name, without much discussion of the fact that the domain name incorporated both complainants' common law trademarks.

ii. Geographical reach of the complainant's trade mark right

The trademark owner must, as a threshold "standing" requirement, establish that he has rights in a trademark. It is not necessary, however, that the

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31 *Kimball Hill* v. *None*, Case No. FA97370 (NAF July 23, 2001).
32 *Centennial Communications* v. *Centennial*, Case No. D2000-1385 (WIPO Jan. 31, 2001).
33 *NBA Properties* v. *Adirondack Software*, Case No. D2000-1211 (WIPO Dec. 8, 2000).
34 *Media West-GSI* v. *Cupcake City*, Case No. D2000-1205 (WIPO Dec. 6. 2000); *Surf Control v. Multiview Solutions*, Case No. AF-0513 (eRes Dec. 21, 2000).
35 *Serena Williams* v. *Byrne*, Case No. D2000-1673 (WIPO Jan. 30, 2001).

complainant's trademark rights exist in the respondent's nation. Of course, the lack of trademark rights in the respondent's nation may be relevant to the "rights or legitimate interests" and "bad faith". While the geographical reach of a complainant's rights may be relevant to the "rights or legitimate interests" and "bad faith" issues, it has no real relevance to the first element of an ICANN claim.

iii. Common law trade mark and cybersquatting issues

Under the Uniform Policy, common law trademark rights may be recognized even in countries where they otherwise do not exist. A person, natural or legal, from any legal system, binds himself contractually to the terms of the Uniform Policy, when registering a <.com> domain name, wherever he may be in the world. This is the only way to ensure fairness across all jurisdictions for all complainants and respondents, and indeed all holders of domain names coming under the Policy. The scope has been extended to include common law rights in trademarks, business names and personal names. All contractual participants in the <.com> domain name system must be accorded the same rights and bound by the same obligations.[36] However, ICANN has no authority to rule that a domain name in and of itself is a trademark.[37]

iv. Doctrine of 'confusing similarity' in cybersquatting cases

"Abusive registration" claim implicates issues of traditional trademark law to the greatest extent. Not only must the complainant have rights in a trademark, but the domain name at issue must be "identical or confusingly similar" to the complainant's mark.[38] The "identical or confusingly similar" element usually generates less controversy than the "legitimate interest" and "bad faith" elements. There have been some contested issues surrounding the "identical or confusingly similar" element, and a number of ICANN panels have squarely addressed such issues.

v. TLDS, Hyphens, Underscores, Punctuation, Spacing, Capitalisation Etc.

The "TLD" portion of a domain name, such as ".com", is generally disregarded in a panel's analysis of the "identity or confusing similarity" issue. This is particularly true when the TLD is ".com".[39] In a case involving a ".net" TLD, the panel held that the ".net" portion of the domain name is as

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[36] *Meetingvenice.it* v. *VENICEONE*, Case No. AF-0824.
[37] *Espace Technologies* v. *Campbell,* Case No. AF-0273.
[38] *Banco Atlantico* v. *Infomax 2020*, Case No. D2000-0795.
[39] *VAT Holdings* v. *Vat.com*, Case No. D2000-0607 (WIPO Aug. 22, 2000); *Bill Withers v. Dominico*, Case No. D2000-1621 (WIPO Jan. 28, 2001); *Western Bonded Products v. Webmaster*, Case No. FA95286 (NAF Aug. 29, 2000).

irrelevant to a "confusingly similar" analysis as a ".com" TLD is. However, a ".org" TLD, since it does not denote "commercial," may support a holding that the domain name is not "confusingly similar" to the trademark. The panel held that the domain name "Pueblo.org" was not "confusingly similar" to the "Pueblo" mark[40], whereas the panel held that the domain name "pueblo.com" was "confusingly similar" to the "Pueblo" mark.[41]

Other *de minimis* differences between a domain name and a trademark are typically disregarded or overlooked in analysis of "confusing similarity" between the domain name and the trademark at issue. Hyphens or underscores between words in a domain name, the lack of spacing between words in a domain name, the lack of capitalisation of letters in a domain name, and similar matters generally are held to be irrelevant to the analysis of "identity or confusing similarity."[42]

vi. Visual, phonetical and conceptual similarity

Panels often evaluate the visual, aural, or conceptual similarity between the trademark and the domain name at issue. For example, it was held that "hot18to30.com" was not "confusingly similar" to the complainant's "Club 18-30" service mark, since the words "hot" and "club" were not visually, phonetically, or conceptually similar, "so the overall perception is that the two are different and readily distinguishable." In this connection, the concept of confusing similarity can be defined along the following lines: All that is necessary is that the domain name misappropriate sufficient textual components from the mark such that an ordinary Internet user who is familiar with the goods or services distributed under the mark would upon seeing the domain name likely think that owing to the visual and/or phonetic similarity between the mark and the domain name that an affiliation exists between the site identified by the domain name and the owner or licensed user of the mark.[43]

In Yahoo's case,[44] the panel held that "yahomo.com" was "confusingly similar" to the complainant's "Yahoo!" trademarks. The panel observed that the domain name "adds a letter and slightly changes the sound, but the appearance and pronunciation of 'yahomo' clearly recall 'Yahoo'.

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40 *Pueblo International* v. *Pueblo On-Line*, Case No. FA95250 (NAF Aug. 24, 2000).

41 *Pueblo International* v. *Pueblo Technology Publishing*, Case No. FA95252 (NAF Aug. 24, 2000).

42 *Can-Best Building Sciences* v. *Scopp*, Case No. AF-0213 (eRes June 20, 2000); *Do the Hustle v. Monkey Media*, Case No. D2000-0625 (WIPO Sept. 5, 2000); *Fielding v. Corbert*, Case No. D2000-1000 (WIPO Sept. 25, 2000) (use of lower-case letters and lack of spacing between words in domain name are irrelevant; *John C. Nordt Co.* v. *Jewelry Exchange*, Case No. FA96789 (NAF Apr. 11, 2001).

43 *Awesome Kids LLC* v. *Selavy Communications*, 2001 SCC OnLine WIPO 137.

44 *Yahoo!* v. *Internet Entertainment Group,* Case No. D2000-1595 (WIPO Feb. 1, 2001).

vii. Highly Stylised Trademarks

A visual analysis of "confusingly similarity" may also entail the comparison of a domain name with a trademark that is stylized, that is, composed of both words and graphics. In case where the trade-mark is a highly stylized word such that the graphic aspect of the mark is a dominant feature of the mark, the panel may decline to find the domain name to be "identical or confusingly similar" to the mark.[45] In many instances, when one peels away the graphic element, all that remains is a descriptive or generic word. In such cases, the panel is likely to hold that the respondent has a "legitimate interest" in his domain name.[46]

viii. Doctrine of multi- factored bad faith test

Cybersquatting can be held only when it is proved that the respondent acted in bad faith. The most difficult element for a complainant, in cybersquatting cases, to establish is that the respondent has registered and is using, the domain name in "bad faith". Courts usually adhere to certain non-exclusive factors in order to determine whether the respondent has acted with bad faith intent or not. There are bad faith in the following circumstances.[47]

1. Where the respondent has registered the domain name primarily for the purpose of selling, renting or transferring the same to the complainant who is the owner of the trademark for a valuable consideration.
2. The respondent has registered the domain name in order to prevent the owner of the trademark from reflecting the mark in a corresponding domain name.
3. The respondent has registered the domain name for the purpose of disrupting the business of the competitor.
4. The respondent, by creating a likelihood of confusion with the complaint's mark, has intentionally attempted to attract, for commercial gain, Internet users to his web site.
5. The respondent has registered the domain name for the purpose of disrupting the business of the competitor.
6. The respondent, by creating a likelihood of confusion with the complaint's mark, has intentionally attempted to attract, for commercial gain, Internet users to his web site.

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[45] *National Kidney Found* v. *Los Girasoles*, Case No. AF-0293 (eRes Aug. 31, 2000).
[46] *Sweeps Vacuum & Repair Center, Inc.* v. *Nett Corpn.*, 2001 SCC OnLine WIPO 131.
[47] UDRP, 1999, Para. 4(a)(iii).

All these factors are non-exclusive and a number of additional bad faith factors have been recognised and developed by ICANN panels in various cases. Still, there are certain unsettled or controversial issues surrounding ICANN "bad faith". Under the Uniform Policy, the burden of proof lies on the complainant to establish respondent's bad faith in the domain name registration. The bad faith determination often must be reached through inference rather than palpable evidence. Still, an ICANN panel may be hesitant to draw the inference of bad faith without some supporting evidences and may insist that bad faith cannot be presumed in the absence of any proof to the contrary.[48]

ix. Doctrine of "legitimate interest"

To succeed an ICANN claim, the complainant must establish that the respondent lacks "rights or legitimate interests" in respect of the disputed domain name in cybersquatting cases.[49] The components of 'rights or legitimate interest test' have been explored in thousands of cases. Still, these components continue to be developed, moulded and refined. The burden to proof, to show that the respondent lacks any "rights or legitimate interests" in the domain name, rests with the ICAAN complainant. In some special cases, the panels have effectively shifted the burden onto the respondent to demonstrate that he has some right or legitimate interests in the domain name.[50] The complainant may make a 'bare assertion' that the respondent lacks "rights or legitimate interest", at which point the respondent must put forth 'concrete evidence' of his rights or legitimacy.[51]

V. INDIAN CASES

In India, as in almost other countries of the world, at present there is no statutory law dealing with domain name and cybersquatting. The much awaited and highly expected Information Technology Act does not contain provisions to curb domain name piracy and cybersquatting.[52] But there are some important cases, which throw light to the Indian judicial and legal position in trademark infringement cases involving cybersquatting. Indian courts adhere to and apply principles of trademark laws and passing of doctrine in cybersquatting cases. Cases of cybersquatting and trademark violations including the use of metatags and hyperlinks have gone to the courts. The first Indian case in this regime was that of Yahoo's case.[53] in which the

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48 *Jazid* v. *Steinar*, Case No. AF-0897 (eRes May 25, 2001).

49 UDRP 1999, Para 4.a(ii).

50 *Dow Jones* v. *Hephzibah Intro-Net Project,* Case No. D2000-0704 (WIPO Sept. 4, 2000) and *Anderson Group* v. *Hammerton,* Case No. D2000-0475 (WIPO July 12, 2000).

51 *Supra* note 23 at 7-6.

52 The Information Technology Act, 2000.

53 *Yahoo! Inc.* v. *Akash Arora*, 1999 SCC OnLine Del 133 : (1999) 19 PTC 201 (Del).

court applied "passing off principles." On the issue of likelihood of confusion, the court held that even if it is assumed that an Internet user is a sophisticated user, he might be an unsophisticated consumer of information. The court observed that many Internet users are not sophisticated enough to distinguish between the subtle difference of the two domain names, namely, 'yahoo.com' and 'Yahooindia.com'. The Delhi High Court granted an interim injunction restraining the defendant from operating any business or selling or advertising or dealing in trade or service in any manner on the Internet under the trade mark or domain name "yahooindia.com" or any other similar trademark or domain name.

In another case, the Bombay High Court held that the defendants adopted the plaintiffs' well known web site, viz., www.rediff.com with dishonest intention.[54] The Indian courts are in the correct dimension and hence there is all possibility to hope that Indian judiciary will bring about proper remedies in this sort of disputes.

In *Tata Sons Ltd*. v. *Manu Kosuri*,[55] the registrations of many doimain names such as jrdtata.com, ratantata.com, tatahoneywell.com were held to be malafide registrations. In *Info Edge (India) (P) Ltd. v. Shailesh Gupta*[56] the domain name NAUKARI.COM of the defendant was held to be identically similar to the plaintiff's domain name 'NAUKRI.COM.' In *Tata Sons Ltd*. v. *Arno Palmen,*[57] the defendants were restrained from conducting any business or dealing in any manner including using domain name www.tatainfotech.in or the word TATA or any name comprising of the same or deceptively/confusingly similar to it regarding any goods, services or domain www.tatainfotech.

In *Online India Capital Co. (P) Ltd.*. v. *Dimensions Corporate,*[58] the Indian court refused to grant injunction on the ground of passing off observing that descriptive words do not afford protection. In this case, the domain names at question were, *www.MUTULFUNDSINDIA.COM* and *WWW.MUTUALFUNDSINDIA.COM*. The Delhi High Court while applying passing off principles said thus: "The words mutual funds forming part of the plaintiffs' domain name of www.mutualfundsindia.com is the description of the character of the services offered by it. The material placed on record by the plaintiffs prima facie falls short of indicating that the aforesaid word has acquired a secondary meaning which is a pre-condition for granting protection to a descriptive name." The court heavily relied on the

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[54] *Rediff Communication Ltd*. v. *Cyberbooth,* 1999 SCC OnLine Bom 275 : 2000 PTC 209 (Bom).
[55] 2001 SCC OnLine Del 250 : (2001) PTC 432 (Del).
[56] 2002 SCC OnLine Del 239 : (2002) 24 PTC 355 (Del).
[57] 2013 SCC OnLine Del 1216 : (2013) 54 PTC 424 (Del).
[58] 2000 SCC OnLine Del 352 : 2000 PTC 396 (Del).

ruling of House of Lords in *Office Cleaning Services Ltd*. v. *Westminster Windows and General Cleaner Ltd*.[59] and other Indian cases to conclude that the plaintiff' s domain name is descriptive of the services offered by him. The plaintiff has failed to show that this descriptive word has acquired a secondary meaning which is a pre-condition for granting protection to such words. The court also distinguish the present case from Yahoo and Rediff case on the ground that latter cases domain name had acquired distinctiveness which is missing in the present case.

In *Acqua Minerals Ltd*. v. *Pramod Borse,*[60] it was held that the trade mark owner has an exclusive right under trade mark law to register the trade mark as domain name. The plaintiff in this case was the registered owner of the trade mark "Bislari" for mineral water. The defendant has registered a web page with the domain name *bislari.com*. After examining the concept of domain name and the objectives of trade mark the court observed that: If an owner of possessor of trademark has prior and exclusive use and lone claim over the trademark, he attains not only superior title but absolute ownership thereof. This is what is the genesis of the word 'domain' and when the property or the territory or the activity relates to a trade or commerce and has been given the name or mark under which the commercial activities are identifiable with and carried out under the said name the users or owner thereof has a domain over it and therefore such a domain name has the same protection as any trade name has been provided. Any person who transgresses into other's realm and tries to usurp his domain name or in other words trade name which is used on the course of trade is guilty of infringement of the said name, if it is registered and if not liable for passing off action. This gives the impression that once a person becomes the registered trademark owner he has, as per the trade mark law, the exclusive right to register the name a domain name and prevent anyone from registering and using it for any other purpose.

VI. CONCLUSION AND SUGGESTIONS

The Internet presents excellent opportunities for businesses to increase their recognition and customer base. Consequently, electronic commerce or trading through the Internet has become a substantial concern for governments and businesses alike. The widespread use of the Internet and the growth of e-commerce have been brought with it many controversial legal issues which raise the fundamental problem in the relationship between trademark law and the domain name system. As discussed above, there is currently a great deal of unsolved confusion surrounding the issue of

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[59] (1945) 63 RPC 39.

[60] 2001 SCC OnLine Del 444 : AIR 2001 Del 463.

trademark and domain names and there are a number of fundamental issues that have to be resolved concerning the interaction between the two.

Cybersquatting is undoubtedly a cyber crime. More over it is a violation of trademark owner's property right. In today's knowledge industry, IPRS are more valuable than any other property. Even though, IP laws protect the trademark owners from infringement, all the IP laws are 'traditional. To curb cybersquattig, the presently existing way is to extend and expand the boundaries of traditional trademark infringement principles. However, this traditional trademark law is not fit to be applied in complicated cybersquatting issues. These situations demand for a new legal regime to prevent cybersquatters and to protect trademark owners right in cyberspace. Thus cybersquatting results not only in trademark infringement but also in consumer deception, fraud and unhealthy trade practices. The property in the trademark must be protected at any level, at any cost and in any space, whether real or cyber. The cyberspace must be secure market place for people to do business. In the absence of a proper mechanism to check effectively this global cyber crime, it will definitely hinder the international economic growth.

The most crucial issues surrounding trademark infringement through cybersquatting is the lack of specific legislation to settle the disputes and prevent the cybersquatters and the absence of a clear-cut regulatory framework worldwide. U. S has enacted an exclusive statute – Anticybersquatting Act - to protect the trademark owners and consumers against the Cybersquatters. The absence of legal regime in other countries like India not only encourages cybersquatters but also results in private and public rights infringement. Hence there must be endeavour to enact a specific statute to tackle the new branding issue. Any law to prevent cybersquatting and regulate domain name system must take care to avoid two dangers. The first is to under regulate. The second is to over regulate. Over regulation will result in rigid market, stifling it of the flexibility of operation, potentially its best feature and so stifle development of electronic commerce and may easily lead to commercial entities setting up in jurisdiction with less rigid controls.[61] Economic development will suffer if the laws are too rigid. Any regulation to curb cybersquatting must take into consideration all these factors. The statute must balance the interests of the trademark owners, traders, domain name holders and above all the rights and interests of the consumers and general public.

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[61] D Rowland and E Macdonald, *Information Technology*, 3rd Edn., Cavendish Publising, (2005).

IMPOSING INSIDER TRADING REGULATIONS, 2015 ON PRIVATE COMPANIES: WARRANTED?

—Dhruva Sareen & Shreya Mathur[*]

> *Nowhere is information more valuable or volatile than in the world of finance, where facts worth fortunes while secret may be rendered worthless once revealed.*[1]

The management, lawyers, accountants etc. of a company have routine access to information inaccessible to general public.[2] Some of this information is price sensitive and the supposed 'insiders' can make a profit by manipulating the sale or purchase of such securities, before the information is made public.[3] In *lex*-jurisprudence, this is known as 'insider trading.' India regulated such insider trading for the first time via SEBI (Prohibition of Insider Trading) Regulations, 1992 (the "**1992 regulations**")[4] by imposing civil and criminal sanctions against any person who engaged in such practice. Riding over a decade of enforcement, in 2015, SEBI overhauled the 1992 regulations[5] in light of the recommendations of Justice N.K. Sodhi Committee Report (the "**Sodhi Committee Report**").[6] The Insider Trading Regulations, 2015 (the "**2015 regulations**") aim to counter several shortcomings of the old regulations to fortify the regulatory framework of insider trading in India. Though the 2015 regulations are commemoratory, its applicability on private companies has become the despicable albatross.

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[1] ¶ 1, SEC v. Materia, 745 F 2d 197 (1984).

[2] *See generally* Paul Ali & Greg Gregoriou, Insider Trading: Global Developments and Analysis 5 (2008) [Hereinafter Ali & Gregoriou].

[3] *See generally* Paul Barnes, Insider dealing and market abuse: the UKs record on enforcement, MPRA, 29th September 2010, p. 6 *as available on* http://mpra.ub.uni-muenchen.de/25585/.

[4] Section 30, Securities and Exchange Board of India (SEBI) Act, 1992 empowered SEBI to make such regulations with the approval of the Central Government.

[5] *See* SEBI Board Meeting PR No. 130/2014.

[6] Report of the High Level Committee to Review the SEBI (Prohibition of Insider Trading) Regulations, 1992, Justice N.K. Sodhi, 7th December 2013, p. 10 [Hereinafter Justice Sodhi Report].

The 1992 regulations applied only on public listed companies; however, the 2015 regulations take it several notches further by bringing private and public unlisted companies under its ambit. This is in conformity to the Companies Act, 2013 (the "**2013 Act**")[7] which prohibits '*any director or key managerial personnel* (the "**KMP**") *from engaging in insider trading of securities of a 'company' regardless of whether the company is public or* ***private, listed or unlisted***.' Exempting the communication required in the ordinary course of business, profession or employment, the provision prohibits communication of all other unpublished price-sensitive information. Moreover, civil and criminal sanctions are imposed for any violation thereof.[8]

The paper aims to put under scrutiny the applicability of 2015 regulations on Private Companies under Section 195 of the 2013 Act. Initially, private companies did not come under the ambit of insider trading; however, the 2013 Act has expanded the scope by bringing both private and public unlisted companies under the compass of the 2015 Regulations. Harped by legal furore and apprehension,[9] there has still not been any clarification by the Ministry of Corporate Affairs (the "**MCA**") unravelling the rationale of applicability of the 2015 regulations on private companies. Traditionally confined to the limits of public listed companies, the 2015 regulations have caught the critics' gaze with it casting a wide net over private and public unlisted companies.[10] The lack of clarity and absence of prior jurisprudence has muddled the concept of insider trading in the context of private companies.

Dealing with the same, the authors trace the legal lineage of insider trading in Indian Law in **Part I** of the paper. **Part II** of the paper attempts to decode the supposed rationale for extending the applicability of Section 195 to private companies. The authors further analyze the insider trading regime in other Common Law countries, specifically New Zealand, USA and Canada in **Part III** of the paper. **Part IV** is an attempt by the authors to point out the shortcomings of the applicability of Section 195 on private companies. Lastly, the authors put forth their humble suggestions in **Part V** of the paper to counter the loopholes discussed previously.

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7 Section 195(1), Companies Act, 2013.

8 Section 195(2), Companies Act, 2013 reads as 'If any person contravenes the provisions of this section, he shall be punishable with imprisonment for a term which may extend to five years or with fine which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher, or with both.'

9 *See generally* Vinod Kothari & Shampita Das, *Insider Trading in Unlisted Companies: Understanding the operation of Section 195*, Indian Financing, 21st July 2014 *as available on* https://www.india-financing.com [Hereinafter Vinod & Shampita].

10 Tanya Choudhary, *Regulation of Insider Trading in Private Companies – Are we Casting the Net too Wide?*, 3(1) NLUJ Law Review 1 (2015), p. 2 [Hereinafter Tanya Choudhary].

I. APPLICABILITY OF SECTION 195 ON PRIVATE COMPANIES: WHAT, WHY AND HOW?

The 2013 Act[11] restrains the directors and KMPs of a company from engaging in insider trading, without distinguishing between a public or private company. Thus, *ipso facto*, the provision seems applicable uniformly to all companies, irrespective of it being private, public, listed or unlisted.

Nonetheless, *academic interpretation* of the provision suggests another conclusion. Section 195 of the 2013 Act defines the overt act of 'insider trading' to involve certain activities of dealing in securities of a company.[12] The term 'securities' would have the same meaning as under the Securities Contracts (Regulation) Act, 1956 (the '**SCRA**').[13] As per the SCRA, securities refer primarily to marketable securities only. Further, the judiciary has pronounced in *Norman J. Hamilton v. Umedbhai Patel*[14] and *B.K. Holding v. Prem Chand Jute Mills*[15] that securities of private companies are ***not*** marketable since there are restraints on its transferability thus disqualifying it to be a security under the SCRA. Thus, the contentions arises that Section 195 makes a reference to only the securities of a public company and not private companies.[16] This argument is in line with the Sodhi Committee Report which stated that '*any security that fits within definition of the term under the SCRA would be amenable to insider trading.*'[17] Moreover, it is contended that the Sodhi Committee Report assumed that the *only* contribution of Section 195 to the existing insider trading mechanism was the extended coverage to companies which intended to get their securities listed.[18] The

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[11] *See* Section 195 (1), Companies Act. 2013.

[12] Explanation (a)(i) to Section 195 (1), Companies Act, 2013 reads as '*insider trading means an act of subscribing, buying, selling, dealing or agreeing to subscribe, buy, sell or deal in any securities by any director or key managerial personnel or any other officer of a company either as principal or agent if such director or key managerial personnel or any other officer of the company is reasonably expected to have access to any non-public price sensitive information in respect of securities of company*'.

[13] *See* Section 2 (81), Companies Act. 2013 reads as ' "securities" means the securities as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956'

[14] *Norman J. Hamilton* v. *Umedbhai S. Patel*, 1978 SCC OnLine Bom 187 : (1979) 49 Comp Cas 1.

[15] *B.K. Holdings (P) Ltd*. v. *Prem Chand Jute Mills Ltd*., 1980 SCC OnLine Cal 135 : (1983) 53 Comp Cas 367.

[16] Tulika Sinha & Arun Mattamana, *The Viewpoint: Notified Sections of the Companies Act, 2013 – Analysis of Issues for M&A Transactions*, Bar & Bench, 3rd January 2014 *as available on* http://barandbench.com/viewpoint-notified-sections-companies-act-2013-analysis-issues-ma-transactions/; Assocham White Paper, *Mergers and acquisitions in the new era of Companies Act, 2013*, Ernst & Young, February 2014 *as available on* http://www.ey.com/Publication/vwLUAssets/Assocham_White_paper_Companies_Act/$File/Assocham_White_paper_Companies_Act.pdf [Hereinafter Assocham].

[17] Justice Sodhi Report, *supra* note 6, at p.17.

[18] *See* Tanya Choudhary, *supra* note 10 at p. 4.

2013 Act[19] vests SEBI with the power to prosecute insider trading in securities of '*listed companies or those companies which intend to get their securities listed*.' This has been used to argue that private companies are still not the subject of insider trading laws.

The authors' contention are supplemented by the legislative intent present in the drafting committee reports on Companies Bills. The 2009 Report incorporates a plea by certain business associations like Bombay Chamber of Commerce and Indian Merchants' Chamber to recommend Section 195 since it overlapped with SEBI regulations.[20] Responding to the plea, MCA reasoned that the definition of 'insider trading' was not existent in either the SEBI Act or the SCRA, and therefore the incorporation of 'insider trading' in '*principal legislation for corporate entities*' would bestow SEBI with the power to curb such *pernicious* activity.[21] Further, MCA explained that legislative intent behind Section 195 was not to modify the existent regulatory mechanism and the provision shall always remain in conformity with the SEBI regulations.[22] The 2011 Report subsequently suggested that an exception be whittled out to prevent the applicability of Section 195 on private companies[23] since the insider trading regime only applied to listed companies. The MCA reacted by stating that Section 458(1) empowered SEBI to enforce these provisions, and consequently, there could not be any conflict between Section 195 and SEBI regulations.

Thus, it is a humble submission that there lays substance in the authors' contention that Section 195 did not intend to extend the applicability of insider trading regulations to private companies. However, literal construction and subsequent interpretation does not negate the possibility of bringing private companies under the ambit of insider trading. The MCA could have evaded such ambiguity by the issuance of a clarification/notification in this regard, however; that does not seem to be forthcoming. The MCA issued a notification exempting private companies from complying with certain provisions of the 2013 Act;[24] but no proposal was made in the context of Section 195.

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[19] Section 458 (1), Companies Act, 2013 reads as '[..] Provided that the powers to enforce the provisions contained in section 194 and section 195 relating to forward dealing and insider trading shall be delegated to Securities and Exchange **Board for listed companies or the companies which intend to get their securities listed** and in such case, any officer authorised by the Securities and Exchange Board shall have the power to file a complaint in the court of competent jurisdiction.'

[20] *Report of the Parliamentary Standing Committee on Finance on Companies Bill 2009*, Ministry of Corporate Affairs, August, 2010 [Hereinafter Parliamentary Standing Committee Report, 2009].

[21] Parliamentary Standing Committee Report, 2009, *Id*.

[22] *Id*.

[23] Report of the Parliamentary Standing Committee on Finance on Companies Bill 2011, Ministry of Corporate Affairs, June 2012.

[24] Ministry of Corporate Affairs Notification, GSR 464(E), *as available on* http://www.mca.gov.in/Ministry/pdf/Exemptions_to_private_companies_05062015.

II. DELIBERATING THE INCLUSION OF 'PRIVATE COMPANIES' IN SECTION 195

As per the debates and discussions between legal scholars and practitioners, both sides of the coin have come to the forefront regarding the applicability of the 2015 regulations on private companies. The authors have developed academic arguments propagating as well as countering the arguments for the said applicability.

A. Arguments for Inclusion of Private Companies

Despite the dynamic contentions against such inclusion, certain aspects of trading do act as a harbinger on the clout of private companies' compliance regimes. The authors have a ***three pronged argument*** to be put forth.

Firstly, it is common practice in developed nations like USA to have private companies' securities traded on online market places.[25] Originating from social networking sites of Facebook and Zynga[26], the non-liquid stock of private companies started being traded on online platforms[27] such as Second Market[28] and Shares Post.[29] Such online platforms were themselves private companies,[30] enabling transactions between buyers and sellers. These online platforms, despite all apprehensions, became efficient marketplaces for the trading of stocks.[31] Though advantageous in the context of reduced costs, certain thwarts to its efficiency exist in the form of asymmetric information and insider trading.[32] To counter such impediments, Facebook, as a private company, implemented its own insider trading policy in 2010 to negate the manipulation of price-sensitive information.[33]

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[25] Oren Livne, Secondary Markets for Private Company Shares: Marketplace Overview and Predictive Capability, 2012 as available on https://www.stern.nyu.edu/sites/default/files/assets/documents/con_035718.pdf.

[26] *See* Peter Lattman, *Stock Trading in Private Companies Draws S.E.C. Scrutiny*, The New York. Times, 27th December 2010; Stephen Bainbrige (ed.), Research Handbook on Insider Trading, 2013, p. 104 [Hereinafter Bainbrige].

[27] Elizabeth Pollman, *Information Issues on Wall Street*, 161 U. Pa. L. Rev. 179 (2012). [Hereinafter Elizabeth Pollman].

[28] Jose M. Mendoza & Eric P.M. Vermeulen, *The "New" Venture Capital Cycle*, Lex Research Ltd., 2011 *as available on* http://direitogv.fgv.br/sites/direitogv.fgv.br/files/arquivos/anexos/mendonzavermeulen_the_new_venture_capital_cycle_part_1.pdf.

[29] *See* Henry Blodget, *Finally, Another Option For Private Investors Who Can't Dump Stock in an IPO*, Business Insider, 28th June 2009.

[30] Tanya Choudhary, *supra* note 10 at p. 6.

[31] *See generally* Paul Schultz, *Where we are Headed: Regulation and The Semi-Public Company,* 12 Centre for the Study of Financial Regulation, University of Notre Dame, 2012, p.4; *See also* Stephen F. Diamond, *The Facebook Effect: Secondary Markets and Insider Trading in Today's Startup Environment*, Santa Clara L. Rev. (2012). [Hereinafter Diamond].

[32] Elizabeth Pollman, *supra* note 27 at p. 183.

[33] Scott McKinney, *Facebook and the Challenge of Staying Private*, 25 Insights 1, 2 (2011). [Hereinafter Scott McKinney].

The policy was successful in unearthing certain ill-practices prevalent in the organization.[34] Henceforth, various jurisdictions are introspecting their insider trading policies for private companies and start-ups when they come out with the Initial Public Offering (the "**IPO**"). In essence, the assurance 'market fairness' principle in insider trading has led to the humble proposition by certain scholars that private companies should also be brought under the ambit of the 2015 regulations.

Secondly it is contended that insider trading primarily points to the infringement of *directors' fiduciary duty*.[35] The price sensitive information accessible to directors[36] is precluded from misuse and manipulation, irrespective of the transaction occurring on a stock exchange.[37] The English law suggests that directors owe a duty of fiduciary nature to the company collectively and not to individual shareholders,[38] and thus disclosure of information to shareholders could not be mandated. The holding became a common law principle for six decades till the New Zealand case of *Coleman* v. *Myers*.[39] In the Coleman Case, the Court held that directors had to disclose all material matters at the time of trading of securities in order to avoid misleading the shareholders.[40] It is further argued that notwithstanding directors' duties, the company itself has the duty to ensure fair treatment to shareholders[41] and therefore all material information should be timely disclosed. It has been held by the Canadian Supreme Court that the 'insider trading' concept enshrines both the principles of securities law and companies' law.[42] The Court further held that if the stakeholders lose faith in the company's *bona fide* and ethical stance, the company loses its financial and managerial support. The reasoning has pressed nations specifically USA,[43] Canada[44] and New Zealand[45] to legislate on the statutory

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[34] The services of a widely-respected senior manager were terminated for violating the company's insider trading policy when he bought the shares of the company ahead of the impending investment by Goldman Sachs, Sarah Lacy and Michael Arrington; *See* Scott Mckineey, *Id*; *See also* Michael Arrington, *Facebook Terminated Corporate Development Employee over Insider Trading Scandal*, Tech Crucnch, 31st March 2011; *See also* Bainbrige, supra note 26 at p. 107.

[35] New Zealand Law Commission Company Law Report, NZLC PP5 1987 (Wellington). [Hereinafter New Zealand Law Commission Report].

[36] Ali & Gregoriou, *supra* note 2.

[37] *Cady, Roberts & Co*., *In re*, 40 SEC 907 (1961) at p. 917.

[38] *Percival* v. *Wright*, (1902) 2 Ch 421; *See generally* Barry Rider, *Percival* v. *Wright – Per Incuriam*, 40 Mod. L. Rev. 471 (1977).

[39] (1977) 2 NZLR 225.

[40] *See also* Allen v. Hyatt, (1914) 30 TLR 444 for supplementary jurisprudence.

[41] New Zealand Law Commission Report, *Supra* note 35.

[42] *Multiple Access Ltd*. v. *McCutcheon*, (1982) 138 DLR (3d) 1 *as cited from* Tanya Choudhary, *supra* note 10 at p. 9.

[43] *See* Chapter III of this paper.

[44] Submission of Canadian Bar Association on the Canada Business Corporations Act, May 2014 at p.16 *as available on* https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/vwapj/Canadian_Bar_Association.pdf/$FILE/Canadian_Bar_Association.pdf.

[45] New Zealand Law Commission Report, *Supra* note 35.

vacuum governing insider trading irrespective of public or private company. Legislative Debate and Discussion have been further discussed in Part IV of the paper.

Thirdly, it is humbly submitted that private companies are more in the need of regulation in the light of the former two arguments. The 2013 Act and the SEBI regulations ensure heavy compliance and disclosure requirements for public companies. Moreover, the information regarding securities can be accessed on the stock exchange websites as well.[46] Therefore, the shareholders in such public companies are at a level playing field in terms of knowledge of information.[47] Thus, insider trading is a possible scenario when price sensitive information is not disclosed defying the compliance requirements, proving further that it would be a rare instance in the sphere of public companies. However, the position in private companies is substantially different. With limited disclosure and reporting requirements, price-sensitive information is accessible only to the directors and employees depending on corporate hierarchy. This suggests that a shareholder from public of a private company would be at the mercy of such employees and directors[48] without proper knowledge of the securities.[49] Private companies are no longer confined to close-knit family businesses, rather the 2013 Act has increased the permissible limit of a private company to be a maximum of 200 members.[50] Expanding private companies have increased the number of investing small retailors.

B. Arguments against inclusion of Private Companies

The cloud of ambiguity over the applicability of Section 195 has continuously raised debates and discussions amongst legal scholars and practitioners.[51] The uncertainty is based on the conception that prohibition of insider trading inculcates efficiency and integrity in the financial markets and is hence ill-suited to transactions not carried out on stock exchanges. Stock exchanges offer a fair level-playing platform for the exchange of

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[46] *See* Section 13(6), SEBI (Prohibition of Insider Trading) Regulations 1992; *See* Sections 8(1) and 2(1)(e), SEBI (Prohibition of Insider Trading) Regulations 2015.

[47] Tanya Choudhary, *supra* note 10 at p. 10.

[48] Several cases in United States and Canada have made a similar observation while dealing with allegations of insider trading in private companies. For example, *Tongue* v. *Vencap Equities Alberta Ltd.,* (1996) 6 WWR 761, *SEC* v. *Stiefel Laboratories Inc*, Case No 1:11-cv-24438 (S.D. Fl. Dec. 12, 2011).

[49] Kelli A. Alces, *Legal Diversification*, 113 Colum. L. Rev. 1978 (2013).

[50] Section 2(68), Companies Act, 2013.

[51] Umakanth Varottil, *Overhauling the Insider Trading Regulations*, IndiaCorpLaw, 21st December 2013 *as available on* http://www.indiacorplaw.blogspot.in; *See* also Vinod & Shampita, *supra* note 9; *See generally* Kevin A Lewis, *A Decade On: Reforming the Financial Services Law Reforms, Lecture delivered at 6th Annual Supreme court Corporate Law Conference*, In House Legal, August 2011 *as available on* http://www.inhouselegal.com.au/Compliance_Course/SupCourtPaper.pdf.

securities between purchasers and sellers.[52] The *bona fide* public transacts on a stock exchange under the presumption that all relevant information has been disclosed and no scope for manipulation remains on account of latent additional material information.[53] Henceforth, the prohibition of insider trading preserves investor confidence and financial market autonomy.[54] The said rationale is supported by the Sodhi Committee Report which argued that prohibiting insider trading presupposed the existence of a price-discovery platform for security.[55] In an unlisted private company, the securities of a company are not listed and therefore there cannot be manipulation or speculation of price discovery or trading. Moreover, transactions in private companies are directly negotiated between parties which is governed by the principle of *caveat emptor*[56] and thus neither party is obligated to disclose any information.

It needs to be understood that online platforms are not presently existent in the Indian context. Moreover, to have an efficacious ease-of-business initiative, private companies need to be exempted from various compliance burdens. The authors further analyze the position of statutory insider trading regulations under other jurisdictions of common law in the next part, to scrutinize if the Indian legislature can borrow intrinsic concepts that could add value to the Indian regulations.

III. LOOKING TO BORROW: BEST PRACTICES AROUND THE WORLD

India is neither the first among the world to attempt the extension of insider trading laws to private companies, nor the most comprehensive. The regime in various countries prohibits insider trading only for public companies, such as UK,[57] Nigeria[58] and Ireland.[59] In others, such as USA[60]

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[52] *See ASIC* v. *Petsas & Miot*, 2005 FCA 88; *See also* Roman Tomasic, Casino Captialism? Insider Trading in Australia (National Gallery of Australia, 1991); *See* generally Michael Fishman & Kathleen Hagerty, *Insider Trading and the Efficiency of Stock Prices*, 23 RAND Journal of Economics 106 (1992) at p. 108.

[53] *SEC* v. *Texas Gulf Sulphur Co.*, 401 F 2d 833, 848 (2nd Cir 1968).

[54] *Report of the High Powered Committee on Stock Exchange Reforms*, Ministry of Finance, Department of Economic Affairs (1986).

[55] Justice Sodhi Report, *supra* note 6, at p. 15.

[56] Australian Government, Corporations and Markets Advisory Committee, *Insider Trading Report*, November 2003 *as available on* http://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2003/$file/insider_trading_report_nov03.pdf.

[57] Part V, Criminal Justice Act 1993 [United Kingdom]; Part VI, Financial Services and Markets Act, 2000 [United Kingdom].

[58] Sections 111 & 315, Investment and Securities Act 2007 [Nigeria].

[59] Part V, Companies Act, 1990 [Ireland]; Part IV, Investment Funds, Companies and Miscellaneous Provisions Act, 2005 [Ireland].

[60] Securities Act, 1933 [United States of America]; Securities Exchange Act, 1934 [United States of America].

and Canada[61], it applies to not only to listed companies but also to public unlisted companies and private companies as well. Further, in Australia[62] and New Zealand,[63] the general insider trading regulations do not cover trading in securities of non-listed companies, so the company law regarding fiduciary duties is regularly invoked to cover private companies as well.

Thus, there are primarily two models for regulating insider trading in private companies. The first approach is the '*Abstain or Disclose*' method, enshrined in the written laws of the United States and Canada, the second is the '*Abstain or Pay Fair Value*' method, which is employed by the courts of Australia and New Zealand to give greater coverage to private companies. A detailed analysis of the two models is as follows:

A. 'Abstain or Disclose' Model

i. United States of America

This model originated the USA in *SEC v. Texas Gulf Sulphur Co.*[64] with the words "anyone in possession of material inside information must either disclose it to the investing public, or, if he is disabled from disclosing it in order to protect a corporate confidence, or he chooses not to do so, must abstain from trading in or recommending the securities concerned while such inside information remains undisclosed."[65]

In the USA, the laws prohibiting fraud relating to insider trading comprises of the Securities Act, 1933,[66] strengthened further by the Securities Exchange Act, 1934.[67] The language of Rule 10b is wide enough to include private and public unlisted companies as well,[68] though the words "insider trading" are not explicitly stated, yet American Courts have consistently used these provisions to prosecute such actions.[69]

In cases such as *SEC v. Stiefel Laboratories Inc.*,[70] *Smith v. Duff & Phelps*[71] and *Castellano v. Young & Rubicam*,[72] a similar situational matrix

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61 Section 131, Canada Business Corporations Act, 1985 [Canada].
62 Section 183, Corporations Act, 2001 [Australia].
63 Section 149, Companies Act 1993 [New Zealand].
64 401 F 2d 833, 848 (2nd Cir1968).
65 *Id.* at ¶ 14.
66 Sections 17 & 77(a), Securities Act of 1933 [United States of America].
67 Section 10(b), Securities and Exchange Act, 1934 and Rule 10b-5 [United States of America].
68 Diamond, *supra* note 31; John Carney, *Does Silicon Valley have an Insider Trading Problem?, 1st April 2011 as available on* www.cnbc.com/id/42377452.
69 H. Wortsman, *The Insider/A Survey in Corporate Disclosure*, 25 FAC. L. REV. 55, 63 (1967) at p. 67.
70 Case No. 1:11-cv-24438 (S.D. Fl. Dec. 12, 2011).
71 891 F 2d 1567 (11th Cir 1990).
72 257 F 3d 171 (2d Cir 2001).

arose wherein private companies indulged in buy-back of shares from their employees without the disclosure of information as to an impending profitable deal, thereby causing tremendous losses to the employees. In all of these, the office-holders of these private companies were adjudged to as liable for nondisclosure and insider-trading of securities.

ii. Canada

Correspondingly, the Canadian laws offer an imposition of liability for dealing in securities of even a private company while in possession of confidential price-sensitive information,[73] however unlike the US regime, the Canadian legislation provides for an affirmative defence to the directors if the information was 'known or ought to reasonably have been known' by the person claiming to be affected by the alleged insider trading.[74]

Here, the first case of insider trading in private company was *Pelling v. Pelling,*[75] wherein the majority shareholder purchased shares from the minority prior to an arrangement with another company to sell them for a profit. The contention of the majority shareholder was that the insider trading provision must be limited to public companies because the provision demands disclosure of information which, if 'generally known' would affect the price of securities, but no information about a private company is 'generally known,' hence it was argued that the intention of the section must be to exclude private companies. The Court disagreed and held that in the absence of a specific exemption for private companies in the statute, the prohibition of insider trading would apply uniformly to all companies.[76]

In India, too, the Companies Act 2013, follows the 'abstain or disclose' model.[77]

B. 'Abstain or Pay Fair Value' Model

In New Zealand, insider trading was first prohibited for all companies way back in 1993.[78] As previously stated, the Companies Act of New Zealand does not provide restrict a director possessing material price-sensitive publicly-unavailable information to deal in shares. It is allowed only if

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[73] *See* Section 131(4), Canada Business Corporations Act, 1985.

[74] *See* Section 131(1)(h), Canada Business Corporations Act, 1985

[75] (1981) 130 DLR (3d) 761.

[76] The Canadian Bar Association, Canada Business Corporations Act, May 2014, available at: https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/vwapj/Canadian_Bar_Association.pdf/$FILE/Canadian_Bar_Association.pdf.

[77] Section 195(1), The Companies Act, 2013 [India] *reads: "*No person including any director or key managerial personnel of a company shall enter into insider trading."

[78] Section 149, New Zealand Companies Act, 1993 *reads.*

the transaction takes place at the 'fair value of shares or securities.'[79] This value is gauged on the basis of all the information that is publicly available or known to the directors,[80] thus, factoring in any unpublished price-sensitive information.

Instead of the 'abstain or disclose' approach followed by most countries, New Zealand follows the 'abstain or pay fair value model'.[81] In the landmark case of *Thexton v. Thexton*,[82] a director agreed to minority shareholder's shares during the time of an ongoing merger negotiation, at a lesser price than the fair value of the shares had been if this information was publicly available. The Court held the director liable on the grounds that liability was regardless of whether the information was disclosed. If the information was not publicly available, directors are prohibited from entering into any transaction of securities that is lesser than the fair value at that time.

In this way, in *Insurego Ltd. v. Harris*,[83] it was held that the Act imposes a strict liability and the intention of the parties is irrelevant. Further, a prior agreement between the parties on how to value the shares under the company's articles or under the terms of a shareholder's agreement or in a subsequent contract for sale are also irrelevant.[84] The only determination is whether the transaction took place at an objective determination of 'fair value', which, if found deficient, makes the directors liable to compensate the seller/buyer for the difference between the 'fair value' and the price traded at.[85]

C. Seeking Greener Pastures: A comparison of the two models

It must be noted that host of practical difficulties have led Canada to rethink its insider trading '*Abstain or Disclose*' model in the context of

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[79] Section 149(1), New Zealand Companies Act, 1993 *reads as:*
'Restrictions On Share Dealing By Directors:
1. *If a director of a company has information in his or her capacity as a director or employee of the company or a related company, being information that would not otherwise be available to him or her, but which is information material to an assessment of the value of shares or other financial products issued by the company or a related company, the director may acquire or dispose of those shares or financial products only if,—*
   (a) *in the case of an acquisition, the consideration given for the acquisition is not less than the fair value of the shares or financial products; or*
   (b) *in the case of a disposition, the consideration received for the disposition is not more than the fair value of the shares or financial products.'*

[80] Section 149(2), New Zealand Companies Act, 1993.

[81] *Thexton* v. *Thexton*, (2001) 1 NZLR 237 [Hereinafter THEXTON].

[82] (2001) 1 NZLR 237.

[83] 2013 NZHC 2542.

[84] *Fong* v. *Wong*, (2008) NZHC 1918.

[85] *Id*.

private companies. The Bar Association of Canada, too, has made the suggestion that the provisions regarding private companies be deleted,[86] and the government is undertaking extensive public consultation based on the recommendations of the Statutory Committee which is reviewing the Canadian statue, on whether or not to retain the provision with respect to private companies.[87]

This leads us to an objective evaluation of both the models, and it seems manifest that the '*Abstain or Pay Fair Value*' model is more beneficial, on the following grounds:

Firstly, it has been seen that the '*Abstain or Disclose*' model works to form a complete ban against trading itself as disclosure of information may not always be possible due to a variety of factors such as confidentiality needs, the loss of competitive advantage etc.[88] However, the '*Abstain or Pay Fair Value*' model, though framed due a dire absence of legislation, upon two decades of enforcement, makes it manifest that the '*Abstain or Pay Fair Value Model*' does not completely prohibit directors, managers etc. to trade in securities of the company while in possession of material price sensitive information *per se*, so long as the transaction is at a fair price, and is hence, more broad and wide-ranging in application and scope.

Secondly, the disclosure requirements are less onerous due to the lack of statutory compulsion for disclosure of price sensitive information to the opposite party.[90]

Thirdly, in such cases where the director did not gain undue advantage of possession of insider information, the directors are exempted from liability. In that sense, '*Abstain or Disclose*' model is a strict-liability model, and does not take into consideration the price paid – even if it were the fair value of securities and no undue profit was made.

Conversely, '*Abstain or Pay Fair Value'* model suffers from the disadvantage that the obligation to deal at fair value continues even in such transactions where both the buyer and seller are insiders and transact at a level playing field, merely because the price-sensitive information has not been publicly disclosed.

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[86] Barry Reiter, *Insider Trading at Private Companies*, Lexpert, February 2011 *as available on* www.bennettjones.ca. [Hereinafter Reiter].

[87] Report of the Standing Committee on Industry, Science and Technology, Statutory Review of the Canada Business Corporations Act, House of Commons, Canada, 28 (June 2010), available at: http://www.ccgg.ca/siste/ccgg/assets/pdf/INDU_Report_June_2010. pdf.

[88] Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857 (1993) at p. 885; Willis W. Hagen, *Insider Liability Under Rule 10b-5*, 44 BUS. LAW. 15 (1988).

IV. LESSONS LEARNT: FORESEEING THE ISSUES

The models of governance in USA, New Zealand and Canada substantiate the claim that insider trading is necessary for corporate governance issues and investor protection. However, the insider trading regulations have always been marred by operational difficulties.

Firstly, the prohibition of insider trading would affect negatively the shareholders' Right to First Refusal (the "**RTFR"**).[89] RTFR grants existing shareholders the primary right to purchase shares from a selling shareholder. The seller has to first offer the shares to the RTFR holder before he can offer to sell it to a third party.[90] Only if the RTFR holder refuses to buy the shares at the quoted price, the seller can offer it to the third party. The contention lays that directors and other KMPs (holding RTFRs) of private companies can exercise their rights to purchase or refuse the shares. However, by the virtue of Section 195, a director/KMP would have to ensure that he is not in possession of any undisclosed price-sensitive information before he can exercise RTFR lest he be punished for violating the 2015 regulations. Alternatively, he'd have to disclose the said information to the selling shareholder before he could exercise the right. This may not be viable in all scenarios though since the confidentiality clause also reigns supreme in its ambit. Thus, the inability of disclosing information may lead to him forcefully waiving his contractual RTFR.[91] This may deprive the shareholders of their legitimate contractual benefits. To add fury to the fire, if the third party buys the shares on sale after the director/KMP refuses, it would lead to diluted stake for the director/ KMP thus defeating the purpose of RTFR. A real time example of this would be the *Latesco Case*[92] heard in the Delaware Court (USA) where a private investor exercised RTFR against the shares of the CEO without disclosing to him that certain patents of the company were going to be sold at a high value. The CEO subsequently sued for violation of fiduciary duty. The respondents reacted by stating that the transaction was governed by the shareholder agreement which did not confer any duty to disclose information about sale of assets. The Delaware Court held that RTFR is an exception to the imposition of strict fiduciary requirements.[93] Although when appealed, the Appellate

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89 Reiter, *supra* note 86; *See generally* David Walker, Rethinking Rights of First Refusal, Discussion Paper 261, 8/99, Harvard Law School *as available on* www.law.harvard.edu/Programs/olin_center.

90 A Ramaiya, Guide to Companies Act, Part I, 17th ed., 2010, p. 963.

91 Reiter, *supra* note 86.

92 *Latesco, L.P.* v. *Wayport Inc.*, A 2d, 2009 WL 2246793 Del Ch 2009.

93 Argument inspired from Tanya Choudhary, *supra* note 10 at p. 18. Her summarization reads as '*This is because the exercise of such a right does not involve any negotiation of price between the fiduciary (in this case, the equity investors) and the selling shareholder (the former CEO) since the negotiation occurs between the selling shareholder and the third party. It is the price offered by the third party that becomes the minimum price to be paid by the fiduciary to exercise his right under the RTFR. The fiduciary does not solicit sales and does not even make an offer to sell purchase the shares from the shareholder. It*

authority acknowledged the waiver of RTFR and decided the case on the law of fiduciary duty. However, the *Latesco* decision has portrayed the judicial hesitance in stifling the rights of the shareholders under a legitimate shareholder agreement.

Secondly, administrative and enforcement roadblocks seem imminent in the functioning of insider trading regulations. Section 458 of the 2013 Act empowers SEBI to enforce the rules of insider trading against listed companies. However, there exists a legislative vacuum over the role of SEBI to enforce the 2015 regulations over private companies. Moreover, the listed companies have a centralized enforcement mechanism where SEBI monitors the fluctuations of price and volume activities.[94] The Private companies cannot be regulated in the same manner since there are no stock exchanges for the transaction of securities. Thus, the mechanism of enforcement is vague and abstract.[95]

Thirdly, the statute does not provide the disclosure requirements (whether it should be public or individual) by directors to protect themselves from the claws of Section 195. New Zealand has mandated the public disclosure of price-sensitive information to cast a sheath of protection from infringing insider trading regulations.[96] There does not seem to be effective machinery in effect for such public disclosure presently in India. The 2015 regulations require the listed companies to adopt a Code of Corporate Disclosures mandating periodical disclosure of price sensitive information to stock exchanges.[97] SEBI can exercise jurisdiction over private companies only if they are associated with a stock exchange; therefore the lack of both have led to ambiguity over reporting requirements. Moreover, the disclosure would be costly and complicated. Thus, the advantages of incorporating as a private company over a public company are negated into a null.

Fourthly, the authors most humbly contend that the infrastructure of SEBI or MCA is not adequate to handle the sheer magnitude of private companies and monitor its compliance reporting.

Fifthly, Section 195 raises a cloud of doubt over its effect on the structuring of deals.[98] In essence, during mergers and acquisitions, and other

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is the selling shareholder who has already arranged separate sale requiring performance under the RTFR.'

94 Omkar Goswami, *Corporate Governance in India,* Taking Action Against Corruption in Asia and the Pacific, 2002 at p.100; Manish Agarwal & Harminder Singh, *Merger Announcements and Insider Trading Activity in India: An Empirical Investigation*, 3 Investment Management and Financial Innovations 140 (2006).

95 Maneka Doshi, *Companies Act Episode 13: Private Companies*, The Firm, 28th July 2014 *as available on* http://thefirm.moneycontrol.com/story_page.php?autono=1139566.

96 Thexton, *supra* note 81.

97 *See* Section 8(1) , SEBI (Prohibition of Insider Trading) Regulations 2015; *See also* Schedule A, SEBI (Prohibition of Insider Trading) Regulations 2015.

98 Assocham, *supra* note 16.

similar instances requiring due diligence, it is common practice to disclose all material information about its finances, performances etc. Some of this information is bound to be price sensitive. This would not have had raised the issue had it not been the applicability of Section 195 which prohibits the communication of non-public price sensitive information.[99] Technically, the directors can be held liable for infringing the 2015 regulations for co-operating with the exercise of due diligence. Although there has been made a legislative exception for public companies,[100] no such counterpart has been formulated for private companies or for the public companies under Section 195.

V. AUTHORS' RECOMMENDATIONS

The deliberation on distinguishing features between private and public companies and the jurisdictional anomalies thereof has led to the conclusion that the insider trading regime cannot be as stringent as that for a public company. The authors believe that it would be prudent to borrow certain legislative and conceptual understanding from best practices prevalent in other countries to overcome the impediments against applicability of the 2015 regulations on private companies.

To counter the undue restrictions on the contractual rights of the shareholders under RTFR, the Indian legislature can allow itself to be *inspired* by the regulations in the **USA**. RTFR should come under the governance of contractual principles and fiduciary duty of directors should not be made applicable in such cases. Similarly, the grievance related to the directors' right of dealing in securities while possessing undisclosed information can be countered through the 'abstain – pay fair value' model propagated by **New Zealand**. It is further submitted that in practical application, the salient features attributable to the said model should be incorporated in the existent model. An exemplification of this could be a carved out exemption to safeguard the validity of trade based on fair valuation against allegations.[101] This would guarantee that the directors' right under RTFR is not improperly restrained.

Private companies cannot be obligated to disclose publicly all the material information. However, abuse of directors' fiduciary position can be prevented by the consequent KMPs' disclosure of material information before entering into a transaction. It is the authors' humble contention that an exemptions cannot be specifically sculpted for private companies, otherwise the insider trading regulations will be plagued by parallel implication

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[99] *See generally* Explanation (a)(ii) to Section 195, Companies Act, 2013.

[100] Regulation 3, SEBI (Prohibition of Insider Trading Regulations) 2015 allows the sharing of undisclosed price-sensitive information for legitimate business purposes.

[101] Vinod & Shampita, *supra* note 9.

on private and public companies. This problem can be catered by borrowing concept of 'insider trading' from **New Zealand**. Such duplication was countered by the New Zealand legislature by applying the insider trading only on private companies while public companies were left to be governed under its securities law.

Another burning issue in prohibition of insider trading is the enforcement in private companies. It is respectfully submitted that the Indian legislature can take inspiration from the regulations in USA, Canada and New Zealand. These countries provide civil remedies to shareholders to directly sue the director alleged to be engaged in the practice of insider trading. In addition, Canada gives the aggrieved shareholder the right to claim compensation from the supposed insider, which is subject to exercising within two years after the cause of action is discovered.[102] The US civil courts have also pronounced that violation of insider trading regulations bestow a civil remedy to shareholders.[103] Similarly, New Zealand permits private enforcement subject to proof by the aggrieved that non-disclosure resulted in the loss in transaction.[104]

It is thus humbly suggested that the regulatory mechanism should permit the shareholders to bring action against the alleged perpetrator under Section 195, along with enforcing the right to claim damages against such insiders. A private right of such nature will affirm that the aggrieved shareholder is restituted the monetary losses he suffers due to insider trading.

VI. CONCLUDING REMARKS

Knowledge is Power. Advance knowledge is profit.[105]

Coherence and inevitability are the fortifying pillars of all commercial transactions. Business Law must always ensure that the rules of conduct and business are unambiguous and do not lack enforcement mechanism. However, Section 195 of the 2013 Act has led to a muddle of operations in the context of insider trading and its applicability and enforcement thereof. The present law is technical and its literal interpretation makes all the directors of private companies liable for virtually engaging in any transaction related to securities. The strict penalization for the violation of the 2015 regulations is all the more reason for the tweaking of law in favour of private companies. It is most humbly submitted and hoped that the MCA will come out with a circular to resolve the present ambiguity over the plight of private companies and the application of the 2015 regulations on them.

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[102] *See* Section 131 (10), Canada Business Corporations Act, 1985.

[103] *Kardon* v. *National Gypsum Co.*, 73 F Supp 798, (1947) at p. 800.

[104] Peter Fitzsimons, *Enforcement of Insider Trading Laws by Shareholders in New Zealand*, 3 Wai L. Rev. 101 (1995).

[105] Gregory Lyon & Jean Du Plessis, The Law of Insider Trading in Australia, 2005, p. 1.

SHARED PARENTING SYSTEM VIS-À-VIS CUSTODY OF CHILD – IS INDIA IN NEED OF LEGISLATION FOR CARING CHILDREN?

—*Dr. Caesar Roy*[1]

Abstract The concept of child custody system is changing. To determine the custody of the child the welfare of the child is the paramount consideration. Accordingly the concept of shared parentage has grown, which is the new concept in custody system. In this concept both the parents will participate in upbringing of the child. While the concept of shared parenting system is prevalent in countries like US, UK, Canada, Netherlands, Australia etc but it is new in India though it is gradually increasing. Some of the provisions of shared parenting system of those countries are also discussed in the present article. In India, at present the custody of children are determined by two laws – the Guardians and Wards, Act, 1890 and the Hindu Minority and Guardianship Act, 1956 but both the Acts are silent on joint custody or shared parenting for children. As there is no straitjacket formula that can be applied universally to all cases of custody, India is in need of new law in this regard. The Law Commission of India is also concerned about the issue of adopting a shared parenting system in India and submitted its 257th Report along with the proposed amendment. Before submitting this Report the Commission issued a Consultation Paper on this subject and invited suggestions on the topic. In the present article various judicial decision on shared parenting system are discussed. Some of the reasons for favouring and criticizing the shared parenting system are mentioned in this article. Some suggestions are also put forward in this article to make this provision fruitful and effective.

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Keywords – custody, shared parenting, joint custody, best interest of the child, parenting plans, Hindu Minority and Guardianship Act, 1956, Guardians and Wards, Act, 1890

I. INTRODUCTION

Guardianship and custody of minor child are important aspects of matrimonial relations and the issue becomes very complicated when couples wish to dissolve their marriage and consequently battle in court over the custody of their minor child. In a custody battle, no matter which parents wins the child's always the loser. But in the concept of shared parenting both the parents may participate in upbringing of the child. The concept of child custody is changing. The concept of shared parenting is the new concept in custody jurisprudence. In recent years, interest in shared parenting has grown among parents who no longer live together, after divorce or separation but where both wish to spend time with children. It is very much necessary and beneficial for the child. Generally divorce and separation affects the upbringing of the child to a great extent. The conflicts, anger and differences between the parents in case of divorce or separation should affect the mental growth of the child. Shared parenting may provide a healthy chance of living a normal life of the child.

While the concept of shared parenting system is prevalent in countries like US, UK, Canada, Netherlands, Australia etc but it is new in India though it is gradually increasing. In India, the spouses generally fight with each other for divorce or separation forgetting about what's best for the child and take on single parenting instead of co-parenting, in rigidity against the spouse. Generally this divorce or separation brings about bitterness, publicity exploiting the emotions of parents as well as the child, leaving the child hurt and confused. Shared parenting or joint custody of the child would be very helpful and beneficial in this regard for the sake of upbringing of the child.

II. MEANING OF SHARED PARENTING

Strictly speaking, parenting is a joint responsibility. A child needs both parents. Mother brings in certain aspects; father brings other aspects in child's development. A child is in need for both the parents and separation from anyone will have a harmful effect on the child. To determine the custody of the child, generally the "best interest" of the child is considered. It is the subjective by nature and judicial discretion plays very vital role in this regard. Shared parenting is a system for the custody of child after divorce or separation as both parents have the right and responsibility of being actively involved in the raising and upliftment of the child. To put it simple, shared parenting system is based on the principle that parental

responsibility should be shared by the parents and the child should not be deprived from the love and affection of both the parents. Both the parents have the reasonable access to their child keeping in mind the welfare of the child. A child has regard for both the parents and separation from anyone will have a harmful effect on the child. Here the term 'shared' is used to mean 'joint', actually shared parenting is meant for both joint legal custody and joint physical custody like US. According to US joint legal custody means both parents have equal rights and responsibilities towards the child including the child's education; health care etc. whereas joint physical custody means both the parents will share physical custody of the child by providing equal time and contact. In case shared parenting both parents are involved in all aspects of the child's life. Though shared parenting is not specifically mentioned in Indian law but recently this concept is frequently used to decide the custody of child.

III. INTERNATIONAL ASPECTS OF SHARED PARENTING

The International Council on Shared Parenting (ICSP) is an international association with individual members from the sectors science, family professions and civil society. The purpose of the association is first, the dissemination and advancement of scientific knowledge on the needs and rights ("best interests") of children whose parents are living apart, and second, to formulate evidence-based recommendations about the legal, judicial and practical implementation of shared parenting. The first International Conference on Shared Parenting organized by the ICSP took place in Bonn, Germany, on 9-11 July 2014. This was the first such gathering of scholars, practitioners and NGO representatives interested in the emerging paradigm of shared parenting in families in which parents are living apart. A wide range of topics as well as perspectives on shared parenting were discussed and debated, and at the end, the conference arrived at the six major areas of consensus, namely[2] –

i) There is a consensus that shared parenting is a viable post-divorce parenting arrangement that is optimal to child development and well-being, including for children of high conflict parents. The amount of shared parenting time necessary to achieve child well-being and positive outcomes is a minimum of one-third time with each parent, with additional benefits accruing up to and including equal (50-50) parenting time, including both weekday (routine) and weekend (leisure) time.

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[2] First International Conference on Shared Parenting, 2014, retrieved from http://two-homes.org/tiki-index.php?page=en_conference_2014&redirectpage=conference_2014 on 01.10.2015.

ii) There is consensus that "shared parenting" be defined as encompassing both shared parental authority (decision-making) and shared parental responsibility for the day-to-day upbringing and welfare of children, between fathers and mothers, in keeping with children´s age and stage of development. Thus "shared parenting" is defined as "the assumption of shared responsibilities and presumption of shared rights in regard to the parenting of children by fathers and mothers who are living together or apart."

iii) There is a consensus that national family law should at least include the possibility to give shared parenting orders, even if one parent opposes it. There is a consensus that shared parenting is in line with constitutional rights in many countries and with international human rights, namely the right of children to be raised by both of their parents.

iv) There is a consensus that the following principles should guide the legal determination of parenting after divorce – i.e. shared parenting as an optimal arrangement for the majority of children of divorce, and in their best interests, parental autonomy and self-determination and lastly limitation of judicial discretion in regard to the best interests of children.

v) There is a consensus that the above apply to the majority of children and families, including conflict families, but not to situations of substantiated family violence and child abuse. There is a consensus that the priority for further research on shared parenting should focus on the intersection of child custody and family violence, including child maltreatment in all its forms, including parental alienation.

vi) There is a consensus that an accessible network of family relationship centres that offer family mediation and other relevant support services are critical in the establishment of a legal presumption of shared parenting, and vital to the success of shared parenting arrangements.

The second International Conference on Shared Parenting, 2015 of the ICSP is scheduled for December 9-11, 2015, in Bonn, Germany. The intersection of shared parenting and family violence will constitute major theme of the upcoming conference.

The United Nations Convention on the Rights of the Child, 1989 (commonly abbreviated as the CRC, CROC, or UNCRC) is a human rights treaty which sets out the civil, political, economic, social, health and cultural rights of children.[3] Like many other countries India has also ratified

[3] The United Nations Convention on the Rights of the Child, 1989, retrieved from http://www.ohchr.org/en/professionalinterest/pages/crc.aspx, on 01.10.2015.

this convention. According to this Convention a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.[4]

IV. LAWS ON CUSTODY OF CHILD IN INDIA

In India, at present the custody of children are determined by two laws – the Guardians and Wards, Act, 1890 and the Hindu Minority and Guardianship Act, 1956. Both the Acts are silent on joint custody or shared parenting for children. The Guardians and Wards Act, 1890 is a comprehensive legislation dealing with the appointment of a person as a guardian of a minor both in respect of his/her person or property. The Act makes it possible for any person to apply to be appointed as a guardian of a minor. The Act also provides for appointment of joint guardians, both in respect of the person and property of the minor. Section 17 of the Act, which is a key provision as regards appointment of a guardian, provides that a court shall be guided by what appears in the circumstances to be for the welfare of the minor.

Another relevant legislation i.e. the Hindu Minority and Guardianship Act, 1956 enumerates the classes of natural guardians of a Hindu minor. But these laws are vested with the idea that guardianship has to be given to one parent and never considered that the best interest can also be derived from the custody of a joint parenting.

In Islamic law, the father is the natural guardian, but custody vests with the mother until the son reaches the age of seven and the daughter reaches puberty. Islamic law is the earliest legal system to provide for a clear distinction between guardianship and custody, and also for explicit recognition of the right of the mother to custody.[5] The concept of Hizanat provides that, of all persons, the mother is the most suited to have the custody of her children up to a certain age, both during the marriage and after its dissolution. A mother cannot be deprived of this right unless she is disqualified because of apostasy or misconduct and her custody is found to be unfavorable to the welfare of the child.[6]

Under Section 49 of the Parsi Marriage and Divorce Act, 1936 and Section 41 of the Indian Divorce Act, 1869, Courts are authorized to issue interim orders for custody, maintenance and education of minor children in

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4 *Ibid*, Article 9.

5 Diwan, Paras (2012). Law of Adoption, Minority, Guardianship & Custody (p. xvi). New Delhi: Universal Law Publishing Co.

6 *Ibid*.

any proceeding under these Acts. Guardianship for Parsi and Christian children is governed by the Guardians and Wards, Act, 1890.

V. SHARED PARENTING IN OTHER COUNTRIES

Shared parenting would mean both parents, after their divorce, would still have full access to the child. Different countries throughout the world have their own different laws on custody of child. Many countries have already adopted the shared parenting in case of custody of child.

In USA either joint legal custody (where both parents have to jointly take major decisions about the child) or joint physical custody (where the child shares time equally with both parents) are prevailed as already stated earlier.

The Family Law (Shared Parental Responsibility) Amendment Act 2006 introduced the most radical changes to Australia's family law since the original Act in 1975 i.e. Family Law Act, 1975. The Amendment Act attempted a significant cultural change – to encourage more shared and co-operative parenting after separation, and to shift the focus, for post-separation dispute resolution, away from court action and towards private, mediated methods. However, the Act repeatedly states, the "best interests of the child" is the "paramount consideration. To grant joint physical custody, Australian courts consider a lot of pre-conditions such as, geographical proximity, compatible parenting, co-operation, ability to supervise the child etc. before applying for the joint parenting of the child the parents need to prove other conditions such as: degree of maturity, value, attitude and behavior of the parents, and openness of mind to communicate with the other parent.

In United Kingdom joint custody arrangements must represent the factual reality of child's life. Welfare principles decide that no order is made that is not good for the child. Family courts in the United Kingdom take into account several factors before awarding joint physical custody: welfare principle, the no-delay principle and the no-order principle.

There are generally two procedures for securing child custody arrangements in Thailand. The first is by mutual consent and the second, by the court.[7] Mutual consent is an option for previously married parents who have divorced by mutual consent, previously married parents who had an uncontested divorce, or unmarried couples in which the child is registered as the legitimate child of the father and the unmarried parents agree on the custody arrangement.[8] The court decides custody arrangements when, there was a contested divorce. In such cases, the court can award custody to the

[7] Thailand Civil and Commercial Code (Part III), Book IV, Section 1520.
[8] *Ibid*, Section 1547.

parents or to a third person as a guardian in lieu of the parents if it is in the "happiness and interest" of the child.[9]

In the Netherlands, there has been an increasing trend towards shared parenting. In 1996, the Dutch Parliament passed a law mandating that joint legal custody be the presumed standard for post-divorce parenting in the Netherlands.[10] From 2009, all divorces must be accompanied by a parenting plan based on the assumption of a shared parenting system. The plan must include: the division in the care and parenting tasks, how to inform and consult each parent on parenting the children and the costs of caring and parenting the children49. If no plan can be agreed upon or the plan is not amenable, the judge has the discretion to send the divorcing parents to a mediator in order to acquire such a plan before continuing the divorce proceedings.[11]

In South Africa, family courts are reluctant to award sole custody to either parent. According to the Children's Act No. 38 of 2005, parental responsibility includes the responsibility and the right (a) to care for the child; (b) to maintain contact with the child; (c) to act as guardian of the child; and (d) to contribute to the maintenance of the child. The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child. The father has full parental responsibility if he is married to the mother, or if he was married to her at the time of the child's conception, or at the time of the child's birth or any time in between, or if at the time of the child's birth he was living with the mother in a permanent life-partnership, or if he (i) consents to be identified or successfully applies in terms of Section 26 to be identified as the child's father or pays damages in terms of customary law; (ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

Other countries like Singapore, Canada, Kenya etc all have shared parenting norms and give the interests of the child utmost importance while deciding custody matters.

VI. JUDICIAL APPROACHES ON SHARED PARENTING IN INDIA

In India, the principle that father is the natural guardian is put to rest and best interests of the child even supersedes statutory provisions. In this

[9] *Ibid*, Section 1520.
[10] Article 247 of Netherland Civil Code.
[11] *Ibid*.

principle, custody is mainly awarded to mothers and the father gets visitation rights. But there are cases where the court has altered the previous decision of father's visitation rights and allowed the mother to take the child to Australia where she had relocated.

Also the custody rights to the father are denied by many High Courts even when they had greater economic prosperity. In the judgment *Kumar V. Jahgirdar v. Chethana Ramatheertha*[12] Supreme Court has reversed the observation that the mother is always the natural guardian and the custody will be given to her always. In *Rosy Jacob v. Jacob A. Chakramakkal*,[13] the Supreme Court has observed that the children are not mere chattels; nor are they mere playthings for their parents. Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian Court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents, over them.

In *Mausami Moitra Ganguli v. Jayant Ganguli*,[14] the Supreme Court was confronted with the custody conflict over 10 year male child. The Court did not consider Section 6 of the Hindu Minority and Guardianship Act after detailing the factors which were indicative of the position that the welfare of the child lies with continuing the custody with the father, this Court dismissed the mother's appeal. The facts are totally distinguishable. The ratio continues to be that it is the welfare of a minor which has paramount importance. The Court has held that welfare of the child may have a primacy even over statutory provisions. Again in *Ashish Ranjan v. Anupam Tandon*,[15] the Supreme Court has held that statutory provisions dealing with the custody of the child under any personal law cannot and must not supersede the paramount consideration as to what is conducive to the welfare of the minor. In fact, no statute on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.

In *Gaurav Nagpal v. Sumedha Nagpal*,[16] the Supreme court held that section 26 of the Hindu Marriage Act, 1955 provides for custody of children and declares that in any proceeding under the said Act, the court could make, from time to time, such interim orders as it might deem just

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12 (2004) 2 SCC 688 : AIR 2004 SC 1525.
13 (1973) 1 SCC 840 : AIR 1973 SC 2090, See also *Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka*, (1982) 2 SCC 544 : (1983) 1 SCR 49.
14 (2008) 7 SCC 673.
15 (2010) 14 SCC 274.
16 (2009) 1 SCC 42.

and proper with respect to custody, maintenance and education of minor children, consistently with their wishes, wherever possible. The court further held that the principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the parents under a statute for the time being in force. The same principle was reiterated in another judgment of the Supreme Court in *Vikram Vir Vohra v. Shalini Bhalla*.[17] In this case although the son had been with the father since the time of his birth, which was a strong argument in favour of the father, the Supreme Court reversed this arrangement and awarded custody to the mother with visitation rights for the father.

A Supreme Court judgment in *Sheila B. Das v. P.R. Sugasree*,[18] takes the standpoint that either parent, provided she/he is financially stable and able to take care of the child, is fit to be the guardian. In the case of 12-year-old Ritwika, the Supreme Court allowed her father P.R. Sugasree, an advocate, to take custody, and her mother, Dr Sheila B. Das, a doctor, to visit her at regular intervals and spend time with her during school vacations.

In May, 2015 Mumbai Bandra family court gives the judgment[19] which in an interim child custody/visitation order and asked both mother (petitioner) and father (respondent) to make a parenting plan, and has created a shared parenting plan based on those submitted by both of them. It has divided the interim custody of daughter for 6 months of the year each to father and mother. This judgment creates a new precedent by actually putting child's interests as paramount, rather than doing lip service to it by granting custody to mothers, and relegating fathers to their 'sole duty' of maintenance providers. The court at the time of giving judgment considered many things. The final shared parenting plan was evolved after submitting of parenting plan by both mother and father to a marriage counsellor, and then a common parenting plan was evolved by the court. This is very good approach as because usually in family courts we see only mediators, who are more of lawyers than marriage counsellors of any kind. Apart from several other practical directions, the court also considered on how to divide long vacations/holidays time, intimation of school reports to both parents, sharing medical details of child etc. The court further held that since both mother and father are working, child support costs to be shared by both of them. The money is to be deposited into an account in name of child. Opening account in name of child is again in line with our recommendation to law commission, and was mentioned by law commission in its report too. Otherwise the common situation normally is of maintenance being paid to mother who usually has child's custody, but there is later no account of

[17] (2010) 4 SCC 409 : AIR 2010 SC 1675.
[18] (2006) 3 SCC 62 : AIR 2006 SC 1343.
[19] A v. T, Int. Application No. 60 of 2015 in Petition No. A-932 of 2015.

whether the money is being spent on child or not. An account in child's name will make it difficult for any parent to misuse the funds.

The Supreme Court has said that the welfare of a child is not to be measured merely by money or physical comfort, but the word welfare must be taken in its widest sense that the tie of affection cannot be disregarded.[20]

In *K.M. Vinaya v. B.R. Srinivas*,[21] the Karnataka High Court held that both the parents are entitled to get custody 'for the sustainable growth of the minor child.' The Court has formulated the manner in which manner the joint custody may be effected –

i) The minor child was directed to be with the father from 1 January to 30 June and with the mother from 1 July to 31 December of every year.

ii) The parents were directed to share equally, the education and other expenditures of the child.

iii) Each parent was given visitation rights on Saturdays and Sundays when the child is living with the other parent.

iv) The child was to be allowed to use telephone or video conferencing with each parent while living with the other.

Different High Courts and the Supreme Court in number of judgments have held that greater economic prosperity of the father and his relatives is not a guarantee of the welfare of a minor and that it does not disturb the presumption in favour of the mother while deciding custody.[22]

VII. LAW COMMISSION OF INDIA ON SHARED PARENTING

The idea of shared parenting in case of a divorce gained further momentum on November, 2014 when the Law Commission of India put out a consultation paper on "Adopting a shared parenting system in India" on its website and invited suggestions on the topic.[23] The Consultation Paper analyzed shared parenting systems across the world and reviewed the existing law in India. It also posed a set of questions pertaining to shared parenting and invited comments from the public. The Consultation Paper also

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[20] *Nil Ratan Kundu v. Abhijit Kundu,* (2008) 9 SCC 413 : AIR 2009 SC (Supp) 732.

[21] 2013 SCC OnLine Kar 8269.

[22] *Ashok Shamjibhai Dharode v. Neeta Ashok Dharode*, 2000 SCC OnLine Bom 770 : (2001) 2 DMC 48 (Bom); *Ravishankar v. Uma Tiwari*, (1999) 1 DMC 585 (MP); *Gaurav Nagpal v. Sumedha Nagpal*, (2009) 1 SCC 42.

[23] Retrieved on 01.12.2015 from http://lawcommissionofindia.nic.in/Consultation%20Paper%20on%20Shared%20Parentage.pdf.

reviewed the existing laws in India regarding child custody as well as relevant Supreme Court and High Court decisions, and concluded that the law on custody in India had evolved to a point where it was appropriate to initiate a discussion on the idea of shared parenting. On receiving several of responses from the public, the Commission set up a sub committee to study the legal provisions pertaining to shared custody in both developing and developed countries, with special emphasis on the circumstances in which joint custody may be granted, parenting plans and mediation. Further, through a series of meetings with legal experts, practitioners and other stakeholders the committee outlined the nature and scope of the concept of shared parenting in India and identified the provisions in the current law that need to be amended. After several rounds of discussions and deliberations, the views of the Commission centred around (i) strengthening the welfare principle in the Guardians and Wards Act, 1890 and emphasize its relevance in each aspect of guardianship and custody related decision-making; (ii) providing for equal legal status of both parents with respect to guardianship and custody; (iii) providing detailed guidelines to help decision-makers assess what custodial and guardianship arrangement serves the welfare of the child in specific situations; and (iv) providing for the option of awarding joint custody to both parents, in certain circumstances conducive to the welfare of the child. The above recommendations of the Commission are put in the form of its 257th Report titled "Reforms in Guardianship and Custody Laws in India."[24]

Previously the Law Commission in its 133rd Report namely "Removal of discrimination against women in matters relating to guardianship and custody of minor children and elaboration of the welfare principle," examined the laws relating to recognition of natural guardianship and appointment by court of guardians for the persons and property of minors and suitable recommendations are made.[25]

VIII. CRITICISM

Some of the reasons are given below against the shared parenting system in India –

i) Both the Guardians and Wards, Act, 1890 and the Hindu Minority and Guardianship Act, 1956 are silent on joint custody or shared parenting for children of divorcing or separated parents. According to

[24] Law Commission of India, Report No. 257, Reforms in Guardianship and Custody Laws in India, May, 2015. Retrieved on November 17, 2015 from http://lawcommissionofindia.nic.in/reports/Report%20No.257%20Custody%20Laws.pdf.

[25] Law Commission of India, One hundred thirty third Report on "Removal of discrimination against women in matters relating to guardianship and custody of minor children and elaboration of the welfare principle," August, 1989. Retrieved on December 12, 2015 from http://lawcommissionofindia.nic.in/101-169/report133.pdf.

these Acts the welfare of the child is the paramount consideration for determination of the custody of child. But the paramount welfare of child would be incomplete if the child is deprived of equal and quality access to both parents.

ii) There is uncertainty and lack of judicial consensus on what exactly constitutes welfare of the child, as a result, in fiercely fought custody battles, there are no ways to ensure that the interests of the child are actually protected. The legal framework is silent on how should custody issues be handled, what factors should be relevant in decision-making, and what should be the process of dispute resolution between parents over children, among others.

iii) It is to be borne in mind that countries mentioned above have a presumption that joint custody is not in the best interest of a minor if one of the parents is found to be a habitual perpetrator of domestic violence, child abuse, child kidnap or child neglect. Non-payment of maintenance can surely be construed as a clear case of child neglect. This matter is to be kept in mind in case of shared parenting.

iv) Perhaps the actual problem arises when the separated parents re-marry. Generally, the second spouse will not like their partners maintaining any links with the first marriage. So he or she will naturally show a dislike towards the child, causing much harm to the child emotionally. So this matter is to be considered where separated couples who get into a second wedlock and the experiences of their children before framing this new system of parentage.

v) Often wide gaps in financial status and social standing of both parents start influencing the child's preference towards more comfortable position. In India, fathers are earning usually and have free-hand in expenses while non-working mothers are left with child support for the childcare, which is not enough to maintain the previous lifestyle. In this case, what both the parents can do is to co-operate with each other in fulfilling the child's needs. Co-parenting is often costly since it involves providing two homes rather than one for a child.

IX. ARGUMENTS IN FAVOUR OF SHARED PARENTING IN INDIA

Some arguments in favour of share parenting are put forward from a child-focused perspective.

i) Before and after divorce children need both parents to be physically and emotionally attuned, involved and responsive in their lives and the removal of any parent threatens their physical or emotional security. Children need both their mother and father – they seek advice

from each parent in different situations. Children need adequate opportunities to bond with each parent.

ii) The children needs emotional support and warmth of the mother who is ordinarily better equipped than the father to import such emotional support and warmth which are essential for building up a balanced personality.

iii) Psychological studies revealing that the involvement of both parents in well being of the child rearing is preferable than sole custody arrangements. Shared custody can reduce acrimony between the parents.

iv) Shared parenting decreases parental conflict and prevents family violence. Some women misuse the protections in Protection of Women from Domestic Violence Act, 2005 and Section 498A of the Indian Penal Code, to take children away from their fathers. However, in shared custody arrangements, parental contact would be withheld only for child abuse, neglect, or mental illness. Children should have contact with both parents regardless of whether the parents reconcile.

X. SUGGESTIONS

Like US there should be two forms of joint custody – joint legal custody and joint physical custody. In India also custody of a child should be in that form. Either the said Acts may be amended in this regard or the judiciary at the time of giving custody should follow this principle. In case of Joint legal custody both parents would have equal rights and responsibilities for major decisions concerning the child, including the child's education, health care etc. whereas Joint physical custody would mean that physical custody which would be shared by the parents in such a way as to assure the child of substantially equal time and contact with both parents. Some suggestions are given below to make the law relating to custody of the children and shared parenting system in India more effective and useful –

i) The provision contained in section 6(a) of the Hindu Minority and Guardianship Act, 1956 constituting the father as a natural guardian of a Hindu minor's person as well as in respect of his property in preference to the mother should be amended so as to constitute both the father and the mother as being natural guardians 'jointly and severally' having equal rights in respect of the minor.[26]

[26] Law Commission of India, One hundred thirty third Report on "Removal of discrimination against women in matters relating to guardianship and custody of minor children and elaboration of the welfare principle," August, 1989. Retrieved on December 12, 2015 from http://lawcommissionofindia.nic.in/101-169/report133.pdf.

ii) The guidelines for child custody and access should be framed. It is suggested that in doing so the observations made by the Karnataka High Court in *K.M. Vinaya case* may be followed. Law commission also in its consultation paper on "Adopting Shared Parenting System in India" supported this manner of arrangements in case of shared parenting.[27] The commission observed that the six monthly arrangement found in this example is much more workable that the weekly arrangement and is likely to cause less instability and inconvenience to the child. It may be noted however, that the terms 'joint' or 'shared' do not mean giving physical custody to parents with mechanical equality, and it is here that judicial pragmatism and creativity is going to play a huge role in developing this concept further.[28] Besides, the other observations made in *K.M. Vinaya case* that parents should have to submit a "Parenting Plan" which provides the personal profile, educational qualification, residence, and income of both parties as well as Parents should open a joint bank account that can only be used for the child's expenses will also be very effective in this regard.

iii) The terms 'best interest' and 'welfare' of the child are to be understood very carefully. Any definition is not enough to cover these terms. These are to be understood by the court depending upon the facts and circumstances of the each and every case while deciding the shared parenting. In determining the 'best interest' and 'welfare' of the child principle, testimony of the child should not be the sole criterion, because a child always may not make a reasoned or right preference. So before deciding the final order the court should judge (after applying its mind) what should be the 'best interest' and 'welfare' of the child depending upon the facts and circumstances of the each and every case.

iv) The Law Commission in its 257th Report recommended for the insertion of a new chapter IIA in the Guardians and Wards Act, 1890 which will deal with 'Custody, Child Support and Visitation Arrangements'. The Commission also provides specific guidelines to assist the court in deciding such matters, including processes to determine whether the welfare of the child is met; procedures to be followed during mediation; and factors to be taken into consideration when determining grants for joint custody.[29]

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[27] Retrieved on 01.10.2015 from http://lawcommissionofindia.nic.in/Consultation%20Paper%20on%20Shared%20Parentage.pdf.

[28] *Ibid*.

[29] Law Commission of India, Report No. 257, Reforms in Guardianship and Custody Laws in India, May, 2015. Retrieved on November 17, 2015 from http://lawcommissionofindia.nic.in/reports/Report%20No.257%20Custody%20Laws.pdf.

v) In India, either new legislation should be made or amendment should be made in the existing laws mandating that joint legal custody be the presumed standard for post-divorcing parenting. Clear guidelines are required to decide shared parenting in India, irrespective of gender of the child. Children of all ages need their parents' time and resources, and enjoy love and affection from both parents. So simply because two parents want to separate or divorce, the presumption of shared custody itself cannot be invalidated based on age of child. However, the shared parenting plan can have guidelines to keep in mind the age of child and needs of child at that age to be with mother or father.

vi) The analyses of laws of different countries are to be taken into consideration at the time of framing of laws in India relating to custody of child to make the laws more meaningful, dynamic and enduring in India.

vii) Orders of joint custody should be made only when the parents are amicable, and behave in a matured and civilized manner. It should not be allowed where the parents are antagonistic to each other and demonstrate an inability to cooperate.

viii) Shared parenting arrangement must be default arrangement of parenting and ex-parte court orders have to be passed and executed if any parent attempts to delay or evade the shared parenting or court proceedings.

XI. CONCLUSION

Now it is the need of the hour that a more child-focused approach to child custody determination is required. The well being of children should take precedence over professional self interest, gender politics, and the desire of a parent who is found to be a danger to the child and the welfare of the children is the paramount interest. There is too much left to the discretion and wisdom of the court to determine the best interest of the child in each case relating to custody of child. "One size does not fit all," every country should deal with the custody and guardianship of the children in its own way by taking into consideration the various factors and not just by blindly copying other countries. Accordingly the Law Commission of India rightly observed that joint custody must be provided as an option that a decision-maker can award, if the decision-maker is convinced that it shall further the welfare of the child.[30]

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[30] Law Commission of India, Report No. 257, Reforms in Guardianship and Custody Laws in India, May, 2015, Retrieved on November 17, 2015 from http://lawcommissionofindia.nic.in/reports/Report%20No.257%20Custody%20Laws.pdf.

HEALTH SECURITY AND NATIONAL STRATEGY UNDER THE PATENTS REGIME: ISSUES AND CONCERN

—*Dr. S.C. Roy*[*]

I. INTRODUCTION

The health security is a buzz word in the new millennium and it is relevant to employment security, food and nutritional security along with adequate medicine, hospital and even before, the immunisation programme. The State is obliged to ensure good health to men, women and children under the constitutional directives in Articles 39(e), 42, and 47. Health is a state of complete physical, mental and social wellbeing. The health implies more than sickness .The right to health is a part of right to life. But the grim reality related to health security is crying. The hospitals are seen in the urban areas and doctors clinics too. The rural India is still far away from glimpse of medical facilities of even small townships. The cheap treatment is still a far cry. In the midst of uproar for health for all, the product patent regime has put a threatening challenge on the majority of population due to excessive hike in medicine price.

In this context ,the paper seeks to study the possibilities of health security in India due to poverty, malnutrition ,lack of pure drinking water facilities, lack of health and hygiene education, Patenting of drugs and uncontrolled pricing. The paper seeks to examine whether compulsory licensing is mere provision in the patents Act 1970 or it has some relevance to health security? What is the national strategy related to health for all in so called civilized state? Whether the threat of patents regime can be converted into gain for health security? What strategy has been initiated after Doha Declaration by the Government of India? What is the situation of Research and Development in Pharma sector? Whether the Indian Pharma companies are competent enough to compete with the companies of Developed countries?

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When there is a question of health in India, people think about hospital, availability of medicine, doctors, patho-labs and other equipments. Despite government planning -- health for all, the government is not in a position to meet the requirement of health. According to World Health Organization, "Health is a state of complete physical, mental and social wellbeing and not merely the absence of disease.[1]" With this, WHO has helped to move thinking beyond a biomedical and pathology-based perspective to the more positive domain of wellbeing including the mental and social dimensions of wellbeing, WHO has radically expanded the scope of health and by extension, the role and responsibility of health professionals and their relationship to the larger society[2]. Article 38 of Indian Constitution impose liability on State that states will secure a social order for the promotion of welfare of the people but without public health we cannot achieve it.[3] The state is responsible to public assistance basically for those who are sick and disable and makes provision to protect the health of infant and mother by maternity benefit[4]. The Directive Principle of State Policy under the Article 47 considers it the primary duty of the state to improve public health, securing of justice, human condition of works, extension of sickness, old age, disablement and maternity benefits and also contemplated. Further, State's duty includes prohibition of consumption of intoxicating drinking and drugs are injurious to health. Article 48A ensures that State shall Endeavour to protect and impose the pollution free environment for good health. Article 47, the State shall regard the raising of the level of nutrition and standard of living of its people and improvement of public health as among its primary duties. None of these lofty ideals can be achieved without controlling pollution inasmuch as our materialistic resources are limited and the claimants are many.[5] The apex court of this country has recognized the rights of the workers and their right to basic health in Bandhua Mukti Morcha v Union of India, delineating the scope of Art 21 of the Constitution, and held that it is the fundamental right of every one in this country to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Art 21 derives its life breath from the directive principles of state policy and particularly clauses (e) and (f) of Art 39 and Arts 41 and 42. It must include protection of the health and strength of workers, men and women; and children of tender age against abuse; opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity; educational facilities; just and humane conditions of work and maternity relief. These are the minimum requirements, which must exist in order to enable

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1 Preamble to WHO constitution as adopted by the International Health Conference, New York, 19–22 June 1946; signed on 22 July 1947 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, p. 100); and entered into force on 7 April 1948.

2 Kumar Avanish, "Human Right to Health", Satyam law international 2007 at 21.

3 Article 38 of the Constitution of India and Article 39(e).

4 Article 41 & Article 42 of the Constitution.

5 *Javed* v. *State of Haryana*, (2003) 8 SCC 369 : AIR 2003 SC 3057.

a person to live with human dignity. No state, neither the central government nor any state government, has the right to take any action which will deprive a person of the enjoyment of these basic essentials. In CESC Ltd. v. Subhash Chandra Bose[6]. The court held that the health and strength of a worker is an integral facet of the right to life. The aim of fundamental rights is to create an egalitarian society to free all citizens from coercion or restrictions by society and to make liberty available for all. The court, while reiterating its stand for providing health facilities in *Vincent Panikurlangara* v. *Union of India*[7], held that a healthy body is the very foundation for all human activities. Therefore health from the womb of the mother is basic and inherent necessity of life upon which the foundation of healthy society can be imagined. But health has not been an integral part of our daily life. Most of the diseases are because of dirty environment and dirty habits. Generally lower income group suffer from very simple and seasonal diseases due to dirty food habits, unclean living, unbalanced food, overeating, intoxication, etc. They spend more on medicines and antibiotics are one of the main composition of their doses which is highly cosly. Here the question arises as to whether the new Patent regime after 2005 is not unfriendly to the Indian consumers? Whether the health security is possible at par with food security?

II. PATENTS LAW AND COMPUSORY LICENSING

Compulsory licenses are generally defined as "authorizations permitting a third party to make, use, or sell a patented invention without the patent owner's consent.[8] Under Indian Patent Act, 1970, the provision with regard to compulsory licensing is specifically given under Chapter XVI. Since compulsory licensing limits the right of exclusive ownership conferred by patents, it has long been controversial.[9] When it comes to implementation of compulsory licensing, there has been little consensus. Among the signatories of TRIPS, developed countries generally tend to view this provision with suspicion, while the developing countries consider it as an issue of prime importance. Patents are granted to encourage inventions and to secure that the inventions are worked in India on a commercial scale and to the fullest extent that is reasonably practicable without undue delay. Patents are not granted merely to enable patentees to enjoy a monopoly for the importation of the patented article. The protection and enforcement of Patent rights contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

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6 (1992) 1 SCC 441 : AIR 1992 SC 573: (1991) 2 Scale 996.
7 (1987) 2 SCC 165 : AIR 1987 SC 990.
8 Priyanka Rastogi and Ansu Bansal, compulsory licensing in patent.
9 ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT 498- 505 (6th ed. 2002).

Patents granted do not impede protection of public health and nutrition and should act as instrument to promote public interest especially in sectors of vital importance for socio-economic and technological development of India. Patents granted do not in any way prohibit Central Government in taking measures to protect public health. The Patent right shall not be abused by the patentee or person deriving title or interest on Patent from the patentee, and the patentee or a person deriving title or interest on Patent from the patentee does not resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology. Patents are granted to make the benefit of the patented invention available at reasonably affordable prices to the public. Patented inventions are worked on a commercial scale in the territory of India without undue delay and to the fullest extent that is reasonably practicable.[10]

Any person interested may make an application to the Controller for grant of Compulsory License for a patent after the expiry of three years from the "date of grant" of the patent on the following grounds: that the reasonable requirements of public with respect to the patented invention have not been satisfied, or that the patented invention is not available to the public at reasonably affordable price, or That the patented invention is not worked in the territory of India. Such an application may also be made by the licensee. No person shall be stopped from alleging the grounds i-iii above by reason of any admission made by him in the license or otherwise or by reason of his having accepted such a license. In considering such an application, the Controller shall take into account-the nature of the invention, the time which has elapsed since the sealing of the patent and the measures already taken by the patentee or any licensee to make full use of the invention; the ability of the applicant to work the invention to the public advantage; the capacity of the applicant to undertake the risk in providing capital and working the invention, if the application were granted; as to whether the applicant has made efforts to obtain a license from the patentee on reasonable terms and conditions and such efforts have not been successful within a reasonable period as the Controller may deem fit. Reasonable period shall be construed as a period not ordinarily exceeding a period of six months. However, these circumstances shall not be applicable in case of national emergency or other circumstances of extreme urgency or in case of public non-commercial use or on establishment of a ground of anti-competitive practices adopted by the patentee.[11]

Compulsory license shall be available for manufacture and export of patented pharmaceutical product to any country having insufficient or no manufacturing capacity in the pharmaceutical sector for the concerned product

[10] S. 83 of the Patents Act, 1970. General principles applicable to working of patented inventions.

[11] S. 84 OF THE PATENT Act, 1970.

to address public health problems, provided compulsory license has been granted by such country or such country has, by notification or otherwise, allowed importation of the patented pharmaceutical products from India. The Controller shall, on receipt of an application in the prescribed manner, grant a compulsory license solely for manufacture and export of the concerned pharmaceutical product to such country under such terms and conditions as may be specified and published by him. The provisions of (a) and (b) shall be without prejudice to the extent to which pharmaceutical products produced under a compulsory license can be exported under any other provision of this Act. 'Pharmaceutical products' means any patented product, or product manufactured through a patented process, of the pharmaceutical sector needed to address public health problems and shall be inclusive of ingredients necessary for their manufacture and diagnostic kits required for their use.[12]

Compulsory licensing is when a government allows someone else to produce the patented product or process without the consent of the patent owner. It is one of the flexibilities on patent protection included in the WTO's agreement on intellectual property — the TRIPS (Trade-Related Aspects of Intellectual Property Rights) Agreement.

The TRIPS Agreement does list a number of conditions for issuing compulsory licences. Normally the person or company applying for a licence has to have tried to negotiate a voluntary licence with the patent holder on reasonable commercial terms. Only if that fails can a compulsory licence be issued, and even when a compulsory licence has been issued, the patent owner has to receive payment.[13] The TRIPS Agreement says "the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization", but it does not define "adequate remuneration" or "economic value".

The compulsory licences must be granted mainly to supply the domestic market[14]. The 2001 Doha Ministerial Conference decided that this should be changed so that countries unable to manufacture the pharmaceuticals could obtain cheaper copies elsewhere if necessary.

III. TRIPS AND COMPULSORY LICENSING

The TRIPS Agreement sets minimum standards in the international rules governing patents, including on medicines. The standards that patents be given for a minimum of 20 years; that patents may be given both

[12] S. 92A of the Patents Act, 1970.
[13] Article 30 of TRIPS Agreement.
[14] Article 31(f) of the TRIPS Agreement.

for products and processes and that pharmaceutical test data be protected against 'unfair commercial use'.

But the question of what deserves to be patented is left for countries to determine. The Agreement only says that patents should be granted for new, inventive and useful inventions - but it does not define these terms. Deciding whether a new formulation, producing a pill version of a drug that earlier it was a powder, or a new combination combining two or more existing molecules into a new pill deserves a new twenty-year patent, is a prerogative of countries, and is not determined by the WTO texts. Therefore countries should determine what kind of inventions deserves patents in the area of pharmaceuticals, in light of their own social and economic conditions. Some governments, such as Brazil, Thailand or India, have done precisely that in today's world as for many patients, that decision can be a question of life or death. Though there is no such thing as a single international patent law, TRIPS represents a harmonisation of patent laws. The industry had been pushing for this kind of move for decades. It's a one-size-fits-all policy that aims at extending the stricter patenting laws previously used in industrialised countries to developing countries, regardless of their radically different social and economic conditions.

Implementation of the TRIPS Agreement's intellectual property standards is having a considerable impact on access to medicines and public health. By limiting competition and local manufacturing, the danger is that TRIPS extends high drug prices and worsens the access to medicines crisis. With TRIPS, life-saving medicines are considered in the same vein as mere consumer goods and the devastating impact of high prices is mostly ignored. The balance between the private interests of the patent holder and the larger interests of society is severely skewed. It didn't take long for the issue to come to a head. In 2001, at the annual ministerial meeting of the WTO in Doha, Qatar, countries agreed to redress that imbalance, and firmly restated the primacy of health over commercial interests. The Doha Declaration reaffirmed countries' right to use TRIPS safeguards such as compulsory licences or parallel importation to overcome patent barriers to promote access to medicines, and guided countries in their use. One final significant achievement of Doha was to extend the deadline by which the least developed countries had to grant and enforce pharmaceutical patents, from 2006 to 2016. For many decades India did not recognize pharmaceutical patents, but the patent law has been overhauled to comply with the requirements of the World Trade Organization (WTO) which India joined in 1995. In 2005, India's legislators revised the patent law to protect innovative molecules discovered after 1995.The compulsory licences can only be issued by national government authorities. However, in India the situation is somewhat different and generic companies can themselves request such licenses from the independent patent controller. In March 2012, India granted its

first compulsory license to the Indian generic drug manufacturer Natco Pharma Ltd for Sorafenib tosylate (Nexavar), an anti-cancer drug patented and marketed by Bayer. Although non-governmental groups reportedly welcomed the decision, whereas western innovative pharmaceutical companies viewed the decision with caution.

IV. DOHA DECLARATION AND PUBLIC HEALTH

The November 2001 declaration of the Fourth Ministerial Conference in Doha, Qatar, provides the mandate for negotiations on a range of subjects, and other work including issues concerning the implementation of the present agreements. It emphasizes that the TRIPS Agreement does not and should not prevent member governments from acting to protect public health. It affirms governments' right to use the agreement's flexibilities in order to avoid any reticence the governments may feel. The member's concerns had been growing that patent rules might restrict access to affordable medicines for populations in developing countries in their efforts to control diseases of public health importance, including HIV, tuberculosis and malaria. The Declaration responds to the concerns of developing countries about the obstacles they faced when seeking to implement measures to promote access to affordable medicines in the interest of public health in general, without limitation to certain diseases. While acknowledging the role of intellectual property protection "for the development of new medicines", the Declaration specifically recognizes concerns about its effects on prices.

The TRIPS Agreement allows the use of compulsory licences. Compulsory licensing enables a competent government authority to license the use of a patented invention to a third party or government agency without the consent of the patent-holder. Article 31 of the Agreement sets forth a number of conditions for the granting of compulsory licences. These include a case-by-case determination of compulsory licence applications, the need to demonstrate prior negotiations with the patent owner for a voluntary licence and the payment of adequate remuneration to the patent holder. Where compulsory licences are granted to address a national emergency or other circumstances of extreme urgency, certain requirements are waived in order to hasten the process, such as that for the need to have had prior negotiations obtain a voluntary licence from the patent holder. Although the Agreement refers to some of the possible grounds (such as emergency and anticompetitive practices) for issuing compulsory licences, it leaves Members full freedom to stipulate other grounds, such as those related to non-working of patents, public health or public interest. The Doha Declaration states that each Member has the right to grant

compulsory licences and the freedom to determine the grounds upon which such licences are granted.[15]

The TRIPS Agreement, which is part of the WTO Agreement, lays down that a compulsory licence, i.e. a licence issued by the public authorities to use a patented invention without the consent of the patent-holder, is to be issued mainly with a view to supplying the domestic market. The Decision by the WTO General Council of 30 August 2003 makes exceptions to this limitation on exports for pharmaceutical products. The decision makes it possible for States that lack manufacturing capacity to import pharmaceutical products on the basis of a compulsory licence. The main purpose of the decision is to give developing countries access to key medicines.[16] Neither the Doha Declaration nor Paragraph 6 decision address the fundamental issue of underinvestment in R&D for health conditions that predominantly impact LMICs. Between 1975 and 1997, 1,223 new chemicals were launched on the market. Of the 31% which were therapeutic innovations, only 1% was helpful for tropical diseases R&D remains heavily concentrated in a small number of large pharmaceutical companies located in high-income countries seeking to serve those markets For example, there are more drugs in the pipeline for brain tumours than for tuberculosis which is one of top killers globally and especially in the developing world As profit-making commercial concerns, these companies focus on markets which promise the greatest economic return. Currently, 90% of research funds go to only 10% of the world's disease burden. For most LMICs, lack of domestic R&D capacity and purchasing power means a lack of drug development to meet significant health needs.[17]

The lack of appropriate legislation in many LMICs to enshrine the protections under the TRIPS agreement, Doha Declaration and IDDT remains a key challenge. National legislation is essential because many provisions are permitted only if written into law. Currently, many LDCs have stricter IPR protection than is minimally required by TRIPS. Of thirty African LDCs, only two do not grant patents for pharmaceuticals. Furthermore, LMICs can only assert available flexibilities and enhance their purchasing power if appropriate national drug policies are in place, backed by a legislative framework concerning such issues as use of generics, drug pricing and taxation. In this context, the key priorities for strengthening national legislation in LMICs should include provisions for compulsory licensing for both import and export, definition of international exhaustion of rights and parallel importing, early working policies and, for LDCs, how to best use the available transitional period for compliance. The option to use compulsory licensing, in particular, is being hindered by complex legal and

[15] Doha declaration on public health, Wikipedia.org.
[16] Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, 2003.
[17] http:/www.ictd.org.

administrative barriers including a failure to write compulsory licensing into law. To remedy this, countries must outline strong government provisions with comprehensive and full entitlements provided under TRIPS, including authorization for patents for public, non-commercial use and fast-track authorization without long negotiations this requires clear and straightforward procedures that do not suspend execution of a compulsory license if appealed against. This would include writing into legislation the onus for proof of patent infringement on the patent holder equally critical is for countries *with* manufacturing capabilities, which have been compliant with TRIPS since 2005, to establish legislative and administrative frameworks for allowing compulsory licensing for export purposes. These countries include India, China, Brazil, Canada, South Africa and Singapore.

V. NATIONAL STRETEGY FOR HEALTH SECURITY.

The National health security is a state in which the nation and its people are prepared for, protected from, and resilient in the face of incidents with health consequences. The strategy is one of the most important documents for the public health, healthcare, and emergency management communities, providing a framework to build community resilience, strengthen and sustain health emergency response systems, improve capabilities, and prioritize resources on current and future budgets.[18]

According to GATS (General Agreement on Trade and Services), medical tourism is the second mode of trade in health services. In this mode, customers (patients) leave their home country to obtain health care services with high quality and affordable prices .Medical tourism occurs when international patients travel across boundaries for their healthcare and medical needs. It can be defined as provision of cost effective private medical care in collaboration with the tourism industry for patients needing surgical and other forms of specialized treatment.[19]

The major service providers in Indian medical tourism are: the Apollo Hospitals, Escorts Hospital, Fortis Hospitals, Breach Candy, Hinduja, Mumbai's Asian Heart Institute, Arvind Eye Hospitals, Manipal Hospitals, Mallya Hospital, Shankara Nethralaya etc. AIIMs, a public -sector hospital is also in the fray. In terms of locations – Delhi, Chennai, Bangalore and Mumbai cater to the maximum number of health tourists and are fast emerging as medical tourism hubs. It also visualizes high-end healthcare services through Indian BPO firms like Hinduja TMT, Apollo Heart

[18] National Health Security Strategy and Implementation Plan (2015-2018).

[19] DR. SUMAN KUMAR DAWN & SWATI PAL, MEDICAL TOURISM IN INDIA: ISSUES, OPPORTUNITIES AND DESIGNING STRATEGIES FOR GROWTH AND DEVELOPMENT, International Journal of Multidisciplinary Research Vol.1 Issue 3, July 2011.

Street, Comat Technologies, Datamatics and Lapiz that work in the areas of claim adjudication, billing and coding, transcriptions and form processing. One-stop centres in key international markets to facilitate patient flow and stream lining immigration for healthcare are envisaged. Therefore, it is clear that the opportunities and challenges for growth in the health sector are seen primarily within the private/corporate sector, not in the public sector[20]. It also draws our attention that these hospitals can provide health care to the foreigners at affordable cost in comparison to their home countries. But whether the Indian patients can afford the medical care cost including the cost of medicine which has been increased after product patents regime? Even the Health Insurance is not affordable to the common Indians. In this scenario the traditional healthcare systems, naturopathy, siddha, yoga, Unani system of medicine, homeopathy can be of great advantages to the Indian patients .It can attract international patients and can generate tourism flows. The earning from such medical tourism can be diverted towards medical subsidy in medicine cost and health care.

Today Singapore ranks sixth in the world in healthcare outcomes well ahead of many developed countries, including the United States. The results are all the more significant as Singapore spends less on healthcare than any other high-income country, both as measured by fraction of the Gross Domestic Product spent on health and by costs per person. Singapore achieves these results at less than one-fourth the cost of healthcare in the United States and about half that of Western European countries.[21] Indian pharma industry has clearly demonstrated that it has the potential to be a part of the solution for universal access to healthcare. India's strength is innovating to improve global access to medicines as opposed to developing more and more "me too" drugs which have been traditionally defined by the West as innovation. There is now a growing acknowledgment that the existing IPR regime that is being touted by the West doesn't foster innovation.

VI. CONCLUSION

The limited progress in improving access to medicines through TRIPS, as affirmed by the Doha Declaration and Paragraph 6 decision, points to the need for reassessment. In February 2004, the WHO constituted committee to review the available evidence and recommend ways forward to improve systems for developing and accessing drugs in least developing countries. The Commission considered access to medicines within a broader context of industry structure and market incentives, recognising that IPRs are only one means of stimulating action. In its final report, the Commission made

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[20] *Ibid*.

[21] William A. Haseltine, Affordable Excellence: The Singapore Healthcare story, How to create and manage sustainable healthcare systems.

sixty recommendations organised into five categories: (a) the discovery of new health-care products; (b) the developmentof drugs from pre-clinical and clinical research, and the regulatory process; (c) the delivery to of new and existing products LMICs*; (d)* the fostering of innovation in the developing world; and *(e)* the roles and responsibilities of WHO in leading ways forward. While the Doha Declaration and Paragraph 6 decision affirm important principles under the TRIPS agreement, regarding the protection of public health within international trade law, key challenges remain. The lack of progress in implementing TRIPS flexibilities to improve access to medicines, and the spread of TRIPS-plus measures through bilateral and regional trade agreements, require concerted attention. LDCs dependent on access to export markets in industrialised countries have been pressured to prioritise trade over public health protections. Powerful trading nations, acting on behalf of transnational pharmaceutical companies, have benefited from a "divide and conquer" strategy.

The challenge of improving access to medicines for LDCs thus stands at a critical crossroad. One choice is for the global community to allow the Doha Declaration to become a pawn in the high politics of trade policy, trampled by the spread of TRIPS-plus measures designed to push access to medicines by the poor even further out of reach. The other choice is to stand true to the public health protections available within the TRIPS agreement. This would mean an affirmation of those principles, setting them apart and above trade negotiations, accompanied by the commitment of sufficient resources to realise their potential. In India, most of the people have less access to health due to lack of adequate employment and sufficient income. The price of the allopathic drugs are of high cost due to lack of efficient price control mechanism. The Ayurvedic and Unani medicine are also costly. Even the Homeopathic medicines have become costly. The cost of treatment in the hospitals have become very costly due to privatisation of hospitals and lack of control mechanism. In this scenario, like food security, India will have to take decision for medicine security via compulsory licensing. The fate of the poor cannot be left at the mercy of the pharma companies. Even the importation can be allowed through compulsory licensing.

CRITIQUE OF THE CONSTITUTION (ONE HUNDRED AND TWENTY-SECOND AMENDMENT) BILL, 2014 / GST[1]

—Arpita Chanana & Mayank Samuel[*]

Abstract: The Constitution (122nd Amendment) Bill, 2014, recently passed by the Lok Sabha on May 6, 2015 is a bill from which expectations as high as an increase in two percent of the GDP are attached. With no doubt, it can be stated that the Indian Indirect Tax Regime was in great need of some overhauling especially after the major problem of cascading of taxes that continued even and especially after VAT came into picture. To solve the same and related problems and learning from the experiences of fellow jurisdictions, the idea of GST was conceived of in India in 2006. But since then the journey of this major change, and as few might call it as 'the game changer' has not been easy, with legislative clearances being the major hurdle. Now that it has passed the Lok Sabha and is awaiting approval from the Rajya Sabha it's crucial to analyse if the right law is about to be passed. The Bill with its fair share of glory does have a fair share of drawbacks too. The authors in this particular piece have attempted to flag out the same with possible suggestions for ameliorating from the present position and analysed if the deadline of April 1, 2016 is attainable, at all?

I. AN INTRODUCTION TO THE BILL

The Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014, hereinafter referred to as the 2014 Bill, was introduced in the Lower House on December 19, 2014 by the Minister of Finance of India, Mr. Arun Jaitley. The 2014 Bill aimed at the amendment of the Constitution in order

[1] NALSAR University of Law.

to introduce the Goods and Services tax (GST) regime throughout the country.[2]

The legislature, through such introduction of GST regime in the 2014 Bill, intended to absorb the different central indirect taxes such as the Central Excise Duty as well as State cesses and surcharges relating to supply of goods and services under one head.[3] With the move, since all goods and services will be taxable, with minimum exemptions, the tax base too will likely become more comprehensive.[4]

As far as the GST regime around the world is concerned, France was the first nation to introduce the GST structure in 1954[5], and as on January 24, 2014, there are 160 countries in the world which have incorporated VAT/ GST within their taxation mechanism.[6]

The 2014 Bill was passed by the Lower House on May 6, 2015[7] though, since then, it has faced several roadblocks in the Upper House since the ruling government doesn't possess a majority and is dependent on support from regional parties and allies. While TMC has shown its support for the bill, Congress, AIADMK and Left Parties constitute the united opposition.[8] The Cabinet, in order to win the support of regional parties like TMC in West Bengal and BJD in Orissa, accepted certain amendments to the GST bill on July 28, 2015, concerning compensation to the states for revenue loss.[9]

This Bill is intended to confer concurrent taxation powers on the Union as well as the States[10], replacing the number of indirect taxes of the Union

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2 The Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

3 Paragraph 2, Statement of Objects and Reasons, The Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

4 EY, *Goods and Services Tax: The Roadmap*, EY, available at http://www.ey.com/IN/en/Services/Tax/EY-goods-and-services-tax-gst, last accessed September 20, 2015.

5 Indirect Taxes By LawCrux Advisors*, The History, Goods and Service Tax (GST) in FRANCE*, available at: https://timetrimebooksoftwaresolutionslawcrux.wordpress.com/2012/10/29/goods-and-service-tax-gst-in-france/, last accessed 20/09/2015.

6 *Countries Implementing GST or VAT,* Official Website Malaysia Goods & Services Tax (GST), available at http://gst.customs.gov.my/en/gst/Pages/gst_ci.aspx, last accessed September 20, 2015.

7 The Constitution (122nd Amendment) (GST) Bill, 2014, available at http://www.prsindia.org/billtrack/the-constitution-122nd-amendment-gst-bill-2014-3505/ , last accessed September 20, 2015.

8 PTI, *Cabinet clears amendments to GST Bill, states to be compensated for 5 years,* The Financial Express (July 29, 2015), available at http://www.financialexpress.com/article/economy/govt-clears-gst-bill-amendments-states-to-be-compensated-for-5-yrs/110275/, last accessed September 20, 2015.

9 *Ibid*.

10 Statement of Objects and Reasons, The Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

and the State Governments, in order to bring indirect taxation under one, single regime. This Goods and Services Tax would be imposed on the various transactions constituting a part of the manufacture and supply of goods and services in India, with an exception of those transactions which have specifically been kept out of the purview of the goods and services tax. For example, GST wouldn't cover alcoholic liquor prepared for human consumption.[11]

The main aim of the Bill is to eliminate the cascading effect of multiple indirect taxes present in India as well as create a common national market for goods and services.[12] What would set replaced by the introduction of GST regime in India would be the entire set of Central Indirect taxes[13] and State taxes[14].[15]

Though Value Added Tax (VAT) at the Central level as well as the State level in past had provided a major breakthrough in the area of indirect tax reforms in India, there remained shortcomings in the form of non-inclusion of several Central and State Indirect taxes, which is now sought to be addressed with the introduction of GST. The Goods and Services Tax, therefore, would provide a significant breakthrough in the direction of a comprehensive indirect taxation throughout India.[16] It shall not just affect the tax structure, but also the tax incidence, computation, credit utilization and reporting, leading to a complete overhaul of the present system.[17]

The authors would, in due course of this paper, discuss the glitches and stumbling blocks present in the 2014 Bill and further, provide comments and suggestions to ameliorate the same.

II. SALIENT FEATURES OF GST CONSTITUTIONAL AMENDMENT BILL

While the idea of a GST mechanism was first put in place in 2006 by the then Finance Minister (FM) of India, Mr. P Chidambaram, it continues

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11 *Supra note* 1, Clause 14(i).

12 *Supra note* 3.

13 Central Excise Duty, Central Sales Tax, Service Tax, Additional Customs Duty (Countervailing Duty) and Central Surcharges & Cesses.

14 State VAT/Sales Tax, Entertainment Tax, Octroi and Entry tax, Purchase Tax, Luxury tax, Taxes on lottery, betting and gambling and State Cesses and surcharges.

15 Paragraph 2(b), Statement of Objects and Reasons, The Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

16 Introduction, *First Discussion Paper On Goods and Services Tax In India*, The Empowered Committee Of State Finance Ministers, New Delhi, (November 10, 2009).

17 *Supra note* 3.

to remain stuck on the pre-implementation stages.[18] The Present GST Bill described as the 'biggest tax reform since 1947' by Arun Jaitley, and targeted to be implemented in April 2016, culminated as a result of a series of negotiations between the Finance Ministers from different states which constituted the Empowered Committee.[19] Mr. Jaitley's aspirations with the Bill are that it shall provide a win-win situation to the Centre and the States. However it's only for time to tell that how well the Bill in its present form will stand as a game changer.

A. Salient Features

1. The 2014 Bill keeping in mind the federal structure of India, empowers the Centre as well as the States to impose GST on the supply of goods and services within a State concurrently where such goods and services, in cases of intra-state supply, would be subjected to a Central GST (CGST) and State GST (SGST). In cases of inter-state supply of goods, IGST, which is the sum total of CGST and SGST, would be imposed, to be collected by the Centre. Both the CGST and SGST shall work on the destination principle.[20] Hence, exports would be zero-rated, and imports would be treated parallel to domestic goods and services.[21]

2. The 2014 Bill envisages a situation where the Centre and the States would be equal beneficiaries of taxation under a uniform regime, while increasing administrative efficiency at the same time, which would further ensure the quelling of concerns of a particular State with respect to relinquishment of taxation powers. Further, the 2014 bill in order to levy GST, covers all goods and services except alcoholic liquor, which would continue to be taxed by the respective state governments outside the GST regime as well as petroleum and petroleum products which would see transition in phases in order to enable the respective State to deal with such revenue loss.[22]

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[18] Economic Laws Practice, *India: Introduction Of The GST Bill*, Mondaq (30/11/2015), available at http://www.mondaq.com/india/x/370170/sales+taxes+VAT+GST/Introduction+Of+The+GST+Bill, last accessed September 20, 2015.

[19] Express News Service, *GST: Finance Minister Arun Jaitley introduces 'biggest tax reform' Bill*, The Indian Express (20/12/2014), available at http://indianexpress.com/article/india/india-others/goods-service-tax-bill-introduced-in-lok-sabha/, last accessed September 20, 2015.

[20] *Supra note* 3.

[21] *Supra note* 3.

[22] Paragraph 2(g), Statement of Objects and Reasons, The Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

3. The 2014 Bill further seeks to subsume Central Indirect taxes[23] and State Indirect taxes[24] so far as they relate to the supply of goods and services (that are the Central Excise Duty, Additional Excise Duty, Service tax, Additional Custom Duty, VAT or Sales Tax, Entertainment Tax, Entry Tax, Purchase Tax, Luxury Tax, and Octroi) in order to create a uniform regime of taxation in India.[25] However, where Entertainment Tax imposed by the States on theaters, movies will be subsumed by GST but such nature of taxes at panchayat, municipality or district level shall continue to exist.[26]

4. Clause 12 of the 2014 Bill, through the introduction of Article 279A in the Constitution, puts forth the constitution of a recommendatory body, GST Council.[27] This GST council is presided by the Union Finance Minister and comprised of Finance Minister from each State and Union Minister of State in charge of Revenue.[28]

5. The Bill places an obligation on the Union Government to assign the additional one percent tax imposed on supply of goods in the course of inter-State trade & commerce to the States for a period of two years or any other time frame which the GST Council might recommend.[29] This one percent origin based tax additional to IGST will be non-creditable at any level in the entire GST chain.[30]

6. The 2014 Bill further recognizes the trust deficit prevalent between the Centre and the States, as one of the cogent reasons for the failure in the implementation of GST regime in India when two-thirds of the world, at present, has the same in place. To overcome this above-mentioned trust deficit problem, Mr. Jaitley has made a compensation announcement for the States for losses in revenue suffered on account of the of the GST regime for a maximum period of five years.[31]

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[23] Such as Central Excise Duty, Additional Excise Duty, Service tax, Central Sales Tax.

[24] Such as State Value Added Tax, Sales Tax, Entertainment Tax, Octroi and Entry Tax and Luxury Tax.

[25] *Supra note* 2.

[26] Rajeev Dimri, *Column: GST Bill must clear stance on local taxes,* The Financial Express (March 20, 2015), available at http://www.financialexpress.com/article/fe-columnist/column-gst-bill-must-clear-stance-on-local-taxes/55519/, last accessed 20/09/2015.

[27] Clause 12, The Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

[28] *Ibid*.

[29] Clause 18, The Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

[30] Rajeev Dimri, *Goods and Services Tax: Place of supply rules need more clarity,* The Financial Express (March 20, 2015), available at http://www.financialexpress.com/article/fe-columnist/goods-and-services-tax-place-of-supply-rules-need-more-clarity/32169/, last accessed September 20, 2015.

[31] Clause 19, Financial Memorandum, para 4, Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

7. Stamp duties, typically imposed on legal agreements by the States will continue to be levied by the respective State governments.[32]

III. AMENDMENTS TO THE CONSTITUTIONAL PROVISIONS

The 2014 Bill inserts Article 246A, 269A, 279A whereas it omits Article 268A inserted into the Constitution through the Constitution (88th Amendment) Act, 2003.[33] It further omits Entry 92 and 92C from the Union List, that is, Taxes on sale/purchase of newspapers and Taxes on services respectively, and Entry 52 and 55 of the State List, that is, Taxes imposed on entry of goods into a local area and Taxes on advertisements not advertised through newspapers, radio and television respectively, of the Seventh Schedule. The Bill also modify the provisions of Article 248, 249, 250, 268, 269, 270, 271, 286, 366, 368, Sixth Schedule and the Entry 84 of the Union List and Entry 54 and 62 of the State List of Seventh Schedule of the Constitution.[34] The amendments are discussed in further detail below:

Article 246A- This Article which has been introduced in the 2014 Bill confers on the Central Government and States the power to make laws as well as impose them with respect to GST whereas the Parliament would retain exclusive power to make laws in instances of inter-state trade.[35]

Article 269A- Such GST levied and collected by the Union Government in the course of inter-state trade has to be shared between the Union and States, as recommended by the GST Council. Further, the Parliament would codify the principles for inter-state trade and commerce, such as with respect to the place of supply.[36]

Article 279A- This article puts forth the constitution of the GST Council which is comprised of the Union Finance Minister, Finance Minister from each State and Union Minister of State in charge of Revenue.[37] This Council would provide recommendations on matters of importance such as taxation rate, taxes to be subsumed under GST as well as resolution of disputes, if any, which may arise out of such recommendations.

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32 *Supra note* 3.
33 *Supra note* 1.
34 *Supra note* 1.
35 Clause 2, Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).
36 Clause 9, Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).
37 Clause 12, Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

Article 268A[38]**,** talking about Service tax sharing mechanism, which was levied and appropriated by the Union Government, between the Union and the States is sought to be deleted by the 2014 Bill[39] since Service tax would be subsumed under GST, thus rendering this provision ineffective.

A. The 2014 Bill alter the provisions of the Articles mentioned below

Article 248- The word 'Parliament' in Article 248(1) would be substituted by 'Subject to article 246A, Parliament', in order to enable both the Parliament and State Legislature to frame laws on GST.[40]

Article 249- The words 'goods and services tax provided under article 246A or' would be inserted after 'with respect to' in Article 249(1) to empower the Parliament to pass laws with respect to GST where a two-third majority resolution has been declared by the Council of States in matters of national interest.[41]

Article 250- The words 'goods and services tax provided under article 246A or' would be inserted after 'with respect to' in Article 250(1) to empower the Parliament to pass laws with respect to GST during the period of Emergency.[42]

Article 268- The words "and such duties of excise on medicinal and toilet preparations" in Article 268(1) would be omitted since the same has been subsumed in the GST regime.[43]

Article 269- The words 'except as provided in article 269A' would be inserted after 'consignment of goods' in Article 269(1) to authorize the Union to collect GST on supplies in course of inter-State trade or commerce which would be shared between the Union and States.[44]

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38 Introduced through the Constitution (88th Amendment) Act, 2003.

39 Clause 7, Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

40 Clause 3, Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

41 Clause 4, Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

42 Clause 5, Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

43 Clause 6, Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

44 Clause 8, Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

Article 270-A new clause has been inserted into the Article which puts an obligation on the Union to share GST levied and collected by it, excepting the one which has been mentioned in Article 269A.[45]

Article 271-The words 'except the goods and services tax under article 246A,' would be inserted after 'in those articles' in Article 271 to mean that no surcharge would be levied over GST.[46]

Article 286- After substitutions in Articles 286(1) and (2) and omission of Article 286(3) in the 2014 Bill, the legislature intends to put restrictions on the powers of taxation on supply of goods and services of the States in instances where such supply is to a place not within such State and foreign exports and imports.[47]

Article 366-A clause has been inserted after Clause (12) in the Article to define the term "Goods and Services Tax" as well as after Clause (26) to define the terms "Services" and "State" for the purpose of the 2014 Bill in order to introduce GST in India.[48]

Article 368- The words 'Article 162, Article 241 or Article 279A' would replace 'Article 162 or Article 241 in Clause (a) of the proviso to Article 368(2).[49]

IV. A CRITIQUE OF THE 2014 BILL

It's not just the Finance Minister of India that aspired high for the Bill but also as per the International Monetary Fund (IMF), the proposed GST regime would improve tax compliance as well as increase economic growth over time in India.[50] Though the 2014 Bill has a number of advantages, it is not devoid of its fair share of drawbacks. The first part of this chapter enumerates the benefits of the 2014 Bill and further compares it with the 2011 Constitutional Amendment Bill which had lapsed. The second part deals

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45 Clause 10, Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

46 Clause 11, Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

47 Clause 13, Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

48 Clause 14, Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

49 Clause 15, Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

50 BS Reporter, *India's GST structure is complex says IMF*, Business Standard (March 11, 2015), available at http://www.business-standard.com/article/economy-policy/india-s-gst-structure-is-complex-says-imf-115031101145_1.html., last accessed September 20, 2015.

with areas where the Bill seems to have fallen flat and flags out the glitches in the Bill which have remained unaddressed by the Legislature till date.

A. Advantages of the 2014 Bill

The amendments proposed in the Constitution through the 2014 Bill envisage a picture of GST as a more efficient tax system, with a neutral application.

1. It would not only empower both the Union and the States to levy GST, in an attempt to simplify indirect taxation in India, which would wider the tax base necessary for lowering the tax rates, but also result in better tax compliance amongst the citizens, by virtue of its in-built taxation mechanism.

2. The introduction of GST would further create one, common Indian market which would contribute to the economic growth of the nation by eliminating varied tax classification disputes between Centre and the States.[51]

3. Furthermore, the 2014 Bill proposing to introduce the GST regime would fix the shortcomings prevalent in the present VAT structure in States where indirect taxes such as Luxury tax and Entertainment Tax don't fall within the ambit of VAT, which gives rise to a cascading effect. The GST regime is also directed at the removal of cascading effects of CENVAT and Service tax and therefore, is certainly an improved version of the present VAT mechanism and disjointed service tax.[52]

4. It will have a far-reaching impact on almost all aspects of business operations in the country, from pricing of products and services by avoiding a cascading effect, to a fundamental optimization of supply chain enabling companies to re-evaluate existing procurement patterns, distribution and warehousing agreements, IT accounting and tax compliance systems. Expectations are also for it to lead towards a reduction in inventory costs, since players will be able to claim a credit for the tax pad on their inventories leading to cash flows. Pertinent to be point out here is the peculiar feature of the GST, i.e. it would be paid at the time of sale/supply unlike the excise system of payment at the stage of removal of goods from the factory.[53]

5. On the other hand, the laws and policies pertaining to GST, if suitably formulated by the Union, such as taxation rates and

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[51] Statement by Union Finance Minister Shri Arun Jaitley, *Introduction to the Constitution Amendment Bill on Goods and Services Tax (GST)*, Lok Sabha, (December 19, 2014).

[52] *Supra note* 9.

[53] *Supra note* 3.

compensating States in case of losses in revenue, would lead to revenue benefits through an enlarged tax base and increasing numbers of tax compliance, for both the Centre and the States.

B. On a comparison between the 2014 Bill and the erstwhile 2011 Bill which had lapsed, the 2014 Bill has made progress on certain controversial issues such as:[54]

1. bringing petroleum products within the ambit of GST,
2. providing recommendatory powers to the GST Council as well as certain other powers to deal with idiosyncratic situations and providing compensation to the States in instances of revenue loss,
3. by virtue of GST's introduction, enabling the Union to generate confidence amongst the States with respect to the benefits accruing to them out of GST.
4. Furthermore, the GST council could recommend floor rates of GST for different items, thus granting the States a bit of leeway in determination of SGST rates for relevant products.[55]
5. For states with high exports, a provision imposing 1% additional tax on the inter-state supply of goods and services was inserted where such tax would go to the originating state for a period of two years in order to deal with the revenue losses which could arise out of subsumption of CST within GST.[56]

C. Anomalies in the 2014 Bill

Though the 2014 Bill sets the foundation stone for a major indirect taxation reforms in India, after overcoming several barriers which have arisen in the past, this Bill seems to miss out on certain important points.

1. The 2014 Bill intended to subsume all forms of indirect taxation, at the State level as well as the Centre, and in furtherance of the same, sought the omission of Entry 52 of the State List (Powers of the States to levy Entry taxes) from the Constitution. However, one needs to bear in mind which the Bill seems to have missed, is the existence of certain constitutional provisions Article 243H and 243X,

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[54] Priyanka Rao, *Goods and Services Tax: Comparison of the 2014 Bill with the 2011 Bill,* PRS Legislative Research (July 23, 2015), available at http://www.prsindia.org/announcements/gst-comparison-of-the-2014-vs-2011-bill-3481/, last accessed September 20, 2015.

[55] BMR Edge, *The key features of GST Constitutional Amendment Bill 2014*, VC Circle (December 22, 2014), available at http://www.vccircle.com/news/others/2014/12/22/key-features-gst-constitutional-amendment-bill-2014, last accessed September 20, 2015.

[56] Clause 18, Constitution (122nd Amendment) Bill, 2014 (passed by Lok Sabha on May 6, 2015).

> which independently empower the States to authorize a Panchayat and a Municipality respectively, to levy and appropriate taxes. Where these municipal level taxes form an important revenue source for the local bodies, such local level compliances also form a part of the major hurdles in a free-market regime.[57]

Hence in this regard the authors suggest that this situation warrants a strict clarity from the legislature. In a case where, the tax levying power is not subsumed by GST it's a hulky dory position for the local bodies, whereas if these powers are being subsumed by GST a compensation procedure parallel to that for the State governments need to be made for the local level bodies too.

2. A comparative study of the 2014 Bill with the GST in Canada and GST in Australia has been undertaken in this paragraph.

   a GST in Canada- The Canadian Goods and Services Tax (GST) is a multi-level value-added tax introduced in Canada on January 1, 1991 and finds its mention in Part IX of the Excise Tax Act[58]. This GST is applicable to the supply of most goods and services in Canada, including real property and intangible personal property.[59] The GST regime in Canada formulates a distinction between the participating provinces, which have harmonized their provincial sales tax with the GST and the non-participating provinces. For participating provinces such as Newfoundland, the harmonized sales tax (HST) would be applicable to the same goods and services as the GST.[60] For the remaining provinces, the goods and services would be taxed under two different heads, meaning such goods and services would be taxed under GST as well as their provincial sales tax, if the same is in place.[61]

There have been instances in Canada which have brought out the incompetency of the GST system where in individuals showed non-existent sales of a non-existent company since the GST is paid by the consumer. In order to deal with such fraudulent activities, the Canada Revenue Agency (CRA) has taken serious actions through audits to detect possible fraudulent GST/HST refund schemes. In case of any such fraud, CRA initiates a criminal investigation against the individuals who promote and constitute a part of such schemes and imposes hefty fines as well as imprisonment terms for

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57 *Supra note* 25

58 *Excise Tax Act (R.S.C., 1985, c. E-15),* Justice Laws website, available at http://laws-lois.justice.gc.ca/eng/acts/e-15/page-94.html#h-71, last accessed September 20, 2015.

59 *Basic information on the GST/HST*, Canada Revenue Agency, available at http://www.cra-arc.gc.ca/tx/bsnss/tpcs/gst-tps/gnrl/menu-eng.html, last accessed September 20, 2015.

60 *Supra note* 58.

61 *Supra note* 58.

an offence under the Excise Tax Act of Canada. A fine of up to 200% of the false refund claimed as well as imprisonment for a period of five years could be imposed, in order to deter the offenders.[62]

(b) GST in Australia-Goods and Services Tax is a value added tax of 10%, which came into existence on July 1st, 2000, and is imposed on most goods, services and other items sold or consumed in Australia. A New Tax System (Goods and Services Tax) Act 1999, hereinafter referred to as the GST Act, substituted the Federal Sales Tax system in Australia as well as omitted the various State taxes, duties and surcharges. The Act purported the application of GST to supply of goods, services and transactions pertaining to transfer of obligations or rights, though such supply should be made for consideration.[63]

Though GST is levied on the businesses, they pass on the burden to their customers through GST's inclusion in the sale price of their goods. Hence, the final GST cost is borne by the consumer of the good who can't claim GST credits.[64] The Australian law imposes a floor limit where businesses with a minimum GST turnover of $75,000 ($150,000 for non-profit organizations) have to register for GST and include the same in the total amount of taxable sales.[65]

A 2003 newspaper clipping from The Age brought out the flaws and shortcomings of the GST Act introducing GST regime wherein it was reported that criminals have stolen millions of Australian dollars through innumerable false claims for GST refunds, made by sham companies and stolen tax file numbers, and was declared by the financial experts as Australia's fastest growing form of fraud.[66] Such fraudulent claims could have led to a loss of no less than ten per cent of the total GST revenue.[67] In October 2013, the Australian Taxation Office (ATO) was investigating the GST fraud in the gold bullion industry in Australia which amounted to a

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62 *Warning: claiming false GST/HST refunds is a crime and will result in serious consequences*, Canada Revenue Agency, available at http://www.cra-arc.gc.ca/nwsrm/lrts/2014/l140321-eng.html, last accessed September 20, 2015.

63 *Division 9: Taxable Supplies*, New Tax System (Goods and Services Tax) Act 1999, Commonwealth Consolidated Acts, available at http://www.austlii.edu.au/au/legis/cth/consol_act/antsasta1999402/, last accessed September 20, 2015.

64 Goods and Services Tax, Australian Government: Australian Taxation Office, available at https://www.ato.gov.au/Business/Starting-and-running-your-small-business/Running-your-business/Goods-and-services-tax-(GST)/, last accessed September 20, 2015.

65 *Supra note* 47.

66 John Silvester, Millions stolen in GST scams, The Age (July 21, 2003), available at http://www.theage.com.au/articles/2003/07/20/1058639660663.html, last accessed September 20, 2015.

67 *Ibid*.

whopping $65 million, where the companies have allegedly reported false GST data as well as fraudulently claimed GST credits.[68]

The ATO, to detect and deal with such instances of fraud, has increased its efforts in verification of GST refund claims of the business through calling up the offices, visiting the establishments, verification from third parties and scrutinizing matters where incorrect data was provided.[69] The ATO has further expanded its efforts in the detection of false and stolen identities which is often assumed to obtain GST refunds.

These steps have, to a major extent, ensured that individuals submitting fraudulent GST claims and avoiding their GST obligations would be investigated by the ATO and penalties along with interest would be imposed.[70] Also, if the act warrants a criminal action, then the same would be referred to the Commonwealth Director of Public Prosecutions (CDPP).[71]

The authors, after this comparative study believe that the Indian legislature should understand the fallible nature of the GST regime and therefore, while enacting a statute in order to enforce GST, should refer to the GST regimes in Australia and Canada, their respective statutes as well as the judicial decisions pronounced by them in instances of fraud in filing GST claims to plug the loopholes in the Indian context. Also, a regulatory body on the lines of Canada Revenue Agency in Canada and Australian Taxation Office in Australia should be established whose fundamental duty would be to ensure an appropriate transition to the GST regime and would possess investigating powers to deal with instances of fraud and other related-offences.

3. The GST design and mechanism, as contemplated by the 2014 Bill, is complex as it envisages a dual GST by which effectively the same transaction will be taxed by one Central law and some or the other of the 29 state laws on the subject. There is nothing in the Constitution which prohibits or prevents a state from formulating a GST entirely on a different tangent, with basically even minor variations in terms of different exemptions and exceptions that have

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[68] *ATO investigates $65m GST fraud in gold bullion trade*, Australian Government: Australian Taxation Office (30/10/2013), available at https://www.ato.gov.au/Media-centre/Media-releases/ATO-investigates-$65m-GST-fraud-in-gold-bullion-trade/, last accessed September 20, 2015.

[69] *Dealing with GST fraud and evasion*, Australian Government: Australian Taxation Office, available at https://www.ato.gov.au/Business/GST/In-detail/Risk-management-and-compliance/Compliance/Targeting-GST-compliance/?page=3, last accessed September 20, 2015.

[70] *Ibid*.

[71] *Supra note* 54.

> the potential of completely distorting the GST.[72] Further all this when seen in light of another important fact that the tax officials in the States do not possess much experience in this area, the proposed GST structure seems to be problematic. According to the International Monetary Fund (IMF) in its report on GST in India, the idea of both the Centre and States imposing GST on supply of goods and services as per the 2014 Bill, in a huge nation like India is a complicated one.[73]

It's only pertinent to note here that the basic architecture or the DNA of a good GST is a complete seamless web of taxation and not in the present mutilated and mangled dual model of the 2014 Bill. For this the authors urge that the consensus reached in the empowered committee to have a Model code separately for the states on the lines of which they shall formulate their respective laws, should certainly be implemented.[74] Further, either the GST Council should do the policing and monitoring of rates by the various states, or as also proposed in the 13th Finance Commission report, the model GST should be imposed **at a single positive rate** on all supply of goods and services by the Centre, which would then be divided between the Union and the States.[75] It is only then can the GST regime work efficiently for a vast and diverse country as India. However, for the former suggestion the GST Council's function to accommodate the unique situations of our states while monitoring and policing tax rates and rules would be a taxing task in itself and worth looking ahead for.

4. The final hindrance of the 2014 Bill is with respect to the frivolous litigation which would arise once GST replaces the various Central and States indirect tax statutes when there are an approximate 67000 cases pending in front of 6 benches of Central Excise and Service Tax Appellate Tribunal (CESTAT) on matters pertaining to Excise, Customs and Service tax.[76] When cases dating back to 2003 and '04 are pending before the Benches, one can't anticipate the multiplicity of cases which would then arise.

The author therefore suggest that the pendency of such cases, where the relevant law would be replaced by GST, should be considered by the

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[72] The Firm, *Half-baked GST or No GST?,* The Firm, CNBC TV 18 (August 1, 2015), available at http://thefirm.moneycontrol.com/news_details.php?autono=2275721, last accessed September 20, 2015.

[73] *Supra note* 37.

[74] *Supra note* 71.

[75] Ministry of Finance, Government of India, *The Model GST,* Clause 5.25, Goods and Services Tax (Chapter-V), p. 67, *13*th *Finance Commission Report,* available at http://fincomindia.nic.in/ShowContentOne.aspx?id=28&Section=1, last accessed September 20, 2015.

[76] CESTAT Pendency, available at http://cestat.gov.in/Pendency.htm, last accessed September 20, 2015.

legislature at the time of the enactment of a comprehensive statute for GST in India in order to avoid multiplicity of cases.

5. Further, the GST Council only has recommendatory powers and there is nothing in the 122nd amendment talking about what needs to be done for a situation when a certain state refuses to fall in line with the model or council recommended rate.[77]

6. It's only tough to imagine that how crucial input products like fuel, electricity, natural gas and other infrastructure related needs are excluded from the purview of GST, simply to put, there won't be any input credit available on the most important and common inputs in production of almost all goods and services. Till date the petroleum sector or the real estate is not fully integrated into our present system. Policy question is whether to leave these sectors unincorporated like has been done till date or keep them separate for they bring maximum revenue to the Governments. The 13th Finance Commission Report too has proposed recommendation near around the same lines. As per the Task Force Report appointed by the Commission majority of these goods which have presently been kept out from the GST mandate should have a dual levy, one GST and second an additional levy, where the former should be creditable, and not the latter.[78]

7. The one percent additional tax apart from its debatable purposes it seeks to deliver in its current manner of drafting easily leads one to imagine a scenario where everything say even stock transfers shall also attract GST. The Select Committee Report which submitted its Report to the Rajya Sabha too has pointed that such a language might lead to cascading of taxes, and hence has recommended substituting "supply" for "all forms of supply for a consideration".[79] Further this one percent being paid at a particular state and not being allowed to avail credit at another state's end seems not justifiable.

8. Another major concern will be deciding the ideal GST rate, if we go for a uniform rate. And in case there is no uniform rate considering that the federal structure ought to be respected and protected in India, the light shifts to the importance of a national cap on the rate, to prevent one state from levying an additional GST. There have been debates around almost every state to whether support a 20 plus rate or something between 10 to 20. Alongside is the other important question of who gets governed by GST. The exemption limit for GST

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77 *Supra note* 71.

78 *Supra note* 74, Clause 5.24 (iii) (vi).

79 Select Committee Report of the Rajya Sabha on The Constitution (122nd Amendment) Bill, 2014 (July 28, 2015).

application is something missing in the present structure, which further raises the question of area specific exemption clauses.[80]

V. CONCLUSION

The introduction of The Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014 by the NDA Government in the Parliament is a historic and much-needed step to overhaul the regime of indirect taxation in India; however the hopes attached to with the Bill to lead to some 2% growth in GDP[81] still appear to be unrealistic. The Bill aims at the removal of the various Central as well as State indirect taxes which would be substituted by a common, uniform regime of GST, intended to come into force by April 1, 2016. Though the time-limit which the ruling government has set for itself to implement this regime would seem ridiculous to many and an uphill task to achieve to others, it is important to appreciate at the same time the determination of the ruling government to implement GST as soon as possible. And at the same time we realize that this is a task easier said than done.

The NDA government first of all needs to ensure that that 2014 Bill doesn't end up as a half-baked GST or like the erstwhile Amendment Bill of GST which couldn't be passed in the House and therefore, had lapsed. For the 2014 Bill to come into force, it has to be passed by a minimum of two-thirds majority in Lok Sabha as well as Rajya Sabha and then, a subsequent ratification by a minimum of half the States. While the Bill is expected to pass without much fuss in the Lower House, getting the requisite majority in the Upper House would be an arduous task for the government against a united opposition. Considering that the Bill is passed in both the Houses, obtaining ratification from half the States and the subsequent efforts of preparing a number of laws regulating the entire GST mechanism, the authors believe that the deadline of April 1, 2016 for implementation of GST is an over zealously set deadline and thus the very recent proposal to push it to April 1, 2017 seems more pragmatic[82].

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[80] *Supra note* 71.

[81] PTI, *GST to increase India's GDP by 1-2%,* Business Standard (April 17, 2015) available at http://www.business-standard.com/article/economy-policy/gst-to-increase-india-s-gdp-by-1-2-115041700039_1.html, last accessed September 20, 2015.

[82] DNA, *GST-Roll out deadline to be pushed back to April 1, 2017*, DNA (January 6, 2016), available at http://www.dnaindia.com/money/report-gst-deadline-likely-to-be-extended-by-another-year-2162660, last accessed on January 31, 2016

THE WHISTLEBLOWING REGIME IN THE U.S. AND THE U.K. : THE WAY AHEAD FOR INDIA

—Nikhil Varshney and Riddhima P. Murjani[*]

Abstract The whistleblower policy, though new in India has been in practice by Securities and Exchange Commission ("**SEC**") in U.S. and Financial Conduct Authority ("**FCA**") in U.K. since a long time. The policy aims to bring transparency in the running of huge corporations and to protect the individual who comes forward and discloses unfair practices or violation of law by these corporations. Still, even in those advanced countries, the laws relating to whistleblower are fraught with limitations. This paper provides all the statutory protection which a whistleblower is entitled to in the U.S. and the U.K.- and what lacunae still exists. This paper provides an insight to the practices prevalent in U.S. and U.K. and in that backdrop, moves on to discuss the situation in India, which is still in a very nascent stage. The author in the conclusion has dealt with various issues and factors that the Indian market regulator Securities and Exchange Board of India ("**SEBI**") shall consider before coming out with the whistleblower policy so as to ensure proper, efficient and effective results.

I. INTRODUCTION

The term whistleblower has its origin in United Kingdom. It was first discussed by Doggett, J., in *Winters v. Houston Chronicle Publishing Co.*[1] The term can be attributed to the action of the 'English bobbies (police constables)' who blew whistle when they noticed the commission of a crime.

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[1] 795 SW 2d 723 (Tex. 1990).

A widely used definition of whistleblowing is *"the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action."*[2] A more restrictive definition is *"Whistleblowing is a deliberate non-obligatory act of disclosure, which gets onto public record and is made by a person who has privileged access to data or information of an organization, about non-trivial illegality or other wrongdoing whether actual, suspected or anticipated which implicates and is under the control of that organization, to an external entity having potential to rectify the wrongdoing.*[3]"

Peter B. Jubb in his paper titled Whistleblowing: 'A Restrictive Definition and Interpretation' explicitly pictures whistleblowing as an act of dissent, which publicly implicates a company by externally disclosing wrongdoing. In response to scandals and the new legislation, an increasing number of companies have adopted whistleblowing policies that should make external disclosure unnecessary by solving the problem internally. These policies are examples of what Dr. W. Vandekerckhove and M.S.R. Commers call *institutionalized whistle blowing*[4], defined as "the set of procedures allowing potential whistleblowers to raise the matter internally before they become whistle blowers in the strict sense". The concept of whistleblowers in the strict sense refers to Peter. B Jubb's narrow definition. The whistleblowing mechanism has proved out to be a useful tool to bring to fore any wrongdoing by a particular organization. Talking about securities market, SEC and FCA have capitalized over this mechanism in order to prosecute any company/firm engaged in illegal activities.

II. THE UNITED KINGDOM CHAPTER

A. The Whistleblowing Regime in U.K.

Talking about the common law background, the common law has never given its workers a general right to disclose information about their employment. Even the revelation of non-confidential material could be regarded as undermining the implied duty of trust and give rise to an action for breach of contract. Where employees have allegedly disclosed information in breach of an express or implied term, they may seek to invoke a public interest defence to a legal action. Although the common law allows the

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2 Near, J.P. and M.P. Miceli, 'Retaliation against whistle-blowers: Predictors and Effects', *Journal of Applied Psychology*, 1986, pp. 137-145.

3 Jubb. P.B., 'Whistleblowing: A Restrictive Definition and Interpretation', *Journal of Business Ethics*, 1999, pp. 77-97.

4 Vandekerckhove, W. and M.S.R. Commers, 'Whistle Blowing and Rational Loyalty', *Journal of Business Ethics*, 2004, pp. 225-233.

public interest to be used as a shield against an injunction or damages, it has proved to be a weapon of uncertain strength.[5]

It is significant to have a look at the judicial precedents in this regard. In *Initial Services Ltd. v. Putterill*[6], the Queen's Bench was of the view that law has allowed an exception to the principle of non-disclosure of confidential information where there is 'any misconduct of such a nature that it ought to in the public interest be disclosed to others'. However, the disclosure must be to someone who has an interest in receiving it. In *Lion Laboratories Ltd. v. Evans*[7], two employees gave a national daily copies of some internal documents doubting the reliability of breathalyzers manufactured by their employer. The company sought an injunction to prevent publication of the information on the grounds of breach of confidence. The action by the company failed because the employees were found to have 'just cause or excuse' for disclosure. Subsequently, *A Company's Application, In re*[8], the High Court refused to grant an injunction against the employee in the financial services sector from disclosing confidential information about his company to a regulatory body, notwithstanding that the disclosure might be motivated by malice. Though Justice Scott continued an injunction against general disclosure, he held that an employee's duty of confidence did not prevent them from disclosing to regulatory authorities matters which were within the province of those authorities to investigate. Thus, apart from the situation where an employee reports a breach of statutory duty to a relevant regulatory body, the common law has not provided reliable guidelines about what could be disclosed and to whom.

The two legislations carving out the circumstances in which whistleblowers are protected in U.K. are the 'Public Interest Disclosure Act, 1998' ("**PID Act**") and the 'Employment Rights Act, 1996' ("**ER Act**"). The former provides protection to workers who make a "qualifying disclosure". The protection is afforded to the whistleblower whether or not the report proves to be accurate so long as the whistleblower possessed a 'reasonable belief'. There is an obligation being casted upon workers to act in good faith and disclosures are not protected if they are motivated by malice or personal gain. Generally the disclosure is made to the employer; though a disclosure can also be made to a responsible third party or a prescribed person i.e. the list of bodies provided by Parliament including the FCA, the Serious Fraud Office and the Office of Fair Trading. Under the PID Act,, a "disclosure" is

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5 Lewis David, Ten Years of Public Interest Disclosure Legislation in the U.K. Are Whistleblowers adequately protected, *Journal of Business Ethics*, Vol. 82 No. 2, Oct. 2008, pp. 497-507.

6 (1968) 1 QB 396 : (1967) 3 WLR 1032.

7 1985 QB 526 : (1984) 3 WLR 539.

8 1989 Ch 477 : (1989) 3 WLR 265 : 1989 IRLR 477.

not defined but according to the judgment in *Kraus v. Penna Plc*[9], it covers both oral and written submissions.

Under the U.K. law, there is no such stringent rule that the employer has to establish a formal whistleblowing procedure; though generally the employers do prefer to have a procedure because of the provision section 7(2) of U.K. Bribery Act, 2010 ("**Bribery Act**") whereby a commercial organization guilty of an offence under section 7 can have a defence in place to prove that the commercial organization had in place all procedures to prevent such an offence. The whistleblowing policy and procedure forms an integral part of the "adequate procedures" that companies must have in place if they want to avoid criminal prosecution for failing to prevent bribery under the Bribery Act.

There is no requirement under U.K. law that the identity of whistleblowers is to be kept confidential or that employees are allowed to make reports anonymously. However, the European Commission's Article 29 Data Protection Working Party expressly advises organizations against encouraging employees to make anonymous reports due to the intricacies involved that can create hassles both for the employer and the employee.[10]

In the U.K., the PID Act protects both internal and external disclosures from retaliation but does not encourage companies to institutionalize whistleblowing. To this end, the erstwhile Financial Services Authority (the current FCA) introduced the Combined Code on Corporate Governance in July 2003 which mainly is for guidance and provides best practice suggestions and has a provision on whistleblowing[11]:

The audit committee should review arrangements by which staff of the company may, in confidence, raise concerns about possible improprieties in matters of financial reporting or other matters. The audit committee's objective should be to ensure that arrangements are in place for the proportionate and independent investigation of such matters and for appropriate follow-up action.

The Combined Code does not have the status of law but all U.K. companies listed on the London Stock Exchange are required by the Financial Reporting Council "to report on how they have applied the principles of the

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9 2004 IRLR 260.

10 Available at http://about.bloomberglaw.com/practitioner-contributions/whistleblower-regimes-in-the-us-and-uk/ as last accessed on August [20], 2015.

11 Financial Services Authority 2003, *The Combined Code on Corporate Governance* (FSA, London, p. 52).

Code, and either to confirm that they have complied with the Code's provisions or where they have not, to provide an explanation."[12]

B. FCA Whistleblowing Requirements

The FCA is the SEC counterpart in U.K. Under *Chapter 18 (Clause 18.1.2)* of *Senior Management Arrangements, Systems and Controls sourcebook* (SYSC) of the FCA Handbook[13], the FCA encourages firms to consider adopting appropriate internal procedures that will encourage staff to blow the whistle internally about matters that are relevant to the functions of the FCA.

In 2002, the erstwhile FSA established a dedicated whistleblowing hotline which, in recent times, has rapidly grown in popularity. Whistleblowing cases reported to the FCA have increased by 35% in one year, according to information obtained under the Freedom of Information Act by Kroll, the global investigations firm[14]. It has been found that between November 2012 and October 2013 the FCA received 5,150 contacts to its whistleblowing helpline compared to 3,813 in the same period the previous year. The FCA's current guidance nudges employees to first report any concerns they have to their own firms, pursuant to the firm's own whistleblowing policy, before making reporting to FCA.

C. The Linkage With U.K. Bribery Act, 2010

As stated earlier, though there is no legal requirement under English law for a company to set up and administer an internal whistleblowing policy or procedure but having such a facility may have an impact on a company's ability to demonstrate "adequate procedures" for the purposes of *section 7(2)* of the *Bribery Act 2010*. Under the said Act, if a company can demonstrate adequate procedures i.e. a good anti-bribery compliance programme, then it acts a complete defence to the charge that the company committed the corporate offence of "failure to prevent bribery".

D. Provisions Under U.K. Employment Rights Act, 1996

In the U.K., employees who qualify as whistleblowers are entitled to statutory protection. The tests for determining whether an employee qualifies are set out in the ER Act (as amended by Public Interest Disclosure Act,

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[12] Financial Reporting Council 2005, available at http://www.frc.org.uk/corporate/combinedcode.cfm as last accessed on August [18], 2015.

[13] Available at http://fshandbook.info/FS/html/FCA/SYSC/18/1 as last accessed on August 4, 2015.

[14] Available at http://www.kroll.com/en-us/intelligence-center/press-releases/whistleblowing-on-the-rise as last accessed on July 20, 2015.

1998). Where an employee makes a disclosure that is both "qualifying" and "protected" in accordance with those tests, then the employee has the right not to be either:

i. Dismissed, where the principal reason for the dismissal is that he made a protected disclosure; or

ii. Subject to a detriment on the grounds that he made a protected disclosure.

The six categories of wrongdoing covered by the legislation are criminal offences, miscarriage of justice, breach of a legal obligation, damage to the environment, danger to health and safety and deliberate concealment of information about these wrongdoings. Also an additional requirement has recently been added under section 17 of the Enterprise and Regulatory Reform Act, 2013 as per which the disclosure must be made "in the public interest".

E. Obligation to Cooperate with FCA

All directors, officers or employees of firms authorized in the U.K. under the Financial Services and Markets Act, 2000 who have approved person status have a stand-alone, regulatory obligation under the FCA's Statements of Principle and Code of Practice for Approved Persons (APER) or both the FCA's APER and the Prudential Regulatory Authority's APER if the firm is dual-regulated. In particular, APER Statement of Principle 4:

> "*to deal with the FCA, the PRA and other regulators in an open and co-operative way and disclose appropriately any information of which the FCA or the PRA would reasonably expect notice*".
>
> Any failure to comply with this obligation could result in disciplinary action being taken against the approved persons.

F. Obligation to Report Suspicions of Money Laundering

The financial institutions and other companies in U.K. have legal or regulatory obligations to report knowledge or suspicion of money laundering (i.e. suspicious activity reports (SARs)) to Serious Organised Crime Agency ("**SOCA**") i.e. the U.K. financial intelligence unit under relevant provisions of the *Proceeds of Crime Act 2002*. SOCA has recently been abolished and SARs are now to be made instead to the new National Crime Agency.

G. Practical Problems in Working of Whistleblower Policy in U.K.

One fact that is universal is people want to avoid conflict and so they keep quiet. Besides this, there are no cash incentives in U.K. as are available under U.S. laws. As a matter of fact, the FCA is working on bringing cash incentives according to Mr. Wheatley who is heading the FCA. According to Mr. Wheatley, the FCA is "absolutely interested" in exploring whether to offer cash incentives to whistleblowers.[15]

The Public Interest Disclosure Act of 1998 which amended the ER Act provides protection for an employee who reports the suspected malpractice in good faith. Claims of detriment or dismissal in response to a whistleblowing disclosure have to be brought in the Employment Tribunal in which costs are not recoverable by the winning party. This means that an employee has to take on significant financial risk in bringing a claim, usually against a party with deeper pockets. The financial ruin that the National Health Service Chief executive faces after speaking out about high death rates is the most apt example. This evinces how British law fails to encourage and protect whistleblowers. Gary Walker, who was chief executive of United Lincolnshire Hospitals Trust before he was dismissed in 2010, claims he may "lose everything" after speaking out against the "culture of fear" in the NHS[16].

H. The Developments by FCA in Pipeline

Financial incentives for whistleblowers are on the cards in U.K. In the aftermath of the investigations into manipulation of the London Interbank Offered Rate (LIBOR), ministers on the Treasury Select Committee have called for the FCA to consider the merits of introducing an incentive programme similar to the SEC's Office of the whistleblower. The FCA is expected to produce a note for the Parliamentary Commission on Banking Standards on how it might go about incentivizing whistleblowers in the future, presumably. Another issue on which FCA is working on is how to provide knowledge to the employees about their coveted right to blow the whistle in case of illegal happenings in their organization so that people can come out robustly and bring fore the misdeeds of their companies/firms.

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[15] Available at http://www.out-law.com/en/articles/2013/march/fca-must-address-whistleblowing-concerns-before-looking-to-offer-incentives-says-expert/ as last accessed on July 24, 2015.

[16] Available at http://blogs.telegraph.co.uk/finance/ianmcowie/100022981/nhs-and-ppi-scandals-show-why-we-need-financial-protection-for-whistleblowers/as last accessed on August 18, 2015.

In addition, by way of a *discussion paper* on transparency published in March 2013 (DP13/1), the FCA is consulting on ways through which it can be more open and transparent about how information received from whistleblowers is to be dealt with. For example, the FCA is pondering over whether to provide a written response to the whistleblower to let them know whether any official action is being taken in response to the report, and provide a general overview of next steps the regulator will be taking. It is also under consideration whether to provide regular status updates to the whistleblower and the compilation and publication of aggregate statistics on whistleblowing. This would bring more transparency and providing regular information would assure whistleblowers and others that FCA takes seriously the information it receives and that it forms an important part of its intelligence-gathering toolkit which would exhort more whistleblowers to come forward.

In the U.K., the Whistleblowing Commission has been set up to examine the effectiveness of the current arrangements for workplace whistleblowing, and to make recommendations for change. The Commission on March 27, 2013 launched a *public consultation* to gather evidence on certain crucial issues related to whistleblowing policy.

III. THE UNITED STATES CHAPTER

A. The Whistleblowing Regime in U.S.

In 2010, in response to a long series of corporate scandals that defrauded countless investors and shook investor confidence, the U.S. Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act which amended the Sarbanes Oxley Act to a very large extent. Section 922 of the legislation amended the Securities Exchange Act, 1934 by adding Section 21F, entitled "Securities Whistleblower Incentives and Protections"[17]. The new section 21F required the SEC to enact a whistleblower program to pay financial rewards to individuals who provide information about possible securities violations to the SEC. The very first award was given in August 2012 of US$50,000 which was paid to a whistleblower that helped the SEC stop a multi-million dollar investment fraud, and amounted to 30% of the monetary sanctions actually collected by the SEC at that time (US$150,000). (An additional payment of US$500 was paid to the whistleblower in September 2012, and further amounts will be payable to this individual as and when the SEC makes additional collections.)[18]

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[17] Codified at 15 USC § 78u-6.

[18] Available at www.practicallaw.com/9-525-9018 as last accessed on August 12, 2015.

The SEC adopted the final rules governing the new whistleblower program in May 2011 as Regulation 21F[19]. As per the new rules, an individual who voluntarily provides the SEC with original information resulting in a successful enforcement action in which the SEC collects over 1 million$ in sanctions will be eligible for a financial reward of between 10% to 30% of the amount collected, depending on various factors. The program recognizes the fact that law enforcement authorities need the public's help to effectively and efficiently police the market. It is a grim fact that securities fraud schemes are often difficult to detect and prosecute without inside information or assistance from participants in the scheme or their associates. For the SEC to obtain a monetary civil penalty, the relevant securities violations must have occurred or have remained ongoing within the past five years even if the whistleblower did not discover the possible violation until a later date.[20]

The most common types of securities violations reported by whistleblowers[21] are financial fraud which involves the filing of false or misleading financial statements with the SEC and use of manipulative business transactions that generally have no practical purpose but to manipulate revenues, expenses, earnings and/or losses for a reporting period. Next comes, offering fraud wherein an individual make misrepresentations and/or omissions of material fact to potential investors in a new company. Then comes insider trading followed by trading and pricing violations, market manipulation and market events which refers to disruptions or aberrations in trading on securities exchange.

Dodd Frank Act, 2010 ("**Dodd Frank Act**") armed the whistleblowers with powerful anti-retaliatory action from their employer. The Act significantly improved the extant whistleblower protection laws in force in U.K. including the much touted Sarbanes-Oxley Act, 2002 which played a seminal role in carving whistleblowing landscape in the United States. The primary purpose of Sarbanes-Oxley Act was to protect shareholders by holding accountable publicly traded companies and individuals engaged in corporate wrongdoing. The Sarbanes Oxley Act provides protection for any of the following types of violations:

(i) Fraud in general- Where a company engages in a scheme to defraud individuals, another company or the government. Sarbanes Oxley Act provides protection for whistleblowers where the employee is not certain as to the precise violation, so long as the employee

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[19] 17 CFR § 240.21 F *et.seq.*

[20] *Gabelli* v. *SEC*, 2013 SCC OnLine US SC 13 : 133 SCt 1216 : 568 US ___ (2013).

[21] Available at http://www.sec.gov/about/offices/owb/annual-report-2012.pdf as last accessed on July 14, 2015.

reasonably believes based on the information available that fraud is taking place.

(ii) Securities fraud- Where a company engages in practices illegal for securities issuers, brokers and/or dealers. The most pertinent securities regulations relate to the requirement that a company must disclose to its shareholders certain information about the company's financial health such as accurate financial statements and any other information that an investor likely would take into consideration when making investment decisions. An employee who complains, or provides information, over the nondisclosure of such information is protected by Sarbanes-Oxley from discrimination; and the employee need not be certain that the nondisclosure of the information is illegal. A reasonable belief that the information was required to be disclosed on part of employee would suffice.

(iii) Any federal law relating to fraud against shareholders- Reporting or complaining about fraud against shareholders is also protected. Sarbanes-Oxley only requires that the violated federal law relate to fraud against shareholders. The employee is required only to have a reasonable belief that the company's wrongdoing will sufficiently impact shareholders; certainty is not a requirement.

In *Lawson v. FMR LLC,*[22] the U.S. First Circuit Court concluded that on a "more natural" reading of Section 1514A, only the employees of the defined public companies are covered and the anti-retaliation provisions of the Sarbanes-Oxley Act do not cover contractors of public companies who report suspected fraud. An appeal against the decision is pending in the U.S. Supreme Court.[23]

B. The New Anti-Retaliation Protections for Sec Whistleblowers

Under the new Section 21F of the Securities Exchange Act, 1934 (after the enactment of Dodd Frank Act), an employer may not discharge, demote, suspend, threaten, harass or take any other retaliatory action against an employee who either:

(i) provides information about his or her employer to the SEC in accordance with the whistleblower rules;

(ii) initiates, testifies in, or assists in an investigation or judicial or administrative action; or

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[22] 670 F 3d 61 (1st Cir 2012).

[23] Available at http://blog.thomsonreuters.com/index.php/amicus-weigh-in-on-dispute-over-securities-law-whistleblower-protections/as last accessed on August 22, 2015.

(iii) makes disclosures that are required or protected under SOX, the Exchange Act and any other law, rule or regulation subject to the jurisdiction of the Commission.[24]

In the event of a retaliatory act, section 21F (h) grants an automatic private right of action in federal court to employees who are retaliated without the need to exhaust administrative remedies prior to filing.[25] The remedies available to a plaintiff under this section include reinstatement to the same seniority, double back pay and litigation costs.[26] There exists a limitation period when it comes to the filing of the claim. It has to be filed no later than six years from the retaliatory conduct or three years from when the employee knew or reasonably should have known of the retaliatory conduct, but the filing of the claim shall not exceed 10 years after the date of the violation.[27]

To be eligible for these anti-retaliatory protections, the whistleblower rules established by the SEC provide that the whistleblower must possess a "reasonable belief" that the information provided relates to possible securities violation and the information must be submitted in accordance with the procedures set forth in the rules under Section IV.[28] According to the SEC, a whistleblower has a "reasonable belief" if he or she holds a subjectively genuine belief that the information demonstrates a possible violation and that this belief is one that a similarly situated employee might reasonably possess.[29] The information must demonstrate a "possible violation" which requires a facially plausible relationship to some securities law violation, thus eliminating frivolous submissions from eligibility.[30]

It is pertinent to mention here the case of *Egan v. TradingScreen, Inc.*[31] wherein the Court held that the prohibition against retaliation and the private right of action apply to an employee who makes a disclosure required or protected by law, like a disclosure under SOX even though the employee did not provide the disclosed information to the SEC. Thus, even a statutory whistleblower is entitled to the anti-retaliation protections, regardless of whether he/she eventually qualifies for an award.[32]

It is significant to mention that these anti-retaliation protections do not come into effect until an employee reports the possible securities violation

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24 Securities Exchange Act § 21F (h) (1) (A) (i)-(iii).
25 Securities Exchange Act § 21F (h) (1) (B) (i).
26 Securities Exchange Act § 21F (h) (1) (C) (i)-(iii).
27 Securities Exchange Act § 21F (h) (1) (B) (iii).
28 17 CFR § 240. 21F-2(b).
29 Implementation Release at 16.
30 Implementation Release at 13.
31 10 Civ, 8202, 2011 WL 1672066, *5 (SDNY May 4, 2011).
32 Implementation Release at 18.

to the SEC in accordance with whistleblower program's rules or otherwise makes a protected disclosure under section 21F(h)(1)(A)(iii).

C. Enhancement of SOX Employee Protections

Dodd-Frank Act also enhanced the employee protections established in SOX. The statute has expanded SOX coverage beyond just public companies to employees of affiliates and subsidiaries of publicly traded companies whose financial information is included in the consolidated financial statements of such publicly traded company.[33] It includes foreign subsidiaries and affiliates of U.S. public companies.[34] Thus, Dodd-Frank Act provides extraterritorial reach in actions brought by the SEC and the Justice Department.[35] The 2010 Act expands SOX coverage to employees of nationally recognized statistical ratings organizations, such as Standard & Poor's Rating Service, A.M. Best Company Inc. and Moody's Investors Service Inc.[36]

Furthermore, Dodd Frank Act has doubled the statute of limitations for SOX whistleblower claims from 90 to 180 days; provides for a jury trial for claims brought under SOX whistleblower protections and declares void any "agreement, policy form, or condition of employment, including a pre-dispute arbitration agreement" which waives the rights and remedies afforded to SOX whistleblowers.[37]

D. Limitations and Eligibility Criteria to get an Award

There are certain limitations and conditions for the eligibility of an individual to get an award:

(i) The information provided by the whistleblower must lead to successful enforcement action by the SEC where monetary sanctions are imposed in excess of US$1 million.

(ii) The information provided by the whistleblower must be "original"[38] and must be provided "voluntarily"[39].

Information provided by a whistleblower is to be considered "original" only if it meets the following conditions:

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33 Pub L 111-203, § 929A.
34 Pub L 111-203, § 929P(b).
35 Pub L 111-203, § 929P(c).
36 Pub L 111-203, § 922(b).
37 Pub L 111-203, § 922(c).
38 17 CFR §240.21F-4(b).
39 17 CFR §240.21F-4(a)(1).

(i) It is derived from the individual's **"independent knowledge"** or **"independent analysis"**[40].

(ii) It is not already known to the SEC from any other source (unless the individual is also the original source of the information).

(iii) It is not exclusively derived from an allegation made in a judicial or administrative hearing, in a government report, hearing, audit or investigation, or from the news media (unless the individual is also the original source of the information).

Certain classes of individuals are made ineligible. They are:

(i) a member, officer or employee of the SEC (or a spouse, parent, child or sibling of a member or employee of the SEC, or reside in the same household as a member or employee of the SEC), the Department of Justice, an appropriate regulatory agency, a self-regulatory organization, the Public Company Accounting Oversight Board or any law enforcement organization at the time they acquired the original information they are providing to the SEC;

(ii) convicts of a criminal violation related to the SEC enforcement action in question or any other related action;

(iii) knowingly and willfully make any false, fictitious or fraudulent statements or representations (or use any false writing or document knowing it is false) with intent to mislead or hinder the SEC or another authority, in the context of making the whistleblowing submission or in other dealings with the SEC or another authority in connection with a related action.

E. Internal Whistleblower Policies

There happens to be no necessity that a whistleblower must first report the misconduct through the employer's internal compliance or whistleblowing procedures or exhaust internal options before making submissions to the SEC. Employees who report misconduct through internal compliance procedures are still eligible to receive a monetary award from the SEC where the employer brings this information and it leads to a successful enforcement action. If after 120 days the employee reports the misconduct to the SEC because of the very reason that the employer has not taken appropriate action or if another employee reports the same misconduct to the SEC within the 120-days period, the employee can still take the award as the 120-day period looks back to the date the first employee reported the misconduct internally.

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[40] 17 CFR §240.21F-4(b)(2).

F. Cases Specifying What Qualifies to be a "Protected Activity"

Sarbanes-Oxley Act followed by Dodd Frank Act mandates that a company does not retaliate against an employee for engaging in protected activity. **"Protected activity"** includes disclosures that relate to securities fraud, bank fraud, wire fraud, or violation of any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders.

The law has not specified any particular language to be followed by whistleblower while making disclosures. There is no particular language specified in order to make any disclosure. In *Collins v. Beazer Homes USA, Inc.*[41], Hon'ble Court held that if Congress had intended to demand of whistleblowers specific language or references, it would have explicitly stated so. The Court further held that lack of such direction by Congress suggests that it intended instead to be more lax with respect to the burden placed on complainants when their reports may ultimately benefit the company's investors.

In *Carter-Obayuwana v. Howard University*[42], the District of Columbia Court of Appeals turned down the argument that an employee must complain using "magic words" to engage in protected activity. While rejecting the defendant's argument that the plaintiff failed to be engaged in protected activity, the Court opined that the plaintiff is required merely to 'alert the employer and make the employer aware of the fact that he/she is lodging a complaint about an illegal conduct. The court harped upon the fact that in alerting an employer that he/she is lodging a complaint an employee need not utilize "magic words" to trigger statutory protection against later retaliation.

As there are no straitjacket rules in making disclosures, there is uncertainty as to the exact level of specificity courts consider before concluding that an employee's disclosure constitutes an engagement in protected activity. In *Lerbs v. Buca Di Beppo, Inc.*[43], the Department of Labour's Administrative Law Judge found that the complainant failed to engage in protected activity when he reported his vague concerns to various officers at the company. The company had employed the complainant who on numerous occasions questioned his supervisor about certain account entries in the company financial records. Initially, the complainant simply asked his supervisor in general terms but later indicated that it was misleading to bankers and investors because the entry was contrary to generally accepted accounting principles. In rejecting the alleged protected activity, the Administrative Law Judge noted that the complainant subsequently

[41] 334 F Supp 2d 1365 (ND Ga 2004).
[42] 764 A 2d 779 (DC 2001).
[43] 2004-SOX-8.

conceded that the company's practices were in fact consistent with generally accepted accounting procedures but that in applying the new practice, the company should have disclosed its method changes in its accounting records, which the company admittedly failed to do. The Administrative Law Judge concluded that the complainant's question about what a particular entry was doing was a mere inquiry and does not qualify as protected activity as it flunked to outline the objectionable practice. The Judge held in order to be protected, a whistleblower must state *particular concerns* which reasonably identify a respondent's conduct that the complainant believes to be illegal. The employee must believe that the practice over which he or she is complaining is illegal and not merely contrary to industry practice.

To constitute protected activity, the activity about which an employee complains must relate to one of the enumerated frauds outlined in the whistleblower provision of the Sarbanes-Oxley Act and if the activity about which the employee complains does not qualify as securities fraud, bank fraud or wire fraud then the disclosure will not constitute protected activity absent a reasonable belief that the activity will have an adverse material effect on the company shareholders. The court in *Minkina v. Affiliated Physicians Group*[44] granted the respondent's motion to dismiss after finding none of the above frauds applicable.

It has been held in spate of cases that a complainant alleging that a company practice adversely affects shareholders is required to show that the allegedly illegal conduct amounts to *material fraud* against the shareholders. For an instance, in *Harvey v. Safeway, Inc.*[45], the Administrative Law Judge concluded that the employee's disclosure of discrepancies in his weekly paycheck did not amount to protected activity because he failed to demonstrate that the company practice in question had a *material* impact on the company's financial reports.

G. Extraterritorial Application of Whistleblower Protections

With Dodd Frank Act coming in, the situation has become clear now that SEC and US Department of Justice have reach beyond U.S. territory in whistleblowing matters. However, prior to Dodd Frank Act, the situation was hazy as there were judgments on both the lines.

The Sarbanes-Oxley Act does not contain express language relating to its extraterritorial application to employees overseas who engage in protected disclosures. However, the exclusion of explicit language allowing for its extraterritorial application does not necessarily foreclose the possibility

[44] 2005-SOX-19.
[45] 2004-SOX-21.

that courts may not find the Sarbanes-Oxley Act's whistleblower provision to contain extraterritorial force.

There were spate of cases wherein the Courts ruled that even in the absence of extraterritorial application, the courts can exercise power beyond the region complaints would be properly brought under the Sarbanes-Oxley Act. However, there existed a body of cases where the Courts ruled otherwise.

However, after the enactment of the Dodd Frank Act those cases are of no relevance as the Act categorically recognizes the extra-territorial jurisdiction in whistleblowing matters.

One of the stark differences between the whistleblower policy followed in U.S. and U.K. is on the monetary incentivization front. In U.K. there is only limited financial incentivization for whistleblowers in relation to cartel activity. The U.K. Office of Fair Trading incentivizes whistleblowing in the competition sector by offering rewards to companies and individuals who file reports about cartel activity that lead to fines or criminal prosecution. In rest cases, there is no monetary award being given to the whistleblowers. Ironically, bribery and cartel activity share similar characteristics but the Serious Fraud Office is not vested with the power to provide financial incentives to individual whistleblowers in relation to violations of the U.K. Bribery Act 2010

IV. THE INDIAN CHAPTER

A. The Indian Background

Corporate whistleblowing, globally considered as one of the best tools to ensure good corporate governance, is still at nascent stage in India. India has been lagging far behind on the whistleblowing front.[46] The Whistleblower Protection Act, 2011 ("**WP Act**") which received the President's assent on May 09, 2014 is restricted to public bodies and does not include private companies in its ambit. Looking back at history, there was no material provision as regards the policy of Whistleblowers in the Code. It was only the Narayan Murthy Committee Report on Corporate Governance, 2003 which gave mandatory recommendation on whistleblowing. The Recommendation involved the following dimensions:

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[46] Available at http://articles.timesofindia.indiatimes.com/2013-09-09/work/41903181_1_india-inc-whistleblowing-organisation as last accessed on July 21, 2015.

(i) Personnel who observe an unethical or improper practice (not necessarily a violation of law) shall be able to approach the audit committee without necessarily informing their supervisors.

(ii) Companies shall take measures to ensure that this right of access is communicated to all employees through means of internal circulars, etc. The employment and other personnel policies of the company shall contain provisions protecting "whistle blowers" from unfair termination and other unfair prejudicial employment practices.

(iii) Company shall annually affirm that it has not denied any personnel access to the audit committee of the company (in respect of matters involving alleged misconduct) and that it has provided protection to "whistleblowers" from unfair termination and other unfair or prejudicial employment practices.

(iv) Such affirmation shall form a part of the Board report on Corporate Governance that is required to be prepared and submitted together with the annual report.

Because of immense pressure from corporate lobby, earlier the mandatory recommendation was relegated to non-mandatory in the amendment made to the Clause 49 of the Listing Agreement. The reason cited was there could be raft of frivolous complaints that could be filed. At present, Clause 49 of the Listing Agreement recommends the company to "establish a mechanism for employees to report to the management concerns about unethical behavior, actual or suspected fraud or violation of the company's code of conduct or ethics policy. This mechanism could also provide for adequate safeguards against victimization of employees who avail of the mechanism and also provide for direct access to the Chairman of the Audit committee in exceptional cases. Once established, the existence of the mechanism may be appropriately communicated within the organization."

B. Other Statutory Protections

There are a few legislations in India that make provision for disclosing information of any wrongdoing in an organization. To start with, Section 46 of the Competition Act, 2002 ("**Competition Act**") of India grants power to the Competition Commission of India ("**CCI**") to provide a lesser penalty on any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have indulged in anti-competitive practices, if he has made a full and true disclosure in respect of the alleged violations and such disclosure is vital. It further provides that such disclosure must be made before the investigation report under section 26 is submitted, to make it eligible for consideration for lesser penalty. The Competition Commission of India (Lesser Penalty) Regulations, 2009 under Regulation 3, backs up

Section 46 of the Competition Act. It states that in order to avail the opportunity of lesser penalty, the disclosing party must co-operate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the Commission; and not conceal, destroy, manipulate or remove the relevant documents in any manner, that may contribute to the establishment of a cartel. However it is not mandatory on the CCI to grant lesser penalty on the disclosing party. Section 46 uses the phrase *'as it may deem fit'*, which establishes that the disclosing party cannot claim lesser penalty as a statuary right. Besides, Regulation 3 provides that, the discretion of the Commission, in regard to reduction in monetary penalty under these regulations, shall be exercised having due regard to –

(i) the stage at which the applicant comes forward with the disclosure;

(ii) the evidence already in possession of the Commission;

(iii) the quality of the information provided by the applicant; and

(iv) the entire facts and circumstances of the case.

Under the Securities and Exchange Board of India Act, 1992 by virtue of Section 24B the Central Government may grant immunity from prosecution and penalty to an alleged violator of the Act and the rules and regulations made under the Act, if he has made a full and true disclosure in respect of the alleged violation.[47] Again the right is not an absolute one and depends upon the discretion of the Central Government and the Government can impose conditions as it may deem fit on granting of such immunity.

The Section goes on to provide that no such immunity shall be granted by the Central Government in cases where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of application for grant of such immunity. The Section has never been used and has over the years been reduced to redundancy, because the power of the Central Government is contingent upon recommendations by the Securities and Exchange Board of India ("**SEBI**") and the process is time-consuming. The Central Government usually delays in making a final decision within which prosecution gets instituted.

The Reserve Bank of India ("**RBI**") came up with Protected Disclosure Scheme in 2007, for Private Sector Banks and Foreign Banks operating in India in order to maintain transparency in the conduct of the said institutions. The scheme in due course of time will be applied to co-operative banks, local-area banks and Net-banking financial institutions. The scheme

[47] The Section was introduced in 1995 before which it read as: Penalty- Whoever contravenes or attempts to contravene or abets the contravention of the provisions of this Act or of any rules or regulations made thereunder, shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

allows employees of the bank, customers, stakeholders, NGOs and public to lodge complaint against any unfair practice by the bank. The Scheme introduces itself with a reference to the Whistleblower Protection Act in USA and the Public Interest Disclosure Act of the UK implying that the primary motto of the scheme is to ensure whistleblower protection. It states that the Central Vigilance Commission established by the Central Government is limited to Public Sector enterprises and hence a regulatory scheme from RBI is necessary to ensure transparency in private and foreign banks. The complaints under the Scheme cover the areas such as corruption, misuse of office, criminal offences, suspected / actual fraud, failure to comply with existing rules and regulations such as Reserve Bank of India Act, 1934, Banking Regulation Act 1949, etc. and acts resulting in financial loss / operational risk, loss of reputation, etc. detrimental to depositors' interest / public interest.

However the scheme discards anonymous / pseudonymous complaints and commits that RBI would keep the identity of the complainant secret, except in cases where complaint turns out to be vexatious or frivolous and action has to be initiated against the complainant. In such cases of vexatious and frivolous complaint, the banking company can take action against the complainant if directed by the RBI.

The Sachar Committee set up in 1977 to recommend reforms in the Companies Act, 1956 ("**CA, 1956**") and the Monopolies and Restrictive Trade Practices Act, 1969 had before it the suggestion of incorporating the requirement of setting up the Audit Committee by companies of certain size. The clamor for good corporate governance was witnessed in Section 292A in the CA, 1956, which required public companies having minimum paid-up capital of minimum five crores to constitute Audit Committees. The new Companies Act of 2013 ("**CA, 2013**") reiterates the same in section 177 but has increased the ambit of the same by roping in all listed companies. Section 177(9) and 177(10) requires every listed company or such class or classes of companies to establish a vigil mechanism for directors and employees. The vigil mechanism shall provide for adequate safeguards against victimization of employees and directors who use such mechanism and make provision for direct access to the Chairperson of the Audit Committee or the Director nominated to play the role of Audit Committee in appropriate or exceptional cases.

Rule 7(1) of the Companies (Meetings of Board and Its Powers) Rules, 2014, provides that the every listed company and the following class of companies which

(i) accepts deposits from public; and

(ii) which have borrowed money from banks and financial institutions in excess of rupees fifty crores

shall establish a vigilance mechanism for their directors and employees to report their concerns and grievances.

There have been certain companies in India which have framed their own internal whistleblowing procedure, for an instance Gujarat Alkalies and Chemicals Ltd.[48], Godrej Y Boyce[49], Tata Steel[50].

Before parting away with this section of the article, it is pertinent to mention here one of the biggest frauds in the Indian corporate history is the Satyam scam. Satyam Computer Services Ltd. ("**Satyam**"). On December 16, 2008 Ramalinga Raju announced a $1.6 billion bid for two Maytas companies i.e. Maytas Infrastructure Ltd and Maytas Properties Ltd stating he wanted to deploy the cash available for the benefit of investors. The announcement was met with fierce opposition from investors and market regulator. Mr. Jose Abraham (whistleblower) who is understood to have used a pseudonym is his e-mails, had first written his email to the company's independent director Krishna G. Palepu. In his email dated December 18, 2008 he disclosed the fact that Satyam did not have any liquid assets, and this fact could be independently confirmed from its banks[51]. The email sent by the whistleblower spread like wildfire. A copy of the email was also sent to Mr. B. Ramalinga Raju, who thereafter started avoiding calls from its audit committee. Left with no other option Mr. Ramalinga Raju on January 07, 2009 wrote a confession letter to the board admitting Rs. 7,800 crore financial fraud and gaps in the balance sheet as a result of inflated profits[52].

The Satyam scam raised the bar for corporate governance in India. The scam brought about flaws in the Indian corporate governance- unethical conduct, fraudulent accounting, dubious role of auditors, ineffective board, failure of independent directors and non-disclosure of pledged shares[53]. The Satyam scam was called "India's Enron" as it highlighted the need

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48 Available at http://www.gujaratalkalies.com/new/whistle.pdf as last accessed on August 04, 2015.

49 Available at http://www.godrejandboyce.com/godrejandboyce/pdf/Whistleblower.pdf as last accessed on August 08, 2015.

50 Available at http://www.tatasteel.com/about-us/pdf/Whistle-BlowerPolicy-for-Employees.pdf as last accessed on August 07, 2015.

51 Available at http://articles.economictimes.indiatimes.com/2009-04-17/news/27650696_1_sfio-report-satyam-board-member-satyam-scandal as last accessed on August 16, 2015.

52 Available at http://archive.financialexpress.com/news/satyam-fraud-full-text-of-rajus-letter-to-board/407799 as last accessed on August 16, 2015.

53 Available at http://www.thehindubusinessline.com/companies/how-satyam-scam-raised-the-bar-of-corporate-governance/article7085855.ece as last accessed on August 26, 2015.

and importance of securities law and corporate governance in India. The Satyam scandal served as a catalyst for the Indian Government to reconsider the corporate governance, disclosures, accountability and enforcement mechanisms.

C. The Way ahead for India and Conclusion

With the CA, 2013 coming into force, the Indian market regulator SEBI is pondering over to make whistleblowing policies mandatory for companies. In the recent past, there have been slew of events which have pointed towards the need to plug the loopholes. One of the very recent examples is Mr. Khemka who blew the whistle against DLF, the big gun in real estate sector. Another example in the recent times is that Dinesh Thakur who was a former employee of Ranbaxy Laboratories and exposed his ex-employer not in India but in the USA and Ranbaxy had to fork over money to the U.S. government for endangering the lives of its people through production of drugs in India in unhygienic conditions.[54]

The Companies (Amendment) Act, 2015 is a forerunner of positive trends of doing business of India. Section 143 of the CA, 2013 provides for the powers and duties of auditors and auditing standards. Section 143(12) of the CA Act 2013, states that if an auditor of a company, in the course of the performance of his duties as auditor, has reason to believe that an offence involving fraud is being or has been committed against the company by officers or employees of the company, he shall immediately report the matter to the Central Government.

The threshold limit for frauds to be reported to the Central Government under section 143(12) is yet to be notified by the Ministry of Corporate Affairs ("**MCA**"). In the absence of such threshold limit, there is still ambiguity as to when an employee shall report a fraud internally or externally. The MCA should amend the Companies (Audit & Auditors) Rules, 2014 and ensure that the Rules shall specify the instances and threshold limits for employees to report frauds internally or externally. Every company shall ensure that the prescribed threshold limits shall be incorporated in the whistleblower policy and the policy shall include adequate protection to such whistleblowers especially anonymity of the employee.

The success of SEC and FCA in this department is a known fact now. When it comes to United States, the monetary incentive with which the whistleblower is equipped has made the entire scenario more rousing. In the

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[54] Available at http://www.firstpost.com/india/why-the-whistleblower-law-doesnt-extend-to-the-private-sector-1040889.html?utm_source=ref_article as last accessed on August 09, 2015.

year 2012 itself, the Office of the Whistleblower received more than 3000 tips, coming from individuals in all 50 states along with 49 foreign countries.[55] Even in the recent Ranbaxy case, the whistle was rather blown in U.S. territory, though the matter pertained to something that happened on Indian soil which made the whistleblower eligible to collect an award too. In U.K. too, the FCA is pondering to introduce the incentives in their whistleblower policy. Considering the raft of scams that India has witnessed in recent past, there has arisen a dire necessity to clamp down the situation by bringing the whistleblower policy and making it a mandate for the entire corporate sector. Introducing monetary incentives in India would be a good move as it has worked wonders in U.S. in the recent times. So far as the issue of filing of 'n' number of frivolous complaints is concerned as was the issue broached few years earlier making it desirable to have whistleblower policy which actually should have gone down as a mandate; SEBI can take a cue from the U.S. position wherein a 'possible violation' of securities law has to be shown in the complaint itself in order to avoid frivolous complaints. Talking economics, it would also add to the amount of recovery that the market regulator makes in a certain year which would eventually help in rebuilding confidence over the market which the investor has lost in light of recent series of events. It is rather an obligation being casted upon SEBI being the market watchdog to catch a whiff of sinister acts happening in the market and to respond to them quickly and sturdily. It would be a positive step if right from the beginning, the SEBI is given an extraterritorial reach in these whistleblowing matters dodging the unsettled time as was seen in U.S. wherein there were judgments on both the lines allowing and rejecting extra-territorial application.

As goes the common saying that SEBI can take any step for investor protection, so to walk the talk it would be better if right from the beginning, the SEBI be vested with wide powers to take drastic steps. There is a fine reason for this, the employees of subsidiary Indian companies having their offices outside India should be given the equal say as is with their parent companies situated in India. Sometimes the two companies work in tandem and the employees of one are aware about the happenings in another; thus it becomes all the more important to give extraterritorial reach to the market watchdog. Also with the enforcement of CA, 2013 cross-border mergers would give India a strong foothold in international arena and it thus becomes important to vest SEBI with wide powers in this regard.

Anonymity is yet another issue. The WP Act has faced widespread criticism as it does away with the staple need of anonymity. When it comes to bringing the whistleblower policy for the companies, it becomes all the

[55] Available at http://www.corporatecrimereporter.com/news/200/seccohenwhistleblower06122013/ as last accessed on August 09, 2015.

more important that there should not be any obligation being casted upon the whistleblowers to first make a complaint to the employer, the whistleblower should be freely allowed to make a decision whether he should first approach the intra-mechanism in the company itself or shall approach the SEBI. Free and conscious decision gets crucial because herein the whistleblower/employee would always be under the fear of losing his coveted job, so in order to ensure that he shall remain unfazed while blowing the whistle, the need is to ensure that there is no pressure being built upon him. The definition of 'complainant' would be very crucial too and it should be ensured that a very wide and exhaustive definition is being given to the same which shall include other stakeholders too, such as vendors, shareholders and customers. Yet another crucial fact that SEBI shall consider while framing the policy is that in order to ensure that no factor acts as deterrent for a whistleblower, the costs which the whistleblower pays from his own pocket in matters of detriment or dismissal in response to a whistleblowing disclosure before the appropriate authority shall be reimbursed by the losing party i.e. the company. This factor has impinged the blooming of whistleblowing in U.K. as therein there is no such provision of reimbursement; however SEBI shall provide a specific provision in this regard. Furthermore, it would be a positive step if we import the scheme of fast-track disposal of cases, as available under Sarbanes Oxley Act later followed in Dodd Frank Act as per which rulings are to be given in 180 days.

In India, the concept of whistleblowing is not very effective as compared to the U.S. and U.K. because of lack of adequate protection to the whistleblowers. There have been various instances of threatening and murder of whistleblowers working for public entities as well. An engineer, Satyender Dubey was murdered in November 2003 for blowing the whistle in the corruption case in the National Highways Authority of India's Golden Quadrilateral project. A few years later, an Indian Oil Corporation officer, Shanmughan Manjunath, was murdered for sealing a petrol pump that was selling adulterated fuel. Alternatively, the WP Act should be amended and include in its scope protection to private enterprises with adequate changes and rewording the Act with whistleblower -friendly approach.

Talking about the situation in U.S. territory, the much-touted Dodd-Frank's whistleblowing regime is poised to bring a sea change in the enforcement landscape for U.S. regulated firms in the financial services sector. It is most likely that many of the SEC's most significant enforcement actions will be the result of whistleblower tips which would dish out a new landscape of securities enforcement. When it comes to the position in U.K., taking a cue from the immense success of whistleblowing programme by SEC even the government in U.K. is planning to introduce monetary incentives for the whistleblowers.

Now is the time to say omega. To perorate, India till today has been devoid of an effective whistleblower policy for the companies/ firms operating in India or it would not be incorrect there is no policy in existence in India in this regard, be it for private sector or the public sector. With WP Act for the public sector in place, it is imperative for the market regulator to put companies on a tight leash too so that a proper signal is been sent to the market not only at national level but at international level too. Also, it is of utmost importance that we learn lessons from the U.S. and U.K. regime so that we don't get bogged down once finally SEBI comes up with the Whistleblower policy. The Government has already armed SEBI with far-reaching powers and it is now due on SEBI to make good use of it and to ensure that the policy does not fall like ninepins and the powerful corporate lobby does not throw a spanner in the works.

SPURIOUS SEEDS: LIABILITY AND COMPENSATION

—Dr. P.P. Rao[*]

I. INTRODUCTION

The New Policy on Seed Development, 1988 eased the regulations on import and export of seeds. Under the New Policy on Seeds, import of vegetable and flower seeds are permitted while other crops are subject to a licence requirement. Developments that took place since Independence in the seed sector reveal that it was informal in early fifties and later it has become formal by the adoption of certain rules and regulations. Indian Government has been controlling the seed sector with an objective to increase agricultural production through regulating the quality and supply of seeds of food crops, cotton seeds, etc. For this purpose minimum standards are fixed, such as germination, purity, etc. Testing of seed in the laboratories, inspection and certification of seeds, restricting the export, import and inter-state movement of non-descript seeds and issuance of licences to the dealers, vendors, etc., who do the business of sale of seeds are the other chosen measures.

The Most significant impact of the Seed Policy 1988 was an increase in collaboration agreements between domestic and foreign companies, aiming at the import of technology and parental material. Under the Policy, vegetable seeds could be imported freely while seeds like oil seeds, pulses and coarse grains like maize, sorghum and millet could be imported for two years by companies which had technical and financial collaboration agreements for production of seed with companies abroad. Import was allowed subject to the provision that the foreign supplier agreed to supply parent line seeds or breeder seeds to the Indian company within two years of the date of first commercial consignment.

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Despite warnings made by scientific community that the country might end up importing plant diseases along with the seeds and the bulk of the seeds used in India would eventually be imported, as was the case with Mexico, the Government of India insisted that the seeds could only be imported for two years (except for vegetables and fruits). Although the industry first welcomed the Seed Policy, it later began to object to the two-year limit, saying that this was too short a period for effective production. After sometime, the seed industry began pressurizing the government to provide adequate intellectual property rights protection, either in the form of plant variety protection or patents. Thus, the control on production of hybrids through licences began to be relaxed. Added to this is the declining role of the State in the seed sector with the result that there is no meaningful control over the quality or other aspects of seeds and trade in seeds.

There are number of instances, evidencing the failure of cotton and other seeds being supplied by multinational companies. With regard to bio-safety laws and other concerned matters, certain institutions, farmers' unions and public interest groups in India though warned the Government against irresponsible and rushed clearance (for companies like Monsanto, etc.) as would have high cost for farmers in terms of the economic and seed sovereignty,[1] the government cleared the entry of international seeds like Bt. Cotton.

The Seeds Bill 2004 sought to replace the Seeds Act of 1966 and the Bill was introduced in Rajya Sabha in December 2004 which proved controversial. It was then subsequently referred to the Parliamentary Standing Committee on Agriculture, which sought responses from all stakeholders. The 2004 Seed Bill was claimed to be one "to provide for regulating the quality of seeds for sale, import and export and to facilitate production and supply of seeds of quality and for matters connected therewith or incidental thereto."

In addition to wanting to put a check on the sale of spurious and poor quality seed and to provide compensation to affected farmers, the Bill also appeared to have an express objective of increasing private participation in the seed trade in the country, ostensibly to meet WTO commitments. The Bill proposed various mechanisms and modalities by which regulation of seed would happen- compulsory registration of all seed varieties; certification not just by State Seed Certification agencies but by accredited agencies outside the government too; inclusion of commercial crops and plantation crops too into the purview of the Bill; provisions for regulation of transgenic material; slight increase in penalties for contravening the law and so on.

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[1] "Failure of B.T. Cotton in India", Research Foundation for Science, Technology and Ecology, (RFSTE) Press_Release (Sept. 26, 2002) p.1: Source http://www.biotecinfo.net/bt_failure.html.

The Seeds Bill 2004 with the amendments proposed later on has emerged as the New Seeds Bill, 2010. Most of the amendments proposed are based on the recommendations of Parliamentary Standing Committee on Agriculture. The new Bill aims to ensure quality of seeds and take care of the interest of the farmers. The Seeds Bill was approved by the Cabinet thrice earlier but could not be passed in the Parliament.

The Seeds Bill, 2010 makes registration compulsory for all kinds or varieties of seeds to be sold in the country. No person will be allowed to engage in the business of selling or supplying any seed which is not of a registered kind or variety. Farmers have been exempted from compulsory registration. The Protection of Plant varieties and Farmers Right Act provides registration of plant varieties with the objective of conserving rights of breeders and farmers. The Seeds Bill is said to be stringent in its provisions as it provides not only for penalty (both fine and imprisonment) but also for cancellation of registration and compensation to farmers. When coming to the ground reality the hybrid seeds supplied by private companies are failed to yield or germinated as per promising expected levels. In the State of Bihar, for example, during rabi season of 2009-10 maize farmers using hybrid seeds supplied by private companies in 61,000 hectors had to suffer immensely due to non-formation of grains, even as hybrid seeds produced by PSUs yielded normal crops. Private seed firms did nothing to mitigate the plight of farmers. The Bihar State government had to spend Rs. 61 crore to bail out the affected farmers. Bihar government not only opposed the Bill in the present form and expressed its concern that the Bill is not only anti-farmer but also brazenly favours multinational in the garb of higher productivity and any attempt to pass the Bill in its present form will irrevocably damage Indian agriculture and make the goal of food security a distant dream and categorically expressed that penalties proposed in the Bill are trivial in nature. Since the penalties/punishments proposed are mild, the government will find it difficult to check the menace of fake, spurious and sub-standard seed.[2] Under the Seeds Bill, 2010 transgenic seed/materials are also allowed. This indicates the Bill makes provision of Genetically Modified Seeds to be sold in the pretext of Seed Act, 2010. It is highly detrimental to the farming community, environment and consumer health.

In this backdrop an attempt is made to present the law relating to liability of companies and payment of compensation to farmers in case of failure of seeds.

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[2] The Telegraph, March 16, 2011.

A. LIABILITY OF SEED COMPANIES

Companies, under a number of Indian enactments are civilly and criminally liable. Companies are also vicariously liable for their representatives' 'actions' resulting in either crime or tort/ Civil wrong or against law. Liability of companies can be summed up under the following Acts.

B. Seeds Act and the Seeds Control Order

Under Seeds Act, 1966 there are no special provisions for registration of variety or kind by companies. According to the optional rule of certification of seeds any person sells, keeps for sale, offers to sell, barters or otherwise supplying seed of any notified kind or variety may get certification for the kind/variety.[3] Export and import of seeds is also not possible unless it conforms to minimum limits of germination and purity.[4] Further, there are certain restrictions regarding marking or labeling.

So, any person who is in the business of seed production/trade should follow the provisions of the Act, and must cooperate with the seed inspectors and oblige their instructions. Hence, under this Act a company is subjected to penalty if it contravenes the provisions of the Act, accordingly penalty provision would be attracted.[5] Under the Seed (Control) Order, 1983 or the Seed Act, 1966 as a dealer only. There is no specific provision which makes the seed companies liable for poor germination or crop failure on that account.

C. PPVFR Act

A certificate of registration for a variety issued under PPVFR Act, 2001 shall confer an exclusive right on the breeder or his successor, his agent or licensee to produce, sell, market, distribute, import or export the variety.[6] This exclusive right has paved the way for private companies to enter into seeds trade.

Under section 39, of the Act, while any propagating material registered under the said Act is sold to farmer or a group of farmers or any organization of farmers, the breeder of such variety shall disclose to the farmer or the group of farmers or the organization of the farmers, all details regarding the expected performance under given conditions. If such propagating material fails to provide such performance under such given conditions,

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3 Section 9 of Seeds Act, 1966.
4 Section 17 of Seeds Act, 1966.
5 Section 19 of Seeds Act, 1966.
6 Section 28 of PPVFR Act, 2001.

the farmer or the group of farmers or organization of farmers, may claim compensation in the prescribed manner before the authority.[7] But no specific procedure is laid down in the Act. This provision indirectly imposes civil liability on the seed companies. Criminal liability of seed companies is specified under various provisions of the Act, which provide for prohibition to apply denomination of registered variety, penalties for applying false denomination, for selling varieties to which false denomination applied, for falsely representing a variety as a registered one and also penalty for repetition of the offence. Under these provisions, either fine or/and imprisonment may be imposed on an offender company. As per the exception given under section 77 of the PPVFR Act any offence is committed, without the knowledge of the company or the person-in-charge of the company, for such commission of offence the company is not liable.[8] Thus, companies can escape liability under the defence of no knowledge and also under the plea that it has taken every care to prevent the commission of such offence.

Under the MRTP Act which was replaced by the Competition Act 2002, 'if any monopolistic, restrictive or unfair trade practice has caused damage to any Government, or trader, or consumer, the MRTP commission after enquiry may award compensation upon an application[9] and the Commission may also issue a temporary injunction order if the company acts in contravention of the provisions, of the MRTP Act, which restricts monopolistic, restrictive or unfair trade practices.'[10]

Thus, civil liability was fixed against the erring companies in cases of charging unreasonably high prices, preventing or reducing competition, limiting technical development, deteriorating products/quality or adopting unfair or deceptive trade practices. Under Section 48-C of the MRTP Act, criminal liability was fixed on companies in case they contravene any order made by the Commission. A maximum of 3 years imprisonment period was suggested in the Act.

D. Competition Act

In the Competition Act, 2002 also civil liability of the enterprises/persons is fixed in case they contravene the provisions of the Act (s.34). If any enterprise acts in contravention of the proviso laid in chapter II of the Act, i.e., entering into anti-competitive agreements, abuse of dominant position and entering into agreements of combinations, etc., has to pay compensation for causing such loss or damage. The section says that "without prejudice to any other provisions contained in this Act, any person may make

7 Section 39 (2) of PPVFR Act, 2001.
8 Section 77 of PPVFR Act, 2001.
9 Section 12-B (1) of MRTP Act, 1969.
10 Section 12-A of MRTP Act, 1969.

and application to the Commission for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of any contravention of the provisions of Chapter II, having been committed by such enterprise."[11]

Criminal liability is also fixed on the erring enterprises or persons through the Sections 42, 43, 44, 45 and 48 of the Act. Accordingly, if a person contravenes, without any reasonable ground, any order of the commission, or any condition or restriction, direction or exemption is liable to a penalty not exceeding rupees ten lakhs. The Commission has also an authority to pass an order of detention in 'civil prison for a term not exceeding one year. Further, the company as well as the person-in-charge of the company is responsible for such violation.

II. COMPENSATION TO FARMERS

In the way to maximizing their profits, the companies resort to aggressive advertisement of their goods and thus, increase their sales. They seldom bother about the sociological or other consequences of their sales.

As the Indian government has been allowing seed trade including the new varieties of genetically modifies seeds, taking this as an opportunity seed companies have started trade in this field and encashing a lot out of it. But when the seeds fail they are escaping from liability. Further, the present laws are not stringent against companies and even not meeting the problems of farmers. Hence, the payment of compensation remains a million dollar question. In most of the cases compensation has not been paid to the farmers at all, if at all it is so, a delayed payment; and that too only nominal.

The concept of compensation can be found from the principles of Tort Law. In this context the other relevant law of contracts. Under the remedies provided in the law of contracts compensation may be awarded for the breach. If seeds are considered as goods the provisions laid down in the sale of goods Act are to be applied in the matters of compensation.

Law of Contracts is about the sanctity of promises while the law of civil wrongs is about responsible behavior. The failure to fulfill a promise or a contractual obligation or to behave responsibly entails liability. Compliance with civil law is ensured through liability. The basic objective of the law relating to liability is to compensate the plaintiff for the loss that has occasioned to him because of the defendants' conduct.

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[11] Section 34 (1) of the Competition Act, 2002.

Crop failures owing to bad quality seeds have been affecting farmer's livelihood options adversely. If a farmer who buys seeds from a manufacturer or dealer does so believing in the representation made by the latter regarding the quality and conformity to germination standards of the seed and the seed fails to germinate as per the description/representation, would give him a right to recover damages/compensation from the seller. However, liability of the seller for selling spurious seeds and the consequent crop failure arises under various legislations.

A. Sale of Goods Act

This is a general legislation applicable to sale of all movable property, including seeds.

B. Extent of liability – Consequential loss

In every contract of sale of goods there are certain implied conditions and warranties besides the express stipulations of the contract. A condition is a stipulation, which is essential to the main purpose of the contract. It gets to the root of the contract and its non-fulfillment upsets the very basis of the contract (s.12 (2) of Sale of Goods Act). A warranty is a stipulation, which is collateral to the man purpose of the contract and is not so important as a condition (s.12 (3)) normally, in a contract of sale of goods. "There is no implies condition as to quality or fitness of the goods for a particular purpose. The buyer has to examine the goods.

C. Caveat Emptor

A basic rule applicable to sale of goods is the principle of caveat emptor. Under which, it is for the buyer to be careful while buying goods. However, when it comes to seeds, these are a special kind of goods. Any defect in the seed cannot be detected by a mere superficial examination of them. Defects relating to germination of seeds especially the genetically modified seeds fare undoubtedly latent defects. Hence, the application of the principle of caveat emptor is limited.

When the buyer makes known to the seller, the specific purpose for which the goods are required, and depends on the skill and judgment of the seller, whose business it is to sell goods of that description, there is an implied condition that the goods shall be reasonably fit for that purpose (s.16 (1)). Moreover, when the goods, by usage of trade or convention are used for only one particular purpose, then also, there is an implied condition that the goods shall be fit for the particular purpose (s.16 (3)). When seeds are bought, the clear implication and the only purpose for which they are

bought are for sowing. The expectation is that the seed while geminate and yield as per the description. So, failure of seed gives rise to the liability of the seller. In case of branded seeds, the manufacturer, and not the intermediate retailer, shall be liable and the liability is strict. Further, an implied warranty as to quality or fitness for a particular purpose may be annexed by the usage of trade (s. 16 (4)).

D. Doctrine of fundamental breach

The English courts have evolved the doctrine of fundamental breach. It means, the breach of a fundamental term of a contract of sale. Certain terms are said to be fundamental, the breach of which amounts to a total non-performance of the contract. Theoretically it is difficult to give a precise definition to the fundamental terms ad distinguished from conditions and warranties. A term, which may be fundamental in one type of contract, may not be so in another type of contract. So, it can be decided only with reference to the circumstances of each case. Even if there is an exemption clause in the contract exempting the liability for any breach of condition or warranty, it cannot give any protection for the breach of a fundamental term. With regard to the disputes arising out of contract of sale of seeds, the doctrine of fundamental breach may be a helpful guiding principle as it can restrict the seed companies, which generally escape from the liability on one pretext or the other.

E. Liability for misrepresentation

A farmer who buys seeds from a manufacturer or dealer does so believing in the representation made by the latter regarding the quality and conformity to germination standards of the seed but if the seed fails to germinate as per the description/representation, this also gives the farmer a right to recover damages/compensation from the seller under the Law of Torts. Liability of a person arises in three different ways for false statements made by him.

(a) Liability for Deceit or Fraud- When a person knowingly makes a false statement of fact making another person to suffer loss by acting on the statement; it may amount to the tort of Deceit or Fraud.

(b) Liability for Negligent Misstatements- If a statement has been made honestly but negligently, that is, without caring to see whether the same is true or not, liability for such negligent misstatement may also arise.

(c) Liability for Innocent Misrepresentation.

If a farmer in belief of a statement printed over the container or in an advertisement relating to germination standards of a particular seed, buys the same and later on if it does not germinate as to the expectation and results in crop failure, in such an event, that particular seed company is liable under the tort of misrepresentation and gives the farmer a right to recover damages. But the difficulty is with the proving of the statement that it is made with the intention to deceive the plaintiff. Further, to make the defendant liable, it has to be proved that the defendant either knew that the statement is false or did not believe in its truth.

In Cann v. Wilson[12], an action for negligent misstatement was recognized and damages were awarded. The House of Lords in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.[13], reinstated the decision in Cann v. Wilson and rejected the views expressed Le Lievre v. Gould[14] and Candler v. Crane, Christmas and Co.[15] that there could be no liability for negligent misstatement in the absence of the contractual or fiduciary relationship between the parties. As stated by Lord Reid, there would be a duty of care in the making of misstatements "where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for his to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him."[16] When a person makes a false statement but there is neither an intention to deceive, nor any negligence in making the statement, there is no liability for such statement under law of torts because in such a case an action cannot lie either for 'Fraud', or fore "negligent Misstatement'. In England, the Misrepresentation Act, 1967, however, permits the award of compensation for such innocent false statements. The compensation under the Act is awarded when there is misrepresentation and the parties make a contract on that basis. The Act stipulates the right to claim compensation in case of non-fraudulent representation in the same way as would have been there, if there had been fraud. According to section 2 (1) of the Act:

"Where a person has entered into a contract after misrepresentation has been made to him by another party thereto and as a result thereof, he has suffered loss, then, if the person making the misrepresentation been made fraudulently, that person shall be so liable not withstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true." This sort of law may be helpful

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12 (1888) 39 Ch D 39.
13 1964 AC 465 : (1963) 3 WLR 101.
14 (1893) 1 QB 491.
15 (1951) 2 KB 164 : (1951) 1 TLR 371.
16 1964 AC 465, at 486 : (1963) 3 WLR 101.

in settling the disputes of compensation arising out of sale of spurious seeds.[17]

As special law prevails over general law, the compensation matters are to be dealt under the following legislations in India:

i. Seeds Act, 1966.

ii. Seeds (Control) Order, 1983.

iii. Plant Varieties and Protection of Farmers Rights Act, 2001.

But special laws in this regard are not adequate enough to meet the new challenges.

The very object of the Seeds Act is to provide for regulating the quality of certain seeds for sale. Prior to the passing of Consumer Protection Act, under unfair trade practices the compensation matters in general had been dealt by MRTP Commission, which was established through the enactment of MRTP Act, 1969. Where 'any monopolistic, restrictive or unfair trade practice has caused damages to any Government or trader or consumer, an application may be made to the Commission asking for compensation, and the Commission may award appropriate compensation.'[18] Where 'any such loss or damage is caused to a number of persons having he same interest compensation can be claimed with the permission of the Commission, by any of them on behalf of them.'[19]

For the first time, for failure of seeds, a provision, 'liability to pay compensation by companies or the right to make an application for compensation by farmers' is laid down in the Protection of Plant Varieties and Farmers Rights Act, 2001. Section 39 (2) of the Act says "… if such propagating material fails to provide such performance under such given conditions, the farmer or the group of farmers or the organization of farmers may claim compensation in the prescribed manner before the Authority". The Authority after following a process i.e., giving notice to the breeder of the variety and opportunity to file opposition and hearing of parties, may direct the breeder of the variety to pay compensation as it deems fit. Except this provision there is no any other stringent rule, in fixing the breeder's liability. In this clause the words chosen viz., 'may make an application', 'may direct the breeder', clearly reveal the non-commitment of the government towards the welfare of the farmers. With this vague legal provision that poor farmer cannot get compensation.

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[17] *See*. Dr R.K. Bangia "Law of Trots", pp. 405-414.
[18] Section 12-B (1) of MRTP Act, 1969.
[19] Section 12-B (2) of MRTP Act, 1969.

As the Competition Act, 2002 has replaced the MRTP Act, 1969 any compensation matter rises from unfair trade practice has to be finalized according to the provisions of Consumer Protection Act, 1986. The matters relating to monopolistic and restrictive trade practices are to be dealt by the competition commission, which is, established under the Competition Act, 2002. The compensation disputes are presently being dealt under Consumer Protection Act. In this context it is necessary to go through the provisions of Consumer Protection Act to verify how best the provisions of the Act are meeting the needs of the problems of the farmers when they suffer loss of crop due to spurious/bad quality seeds supplied by the seed companies.

F. Compensation Provisions Under CP Act

Originally the Consumer Protection Act with the objectives specific – the right to seek redressal against unfair trade practices or unscrupulous exploitation of Consumers – and to provide speedy and simple redressal to consumer disputes to be settled by quasi-Judicial machinery - is enacted.[20]

According to Section 14 of the original Act 1986, the district Forum can issue an order to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party. And to remove the defect pointed out by the appropriate laboratory from the goods in question.[21] Further, it may pass an order to replace the goods with new goods of similar description, which shall free from any defect[22] and return to the complaint the price, or as the case may be, charges made by the complainant.[23] The Amendment to Section 14 (1) (d) stipulates that the District Forum shall have the power to grant punitive damages in such circumstances as it deems fit.[24] It can also give direction to pay such sum determined by it, if it opines that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently, provided that the minimum amount of sum so payable shall not be less than five per cent, of the value of such defective goods sold or services provided as the case may be to such consumers.[25] It can also pass orders to issue corrective advertisement to neutralize the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement.[26]

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[20] Section 2 (e) and Statement of Objects and reasons of the Consumer Protection Act, 1986.
[21] Section 14 (a) of the Consumer Protection Act, 1986.
[22] Section 14 (b) of the Consumer Protection Act, 1986.
[23] Section 14 (c) of the Consumer Protection Act, 1986.
[24] The Consumer Protection (Amendment) Act, 2002.
[25] Section 14(1) (hb) of the Consumer Protection (Amendment) Act, 2002.
[26] Section 14(1) (hc) of the Consumer Protection (Amendment) Act, 2002.

District Forum can pass these orders by following the procedure laid down in Section 13 of the Act. As defined in the Act, 'defect' means any fault, imperfection or shortcoming in the quality, quantity, potency or standard, which is required to be maintained by or under any law for the time being in force or as is claimed by the trader in any manner whatsoever in relation to any goods.[27]

'Goods' means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or farming part of the land which are agreed to be served before sale or under a contract of sale (s.2(i)).[28]

According to sub-section 3-A of Section 13 of the Consumer Protection Act, where the complaint does not require analysis or testing of commodities, the Forum has to dispose of the matter within a period of three months from the date of receipt of notice by opposite party. Where analysis of testing of commodities is necessary the case has to be finalized within a prior of five months.

As per the Amendment to Section 15, "no appeal by a person, who is required to pay any amount in terms of an order of the District Forum shall be entertained by the State Commission unless the appellant has deposited in the prescribed manner, fifty per cent of that amount or twenty five thousand rupees, which ever is less." If an appeal is preferred over the State Commission's order the appellant has to deposit 50 per cent of the awarded amount or rupees thirty five thousand which ever is less.[29]

Both the State and the National Commissions should dispose of the matters within a period of 90 days. If delayed, reasons for the delay should be made recorded.[30]

III. JUDICIAL RESPONSE

Maharashtra Hybrid Seeds Co. Ltd. v. *Alavalapati Chandra Reddy*,[31] is a case relating to failure of seeds to germinate. It was found out that the failure was not attributed to fault or deficiency on the part of the farmer. The District Consumer Forum awarded compensation to the farmer besides the cost of the seed, which was upheld by both State Commission as well as National Commission. The Supreme Court refused to interfere with these

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[27] Section 2 (f) of the Consumer Protection Act, 1986.

[28] 'Goods' under C. P. Act carries the same meaning as defined under Section 2(7) of the Sale of Goods Act, 1930.

[29] Section 19 of the Consumer Protection (Amendment) Act, 2002.

[30] Section 19 (A) of the Consumer Protection Act.

[31] (1998) 6 SCC 738.

concurrent findings. Incidentally, a question of law was raised, "whether the request was justified in moving the Consumer Forum for redressal, when the remedy under Seeds Act and Seeds Rules is available." The Supreme Court of India observed in this case that the question of law is to be considered before deciding a matter relating to compensation arising out of sale of spurious or bad quality of seeds. But the Apex Court did not make it clear whether or not the Consumer Protection Act was applicable in the instant case. The question was left with a direction that it is to be settled in an appropriate case.[32] Subsequently, the National Consumer Redressal Commission in the case of *National Seeds Corpn. Ltd.* v. *M. Madhusudhan Reddy*[33], held that though the Seed Act is a special Act, but therein no provisions are specifically laid down to compensate a farmer to whom defective seeds are supplied.[34] Further, it has been held that the remedy is available to a farmer in the said situations under Consumer Protection Act. Though Section 13 (1)(c) of the Consumer Protection Act is applicable i.e., testing of defecting goods in State laboratories, when which becomes un-implementable then one has to resort to alternative method i.e., relying on the reports of officials as considered in the above said case. Section 13(1) (c) of Consumer Protection Act, 1986 says that "where the complaint alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, the District Forum shall obtain a sample of the goods from the complainant, seal it and authenticate it in the manner prescribed and refer the sample so sealed to the appropriate laboratory along with a direction that such laboratory make an analysis or test which ever may be necessary, with a view of finding out whether such goods suffer from any defect alleged in the complaint or suffer from any other defect and report its findings thereon to the District Forum within a period of forty-five days of the receipt of the reference or within such extended period as may be granted by the District Forum."

It was viewed by the commission in the above case that "It cannot be the case of the petitioner to implement an unimplementable proposition. It is not the case of the petitioner that either under the Seeds Act or on the label of the product or under any other provisions of law, that the farmer is expected to conserve certain portion of seed to meet the ludicrous expectations of the petitioner, for the farmer to produce some seeds from somewhere to get it tested to meet the requirements of Section 13 (1) (c)."

In the appellate stage of the case, the Supreme Court[35] was called upon to pronounce judgment *inter alia* on the question whether the Seeds Act was a special legislation *vis-à-vis* the Consumer Act and consequently

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[32] (1998) 6 SCC 738-739.
[33] (2012) 2 SCC 506.
[34] (2003) 6 ALT 5 (NC) (CPA).
[35] *National Seeds Corpn. Ltd.* v. *M. Madhusudhan Reddy*, (2012) 2 SCC 506.

whether it was improper on the part of the District Forums to entertain and decide the complaints filed by the Respondents. The Apex Court held that "though the Seeds Act is a special legislation insofar as the provisions contained therein ensure that those engaged in agriculture and horticulture get quality seeds and any person who violates the provisions of the Act and/or the Rules is brought before the law and punished, there is no provision in that Act and the Rules framed thereunder for compensating the farmers etc., who may suffer adversely due to loss of crop or deficient yield on account of defective seeds supplied by a person authorised to sell the seeds." Moreover, the court observed that there was nothing in the Seeds Act and the Rules which may give an indication that the provisions of the Consumer Act are not available to the farmers who are otherwise covered by the wide definition of 'consumer' under Section 2 of the Consumer Act. Further, in an attempt to uphold the sanctity of the Consumer Protection Act, 1986, the court concluded that any attempt to exclude the farmers from the ambit of the Consumer Act by implication will make that Act vulnerable to an attack of unconstitutionality on the ground of discrimination and there was no reason why the provisions of the Consumer Act should be so interpreted.

In an appeal on a consumer dispute relation to defective seeds (cotton-seeds Y-1 variety), the Maharashtra State Consumer Disputes Redressal Commission, for want of proper evidence, quashed the District Consumer Forum's (Buldhana) Order, directing opposite party to pay compensation. It is observed by the Commission that in the Panchnama (Investigation Report), the Agricultural Officer of Panchayat Samiti has not expressed his opinion with regard to the quality of seeds. It is not disclosed in the Panchnama, as to why germination was to the extent of 20 per cent though it is mandatory on the Agricultural Officer to explain as to why germination was poor. The Panchnama is silent about the quality of seeds. There is a variety of reasons for poor germination. The excess water or excess rain may result into low germination. Similarly, if the land is soft and if seeds are sown below the standard depth, it also effects germination. Therefore, it cannot be said positively or conclusively that the seeds were of sub-standard quality or adulterated. In the absence of positive evidence, on cannot jump to a conclusion merely on the basis of low germination, that seeds were either defective or adulterated.[36]

The poor germination though really is caused due to defective seeds; the poor farmer still has to rely on honest officers in acquiring proper report to adduce evidence to win his case against a seed company. It is not quite unusual to conceive of underhandedness or foul play in preparation of

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[36] *Khamagaon Taluka Bagayatdar Shetkari and Fale (Fruits) Vikri Sahakari Sanstha* v. *Babu Kutti Daniel*, (2006) 3 CPJ 269.

test-reports by unscrupulous officers[37] on account of which genuine and valid claims may be defeated.

IV. PROBLEMS OF ENFORCEMENT

The Forum that is contemplated in the Bill, where compensation is to be sought, is a Consumer Forum/Commission. This is not new as this Consumer Forums/Consumer Commissions are already in existence since 1986. Farmers, aggrieved by the judgment/award of a Consumer Forum cannot approach a State Redressal Commission as it involves heavy expenditure such as advocate's fee, traveling charges and of course incidental expenses. The factors like prescribed time limits fixed in Consumer Protection Act for disposal of cases, lack of technical knowledge to the members of the Consumer Forums may cause an adverse impact in delivering justice by these forums.

The factors like multiplicity of legislations and duplication of forums are further aggravating the problems and creating confusion for the farmers. There is no clarity as to how and who has to establish the facts in case of seed failure. Is sample analysis necessary? If so, how is the sample to be saved and analysed? There are no answers to these questions.

V. CONCLUSION

In conclusion, it may be said that till the onset of 1990s the private seed companies were not very active in the field. Hence, the question of fixing their liability or payment of compensation did not arise. But the scenario is fast changing and the exigencies of increased private sector role demand that the seed companies be made strictly accountable. Sadly the successive governments are withdrawing themselves more and more from their responsibility towards the poor farmers. Of course on paper, the Government has control over the seed companies but his power is seldom exercised to protect the interests of the poor farmers.

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[37] *See e.g. ITC Ltd.* v. *State of U.P.*, (2008) 62 ACC 875.

PATENTING OF LIVING ORGANISMS: POLICY ISSUES AND CONCERNS — INTERNATIONAL TRENDS

—*Gagan Krishnadas*[*]

Abstract *Patenting of living organisms has been a controversial issue ever since the development of modern biotechnology. Through Diamond v. Chakrabarty, 65 L Ed 2d 144 : 447 US 303 (1980) US Supreme Court made way for patenting of microorganisms. The Uruguay Round which came out with the TRIPS agreement was the first international instrument dealing with the patentability of living organisms. It made a compromise in the form of Art. 27.3(b) with regard to the patenting of life forms. Patentability of life in various countries is varied as per their domestic laws and judicial pronouncements. Allowing patents to living organisms has given rise to social and ethical concerns.*

This paper seeks to (1) trace the negotiating history of the patentability of life forms in TRIPS and its interpretation; (2) identify the double-decker policy embedded in Article 27.3(b); (3) examine the patent policy of life forms followed in USA, European Union and India; (4) list out the ethical and social issues arising out of the patenting of life forms, especially higher living forms; and (5) put forward a proposal to harmonise the policy relating to patenting of living forms through the built in review mechanism provided in Art. 27.3(b).

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I. TRIPS AND THE PATENTING OF LIVING ORGANISMS

Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is the international agreement administered by the World Trade Organization (WTO). Till date, it is the most comprehensive multilateral agreement on intellectual property. The agreement lays down minimum intellectual property standards to be followed by the members of WTO. The matter relating to patenting of living organisms is dealt under Article 27 of the TRIPS. Article 27[1] lays down the patentable subject matter and exceptions to it. One should know the negotiating history of this provision in order to interpret and appreciate it.

A. Negotiating History of Article 27.1

Prior to TRIPS, Paris Convention was the one dealing with patents. Paris Convention allowed the members to have their own exclusions from patentability and did not establish any patentability criteria. The language of Article 27.1 was based on Article 10 of the draft WIPO Patent Law Treaty of 1991. This made patents available to inventions in all fields of technology if the invention was novel, had industrial applicability and had an inventive step. During the Annel Draft, the matter of patentability of both products and processes for inventions in all fields of technology was unresolved; and the exception clause contained both "may" and "shall" which shows that it was still undecided whether these exceptions were mandatory or directory in nature. The Brussels draft did not contain the non-discrimination

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[1] Article 27: Patentable Subject Matter

1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.
2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.
3. Members may also exclude from patentability:
   (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;
   (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

requirement[2]. The provision took its final form under the 1991 Dunkel Draft.[3]

B. Interpretation of Article 27.1

The TRIPS Agreement requires Member countries to make patents available for any inventions, whether products or processes, in all fields of technology. But this is subject to the normal tests of novelty, inventiveness and industrial applicability. It is also required that patents be available and patent rights enjoyable without discrimination as to the place of invention and whether products are imported or locally produced. A footnote appended to this provision states that, for the purposes of this Article, the terms "inventive step" and "capable of industrial application" may be deemed by a Member to be synonymous with the terms "non-obvious" and "useful" respectively. In general, this provision lays down wide patentable criteria. We can find that it makes no discrimination with respect to the field of technology in which invention is made and place of invention. The words - "whether products are imported or locally produced" extends the patent rights of the owner over all the member countries.[4]

C. Negotiating History of Article 27.3(b)

Often referred as "biotechnology clause", this clause was to be reviewed four years after entry into force of the Agreement. This built in review reflected the opposing interests between the developed and developing countries. The developed countries wanted protection for biotechnological innovations and developing countries were concerned about the patentability of life forms.[5]

During the pre-TRIPS era, the U.S. Supreme Court through its decision in *Diamond v. Chakrabarty* allowed patenting of a living organism *per se*. This made way for expansion in the patentable subject matter in industrialised countries to include cells and sub-cellular parts, including genes as well as multicellular organisms. In this regard, developing countries have followed a conservative approach. Initially, United States, Japan, the Nordic Countries and Switzerland aimed at broad patent coverage for living organisms. But the developing countries rejected such an approach. The Annell draft shows that microorganisms were also proposed to be excluded from

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2 Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

3 UNCTAD-ICTSD, Resource Book on TRIPS and Development (2005).

4 Carlos Correa, Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement (2007).

5 UNCTAD-ICTSD, Resource Book on TRIPS and Development (2005).

being patented. In the Brussels Draft, proposed two possible ways for exceptions. First one suggested patenting microorganisms and excluding animals from patents.[6] The second one did not allow patents for both animals and microorganisms.[7] During the final draft, the proposal to allow patents for microorganisms and excluding animals was accepted.

The flexibility permitted by Article 27.3(b) in relation to the form of protection for plant varieties has been the reflection, to a large extent, of the lack of consensus on the matter among the industrialized countries during the TRIPS negotiations.

D. Interpretation of Article 27.3(b)

Article 27.1 gives the general rule of patentability and Article 27.3 gives the exceptions to the patentability. The clause starts with the words – "Members *may* also exclude from patentability" which gives discretion to the members to exclude plants and animals from patenting. But this exception does not include microorganisms. Microorganisms are those life forms which cannot be seen by our naked eyes and they belong to the class of: bacteria, fungi, protozoa or viruses.

Another possible exclusion from patentability relates to biological processes for the production of plants or animals. Processes for the therapeutic treatment or utilization of plants and animals are not covered by the exception. TRIPS obliges its Members to protect plant varieties by means of patents, an effective *sui generis* regime or a combination of both.[8]

II. DOUBLE DECKER POLICY

James Boyle[9] explains[10] about the two extreme advocates in the field of intellectual property. There are on one hand, what he calls as "maximalists" who advocate high protection to patents, and on the other hand, there are what he calls "minimalists" who advocate public domain. He terms them as "exaggerated ideal types." In his words, double-decker structure policy contains - "*a lower deck of tumultuous popular and nonlegal arguments about everything from the environment to the limits of the market, and a calm upper-deck which is once again fine-tuning the input-output table of the innovation process*."

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6 Proposed by developed countries.

7 Proposed by developing countries.

8 Carlos Correa, Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement (2007).

9 William Neal Reynolds Professor of Law, Duke University School of law.

10 James Boyle, Enclosing the Genome: What the Squabbles over Genetic Patents Could Teach Us, in Ethics, Computing, and Genomics (2006).

Charles R. McManis[11] extends[12] the arguments of Boyle to Article 27, saying that the provision balances the two opposing viewpoints in the raucuous debate occurring on the lower deck of the bus over the patenting of higher life forms. At the same time he says that the broad language of Article 27.1 and its applicability to patenting of genetic sequences did not arouse any attention during the TRIPS negotiations, thus allowing the issue to comfortably settle on the upper deck.

The double-decker policy in Article 27.1 has been very well explained by McManis in the following words:

> "Paradoxically, under the new TRIPS regime, it may be easier (and thus more essential) to obtain patent protection for the results of upstream genetic research than for the resulting downstream commercial products and processes. This is so because Article 27 of the TRIPS Agreement is drafted in such a way that it will arguably require the members of the World Trade Organization to provide patent protection for the results of genetic research at the microbiological and submicrobiological level but it will leave members free to grant or exclude patent protection for commercially valuable ''macrobiological'' products (i.e., plants and animals), as well as for any associated biological processes (other than microbiological processes) for producing the same. Thus, in a post-TRIPS world, the only reliable avenue for securing patent protection with respect to downstream macrobiological products and processes may turn out to be through the prompt filing of upstream patents at the microbiological or submicrobiological level, as innovations at this level will be the heart of the downstream products and processes in any event."[13]

The built-in review mechanism in Article 27.3(b) was done to please the United States, but the review which should have taken place during 1999 has not yet happened. It is most likely that the review cannot happen without heated debates and there is possible political fallout to be caused when this contentious provision comes up for review.

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[11] Thomas & Karole Green Professor of Law, Washington University School of Law.

[12] McManis Charles R., *Genetic Products and Processes: A TRIPS Perspective*, *in* ADVANCES IN GENETICS (2003).

[13] *Ibid*.

III. INTERNATIONAL TRENDS

Having discussed the status of TRIPS for patenting life forms, let us now look at the international trends by examining the position in United States of America, European Union and India.

A. Position in U.S.A.

U.S. Patent law is based on Article 1, Section 8 of American Constitution which gives powers to Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Title 35, section 101 of the Patent Act provides for the patentability of inventions in broad general terms: "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title." The law relating to patenting of living organisms has been developed by through judicial interpretations.

i. Diamond v. Chakrabarty[14]

The question before the Supreme Court was whether the invention of a genetically modified bacterium capable of breaking down multiple components of crude oil was patentable. The court said that the Act embodied Jefferson's philosophy that ingenuity should receive a liberal encouragement. Court read the term 'manufacture' in § 101 in accordance with its dictionary definition to mean 'the production of articles for use from raw materials prepared by giving to these materials new forms, qualities, properties, or combinations whether by hand labour or by machinery. The Court said that the patentable subject matter was to be given a broad interpretation to include "anything under the sun made man." This didn't mean to say that § 101 embraces every discovery. Laws of nature, natural phenomena and abstract ideas are not patentable. The court said, "His claim is not to a hitherto unknown natural phenomenon, but to a non-naturally occurring manufacture or composition of matter -- a product of human ingenuity *having a distinctive name, character [and] use*." The relevant distinction was not between living and inanimate things but between products of nature, whether living or not, and human-made inventions.

[14] 65 L Ed 2d 144 : 447 US 303 (1980) : 206 USPQ 193.

ii. Commr. of Patents and Trademarks v. Allen[15]

In this case, the applicants of patents developed a type of oysters which were modified by changing its nature of fertility to make it edible all over the year. The court rejected the patent for the product since there was no inventive step involved. The court said that the information regarding fertility was known so well by those skilled in the art that it rendered the invention obvious. The court made it clear in this same case that transgenic human beings could not be a subject matter of patent.

iii. Official Gazette of USPTO

On April 7, 1987, the United States Patents and Trademark Office (USPTO) issued a notice[16] about Patentability of Animals. The Patent and Trademark Office said that it will hitherto consider non.naturally occurring non-human multicellular living organisms, including animals, to be patentable subject matter within the scope of 35 U.S.C. 101. It said that any claim directed to or including within its scope a human being will not be considered to be patentable subject matter under 35 U.S.C. 101, because grant of a limited, but exclusive property right in a human being is prohibited by the Constitution.[17]

On April 12, 1988, USPTO granted patent[18] to "a transgenic non-human mammal whose germ cells and somatic cells contain a re-combinant activated oncogene sequence introduced into said mammal…" The USPTO has said in its Gazette that there is no hard and fast rule for granting patent to animals and it will examine the patentability on a case to case basis by applying the test of non-obviousness and inventive step.

B. Position in European Union

Two important sources for the patent law in European Union are the European Patent Convention (EPC) and the Biotechnology Directive.[19] Article 52[20] of EPC lays down the requirements for patentability. Patent

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15 2 USPQ 2d 1425.

16 2105 Patentable Subject Matter — Living Subject Matter [R-08.2012], http://www.uspto.gov/web/offices/pac/mpep/s2105.html (last visited Jan 24, 2014).

17 The court did not expressly mention the part of the Constitution. The court was probably referring to the Thirteenth Amendment of U.S. Constitution which prohibited slavery.

18 Philip Leder & Timothy A. Stewart, Transgenic non-human mammals (1988).

19 Directive 98/44 on the legal protection of biotechnological inventions.

20 Article 52: Patentable inventions

1. European patents shall be granted for any inventions which are susceptible of industrial application, which are new and which involve an inventive step.
2. The following in particular shall not be regarded as inventions within the meaning of paragraph 1:
   (a) discoveries, scientific theories and mathematical methods;

is granted if the invention is novel, involves an inventive step and has an industrial application. Article 53[21] lays down the exceptions to the patentability. Inventions which are against morality, plants and animal varieties and biological processes for the production of plants and animals are excluded from patentability. However, microbiological processes and products are patentable.

The case laws of European Patent Office is quite complicated, and hence the issue of patentability will be discussed with respect to various life forms.

i. Viruses and Bacteria

Viruses and bacteria are patentable *per se*. This can be known by Article 53(b) of EPC which says that the exclusion of animal and plant variety patents does not apply to microbiological processes and products. In T356/93, this was affirmed.

ii. Cell Lines and Stem Cells

T356/93 has held that Cells, even those derived from a multicellular plant or animal, are the products of microbiological processes for the purposes of patentability.

iii. Plants

Researchers have opined[22] that the decision of G1/98 allows patents to transgenic plants. The Biotechnology Directive clearly indicates that plants

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(b) aesthetic creations;
(C) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers;
(d) presentations of information.

3. The provisions of paragraph 2 shall exclude patentability of the subject-matter or activities referred to in that provision only to the extent to which a European patent application or European patent relates to such subject-matter or activities as such.

Methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practised on the human or animal body shall not be regarded as inventions which are susceptible of industrial application within the meaning of paragraph 1. This provision shall not apply to products, in particular substances or compositions, for use in any of these methods.

[21] Article 53: Exceptions to Patentability

1. European patents shall not be granted in respect of:
   a. inventions the publication or exploitation of which would be contrary to "ordre public" or morality, provided that the exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States;

plant or animal varieties or essentially biological processes for the production of plants or animals; this provision does not apply to microbiological processes or the products thereof.

[22] D. Schertenleib, *The Patentability and Protection of Living Organisms in the European Union*, 26 European Intellectual Property Review 203–213 (2004).

bearing a genetic modification to a single gene are patentable. Logically, plants bearing multiple gene modifications also ought to be patentable as they are obtained through a series of disclosed discrete modifications that are each patentable.

iv. Animals

"The bar on the patenting of animal varieties has been rarely tested, unlike the corresponding one on plant varieties. As a consequence, the law is relatively clearer. In T19/90 and V6/92 (the Onco Mouse case) it was held that a patent claiming mammals being genetically engineered to carry additional genes making them susceptible to cancer was valid and not barred by Art. 53(b) EPC."[23]

C. Position in India

Patents are governed by the Patents Act, 1970. Section 2(j) defines "invention" as a new product or process involving an inventive step and capable of industrial application. Section 3 lays down the exceptions to *inventions*. Section 3(j)[24] excludes plants and animals in whole or any part thereof other than micro-organisms but including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals from the definition of *inventions*. As per this sub-section, plants and animals or any part of the plant or animal is not patentable, an exception is made in the case of micro-organisms (hence micro organisms are patentable). However, any discovered micro-organism from the nature is not patentable. There is no explanation as to what constitutes micro-organisms. Hence there is a possibility of the word micro-organisms covering - cells, cell-lines, genes etc.

In *Dimminaco A.G. v. Controller of Patents and Designs*[25] the issue involved was the patenting of the process for preparation of infectious bursitis vaccine, which is invented for protecting poultry against infectious bursitis. The Controller held that the process of separation of the vaccine which has living entity cannot be considered a manufacture and hence not patentable under section 2(1)(j)of the Patents Act. He also held that since the vaccine contains living organism it cannot be patented. The court held that the matter involved is of a new process of preparation of vaccine under specific scientific conditions and the said vaccine is useful for protecting poultry against contagious bursitis infection and there is no statuary bar to accept a manner of manufacture as patentable even if the end products contain living organism.[26]

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[23] *Ibid*. at 211.

[24] Inserted by an amendment during the year 2002.

[25] AID No. 1 of 2001.

[26] Manual of the Patent Practice and Procedure, (2008), http://www.ipindia.nic.in/ipr/patent/DraftPatent_Manual_2008.pdf (last visited Feb 6, 2014).

IV. POLICY ISSUES AND CONCERNS

The issue with patenting of living organisms is not with the legality of the provisions; it goes further into the heart of the matter – that is the policy. The issues arising out of such policy has to be dealt under different heads.

A. Ethical Concerns

Living organisms should not be placed on the same level as human technical inventions. Some things should be outside the property system like babies, votes, kidneys etc. We should not manipulate, trade and commodify the nature. Like the deep-sea bed, atmosphere, even the living organisms and their genes belong to the common heritage of the mankind. It should not be allowed to become someone's private property.

B. Cruelty

It is argued that modifying a living being genetically or otherwise in a particular way goes against the tenets of nature. For instance, cotton crop was genetically modified by infusing a bacterium Bacillus thuringiensis to produce toxins which makes it resistant against certain worms. It is surely cruelty to make modifications at the cellular level, which will cause pain to the life form.[27]

C. Scientific reasons

A gene sequence is not a conventional chemical substance, but more like an information code with many different functions. The holder of a patent that describes one commercial use should not receive a monopoly on all possible functions.

D. Inconsistency in the Policy

As of now, patenting of living organisms is also not allowed in some developing countries. But some of the developed countries are actively granting patents even to animals and plants. This inconsistency causes the biotechnology countries to establish their business in the jurisdictions where patenting is allowed and they ultimately result in transferring their costs on the third world countries.

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[27] Michelle K. Albrecht, *Genetic Engineering of Domestic Animals: Human Prerogative or Animal Cruelty*, 6 Animal L. 233 (2000).

E. Economic concerns

Patents may make access to genetic resources more difficult and in some cases block that access altogether. Research and development are hindered, and in many cases the resulting costs are disproportionately high. These problems are of particular relevance to health systems and medical research, but their consequences can also be seen in agriculture and plant breeding.[28]

V. SUGGESTIONS & CONCLUSION

The author wishes to take a strong view against patenting of life forms altogether without making a distinction between micro-organisms and higher living forms. At the most, patents may be granted for protection on products derived from such organisms, that too for a specific use, but under no circumstances should patenting be allowed on the organism itself.[29] There is a necessity to bring harmony between the policies relating to patenting of living organisms in various jurisdictions.

The author proposes this change to happen through the built in review of Article 27.3(b) of TRIPS. This will ensure enforcement of the provision through WTO and thereby bring uniformity in the laws of all member countries. An independent convention in this regard will not be of much help. There is already a convention made by U.N.E.S.C.O which is called as the Universal Declaration on the Human Genome and Human Rights[30], which has laid down that Human Genome belongs to the Common Heritage of Humanity and should not be exploited. But this convention has no enforcement mechanism. It has to be borne in mind that excluding life forms from patenting will not put an end to the genetic research. It only puts an end to the economic exploitation of the living forms by multi-million biotechnology companies. The matter relating to biotechnology research should be dealt separately.

In the first enclosure movement, man tamed the animals and made them his property by using his physical strength. Now, during the second enclosure movement, man is on his way to take a control over all the living organisms (including his own species) at that level of the organism which will leave the living being with no will of its own. The double-decker policy followed in Article 27 of TRIPS and elsewhere should be given up totally, and there should be no patents on any type of living organism, whether higher or lower.

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[28] Greenpeace, True Cost of Gene Patents – A Greenpeace Documentation (2004).

[29] Suman Sahai, *GATT and Patenting of Micro Organisms*, Economic and Political Weekly 841–842 (1994).

[30] WHO | UNIVERSAL DECLARATION ON THE HUMAN GENOME AND HUMAN RIGHTS 1997, WHO, http://www.who.int/genomics/elsi/regulatory_data/region/international/030/en/ (last visited Jan 22, 2014).

COMMENT ON VALIDITY OF DISCHARGE VOUCHERS IN INDIA

—*Shaurya Joshi & Deepti Bajpai*[*]

Abstract In the recent times, the insurance companies have adopted the policy of insisting on obtaining a discharge voucher before paying any claims to the insured. These discharge vouchers absolve the companies of any liability after the payment of the agreed amount and represent accord and satisfaction on the part of the insured person. The said practice is prejudicing the rights of the policyholders as the insured persons mostly sign such discharge voucher under economic duress. The companies are not bound by any time limits to settle the claims and hence, they delay payments. When such payments are delayed, people who claim the insured amount settle for any amount in order to obtain the payments swiftly. Such practice has been condemned by the Delhi High Court in Worldfa Exports (P) Ltd. v. United India Insurance Co. Ltd.[1] The article discusses the case law discussing the validity of discharge vouchers and also highlights how the present IRDA Guidelines and Regulations are insufficient to deal with such a malpractice. The article then highlights the regulations in other countries which deal and curb such malpractice in order to ensure the rights of the policyholders are protected. The authors, then conclude that the IRDA has not provided sufficient protection to people in this regard and hence, in order to prevent such acts on the part of the insurance companies the regulatory authority should amend the Regulations and provide for strict time bound assessment and payment of insurance claims in order to protect the rights of the insured persons. This will also ensure that accord and satisfaction given after the claim is not given under economic hardships and

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[1] 2015 SCC OnLine Del 13951 : (2015) 225 DLT 722.

duress. The amendment in regulations will also reduce litigations on disputes related to settlement of claims

I. INTRODUCTION

In recent times, the practice of the insurance companies to insist on the discharge voucher before paying the liability under an insurance claim has caused great deal of hardships to the policyholders. The practice has been condemned and criticized on a number of occasions in various judicial pronouncements.[2] The Courts have held that such a practice is unfair and the concurrence obtained for the full and final settlement is not voluntary but is given under duress or coercion.[3] The insurance companies have also desisted the claims made by policy holders for arbitration and other laws in the courts by relying on the discharge voucher. The Courts have rightly held that a claim for arbitration cannot be rejected merely or solely on the ground that a settlement agreement or discharge voucher had been executed by the claimant, if its validity is disputed by the claimant.[4] However, where the dispute raised by the claimant with regard to validity of the discharge voucher or no-claim certificate or settlement agreement, prima facie, appears to be lacking in credibility as the insure was in good financial condition at the time of signing the voucher, there may not be a necessity to refer the dispute for arbitration.[5]

There have been a number of occasions where the mere execution of the discharge voucher has not always deprived the consumer from preferring claim with respect to the deficiency in service or consequential benefits arising out of the amount paid in default of the service rendered.[6] Despite execution of the discharge voucher, the consumer may be in a position to satisfy the authorities that such discharge voucher or receipt had been obtained from him under the circumstances which can be termed as fraudulent or exercise of undue influence or by misrepresentation or the like.[7]

The denial of payment to the insured for not signing the discount voucher at the relevant time also defeats the very purpose of taking out the policy. The insurer has a superior bargaining position as the insured having suffered a loss is faced with 'take it or leave it' position.[8] There can be cir-

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2 *Bharat Coking Coal Ltd.* v. *Annapurna Construction*, (2003) 8 SCC 154.

3 *NTPC Ltd.* v. *Reshmi Constructions, Builders & Contractors*, (2004) 2 SCC 663.

4 *National Insurance Co. Ltd.* v. *Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : AIR 2009 SC 170.

5 *Union of India* v. *Master Construction Co.*, (2011) 12 SCC 349.

6 *National Insurance Co. Ltd.* v. *Nipha Exports (P) Ltd.*, (2006) 8 SCC 156.

7 *United India Insurance* v. *Ajmer Singh Cotton & General Mills*, (1999) 6 SCC 400 : AIR 1999 SC 3027.

8 *Oriental Insurance Co. Ltd.* v. *Mercury Rubber Mills*, 2012 SCC OnLine Del 503 : (2012) 127 DRJ 650.

cumstances like huge indebtedness to the banks that can affect free will.[9] Thus, in these cases there was no question of final accord of satisfaction to make the insured ineligible for making a claim against the insurer under other judicial forums.[10]

The recent judgment of the Delhi High Court in Worldfa Exports (P) Ltd. v. United India Insurance Co. Ltd.[11] has reignited the debate and highlighted that this practice is still widely employed by the insurance companies to avoid litigation on the amount of money claimed under insurance policies.

The facts in the case were that Worldfa Export Private Limited ("Petitioner") had insured his factory in February, 2012. In October 2012, a fire broke out in the insured premises and the petitioner lodged a complaint with the insurer, United India Insurance ("Respondent"). The Respondent appointed surveyors and after assessment sought the concurrence of the Petitioners. The Petitioners executed a discharge voucher in November, 2014. In July 2015, the Respondents released almost five Crores against the claimed sum of approximately twelve Crores. The Petitioners invoked the arbitration clause in the policy and claimed the balance amount. They also alleged that the discharge voucher cannot be treated as full and final settlement as it was given under duress and coercion owing to the inordinate delay of the Respondents and financial troubles of the Petitioners. The Respondents raised an objection to appointment of an arbitrator, contending that no arbitral disputes survived after the concurrence of the Petitioner for full and final settlement. The Petitioner then approached the Court for appointment of an arbitrator under Section 11(9) of the Arbitration and Conciliation Act, 1996. The Court also impleaded Insurance Regulatory and Development Authority of India ("IRDA") as a respondent on the request of the Petitioner.

The Petitioner contended that relevant guidelines by IRDA for protection of policyholder's interest do not provide for any penal consequences for delay in settlement of claims.[12] The delay forces the insured to sign the discharge voucher for early settlement. The Petitioner highlighted that the inefficiency of regulations for the timely completion of assessment and payment has encouraged unfair practices employed by insurers wherein they insist on discharge voucher or no claim certificate as a pre-condition of payment. Petitioner supported this contention with a number of judgments wherein the Courts have held that such voucher does not come in the way of the

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9 *Pacific Garments (P) Ltd.* v. *Oriental Insurance Co. Ltd.*, 2012 SCC OnLine Del 5779 : (2013) 133 DRJ 385.

10 *Supra* note 7.

11 2015 SCC OnLine Del 13951 : (2015) 225 DLT 722.

12 IRDA (Protection of Policyholders Interests) Regulations, 2002.

right to seek adjudication through arbitration or consumer courts for any grievance.[13]

The Court held after relying on the case of Oriental Insurance Co. Ltd. v. Govt. Tool Room and Training Centre[14] and held that the practice of the insurance companies to demand for the discharge voucher for a condition precedent to payment of claimed amount is not allowed by law. The amount assessed is the admitted liability of the insurer and he is obliged to pay the same to the insured whether the insured accepts the assessment or not. The Court also relied on National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.,[15] wherein the Supreme Court has clearly held that the procedure of the insurance company asking the insurer to issue an undated receipt acknowledging receipt of a sum smaller as compared to its own claim in full and final settlement as a condition for releasing and admitting a lesser amount is unfair, irregular and illegal. The accord and satisfaction in such a case is not voluntary but under duress, compulsion and coercion. The coercion is subtle, but very much real. The "accord" is not by free consent.

The Court also directed IRDA to ensure that companies do not indulge in such practices and also directed the regulatory authority to convene a meeting of all insurance companies to obtain an undertaking to abide by the relevant Circular. This is not the first instance the Court has asked IRDA to issue directions. The courts have asked IRDA to issue circular and directions in cases wherein the insurance companies try and avoid liabilities.[16] The Court then allowed the petition and appointed an arbitrator.

The Court relied on the IRDA Circular dated 24th September, 2015[17] which directed all insurance companies not to withhold claim amount where liability was established. They were further directed under the Circular not to use the discharge vouchers as a means of estoppel against the insured to seek higher compensation under any judicial forum.[18]

Thus, the Court held that insurer cannot deny the payment of admitted claim unless a complete discharge is given by the insured. The practice would amount to coercion and undue influence as defined in Section 15 and Section 16 of the Contract Act, 1972. Such contracts are voidable under 19A of the Contract Act. It also amounts to deficiency in services within Section

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13 *National Insurance Co. Ltd.* v. *Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267.

14 *Id.*

15 *Id.*

16 *Yashpal Luthra* v. *United India Insurance Co. Ltd.*, (2010) 3 ACC 130.

17 https://www.irda.gov.in/admincms/cms/whatsNew_Layout.aspx?page=PageNo2621&flag=1 (last accessed on 29th January, 2016).

18 https://www.irda.gov.in/admincms/cms/whatsNew_Layout.aspx?page=PageNo2621&flag=1 (last accessed on 25th January, 2016).

2(1)(g) of the Consumer Protection Act, 1986.[19] The matter is now listed next on 22nd December for reporting compliance to the directions issued.

II. THE POSITION IN INDIA

In the light of above cases, it is only necessary that we explore the regulatory regime controlling such vouchers. The IRDA is responsible for regulation and just functioning of the insurance companies. It mandates that the insurance companies are not exploiting the consumers by making them agree by fraud or coercion to arbitrary and discriminatory terms. The signing of discharge vouchers is one such practice followed by the insurance companies in order to settle the claim at the price they want. The IRDA (Protection of Policyholders' Interest) Regulations, 2002 ("Regulations") is one such guideline, which state that what all contents are necessary for the insurer to mention in the insurance policy and what are the duties and rights of the policyholder.[20] However, these regulations do not talk about the scheme of discharge vouchers and what shall be the validity of the same.

Regulation 9 of the Regulations provides for the procedure to claim the insurance money under the policy of insurance. These regulations, however, are not punishing the insurance companies for delay in the payment of claims and also do not provide any timeline for settlement of claims. Thus, as there is a lack of guidelines on these issues, the insurance company delay the payments and ensure that the insured has to settle for less at the lapse of considerable time.

It is relevant to look at other jurisdictions and the mechanisms they employ to overcome such practice by the insurance companies.

III. LEGISLATION IN OTHER COUNTRIES TO PROTECT INTEREST OF THE POLICYHOLDERS UNITED KINGDOM

There are various legislations like the Unfair Terms in Consumer Contracts Regulations, 1999 prohibit the unfair practices to the detriment of the consumer and those which seek to protect the interest of the policyholders in the United Kingdom. A contract term which has not been individually negotiated is regarded as unfair, if contrary to the requirements of good faith, which causes significant imbalance on the parties' rights and

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[19] *National Insurance Co. Ltd.* v. *Sehtia Shoes*, (2008) 5 SCC 400.

[20] https://www.irda.gov.in/ADMINCMS/cms/frmGeneral_Layout.aspx?page=PageNo50&flag=1 (last accessed 23rd January, 2016).

obligations under the contract to the detriment of the consumer.[21] Regulation 6 provides that the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.[22]

The Court has held that a contract entered into as a result of economic duress (or illegitimate threat to the economic interests of a party) as voidable.[23] The line which divides legitimate and illegitimate pressure is unclear. In CTN Cash and Carry v. Gallagher Ltd.,[24] it was suggested that even a legitimate threat could amount to economic duress. The case of DSND Subsea Ltd v. Petroleum Geo-Services ASA,[25] provides the most recent definition of 'economic duress' where Dyson J stated that:

> *"The ingredients of actionable duress are that there must be pressure, (a) whose practical effect is that there is compulsion on, or lack of practical choice for, the victim, (b) which is illegitimate, and (c) which is a significant case inducing the claimant to enter into the contract. In determining whether there has been illegitimate pressure, the court takes into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining."*

In Pao On v. Lau Yiu Long,[26] Lord Scarman stated that the essence of the doctrine of economic duress was that "there must be coercion of will such that there was no true consent and it must be shown that the contract entered into was not a voluntary act. Hence, a contract or a discharge voucher to the effect of full and final settlement of the claim obtained under economic duress will be voidable and the insured will have the right to seek remedy under English law.

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21 http://www.legislation.gov.uk/uksi/1999/2083/regulation/5/made (last accessed on 29th January 2016).

22 *Id*.

23 *D & C Builders Ltd.* v. *Rees*, (1966) 2 QB 617 : (1966) 2 WLR 288 (CA).

24 (1994) 4 All ER 714.

25 2000 BLR 530.

26 1979 UKPC 17.

IV. UNITED STATES

A. Action in torts:

Under the law, the insurer has a duty of indemnification, which is the duty to pay a judgment entered against the policyholder, up to the limit of coverage.[27] In the United States there can be tort claims against actions of the insurance company which are taken in bad faith.[28] Earlier, such type of claims were allowed for third party liability insurance but was then expanded by California to first-party fire insurance cases.[29] If an insurance company denies an insurer of its legitimate claim amount in the guise of a release of discharge voucher, it is exposed to bad faith action and in which extremely high punitive damages can be slapped on the insurance company.[30] Courts in nearly thirty states recognized the claim by the late 1990s. In the nineteen states, state legislatures became involved and passed legislation that specifically authorized bad faith claims against insurers.[31] Punitive damages have been awarded in State Farm Mutual Automobile Insurance. Co. v. Campbell,[32] in which the U.S. Supreme Court overturned a jury verdict of $145 million in punitive damages against the State Farm Insurance.

B. Action under other laws

In United States, there are strict provisions which lay down standard of prompt, fair and equitable settlement as under the Fair Claims Settlement Practices Regulations (California Code of Regulations).The United States Court has held in Cynthia Phelps v. State Farm Mutual Automobile Insurance Co.[33] that the insurance companies have violated Section 304.12-230 Sub-sections (6) and (7) of the Kentucky's Unfair claims Settlement Practices Act. They had not attempted in good faith to effectuate prompt, fair and equitable settlement of claims in which the liability has become reasonably clear and which compels the insurers to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insurers.[34]

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27 *Buss* v. *Superior Court*, 16 Cal 4th 35 (1997).
28 *Comunale* v. *Traders & General Insurance Co.*, 50 Cal 2d 654.
29 *Gruenberg* v. *Aetna Insurance Co.*, 108 Cal. Rptr. 480.
30 *Jones* v. *Secura Insurance Co.*, 638 NW 2d 575.
31 Stephen S. Ashley's treatise, Bad Faith Actions: Liability and Damages, 2nd ed. (Eagan, MN: Thomson West, 1997), §§ 2.08 and 2.15
32 *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 US 408 (2003).
33 736 F 3d 697 (6th Cir 2012).
34 *Anderson* v. *Liberty Lobby*, Inc., 91 L Ed 2d 202 : 477 US 242 (1986).

Apart from these, there are model legislations given by the institution called National Association of Insurance Commissioners ("NAIC") which can be considered to be the Competition Commission of India for the insurance sector in the US. The mandate of the Commission is to refute unfair methods of competition and general deceptive practices in the insurance sector and avoid harassment of insured persons. One of its first objectives was the adoption by all states of a uniform blank for insurer annual financial.[35] These model laws then form the basis of acts enacted by each state or regulations by state insurance regulators.

The "Model Laws, Regulations and Guidelines" published by NAIC collects all current model laws and regulations.[36] Each model law or regulation which includes the text of the model law or regulation together with its history, a listing of states that have enacted the model or a related law and a history of the model law or regulation prepared by the NAIC staff.[37]

These modal laws have general and broad regulations and they try and give a uniform act to be enacted by all states. The modal laws also provide for a time bound payment after reasonable investigation on the part of the companies. Relying on these laws, many states that have enacted their own statutes, contain provisions prohibiting insurers from "compelling insurers to institute litigation by offering substantially less than the amounts ultimately recovered" when an insured makes a claim.

Thus, relying on these modal laws, effective laws with punitive sanctions have been passes by states like Oklahoma and Massachusetts.

V. SINGAPORE

The Financial Industry Disputes Resolution Centre Ltd ("FIDReC") is an independent and impartial institution specializing in the resolution of disputes between financial institutions and consumers. FIDReC subsumes the work of the Consumer Mediation Unit ("CMU") of the Association of Banks in Singapore and the Insurance Disputes Resolution Organization ("IDRO").[38] The organization gives an affordable and accessible one-stop avenue for consumers to resolve their disputes with financial institutions including those in insurance sectors. . A consumer who is not satisfied with the outcome of the hearing can commence legal action against the insurer.[39]

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35 http://www.naic.org/documents/prod_serv_marketreg_rii_zb.pdf (last accessed on 28th January, 2016).

36 http://www.naic.org/prod_serv_model_laws.htm (last accessed on 25th January, 2016).

37 http://archive.law.fsu.edu/journals/lawreview/downloads/263/rand.pdf (last accessed on 28th January, 2016).

38 http://www.fidrec.com.sg/website/background.html (last accessed on 24th January, 2016).

39 http://www.fidrec.com.sg/website/faq.html (last accessed on 29th January, 2016).

The Singapore insurance industry has also adopted a General Insurance Code of Practice. The objective of the code is to ensure that the general insurance customer is treated fairly and receives a high standard of service. The code sets minimum standards regulating the sales, advisory and service standards of the general insurer and intermediary (including agents and brokers). The Clause 7.2 of the Code of Practice imposes strict timelines and procedural requirements to ensure that claim is fairly and promptly assessed and the legitimate amount paid to the insured.[40]A consumer aggrieved by the acts of the insurance company can complain against the violation of this Code to FIDReC.

In Projection Pte. Ltd. v. Tai Ping Insurance Co. Ltd.,[41] the Singapore Court had taken note of the fact that a discharge voucher is treated no more than an acknowledgment of the receipt of the sum in full settlement of the claim, and, as is the common practice of insurance companies, is prepared in advance of the payment that had yet to be received. It is a procedure normally adopted by insurance companies as a follow-up to a settlement which they have agreed.

VI. AUSTRALIA

The Australian Prudential Regulation Authority ("APRA") has the power pursuant to the Insurance Act 1973 to investigate a general insurer and take actions against defaulters.[42] The Australian Securities and Investment Commission ("ASIC") is responsible for the general administration of the insurance laws.[43] ASIC pursuant to s 1101A of the Corporations Act 2001 has put in place a General Code of Practice for Insurance ("Code").[44] The earlier code was given in 2012 which was revised in 2014.[45] Insurance companies who have not adopted the revised code still can follow 2012 code.[46] The Code is supported by a transparent and independent governance framework to ensure Code compliance is effectively monitored and enforced. The Code imposes strict timelines on the insurance companies with respect to settlement of claim.[47] The insurance company is required to make a decision

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40 http://www.gia.org.sg/pdfs/code_of_practice.pdf (last accessed on 29th January, 2016).

41 2001 SGCA 28.

42 http://www.apra.gov.au/aboutapra/Pages/default.aspx (last accessed on 28th January, 2016).

43 Insurance Contracts Act 1984, Section 11A.

44 http://codeofpractice.com.au/assets/documents/Code%20of%20Practice.pdf (last accessed on 28th January, 2016).

45 http://www.asiainsurancereview.com/News/View-NewsLetter-Article?id=29441&Type=eDaily (last accessed on 28th January, 2016).

46 http://codeofpractice.com.au/assets/documents/Code%20of%20Practice%202012%20-%20FINAL%20l.pdf (last accessed on 29th January, 2016).

47 http://www.insurancecouncil.com.au/for-consumers/code-of-practice (last accessed on 30th January, 2016).

on the claim within four months from lodging of the claim.[48] In the event, the claim is denied, the insurance company has to provide reasons in writing for the same and provide a copy of the survey report to the insured.[49] The insured may then choose to challenge the decision of the insurance company and take recourse to an elaborate and effective dispute resolution mechanism.[50] Under the provisions of the Code, the insurance company is mandated to resolve all complaints and disputes quickly and fairly and keep the insured informed of the progress of the response to their complaint. It has usually conspired in such circumstances that the internal dispute resolution team can sort out many problems the insured may have, but if the dispute still remains unresolved or the insured is unhappy with the decision, the insured may make a reference to external dispute resolution scheme administered by an independent body.

The Financial Ombudsman Service ("FOS"),[51] under Regulation 10 of the Code The Financial Ombudsman Services consists of members who are financial services providers like banks, credit unions, building societies, general insurance companies and their agents, life insurance companies and brokers, superannuation providers, fund managers, mortgage and finance brokers, financial planners, stockbrokers, investment managers, friendly societies, time share operators, credit providers and authorized credit representatives.[52]

The FOS independently and impartially examines the general insurance disputes between general insurance companies and customers. The FOS is independent and provides a free service for consumers. It mediates between the insurer and the consumer, and when mediation is unsuccessful, an ombudsman can reach a conclusion. The decisions of the FOS are legally binding on the insurance company but not on the insured persons.

A notable feature of the Australian Code is that it makes provisions for insurers who are suffering from financial hardships caused due to the event that triggered insurance. In such scenarios, the Australian Code stipulates that the insurance company should assess the claim quicker as well as provide interim financial assistance to the insured.

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48 General Insurance Code of Practice, Regulation 7.17.
49 General Insurance Code of Practice, Regulation 7.19.
50 General Insurance Code of Practice, Regulation 10.
51 General Insurance Code of Practice, Regulation 7.22.
52 https://www.fos.org.au/annualreview/2009-2010/PDF/FOS_AR2009-10.pdf (last accessed on 30th January, 2016).

VII. CONCLUSION

There is a need of very strict regulatory framework of assessment of claim to ensure that the interest of the insured is not jeopardized or compromised as a result of unequal bargaining position of the insurance company. Thus, to conclude, it can be clearly seen that the insurance companies use the discharge voucher to negate their responsibilities to pay the actual claim to the insured persons. The lack of any guidelines by IRDA on the time bound payment by the insurance company has only helped the case of such companies. The companies deliberately delay payments in the name of investigation or some other procedural hassles and then try and obtain the consent for accord and satisfaction under economic duress. In such a scenario, there is a need of very strict regulatory framework of assessment of claim to ensure that the interest of the insured is not jeopardized or compromised as a result of unequal bargaining position of the insurance company. The IRDA should take cue from the regulations prevalent in other countries and amend the Regulations in such a way to include time bound payments and other practices which will ensure that discharge voucher is not obtained under economic duress.

DRONE STRIKES: A NEW FORM OF AMERICAN IMPERIALISM

—*Sanskriti Mohanty & Satyajeet Panigrahi*[*]

Abstract Drone strike, purportedly a counterterrorism measure, has turned out to be an operation that works in the interest of America unapologetically jeopardizing the lives, properties, peace and security of other nations. Hence, this paper broadly seeks to establish that drone program, entailing the targeted killing of the militant groups and consequential indiscriminate assassination of civilians without the consent of the concerned states, is 'U.S imperialism' in the real sense. The paper, thus, delves into the following issues: the legal status of CIA as a 'non-combatant enemy' and politics of its stealthy targeted killing; in the context of international law, it elaborates on the inconsistency of drone strikes with the sovereignty of Pakistan; the shallowness of the plea of 'self-defense in the armed conflict' with al-Qaeda, in view of scant adherence to principles of International Humanitarian Law and drone strikes resulting in extrajudicial killing in violation of Human Rights Law. The paper concludes that drone strike need concerted international unified efforts resting on 'endeavour, participation and cooperation' and strict adherence to international law to be an effective weapon of counterterrorism.

Keywords: U.S imperialism, non-combatant enemy, self-defense, armed conflict, al-Qaeda, International Humanitarian Law, extra judicial killing, Human rights Law, counter-terrorism.

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I. INTRODUCTION

Tracing the roots of drone strikes from drone to drone attacks:

> "*Drone strike is, as it operates now, an egocentric agenda underpinned by the U.S's tacit resolve to demonstrate to the world at large that it can endanger the peace and security of any foreign nation to make its sovereign authority invincible."*

Drone strikes legalized by a horror-struck Bush administration under the authorization of use of military forces (AUMF), post-9/11 terrorist attack, are a ramification of the drone's military exploitability from a mere surveillance tool to a missile bomber.[1]

The U.S drone strikes were first undertaken in Afghanistan with the authorization of Security Council and declaration of Afghanistan and its air space as a combat zone but departure from this mandate was soon made with America making geographical expansion of use of drone strikes far beyond Afghanistan to Yemen, North west Pakistan and Somalia on the premise that battlefield follows those designated as enemy for their affiliation to al-Qaeda.[2] Thus implying that, notwithstanding any prohibition, the U.S is at liberty to undertake drone strikes anywhere in the world basing on its subjective satisfaction of presence of enemy. Thus U.S affirms its stand on the pretext that:

> "The war against terrorists of global reach is a global enterprise of uncertain duration."[3]

Bush's regime, though marked the inception of drone strike, Obama's regime proliferated it to an extent where it became brutal and a bane to humanity. After assuming the office of president, since 2009, Obama has ordered as many as 361 drone strikes as on January 31st, 2015 whereas Bush had ordered only 52 strikes during his reign[4]. Moreover, the Bush administration had ordered one drone strike over Pakistan in 2004, whereas Obama's administration was ordering a strike every four days during the

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1 Milena Sterio, *The United States' Use of Drones in the War on Terror: The (Il)legality of Targeted Killings Under Internationa*l , 45 Case W. Res. J. Int'l L.197, 198 (2012).

2 *Id.* at 199.

3 The White House, *The National Security Strategy of The United States of America*, (September 2002), available at: http://history.defense.gov/docs_nss.shtml, (2014) [hereinafter National Security Strategy-2002].

4 Jack Serle, *Monthly Updates on the Covert War* (Feb 2, 2015), available at: https://www.thebureauinvestigates.com.

first two years of his administration when the program was at peak.[5] Report of Bureau of Investigative Journalism (BIJ) states that 2500 people so far have been killed by the strikes during Obama administration since 2009 and further the report of the bureau reveals that of all the drone attack victims since 2004, more than 76% of the dead fall in the legal grey zone, 22% are confirmed civilians (included 5% minors) and only the remaining 1.5% are high-profile targets.[6]

Evidently, drone has emerged as the core tool of counter terrorism under Obama's administration, given that drones, unmanned and remotely operable, have reduced warfare into a "video game" easy to handle, thereby involving no deployment or loss of the U.S troops in the bloodshed zone of the targeted area where the lethal missile are released through the click of a button by CIA operators tucked to their seats in their Nevada office.[7] But Obama and other officials in his administration justify the resort to drone attack on a more altruistic ground that it causes fewer civilian casualties compared to other bombing technologies. In this context, Obama answered to a pointed question on drone attacks as:

> "a lot of strikes being in the FATA [federally Administered Tribal areas of Pakistan] going after al-Qaeda suspects, actually has not caused a huge amount of civilian casualties."[8]

The advocates of U.S drone strikes uphold its use on the basis of its high precision, goal achieving proficiency in targeting and eliminating the suspected "high-value" al-Qaeda leaders while overlooking the high scale civilian casualties caused as a result of such attacks[9].

In 2009, CIA director Leon Panetta observed that drones are "the only game in town in terms of

Confronting or trying to disrupt the al-Qaeda leadership," which remains the position of the Obama administration[10].

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5 Chris Woods, *'OK, Fine. Shoot him.' Four Words That Heralded a Decade of Secret US Drone Killings*, BUREAU OF INVESTIGATIVE JOURNALISM (Nov. 3, 2012), http://www.thebureauinvestigates.com.

6 Louis Jacobson, *Do drone attacks comply with International Law,* http://www.politifact.com,July 1st 2010.

7 Andrew C. Orr, Note, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 CORNELL INT'L L.J. 729, 735 (2011).

8 White House, "President Obama's Google+ Hangout," (Jan 30, 2012).

9 John O. Brennan, *this Week with george Stephanopolous*, ABC, April 29, 2012.

10 "U.S. Airstrikes in Pakistan Called 'Very Effective,'" CNN, May 18, 2009.

According to Professor O'Connell, an American scholar, paradoxically, drone strikes have killed 750-1000 unintended victims for the sake of killing nearly 20 leaders of Al-Qaeda by October 2009 in Pakistan.[11]

on an analysis of the above competing stands, it can be concluded that the success of the drone strikes may seem welcoming when considered from a narrow military front but on a wider strategic plane reckoning with the human rights concerns, the disproportionate killing of innocent people while preying on its targets at a micro level, makes the drone strikes unpalatable and its success dismal. Hence, it reflects the blurred distinction between those targeted to be killed and those actually killed by the drone strikes raising questions on its sustainability and reliability.

II. CIA'S MOST PRIVATE AFFAIR: THE DRONE WARFARE

Jane Mayer stated in her article quoted:

> "The U.S. government runs two drone programs. The military's version, which is publicly acknowledged, operates in the recognized war zones of Afghanistan and Iraq, and targets enemies of U.S. troops stationed there. As such, it is an extension of conventional warfare. The C.I.A.'s program is aimed at terror suspects around the world, including in countries where U.S. troops are not based."[12]

Drone strikes by CIA[13] have been categorized into two-the "kill list" targeting and the "signature strikes". Strikes that target anyone on a "kill list", consisting of the details of high level al-Qaeda leader selected through a complex multilayered sanction procedure, requires ultimate approval of the president, Obama. The second type of operation is the "signature strike", under which CIA exercises the discretion to target any person suspected to be a militant without any official procedure being followed as such[14]. Further, the wall street journal report reveals that the CIA's Pakistan drone strike program was initially exempted from the "imminent threat" requirement until the end of combat operation in Afghanistan.[15] In this context it is to be noted that CIA drone strikes are conducted with high confidentiality,

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[11] Mary Ellen O'Connell, *Drones Under International Law*, WASH. UNIV. L. INT'L DEBATE SERIES 585, 590 (2010).

[12] Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.'s Covert Drone Program?*, THE NEW YORKER, http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer (Oct. 26, 2009).

[13] Central Intelligence Agency (CIA).

[14] Micha Zenko, *Transferring CIA drone strikes to the Pentagon,* http://www.cfr.org.

[15] *Id.*

unlike the military run programs subject to public scrutiny, and are classified as Title 50 covert actions, defined as "activities of the United States Government . . . where it is intended that the role . . . will not be apparent or acknowledged publicly, but does not include traditional . . . military activities."[16] And this aspect of the drone strike has triggered controversy about the legality of the procedure adopted in the undercover CIA program.

The drone attacks conducted by the CIA have been resented by the international community for their non-combatant status and it has been demanded that they be subjected to legal process for their unlawful killing of civilians amounting to murder. Vogel quoted that CIA operators are "unprivileged belligerent" akin to those militants against whom they are fighting[17]. In fact, intelligence personnel do not enjoy immunity like the military or armed forces for the same act and thus the CIA personnel could be prosecuted for murder under domestic law of any country in which they carry out the drone strike and could be prosecuted for violation of any U.S law as well. But the U.S through its political tactics has successfully evaded holding the CIA operators liable for the unlawful killings even under its domestic laws for killing its citizens, as in the 2011 incident in which CIA was absolved from legal prosecution despite having killed two innocent men held as hostages, one of whom was an American, in a drone attack.

As the operation is clandestine, the government cannot disclose anything about CIA's drone program. Hence, it has been pointed out in this regard that even a threshold of transparency cannot be expected from the CIA program.[18] Therefore, all other legal issues apart, drone strikes by U.S. can get over its major legal controversies only when the shroud of secrecy is raised and the operation is transferred to military to bring in transparency and accountability.

III. U.S. DRONE STRIKE: WHETHER STATE TERRORISM UNDER INTERNATIONAL LAW?

U.S has been criticized widely of carrying out its drone strikes at the cost of international law in justifying its stand by distorting and giving its own self-favoring interpretation of the various legal integral concepts of international law, thus, attacking the very soul of international law[19]. More

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16 *Id*.

17 Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39DENV.J.INT'L L. & POL'Y 101, 134-35 (2011); Gary Solis, *CIA Drone Attacks Produce America's Own Unlawful Combatants*, WASH.POST, Mar. 12, 2010, A17.

18 *Supra* note 13.

19 Rosa Brooks, *Drones and the International Rule of Law, 28 Journal of Ethics and International Affairs, pp. 83-103, 83, (2014).*

so, in a broader sense the drone strikes have become the bone of contention in the international arena owing to:

Firstly, the covertness of the CIA's drone strike program has resulted in skepticism about the legality of the key parameters constituting the targeted killing.

Secondly, the absence of any international instrument specifically dealing and laying down the necessary legal framework on the use of drone strikes renders its position under international law uncertain and contentious.

In an armed conflict with al-Qaeda: America's defence for use of drone strikes

U.S administration has astutely responded to the questions raised on the legal validity of drone program under international law affirming that it is in a continuous armed conflict with al-Qaeda and so drone strikes comply with the international rule of war as a measure of self-defense.

Obama at the National Defense University, Washington, DC[20] asserted:

> "We are at war with an organization that would kill as many Americans as it could if we did not stop them first. So, this is a just war- a war waged proportionally, as a last resort, and in self-defense"

Harold Koh, State Department Legal Advisor, at the American Society of International Law Annual Meeting on March 25, 2010, rationalized the use of drones stating:

> "it is the considered view of this Administration that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war." In his speech, Koh cited both domestic law (AUMF) and international law as proof that the United States is engaged in armed conflict with al-Qaeda, the Taliban, and "associated forces".[21]

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[20] Rune Ottosen, *Underreporting the legal aspects of Drone Strikes in international conflicts: a case study of how Aftenposten and The New York Times cover the drone strike,*Vol.13, No.2 conflict and communication online (2014).

[21] Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Address at the Annual Meeting of the American Society of International Law 14, *available at* http://www.state.gov/documents/organization/179305.pdf (Mar. 25, 2010).

Koh substantiated his argument enumerating the three legal foundations of the drone operation:

First, it is a continuing *war of self-defense* against an enemy that attacked America on September 11, 2001, and before, and that *continues to undertake armed attacks* against the United States.

Second, in Afghanistan, U.S. works in partnership with a consenting host government.

And third, the United Nations Security Council has, through a series of successive resolutions, authorized the use of *"all necessary measures"* by the NATO countries constituting International Security Assistance Force (ISAF) to fulfill their mandate in Afghanistan.[22]

The consistency of the U.S. drone strikes with International law will, hence, be examined and determined in light of the U.S. argument of use of drone strikes as a measure of self-defense, proportional to the threat posed, in the continuous war with al-Qaeda and the associated force.

An issue of Sovereignty, consent and intervention:

No controversies were raised on the first U.S. drone strikes carried out in Afghanistan with the authorization of Security Council but the subsequent extension of drone strikes to Yemen, Somalia and Pakistan were widely censured and strongly protested especially in Pakistan on the ground that drone strikes amounted to state intervention and breach of sovereignty. Ben Emmerson, U.N. Special Rapporteur on counter-terrorism and human right stated that:

> "the U.S. drone campaign "involves the use of force on the territory of another state without its consent, and is therefore a violation of Pakistan's sovereignty."

The Pakistan judiciary also condemned the drone attacks in the *Peshawar case* and ruled:

United States drone strikes on targets in Pakistan illegally breached national sovereignty and were in "blatant violation of Basic Human Rights" and provisions of the Geneva Conventions.

"That the drone strikes by the CIA & US Authorities, are *blatant violation of Basic Human* Rights and are against the UN Charter, the UN

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[22] *Id.*

General Assembly Resolution, adopted unanimously, the provision of Geneva Conventions thus, it is held to be a *War Crime*."[23]

The court further held that drone strikes illegally breached Pakistan's sovereignty and ordered the government to "use force" to cease the drone strike within the sovereign territory of Pakistan.

Inspite of all these oppositions U.S. continues its drone strike defiantly alleging tacit consent from Pakistan to drone strikes. Further stating that it carries out counter terrorism activities only in the territories of the countries which consented to it or "unwilling or unable" to fight against terrorist groups operating in their territory.[24]

Moreover, U.S has intervened in the internal affairs of Pakistan thus risking the exacerbation of national armed struggle by targeting and killing vast majority of low-level suspected militants who were mostly insurgents rather than international terrorist.[25]

Drone strikes, jus ad belum and the right of self-defense under the U.N Charter

Drone strikes constitute extraterritorial use of force against the non-state actors. In this regard the justification forwarded by the U.S. is that the use of force is the lawful exercise of its right of individual or collective self defense, one of the two main exceptions under chapter VII to the general prohibition on the use of force under article 2(4) of the U.N. Charter.[26]

The restriction under the Charter on the use of force is the central pillar of the concept of *jus ad bellum* which provides the threshold restriction on the recourse to force. *Jus ad bellum* recognizes the use of force by a state when it is in conformity with the requisites of right of self-defense under article 51 of the Charter:

> "Nothing in the present Charter shall impair the inherent right of collective or individual self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security."

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[23] Andrew Buncombe, 9 May 2013, "Pakistani court declares US drone strikes in the country's tribal belt illegal", *The Independent*.

[24] See Rosa Brooks , *supra* note 19 at 90.

[25] Micha Zenko, *Reforming U.S. Drone Strikes Policies,* Council Special Report No. 65

[26] Article 2(4) of UN charter states:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

The provision contemplates that an armed attack should pre-exist the resort to force as a defensive move and no measures should have been taken by the Security Council in respect of that armed attack.

The defensive stance of America pertaining to terrorist attack of the scale of 9/11 falling within the meaning of an armed attack under article 51 of the Charter remains conflict-ridden as armed attack is not defined either under the Charter or any treaty. So it is pertinent to determine whether terrorist attack qualify as an armed attack under international law with the help of judicial interpretation and juristic writings.

In *Nicaragua case*[27], the court affirmed that only acts attributable to a state can constitute an "armed attack" and also assistance to rebels in the form of the provision of weapons or logistical or other support by a state amount to armed attack.

However, labeling terrorist attacks of high magnitude, like 9/11 attack, as armed attack still continues to be crossroads of contradicting views.

Addressing this issue on the connotation of armed attack, America hinged its argument on the Security Council resolution 1368 passed a day after the 9/11 terrorist attack which at the outset condemned the attack as "such acts, like any act of international terrorism, constitute "a threat to international peace and security."[28] And in the subsequent resolution of 1373 it also unequivocally recognized ""the inherent right of individual or collective self-defense in accordance with the Charter."[29]

And this move by the Security Council is considered to have brought a paradigm shift in the conception of armed attack, thus, implying that armed attack also include terrorist attack.

To review the vindication invoking the principle of self-defense, the action has to be assessed on the basis of the twin doctrines of necessity and proportionality laid down in the *Caroline test* also as the basis of pre-emptive or anticipatory self-defence.[30]

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[27] International Court of Justice (ICJ), Case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua* v. *United States of America*), Judgment, 27 June 1986, para. 195.

[28] UN Security Council, Resolution 1368(2001), September 12, 2001, UN document S/1368(2001).

[29] UN Security Council, Resolution 1373(2001), September 28, 2001, UN document S/RES/1373 (2001).

[30] "Lawful right of self-defense exists where there is a 'necessity of self-defence, instant, overwhelming, and leaving no choice of means, and no moment for deliberation', and also, 'the actions must be proportional, as the acts justified by the necessity of self-defense

Alston, the U.N special Rapporteur has, further, insisted on seeking immediate approval of the Security Council for the strikes, as a measure of self-defense to be lawful which U.S has defiantly flouted through its stealthy program.

U.S's actions which has continued for over a decade now hardly seems to be satisfying either the requirement of 'imminence of threat' as a stimulus for attack under the doctrine of necessity or the requirement of proximity of action and purpose under the rule of proportionality, given the extent of civilian casualties.

Jus in bello and U.S drone strikes

Jus in bello or the rules of war govern the actions of the states and protect the individuals against excessive use of violence by hostile powers in a conflict situation. For a state action under *jus in bello* to be valid, there should be an armed conflict as contemplated under Geneva Convention and it should conform to the fundamental rules of proportionality, precautionary in attack, distinction and the weapons prohibited and considered unlawful under IHL should not be employed.

An assessment of the drone program with the available little public information indicates that America's adherence to the cardinal working principles of *jus in bello* has been murky as it has resulted in the disproportionate death and damage to civilians amounting to indiscriminate attack violating rule of proportionality[31]. This reflects, the failure of the program in meting out humane treatment to those not taking part in the conflict and civilians and distinguishing them from the legitimate targets, persons actively participating in the conflict or combatant[32]. Further the adoption of signature strikes to strike suspected militants basing on rudimentary behavioral pattern has resulted in blatant violation of rule of distinction.

Drone attacks: extra legal arbitrary execution under international human rights law

Kofi Annan quoted:

> "We should all be clear that there is no trade-off between effective action against terrorism and protection of human

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must be limited by that necessity, and kept clearly within it.' Letter dated 27 July 1842 from Mr Webster, US Department of State, Washington, DC, to Lord Ashburton.

[31] Rule 14 of the ICRC's study of customary international humanitarian law: Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.

[32] *See* common Article 3 of Geneva Convention.

> rights… In the war against terrorism, human rights norms are not respected by many states but if great powers become the violators of such norms then it will open doors to "unrestricted wars."[33]

Human rights law, centered around right to life and liberty and the corollary rights guarantying the former, is of inexhaustive, universal application. Irrespective of the situation, it is firmly established under international human rights law and humanitarian law that the right to life of an individual is absolute and cannot be compromised upon in any situation of emergency or war without just reasons.

The International Covenant on Civil and Political Rights provides for right to life under Article 6 and states that: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

And the arbitrary deprivation of life, ultravires the law, by a state constitutes extrajudicial killing.

Amnesty International puts that:

> "International law permits the use of lethal force in very restricted circumstances. But from the little information made available to the public, U.S. drone strike policy appears to allow extrajudicial executions in violation of the right to life, virtually anywhere in the world"[34]

IV. CONCLUSION

It can be concluded from the above discussion that the U.S unilateral drone strike policy has reaped more political nuances than military success. As it is rightly said *"every cloud has a silver lining*", the dawn of a just war against terrorism can also be heralded by doing away with the repulsive *unilateral* drone strikes and carving out an international legal framework fostering participation, transparency, communication and allegiance among the states and ensuring prevalence of rule of law.

"An organized adversary power can be fought only by concerted unified efforts and not by monopolized programs."

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[33] Kofi Annan, UN Secretary General, in his address to the UN Security Council meeting on counterterrorism measures, New York, January 18, 2002, SG/SM/8105SC/7277 21 January 2002, http://www.unis.unvienna.org/unis/pressrels/2002/sgsm8105.html.

[34] *Killing outside the bounds of law,* www.amnestyusa.org.

INTERNATIONAL ANTI-MONEY LAUNDERING REGIME AND INDIA

—*Mr. Owais Hasan Khan*

Abstract An effective and meaningful international money laundering regime requires three basic ingredients: international norms building, putting in place firm legal and enforcement foundation and creating close interrelations with different national systems so that international norms are incorporated into domestic legal system. In this paper, third ingredient to the building of effective international money laundering regime shall be analysed in reference to India.

Although India has responded well and incorporated and harmonised international money laundering regime into its domestic legal system; still lot has to be done in its proper implementation.

Keywords: - Money Laundering, Black money, Anti-money laundering regime, Basle Regulations, United Nations Convention, Vienna Convention.

I. INTRODUCTION

The menace of money laundering has an international dimension. And it involves series of complex transactions covering many national jurisdictions with the aim of obscuring the origin of the illegal money and integrating it in legitimate financial market.

The International dimension of money laundering was evident in a study of Canadian money laundering police files. They revealed that over 80 percent of all laundering schemes had an international dimension.[1] Generally

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1 "Operation Green Ice" (1992) showed the essentially transnational nature of modern money laundering.

the jurisdictions which got weak financial regulatory mechanism are used as vehicle for layering the illegal money.

Many international legal regimes have been brought in place to combat the menace of money laundering. The earliest in 1988 with two important initiatives: The Basel Committee on Banking Regulations and Supervisory Practices 1974 and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, followed by forty point recommendation by Financial Action Task force in 1990.

However, objective of these international initiatives depends largely on how various member nations incorporate them in their domestic jurisdiction, along with harmonising and developing a sense of cooperation in regard to securing the common object of combating money laundering.

The present paper analyse the response of India to international anti money laundering regime in form of various legislative, policy and institutional initiatives.

Money laundering is a process through which the existence, source and application of money derived from illegal and criminal activities is concealed. And thereby it is disguised to make it appear as legitimate.

Money laundering as a term is of recent origin and was first time coined and used by British Newspaper 'Guardian'. This use was in reference to US President Richard Nixon's "Committee to re-elect the President" that moved illegal campaign contributions to Mexico, and then brought the money back through a company in Miami.[2] However, its first use in judicial context came in 1982 in America in United States v. $4,255,625.39.[3]

As defined by Black's Law Dictionary, "money laundering is a term used to describe investment or other transfer of money from the racketing; drug transactions and other illegal source which cannot be traced."

As the term suggests in the process of money laundering, the 'black money' (money received from illegal and criminal activities) is laundered or washed so as to make it 'white money' or 'legitimate money'. It is the funnelling of cash or other funds generated from illegal activities through legitimate financial institutions and businesses to conceal the source of the funds.

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2 Incident is known as US Watergate Scandal, 1973.

3 551 F Supp 314 (SD Fla 1982).

Article 1 of EC Directive defines the term 'money laundering' as "the conversion of property, knowing that such property is derived from serious crime, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the committing such an offence or offences to evade the legal consequences of his action, and the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from serious crime".[4]

On similar lines Robinson defines money laundering as a process whereby "illegal, or dirty, money is put through a cycle of transactions, or washed, so that it comes out the other end as legal, or clean money."

In other words, the existence and source of illegally obtained money can be disguised through the process of successive transactions and deals in order that those same funds can eventually be made to appear as legitimate income.

A. Processes and Techniques of Money laundering

The crime of money laundering is done through a series of clandestine and deceptive transactions. Unlike most of other crimes money laundering is not a single time offense but it is done through the chain of transactions which ultimately converts black money into white money. There are three basic steps which are involved in money laundering transactions. The first being 'placement' under which money received from illegal sources are introduced in legitimate financial institutions. This is physical disposal of the ill-gotten proceeds which is primarily done to make the funds more liquid. For example, if cash is converted into a bank deposit, it becomes easier to transfer and manipulate.[5]

Placement is followed by 'layering' which embroils a complex layers of financial transactions which aim at disguising the illegal money so that it could integrate in the legitimate market by dispersing and camouflaging the illegal money. Different techniques like correspondent baking, loan at low or no interest rates, money exchange offices, back-to-back loans, fictitious sales and purchases, trust offices, and recently the Special Purpose Vehicles (SPVs) are utilized for the purpose of laundering the money.

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4 *See* European Council Directive 91/308/EEC of 10 June 1991, Prevention of the use of the financial system for the purpose of money laundering. (October 22,2015, 16:10 hours) http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31991L0308.

5 Australian Transaction Reports and Analysis Centre, Austrian Government, Introduction to money laundering, Australian Transaction Report and Analysis Centre. Australian Government Official Website (October 22,2015, 16:15 hours) http://www.austrac.gov.au/elearning/pdf/intro_amlctf_money_laundering.pdf.

Final stage of money laundering under which illegal money is finally blended in the legitimate market is known as 'integration'. Subsequent thereto, ill-gotten money which is now layered in the legitimate financial institutions are pulled out and invested in new form of businesses and enterprises.

Although all money laundering acts is done through these three stages however it is not necessary every time. There have been circumstances where only two of three stages have been used for money laundering purpose. For example, The Spence Network case and The Douglas case.[6]

There are also various techniques through which ill gotten money is laundered. Depending upon the circumstances, various modes can be chosen through which illegal money can be integrated in the legitimate financial market. Techniques includes like ***'smurfing'*** by which cash is broken into smaller deposits of money, used to defeat suspicion of money laundering and to avoid anti-money laundering reporting requirements. Or operationalising a *'cash-intensive businesses'* which typically is involved in receiving cash which is deposited in accounts having both legitimate and criminally derived cash, claiming all of it as legitimate earnings. Best example of this is a service business as it involves no variable costs.

Similar is the investment in real estate and money paid to buy chips at Casinos. The real estate may be purchased with illegal proceeds, then sold. The proceeds from the sale appear to outsiders to be legitimate income. In case of Casinos, an individual will walk in to a casino with cash and buy chips, play for a while and then cash in his chips, for which he will be issued a cheque. The money launderer will then be able to deposit the cheque into his bank account, and claim it as gambling winnings.

Another technique for money laundering is called as *'round tripping'* whereby money is deposited in a controlled foreign corporation offshore, preferably in a tax haven where minimal records are kept, and then shipped back as a Foreign Direct Investment.

II. INTERNATIONAL LEGAL REGIME ON MONEY LAUNDERING

Before 1970s and 80s all actions preventing the banking system from being used for criminal ways have largely been undertaken by judicial and regulatory agencies at national level. However, with the gradual integration of financial systems of community of nations and growth to international dimension of organised criminal activities, particularly in respect of

[6] Australian Transaction Reports and Analysis Centre, *supra*, at page 5.

narcotic drugs and terrorist financing, has led to all-around initiatives at the international level to combat the menace of money laundering.

The International dimension of money laundering was evident in a study of Canadian money laundering police files. They revealed that over 80 percent of all laundering schemes had an international dimension. More recently, "*Operation Green Ice*"[7] (1992) showed the essentially transnational nature of modern money laundering.

One of the earliest such initiatives was undertaken by the Committee of Ministers of the Council of Europe in June 1980. In its report[8] the Committee of Ministers concluded that "... the banking system can play a highly effective preventive role while the cooperation of the banks also assists in the repression of such criminal acts by the judicial authorities and the police".

Subsequently, after Basle Committee on Banking Regulation and Supervisory Practices 1974, the issue of how to prevent laundering the proceeds of crime through the banking and financial system of nations has attracted increasing attention from legislative authorities, law enforcement agencies and banking supervisors in a number of countries.

Some of the important initiatives undertaken at international level regarding money laundering and criminal misuse of banking and financial system are discussed briefly below:

A. Basle Committee on Banking Regulations and Supervisory Practices (1974)

Basle Committee on Banking Regulations and Supervisory Practices is one of the first international legal instruments dealing with money laundering at international plane.

The committee basically provides a forum for regular cooperation on banking supervisory matters. Its objective is to enhance understanding

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[7] In Operation Green Ice, law enforcement from Italy, Colombia, the United Kingdom, Canada, Spain, Costa Rica, the Cayman Islands, and the United States co-operated together to expose the financial infrastructure of the international mafia. *See* Ronald J. Ostrow and William D. Montalbano, Drug Agents Break Global Money-Laundering System, Los Angeles Times, September 29, 1992 (October 22,2015, 16:20 hours) http://articles.latimes.com/1992-09-29/news/mn-317_1_money-laundering-system.

[8] *See* Measures against the transfer and safeguarding of funds of criminal origin. Recommendation No. R(80)10 adopted by the Committee of Ministers of the Council of Europe on 27th June 1980.

of key supervisory issues and improve the quality of banking supervision worldwide.

The Basel Committee on Banking Supervision was established as the Committee ON Banking Regulations and Supervisory Practices by the central-bank Governors of the Group of Ten countries at the end of 1974 in the aftermath of serious disturbances in international currency and banking markets (notably the failure of Bankhaus Herstatt in West Germany). The first meeting took place in February 1975 and meetings have been held regularly three or four times a year since.[9]

Basle Committee intents to deals in all aspects of laundering through the banking system, i.e. the deposit, transfer and/or concealment of money derived from illicit activities whether robbery, terrorism, fraud or drugs. It seeks to do this in three principal ways: by exchanging information on national supervisory arrangements; by improving the effectiveness of techniques for supervising international banking business; and by setting minimum supervisory standards in areas where they are considered desirable.

The Committee's work is organised under four main sub-committees[10] which includes The Standards Implementation Group, The Policy Development Group, The Accounting Task Force and The Basel Consultative Group.

B. Prevention of Criminal Use of the Banking System For The Purpose Of Money-Laundering (December 1988) (Vienna Convention)

Prevention Of Criminal Use Of The Banking System For The Purpose Of Money-Laundering was formulated to check the criminal use of banking and other financial institutions. Frequently banks are unwittingly used as intermediaries for the transfer or deposit of funds derived from criminal activity.

It seeks to prevent banking system from being criminally misused in money laundering by the application of the four basic principles[11]. It includes firstly, *customer identification* to ascertain the true identity of

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[9] Bank of International Settlements, History of the Basel Committee, Bank of International Settlements Official Website (October 22,2015, 16:30 hours) http://www.bis.org/bcbs/history.pdf.

[10] See official website of Bank for International Settlements, (October 22, 2015, 16:30 hours) About Basel Committees. http://www.bis.org/bcbs/about.htm.

[11] *See* text of Prevention Of Criminal Use Of The Banking System For The Purpose Of Money-Laundering, Bank of International Settlements Official Website (October 22,2015, 16:35 hours) http://www.bis.org/publ/bcbsc137.pdf.

the customer and to prevent any criminal gaining entry into banking system. Further the exercise of proper identification prevents the creation of fictitious and fake accounts which are the main gateway through which black money is integrated in the economy.

It mandates all banks to have in force effective policy, procedure and standards to ascertain the identity of every customer. And it should also be made explicit that no banking transaction shall be conducted unless and until proper identity of the customer is established.

Secondly, *compliance with law,* which requires that domestic laws and regulations must be adhered by banks and financial institutions. No bank should commence its business before obtaining and complying with the entire procedural and legal requirements put in place by domestic legislations. It is further expected from state that it should keep it national legislation regarding banking in conformity with the international standards.

Thirdly, *cooperation with law enforcement authorities* under which banks are obliged to keep close cooperation with the domestic law enforcement authorities and should assist them in combating criminal activities done through banks. Where banks become aware of facts which lead to the reasonable presumption that money held on deposit derives from criminal activity or that transactions entered into are themselves criminal in purpose, appropriate measures, consistent with the law, should be taken, for example, to deny assistance, sever relations with the customer and close or freeze accounts

Fourthly, *adherence to the statement* as set out in Prevention Of Criminal Use Of The Banking System For The Purpose Of Money-Laundering is required from all the banks and financial institutions. Such adherence can be achieved by the banks by incorporating all these basic principles in their respective policy framework and by nations through formulating there domestic laws in line with this international standard.

The Statement thus sets out to reinforce existing best practices among banks and, specifically, to encourage vigilance against criminal use of the payments system, implementation by banks of effective prevention, safeguards and cooperation with law enforcement agencies.

C. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)

This Convention provides comprehensive measures against drug trafficking, including provisions against money laundering and the diversion of

precursor chemicals. The peculiarity of this convention is that it recognises the nexus between money laundering and other organised crime like illicit trafficking in drugs.

UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances is one of the three major drugs control treaties currently in force, other being 'Single Convention on Narcotic Drugs' of 1961 and the 'Convention on Psychotropic Substances' of 1971.

The treaty required the signatories to criminalize the laundering of drug money, and to confiscate it where found. All countries ratifying agree to introduce a comprehensive criminal law against laundering the proceeds of drug trafficking and to introduce measures to identify, trace, and freeze or seize the proceeds of drug trafficking. Based on the convention many countries have framed their national legislations.

D. 2.4 Global Programme against Money Laundering, 1997 (GPML):

The Global Programme against Money Laundering (GPML) was established in1997 in response to a mandate arising from the 1988 Convention, which Member States were required to criminalize money-laundering related to the proceeds of illicit trafficking in drugs and to put legal frameworks in place to facilitate the identification, freezing, seizing and confiscation of the proceeds of crime.[12]

The main and the exclusive objective of the programme were to strengthen the ability of Member States to fight money laundering and to assist them in depriving persons of the proceeds of their criminal activity.[13]

The main strategy followed by the GPML to combat money laundering is through technical cooperation and research. Technical cooperation will focus on assisting legal, financial and law enforcement authorities in developing the necessary infrastructure to fight money-laundering.

The research activity will continue to focus on work that adds to the body of information on contemporary issues relevant to money-laundering, the maintenance and improvement of relevant databases, the analysis of data

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[12] United Nations Office on Drugs and Crime, United Nations Global Programme against Money Laundering, Proceeds of Crime and the Financing of Terrorism (GPML) Official Website of United Nations Office on Drugs and Crime (October 22,2015 16:40 hours) https://www.unodc.org/documents/evaluation/indepthevaluations/Indepth_evaluation_of_the_United_Nations_Global_Programme_against_Money_Laundering_Proceeds_of_Crime_and_the_Financing_of_Terrorism.pdf.

[13] *Ibid.*

on specific aspects of money-laundering and the provision of logistic support for technical cooperation activities at the country level.[14]

With the help of these strategic tools GPML tends to create higher awareness among public and private sector on the key issues of money laundering and ways to combat it. Building anti-money laundering infrastructure of international standards within all member countries and developing technical skills of the person engaged in judicial, financial, law enforcement and regulatory sectors.[15]

E. 2.5 Financial Action Task Force (FATF) and its Recommendation on Money Laundering and Terrorist financing (1989)

The establishment of FATF is the high water mark in the area of anti money laundering regime at international level. Financial Action task force was created as inter-governmental body in 1989 under the aegis of the EU G8 group. The main purpose of FATF to generate the necessary political will to bring about legislative and regulatory reforms for the development and promotion of national and international policies to combat money laundering and terrorist financing.

In 1990 FATF come up with forty recommendations to combat the misuse of financial systems by persons laundering drug money. However, it was revised in 2001 and nine more recommendations were added to it.

The revised Forty Recommendations now apply not only to money laundering but also to terrorist financing, and when combined with the Eight Special Recommendations on Terrorist Financing provide an enhanced, comprehensive and consistent framework of measures for combating money laundering and terrorist financing.[16]

These 40 recommendations can be divided into three broad categories:

Legal: What law-making bodies need to do to create an overall legal framework to combat money laundering? For example, the first legal recommendation was that governments must criminalize money laundering in its own right, and not merely in connection with drug trafficking.

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[14] *Ibid.*
[15] *Ibid.*
[16] *See* FATF 40 Recommendations, Financial Action Task force Publication.

Financial Regulatory: How governments should regulate their financial systems? An important example is that governments should require financial institutions to report suspicious activity to authorities.

International Cooperation: How governments should work together. For example, they should collaborate and exchange information in criminal matters and enter into bilateral treaties to facilitate seizure, forfeiture and other actions.[17]

In October 2001 the FATF expanded its mandate to deal with the issue of the financing of terrorism, and took the important step of creating the Nine Special Recommendations on Terrorist Financing. It endorsed that each country should take immediate steps to ratify and to implement fully the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism along with criminalize the financing of terrorism, terrorist acts and terrorist organizations as predicate offences and to implement measures to freeze without delay funds or other assets of terrorists, those who finance terrorism and terrorist organizations in accordance with the United Nations.

Recommendation also suggested that each country should also adopt and implement measures, including legislative ones, which would enable the competent authorities to seize and confiscate property that is the proceeds of terrorism and afford another country the greatest possible measure of assistance in connection with criminal, civil enforcement and administrative investigations, inquiries and proceedings relating to the financing of terrorism, terrorist acts and terrorist organizations.

It further suggested that Countries should take measures to require financial institutions, including money remitters, to include accurate and meaningful originator information (name, address and account number) on funds transfers and related messages that are sent. And should have measures in place to detect the physical cross-border transportation of currency and bearer negotiable instruments, including a declaration system or other disclosure obligation.[18]

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[17] International Federation of Accounts publication, Anti-Money Laundering (2nd ed. March 2004) available at http://www.pab.gov.jm/docs/anti-money-laundering-2nd%20Edition%20 2004.pdf.

[18] Financial Action Task Force, FATF IX Special Recommendation, October 2001, (October 22, 2015, 16:50 hours), http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20 Standards%20 %20IX%20Special%20Recommendations%20and%20IN%20rc.pdf.

III. REGIONAL AND SUB-REGIONAL ANTI-MONEY LAUNDERING INITIATIVES

Other than these international legal initiative combating money laundering there are also some regional and sub-regional anti-money laundering initiatives. These include Asia-Pacific Group on Money Laundering (APG) which is an autonomous and collaborative international organisation founded in 1997 in Bangkok, Thailand. It consists of 41 member countries and a number of international and regional observers including the United Nations, IMF and World Bank. The APG is closely affiliated with the FATF based in the OECD Headquarters at Paris, France. One of the important objectives of APG is to assess compliance by its members with the global AML/CFT standards through a robust mutual evaluation programme.[19]

European Union has also formulated scores of legal mechanism to combat money laundering. Important among them are Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime[20], Council common position on the application of specific measures to combat terrorism, EC Directive on Prevention of the use of the Financial System for the Purpose of Money Laundering in 1991 and etc.

Certain private initiatives are also taken in certain quarters. One of the important private initiative came from Transparency International (TI), a Berlin based NGO in collaboration with 11 International Private Banks.[21]

This initiative gave eleven principles as a measure against money laundering, corruption and other serious crimes done through financial institutions. They are knows as Global Anti-Money-Laundering Guidelines for Private Banking or the Wolfsberg AML Principles. The Wolfsberg Principles are a non-binding set of best practice guidelines governing the establishment and maintenance of relationships between private bankers and clients.[22]

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[19] *See* official website of Asia-Pacific Group on Money Laundering (APG) http://www.apgml.org/.

[20] Also known as Strasbourg convention, intended to extend the provisions of international cooperation against the activities of international organized criminality in general beyond the area of drug trafficking.

[21] ABN AMRO Bank N.V., Bank of Tokyo-Mitsubishi Ltd., Barclays Bank, Citigroup, Credit Suisse Group, Deutsche Bank AG, Goldman Sachs, HSBC, J.P. Morgan Private Bank, Santander Central Hispano, Société Générale, and UBS AG.

[22] *See* Kris Hinterseer, The Wolfsberg Anti-Money Laundering Principles, Journal of Money Laundering Control, Vol. 5:1 2001.

IV. INDIA'S RESPONSE OF INTERNATIONAL MONEY LAUNDERING REGIME

Integration of India with global economy started in 1990s with the structural adjustment of India's economy. Such structural adjustment was the result of globalisation, privatisation and liberalisation of Indian economic setup. With this movement towards global economic and financial integration India also became vulnerable to the international money laundering activities.

International Narcotics Control Strategy Report by Bureau for International Narcotics and Law Enforcement Affairs emphasizes India's Vulnerability to money-laundering activities in following words:

> "India's emerging status as a regional financial centre, its large system of informal cross-border money flows, and its widely perceived tax avoidance problems all contribute to the country's vulnerability to money laundering activities. Some common sources of illegal proceeds in India are narcotics trafficking, illegal trade in endangered wildlife, trade in illegal gems (particularly diamonds), smuggling, trafficking in persons, corruption, and income tax evasion. Historically, because of its location between the heroin-producing countries of the Golden Triangle and Golden Crescent, India continues to be a drug-transit country."[23]

Legislative enactment in India regarding anti money laundering is Prevention of Money laundering Act 2002 (PMLA) which exclusively deals with the issue of money laundering. However, even before PMLA there were many legislative enactments which deals with money laundering in one way or the other, such as The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, The Income Tax Act, 1961, The Benami Transactions (Prohibition) Act, 1988, The Indian Penal Code and Code of Criminal Procedure, 1973, The Narcotic Drugs and Psychotropic Substances Act, 1985 and The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988.

More recently, Prime Minister Narendra Modi led NDA government has also taken number of initiatives in regard to black money and money laundering. Most significant is the **Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015** which is enacted to account for and tax foreign unaccounted income and undisclosed assets of tax residents of India.

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[23] *See* International Narcotics Control Strategy Report dated February 29, 2008.

The two most significant features of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 are to charge 30% tax with a penalty three times the tax due on undisclosed foreign income and assets along with rigorous imprisonment of between three to ten years.

The 2015 Act also provided for a one time compliance window to the holders of unaccounted income and assets abroad.[24] The compliance window remained open from 1st July 2015 to 30 September 2015[25] and those who made disclosures under compliance window were exempted from prosecution after paying the applicable taxes[26] and penalty[27] thereof. Under compliance window only 638 declaration amounting to Rs. 3,770 crores were made.

Some of the important legislative enactment dealing with Anti money laundering are discussed as under:

A. Criminalisation of Money Laundering enactments

The foundational mandate of all international AML instrument is the idea of criminalising the act if money laundering. Such criminalisation demands that money laundering should be branded as a criminal offence and should be dealt with accordingly.

India has criminalised money laundering under two enactments i.e. the **Prevention of Money Laundering Act, 2002** (PMLA) as amended in 2005 and 2009, and the **Narcotic Drugs and Psychotropic Substances Act, 1985** (NDPS Act) as amended in 2001. NDPS is specific enactment dealing with the narcotic drugs and it's financing and proceeds. Whereas, PMLA is broader in its scope and it deals with all the aspect of money laundering.

PMLA and NDPS Acts were the results of two UN Conventions i.e. Vienna and Palermo Conventions.[28] These conventions requires making

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[24] *See* Chapter VI of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 from Sec. 59 onwards.

[25] *See* Circular No. 12 of 2015 F. No. 142/18/2015-TPL issued by Government of India Ministry of Finance Department of Revenue Central Board of Direct Taxes (TPL Division) (November 02, 2015 13:08 hours) http://www.incometaxindia.gov.in/news/explanatory-circular-on-the-tax-compliance-under-chapter-vi-of-the-black-money-03-07-2015.pdf.

[26] As per Sec. 60 of Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 tax payable would be 30% of the value of such disclosed asset on the date of the commencement of the Act.

[27] As per Sec. 61 of Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 in addition to tax paid under Sec. 60 person would be liable to the penalty at the rate of one hundred percent of such tax.

[28] Also known as United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and Palermo Convention against Transnational Organised Crime

activities such as conversion or transfer of criminal proceeds for specific purposes; concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to criminal proceeds etc, a criminal offence.

Sec 3 of PMLA and Sec 8A of NDPS Act accordingly provides as follows:-

Section 3: "Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money laundering".[29]

Similarly **Sec 8A** of NDPS Act provides

No person shall

(a) convert or transfer any property knowingly that such property is derived from an offence committed *under this Act or any other corresponding law of any country or from an act of participation in such offence, for the purpose of concealing or disguising the illicit origin of the property or to assist any person in the commission of an offence or to evade the legal consequences; or*

(b) conceal or disguise the true nature, source, location, disposition of any property knowing that such property is derived from an offence committed under this Act or under any other corresponding law of any other country; or

(c) Knowingly acquire, possess or use any property which was derived from an offence committed under this Act or under any other corresponding law of any other country."[30]

The preamble of the PMLA provides that enactment aims to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering.[31] The Act comprises of X chapters, 75 Sections, and a Schedule and it extends to whole of India except the State of J&K.

–TOC Convention.

29 Prevention of Money Laundering Act, Sec. 3 (2002).

30 Narcotic Drugs and Psychotropic Substances Act, Sec 8A (1985).

31 Preamble of the said Act also refers to the Political Declaration and Global Programme of Action annexed to the resolution S-17/2 of General Assembly of the United Nations at its Seventeenth special session on 23rd February 1990, as well as the Sessions on 8th, 9th, and 10th June 1998 which calls upon the Member States to adopt national money-laundering (rather it should be anti-money-laundering) legislation and programme.

As defined by Sec 3 Offence of money-laundering means the projection of tainted money (proceeds of the crime) as untainted either directly or indirectly or assisting in such act knowingly or knowingly is a party or is actually involved in such process or activity. The Punishment prescribed for the offence of money laundering in cases of money obtained from normal crime is rigorous imprisonment for a term which shall not be less than 3 years but which may extend to 7 years and shall also be liable to fine which may extend to five lakh rupees.[32]

Further, Sec 5 provides for the confiscation of property involved in money laundering. It says if the Director has reason to believe that a person is in possession of property involved in money-laundering or he is dealing in such property, the Director is empowered to attach the property.[33]

For the offences under the NDPS Act is concerned the Director is empowered to attach the laundered property in drug related cases soon after the case regarding offence is sent by the police officer or a complaint is filed before the court for taking cognizance of the offence. However, in other cases some safeguard is provided as to attachment can only be made only when the investigation is complete and a report is forwarded under Section 173 of Criminal Procedure Code.

Further, the also Act prescribes for formation of a three member Adjudicating Authority for dealing with matters relating to attachment and confiscation of property under the Act. The Adjudicating authority upon receipt of complaint or information of an offence under the Act issues a show cause notice under the Act as to why said property not be declared to be property involved in money-laundering.[34]-[35]

B. Criminalisation of Terrorist Financing

Terrorist financing and drug trafficking are the two areas on which black money or laundered money is widely used. Therefore, in regard to both these offences special and exclusive legislations have been formulated. Some of major anti-terrorist financing legislations are Unlawful Activities (Prevention) Act, 1967 (UAPA) as amended by the Unlawful Activities (Prevention) Amendment Act, 2004 and the Unlawful Activities (Prevention) Amendment Act, 2008 and National Investigation Agency Act, 2008.

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[32] Prevention of Money Laundering Act, Sec.4 (2002).

[33] Prevention of Money Laundering Act, Sec.5 (2002).

[34] Section 6 Prevention of Money Laundering Act provides for composition and powers of such authority.

[35] *See* Ss. 6-8 of Prevention of Money laundering Act.

In regard to criminalisation of terrorist financing India has formulated legislation even before the initiative taken at the international level. First major international initiative against terrorist financing came in the form of International Convention for the Suppression of the Financing of Terrorism (FT Convention) on 8 September 2000. It was followed by FATF nine special recommendations on money laundering and terrorist financing in October 2002.

However, with 2004 and 2008 amendments Terrorist financing law of India was harmonised with the international standards.

The UAPA criminalises terrorist financing according to its sections 17 and 40. Sec. 17 criminalises raising of funds which are intended to be used for terrorist financing. It says *"Whoever, in India or in a foreign country, directly or indirectly, raises or collects funds or provides funds to any person or persons or attempts to provide funds to any person or persons, knowing that such funds are likely to be used by such person or persons to commit a terrorist act, notwithstanding whether such funds were actually used or not for commission of such act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine".*

Similarly in line with Sec.17, Sec 40 criminalise raising of funds for a terrorist organisations. It says

> *"A person commits the offence of raising fund for a terrorist organisation, who, with intention to further the activity of a terrorist organisation, (a) invites another person to provide money or other property, and intends that it should be used, or has reasonable cause to suspect that it might be used, for the purposes of terrorism; or (b) receives money or other property, and intends that it should be used, or has reasonable cause to suspect that it might be used, for the purposes of terrorism; or (c) provides money or other property, and knows, or has reasonable cause to suspect, that it would or might be used for the purposes of terrorism. A person, who commits the offence of raising fund for a terrorist organisation under sub-section (1), shall be punishable with imprisonment for a term not exceeding fourteen years, or with fine, or with both".*

National Investigation Agency Act, 2008

The NIA Act has resulted in the establishment of a federal investigating agency known as the National Investigation Agency (NIA) for investigation and prosecution of offences under the Acts mentioned in the Schedule to this Act, which are Atomic Energy Act, 1962, Unlawful Activities (Prevention) Act, 1967, Anti-Hijacking Act, 1982, the Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982, SAARC Convention (Suppression of Terrorism) Act, 1993, the Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002, the Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005 and offences under Chapter VI of the Indian Penal Code (ss.121 to 130 (both inclusive)); and Sections 489-A to 489-E (both inclusive) of the Indian Penal Code.

C. Institutional/ Enforcement Mechanism

For the purpose of combating money laundering, Government of India had established certain institutions. Objective of such institutions is mostly to regulate the banking activity and to seek the proper implementation of the legislation dealing with the issue of money laundering.

i. Reserve Bank of India

Reserve Bank of India is one of the oldest financial regulatory authorities of India which was established in 1935 in accordance with Reserve Bank of India Act 1934. The main purpose of RBI is to control monetary policy and to supervise large segment of financial institutions, including commercial banks, co-operative banks, non-banking financial institutions and various financial markets. Such supervision is done through the help of Board of Financial Supervision (BFS).[36]

In regard to Anti-money laundering, RBI issues circular and notifications as a guidance for different banks in India. By virtue of Notification GSR.444 (E)[37] all banks are required to mandatory comply with the RBI guidelines and notifications.

This notification was issued on 1 July 2005 by the Central Government of India regarding The Prevention of Money-Laundering (Maintenance of Records of the Nature and Value of Transactions, the Procedure and Manner

[36] Supervisory authority has been entrusted to RBI by a separate enactment in 1949, the Banking Regulation Act.

[37] Government of India Notification GSR.444(E).

of Maintaining and Time for Furnishing Information and Verification and Maintenance of Records of the Identity of the Clients of the Banking Companies, Financial Institutions and Intermediaries) Rules, 2005 (referred to as the PML Rules). Rule 7(4) requires every banking company, financial institution and intermediary to observe the procedure and the manner of furnishing information as specified by the Reserve Bank of India (RBI), the Securities and Exchange Board of India (SEBI), and the Insurance Regulatory and Development Authority (IRDA)[38]

RBI has issued a series of master circulars to the banks, about the precautions to be exercised in handling their customers' transactions. Important amongst these is a guidance note issued about treatment of customer and key to knowing the customer. The identity, background and standing of the customer should be verified not only at the time of commencement of relationship, but also be updated from time to time, to reflect the changes in circumstances and the nature of operations of the account.[39]

ii. The Directorate of Enforcement (ED)

The ED was established in 1956 and is an intelligence and investigative arm of the Central Government. It is headquarter in New Delhi with five Regional offices at Mumbai, Chennai, Chandigarh, Kolkata and Delhi headed by Special Directors of Enforcement.

It is primarily responsible for the enforcement of the Foreign Exchange Management Act, 1999 (FEMA) and certain provisions under the Prevention of Money Laundering Act along with enforcement of the Conservation of Foreign Exchange Prevention of Smuggling Activities Act, 1974 (COFEPOSA).[40] Enforcement Directorate are entrusted with many functions including collecting, developing and disseminating intelligence relating to violations of FEMA, 1999, the intelligence inputs are received from various sources such as Central and State Intelligence agencies, complaints etc. and to investigate and adjudicate on the same.

It also undertakes to provide and seek mutual legal assistance to/from contracting states in respect of attachment/confiscation of proceeds of crime as well as in respect of transfer of accused persons under PMLA.

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[38] Government of India Notification GSR.444(E).

[39] RBI notification- DBOD.AML.BC.18/14.01.001/2002-03, dated August 16, 2002.

[40] ED can also investigate certain matters under NDPS Act, IPC, Prevention of Corruption Act, Arms Act, Unlawful Activities Prevention Act, Customs Act, Wildlife Protection Act, Explosive Substance Act and Unlawful Activities (Prevention) Act.

iii. Financial Intelligence Unit- India (FIU-IND)

Financial Intelligence Unit – India (FIU-IND) was set by the Government of India[41] in 2004 as the central national agency responsible for receiving, processing, analysing and disseminating information relating to suspect financial transactions. FIU-IND is also responsible for coordinating and strengthening efforts of national and international intelligence, investigation and enforcement agencies in pursuing the global efforts against money laundering and related crimes. FIU-IND is an independent body reporting directly to the Economic Intelligence Council (EIC) headed by the Finance Minister.[42]

The primary function of Financial Intelligence Unit is to gather intelligence and receive reports of suspicions cash or security transfer. On receipt of such intelligence they are supposed to analyse them, formulate them in form of a report and to transfer/share it to enforcement and other regulatory authorities.[43]

Functions which are performed by FIU-IND are basically the functions assigned to Director under PMLA. Section 12 of the (PMLA) requires every banking company, financial institution or intermediary to furnish information of all prescribed transactions to the Director in a timely manner as prescribed. The term Director[44] means a Director, Additional Director, or Joint Director appointed under section 49 of the PMLA. Chapter VIII of the PMLA, entitled ―Authorities, provides for the appointment of specified Authorities for the purposes of the PMLA, and section 49 states that the Central Government may appoint such persons as it thinks fit for the purposes of being Authorities under the PMLA.

Subsequent to the establishment of FIU in 2004, functions of directors under PMLA were concurrently but independently transferred to FIU.[45] These functions are to collect information and to act as the central reception point for receiving Cash Transaction reports (CTRs) and Suspicious Transaction Reports (STRs) from various reporting entities. And to make analysis of such information in order to uncover patterns of transactions suggesting suspicion of money laundering and related crimes.

It also shares information with national intelligence/law enforcement agencies, national regulatory authorities and foreign Financial Intelligence

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41 vide O.M. dated 18th November 2004.

42 www.fiuindia.gov.in-official website of Department of Revenue, Ministry of Finance.

43 FIU is independent body and is bound to report to Finance Ministry only. However, they can share in with certain enforcement authorities like ED. RBI etc.

44 defined in section 2 of the PMLA.

45 *See* Gazette of India- Notification (reference: G.S.R.No.439(E)) dated 1 July 2005.

Units and act as a central repository by establishing and maintaining national data base on cash transactions and suspicious transactions on the basis of reports received from reporting entities.[46]

The FIU-IND also receives requests from law enforcement agencies, including requests to source information from foreign FIUs through the Egmont Group. The Egmont Group of Financial Intelligence Units is the informal group of FIUs of different nations. Different FIUs across the world came together in 1995 to formulate a network of cooperation amongst them. Indian FIU is also a member of Egmont group and shares information with other FIUs.

V. CONCLUSION

Money laundering is a criminal act through which proceeds of unlawful and criminal activities is laundered or processed in such a way so as to bring it in market as a lawful proceed. Money laundering poses a great threat to the economy of any nations as it helps criminals and criminal activities to prosper. It great threat come in form of its use in some or other way in drug paddling and terrorist financing.

For combating money laundering at international level lot of initiative has been taken. Beginning from Basle Committee on Banking Regulations and Supervisory Practices (1974), this happens to be first international initiative against money laundering. Finally in 1990 FATF came with forty pints recommendations, which forms the high water mark in the area of international anti-money laundering regime.

Together with international initiatives, some regional and private initiatives against money laundering crimes were also taken. Prominent among them is Asia-Pacific Group on Money Laundering. And from private initiatives came Global Anti-Money-Laundering Guidelines for Private Banking or the Wolfsberg AML Principles.

India's response to international money laundering regime has been significantly efficient. Even before the beginning of international attempts countering money laundering India had many general and specific legislatures dealing with the act of money laundering. Such legislatures were form of certain provision in IPC and Cr.P.C along with Conservation of foreign Exchange and Management Act.

Most potent and exclusive attempt by India against money laundering came with Prevention of Money Laundering Act, 2002 and establishment of

[46] *Ibid* Annexe 2.

Financial Intelligence Unit in 2004 inline of international Egmont group of FIUs. Along with FIU, RBI through its various circular and directives plays a crucial role combating menace of money laundering.

Recent efforts by Narendra Modi in form of Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 looks promising but it yet to prove its true potential. Amnesty scheme under the Act in form of three-month compliance window has been often been labelled as "superflop"[47], predominantly because it led to just 638 declaration amounting to Rs 3,770 crore[48] comparing to 1997, during P Chidambaram's amnesty scheme for black money holders, declarations amounting to Rs. 33,000 crore were made.[49]

However, the real test of the Black Money Act will lie in post compliance window period by showcasing how effective investigation and prosecution the Act can carry out against those who still hold the unaccounted money abroad. Only the effective investigation and prosecution can ensure and deter further flight of money to cross border destinations.

Albeit, India has formulated many legislature and established mechanism for dealing with the crime of money laundering. Even than lot has to be done so that crime of money laundering can be completely checked. Still huge amount of illegal money is laundered every year in Indian economy because of weak enforcement mechanism and failure of existing regime to curb the menace.

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47 R. Jagannathan, Why black money scheme was a superflop, and what Modi can do to redeem it, First Post (03-11-2015 12:37 hours) http://www.firstpost.com/business/why-the-black-money-scheme-was-a-superflop-and-what-modi-can-do-to-redeem-it-2452626.html.

48 Santosh Tiwari, Where is India's black money? Reports gather dust even as Modi govt scheme fails, The Financial Express, October 5,2015 (http://www.financialexpress.com/author/santoshtiwari/) October 5, 2015 9:43 AM.

49 *Supra* Note No. 47.

A DECADE OF "THE RIGHT TO INFORMATION ACT, 2005" - CRITICAL EXPLORATION OF THE SCOPE AND IMPACT OF THE ACT

—Aishwarya Deb[*] & Prithwish Roy Chowdhury[†]

Every person on the street is destined to deal hopelessly with corruption in almost every aspect of daily work and living. The most effective systemic check on corruption would be where the citizen herself or himself has the right to take the initiative to seek information from the state, and thereby to enforce transparency and accountability. It was for this sole reason that the Right to Information Act (RTI) came into existence in the year 2005, aiming to provide a legal right to have access to government-held information in order to strengthen democracy by ensuring transparency and accountability in the actions of public bodies. This paper discusses the impact of the RTI Act after a decade of its implementation and the major issues of concern related to it. A decade of implementation of RTI Act has been witness to citizens, both rich and poor, availing the opportunities under the said Act and obtaining information under this law. However, challenges still exist in the effective implementation of the Act. Also full implementation of proactive disclosures of the RTI Act is yet to take place, though it may result in multiple no. of applications and subsequently, higher level of pending requests. Another issue, which has been reverberating for the past one decade, is whether the higher Judiciary is subject to the provisions of the said Act. The paper also discusses the troubles faced in the implementation of the Act, including instances like lack of awareness among people, lack of sincere efforts on part of the government and the like. There is no doubt that the Act has brought

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positive changes in the levels of corruption and accountability , but it can effectively serve as a watchdog, if the implementation of the Act is supported by both political and social change. Even after a decade, the RTI Act still seems to be passing through a decisive phase and as such, much more needs to be done to assist its growth and development.

I. INTRODUCTION

"Democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold governments and their instrumentalities accountable to the governed..."[1]

The relationship between information and authority is intense. Without information, the citizens of a State would have no power to make choices about their government – no ability to significantly participate in the decision-making process, to hold their government accountable, to put a stop to corruption, to reduce poverty, or, ultimately, to live in a real democracy. In such a scenario, citizens' access to information can ensure transparency and accountability in government systems and processes.[2] Such a right to information could be secured by a Statute in order to ensure the citizens of their right to question, scrutinize, audit, assess and evaluate government acts and decisions, to ensure that these are consistent with the principles of public interest, probity and justice. In India, such access to governmental information has been provided under the *Right to Information (RTI) Act, 2005* in order to strengthen democracy by ensuring *transparency* and *accountability* in the actions of public bodies.

A. The Raison D Être for The Evolution of Right to Information in India

The struggle to institutionalize the right to information has been extensive and hard-fought. Demands for transparency and the need for accountability in public action are said to have arisen soon after Independence.[3]

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1 Right to Information Act, 2005, Preamble.

2 Simi T.B., Madhu Sharma & George Cheriyan, *Analysing the Right to Information Act in India*, (CUTS CART Briefing Paper Series, Paper No. 1, 2010), available at http://www.cuts-international.org/cart/pdf/Analysing_the_Right_to_Information_Act_in_India.pdf (last visited on October 3,2015).

3 Shobha SV, *The Central Information Commission: A Nut and Bolt Analysis* in RIGHT TO INFORMATION: FOR INCLUSION AND EMPOWERMENT (2013), available at http://

In 1975, the Supreme Court of India[4] recognized the right to information to be a fundamental right of every citizen of India under *Article 19* of the Constitution of India.[5] This was followed by a chain of progressive judgments by the Supreme Court elaborating this right. Yet, practically, citizens could not enjoy this right. The impetus for recognizing the right to information, as have been enshrined in the Constitution of India, arose principally out of the failure of the government to thwart corruption and to ensure efficient and empathetic governance. The main reason behind the gradual and strong advancement of RTI in India is the *Mazdoor Kisan Shakti Sanghatan (MKSS)*, a grassroots organization based in Rajasthan, where the poor wage workers, asserted their right to access information by responding against wrong entries in muster rolls, which was the sign of rampant corruption in the system, and demanding official information recorded in government rolls related to drought relief work. The inhabitants were aware that local officials had engaged in corruption, but it was impossible to prove it without access to the muster rolls. MKSS began to demand access to the muster rolls from local bodies and were met with strong resistance, including claims by the local authorities that the muster rolls were "secret documents."[6]

However, MKSS opposed this resistance with local rallies, hunger strikes, and sit-ins. In 1994, MKSS began to arrange *public hearings* to which it invited villagers, government officials, and impartial mediators such as a journalist, lawyer or academic. However, the government officials did not participate, and on various events they tried to squash the hearings by intimidating the people. The public hearings gave the people a platform and helped to incline the balance of power in favor of the people, allowing them to hold their administration accountable for its actions. Until these public hearings, the right to information in the region was considered an elite urban preoccupation, perhaps useful in the "intellectual arena and not on the street corners."[7] But the hearings caught the imagination of lawyers, journalists and social activists and allowed MKSS to play the role of an auditor, demonstrating that social action exposes corruption.[8] The demand for national law started under the leadership of National Campaign on People's Right to Information (NCPRI). *The Freedom of Information (FOI) Bill 2000* was passed in the Parliament in 2002 but not notified, hence, it

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rti.gov.in/rti_fellowship_report_2011.pdf (last visited on October 3, 2015).

4 *State of U.P.* v. *Raj Narain*, (1975) 4 SCC 428 : AIR 1975 SC 865.

5 *Id*.

6 Article 19, *Access to Information: An Instrumental Right for Empowerment*, July 2007, available at https://www.article19.org/data/files/pdfs/publications/ati-empowerment-right.pdf (last visited on October 10, 2015).

7 *The Right to Know, The Right to Live: People's Struggle in Rajasthan and the Right to Information*, July 1996, available at http://www.mkssindia.org/wp-content/uploads/2010/08/MKSS-Threefold.pdf (last visited on October 3, 2015)

8 *Supra* note 7.

never came into effect. It was as a result of years of campaigning at the national and regional level that the right to information gradually started taking a real form – first through legislation passed by certain states and then by the Centre through the Right to Information Act 2005 (RTI Act).[9]

B. 10 Years of RTI Act- Where does it Stand?

The 12th of October, 2005 was significant for a very special reason, a reason which made the Indian populace rejoice; it marked the beginning of an era of empowerment of a special kind. It was the day on which the Right to Information Act, 2005 came into force in India. For a population familiar with the dense veil of secrecy which shrouded most institutions, the promise of the 'sunlight'[10] of transparency meant a return of power to the people. The enactment of the RTI Act in 2005 has often been termed as the zenith of the campaigns, but the struggles have hardly ended. For every success story that the RTI Act puts forward, there are many that have left citizens disheartened and discontented with this path-breaking legislation. From non-responsive public information officers to evasive responses to harassment experiences of information seekers across the country are telling a story about the RTI Act which is not as bright. On the other hand, there are specific reasons which enshrine upon the RTI Act the status of a *revolutionary legislation* – firstly, the citizens can demand disclosure of governmental records and documents in a time-bound manner[11]; secondly, the burden lies on the governmental department to explain refusal to disclose information;[12] thirdly, public authorities are mandatorily required by law to *suo motu* place information about themselves in the public domain;[13] lastly, the government officials are individually accountable for not discharging their duties under the Act.

II. ANALYSING THE SCOPE OF THE ACT

The Right to Information Act, 2005 subjects the public institutions and the Government machineries to unparalleled levels of scrutiny. To ensure that the ideals of transparency and government accountability do not remain mere rhetoric, the Act sets up a clear structure to facilitate access to information – starting from the Public Information Officers (PIOs) in every public authority to the first appellate authority (FAA) and Information Commissions as the second appellate forum. The Act specifically bestows upon every "citizen" of India the right to access information, including

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9 *Supra* note 6.
10 *Id*.
11 *Supra* note 6.
12 *Id*.
13 *Id*.

overseas citizens of India and persons of Indian origin. Such a citizen, who wishes to obtain any "information"[14] under the said Act, must submit an application along with an application fee, to the Public Information Officer (PIO) of the respective public institution. If the institution fails to dispose of the applications within the specified time limits, the applicant would have to be provided with such information free of cost.

Irrespective of whether a citizen seeks for such information, the statute, in particular, requires every public authority to publish[15] categories of information, for instance, particulars of its organisation, functions and duties; norms set for discharge of its functions; rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions and the like. Apart from the enabling provisions, the said Act enumerates the kinds of information that are exempted from disclosure.[16] However, these exempted information or those exempted under the *Official Secrets Act, 1923* can be disclosed if public interest in disclosure overweighs the harm to the protected interest.[17] Notwithstanding such exemption, such information would cease to be exempted if twenty years have lapsed after happening of the incident to which the information relates.

The said Act provides *two levels of appellate* mechanisms – the first appellate forum being an officer senior in rank to the *Public Information Officer* (PIO) in the same department and the second being the Central/ State Information Commission. The appeal procedure forms a vital part of the Act and was one of the rallying points for the civil society during the drafting of the law. We must also concede the fact that without an autonomous, speedy and effective redressal mechanism under the Act, citizens would be left at the whims and fancies of Information Officers who may act irresponsibly. The appeal procedure enshrined under this Act ensures that the citizens are not forced to come up to the Courts at every occasion to enjoy their fundamental right to information. If a claimant is not supplied information within the prescribed time of 30 days or 48 hours, as the case may be, or is not satisfied with the information furnished to him, he may prefer an appeal to the first appellate authority. If still not satisfied the applicant may prefer a second appeal with the *Central Information Commission* (CIC)/State Information Commission (SIC) within ninety days from the date on which the decision should have been made by the first appellate authority or was actually received by the appellant.

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[14] The Right to Information Act, 2005, § 2(j).
[15] *See id.* §4(1) (b).
[16] *See id*. § 8.
[17] *See id*. § 8(2).

No statute can meet the requirements of the society, unless penalties are laid down for the contravention of its enabling provisions. Where the Information Commission at the time of deciding any complaint or appeal is of the opinion that the Public Information Officer has without any reasonable cause, refused to receive a request for information or not furnished within the time specified or denied the request for information or knowingly given incorrect, incomplete or misleading or distorted information it shall impose a *penalty* of Rs.250 each day till application is received or information is furnished subject to the condition that the total amount of such penalty shall not exceed Rs.25,000.

III. CENTRAL INFORMATION COMMISSION- THE REGULATOR, BALANCER AND EDUCATOR

Apart from being an appellate organ, the Central Information Commission (CIC), also plays a critical role in the implementation of the Act in many ways. In the words of the former President of India, it plays a critical role as the '*regulator, balancer and educator'*.[18] It is the ultimate appellate body under the statute for RTI applications relating to public authorities under the Central Government. It has the power to impose penalties on the erring PIOs, grant compensation to the aggrieved applicants and decide whether an institution falls within the domain of the Act.

For a fairly new legislation, the CIC's analysis and application of the law is central to building a consistent body of right to information jurisprudence in the nation. Given its powers and functions and as '*the most visible aspect of the RTI-regime*'[19], the CIC's working has an obvious impact on the implementation of the RTI Act in the country. Through some *landmark decision*s, the CIC has paved its path towards securing transparency in administrative activities. For instance, soon after the enactment of the Act, the CIC while responding to one of the RTI applications, asked the UPSC to show marks to Civil Services aspirants The CIC directed the Union Public Services Commission (UPSC) to declare individual marks scored by 2,400 candidates appeared for the Civil Services Preliminary examinations in 2006 and ordered it to declare cut-off marks for each subject.[20] Subsequently, in a somewhat similar case[21], applicants applied for information regarding merit list for selection of candidates to various posts in the university. However, no proper information having been provided by the authorities, the

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[18] Smt. Pratibha Devisingh Patil, 4th Annual Convention of the Central Information Commission, October 12, 2009, available at http://cic.gov.in/convention-2009/PresidentSpeech.pdf (last visited on October 2, 2015) (discussed during the inauguration speech).

[19] *Supra* note 6.

[20] CIC/WB order dated November 13, 2006.

[21] *Paramveer Singh* v. *Punjab University*, 2006 SCC OnLine CIC 252.

Commission directed such information to be enlarged to the applicants and held that that every public authority, must take all measures in pursuance of § 4(1) (a), to implement efficient record management systems in their offices so that the requests for information can be dealt promptly and accurately.[22] In *Shyam Lal Yadav v. Deptt. of Personnel & Training*[23], where the applicant had sought details of property statements filed by bureaucrats, it was held by the Commission that property statements filed by civil servants are not confidential and information can be disclosed after taking the views of concerned officials as per the provisions of the RTI Act. The Commission took a step ahead in *Ram Bhaj v. Seema Bawa*[24] by formulating guidelines for redressal of the grievances of the citizens and directed the Delhi Government to notify the common people about the same.

There is no doubt that the Commission has effectively worked to bring about transparency in administrative activities, but such actions itself *do not* make it *infallible*. The lack of proper reasoning has been the ground for High Courts to strike down orders of the CIC on certain occasions[25] . The Courts have also held in some cases that the CIC has erred by not giving an opportunity of hearing to the necessary parties.[26] In *Sarla Rajput v. Central Information Commissioner*[27], the High Court of Delhi while quashing the penalty order against the Petitioner held that "*before imposing penalty of Rs. 25,000/- vide order dated 15th December, 2007 reasonable opportunity of hearing was not granted to the Public Information Officer i.e. the petitioner. No notice was issued to the petitioner to explain her stand and justify her position...*"[28] As a young institution set up under a comparatively new and path-breaking legislation which questions several antiquated standards of governance, the CIC has to establish itself as a self-governing, efficient and trustworthy quasi-judicial body. If a significant number of its orders are struck down by Courts, the CIC's efficiency and decision-making abilities come into question. According to the opinion of the Karnataka High Court, the Commission no doubt, is a necessary party to a proceeding because the presence of the Commission is indispensable for a complete and ultimate decision on the question involved in the proceedings.[29]

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22 *Id*.
23 2010 SCC OnLine CIC 10607.
24 2010 SCC OnLine CIC 4419.
25 *See Union of India* v. *Vivek Bhatia*, 2009 SCC OnLine Del 1412.
26 *Id*.
27 2009 SCC OnLine Del 1755.
28 *Id*.
29 *Poornaprajna House Building Coop. Society Ltd.* v. *Karnataka Information Commission*, 2007 SCC OnLine Kar 148 : AIR 2007 Kar 136.

IV. JUDICIARY AND THE RIGHT TO INFORMATION

The independence of judiciary has been a subject of debate within the purview of the RTI Act. Since the past few years, the legal critics have come up with such views regarding the "transparency" of the judicial activities which insist on the judicial fraternity the need to re-examine its previously adopted conformist approach with respect to surrendering itself before this socio-beneficial legislation designed to ensure transparency and accountability in working of every public authority so that it gives a clear and strong signal to all those critics who often condemn its image as an institution functioning in a surreptitious and obscure manner. In a very recent decision[30], which has given a new dimension to this long-reverberating debate, a three-judge bench of the Hon'ble Apex Court of India dismissed a Special Leave Petition (SLP) preferred by one Mr. S.C. Agarwal who was discontented with the decision of the lower court wherein the latter Court had disallowed his prayer so as to direct the disclosure of information regarding details of medical facilities availed by the individual Judges of the Apex Court and their family members including those relating to expenses on personal treatment in India or overseas.[31] What has to be noted is that the petitioner had, relying on an earlier decision of the Delhi High Court, consequently filed an RTI majorly focusing on the point that *"the information on the expenditure of the government money in an official capacity cannot be termed as personal information"*[32]

The CPIO, while following the orders of the CIC, furnished the applicant with the actual total expenditure for the preceding three years but expressed that the maintenance of judge-wise information regarding actual total medical expenditure was not mandatory. Being dissatisfied with such an approach of the CPIO, the applicant again come up to the CIC following which the Registry of the Supreme Court contested the same firstly before the Delhi High Court and then before itself *though* on the judicial side. Though the Apex Court disclosed the total amount reimbursed on medical treatment from the budget grant for relevant years in respect of Supreme Court Judges (sitting and retired) and employees of the Court, this case turned out be a major example witnessing the conflict between the higher judiciary and the statutory watchdog of the RTI, CIC.

We must also recall the efforts of our learned parliamentarians who raucously mired the introduction of the *Judges (Disclosure of Assets and*

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[30] *S.C. Agarwal* v. *Supreme Court of India*, Special Leave to Appeal (C) No. 15291 of 2015(SC) (UR).

[31] Hemant Kumar, *RTI vis-à-vis Judiciary*, available at http://lawyersupdate.co.in/LU/8/1909.asp (last visited on October 2, 2015).

[32] *Supreme Court of India* v. *S.C. Agarwal*, WP (C) No. 188 of 2009 (SC).

Liabilities) Bill, 2009 on the ground that a certain clause[33] in the aforesaid legislation overtly excluded the public and judicial scrutiny of such details submitted by members of the Higher Judiciary to their respective competent authorities.

The Commonwealth Human Rights Initiative had recommended that "The CJI, as the competent authority, may invoke his powers under section 28 of the RTI Act and immediately frame Rules relating to the collection of fees and the disposal of first appeals in the Supreme Court."[34] Further, in pursuance of a recent development wherein the Supreme Court has sought response from all National political parties over why they should not be brought under the ambit of the RTI while hearing a writ petition[35] by the Association for Democratic Reforms in this regard, it becomes all the more necessary for the Apex Court to revisit its prevalent conservative approach with respect to adequately submitting itself before the RTI so that there is no scope for our politicians to accuse the Judiciary of adopting double standards when a question comes regarding inculcating transparency in the public life.

Notwithstanding the aforesaid issues, the fact that the Apex Court has broadly complied with the provisions of the RTI Act, cannot be over-looked. Also, apart from appointing a CPIO and FAA as required under the pertinent provisions of the *RTI* Act, it has even nominated one officer of the rank of "Registrar" as Transparency Officer for the Supreme Court.

The CIC, having, time and again held that the judicial proceedings would not be covered under the RTI, it becomes a clear option on the part of the Apex Court, to formulate suitable regulations preferably in consultation with other judges to keep in check the impending instances of any misuse of the RTI law affecting the principles of judicial independence.

What is desirable is the formulation of a "Code of Transparency" by the Hon'ble Apex Court which would provide for the broad outline with respect to publishing and disseminating of information in relation to itself in wider public domain, after wisely deciding what it considers to be apposite and fit. After all, judicial independence does not necessarily mean that judges are above the law.

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[33] Clause 6.

[34] *An Analysis of the RTI Rules of the Supreme Court, the Delhi High Court and the Subordinate Courts*(2010), available at http://www.humanrightsinitiative.org/publications/rti/rti_in_the_judiciary_series_1.pdf (last visited on October 3, 2015).

[35] *Union of India* v. *Assn. for Democratic Reforms*, (2002) 10 SCC 111.

V. LIMITATIONS OF THE TRANSPARENCY LAW

The RTI legislation aims to govern the *bureaucracy* so that it functions efficiently and impersonally, but changing a culture of secrecy to one of openness is, in reality, like a path tinted with thorns. Not one, but many people have fallen prey to the nasty activities of the bureaucratic officials and the infallible efforts made by them to suppress any voice which stood against their activities. Back in 2010, one RTI activist named Amit Jethwa was gunned down outside the High Court of Gujarat for naming an MP while exposing illegal mining on the Gir Forest. This was just the beginning of such outrageous killing of RTI applicants and informants, followed by the murders of Mr. Arun Sawant and Vishram Dadodiya who were also murdered shortly after they had filed the RTI applications. Apart from the aforesaid deaths, what caught attention of the whole nation was the murder of Mr. Satyendra Dubey, an engineer of the National Highways Authority of India, as a consequence of his writing a letter to the Prime Minister regarding corruption in the construction of highways. Then again, the mysterious death of Mr. Ramdas Ghadegavkar, an activist who had exposed the sand mafia in Nanded, drew the attention of the Government towards the issue of protection of whistle-blowers. Subsequently, the legislature enacted the *Public Interest Disclosure (Protection of Informers) Act, 2013* which sought to establish a mechanism to register complaints on any allegations of corruption, intractable abuse of power and provide safeguards against the victimization of the individual who makes the complaint. But even after such enactment the problems did not decrease and in order to mitigate such problems, the legislature again had to come up with a *Public Interest Disclosure (Protection of Informers) Amendment Bill, 2015* with some additional changes in the previous Act.

Apart from the above-mentioned problems, there are various other issues (as discussed below) attached to the implementation of the RTI Act, which, if not addressed comprehensively, will continue to be an issue.

1. The Act empowers the appropriate Government to develop and organize educational programmes to advance the understanding of the public, especially disadvantaged communities, regarding how to exercise the rights contemplated under the Act.[36] But*, no proper educational programme* having been organized by the Government has led to a *low level of awareness* amongst the commoners of the country, particularly the disadvantaged and ostracized sections of the society.
2. The Act *does not* prescribe for a *standard format* of RTI Application which would help in getting basic information regarding the

[36] *Supra* note 18, § 26.

informant, making it easier for the public authorities to identify the nature of frequent information requests so that it can be provided as a suo-motu disclosure[37]. However, as per the provisions of the said Act, only few states have prescribed a standard form for an application.

3. The *mode of request* or filing an application being only in writing has made it *inconvenient* for majority of the mass. In spite of living in a digital age, hardly any initiative has been taken by the RTI officials to receive applications through electronic submission channels; also no provision has been made for the applicants to pay the prescribed fees through electronic means.

4. It is the duty of the Public Information Officers to assist the citizens in filing the applications[38] as per the said Act, but in reality the officials *hardly* put a step forward to *help* the *people seeking assistance* while drafting and filing applications.

5. The Act also provides that the information has to be provided in the form it has been requested by the applicant, unless such information would unreasonably divert the resources of the Public Authority[39]. However the officers never make use of this provision for the *inspection of records* as was found out in an information provider survey.[40]

6. *Lack of infrastructure* and the slipshod attitude of the RTI officials have resulted in failure to provide information sought by the applicants within the prescribed period. As observed in the reports of various surveys, as and when the appeal or complaint is filed by the pursuer, the Information Commission gets to know the *failure* of the public institutions in providing the requisite information *within prescribed time* to more than half of the applicants.

7. Though the legislation provides for an appellate authority[41], but *no such judicial power* has been enshrined upon the said authority. Also the appeal process is a very l*engthy and rigorous* one, making it really difficult for the dejected applicants to proceed further.

VI. EXCLUSION FROM THE SCOPE OF RTI

Though the scope of the right to information legislation is wide, there are certain other statutes, namely the *Sexual Harassment of Women at Workplace (Prevention Prohibition and Redressal) Act, 2013,* which have

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37 *Id*. § 4(2).
38 *Id*. § 5(3).
39 *Id*. § 7(9).
40 *Supra* note 6.
41 *Supra* note 18, § 18.

expressly excluded some of its provisions from the purview of the RTI law. The Act of 2013 prohibits publication or making known contents of complaint and inquiry proceedings[42], related to the disposal of the sexual harassment complaint made by a victim. While it is commendable that this provision promises to contain such delicate matters within the purview of the organizations in which they occur, the same information should also be made available on request to a concerned party. Expressly excluding such information from the scope of the Right to Information (RTI) Act, 2005, will not only hinder the interest of the community at large but also keep the false or fabricated cases covered under its protective umbrella.

VII. APPROPRIATENESS OF THE AMENDMENT BILL, 2013 WITH RESPECT TO THE OBJECTIVE OF THE RTI ACT

The Right to Information (Amendment) Bill, 2013 was prompted by a recent judgment delivered by the Central Information Commission in *Subhash Chandra Aggarwal* v. *Indian National Congress*[43], wherein "political parties" were held to be "public authorities". This Bill seeks to restrict the scope of the term "public authorities" by overtly excluding from its purview the respective political parties. Such a change in the RTI legislation aiming to guard political parties from providing information under the transparency law is against the very purpose of the Act[44]. The Act which promises to enable the citizens to have at least the bare minimum information needed for making a well-versed decision and to hold all the instrumentalities of the government accountable for their respective actions, cannot undergo such a radical change.[45] It is crystal clear that the recent amendment, in the disguise of eliminating the catastrophic effects of the above-mentioned decision, is in fact a devise to invalidate the "politically inconvenient" judgment. While the political leaders contend that such an inclusion of "political parties" as "public authorities" would overturn the functioning of the RTI system, we strongly disagree with such views supporting the "self-seeking" exclusion of political parties.

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[42] The Sexual Harassment of Women at Workplace (Prevention Prohibition and Redressal) Act, 2013, § 16.

[43] 2013 SCC OnLine CIC 8915.

[44] Akarshita Dhawan & Himaja Bhatt, *RTI on Political Parties- Towards a more democratic Democracy*, available at http://www.manupatra.co.in/newsline/articles/Upload/3AB4D1B7-2C61-4CDB-9871-2687E903A677.pdf (last visited on October 3, 2015).

[45] *Id.*

A. The Path Ahead of Rti

The objective of this paper has been to analyse the position of the Act after a decade of its implementation. Our society, having essentially reacted to the changes brought about by the RTI regime, has also occasionally witnessed violence and its victims, but the fact that the legislation promises a much more *progressive* method of making governments answerable should not over-looked. The RTI Act 2005 have had a far-reaching, even reformative, impact on our pursuit for fulfillment of the major egalitarian and constitutional objectives, and its efficacy cannot certainly be questioned, but improved. For this reason, even as it strives to improve in the future, the legislation has proved it worth and can legitimately take great pride in what it has already accomplished this far. Secrecy being an old habit of the bureaucracy, they are usually cautious while parting with any information and usually do not divulge information unless there is a reason good enough to enlarge it. Such being the case, implementation of the RTI Act has, arguably, become the most intricate task. Thus in order to make the Act more user-friendly and implementation much easier, certain changes are required to be made in the legislation itself.

In furtherance, the following agendas for action towards the implementation of the Act are proposed:

1. The *sine qua non* for effective implementation of the Act is raising the awareness levels amongst the common people, especially the rural sections and women. This can be done by promoting Right to information as a brand name and using effectual marketing strategies for the same.

2. Most of the work being mechanical in nature, a lot of pressure will be reduced if such tasks are relatively carried out through standardized or *summary procedures*.

3. The RTI functionaries must set for themselves certain transparent performance appraisal criteria, and then make *bona fide* efforts to meet these criteria. It has been observed in a seminal book on public institutions that "*assessing the performance of public institutions requires clear yardsticks and criteria. Indeed, one measure of the performance of any institution is whether it has developed any criteria to assess its own performance*."[46]

4. Qualitative and quantitative efforts have to be made to *train effectively* the civil servants and the RTI officials and provide them proper orientation regarding the usage of the Act and further

[46] Pratap Bhanu Mehta, *India's Judiciary: The Promise of Uncertainty* in PUBLIC INSTITUTIONS IN INDIA: PERFORMANCE AND DESIGN 13 (2005).

implementation of the Act in facilitating common people's right to information.

5. If there is *pro-active disclosure of information* by the public institutions themselves, there will be less number of requests and applications. Also, apart from saving time and money of thousands of applicants, a proactive regime of information disclosure will lead to the proper implementation of the Act. It is expected of the public authorities to monitor this aspect more stringently and involve external professional agencies to help them carry out the said task.

6. Though the Act provides for detailed instructions regarding the whole procedure, poor infrastructure and poor state of record management is a major constraint in providing requisite information within the prescribed time. To overcome this problem, a proper management of records, especially their *computerization and digitization*, is a must. It has to be noted that only posting of materials on government websites will not guarantee the access information. At the least, the officials should provide and promote awareness through digital media and also provide the exact URLs to the applicants seeking any information.

7. The Chief Information Commission should inexorably function in a way that is *people-friendly* and uphold the spirit of the legislation. Starting from interacting with the commoners outside the traditional adjudicatory set-up to actively complying with the obligations[47] under the Act, the Commission must make it *accessible for the common people* and open to public engagement.[48]

8. Though the RTI Act gives a fair amount of authority to the information commissions and there being no legal compulsion to follow the governmental rules of procedure with respect to its internal functioning, there is a huge scope for improvisation. But hardly any sort of improvised ways are developed as most of the officials are not properly acquainted with the tenets of good governance the RTI legislation itself. There, there is a need to strengthen the legal background of the officials and also increase consistency and the ability to learn from each others' experiences.

9. The appellate authority should be given *judicial powers* in accordance with the Code of Criminal Procedure. This will lead to speedy disposal of applications and provide adequate relief to the dejected applicants. Also, it should be made mandatory on the part of the public authorities to provide adequate reasons in writing if they

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47 *Supra* note 18, §4.

48 *Supra* note 6.

refuse to provide complete information sought by any applicant within the prescribed period.

VIII. CONCLUSION

There is no doubt that the Right to Information Act has the *potential* of turning the *balance of power* in favour of the common people of India and transform the democracy into a *participatory* one, making the governmental institutions answerable to the people for each and every actions. However, such a potential can only be nurtured if the Act is properly *implemented.* Also, success on the part of the Act must be gauged, not by the quantum of applications or information sought, but by its effectiveness in improving the *quality of governance.* In order to accomplish this, the scope of the legislation has to be expanded and innovative measures, as discussed earlier, should be taken into consideration to promote *institutional integrity.* The contributions made by the public institutions and the legal institutions towards the implementation of the RTI regime will go in vain if such efforts are unaccompanied by a social change. If the common people make it a point to exercise their right to access information under the Act, it will become all the more difficult for the government to meddle with it, to weaken it or to repeal it in total It is quite a possibility that with exposure of the misdeeds, the government might turn out to be more accountable thereby leading to a gradual but predictable movement towards enhanced governance. The struggle is going to be difficult, but it isn't impossible as Fidel Castro says, *"A revolution is not a bed of roses. A revolution is a struggle between the future and the past."*

VICTIMOLOGY AND INDIA: COUNTERBALANCING THE RETRIBUTIVE TILT

—*Neha Sharma*[1]

Abstract India follows an adversarial form of criminal justice system where victimology has been a narrowly addressed or even neglected field of criminal jurisprudence. The victim also has no role to play in the trial except as a witness. There has been plenty of focus on human rights of accused but not of the victim. The criminal jurisprudence, places the accused at an advantageous position compared with the victim. The Indian criminal justice system presumes the accused to be innocent till proven guilty. His biggest reparation is believed to lie in the retributive justice which punishes the offender and sometimes with a tinge of mercy, provides the victim with token relief guised as compensation. The victim is certainly entitled to not just more relief in terms of material compensation but in a perspective that looks at his life in a more holistic manner. A victim of crime cannot be a 'forgotten man' in the criminal justice system. The concept of victimology specifically in India can be analysed through the Code of Criminal Procedure and various amendments made to it more specifically the Criminal Amendment Act, 2013 that has taken some significant strides towards the victim. It is high time to act, and there are measures that need to be taken urgently to address the victims' plight. Steps such as a single specific statute for victim compensation, adopting a holistic approach towards the victim addressing his rights and dignity and providing for a better State compensation mechanism are steps that will certainly address the present scenario to a great extent.

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I. INTRODUCTION

'Law should not sit limply, while those who defy it go free and those who seek its protection lose hope.'[2]

Time and again as human rights activist raise their voice, the law develops bringing out a more humanitarian face. The development is hailed as bringing in a justice more deserving of the human society. The progress is unequivocally praiseworthy but there is certain aspect that goes unnoticed. This crusade in support of human rights often passes by overlooking the victim writhing in pain. His plight unnoticed, the victim crawls to live another day in a life overturned by one incident for which he may not even be remotely responsible. The benign State looks at the victim's misery offers him some monetary compensation, trinkets in the name of respite.

The state of victims deserves immediate attention. The scope of victimology is not limited to mere monetary compensation. Neither is victimology, speaking in traditional sense, providing punishment to the wrongdoer for there is no torture inflicted on the guilty that can make good the terrible loss caused by homicide[3].

There are various definitions of vicitmology. Victimology is an academic scientific discipline which studies data that describes phenomena and causal relationships related to victimizations. This includes events leading to the victimization, the victim's experience, its aftermath and the actions taken by society in response to these victimizations.[4]

In our criminal justice system the wheel of criminal justice begins rolling with the commission of crime by the offender and ends at the point where he gets his punishment.[5] The criminal jurisprudence, places the accused at an advantageous position compared with the victim. The Indian criminal justice system presumes the accused to be innocent till proven guilty and entitles him to fairness and true investigation and fair trial.[6] The accused after a fair and full-fledged trial may be pronounced guilty. The major source of reparation for the victim is the retributive justice being delivered on the guilty. It is often forgotten that the length of the prison term is no reparation to the crippled or bereaved and is futility compounded with cruelty.[7]

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2 *Jennison* v. *Baker,* (1972) 2 QB 52 : (1972) 2 WLR 429 : (1972) 1 All ER 997.

3 *Maru Ram* v. *Union of India,* (1981) 1 SCC 107 : AIR 1980 SC 2147.

4 John P.J. Dussich, 'Victimology – Past, Present And Future', (131st International Senior Seminar Visiting Experts' Papers), <http://www.unafei.or.jp/english/pdf/RS_No 70/ No70_12VE_ Dussich.pdf> accessed 19 November 2014.

5 *Ashwani Gupta* v. *Govt. of India,* 2005 SCC OnLine Del 20 : (2005) 117 DLT 112.

6 *Sidhartha Vashisht* v. *State (NCT of Delhi),* (2010) 6 SCC 1.

7 *Maru Ram,* (1981) 1 SCC 107 : AIR 1980 SC 2147.

The victim is certainly entitled to not just more relief in terms of material compensation but in a perspective that looks at his life in a more holistic manner. It is high time and a victim of crime cannot be a 'forgotten man' in the criminal justice system. It has been held that an honour which is lost or life which is snuffed out cannot be recompensed but then monetary compensation will at least provide some solace.[8] However time has come not to just move forward but to go beyond the traditional concepts of victim compensation and develop a scheme more in conformity with humanity than with legal technicality. Victimology must find fulfillment, not through barbarity but by compulsory recoupment by the wrong-doer of the damage inflicted, not by giving more pain to the offender but by lessening the loss of the forlorn.[9]

The principal aim of this article is to trace and evaluate the emergence, development and current status of victims' rights in India as well as in the international arena. The approach has been to analyse the development of victimology the Code of Criminal Procedure 1973 in light of various amendments and juxtaposing the present Indian position with the global scenario.

II. VICTIMOLOGY IN INDIA

India follows an adversarial form of criminal justice system where the accused is presumed innocent until proven guilty and entire burden of proof is on the prosecution. The judge acts merely as an umpire and plays a very passive role in dispensing of justice. Moreover, the victim also has no role to play in the trial except as a witness. He merely remains as a spectator in trial where his own rights are being discussed. The entire focus of the trial is on the accused and not on the plight of the victim.[10]

The word 'victim', is defined under S. 2(wa) Code of Criminal Procedure, and it reads as follows:

> *'victim means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression 'victim' includes his or her guardian or legal heir.'*[11]

Victimology is a study of crime from the point of view of the victim, of the persons suffering from injury or destruction by action of another person

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8 *State of Gujarat* v. *High Court of Gujarat,* (1998) 7 SCC 392.

9 *Maru Ram,* (1981) 1 SCC 107 : AIR 1980 SC 2147.

10 Report of Committee on Reforms of Criminal Justice System Government of India, Ministry of Home Affairs (Malimath Committee).

11 The Code of Criminal Procedure 1973, s 2(wa).

or a group of persons.[12] It is fundamentally a perception of a trial from the viewpoint of the criminal as well as the victim.[13] The term '***victimology***' was coined by a French lawyer, Benjamin Mendelsohn in 1947. It has been derived from a Latin word '*victima*' and a Greek word '*logos*'.

The concept of victimology was introduced in India much before the United Nations or the other developed nations recognized the triviality of the protection and promotion of victim's right. The entire credit for the recognition of victimology in India should be attributed to the Supreme Court of the country. Justice V. N. Krishna Iyer in ***Rattan Singh v. State of Punjab***,[14] noted:

> '*The victimization of the family of the convict may well be a reality and is regrettable. It is a weakness of our jurisprudence that the victims of the crime, and the distress of the dependants of the prisoner, do not attract the attention of the law.*'

The Supreme Court in a string of decisions a few of which are already cited, has recognized time and again one or the other right of the 'victim' including *locus standi* of his/her family members to appeal against acquittal in the broadest sense.[15] Moreover, the Supreme Court has appreciated a global paradigm shift away from retributive justice towards victimology or restitution in criminal law.[16] The legislature, on the contrary, overlooked the express apprehension of the Supreme Court and did not take any statutory initiative to remove this deficiency of law. However, the Law Commission of India recognised this concern and came up with its 154th Law Commission Report and made radical recommendations on the aspect of compensatory justice through a Victim Compensation Scheme.[17] The report defined victim as a persons who has suffered physical or mental harm, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws.[18]

Let there be a special reference to the Supreme Court decisions which built up the victim's right brick by brick, revolutionised the conventional criminal justice system and sensitized its stakeholders.[19]

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[12] Vasu Nair Rajan, *Victimology in India: Perspectives Beyond Frontiers (*Ashish Publishing House 1995) 5.

[13] *Rattiram* v. *State of M.P.,* (2012) 4 SCC 516.

[14] (1979) 4 SCC 719.

[15] *Tata Steel Ltd.* v. *Atma Tube Products Ltd.,* 2013 SCC OnLine P&H 5834 : (2014) 1 PLR 1.

[16] *Ankush Shivaji Gaikwad* v. *State of Maharashtra,* (2013) 6 SCC 770.

[17] The Law Commission of India, *Report on the Code of Criminal Procedure, 1973* (Law Com No 154, 1996).

[18] *Ibid*.

[19] *Tata Steel Ltd.,* 2013 SCC OnLine P&H 5834 : (2014) 1 PLR 1 (n 14).

In ***Puran v. Rambilas***,[20] the Supreme Court upheld the *locus standi* of father of the deceased in a dowry death case, to move the High Court and seek cancellation of bail granted by the Sessions Court as he was not a stranger to the case. A similar decision was given by the Constitution Bench in another case which considered the question where the brother of a victim who had been murdered, was allowed the right to petition under article 136 of the Constitution against the acquittal of the accused.[21] The Court further held that a petition filed by the private party other than the complainant should be entertained only in cases where the denial of appeal leads to a violation of public interest and that the State has abstained from petitioning from special leave for reasons which do not bear on the public interest but are prompted by private influence, want of bona fide and other extraneous considerations.[22]

Right of the complainant at whose instance the police-case was registered, to be heard by the High Court in the proceedings initiated by the accused for quashing those proceedings was recognized by the Supreme Court in ***J.K. International v. State (Govt. of NCT of Delhi)***.[23] Moreover, the complainant has a right to be heard of before the cancellation of his FIR ort submitted. In ***Mosiruddin Munshi v. Mohd. Siraj***,[24] the right of the complainant to be heard before an order affecting the criminal proceedings initiated at his instance was recognized and it was held that the FIR could not be quashed by the High Court at the instance of the accused without notice to the original complainant. The informant must be given an opportunity of hearing so that he could make his submissions to persuade the Magistrate to take cognizance of the offence and issue due process.[25] The Code of Criminal procedure also indicates that the role of an aggrieved is not altogether wiped out from the scenario of the trial merely because the investigation was taken over by the police and the charge sheet was laid by them.

The right of a victim to file an appeal under article 136 of the Constitution has also been recognised by the Supreme Court in cases where an order of acquittal is passed by the High Court, to meet the pressing demands of justice.[26] Notwithstanding these decisions or the chorus of such like rights being heard in all civic societies, the Legislature in its wisdom did not deem it necessary to permit a 'victim' to appeal against the acquittal of his wrong-doer even while carrying out sweeping amendments in the

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20 (2001) 6 SCC 338.
21 *P.S.R. Sadhanantham* v. *Arunachalam,* (1980) 3 SCC 141.
22 *Ibid*.
23 (2001) 3 SCC 462.
24 (2008) 8 SCC 434.
25 *Bhagwant Singh* v. *Commr, of Police*, (1985) 2 SCC 537.
26 *Ramakant Rai* v. *Madan Rai*, (2003) 12 SCC 395.

Code in the year 2005.[27] An attempt at protecting the victim's rights and allowing their prosecution has been made for the first time under the proviso to S. 372 in Chapter XXIX dealing with appeals.[28]

The Supreme Court recognized the rights of rape victim in ***Delhi Domestic Working Women's Forum v. Union of India***.[29] The Court[30] under the exercise of its PIL jurisdiction directed the National Commission for Women to evolve a Scheme to protect rape victims through various measures. Further the Court[31] casted an obligation on the Union of India to implement the Scheme so evolved by the Commission. Moreover, the Supreme Court has provided mandatory guidelines for the recording of evidence of victim of offence under Sections 354, 375, 367 & 377 of the Indian Penal Code.[32]

The High Courts have also dutifully espoused the cause of 'victims' and expanded the jurisprudence to create a space for them at one or the other stage of Court hearings.[33] Observations made by a Division Bench of Assam High Court in ***N.C. Bose v. Prabodh Dutta Gupta***,[34] can be usefully quoted as the following:

> *'It seems to me that the person vitally interested in the issue of the prosecution or the trial is the person aggrieved who 'initiates' the proceedings. The Legislature therefore could not have intended to shut out such a person from coming to the High Court and claiming redress u/s. 526 of the Code. The words should be construed to have the widest amplitude so long as the effect of the interpretation is not to open the door to frivolous applications at the instance of intermeddlers or officious persons having no direct interest in the prosecution or trial.'*[35]

A. State Liability to Pay Compensation:

The Constitution of India obligates the State to protect the interests of a victim. The maintenance of law and order is the fundamental duty of the

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27 *Tata Steel Ltd.,* 2013 SCC OnLine P&H 5834 : (2014) 1 PLR 1 (n 14).
28 *Balasaheb Rangnath Khade* v. *State of Maharashtra,* 2012 SCC OnLine Bom 635 : 2013 ALL MR (Cri) 1184.
29 (1995) 1 SCC 14.
30 *Ibid.*
31 *Ibid*.
32 *Sakshi* v. *Union of India*, (2004) 5 SCC 518.
33 *Tata Steel Ltd.,* 2013 SCC OnLine P&H 5834 : (2014) 1 PLR 1.
34 1954 SCC OnLine Gau 17 : AIR 1955 Gau 116.
35 *Ibid.*

State. Article 38 enjoins on the State to strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political interests of the people are maintained.[36] Article 21 lays down that no person shall be deprived of his right to life or personal liberty except according to the procedure established by law.[37] Moreover, under Article 300-A, no person shall be deprived of his property save by authority of law and to allow his properties to be reduced to ashes by the force of darkness and evil is a clear deprivation of the right to property guaranteed by the Constitution.[38]

The very object of creating a State giving a Governor for governance of the society to adhere to the norms itself imposes a responsibility on the Governors.[39] The failure of a State in protecting the life and liberty of the citizens must result in a consequential remedy for the victims. The defense of shortage of funds cannot be taken by the State. However, if the plea of shortage of funds were to be accepted, it would be against the very grain of the Welfare State concept where the fundamental object is to serve the interests of its citizens and to protect their lives and limbs. Inadequacy of Statute in this regard cannot compel a victim to suffer.

Black's Law Dictionary defines 'reparation' as the payment made for an injury or damage for a wrong done. Reparation in monetary terms can be in the form of compensatory, pecuniary or substantial reparation.[40] Compensatory damages are to compensate only the amount of injury suffered by a victim. Pecuniary damages include not only the loss of money but all forms of quantifiable losses suffered by a victim. Substantial damages are the amount paid merely to satisfy a breach of legal right.

However, reparation is referred not only to mean monetary damages but also to describe more intangible outcomes, as where an offender makes an apology to a victim and provides some reassurance that the offence will not be repeated, thus repairing the psychological harm suffered by the victim as a result of the crime.[41] Thus, Reparation is taken to mean the making of amends by an offender to his victim or to victims of crime generally, and may take the form of compensation, the performance of some service or the return of stolen property (restitution), these being types of reparation which might be described as practical or material.[42]

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36 The Constitution of India, Art 38.

37 The Constitution of India, Art 21.

38 *R. Gandhi* v. *Union of India,* 1988 SCC OnLine Mad 318 : AIR 1989 Mad 205.

39 Aucoin, K. & Beauchamp, D. *Impacts and consequences of victimization*, 27(1) Canadian Centre for Justice Statistics Juristat (2007) a*vailable at* http://www. statcan.gc.ca/pub/85-002-x/85-002-x2007001-eng.pdf.

40 *Ashwani Gupta,* 2005 SCC OnLine Del 20 : (2005) 117 DLT 112.

41 *State of Gujarat,* (1998) 7 SCC 392.

42 *Ibid.*

The Supreme Court in ***Nilabati Behera v. State of Orissa***[43] enjoined Courts to '*evolve*' new tools and *'mould'* the remedies for harm done variously. In that case death of a son of 22 years in police custody entitled a mother to compensation as an heir of the 'victim' by way of monetary amends and redressal by the State since the death constituted violation of the Fundamental Right to Life by the State's instrumentalities or servants.[44]

The Punjab & Haryana High Court in ***Punjab Istri Sabha V. Surjit Singh Barnala,***[45] observed that the terrorists' victims form an integral part of the Indian society; they have every right to settle down at one place and carry on their profession. They have the constitutional right to live and they cannot be deprived of their lives, hearths and homes. Their right to property is inviolable.[46] Fundamental rights are not mere ***brutum fulmen***.[47] They cannot be rendered desuetude or dead-letter or as observed by Bhagwati, J., as he then was, *'a paper parchment, a teasing illusion and a promise of unreality'*, by the illusion and a promise of unreality, by the failure of the State to protect those rights.[48] These unfortunate victims of terrorists' violence were, therefore, entitled to seek reasonable compensation from the State of Punjab which has failed in its duty to protect their constitutional and legal rights.[49]

Similarly, the Single Judge Bench of the Delhi High Court, in the case of compensation for riot victims of 1984, observed that the State must act in time so that the precious lives of the people are not destroyed or threatened, as otherwise Article 21 of the Constitution would remain a paper guarantee.[50] The State has to undertake the minimum standards of civilized behaviour of its citizens so that the life, liberty, dignity and worth of an individual is protected and preserved and is not jeopardized or endangered.[51] However, if the State is able to discharge its duty then it has to pay adequate compensation for the loss suffered by the victims because of the non-fulfillment of State's obligations.

Again a Division Bench of the Delhi High Court noted that the sweep of Article 21 of the Constitution is wide and far-reaching and would undoubtedly cover a case where the State fails to discharge duties cast upon it resulting in deprivation of life and limb of a person since right to life is

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43 (1993) 2 SCC 746.
44 *Balasaheb Rangnath Khade,* 2012 SCC OnLine Bom 635 : 2013 ALL MR (Cri) 1184.
45 1989 SCC OnLine P&H 987 : 1990 ACJ 1064.
46 *Punjab Istri Sabha* v. *Surjit Singh Barnala,* 1989 SCC OnLine P&H 987 : 1990 ACJ 1064.
47 *R. Gandhi* v. *Union of India,* 1988 SCC OnLine Mad 318 : AIR 1989 Mad 205.
48 *Ashwani Gupta,* 2005 SCC OnLine Del 20 : (2005) 117 DLT 112.
49 *Ibid.*
50 *Bhajan Kaur* v. *Delhi Admn.,* 1996 SCC OnLine Del 484 : (1996) 3 AD (Del) 333.
51 *S.S. Ahluwalia* v. *Union of India*, (2001) 4 SCC 452 : (2001) 2 SCR 468.

not negotiable.[52] The award of compensation for established infringement of the indefeasible rights guaranteed under Article 21 of the Constitution was held to be a remedy available in public law since the purpose of public law is not only to civilize public power, but also to assure the citizens that they are under a legal system wherein their rights and interests shall be protected and preserved.[53]

B. Quantum of Compensation:

The quantum of payment by way of compensation must be reasonable. The quantum of compensation may be determined by taking into account the nature of an act or omission, the justness of claim by the victim and the ability of accused to pay.[54] The Supreme Court has, further, observed that in calculating damages, the Courts are required to have some guess work in the quantification of the conventional sum and to the same should be added inflation and consequent decline in value of rupee.[55]

The amount of compensation should be paid by the person who is vicariously liable or was negligent and caused the injury to the victim with the necessary *mens rea*.[56] In case there is joint-liability for any crime then victim can get compensation can be paid in equal proportions by each accused. The liability for payment of compensation may also differ on the basis of the acts of each accused. Moreover, reasonable period for payment of compensation or the installments for the compensation amount may also be specified by the Court. The Court may also impose a sentence in case a default is made in making the payment.[57]

The Supreme Court while assessing the compensation for a permanent disability caused by an accident included both for loss of income, pain and suffering and loss of marital life and the non-possibility of marriage.[58] The claimant therein was a mason by profession who worked on a temporary basis and became a paraplegic because of the accident.

The legislature under the Section 545[59] enabled the Court to pay compensation only out of the fine imposed under the law. However, if the sentence does not include the requirement for payment of any fine amount then the Court may direct the accused to pay compensation.[60]

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52 *Shyama Devi* v. *NCT of Delhi,* 1999 SCC OnLine Del 199 : (1999) 78 DLT 827.
53 *Ibid*.
54 Bharat Bhudan Das, *Victims in the Criminal Justice System*, (1st edn, APH Publishing Corporation, 1997) 87.
55 *Nagappa* v. *Gurudayal Singh*, (2003) 2 SCC 274 : (2003-1) 133 PLR 9.
56 *Sarwan Singh* v. *State of Punjab,* (1975) 1 SCC 284.
57 *Hari Singh* v. *Sukhbir Singh,* (1988) 4 SCC 551.
58 *Karnataka SRTC* v. *Mahadeva Shetty,* (2003) 7 SCC 197 : AIR 2003 SC 4172.
59 The Code of Criminal Procedure 1898.
60 The Code of Criminal Procedure 1973, s 357(3).

C. Malimath Committee Report:

Addressing to the plight of victims in India, the Ministry of Home Affairs constituted the Committee on the Reforms of Criminal Justice System in November 2000. The Committee was headed by former Chief Justice of Kerala and Karnataka, and former member of the National Human Rights Commission (NHRC), Justice V.S. Malimath. The Committee came up with its recommendations in 2003 to overhaul the existing Criminal Justice system under the **Malimath Committee Report.** The Committee was constituted by Government of India with an avowed object of suggesting ways and means for developing a cohesive system in which all the parts work in coordination to achieve the common goal as the people by and large have lost confidence in the criminal justice system and the bewildered victim is crying for attention and justice.[61]

The Committee was of the view that the existing criminal justice system is utterly insensitive to the rights of the victim. The entire focus of the existing criminal justice system is on the accused and not on the victim. The Committee recognised the significance of rights of the victims for a dispensing a better and quicker justice. The Committee also stated that the rights of victim cannot be disregarded for scarcity of funds. However, addressing to the issue of deficiency of funds, the Committee proposed for setting up of a victim compensation fund. With increase in quantum of fine recovered, diversion of funds generated by the justice system and soliciting public contribution, the proposed victim compensation fund can be mobilised at least to meet the cost of compensating victims of violent crimes.[62]

The Committee made the following recommendations to provide justice to the victims which include the right of the victim to participate in cases involving serious crimes and to adequate compensation.

1. *Right to Appeal:* The victim shall have a right to appeal against any unfavourable order passed by the Court. Unfavourable order includes acquittal of the accused; conviction for a lesser offence; imposition of an inadequate sentence; or grant of an inadequate compensation. The victim can file such appeal before any court to which an appeal ordinarily lies.
2. *Legal services:* The legal assistance given to victims in select crimes may also include psychiatric and medical help, interim compensation and protection against secondary victimization.
3. *Victim compensation:* Victim Compensation is an obligation of the State in all serious crimes irrespective of the arrest or acquittal of

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61 *Tata Steel Ltd.,* 2013 SCC OnLine P&H 5834 : (2014) 1 PLR 1.

62 *Krishan* v. *State of Haryana,* (2006) 12 SCC 459 : (2006) RD P&H 3519.

the offender. This obligation is to be codified in the form of a distinct legislation

4. *Victim Compensation Fund:* The creation of a Victim Compensation Fund under the Victim Compensation Law will help to achieve the financial requirements to compensate the victims. The Fund may be administered by the Legal Services Authority. Legislature's Endeavour Towards Victims' Rights:

D. The Code of Criminal procedure (Amendment) Act, 2005:

In 2005, the legislature brought sweeping amendments in the Code. The only significant amendment brought into force was in S. 378 whereby the appeals against acquittal in certain cases are now maintainable in the Court of Session without any leave to appeal.[63] The amendment was brought to check the arbitrary exercise of power and to curtail reckless acquittals. Moreover, section 377[64] was also suitably amended enabling a victim to prefer an appeal to the Court of Session if the sentence given by a Magistrate can be regarded as inadequate.[65]

E. The Code of Criminal Procedure (Amendment) Act, 2008

Compensation for victims happens to be rather lately recognised concept in India. When seeking of compensation from the perpetrator or the State was concerned, the victim found himself at a dead end. The perfection of the initiative maybe a question but the fact that cannot be denied is that it is definitely a step forward. Certain changes brought in by the 2008 Amendment are as follows:

1. The Amendment addressed the very concept of victimisation by providing a much needed definition of victim in Section 2(w) of the Code of Criminal Procedure 1973. It states:

   'victim' means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression 'victim' includes his or her guardian or legal heir".[66]

1. A noticeable point in the definition is the inclusion of victim's guardian or legal heir in the definition itself.

2. Overcoming the initial all State prosecution the Amendment now through Section 24 of the Code of Criminal Procedure allows the

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[63] The Code of Criminal Procedure (Amendment) Act 2005, s 32.
[64] The Code of Criminal Procedure 1973.
[65] The Code of Criminal Procedure (Amendment) Act 2005, s 31.
[66] The Code of Criminal Procedure (Amendment) Act,2008, s 2.

victim to engage an advocate of his choice to assist the prosecution with the Court's permission.[67]

3. Considering the sensitive nature of the sexual offences the Amendment provides that such proceedings are to be presided over by a woman judge as far as practicable.
4. Introduction of safeguards for rape victims in Section 157 is another significant addition to the Code.[68]
5. The legislature further recognised the sensitivity required and the problems related to prolonged and delayed trials and provided that an investigation in case of a child rape may be completed within 3 months from the date of recording of information by the officer in charge of the police station.[69]
6. Another change has been brought in requiring camera trial to be conducted by woman judge or magistrate as far as practicable under proviso of Section 327(2) of the Code of Criminal Procedure 1973.[70]
7. Recognising the burden on the victim's shoulder by not just the act perpetrated against him but also the prolonged trial that goes on for achieving justice, the Code of Criminal Procedure now provides for victim compensation scheme under Section 357A.[71]
8. Another salient feature is the right to appeal granted to victim and thus stretching the concept of prosecution from being limited to State to making the victim a participant from a mere onlooker. The same has been brought forth by amending Section 372 to add the right to appeal against any order passed by the court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation.

F. The Code of Criminal Procedure (Amendment) Act 2013

The Criminal Law Amendment Act 2013 finds its source from the Justice J.S. Verma Committee report. The Committee was formed as a retaliation to the Delhi gang rape incident of December 2012. The incident had raised a major furore with the public taking to streets asking for justice and a system that has more inclination towards the victim compared to the apathetic system that existed and the only surety it provided was the crushing of remains of already broken hopes of a tormented victim.

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[67] The Code of Criminal Procedure (Amendment) Act 2008, s 3.
[68] The Code of Criminal Procedure (Amendment) Act 2008, s 11.
[69] The Code of Criminal Procedure (Amendment) Act 2008, s 16.
[70] The Code of Criminal Procedure (Amendment) Act 2008, s 24.
[71] The Code of Criminal Procedure (Amendment) Act 2008, s 28.

The Committee gave its recommendations on January 23rd, 2013 by taking into consideration the opinions of various sections of the Society. The Recommendations had to be implemented soon, and the Government was running against time. Thus an Ordinance was brought forth that dealt with the amendments, the Ordinance being Criminal Law (Amendment) Ordinance, 2013.

Subsequently the Ordinance was replaced by the Criminal Law (Amendment) Act 2013 which was passed on 19th March, 2013 by the Lok Sabha and 21st March, 2013 by the Rajya Sabha. The final Amendment Act underwent great deliberations and in some matters departed from the original recommendations made by the Justice Verma Committee.

The Amendment Act has brought significant changes in the text and scope of the criminal laws by amending The Indian Penal Code 1860, The Code of Criminal Procedure 1973 and the Indian Evidence Act 1872. Dealing in the specific context of vicitimology, following reforms are dealt with:

1. *Recording of Information and Statement by Women Officer*: Recording of information by police officer under Section 154 has been amended to provided that in case of an offence being committed or attempted under Sections 326A, 3268, 354, 354A, 3548, 354C, 3540, 376, 376A, 3768, 376C, 3760, 376E, or 509 of the Indian Penal Code 1860 then the information given by a woman who is the victim shall be recorded by a woman officer. Further in the specific cases of Sections 354, 354A, 3548, 354C, 354D, 376, 376A, 3768, 376C, 376D, 376E or 509 if the victim is temporarily or permanently mentally or physically disabled, then the police officer is required to record the information at the residence of the victim or any place convenient to the victim and as per her choice ensuring the presence of an interpreter or a special educator and the process shall be video-graphed. In terms of Section 164 it is now required by the police officer to get the statement recorded by a Magistrate as soon as possible.[72]

Another related amendment has been made to Section 161 providing that the statement of the victim in cases of Sections 354, 354A, 3546, 354C, 3540, 376, 376A, 3766, 376C, 376D, 376E or 509 of the Indian Penal Code shall also be recorded by a woman police officer or any woman officer.[73]

2. *Previous Sanction not Required for Prosecution of Public Servants*: The Amendment Act of 2013 does away with the requirement of

[72] The Criminal Law (Amendment) Act 2013, s 13.
[73] The Criminal Law (Amendment) Act 2013, s 15.

prior sanction in order to prosecute an accused public servant if the offence committed falls under Sections 166A, 166B, 354, 354A, 354B, 354C, 354D, 370, 375, 376, 376A, 376C, 376D, 509 of Indian Penal Code 1860. This has been done by providing an explanation to Section 197 that concerns the prosecution of public servant.[74]

3. *Day to Day Trial:* Doing away with the procedural delays once the matter reaches the Court, the Amendment has Substituted Section 309(1) and added a proviso so that in every inquiry trial hearing shall be done on a day to day basis until the Court is finished the examination of all the witnesses in attendance.[75]

4. *Victim Compensation Scheme***:** Realising the still continuing problem with the issue of victim compensation, Section 357B has been added to the Code of Criminal Procedure 1973 making the State liable for paying compensation to the victim and the same to be in addition to fine paid by the perpetrator as per Sections 326A or 376D of Indian Penal Code.

5. *Free of Cost Medical Treatment:* Section 357C can be hailed as one of the sensitive as well as sensible move of the Parliament towards recognising the harsh realities surrounding the victim of an offence. The Section provides that all hospitals, irrespective of being government-run or private enterprise are bound to immediately provide first-aid or medical treatment, free of cost, to the victims of any offence falling under Section 326A, 376, 376A, 376B, 376C, 376D or Section 376E of the Indian Penal Code and to immediately bring such incident to the notice of the police.[76]

III. RECOMMENDATIONS

Much has been said about the scope of victimology and how the same has been implemented by India and across the globe. There are steps that have been taken by India and some of them are laudable as well. However a neutral and balanced approach requires mentioning of the fact that many more steps are required in the field. Moving ahead from the limited perspective of an onlooker who merely counts the positives and negatives it is essential to take steps to remove the cons and increase the pros.

Giving the victim of crime his rightful place and taking a serious note of his existence, his feelings and his rights with a view to offer redress to him for his injuries is the approach that always has to be kept in mind when attempting to alleviate the condition of the victims of crime.

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[74] The Criminal Law (Amendment) Act 2013, s 18.
[75] The Criminal Law (Amendment) Act 2013, s 21.
[76] The Criminal Law (Amendment) Act 2013, s 23.

Implementation of United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

The United Nations Declaration of Basic Principles of Justice Victims of Crime and Abuse of Power[77] has provided a strong first step with respect to the international victims' movement. This document, even though suffering from an inherent limitation of non-binding nature, sets out the minimum standard for the treatment of crime victims[78].

So far as India is concerned there have been certain strides forward in the arena of compensation such as Section 357 of the Code of Criminal Procedure that provides for victim compensation and more particularly Sub Section (3) that provides for a convicted person to pay for compensation where there is no fine in the offence[79]. The Code also speaks in terms of creation of a scheme of compensation[80] under Section 357 A of the Code of Criminal Procedure, 1973 as inserted by the Criminal Amendment Act, 2008. These steps in matching the global standards are praiseworthy however there are further measures to be taken.

The Declaration provides that victims should be treated with compassion and respect for their dignity[81]. So far as India is concerned the apathy that a victim faces are not facts of which the society is unaware. Complainants say that they are treated indifferently by police and sometimes harassed when they go to them with their grievances. The complaints go to the extent stating that the police do not truthfully record the information but distort facts as per their convenience changing the very substance of the offence. Sometimes police official launch a counterblast by dressing the victim in the garb of accused and initiating persecutions in the guise of investigation.[82] Even though some may rely on random official statistics to show rarity of such events, the fact is that any such singular instance is alarming considering that the object at the receiving end is a human being. The need of the hour is sensitivity training for the police officials to make their approach in more specific lines with the victim and to establish enforcement of the law as their primary objective. Training the police officials is also necessary for prompt and proper aid to the victim[83].

Article 13 of the Declaration provides for establishment, strengthening and expansion of national funds for compensation to victims and as further

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77 Basic Principles of Justice for Victims, (n 78).

78 Subhradipta Sarkar, *The Quest for Victims Justice in India*, <http://www.wcl.american.edu/hr brief/ 17/2sarkar.pdf> accessed on 27th July, 2014.

79 Code of Criminal Procedure 1973, s 357 (3).

80 Code of Criminal Procedure 1973, s 357 A.

81 Basic Principles of Justice for Victims, (n 78) Art 4.

82 Malimath Committee (n 9) 78.

83 Basic Principles of Justice for Victims, (n 78) Art 16.

measure establishment of other funds for the purpose for cases where the State of which the accused is a national is not in a position to compensate the victim for the harm[84]. Even though there is Section 357A present in Code of Criminal Procedure there is much discretion involved at the level of the Judiciary and the Section speaks about mere schemes whereas it should provide for establishment of a permanent fund with defined and fixed sources of inflow of money and lay down certain situations where the compensation can be availed of without seeking the indulgence of the Courts.

Lastly it is also essential to note that the only support required is not monetary in nature. The victim is going through not just monetary issues but also physical, mental and emotional distress. As the UN Declaration states there should be an endeavour by the State to ensure that victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means and that he should be informed of and provided with health and social services and other relevant assistance[85]. An action thus will ensure that not just the monetary aspect but a holistic consideration is done of the torn and tormented victim who looks up to the state from the depths of despair.

A. Providing for a Specific Statute

So far as compensating the victim of a crime is concerned the Legislature has provided for various statutes and in which there are specific provisions dealing with compensation to be provided to the victims. The problem is that the lay man does not know the law and definitely not so well as to pick out specific Sections from different statutes. There are various examples such as Section 5 of the Probation of Offenders Act that provides for compensation in cases where offenders are directed to be released on probation[86] further provisions in Workmen's Compensation Act[87], Fatal Accidents Act[88], Motor Vehicles Act[89] and Domestic Violence Act[90], provides that wrong doer should pay compensation to victims.

There are also State schemes such as the one made by the Government of Bihar acknowledging the responsibility of state for compensation and

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84 Basic Principles of Justice for Victims, (n 78) Art 13.
85 Basic Principles of Justice for Victims, (n 78) Arts 14, 15.
86 The Probation of Offenders Act 1958, s 5.
87 The Workmen's Compensation Act 1923.
88 The Fatal Accidents Act 1855.
89 The Motor Vehicles Act 1988.
90 The Protection of Women from Domestic Violence Act 2005.

rehabilitation of victim irrespective of identification and prosecution of accused[91].

While all such endeavours are praiseworthy it is necessary to have one consolidated Act providing for compensation to victims so that once they have already suffered a tragedy, a further torture should not be imposed upon them by trapping them into technicalities of various legislations and executive schemes.

B. Defining the Scope of State Liability

So far all cases where victims have been granted compensation by the State have somehow or the other seen the Judiciary as the triggering factor. Thus for fixing the liability of the State, the victim has always to go through the mechanism of the Judiciary. The road is a long and treacherous one where the victim has to fight the mighty State which has at its disposal all resources of the land. The outcome of a fight between the suppressed victim and an omnipotent State is not hard to predict.

Thus proper statutes should be brought forth that will determine the State liability in certain list of circumstances and the same should also provide for a mechanism for proper calculation of reasonable compensation. Such a statute shall not only provide more accessible compensation options to the victims of crime but also remove the 'case to case basis' uncertainty that exists in the judicial route to get compensation from the State.

IV. CONCLUSION

Whatever Nation we may choose, whichever statute we may select, the gist remains the same. The party perpetually at the losing end is always the victim. The accused may be acquitted, the State may get the accused punished and reaffirm its sovereign control over the land but what goes unnoticed is what happens to the victim. Every party in trial has a chance of winning but not the victim. At the most what he may use for his consolation is that the victorious prosecutor has sent the perpetrator behind the bars but the victim shall continue to feel the pangs of misery and tragedy by that one incident that maybe disabled him for life or killed the man who was the sole bread earner of the family.

Certain steps have been taken. The United Nations recognised the travesty which the victim encounters everyday and for the first time provided for a minimum global standard to ensure not just the rights but also the dignity of the so often and so easily trampled upon victim. Thus came into

[91] The Bihar Victim Compensation Scheme 2011.

existence the United Nations Declaration of Basic Principles of Justice Victims of Crime and Abuse of Power, 1985.

The move was laudable but however was disabled by the inherent loophole in a United Nations General Assembly i.e. the non-binding nature. The Declaration in itself was not effective however it did raise a voice for the much needed cause and the voice did gather some attention.

Speaking in the specific context of India, which predominantly exhibits characteristics of a typical Marxist version of society, torn between the haves and the have not's, or in this case, the tormentors and the tormented. It was a notion that justice is for the powerful and for the weak it is just another cause of despair. Speaking in the specific context of criminal law, there is the accused, the State and the victim which are the stakeholders in a criminal lawsuit. The Indian Laws have a pro-accused approach bestowing upon him the privileges of presumption of innocence, protection from double jeopardy, reasonable doubt, protection from self-incrimination etc. The logic has always been that the victim comes armed with the State but the accused fights his own battle. While one may not deny that certain safeguards are needed for the accused who faces the omnipotent State machinery as an opponent but at the same time to say that the gaining party or the victor is the victim is the most erroneous presumption that a jurist can make.

The State comes not for the victim but to show its sovereignty ensuring the existence of law and order from which the State derives its lifeblood. Thus the wounded victim watches as an onlooker the fight that goes on between the puissant state and the safeguarded accused.

However it will be wrong to state that the Indian laws have not done anything for the victim. There have been measures and particularly the Code of Criminal Procedure, 1973 as it evolves through a series of amendments the last one coming into effect in 2013 the law moves towards the cause of victims.

There are miles that have been covered and there are many more miles left to go. There are many suggestions and it should be the earnest effort of the law makers and the law enforcers to make sure these suggestions with many more pro victim recommendations not only find their way to the criminal justice system but also provide a channel for true justice to flow to the parched land of hopes of the victim.

CRITICAL ANALYSIS OF *PEOPLE'S UNION FOR CIVIL LIBERTIES* v. *UNION OF INDIA* IN THE LIGHT OF ELECTORAL REFORMS CATEGORY: NOTES AND COMMENTS

—*Ananth Maheshwar Kini*

Abstract The issue of Electoral reforms are one among the various issues which have been subject of intense debate throughout the country, especially, in the backdrop of which Honourable Supreme Court of India recently introduced None of the Above (NOTA) button.

This paper presents both explorative and normative aim. First, the paper undertakes an exhaustive analysis of the judgment and then applies the same to the recently held assembly election in various states in India. It extends its focus to the pros and cons of NOTA and key issues faced in conducting free and fair elections. On the normative front, the paper discusses the various feasible solutions to the issue of electoral reforms. However, the paper does not address the status of electoral reforms in other countries and focuses only on the Indian sub- context.

Keywords: Election Commission, NOTA, Electoral Reforms, Representation of the People Act 1951, Conduct of Election Rules 1961

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PEOPLE'S UNION FOR CIVIL LIBERTIES *v.* UNION OF INDIA[1] (NOTA CASE)

Writ Petition (Civil) No. 161 of 2004 (Under Article 32 of the Constitution of India)

Decided On: 27.09.2013

Hon'ble Judges/Coram:

P. Sathasivam, C.J.I., Ranjana Prakash Desai and Ranjan Gogoi, JJ.

Subject: Constitution

Legislation:

Constitution of India - Article 324, Article 32, Article 14, Article 21, Article 19 (1) (a) Representation of the People Act, 1951 - Section 128 Conduct of Election Rules, 1961- Rule 41, Rule 49, Rule 39

Counsels:

Mr. Rajinder Sachhar, learned senior Counsel for the Petitioners,

Mr. P.P. Malhotra, learned Additional Solicitor General for the Union of India-Respondent

No.1 herein,

Ms. Meenakshi Arora, learned Counsel for the Election Commission of India-Respondent No.2 herein,

Ms. Kamini Jaiswal and Mr. Raghenth Basant, learned Counsel for the impleading parties

> "*Mechanism of casting vote shall be illegal and ultra vires if there is compromise on the secrecy of vote as elector and does not provide any privacy when fact of neutral/ negative voting goes into record*.[2]"

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1 *People's Union for Civil Liberties* v. *Union of India*, (2013) 10 SCC 1 : (2014) 2 SCC (L&S) 648.

2 *Id.,* ¶ 41.

I. FACTS OF THE CASE

The Present writ petition is filed by the Petitioners under Article 32 of the Indian Constitution to the Supreme Court of India (hereinafter, 'Court') on the ground that of Rules 41(2) and (3) and Rule 49-O of the Conduct of Election Rules, 1961[3] (hereinafter, 'Rules') are not constitutionally valid as these rules violate secrecy of voting which is fundamental to free and fair elections[4] required to be maintained as per Section 128 of the Representation of the People Act, 1951[5] (hereinafter, 'RP Act') and Rules 39 and 49-M of the Rules.

Previously on 23rd February 2009, an objection was raised on the maintainability of writ petition on the ground that right to vote is not Fundamental right and therefore the writ is not maintainable.

The Court considered several cases viz. Union of India v. Assn. for Democratic Reforms[6], People's

Union for Civil Liberties (PUCL) v. Union of India[7] , Kuldip Nayar v. Union of India[8] (hereinafter, 'Kuldip') came to the conclusion that doubt in this regard shall be referred larger Bench to arrive at a decision.

One Centre for Consumer Education and Association for Democratic Reforms have filed applications for impleadment in this Writ Petition which has been accepted by this Court.

II. ISSUES RAISED

1) Whether the Writ petition filed under Article 32 of the Indian Constitution is maintainable?

2) Whether Rules 41(2) and (3) and 49-O of the Rules are constitutional validity to the extent that these provisions violate the secrecy of voting which is fundamental to the free and fair elections[9] and is required to be maintained as per Section 128 of the RP Act and

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3 Conduct of Election Rules, 1961, Ministry of Law Notifn. S.O. 859, dated the 15th April, 1961, *see* Gazette of India, Extraordinary, Pat II, Section 3 (ii), Page 419.

4 'Free and fair elections' is considered as basic feature of the Constitution in *Kesavananda Bharati* v. *State of Kerala*; (1973) 4 SCC 225 : AIR 1973 SC 1461.

5 Representation of the People Act,1951.

6 *Union of India* v. *Assn. for Democratic Reforms*, (2002) 5 SCC 294.

7 *People's Union for Civil Liberties (PUCL)* v. *Union of India*, (2003) 4 SCC 399.

8 *Kuldip Nayar* v. *Union of India*, (2006) 7 SCC 1.

9 2(d) of RP Act defines election as "means to fill a seat or seats in either House of Parliament or in the House of either House of Legislature of a State other than the State of Jammu and Kashmir".

Rules 39 and 49-M of the Rules but also violate of Articles 19(1) (a) and Article

21 of the Constitution of India besides International Covenants?

Issue No. 1: Whether the Writ petition filed under Article 32 of the Indian Constitution is maintainable?

Addressing the first issue Mr. P.P. Malhotra, learned Additional Solicitor General (ASG) appearing for the Union of India (hereinafter, 'Respondent No. 1') raised categorical objection that the writ petition under Article 32 would lie to this Court only for the violation of fundamental rights and since the right to vote is not a fundamental right, the present Writ Petition under Article 32 is not maintainable. It is the specific stand of the Union of India that right to vote is not a fundamental right but merely a statutory right. He asserted that neither the

RP Act nor the Constitution of India declares the right to vote as anything more than a statutory right and hence the present writ petition is not maintainable.

Discussing the maintainability of the writ petition the Court has divided the main issue into sub issues viz.

a. Whether there is any doubt or confusion with regard to the right of a voter in Kuldip (supra) ***b.*** Whether earlier two judgments viz., Association for Democratic Reforms (supra) and People's Union for Civil Liberties (supra) referred to by the Constitution Bench in Kuldip (supra) stand impliedly overruled.

In People's Union for Civil Liberties[10]**,** the bench expressed separate but concurring opinions, Justice Reddi, made an observation as to the right to vote being a Constitutional right if not a fundamental right[11]

Discussing the position of the right to vote, the Court referred to the judgment made in Association for Democratic reforms[12] (supra) and People's Union for Civil Liberties[13] (supra) came to the conclusion that right to vote

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[10] M.B. Shah, P. Venkatarama Reddi and D.M. Dharmadhikari, JJ; (2003) 4 SCC 399.

[11] *Ibid*. at ¶ 97.

[12] The Court in ¶ 53 held that "Article 19(1) (a) provides for freedom of speech and expression. Voters's speech or expression in case of election would include casting of votes that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is must. Voter's (little man-citizen's) right to know antecedents including criminal past of his candidate contesting election for MP or MLA is much more fundamental and basic for survival of democracy."

[13] The Court has held in People's Union for Civil Liberties that "Failure of the parliament to make a provision for the disclosure of information regarding assets and liabilities results in

is statutory right, but these judgment have added that right to know background of an electoral candidate is Fundamental right so that the voter can his exercise his right rationally.

After a careful perusal of the verdicts of by this Court in Kuldip[14] (supra), Association for Democratic Reforms (supra) and People's Union for Civil Liberties (supra), the Court is of the considered view that Kuldip (supra) does not overrule the other two decisions rather it only reaffirms what has already been said by the two aforesaid decisions.[15] The said cases recognize that the right to vote is a statutory right and not a Fundamental right.

In People's Union for Civil Liberties (supra) it was held that "a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression[16]". Therefore, it cannot be said that Kuldip (supra) has observed anything to the contrary.

Thus, there is no contradiction as to the fact that right to vote is neither a fundamental right nor a Constitutional right but merely a pure and simple statutory right. The same has been settled in a catena of cases and it is clearly not an issue in dispute in the present case. With the above observation, the Court holds that there is no doubt or confusion persisting in the Constitution Bench judgment of this Court.[17]

A. Writ Petition held to be maintainable

Even though the Court is unanimous that right to vote is statutory right but still the writ petition was held to be maintainable as it would not possible for the Petitioners to approach the High Court of every state to vindicate their grievance by way of a writ petition under Article 226 of the Constitution of India. The Court thus allowed the writ petition because of the significance attached with the right. Considering that the reliefs prayed relate to the right of all eligible voters, it may not be appropriate to direct the Petitioners to go to each and every High Court and seek appropriate relief. Accordingly, apart from our conclusion on legal issue, in view of the fact that the writ petition is pending before this Court for the past nine years, it may not be proper to reject the same on the ground. For the

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violation of guarantee under Article 19(1)(a) of the Constitution".

14 The Court has held in ¶ 200 that "The secrecy of ballot is a vital principle for ensuring free and fair elections. The higher principle, however, is free and fair elections and purity of elections. If secrecy becomes a source for corruption then sunlight and transparency have the capacity to remove it".

15 *See* NOTA Case *Supra* Note 1 at ¶ 21.

16 People's Union for Civil Liberties at ¶ 102.

17 *Id*., ¶ 21.

reasons mentioned above, we reject the said contention and hold that this Court is competent to hear the issues raised in this writ petition filed under Article 32 of the Constitution.[18]

Issue No. 2: Whether Rules 41(2)[19] and (3) and Rule 49-O[20] of the Rules are constitutional validity to the extent that these provisions violate the secrecy of voting which is fundamental to the free and fair elections and is required to be maintained as per Section

128[21] of the RP Act and Rules 39[22] and 49-M[23] of the Rules but are also violative of Article

19(1)(a) and Article 21 of the Constitution of India besides International Covenants? the Rules

Addressing the second main issue Mr. Rajinder Sachhar, appearing on behalf of the Petitioners, pleaded before the Court that the various provisions, particularly, Section 128 of the RP Act as well as Rules 39, 41, 49-M

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[18] *Supra* Note 1 at ¶ 25.

[19] Rule 41. Spoilt and returned ballot papers.--(1) An elector who has inadvertently dealt with his ballot paper in such manner that it cannot be conveniently used as a ballot paper may, on returning it to the presiding officer and on satisfying him of the inadvertence, be given another ballot paper, and the ballot paper so returned and the counterfoil of such ballot paper shall be marked "Spoilt: cancelled" by the presiding officer.

(2) If an elector after obtaining a ballot paper decides not to use it, he shall return it to the presiding officer, and the ballot paper so returned and the counterfoil of such ballot paper shall be marked as "Returned: cancelled" by the presiding officer.

[20] 49-O. Elector deciding not to vote.--If an elector, after his electoral roll number has been duly entered in the register of voters in Form 17A and has put his signature or thumb impression thereon as required under Sub -rule (1) of Rule 49L, decide not to record his vote, a remark to this effect shall be made against the said entry in Form 17A by the presiding officer and the signature or thumb impression of the elector shall be obtained against such remark.

[21] Section 128-Maintenance of secrecy of voting--(1) Every officer, clerk, agent or other person who performs any duty in connection with the recording or counting of votes at an election shall maintain, and aid in maintaining, the secrecy of the voting and shall not (except for some purpose authorized by or under any law) communicate to any person any information calculated to violate such secrecy:

(2) Any person who contravenes the provisions of Sub-section (1) shall be punishable with imprisonment for a term which may extend to three months or with fine or with both.

[22] Rule 39 - Maintenance of secrecy of voting by electors within polling station and voting procedure.--(1) Every elector to whom a ballot paper has been issued under Rule 38 or under any other provision of these rules, shall maintain secrecy of voting within the polling station and for that purpose observe the voting procedure.

[23] Rule 49M - Maintenance of secrecy of voting by electors within the polling station and voting procedures.--(1) Every elector who has been permitted to vote under Rule 49L shall maintain secrecy of voting within the polling station and for that purpose observe the voting procedure hereinafter laid down.

(2) Immediately on being permitted to vote the elector shall proceed to the presiding officer or the polling officer incharge of the control unit of the voting machine who shall, by pressing the appropriate button on the control unit, activate the balloting unit; for recording of elector's vote.

and 49-O of the Rules provides that an elector has a right not to vote but the secrecy of his having not voted is not maintained under Rules 41(2) and (3) thereof.

He asserted under Rule 49-O of the Rules the right of a voter who decides not to vote has been accepted but the secrecy is not maintained. In case an elector decides not to record his vote, a remark to this effect shall be made against the said entry in Form 17-A by the Presiding Officer and the signature or thumb impression of the elector shall be obtained against such remark. Hence, if a voter decides not to vote, his record will be maintained by the Presiding Officer which will thereby disclose that he has decided not to vote.[24]

Learned senior Counsel argued that even though right not to vote is recognized by Rule 41 and Rule 49-O of the Rules, but, it forms a part of freedom of expression of a voter which is protected by Article 19[25] of the Constitution of India, therefore the secrecy of the voter has to be maintained.

For the purpose of proving that Article 19 of the Constitution is violated, the Petitioners relied on S. Raghbir Singh Case[26], where this Court deliberated on the interpretation of Section 94 of the RP Act which mandates that no elector can be compelled as a witness to disclose his vote, this Court found that the "secrecy of ballots constitutes a postulate of constitutional compulsion of law be forced to disclose for whom he has voted would act as a positive constraint and check on his freedom to exercise his franchise in the manner he freely chooses to exercise". Secrecy of ballot, thus, was held to be a privilege granted in public interest to an individual.

B. Submission of Election Commission of India-Respondent No. 2

Ms. Meenakshi Arora, learned Counsel appearing for Respondent No. 2, points out various provisions both from the RP Act and the Rules, humbly submits that secrecy is an essential feature of "free and fair elections" and Rules 41(2) and (3) and 49-O of the Rules violate the requirement of secrecy.

Learned Counsel also asserted through supplementary written submission that the Election Commission of India is presently exploring the possibility

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[24] *Supra* Note 1 at ¶ 7.

[25] Article 19(1)(a) of the Constitution of India reads: Protection of certain rights regarding freedom of speech, etc.—
(1) All citizens shall have the right-
(a) to freedom of speech and expression;

[26] *S. Raghbir Singh Gill* v. *S. Gurcharan Singh Tohra*; 1980 Supp SCC 53.

of developing balloting unit with 200 panels. Therefore, if the Court decides to uphold the prayers of the Petitioners herein, the additional panel on the balloting unit after the last panel containing the name and election symbol of the last contesting candidate can be utilized as the **None of the Above**[27] (Hereinafter, 'NOTA') button[28].

C. Submission of Impleading Parties

Ms. Kamini Jaiswal and Mr. Raghenth Basant, appearing for the impleading parties agreed with the submission of the Petitioners and Respondent No. 2, praying that NOTA should be introduced in pooling booth so that those voters who do not for vote any candidate would be able to maintain their secrecy.

D. Submission of Respondent No. 1 on Constitutional validity of Rules 41(2) and (3) of the Rules

Opposing the submission made by the Petitioners, Impleading Parties and Respondent No. 2, Mr. Malhotra, learned ASG argued that the power of Election Commission under Article 324 of the Constitution is wide enough, but can be in no manner, be construed as to cover those areas, which were already covered by the statutory provisions.

It is also argued that the right of secrecy has been extended to only those voters who have exercised their right to vote and the same, in no manner, can be extended to those who have not voted at all. Finally, he submitted that "election" means an election to fill a seat, it cannot be construed as an election not to fill a seat[29].

Respondent No.1 further contends that principle of secrecy of ballot is extended only to those voters who have cast their votes in favour of one or the other candidates. The pith and substance of his argument is that secrecy of ballot is a principle which has been formulated to ensure that no case it shall be known to the candidates or their representatives that in whose favour a particular voter has voted so that a voter can exercise his right to vote freely and fearlessly. The stand of the Union of India as projected by

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[27] *Supra* Note 1 at ¶ 59 "For illustration, if there are 12 candidates contesting an election, the 13th panel on the balloting unit will contain the words like "None of the above" and the ballot button against this panel will be kept open and the elector who does not wish to vote for any of the abovementioned 12 contesting candidates, can press the button against the 13th panel and his vote will be accordingly recorded by the control unit. At the time of the counting, the votes recorded against serial number 13 will indicate as to how many electors have decided not to vote for any candidate."

[28] *Ibid.*

[29] *Supra* Note 1 at 8.

learned ASG is that the principle of secrecy of ballot is extended only to those voters who have cast their vote and the same in no manner can be extended to those who have not voted at all.[30]

He also points that the NOTA has no legal consequences and shall be of no motivation to the voters to vote and reject the candidates, thus it shall have no effect on not going to polling station.

III. JUDGMENT

After giving anxious consideration to the arguments made by both the Parties, Court unanimously upholds that not allowing a person to cast vote negatively defeats the very essence of freedom of expression and also the right ensured in Article 21 i.e. right to liberty.

The Court referred to the electoral systems of various countries[31] and also to Australian judgment in R. v. Jones[32] where it was held that in constituency-based representation, "secrecy" is the basis. Emphasis was also made to the 170th Report of Law Commission of India, which had recommended the implementation of the concept of negative vote and also pointed out its advantages.

Considering that democracy is all about choice which can be expressed by giving the voters an opportunity to verbalize themselves unreservedly and by imposing least restrictions on their ability to make such a choice. Thus, by providing NOTA button[33] in the Electronic Voting Machine (hereinafter, 'EVM'), it will accelerate the effective political participation in the present state of democratic system and the voters in fact will be empowered[34], which will eventually compel the political parties[35] to nominate a sound candidate, who will stand for
purity of the electoral process.

Free and fair election is a basic structure of the Constitution and necessarily includes within its ambit the right of an elector to cast his vote without fear of reprisal, duress or coercion. Protection of elector's identity and

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30 *Ibid* at 30.

31 Viz. France, Belgium, Brazil, Greece, Ukraine, Chile, Bangladesh, State of Nevada (USA) which have NOTA as an option and other Countries such as Finland, Sweden, United States of America, Colombia, Spain which have Blank Vote or Write in ('Write-in' is a form of negative voting which allows a voter to cast a vote in favour of any fictional name/candidate.).

32 *R*. v. *Jones*; (1972) 128 CLR 221.

33 *Supra* Note 1 at ¶ 57 "Even though NOTA button is similar to ABSTAIN button but serves a very fundamental and essential part of a vibrant democracy."

34 *Ibid* at 53.

35 2(f) of RP Act defines Political Party as "an association or a body of individual citizens of India registered with the Election Commission as a political party under section 29A".

affording secrecy is therefore integral to free and fair elections and an arbitrary distinction between the voter who casts his vote and the voter who does not cast his vote is violative of Article 1436[36] of Indian Constitution[37]. Also the Article

21(3)[38] of the Universal Declaration of Human Rights[39] and Article 25(b)[40] of the International

Covenant on Civil and Political Rights[41] recognizes the right of secrecy of a voter. Thus, secrecy is required to be maintained for both categories.

In the light of the above discussion, the Court declares that Rules 41(2) and (3) and Rule 49-O of the Rules are ultra vires Section 128 of the RP Act and Article 19(1)(a) of the Constitution to the extent they violate secrecy of voting. Election Commission is hereby directed to provide necessary provision in the ballot papers/EVMs for introduction of another button called "None of the Above" (NOTA) is to be introduced.

The Court also directs the Election Commission to undertake various awareness programmes to educate the masses about NOTA and to implement the same either in a phased manner or at a time with the assistance of the Government of India, which will provide necessary help required in the implementation of the above direction.

IV. CRITICISM

In the case of Lok Sabha and Legislative Assembly elections where there is only one contesting candidate in the fray, the Returning Officer has to, in accordance with the provisions of the Section 53(2) of RP Act, declare the sole contesting candidate as elected. The provision of NOTA option which

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[36] Article 14 – "The State shall not deny to any person equality before law or equal protection of the laws within the territory of India."

[37] *Ibid*.1 at ¶ 54.

[38] Universal Declaration of Human Rights Art. 21(3) - "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."

[39] Universal Declaration of Human Rights adopted by United Nations General Assembly on 10th December 1948.

[40] International Covenant on Civil and Political Rights Art. 25 -"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions".

[41] International Covenant on Civil and Political Rights adopted by United Nations General Assembly on 16th December 1966.

is an expression of decision not to vote for the contesting candidates is not relevant in such cases[42].

A senior Election Commissioner official told Hindustan Times[43] that the NOTA option would not impact the results of the elections, "The NOTA option on EVMs has no electoral value. Even if the maximum number of votes cast is for NOTA, the candidate getting the most of the remaining votes would be declared winner."

V. PRACTICAL APPLICABILITY OF THE NOTA BUTTON

The recently held assembly elections in Chhattisgarh, Delhi, Madhya Pradesh and Rajasthan was the first where voters had the option of voting for "None of the Above" (NOTA). If reliable sources are to be believed more than 15 lakhs people exercised this option in the states polls. Around 50,000 voters opted for NOTA in Delhi; 3.57 lakhs in Chhattisgarh; 5.9 lakhs in Madhya Pradesh and 5.67 lakhs in Rajasthan.

According to the Election Commissioner's website, NOTA received 9,47,276 votes or 2.5% vote share in the Bihar Assembly election held in November 2015. Though this vote share is not significant but with proper publicity and awareness campaigns, the rise in vote share of

NOTA may be seen in the coming years.

Seniors Party leaders of the Bharatiya Janata Party (BJP), Narendra Modi and L.K. Advani[44], welcomed the NOTA provision. They, however, asked for another 'electoral reform' viz. that voting should be made mandatory.

VI. ISSUES IN ELECTORAL POLITICS IN INDIA

The election at present face several legal and social issues, some of these issues are booth capturing, casteism, excessive expenditure[45], poll violence, bribery, promoting enmity between different caste, religion, classes etc.

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42 Available on http://pib.nic.in/newsite/mbErel.aspx?relid=100291, last updated on 28th October 2013.

43 Hindustan Times Newspaper, Dated 14th May 2015, New Delhi.

44 LK Advani stated that the "Voters, who without any legitimate justification, have not been exercising the valuable right of franchise the Indian Constitution has conferred on them have, unwittingly thus, been casting a negative vote against all the contesting candidates without intending to do so..I hold, therefore, that a negative vote would become really meaningful if it is accompanied also by the introduction of mandatory voting,".

45 In Contravention of § 77 of the RP Act.

There also have been instances where political parties have been caught offering money to voters or soliciting votes in the name. The height of these corrupt practices is so much that the principle of "Fair and free election" is being threatened.

Poor Voter turnout is also another major issue as people take elections for granted not realizing that if one has not voted, he/she has lost his/her right of being heard and therefore the right to complain as Benjamin Jealous[46] rightly said that "The right to vote is the right upon which all our rights are leveraged, and without which none can be protected".

Insufficient representation of women in rural panchayats, urban local bodies, Parliament and State Legislature is another issue which has been to some extent addressed by Constitution (110th Amendment) Bill, 2009[47], Constitution (112th Amendment) Bill, 2009[48] and Constitution (108th Amendment) Bill, 2010[49], but unfortunately these have not been passed by the Parliament yet.

VII. SUGGESTION/RECOMMENDATION

H.S. Hooda[50] has suggested amendment in section 77 of the RP Act wherein Explanation -1 and Explanation – 2 be deleted and *in lieu* thereof maximum limit of election expenses in Parliamentary constituency and Assembly constituency may be increased by way of amending Rule 90 of the Rules. Aswini Kumar Das[51] is of the view that distribution of money, houses, lands and other commodities during the period of election should be stopped and rather it should be carried out by para-military forces.

Law Commission in its 255th Report, headed by Justice A.P. Shah, recommended that independent candidates should be debarred from contesting elections and paid news be made an electoral offence. It has also recommended changes to rules governing election funding.

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46 Civic Leader and former President of National Association for the Advancement of Coloured People (NAACP).

47 The Bill seeks to amend Article 243D of the Constitution to increase the reserved seats for women in rural panchayats and urban local bodies from one-third to half of the total number of seat in panchayat.

48 The Bill seeks to amendment Article 243T of the Constitution to increase the quantum of reservation of women from one-third to half of the total number of seat in a Municipality.

49 The Bill, seeks to reserve 181 seats out of 543 seats in the Lok Sabha and 1,370 seats out of a total of 4,109 seats in 28 state assemblies for women.

50 Former Advocate General, Haryana.

51 Retd. Additional Chief Electoral Officer, Orissa.

Ramesh Pokhriyal[52] has inter alia, stated that State should fund the elections and the expenditure should be shared between the State and the Central Government. He has also suggested that giving of one day's pay to labourers and other poor people may be considered if they do not turn up for voting due to the earning of livelihood.

Bhupinder Singh Hooda[53] suggested mechanism should be evolved to put a ban on donations from blacklisted persons.

Bringing political parties within the purview of RTI Act 2005 has much been debated and recently, Department of Personnel and Training (DoPT) submitted an affidavit to Central

Information Commission (CIC) stating this would adversely impact the internal working and political functioning of the political parties.

Election Commissioner has suggested many electoral reforms some of them include transfer of rule making authority of RP Act to Election Commission, instead of the Central Government[54], Compulsory maintenance of Accounts by Political parties and audit thereof by agencies specified by the Election Commission[55]

The Standing Committee on Law and Justice[56] made certain key observations and recommended statutory backing to Model Code of Conduct for Political parties.

VIII. PERSONAL OPINION

I support the decision of the Court to introduce NOTA button in polling booth, however I am little sceptical to the use and significance of this new change, in particular if this change will serve any purpose or not. Though, I strongly agree that that Rules 41(2) and (3) and Rule 49-O of the Rules are ultra vires Section 128 of the RP Act and Article 19(1) (a) of the Constitution.

It is evident from the recent past that the NOTA has been accepted by the voters and is definitely a necessary step in the light of electoral reforms.

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[52] The then Chief Minister of Uttarakhand at a Regional consultations held in Lucknow on 30th January, 2011.

[53] The then Chief Minister of Haryana at a Regional consultations held in Chandigarh on 5th February, 2011.

[54] Proposal made by Chief Election Commissioner's Letter dated 15th July, 1998 addressed to the Law Minister of India.

[55] Proposed Electoral reforms, Election Commissioner of India, 2004.

[56] Report on "Electoral Reforms- Code of Conduct for Political Parties and Anti Defection Law" submitted on 26th August, 2013.

However, I believe that it is too early to comment on the success of NOTA as people are still unaware of NOTA provision and believe that they have to vote for a candidate at the polling booth. Proper awareness campaign and publicity is the need of the hour in this regard.

Also in my view minimum educational qualification should be made mandatory for candidates who want to contest election be it in Panchayat or the National level. I am a firm believer that to bring a change in the electoral system, we have to together weed out the malpractices and get involved in the political process as Mahatma Gandhi rightly said "You must be the change that you want to see in this world"

IX. CONCLUSION

Even after several electoral reforms in the recent past, elections in India continue to suffer from several defects and loopholes. The judgment given by the Supreme Court in the present case along with Lily Thomas v. Union of India[57] have been some of the recent judgments dealing with the crux of electoral reforms in India. However, it is still a debatable point whether the voter's participation will increase due to this change or will the political parties give ticket to candidates who stand for integrity. Thus, it can be concluded that this is just a beginning of a long journey, a small step towards a free and fairer elections.

[57] *Lily Thomas* v. *Union of India*; (2013) 7 SCC 653 : (2013) 6 ABR 236 : (2013) 3 GLR 2209 : (2013) 3 PJLR 261. In July 2013, the Hon'ble Supreme Court ruled that Parliamentarians and State Legislators who were convicted of serious crimes having two years or more as punishment would be debarred from contesting elections, the Court struck down Section 8 of RP Act, which allowed convicted Parliamentarians and State Legislators to continue in office until the appeal is disposed.

FORM IV

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I, A. Lakshminath, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-
A. Lakshminath

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