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*The journal is highly indebted to the initiative, guidance and determined efforts of **Swapnil Verma** and **Sankalp Sharma**, fifth year students of National Law Institute University who have greatly contributed towards bringing out this issue. We seek their future support and good wishes.*

The Journal could not have been published without the time and effort of the following persons.

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MESSAGE FROM THE PATRON

NLIU Law Review is the result of the unending endeavor of the young minds to achieve academic excellence in every way possible. NLIU Law Review, the student-run law review of the National Law Institute University had a humble beginning as an effort on the part of a handful of students to initiate an atmosphere of superior quality research and legal understanding. The first issue of this review indicates a touchstone in the history of legal education provided by the University as it is a reflection of the values inculcated in the students in the course of their academic career.

The law review is a collective effort by the student body to assemble articles, case notes, comments and essays on a host of legal issues and issues of contemporary relevance. The journal has been possible as a result of the hard work and intellectual efforts on part of the students. The articles have been selected on the basis of a detailed editorial test. I commend the contributors as well, for providing fresh perspectives on a variety of legal issues of contemporary relevance. The articles are on a plethora of legal issues in different forms, which together make for an extremely interesting and informative reading. I congratulate the students and the contributors on their efforts and wish them all the best for their future endeavors. I would also like to place on record my appreciation for the hard work done by the members of the Editorial Board and the Faculty Advisor, Professor Ghayur Alam.

Prof. (Dr.) S.S. Singh
Director, National Law Institute University, Bhopal

MESSAGE FROM THE FACULTY ADVISOR

It gives me immense pleasure to be a witness to the launch of the very First Issue of the NLIU Law Review of the National Law Institute University, Bhopal. In furtherance of the objectives of the University, students have undertaken this initiative to promote legal research and bring out this Law Review focusing on issues of contemporary legal significance. Members of various Committees of the NLIU Law Review have done a commendable job in bringing out this Issue in such a short span of time. I am most impressed by the dedication, die hard commitment and great zeal of the students involved in this Endeavour. They have displayed the quality of utmost persistence and are unstoppable in their aspirations. I hope and pray that they continue to work, for this Law Review and in their lives, with greater zeal, dedication and commitment. I would further like to add that that the students have proved their scholarly and analytical skills to carry out the editorial work in an effective and time-bound manner. They have also shown managerial and organizational ability of the highest order. I am also grateful that the University has been able to provide an opportunity to the students to unleash their energy for this cause. It has been a great pleasure to work with them.

I wish the NLIU Law Review a Grand Readership and congratulate the students for successfully bringing out this Issue.

We would love to receive comments and suggestions on the research work published in this Issue. Suggestions for improving the quality of this Law Review are most welcome.

Prof. (Dr.) Ghayur Alam
Faculty Advisor

EDITORIAL NOTE

Law, whether as a subject of study or profession, was earlier thought a very insulated and land-locked subject of study. However, over the last decade; the growing demand for a legal background and the improvement in the quality of legal education in the country has awakened many to the multi- faceted area the legal profession is.

The NLIU Law Review is the first of its kind to be initiated by the student body of the University. Our aim is to encourage students to come forth with interesting and fresh perspective on new and hitherto unexplored areas of the law.

It is but obvious that with the Copenhagen Summit being a burning topic of discussion, the importance of the Environment and the threats it faces has come into discussion with a greater fervour. In *Preserving our Oceans: Analysis of Environmental Threats, International Obligations and Participatory Approach Towards Conservation of Marine Ecosystems,* the author has looked into the international obligations which are cast on the nations as regards their environmental policies under the International Environmental Law.

In *Battle of The Turf Between RBI and CCI - An Analysis*, the author has provided an interesting insight into the relationship between the RBI and the Competition Commission of India in the present economic scenario. The judiciary is considered the most free, fair and unbiased organ of the Indian Government. With the recent controversy as to the appointment of judges, *Appointment Or Disappointment: Problem And Perspective To The Appointment Of Judges In The Indian Judiciary* looks at the problems which have arisen and gives a collective view of the voices which have risen in protest of the same.

The paper on *DRT – A Court of Civil Matters Yet Not A Civil Court* deals with the Debt Recovery Tribunal and with the help of the recent

cases seeks to understand the dispute between its jurisdiction and that of the civil courts.

The constitutionality of the provisions of a summary trial under the Act has also been delved into by the author which provides for a new viewpoint on the issue. In *Separation of Powers: A Comparative Study of India, USA, UK and France* the author has compared the doctrine to that in the legal systems of other countries; namely those who have affected ours in a major way. *Constitutional Validity of Section 21 of the Hindu Succession Act, 1956* provides an interesting and extremely original insight into the aforementioned Act which is a very less researched area of the law. The conflict that arises due to the rigid belief that the younger issue lives longer has been analyzed in the course of the paper. The disabled in India have been sought to be protected and looked after through various legislations. However, it is to be seen how far these laws have fit effectively into the institutional framework as examined in *Disability Care and Indian Infrastructure*.

The case laws are insightful and cover the diverse areas of banking law, corporate law and criminal law.

On this note; we hope the efforts on our part have gone a long way in satiating your thirst for knowledge and keep you asking for more. We look forward to the same enthusiasm to make the journal a success!

Editorial Board

PRESERVING OUR OCEANS: ANALYSIS OF ENVIRONMENT TREATS, INTERNATIONAL OBLIGATIONS, AND PARTICIPATORY APPROACH TOWARDS CONSERVATION OF MARINE ECOSYSTEM

Mishita Jethi[*]

I. HISTORY OF THE 'FREEDOM OF HIGH SEAS'

The earliest Roman Empire recognised the utility of freedom of the seas, and the sea was "common to all men".[1] However, at the height of the Roman Empire, the entire Mediterranean Sea was regarded as a Roman lake. Thus, one may argue that the concept of such waters being 'common to all men' was simply a way of stating the right of the *Roman citizens* over the seas. There was no international flavour in this recognition, because the waters dealt were all *mare clausum*, i.e. closed seas, totally under the dominion of the Roman empire.[2]

With the breakdown of social order after the Roman authority, various governmental entities arose and developed into modern-states, appropriating adjacent areas of sea for their exclusive use, with Spain and Portugal emerging as forerunners in maritime navigation and exploration.[3] In the later centuries, the concept of freedom of seas arose once again, with the other nations in Europe challenging Spain and Portugal's right to exclusive trade with the 'New World'. In his

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[1]PERCY THOMAS FENN, *Justinian and the Freedom of the Sea*, 19 AJIL 716-727 (1925).

[2]PITMAN POTTER, *THE FREEDOM OF THE SEA IN HISTORY, LAW AND POLITICS* (Longmans, Green and Co. New York 1924).

[3]THOMAS WEMYSS FULTON, THE SOVEREIGNTY OF THE SEA 3-6 (EdinburgWm. Blackwood and Sons, 1911).

treatise, Dutch jurist Grotius argued, that every nation was free to travel to every other nation and to trade with it, utilizing the high seas for that purpose.[4] According to his classification, the sea fell in a category of things which could not be placed under 'ownership' because it could not be reduced to possession, and one vessel's navigation was not an impediment to others. In modern law, this concept ripened into the doctrine of 'Freedom of High Seas', with there being an unbroken line of judicial authority from the 18th century onwards affirming that the high seas are free and open for the use of all and may not be appropriated to any nation.[5]

II. MODERN CONCEPT OF 'LIMITED SOVEREIGNTY'

A. State Practice and the International Court of Justice

It has been stated in the previous section that from the very beginning, the high seas were considered to be open for all, and not to be made territory of any State. To understand what '*territory*', and thus '*sovereignty*', of a State means, we must realize that it is a well-recognized principle of international law that no State can be deemed subordinate to external authority, including the rule of a body of international law. In the case of *The Schooner Exchange* v. *McFaddon*[6] it was held that *"The jurisdiction of the nation within its own territory is necessary and exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its own sovereignty to the extent of the restriction."* The

[4]HUGO GROTIUS, MARE LIBERUM CHAPTER 5 (Oxford, England: Clarendon Press, Magoffin translation 1916).
[5]LE LOUIS, *2 Dodson 210*, 165 English Reports 1464 (1817); The Marianna Flora, 11 Wheat (24 US) 1 (1826); The SS Lotus Case (France v. Turkey) PCIJ Series A, No: 10 (1927).
[6]11US (7 Cranch) 116, at 156, (1892).

Right of Passage case[7] is an example that a State's conduct within its own territory is unrestricted by international legal rules. The specific right of States to render independent decisions with respect to their natural resources and their right to freely use and exploit their natural wealth and resources has been identified in a series of statement from the UN General Assembly.[8] Thus the 'territory' of a State is understood to be that geographical extent over which and for which a State can make independent legislations, without requiring to consult any external authority or entity.

However, it is equally true that it is international law that defines the points of intersection, and therefore the limits of States' sovereignty. The consent of State is not required to subordinate a State rule which has risen to the dignity of international law.[9] No State maybe vested with exclusive competence or unfettered liberty even as to its own resources when the interests of other states are implicated. In 1951, the International Court of Justice ("**ICJ**") held that *"[t]he delimitation of the sea areas has always had an international aspect, it cannot be dependent merely on the will of the coastal States as expressed in its municipal law*".[10] In the *Icelandic Fisheries* case[11], it was indicated that the states not only have a duty in customary International law to allocate common resources equitably but also to conserve them for future benefits in the interest of sustainable utilization. This case does support the existence of a customary obligation on the part of the nations to co-operate in conservation and sustainable use of common property resources of High seas.

[7]The Right of Passage over Indian Territory case, (Portugal v. India), (1960) I.C.J. 6.

[8]G.A. Res 626 (VII), U.N. Doc. A/RES/626 (1952); G.A. Res 1803 (XVII), U.N. Doc. A/RES/1803(XVII) (1962).

[9]BRIAN D. SMITH, STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT: THE RULES OF DECISION, (Oxford: Clarendon Press 1988).

[10]The Anglo-Norwegian Fisheries case (1951) ICJ Reports 3, 132.

[11]1974 ICJ Reports, 3.

B. The UN Conventions and Codification of 'Territorial Sea' and 'Reasonable Use'

This brings us to the special status accorded to the high seas and coastal zones in international law. In this spirit, the concept of '*territorial sea*' maybe studied. This concept became a rule of customary international law together with the freedom of the high seas. The principle was ultimately codified in *the Convention on the Territorial Sea and the Contiguous Zone*[12], which provides that

'The sovereignty of a State extends beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea…The sovereignty of a coastal State extends to the air space over the territorial sea as well as to its bed and subsoil.'[13]

The First UN Conference on the Law of the Sea was held in Geneva in 1958 and The Convention on the High Seas[14] was adopted. Under this Convention however, this freedom was to be exercised by all States "*with reasonable regard to the interests of other States*".[15] Even the US Courts as early as 1826 said that one must exercise ocean rights so as not to impinge on the rights of others or cause damage to the property of others.[16] This notion of something other than 'absolute' right of freedom on the high seas was the beginning of a new stage in the law of the sea development that would have important ramifications for the emergence of international rules concerning high seas trade in the latter half of the twentieth century

The various treaties of the United Nations have stated that common places and the high seas are open to *legitimate and sustainable use* by

[12]Convention on the Territorial Sea and the Contiguous Zone, 15 UST 1606 (1964), 516 U.N.T.S. 205 (1964).
[13]Convention on the Territorial Sea and the Contiguous Zone, Article 1(1) and 2.
[14]Convention on the High Seas, April 29, 1958, 13 UST 2312 (1962), 450 U.N.T.S. 82 (1962).
[15]Convention on the High Seas, Article 2.
[16]The Marianna Flora, 11 Wheat (24 US) 1 (1826).

all the states warding off absolute sovereignty of a particular state.[17] The 1982 United Nations Convention on the Law of the Seas[18] ("**UNCLOS**") was intended to be a comprehensive restatement of almost all aspects of the Law of the Sea. Its basic objective is to establish

"*A legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and the oceans and equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of marine environment*."[19]

A. Stages of Evolution of the Use of Marine Resources

Thus, the evolution of rules of customary international law with regards to marine resources has been crystallised into four stages by a known jurist in international environment law: (1) unrestricted and unregulated freedom of the high seas, (2) reasonable use of the high seas, (3) regulated use of the high seas, and (4) establishment of property rights in the high seas.[20] The first stage was in the ancient Roman era which continued until the formation of the modern world as we understand now. The second stage was the concept as evolved under the Convention of the High Seas and the Convention Territorial Seas, where there was freedom of high seas but with due regard to the interests of other nations. Under this approach however, the standards of 'reasonableness' were never codified or hardened by law. There was no compulsory dispute settlement procedure and traditional diplomatic processes were banked on. Thus, environmental harm inflicted by coastal States would usually either go unnoticed, or was protected under the doctrine of sovereignty. In the third stage, international law became more regulatory and treaties and regulations

[17]Convention on High Seas, Article 1 and 2; *Infra* note 18, UNCLOS, Article 87 and 89.
[18]United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 12.
[19]Preamble of the UNCLOS.
[20]HERBERT GARY KNIGHT, MANAGING THE SEA'S LIVING RESOURCES: STUDIES IN MARINE AFFAIRS, 27, (Toronto: Lexington Books 1977).

drawn up by affected countries have become binding. In the fourth stage, in which we see ourselves now, coastal States have started allocating exclusive tenure to public and private companies through a variety of rights, under the system of exclusive economic zones. The Convention on the Continental Shelf[21] as well as customary international law accords exclusive access to coastal States to the nonliving resources off their coasts. My understanding suggests that from this stage, we are now not only ready to move to, but also forced to recognise the fifth stage of sustainable and universal use of the high seas and marine resources.

III. THE IMPORTANCE OF BIODIVERSITY IN MARINE ECOSYSTEMS

'Ecosystem' means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.[22] 'Biological diversity' means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.[23]

The oceans cover 70% of the planet's surface area, and marine and coastal environments contain diverse habitats that support an abundance of marine life. Marine organisms of the same species living in a specific area are populations of that particular species. A population never lives in isolation but interact with other populations. A group of plant and animal population living together in the same region is a community. For example, a variety of marine animals in a food chain system coexist. Life in our seas produces a third of the

[21]Convention on the Continental Shelf, April 29, 1958 15 UST 471 (1964), 499 UNTS 311 (1964).
[22]*Infra* note 34, Article 2.
[23]*Id.*

oxygen that we breathe, offers a valuable source of protein and moderates global climatic change. Some examples of important marine ecosystems are Oceans, Estuaries and salt marshes, Lagoons, Tropical Communities (Mangrove Forests and Coral Reefs), Rocky subtidal (Kelp Beds and Sea grass Beds) and Intertidal (Rocky, sandy, and muddy shores).The many marine ecosystems coupled together sustain the larger, complex, and intricately interlinked global ecosystem - ecosphere.[24]

Marine ecosystems are a part of the largest aquatic system and environmental resources on the planet, covering over seventy percent of the Earth's surface. The habitats that make up this vast system range from the productive near-shore regions to the barren ocean floor. Marine ecosystems are very important in to the overall health of both marine and terrestrial environments. According to the World Resources Center, coastal habitats alone account for approximately one-third of all marine biological productivity, and estuarine ecosystems (i.e., salt marshes, seagrasses, mangrove forests) are among the most productive regions on the planet. In addition, other marine ecosystems such as coral reefs provide food and shelter to the highest levels of marine diversity in the world.[25]

IV. THREATS TO THE MARINE ENVIRONMENT

Today, there is broad recognition that the seas face unprecedented human-induced threats from industries such as fishing and transportation, the effects of waste disposal, excess nutrients from agricultural runoff, and the introduction of exotic species. If we fail to understand both the vulnerability and resilience of the living sea, the relatively brief history of the human species will have to face tragic

[24]FRED T. MACKENZIE AND JUDITH A. MACKENZIE, OUR CHANGING PLANET: AN INTRODUCTION TO EARTH SYSTEM SCIENCE AND GLOBAL ENVIRONMENTAL CHANGE 94 (Prentice Hall. Upper Saddle River, 1995).

[25]http://www.epa.gov/bioindicators/aquatic/marine.html. accessed on 30th December, 2009.

destiny. While socio-economic and political interests of the nations may be fragmented, reliance upon shrinking ocean and coastal resources, international trade and foreign investment capital are the most important factors that are common in all economies. According to the Millennium Ecosystem Assessment, the world's oceans and coasts are highly threatened and subject to rapid environmental change. Major threats to marine and coastal ecosystems include:[26]

- Land-based pollution and eutrophication
- Overfishing, destructive fishing, and illegal, unreported and unregulated (IUU) fishing
- Alterations of physical habitats
- Invasions of exotic species
- Global climate change

The main conclusion of the 'International Conference on Impacts of Population and Markets on Sustainability of the Ocean and Coastal Resources: Perspectives of Developing Economies of the North Pacific Rim', held in Seattle from June 2-3, 1999 was that '*there is an urgent need to start a regional study on impacts of population and market pressures on environmental health of the ocean and coastal resources of the region.*'[27] It has been 10 years since that conference, and we are yet to see any major environmental impact assessment undertaken in our country, particularly for the coastal regions.

A. Coastal tourism

A major threat to the marine environment is coastal tourism. Major environmental and social consequences result from uncontrolled tourism development. Tourism development without due attention to the health of the coastal environment can damage the coastal

[26]Convention on Biological Diversity, *What's the problem*, (Oct. 8, 2009. http://www.cbd.int/marine/problem.shtml.

[27]VLAD M. KACZYNSKI, *Integrative Analysis of Human Impacts on Oceans and Coasts in the Asia-Pacific*, 10. Presented at the Pukyong National University - University of Washington Joint Seminar: Impact of Population and Markets on Marine Environment: Perspectives of the Asia-Pacific Economies, Mar. 13, 2001, Busan, Korea.

ecosystems by destroying coral reefs and mangroves leading to siltation of coastal waters. In addition, beach erosion, oil leaks from boat engines, the physical damage to the reef and sea grass bottoms caused by divers and snorkellers, improper waste and sewage disposal, and the leakage of tourism income to outsiders is all negative consequences of tourism development. Tourism in many of islands in Southeast Asia are especially under increasing pressure due to their limited resource base such as fresh water and land and limited capacities of waste disposal. Tourism impact may be more severe in islands because tourists and tourist amenities tend to concentrate near the ecologically and geomorphologically dynamic coastal environment. The small size of many islands also means that they are bound to locate in the coastal zone.

Many of today's coastal settlements can be traced back to the early 20th century when trade and commerce began to flourish inter-regionally within the world. The ports became critical supply points for the settlers as they moved to hinterlands and for the traders who began to look for newer markets. In fact, post 1950s in United States, the demand for coastal housing, recreational as well as permanent became great. Since this area of coastal lands is finite, developers all across the world started to "reclaim" the fertile wetlands. Areas totally unsuited for housing development are "hardened" to accommodate burgeoning coastal communities, usually with no semblance of planning and environmental concern. Apart from housing, shipping industries have also contributed in multifarious ways to upset and destroy the delicate balance of environment in coastal regions. The offshore oil industries have grown dramatically in recent years in many countries. There have been oil-spills connected with production and transport operations that have affected coastal resources. While the environment continues to adapt to meet the demands of human population, due to its assimilative nature, there are limits to this assimilation also. Understanding the nature of

conflicting uses of coastal resources provides a clearer basis for management actions that follow.

Tourism is promoted in many economies because it can generate economic and social development, and alleviate poverty in many coastal nations. It can add to the GNP considerably and bring in export earnings. However, coastal areas are one of the most frequently visited areas. Because the coastal zone is a highly sensitive geographic space bordering land and water, they are vulnerable to environmental pressure, and thus, sustainable tourism practice is encouraged such as ecotourism. GESAMP 2001 report also mentions that tourism is the world's biggest industry, and is rapidly growing. Unfortunately, tourism lacks sufficient management in the environmental area. Most tourist places are located near the coast and this causes extreme environmental pressure. Tourists generate much waste. Today, marine tourism is facing the dilemma between increasing tourists and improper disposal of waste.[28]

B. Overfishing

Overfishing is widely acknowledged as one of the greatest single threat to marine wildlife and habitats. The Food and Agriculture Organization ("**FAO**") of the United Nations reports, that nearly 70% of the world's fish stocks are now fully fished, overfished or depleted. Such global and/or regional trend naturally raises an important question on fisheries/resources sustainability. That is to say, how can coastal states with limited but transboundary[29] marine living resources provide their people with seafood in a sustainable manner under the restrictive conditions? Technological advances in the modern practices of fishing can be ascribed as a major reason for this

[28]A Sea of Troubles, GESAMP, (Jan. 2001), http://www.gesamp.org/publications/a-sea-of-troubles.

[29]Marine transboundary issues arise from transmigration nature of marine living resources and pollutants across the national ocean boundaries.

depletion. Modern trawlers swallow large fish stocks.[30] These vessels can catch twice as much fish in an hour as a sixteenth-century ship could haul in a whole season.[31] FAO estimate that a ton of unwanted "by-catch" is caught for every three tons of fish netted a total of 27 million tons of this by catch is killed each year.[32] 'Bottom trawling' is also detrimental to benthic sea bed.

Many experts on marine ecosystem and resources believe that ocean carrying capacity may no longer allow overexploitation of marine living resources. In reality, North Pacific coastal states and international fishery organizations have put much more efforts on resource management over their jurisdictional waters as well as the high seas than ever before. This is a clear sign that cheap marine fisheries operation in the oceans will be no longer possible throughout the region.[33] The ninth meeting of the Conference of the Parties to the Convention on Biological Diversity ("**CBD**")[34] as well as other relevant UN/international fora, such as the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters and the 1996 London Protocol, sounded a warning on the potential adverse impacts of direct human-induced ocean fertilization on marine biodiversity. The Conference of the Parties to the CBD, in its ninth meeting, also raised its concerns on the potential impacts of ocean acidification.[35] The necessity to combat the degradation and depletion of fish stocks, both in the zones under national jurisdiction and in the high seas and its causes, such as overfishing and excess fishing capacity, by-catch and discards, has

[30]THOMAS TELESCA, *Sovereignty or the Precautionary Principle: Which will save Our Fish?* 12 SOUTHEASTERN ENVTL. L.J. 23 (2003).
[31]*Id.* at 45.
[32]COLIN WOODARD,OCEAN'S END 42 (Basic Books 2000).
[33]Seong K. Parkand Jae M. Choi, *Transboundary Marine Ecosystem and Living Resource Problems in the North Pacific*, Presented for the Open Meeting of International Science Planning Committee (ISPC), (Oct. 6-8, 2001).
[34]1760 U.N.T.S. 143, 1992; 31 I.L.M. (1992) 822.
[35]Secretariat of the Convention on Biological Diversity, Statement of Dr Ahmed Djoghlaf, Executive Secretary, at the Meeting of Steering Committee Global Form on Oceans, Coasts and Islands Washington DC, USA 5 - 6 February 2009.

been one of the recurrent topics in the process of implementation of the programme of action adopted in Rio de Janeiro.

As far as the world's coral reefs are concerned, about 20% of them have been effectively destroyed and show no immediate prospects for recovery; about 16% of them were seriously damaged by coral bleaching in 1998, but of these about 40% have either recovered or are recovering well; about 24% of the remaining reefs are under imminent risk of collapse through human pressures; and a further 26% are under a longer-term threat of collapse.[36]

C. Pollution

The late 1980s and early 1990s were a time when the world population came to terms with the rising menace of environmental pollution. Awareness of the impact of pollution on coastal environments, on fisheries, and on human populations became widespread by 1980s. Real problems of over fishing, loss of marine biological diversity and degradation of marine ecosystems has become more apparent recently.[37] For these reasons, protection of the marine ecosystem and the sustainable use and development of its resources have become significant issues in the modernization of the law of the sea. A study group on unintended occurrence of pesticides in marine environment organized by Organization for Economic Co-operation and Development[38] ("**OECD**") has started a programme of monitoring residue levels in aquatic wildlife. This group states that production of H_2S is a serious coastal pollution problem where sea water containing sulphate is reduced by large amounts of organic

[36]Secretariat of the Convention on Biological Diversity, Statement of Dr Ahmed Djoghlaf, Executive Secretary, at the Meeting of Steering Committee Global Form on Oceans, Coasts and Islands Washington DC, USA 5 - 6 February 2009.

[37]Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP), *The State of Marine Pollution*, (UNEP 1990).

[38]Founding Convention of the Organization for Economic Co-operation and Development ('OECD Convention'), 888 UNTS 179.

matter in sediments and stagnant waters.[39] Lead concentration have elevated in higher organisms near the end of marine food chains. Accumulation of industrial lead in surface layers of near-shore sediments has elevated lead levels in shellfish.[40]

Every coastal State is granted jurisdiction for the protection and preservation of the marine environment of its exclusive economic zone. Such jurisdiction allows coastal States to control, prevent and reduce marine pollution from dumping, land-based sources or seabed activities subject to national jurisdiction, or from or through the atmosphere. With regard to marine pollution from foreign vessels, coastal States can exercise jurisdiction only for the enforcement of laws and regulations adopted in accordance with the UNCLOS for "*generally accepted international rules and standards.*" Such rules and standards, many of which are already in place, are adopted through the competent international organization, namely the International Maritime Organization ("**IMO**").[41]

D. Illegal trade of marine biological species

Trade in rare wildlife and marine life species is thought to be the second most lucrative illegal trade in the world.[42] The Convention on International Trade in Endangered Species of Wild Flora and Fauna[43] ("**CITES**") emphasizes environmental trade measures. CITES is a non-self executing treaty and cannot be implemented until specific legislation has been adopted by each member State.[44] The failure to adopt domestic legislative framework and regulatory measures

[39]CHARLES S. PEARSON, INTERNATIONAL MARINE ENVIRONMENTAL POLICY: THE ECONOMIC DIMENSION (California: John Hopkins University Press, 1975).
[40]EDWARD D. GOLDBERG, A GUIDE TO MARINE POLLUTION, SCRIPPS INSTITUTE OF OCEANOLOGY (La Jolla, California, Gordon and Breach Science Publishers).
[41]ALAN E. BOYLE, *Marine Pollution Under the Law of The Sea Convention*, 79 AM. J. INT. LAW 1985.
[42]P.K.RAO, INTERNATIONAL ENVIRONMENTAL LAW AND ECONOMICS 178 (Blackwell Publishers, 2002).
[43]993 U.N.T.S. 243: 119, 125, 127, 140; Signed at Washington, D.C., on 3 Mar. 1973, Amended at Bonn, on 22 June 1979.
[44]CITES, art. VIII.

prevents parties from adopting the required trade measures envisaged under CITES. An important issue is the State's obligation to ensure environmental measures in international trade, in relation to the provisions of the World Trade Organization[45] ("**WTO**"), which came into existence based on an agreement of 1994. For WTO members who are also a party to CITES, provisions of CITES could have prevailed according to the principles of customary international law. According to this view, *lex posterior* would have prevailed. However, Article II.4 of the WTO Agreement clarifies that "*The General Agreement on Tariffs and Trade 1994 is legally distinct from The General Agreement on Tariffs and Trade 1947*". It thus appears that GATT now postdates CITES. Here it maybe argued that *lex specialis* will prevail, because specific environmental agreements are not as broad-based as GATT/WTO.[46] This issue remains relevant for years to come and are subject to interpretations in specific combinations of agreements and their provisions.

V. PROVINCE OF ALL MANKIND: ARGUMENTS FOR PROTECTION OF MARINE RESOURCES BY ALL STATES

A. Argument Under Principles of Customary International Law

There exists in international environmental law, a real and binding primary obligation of the States for the protection of the environment, whose breach involves responsibility for a wrongful act.[47] These real

[45]33 I.L.M. (1994) 15.
[46]P.K.RAO, INTERNATIONAL ENVIRONMENTAL LAW AND ECONOMICS (Blackwell Publishers, 2002).
[47]RICCARDO PISILLO-MAZZESCHI, FORMS OF INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM, IN INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM (Francioni & T. Scovazzi eds., 1991).

and binding obligations are guided by the due diligence rule.[48] International decisions,[49] practice and opinion now clearly evidence the emergence of an international obligation designated to check the potentially intrusive liberty of states with respect to environmental matters: *sic utere tuo, alienum non laedas.* The International Court in *Corfu Channel*[50] case referred to 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other State.' The obligation to prevent 'transboundary harm' has also been stated by the Court repeatedly.[51] The obligation to prevent conduct in State territory from causing material damage to the environment in the territory of another State has risen to the dignity of a rule of customary international law.[52] The logic of due diligence can be extended to the exercise of legal authority by a State over private activities in areas such as the contiguous zone, the continental shelf and the exclusive economic zone to prevent environmental harm to another state.[53] The States are under an obligation to ensure that their territories are not utilized for any activity that may be potentially hazardous to the environment of the other States.[54] This principle is also extendable to harm caused by the activities of the State in and around the coastal areas. Even while performing their legitimate

[48]Convention on the Non-Navigational Uses of International Watercourses, Draft Report of the International Law Commission, G.A.O.R., 43d Sess., U.N. Doc. A/CN.4/L.463/Add.4, (1991), 3 COLO. J. INT'L ENVT'L L. 1 (1992) Articles 8-19, 26, 27.

[49]Trail Smelter case, (US v. Canada) 3 RIAA (1905).

[50]The Corfu Channel case, (UK v. Albania) (1949) ICJ 4, 22.

[51]The Nuclear Tests case, (Australia v. France) (1974) ICJ 253; The Lac Lanoux case, (1957) (Spain v. France) 12 RIAA 281.

[52]Caflisch, *International Law and Ocean Pollution: the Present and the Future*, 8 REVEU BELGE DROIT INTERNATIONAL 7, 15 (1972); Legault, *The Freedom of the Seas: A License to Pollute?*, 31 U. TOR L.J, 211, 217 (1971).

[53]Amerasinghe, *Basic Principles relating to the International Regime of the Oceans',* 6 J. MAR. L & COMM. 213 (1975).

[54]Convention on the Non-Navigational Uses of International Watercourses, Draft Report of the International Law Commission, G.A.O.R., 43d Sess., U.N. Doc. A/CN.4/L.463/Add.4, (1991), reprinted in 3 COLO. J. INT'L ENVT'L L. 1 (1992) Articles 8-19, 26, 27.

activities, States are under an obligation to prevent, abate and control transfrontier pollution to such an extent that no substantial injury is caused in the territory of another State.[55] For marine resources, this obligation requires States to utilise their biological resources, and also coastal environment in a way that is not harmful to other States. The various activities of damaging nature carried out by States in the fragile marine ecosystems are harming not just the coastal States but also States in the hinterland.

B. Obligations under treaties and multilateral agreements

The real awakening in the field of international environment law began with the historic conference held in Stockholm in 1972 called the Declaration of the UN Conference on the Human Environment ("**Stockholm Declaration**").[56] The process of developing a new international environmental law was also given a substantial impetus by the Declaration on Environment and Development ("**Rio Declaration**").[57] Recommendations of the Stockholm Declaration led directly to the adoption of the 1972 London and Oslo Dumping Conventions, and the 1973 ("**MARPOL**") Convention for the Prevention of Pollution from Ships. Conservation of biological diversity is a common concern of humankind.[58] In this light, States cannot disregard environment of common places and other States.[59] The CBD expresses the willingness of the Contracting States to conserve and sustainably use biological diversity for the benefit of

[55]Article 3, "ILA Montreal Rules of International Law Applicable to Transfrontier Pollution (1982)", in Report of the International Law Commission on the work of its fiftieth session First report on "Prevention of transboundary damage from hazardous activities" UN Doc. A/CN.4/487/Add.1 Geneva, 20 April-12 June 1998.
[56]Declaration of the United Nations Conference on the Human Environment, June 16, 1972, Principle 21, U.N. Doc. A/C, 48/14 (1972), reprinted in 11 I.L.M. 1416 (1972).
[57]U.N. Doc. A/CONF.151/26/REV.1(1992), Vol. 1, Aug. 12 1992.
[58]CBD, Preamble.
[59]U.N. G.A. Res. 3281 (XXIX) (1974), Charter of Economic rights and duties of states; UNCLOS art. 193; Rio Declaration, art. 2; CBD, art. 3.

present and future generations.[60] UNCLOS mandates the state parties for conservation and management of living resources of High seas.[61] Further States have the obligation to protect and preserve the marine environment.[62] Besides, Article 2 of the Rio Declaration is also similarly worded and says that

"States have … the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

Principle 21 of the Stockholm Declaration embodies a State's sovereign right over their own resources, but also the responsibility to ensure that activities within their jurisdiction do not cause transboundary harm.[63] There are several treaties which have adopted this principle of due diligence to ensure that activities of the State refrain from causing transboundary harm.[64] This rule, established in principle 21, is now a general principle of international law.[65]

C. Human rights argument

Prior to World-War II, how a State chose to treat its nationals and its internal resources was a matter beyond the reach of international law. Since then, it has become a matter of international concern and a proper subject of regulation by international law.[66] Freedom from environmental degradation and injury is identified as a protected human right.[67] The requisite international interest is the community's

[60]*Id*.
[61]UNCLOS, art. 119.
[62]UNCLOS, art.192.
[63]Dupuy, P.M., *International Law And Pollution*, in INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 337 (Edith Brown Weiss et al., 1998).
[64]McCaffrey & Stephen C., *International Environmental Law*, in International Environmental Law And Policy 504 (Edith Brown Weiss et al., 1998).
[65]RICCARDO PISILLO-MAZZESCHI, FORMS OF INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM, IN INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM (Francioni & T. Scovazzi eds., 1991).
[66]Universal Declaration of Human Rights, G.A. Res. 217 A, 10 Dec. 1948 (A/810) 71.
[67]Ho, *UN Recognition of the Human Right to Environment Protection*, 2 EARTH LJ 225 (1976).

concern for the protection of the human right to be free from the adverse effects of environmental degradation. The right to environmental protection is implicit in the right to health; the relationship between the wellbeing of an individual and the quality of the natural environment is patent.[68] Thus, there is a duty cast on all States to ensure that the delicate environment around aquatic regions is not disturbed so as to cause health hazards to populations in other States.

D. Environmental unity argument

Earth's biosphere represents a single indivisible system characterised by the inter-relations of its various ecological subsystems. The disruption of any one promotes the breakdown of another.[69] As a corollary, injury to any part of the ocean environment, even within an exclusive juridical zone, constitutes by definition, injury to the whole resource. Resources in the marine environment are thus in some sense 'international' even if within the zone of exclusive territorial authority. 'Natural Solidarity' of the sea renders all regions a part of a continuous biosphere. Such pollution may affect system wide resources, such as migratory species of fish and overall biological stock of other species.[70] Of late, it has been recognized that "*it is one of the advances in maritime international law, resulting from the intensification of fishing, that the former laissez-faire treatment of the living resources of the sea in the high seas had been replaced by the recognition of a duty to have due regard to the rights of other States and the needs of conservation for benefit of all*."[71] As a result, the rationale of sovereignty will not hold ground if the exploitation of

[68]International Covenant on Economic Social and Cultural Rights, Annex, General Assembly Resolution 2200, 21 UN GAOR Supp (No. 16) UN Doc A/6316.
[69]Handl, *Territorial Sovereignty and the Problem of Transnational Pollution*, 69 AJIL 50,53 (1975).
[70]Topping, *Sewage and the Sea*, Marine Pollution 303 at 322-333.
[71]The Fisheries case, (United Kingdom v. Iceland), (1974) ICJ Reports 3.

marine resources of a Coastal State are done in a manner contrary to the international environmental policies.

E. Protecting the seas

Thus, as seen from general principles and specific obligation of international environment law and other arguments, '*marine ecosystem approach and management*' has been recognized in various treaties[72] and other international instruments.[73] All States are obliged to undertake measures to protect the marine environment.[74] Ecosystem approach has longed formed a corpus of customary international law and general principles of international law. Ecosystem-based management is currently a highly topical issue and is being widely discussed in the context of fisheries management.[75] The Action Plan for the Human Environment adopted at the Stockholm Declaration recommends that States 'ensure that ocean dumping by their nationals anywhere…is controlled.'[76] The introductory general statement of obligation in the UNCLOS implies a duty to take all possible steps, including exercise of extraterritorial authority, to prevent marine pollution.[77] The 1975 US draft of UNCLOS required States to implement marine pollution laws of international standards or higher with respect to any spatial areas over which they possess jurisdiction, flag vessels, and nationals.[78] Thus, it may easily be said that there are enough number of treaties, multilateral agreements and general obligations under customary

[72] UNCLOS; UNFSA; CBD.

[73]1992 The FAO Code of Conduct for Responsible Fisheries; CBD; UN General Assembly Resolution 56th Meeting 2004. UN Doc. A/59/122, of July 1 2004. See inter alia paras 4-6, 56-62, 67-68 and 74-89.

[74]UNCLOS, art 192 & 194.

[75]Introduction of the new Common Fisheries Policy in January 2003 focused on this approach as the way forward to a sustainable fishing industry.

[76]Stockholm Declaration, Recommendation 86.

[77]UNCLOS, art. 192.

[78]US: Draft Articles on the Protection of the Marine Environment and the Prevention of Marine Pollution, Article 4, U.N. Doc. A./AC 138/SC iii/L 40.

international law for the States to prevent causing harm to the environment in general and the oceans in particular.

VI. SUSTAINABLE DEVELOPMENT OF MARINE ECOSYSTEMS: TRADE POLICIES AND SOVEREIGN RIGHTS V. THE ENVIRONMENT AND PRIVATE RIGHTS

"*One Nature, One World, Our Future"* was the motto of the ninth meeting of the Conference of the Parties—the Bonn Biodiversity Summit—held in May 2008, the largest-ever gathering of the biodiversity family. In Bonn, the Parties to the Convention reaffirmed that our future lies in the ocean and recognized that strong evidence has been compiled to emphasize the need for urgent action to protect biodiversity in selected seabed habitats and marine areas in need of protection.[79] The role of indigenous and local communities in the future process was also highlighted, and the Conference of the Parties called on Parties to integrate the traditional, scientific, technical and technological knowledge of indigenous and local communities, and to ensure the integration of social and cultural criteria and other aspects for the identification of marine areas in need of protection as well as the establishment and management of marine protected areas. Further, an understanding of the legal relationships among obligations of the States, private rights, public rights, public interest and public trust doctrine is essential to more effectively manage the coastal resources, and in appreciating the quandary between sovereignty, international trade and development on one hand and conservation of the marine environment on the other. As we have seen that some of the main deficiencies from the coastal resources management are

[79]Secretariat of the Convention on Biological Diversity, "Sustaining the Blue Planet: Our Ocean Our Future", Message of Dr Ahmed Djoghlaf, Executive Secretary, on the occasion of The World Ocean Day 8 June 2008.

externalities, collective goods and common pools.[80] In order to overcome these deficiencies, certain ways which may be taken towards the sustainable development of the marine ecosystems are given as conclusions.

A. International trade policies

It goes without saying that no international organization is above international law. Accordingly, international organizations are mandated to respect international environmental laws and not seek to promote and era of global environmental externalities in the *res nullius*, particularly in the marine environment. In general, international economic laws should integrate environmental considerations in order that economic policies remain sustainable.

International trade policies have a major impact on the earth's biodiversity, potentially interfering with and undermining national and international conservation laws and policies. Trade liberalization can also increase exploitation of biological and natural resources and exacerbate the associated negative impact on the society. The economic question of 'optimal biodiversity' and the prioritization of environment cannot be addressed without sufficient clarity about the future roles of different ecological and economic factors in welfare maximization in a sustainable sense. Whether a trade ban is effective in achieving its goal of environment preservation and enhancement depends crucially on the discount rate, which is an object if a country's macro-economic policies, as much as it is on the intervention by the international community to protect wildlife species.[81] Imperfectly competitive trade leads to environmental deterioration, especially when national governments tend to "rent-shift" with lax environmental policies and protection of domestic industry competitiveness against foreign rivals.

[80]ROBERT B. DITTON ET AL. COASTAL RESOURCES MANAGEMENT, 99, (Toronto: Lexington Books, 1977).
[81]Van Kooten and Bulte, 335 (2000).

WTOs '*environmental provisions*' maybe summarised under the following heads:

1. GATT Article XX (b) and (g): policies affecting trade in goods for protecting human, animal, or plant life or health are exempt from normal GATT disciplines under certain conditions.
2. Technical Barriers to Trade (product and industrial standards) and Sanitary and Phytosanitary Measures (animal and plant health and hygiene): recognition of some environmental objective.
3. Agriculture: environmental programs exempt from cuts in subsidiaries.
4. GATS Article 14: policies affecting trade in service for protecting human, animal, or plant life or health are exempt from normal GATS disciplines under certain conditions.

There is a need for the WTO to give specific recognition to environmental values. Article XX (b) and XX (g) of the GATT 1994 should be amended to provide a general exception for trade measures that are reasonably necessary for the protection of domestic environment. In addition, Article XX may also amended to incorporate a safe harbour for multilateral environmental agreements that employ trade measures, which are reasonably necessary and related to the subject matter of the agreement.[82] In this regard, even the WTO Committee on Trade and Environment suggested that if a dispute arises between WTO members, that are parties to a multilateral environmental agreement, over the use of trade measures they are applying amongst themselves pursuant to the agreement, "*they should consider trying to resolve it through the dispute settlement mechanism given under the agreement*."[83]

[82]AUTAR KRISHEN KAUL, THE GENERAL AGREEMENT ON TARIFFS AND TRADE/WORLD TRADE ORGANIZATION: LAW, ECONOMICS AND POLITICS, 568, (New Delhi: Satyam Books, 2005).
[83]P.K.RAO, INTERNATIONAL ENVIRONMENTAL LAW AND ECONOMICS, 269, (Blackwell Publishers, 2002).

B. Allocation of resources to include environmental costs

Market institutions play a major role in governance of economic resources; however, this is not true for environmental resources that do not have a market. Problems of irreversibility are more relevant in international environmental laws. Without market price for use of marine environmental services in production, the private prices for goods and services do not reflect the full social cost of production. Usually, marine resources are not allocated to competing uses on the basis of highest productivity, but are used and abused as dumping grounds for waste disposal. There is no economic incentive to reduce waste loads through treatment, recycling etc. Market cost should include marginal social cost of production, including the cost to the society of using marine resources. Such users never pay a price of these resources despite their economic value, and consider them as 'free' goods. Such costs are called 'externalities', which are created by users of marine environmental resources and borne by others.[84] If such externalities are left uncontrolled, there would be no incentive left for output reduction. In such cases, States should ask their governments to step-in in the management of marine resources to improve allocation efficiency and social welfare. Trade liberalization combined with appropriate internalization of environment costs promises to augment global welfare in the short run as well as long run, and hence maybe sustainable.

C. Private property rights and 'public trust' doctrine

Private property owners of land that border on the coastline have all rights of ownership plus some additional rights because of their location. Riparian rights include access to and from the water and use of the water in front of the property for navigation, fishing, swimming, and other purposes. The right of a riparian owner to use

[84]R.Coase, *The Problem of Social Cost;* G. Calabresi, *Transaction Cost, Resource Allocation and Liability Rules,* Economics Of The Environment (Dorfman and Dorfman eds, Norton, 1972).

the public water offshore from his property is an excellent example of how private and public property is interrelated. Many coastal resource regulations dealing with matters of wetlands and shoreline protection limit the use of private property, in all of these regulations, the one that raises many legal questions is the process of 'taking', which refers to acquisition of land by government without paying any compensation.

The *public trust* doctrine provides a rational and legal precedent for placing ecological protection above private property rights.[85] This doctrine has been advocated in some court opinions, for example "*the duty of the State [is] to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that tight of protection only in rare cases when the abandonment of the right is consistent with the purposes of the trust*."[86] When the object or public purpose is to prevent destruction of wetlands, there are alternatives to regulations. One way is to have the state exercise its power of eminent domain and acquire land in fee simple or to acquire lesser interests in the property such as developmental rights. At a general level, the economic principle of conservation would require that the optimal level of biotic conservation would seek to equate marginal social cost of conservation with marginal social benefit.[87]

D. Bioprospecting

Activities such as 'bio prospecting', undertaken by different entities, should form part of an overall package and resources should then be utilized from a mix of sharable rents and public fiscal financial resources. Bio prospecting 'rents' in some cases are very significant and possess the potential to finance relevant bio conservation. However, bio prospecting and rent-seeking aspects of genetic resource exploitation, combined with misappropriation of indigenous

[85]Hurlbut, 398, (1994).
[86]National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709 (Cal 1983).
[87]Batabyal, (2000).

knowledge in the use of biological products, stand out as areas of global discontent, particularly between developing and developed countries. Owing to methodological flaws, primarily based on the assumption of uninformed or no *a priori* information regarding the potential likelihood of a plant or biotic product being employed in medicinal or related uses,[88] suggested that returns to genetic assets of bio prospecting may not be sufficient to create significant self-supporting conservation incentives.

E. Recognition of rights of the indigenous communities

Granting intellectual property rights to innovations and knowledge products is a conventional method of converting public goods to private goods in the industrial countries. However, patenting and commercialization is not a standard practice in many societies, especially in relation to indigenous knowledge. In the absence of external influences, such as multinationals, the knowledge base is preserved and localised for the benefit of the local people.

It has long been recognised that *"[I]ndigenous people and their communities ... have a vital role in environmental management and development ... States should recognize and duly support their ... and enable their effective participation in the achievement of sustainable development*."[89] Some 'development projects' tend to routinely dislocate the life and livelihood of indigenous people, without the latter's consent in the process. The CBD recognizes the dependency of indigenous and local communities on biological diversity and the unique role of indigenous and local communities in conserving life on Earth. This recognition is enshrined in the preamble of the Convention and in its provisions. It is for this reason that in Article 8(j) of the CBD, Parties have undertaken to *"respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities relevant for the conservation of biological diversity*

[88]Simpson et al. (1996).
[89]*Supra* note *58*, Principle 22.

and to promote their wider application with the approval of knowledge holders and to encourage equitable sharing of benefits arising out of the use of biological diversity." In this regard, Parties to the Convention adopted the Akwé: Kon Guidelines[90] for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place or which are likely to impact on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities. These guidelines are intended to provide a collaborative framework ensuring the full involvement of indigenous and local communities in the assessment of cultural, environmental and social concerns and interests of indigenous and local communities of proposed developments. Moreover, guidance is provided on how to take into account traditional knowledge, innovations and practices as part of the impact-assessment processes and promote the use of appropriate technologies.

VII. CONCLUSION

The duty of the States to protect the marine environment extends not only towards the territorial seas and zones of exclusive jurisdiction, but also towards any activity carried out by a State that may have the potential to harm the aquatic bionetwork of any region. International trade policies affecting the seas, particularly at the WTO level, should be made keeping in mind the plausible harm that they might cause to the marine resources. States will have to contemplate and implement innovative ways to conserve the dwindling biodiversity in the marine ecosystems, both in the coastal regions and in the high seas. One way would be to revert back to the more traditional and non-invasive ways

[90]Akwé: Kon (A holistic Mohawk term meaning 'everything in creation' provided by the Kahnawake community located near Montreal, where the guidelines were negotiated) Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities.

of exploiting the natural resources. This can be done by integrating the traditional knowledge of the local communities in the modern technology. Further, imposition of rents on multinationals while giving them licenses for bioprospecting is another way to ensure that rampant industrialization does not swallow up the delicate environmental balance of the coastal region. Coastal tourism needs to be made more ecofriendly, particularly in areas of high marine biodiversity, such as estuaries and marshlands. Newer industrial establishments must be made to absorb and integrate the damage to the environment in their production costs, so that it gives them an incentive to adopt more environmental friendly production techniques. Above all, as citizens of the world, and as inhabitants of the blue planet, we must play an active role in the conservation of earth's biological diversity in the oceanic territories.

BATTLE OF THE TURF BETWEEN RBI AND CCI - AN ANALYSIS

Shubham Khare and Niharika Maske[*]

I. INTRODUCTION

The Banking Sector is considered as the lifeline of the Liberalized and Globalised Indian Economy. It holds the key to the smooth functioning of various industrial giants, small and medium scale industries by acting as a major source of credit, it also plays a pivotal role in structuring international trade and commerce. Banking sector also acts as lifeline for individuals (retail customers) by catering to their credit and other financial needs. Lately Consolidation has been the buzzword in the Indian Banking industry especially amongst the public sector banks. The public sector banks account for nearly 80% of the total net income and profit of the banking industry.

The trends towards globalisation of all national & regional economies has increased the intensity of mergers, in a bid to create more focused, competitive, viable, larger players in banking industry. Liberalization of the earlier state controlled, sluggish Indian economy has made mergers more necessary and acceptable.[1]

Consolidation of Banks has gained popularity in India after the 1997 Narshiman Committee Report. The report recommended mergers of banks especially public sector banks. It further said that "*Mergers of public sector banks should emanate from management of banks with*

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[1]Dr. Manoj Dash, *Consolidation in Indian Banking* (Dec. 3, 2009), http://www.indianmba.com/Faculty_Column/FC248/fc248.html.

Government as the common shareholder playing a supportive role."[2] Such mergers, however, can be worthwhile if they lead to rationalisation of workforce and branch network. It further provided that the rationale behind bank mergers shall not be bailing out weak banks rather it should be mergers between strong banks that would make for greater economic and commercial sense and would have the force multiplier effect.

The recent global economic downturn has again brought into spotlight the banking sector and its reforms. In recent past the policymakers in India has also shown commitment towards reforming the banking sector as an endeavor to ensure the growth of Indian economy as well as keeping it free from the clutches of economic disasters. India's mantra for banking reforms would be consolidation, competition & convergence to enable Public Sector Banks to become stronger, bigger and globally competitive. The logic behind is to create a few solid banks capable of operating and competing internationally.

To a large extent, this consolidation is based on a belief that gains can accrue through expense reduction, increased market power, reduced earnings volatility, and scale and scope economies. Whether or not bank mergers actually achieve the expected performance gains is the critical question. If consolidation does, in fact, lead to value gains, then shareholder wealth can be increased. On the other hand, if consolidating entities does not lead to the promised positive effects, then mergers may lead to a less profitable and valuable banking industry.[3] The negative effects of the mergers may result in a less competitive banking industry that will bring it within the purview of anti-trust/ Competition laws.

After the enforcement of Competition Act, 2002 (hereinafter the Act) and the proposed notification of provisions relating to *control of*

[2]Committee on Banking Sector Reforms (Narasimham Committee II), Chapter V, para 5.13-5.15 (Dec. 10, 2009)., http://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/24157.pdf.

[3]Steven J. Pilloff & Antony M. Sontemero, *The Value Effects of Banks Merger & Acquisitions* (Dec 5, 2009),http://fic.wharton.upenn.edu/fic/papers/97/9707.pdf.

combinations under the Act will make mergers of two or more banks or acquisitions of one bank by another subject to approval by the Competition Commission of India ("**CCI**"). Earlier, under the Monopolies and Restrictive Trade Practices Act, 1969 mergers and amalgamations of banks were exempted from any kind of scrutiny. The inclusion of bank mergers within the purview of the CCI has given birth to a new conflict i.e. the tussle of jurisdiction between CCI and Reserve Bank of India ("**RBI**").

This article is an effort to examine the tussle of jurisdiction between the Sectoral Regulator in the Banking Industry i.e. the Reserve Bank of India and the Indian anti-trust watch dog i.e. the Competition Commission of India on issues pertaining to consolidation of banks. In the aforementioned endeavor it tries to determine the motivations behind bank mergers. It also analyse the relevant provisions of the Competition Act, 2002 consequently establishing the grounds on which bank mergers can be regulated under the Competition Act. It also analyses the functions of RBI and CCI. Finally, it suggests a model relationship to be adopted between Sectoral Regulators and CCI in India, keeping in mind the Indian scenario and also drawing inference from foreign jurisdictions.

II. PART I

A. Motives behind consolidation of banks

Over a period of time the Indian Banking Sector has seen many positive developments. The policy makers, which comprise the RBI, Ministry of Finance and related government and financial sector regulatory entities, have made several notable efforts to improve regulation in the sector. The sector now compares favorably with banking sectors in the region on metrics like growth, profitability and non-performing assets ("**NPAs**"). A few banks have established an outstanding track record of innovation, growth and value creation.

This is reflected in their market valuation. However, improved regulations, innovation, growth and value creation in the sector remain limited to a small part of it. The cost of banking intermediation in India is higher and bank penetration is far lower than in other markets. India's banking industry must strengthen itself significantly if it has to support the modern and vibrant economy which India aspires to be. While the onus for this change lies mainly with bank managements, an enabling policy and regulatory framework will also be critical to their success.[4] Value creating M&A will play a very important role in the development of banking sector.

The bank merger phenomenon has been widely accepted as the way to achieve performance improvement, especially when merger activities focus on geography, economics of scale, and activity lines.[5]

Consolidation (Mergers and Acquisitions) activity results in overall benefit to shareholders when the consolidated post-merger firm is more valuable than the simple sum of the two separate pre-merger firms. The primary cause of this gain in value is supposed to be the performance improvement following the merger.[6] Several types of efficiency gains may flow from merger and acquisition activity. Of these, increased cost efficiency is most commonly mentioned. Many mergers have been motivated by a belief that a significant quantity of redundant operating costs could be eliminated through the consolidation of activities.[7]

[4]Mckinsey, *Indian Banking 2010- towards a High Performing Sector* (Feb. 21, 2010), http://www.mckinsey.com/locations/india/mckinseyonindia/pdf/india_banking_2010.pdf.

[5]Viverita, *The Effect of Mergers on Bank Performance: Evidence From Bank Consolidation Policy In Indonesia* (Dec. 5, 2009), http://www.wbiconpro.com/112-Viverita.pdf.

[6]*Id.*

[7]BARTON CROCKETT, FIRST BANK CLAIMS WELLS OVERSTATES DEAL SAVINGS, (American Banker 1995).

There are a number of reasons governing the need of consolidation of banks in India. They can be summarized as following:

The emergence of titans has been one of the noticeable trends in the banking industry at the global level. These banking entities are expected to drive the growth and volume of business in the global segment. In the Indian banking sector also, consolidation is likely to gain prominence. Despite the liberalization process, state-owned banks dominate the industry, accounting for three-quarter of bank assets. The consolidation process in recent years has primarily been confined to a few mergers in the private sector segment, although some recent consolidation in the state-owned segment is evident as well. These mergers have been based on the need to attain a meaningful balance sheet size and market share in the face of increased competition, driven largely by synergies and location based and business-specific complementarities. Efforts have been initiated to iron out the legal impediments inherent in the consolidation process. As the bottom lines of domestic banks come under increasing pressure and the options for organic growth exhaust themselves, banks in India will need to explore ways for inorganic expansion. This, in turn, is likely to unleash the forces of consolidation in Indian banking.[8]

Secondly, as pointed out by the Deputy Governor of Reserve Bank of India, consolidation is required to meet the growing Capital needs of the Banks He said, "*Consolidation in banks is necessary and the issue facing the sector is to meet the growing capital needs of banks"*[9]

Thirdly, Consolidation is required for customers also. Intermediation costs in India remain high because there is relative inefficiency in the system. Whether it is the small and medium enterprise segment or the mass-market retail segment or even the agricultural segment – all are

[8]Dr. C Rangarajan, *The Indian Banking System- The Challenges Ahead* (Feb. 21, 2010), http://rbidocs.rbi.org.in/rdocs/Bulletin/DOCs/67729.doc.

[9]Thompson Reuters, *Consolidation in Banks needed- RBI Deputy* (Dec. 4, 2009), http://in.reuters.com/article/topNews/idINIndia-40340320090615.

under-served. India has sub-scale banks that cannot invest and serve their customers.

Fourthly, Consolidation of banks may lead to increased revenue efficiency. Scale of economies may help larger banks to offer more products and services and scope of economies may allow provider of multiple products and services to increase the share of targeted customer activity.

Fifthly, to create bigger and stronger banks in place of small banks, the merger of banks in the same geographical areas reduces the number of competitors in that particular area an in turn provides increased income and revenue to the surviving entity by increasing loan rates and decreasing deposit rates.

The above mentioned benefit in turn exposes the bank mergers and acquisitions to the scrutiny and review of the competition authority as The Competition Act 2002 is designed to prohibit mergers with anti-competitive effects.

B. Competition act and its basic purpose

The basic purpose of the Competition law can be inferred from the Competition policy. The Competition Policy has been laid down in the Raghavan's Committee report. The object of the Competition policy is as follows:-

"Competition Policy, in this context, thus becomes instruments to achieve efficient allocation of resources, technical progress, consumer welfare and regulations of concentration of economic power. Competition policy should thus have the positive objective of promoting consumer welfare"[10]

The Raghavan's Committee defines free competition as total freedom to develop optimum size competition without any restriction. The main object behind the competition policy is to ensure development and growth of Indian market and protection of consumer interest by increasing fair competition and prohibiting anti-competitive practices.

[10]Raghavan's Committee Report (May 2000).

This object has also been incorporated in the Preamble of the Competition Act.

The Preamble of the Competition Act says *"An Act to provide, keeping in view of the economic development of the country for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.*[11]

The preamble of the Act clearly lays down that the main object behind the formulation of the act is to establish a Commission to:

- to prevent practices having adverse effect on the Competition;
- to protect the interest of consumers;
- to ensure freedom of trade carried on by other participants in markets in India;
- And for matters connected therewith or incidental thereto.

As aforesaid, the Competition Act provides for the establishment of a commission known as the Competition Commission of India. The CCI will be a regulatory Authority that will regulate the behavioral patterns of the players of the market to ensure elimination of anti-competitive practices and growth of fair competition in the market. CCI is a Competition Law Enforcing Authority. It has also been assigned the task to take a proactive stand to promote competition.[12]

It can thus be concluded that the Competition Act seeks to achieve: -

1. Prohibiting trade practice causing adverse effect on the market and thus ensuring a fair and equitable market;
2. The protection and promotion of interest of Consumers;
3. The promotion of Competition in market;
4. To ensure freedom of trade to other participants in the market.

[11]Competition Act, Preamble (2002), http://www.taxmann.net/Companylaws/competitionAct/Contents.htm.

[12]D.P. MITTAL, COMPETITION LAW & PRACTICE, 338 (Taxmann Allied Services Pvt. Ltd., 2008).

C. Consolidation of banks and competition law

Earlier any kind of merger or acquisitions of banks was exempted from review under **Monopolies and Restrictive Trade Practices Act, 1963** but it has now been included under the **Competition Act, 2002**. Under the Act, CCI is authorised to inquire into agreements both horizontal and vertical - among banks; abuse of dominant position and mergers between banks above the prescribed thresholds.[13]

The Competition Act, 2002 aims at prohibiting anti-competitive practices adopted by enterprises or market players. The anti-competitive behaviour can be classified into three categories: -

1. Anti-competitive Agreements or Cartels
2. Abuse of Dominance
3. Combinations (mergers, amalgamations and acquisitions) above a specified threshold.

Consolidation in the banking industry is vulnerable to be tested on two out of the three grounds mentioned above. They are:

- The merger of two or more banks will come under the purview of examination by CCI, if it is above certain specified threshold limit.
- When an entity created out of bank mergers or acquisition can be classified as a dominant enterprise and has abused its dominance or is likely to abuse its dominance.

[13]Competition Commission of India, *Competition Issues in Banking Sector* (Dec. 8, 2009), http://www.cci.gov.in/images/media/presentations/12competion_bank-sector_cci_20080410174812.pdf.

D. Consolidation of banks and combinations under the competition law

The word 'combinations'[14] is an umbrella term which includes mergers, amalgamations and acquisition of control, shares, voting rights or assets. Combinations can be classified into horizontal, vertical and conglomerate combinations. If a proposed combination causes or is likely to cause appreciable adverse effect on competition, it cannot be permitted to take effect. The Combination of banks may lead to high degree of market concentration as when a bank acquires another bank or merges with another bank; the transaction reduces the number of competitors. This reduction can facilitate price-fixing and other anti-competitive collusion. It can also give resulting firm market power to raise prices unilaterally and extract an uncompetitive high price for a significant period of time. Hence Anti-trust law scrutinizes expansion of banks any mergers and acquisitions.[15] The Competition Law also aims at preventing combination which is likely to have an adverse effect on the market in the future. Certain combinations tend to create enterprises that subsequently abuse its dominance. Such anti-competitive combinations should be prevented from coming into existence.[16]

The combinations are regulated under Section 5 of the Competition Act, 2002. Section 5 of the Competition Act 2002,[17] defines Combinations as "*Acquisitions of one or more enterprises by one or more persons or merger or amalgamations of enterprises, with*

[14]Combination has been defined as the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises. Competition Act §5 (2002), http://www.taxmann.net/Companylaws/competitionAct/Contents.htm.

[15]MACEY, RICHARD SCOTT CARNELL & GEOFFREY P. MILLER, THE LAW OF BANKING AND FINANCIAL INSTITUTION 203 (Aspen Publishers, 4th ed, 2008).

[16]MITTAL, *supra* note 12, at 285.

[17]Competition Act §5 (2002), http://www.taxmann.net/Companylaws/competitionAct/Contents.htm.

reference to threshold criteria of the value of assets and turnover of the enterprise involved."[18]

It further lays down certain requirements including a threshold requirement based on assets and turnover of the combining enterprises or groups. It is as follows:

a) Where Enterprises are involved

1. *In India*- assets of the value of more than rupees one thousand crores or turnover more than three thousand crores; or
2. *In India or outside India*- five hundred million US dollars (including at least rupees five hundred crores in India) or turnover, fifteen hundred million US dollars including at least rupees fifteen hundred crores in India (in aggregate).

b) Where a group or an enterprise belonging to a group is involved

3. *In India*- assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
4. *In India or outside India*- two billion US dollars, (including at least rupees five hundred crores in India) or turnover, six billion US dollars including at least rupees Fifteen hundred crores in India.(in aggregate).[19]

Therefore, any bank having assets or turnover above the threshold mentioned in Section 5 of the Act has to compulsorily report any kind of merger and acquisition activity undertaken by it to the CCI. The requirement of mandatory reporting is laid down under Sec 6(2)[20] of the Act which provides that, "*Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, **[shall]** give notice to the Commission, in the form as may be specified, and the fee which may be determined, by*

[18] *Id.*
[19] MITTAL, *supra* note 12, at 299.
[20] Competition Act, (2002), http://www.taxmann.net/Companylaws/competitionAct/Contents.htm.

regulations, disclosing the details of the proposed combination, within [thirty] days of—

(a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5 by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;

(b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section."

On notification CCI will inquire into and investigate the proposed combination to determine whether such combination is anti-competitive or not and also whether it is likely to be antic-competitive in the future or not.

E. Consolidation of banks and abuse of dominance under the competition act

The combination is anti-competitive if it creates a dominant enterprise that subsequently abuses its position. It is to some extent analogous to the agreement between the parties and suffers from same vices of enjoying dominant position and abusing of the combining parties

Section 6 of the Competition Act, 2002 prohibits a person or an enterprise from entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India. Such a combination is void.

Section 6(1) of the Competition Act 2002,[21] says "*No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void."*

The above mentioned provision clearly lays down that any combination which has created an adverse effect or is likely to have an adverse effect in the Indian market in the future, is void. *The*

[21]Competition Act §6(1) (2002), http://www.taxmann.net/Companylaws/competitionAct/Contents.htm.

relevant market is required to be determined before holding any combination anti competitive. Relevant market can be divided into two parts the relevant Geographical and Product market.

Relevant Product market is defined under Section 2(t) of the Competition Act 2002[22] as "*a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer by reason of characteristics of the products or services, their prices and intended use."*

On the other hand the *Relevant Geographical market is defined under Section 2(s) of the Competition Act 2002.*[23] It provides "*a market comprising the area in which the conditions of competition for supply of goods and provisions of services or demand of goods are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas."*

Therefore, any form of bank merger that is likely to be anti-competitive or have an adverse effect on the competition in the market will be prohibited under the Competition Act. Whether a merger or acquisition lead to market dominance of the merged or amalgamated enterprise will be determined on the basis of following factors:

- Where there is high degree of market concentration
- Where there are barriers to entry
- Where there is a lack of substitutes for a product supplied by the incumbent enterprises[24].

As stated by OECD, the mergers and acquisitions of banks can lead to the following situation which may be considered to be anti-competitive in nature. They being

- *Multi-market contacts*: banks that compete in many markets recognize the need to co-exist rather than compete.

[22]Competition Act, §2(t) (2002), http://www.taxmann.net/Companylaws/competitionAct/Contents.htm.
[23]Competition Act, §2(s) (2002), http://www.taxmann.net/Companylaws/competitionAct/Contents.htmon.
[24]MITTAL, *supra* note 12, at 300.

- *Barriers to entry*: Contestable markets are highly competitive. However, entry restrictions exist in the form of:
  1. *Regulatory barriers*: minimum capital requirements; restraints on lines of business; licensing of branches or subsidiaries; restrictions on entry of foreign banks etc.
  2. *Exit barriers* in the form of measures to prevent bank insolvencies, especially the too big to fail factor
  3. Substantial state ownership of banks would mean that foreign firms cannot take over domestic banks of any substance
- The impact of electronic banking developments on proper market definition and assessment of barriers to entry must be carefully considered in bank merger cases;
- Competition problems in bank mergers are most commonly encountered as regards loans to small and medium sized businesses;
- Barriers to entry in banking could well be high enough to prevent a sufficiently rapid neutralization of any anticompetitive effects that may be expected from bank mergers in sufficiently concentrated markets.
- Efficiencies could be relevant in bank mergers, but competition officials should be skeptical of claims linked to supposed economies of scale especially in dealing with mergers where all the parties are sufficiently large that each has probably exhausted virtually all available economies of scale.[25]

[25] *Id.* at 6.

III. PART II

A. The tussle of jurisdiction between RBI and CCI

As stated earlier, the Act grants power to the CCI to investigate bank mergers & acquisition to determine whether it is anti-competitive or not. Therefore, CCI has the statutory authority to examine consolidation of banks but the recent stand of RBI has sparked off a new controversy. This controversy pertains to the tussle of jurisdiction between the prudential regulator i.e. RBI and the apex Competition Authority CCI regarding the competition related aspects of bank mergers or acquisition. RBI being the sectoral or prudential regulator has sought exemption from the Ministry of Finance for review bank mergers and acquisition by the CCI under Competition Act, 2002.

In a note addressed to the Ministry of Finance, RBI has stated that the aforementioned exemption should be granted following the urgency and unique nature of bank mergers, especially forced mergers.[26] RBI has based its argument on the fact that it is well versed with the banking sector and is in a better position to be the final authority to decide about M&A activities involving banks.

Whereas on the other hand CCI has disagreed with RBI's proposal and has stated that RBI should restrict itself to prudential regulation and leave competition issues to CCI. It has further stated that the public sector banks already have unfair advantage over the private banks on account of certain entry barriers etc.[27]

The basic objective of any economic regulation is to reduce transaction costs and address information asymmetries, externalities

[26]Anindita Dey, *Exempt Bank M&A from Competition Act: RBI* (Dec. 9, 2009), http://www.business-standard.com/india/storypage.php?autono=370748.

[27]Dr. P.K Vasudeva, *Competition Regulator- Needless debate over Turf* (Dec. 9, 2009), http://www.sarkaritel.com/news_and_features/infa/november2009/27competition_regulator.htm.

and distributional issues. The need for achieving these objectives is heightened in the case of 'natural monopolies'. In other words, sectors where market characteristics prevent competition become attractive for specific regulations, to prevent inefficient use of resources and protect consumers. Competition law also aims at preventing market power, thereby ensuring efficiency and consumer welfare. In essence, therefore, sectoral regulations are specific, while competition law is generic, but both are intended to be complementary. However, the intended complementarities between sectoral regulation and competition law may suffer on account of legislative ambiguity or interpretational bias. Since the basic objectives of both are consumer oriented, overlaps cannot be avoided by drafting skills alone.[28] The functions and objectives of both the prudential regulator and CCI have to be taken into consideration.

B. RBI and its functions

RBI is the apex body of the Indian banking sector. It was created under The Reserve Bank of India Act, 1934 and commenced on April 1, 1935. The Act, 1934 (II of 1934) provides the statutory basis of the functioning of the Bank.

The Bank was constituted for the need of following:

- To regulate the issue of banknotes
- To maintain reserves with a view to securing monetary stability and
- To operate the credit and currency system of the country to its advantage.

The major functions of RBI can be summarized as follows:

i. It is a bank of issue. (It issues currency)
ii. It is banker to government.
iii. Banker's bank and lender of the last resort.

[28]Amitabh Kumar, *Do We Require More Sectoral Regulators? (*Dec. 9, 2009), http://www.cci.gov.in/images/media/articles/sectoral_regulators_13_5_2005_FE_20080409114858.pdf.

iv. Controller of Credit
v. Custodian of Foreign reserves
vi. It performs supervisory functions which include supervision and control over commercial and co-operative banks, relating to licensing and establishments, branch expansion, liquidity of their assets, management and methods of working, amalgamation, reconstruction, and liquidation.
vii. It performs promotional functions which include a variety of developmental and promotional functions, which, at one time, were regarded as outside the normal scope of central banking. The Reserve Bank was asked to promote banking habit, extend banking facilities to rural and semi-urban areas, and establish and promote new specialised financing agencies.[29]

RBI also has the power to decide bank M&A under Section 44A (4)[30] of the Banking Regulations Act, 1949. It provides "*If the scheme of amalgamation is approved by the requisite majority of shareholders in accordance with the provisions of this section, it shall be submitted to the Reserve Bank for sanction and shall, if sanctioned by the Reserve Bank by an order in writing passed in this behalf, be binding on the banking companies concerned and also on all the shareholders thereof."*

The Reserve Bank of India has the statutory right to approve or reject any scheme of amalgamation or merger of a bank and no such scheme shall come into effect unless sanction of RBI has been obtained. The prudential regulator if having a statutory power shall get primacy to examine Bank M&A. Prudential regulation is largely centered on laying and enforcing rules that limit risk-taking of banks, ensuring safety of depositors' funds and stability of the financial sector Thus regulation of M&As by RBI would be determined by such

[29]*India Finance and Investment Guide, RBI* (Dec. 9, 2009). http://finance.indiamart.com/investment_in_india/rbi.html.
[30]The Banking Regulations Act, 1949, No. 10, Acts of Parliament, 1949, § 44A (4).

benchmarks.[31] The RBI may or may note examine a bank merger or acquisition on the touchstone of anti-trust laws.

Further, CCI has stated that the incumbents play a very major role in the sectoral regulations. The members of the prudential regulators are from the concerned industry only and they have a sense of loyalty towards their former employers and this may sometimes result in approval of anti-competitive mergers.

C. Competition commission of India and its functions

CCI is the apex body having statutory validity to govern, regulate with any anti-competitive behaviour of the enterprises. The CCI is established under Section 7 (1)[32] of the Competition Act, 2002 by the Central government. It provides that "*With effect from such date as the Central Government may, by notification, appoint, there shall be established, for the purposes of this Act, a Commission to be called the "Competition Commission of India."*

The rationale behind the establishment of the CCI is curbing of negative aspects of competition which can be inferred from the Statement of Object and reason for the introduction of the Competition Bill. It says: -

"*The Bill also aims at curbing negative aspects of Competition through the medium of CCI. CCI will have principal bench and Additional benches and will also have one or more merger benches. It will look into violations of the Act, a task which could be undertaken by the Commission based on its knowledge or information or complaints received and references made by the Central Government, State Government or Statutory Authorities. The Commission can pass orders for granting relief or any other appropriate relief and compensation or an order imposing penalties etc…..*"[33]

[31]Business Standard, *Letters: Bank on the CCI* (Dec. 9, 2009), http://www.business-standard.com/india/news/letters-bankthe-cci/375867/.
[32]The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India), §7(1).
[33]Statement of Object and Reasons of The Competition Bill, 2000.

Section 18 of the Act lays down the functions and duties of the CCI. It provides that "*Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants, in markets in India"*

It is evident from the aforementioned provisions that the CCI has been constituted with the intention of and purpose of eliminating practices having adverse effect on competition and to protect the interest of consumers in India. Further it exercises jurisdiction over all sectors including the banking and financial sector. The CCI can examine a transaction on being referred to it by the parties or by the government; it also has the power to take up a matter suo moto[34].

The guiding principles of the CCI are:

1. To be in sync with markets; have a good understanding of the market force.
2. To minimize cost of compliances by the enterprises and cost of enforcement by the commission
3. To maintain confidentiality of business information; to maintain transparency in the commissions own operations
4. To be a professional body equipped with requisite skills.
5. To maintain a consultative approach.[35]

[34]Competition Act, Section 20(1) (2002), which provides that "The Commission may, upon its own knowledge or information relating to acquisition referred to in clause (*a*) of section 5 or acquiring of control referred to in clause (*b*) of section 5 or merger or amalgamation referred in clause (*c*) of that section, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India."

[35]Competition Commission of India, Guiding Principles (Dec. 10, 2009), http://www.cci.gov.in/index.php?option=com_content&task=view&id=120.

IV. PART III

A. The foreign experience

a) United Kingdom

This interplay of jurisdiction between the sectoral regulators has been encountered in the UK previously. The interplay in UK was not directly between The Competition Authority and prudential regulator of the banking sector rather it was between The Competition Authority and Sectoral Regulators, especially in the public utility services.

Earlier the role of competition authority was very limited. The Fair Trading Act, 1973 excluded the public sector utility services such as gas, electricity, posts, and telecommunication etc from the scope of monopoly references by the Director General of Fair Trading. In all these sectors the reference could only be made by the ministers.[36] So in effect the regulation was more political than legal in nature. The Competition Act of 1980 increased the power of the Competition Authority whereby the minister could refer to the Monopolies and Mergers Commission disputes relating to possible abuse of monopoly position amongst others.[37]

During the 1990s the government created sectoral regulators to regulate the activities of the public sector enterprises providing public utility services. The regulators like Director General of Telecommunication, assisted by Often, and various others such as

[36]Fair Trading Act, §50(2) (1973), http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1973/cukpga_19730041_en_5#pt4-pb2-l1g51.

[37]Competition Act, §11 (1980), http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1980/cukpga_19800021_en_1#pb2-l1g11.

Ofgas, Offer etc. These were created with the aim of restraining monopoly until it could be replaced by competition.[38]

Under The Competition Act, 1998, the prudential regulators are bestowed with authority and power to enforce the Act's prohibition. These concurrent powers permit these regulators to enforce prohibition activities in their own sectors; the sectors are very widely defined. The Scheme of the act is that the prohibition should be applied in the same way by the sectoral regulators as by the office of Fair Trading, rather than being shaped by the different context of the utility service. [39]

In UK the sectoral regulators have been given the power under the Competition act to enforce anti-competitive prohibitions provided under the Competition Act in their own sectors. Therefore, although the sectoral regulators have the power to determine anti-competitive activities and impose prohibition but that has to be in consonance with the Act. Therefore, effectively it is the Competition Authority who has final jurisdiction although it is exercised through the medium of Sectoral regulators.

b) Australia

Australia has a unique structure where both competition authority and the sectoral regulators have been brought under one roof i.e. Australian Competition and Consumer Commission ("**ACCC**"). The Australian Competition and Consumer Commission is an independent statutory authority. It was formed in 1995 to administer the *Trade Practices Act 1974* and other acts. The ACCC promotes competition and fair trade in the market place to benefit consumers, business and the community. It also regulates national infrastructure industries. Its primary responsibility is to ensure that individuals and businesses comply with the Commonwealth's competition, fair trading and consumer protection laws.

[38]POSSER TONY, THE LIMITS OF COMPETITION LAW- MARKETS & PUBLIC SERVICES 44 (Oxford University Press, 2005).
[39]*Id.* at 53.

The ACCC is the only national agency dealing generally with competition matters and the only agency with responsibility for enforcing the Trade Practices Act and the state/territory application legislation.

In fair trading and consumer protection its role complements that of the state and territory consumer affairs agencies which administer the mirror legislation of their jurisdictions, and the Competition and Consumer Policy Division of the Commonwealth Treasury.[40] Australia has put the question of tussle of jurisdiction between the Sectoral Regulators and Competition Authority to rest by making an institution which is combination of both and aims at fulfilling their objectives.

c) United States of America

The USA is also a unique example due to its federal structure. In USA industrial regulators are granted a monopoly in enforcing all or part of competition law in their relevant sectors. The Department of Justice and Federal Trade Commission often advice the industry specific regulators on matters that may affect competition. This advice may be voluntary or, in some circumstances, required by statute. For example, the US antitrust agencies, like any private person may file comments offering their competition expertise in regulatory proceedings before independent agencies. In contrast, some states require the regulator to seek advice from the competition agencies in particular types of proceedings.[41]

The Position in USA is akin to that in UK, where the sectoral regulators have the authority of enforcing either a part or whole of competition law.

[40] *Australian Competition and Consumer Commission, Roles and Activities* (Dec. 11, 2009), http://www.accc.gov.au/content/index.phtml/itemId/54137#h2_14.

[41] Dr. Gamze Ascyoglu Oz, *The Role of Competition Authorities and Sectoral Regulators: Regional Experiences* (Dec. 11, 2009), http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p17_en.pdf.

The French law provides for mandatory consultation between certain sectoral regulators and the competition authority. After experimentation with complete exclusion of utility and public service sectors from competition law, Germany has settled for a division of labour between the two, by suitably amending the laws to minimize parallel competencies. In South Africa, sectoral regulation was initially excluded from the jurisdiction of the competition authority. It was subsequently brought within its domain as experience showed that competition issues could not be handled by sectoral regulators.[42] Further, In Denmark, sectoral regulator has to ask a vinculative opinion from the CA, In Italy and Sweden**,** Competition Authorities have the primary role and receive opinion from the other Sectoral Regulators and in Netherlands there is explicit coordination between the Sector Regulators and the Competition Authorities.[43]

V. PART IV

A. Conclusion

Competition law and policy is crucial in ensuring competitive practices and prohibiting anti-competitive practices in the market. The competition law is generally enforced through a Competition Authority. If a country has selected *markets* as the primary basis for organizing its economic system and if it wants those markets to function well it needs to protect the competitive process.[44] Competition Authorities plays a vital role in creating and ensuring a competitive market by regulating the behaviour of market players including state owned enterprises. The state owned enterprises are

[42]*Id.* at 17.

[43]P.P. BARROS, THE RELATIONSHIP BETWEEN SECTORAL REGULATORS AND COMPETITION AUTHORITIES - INCENTIVES FOR ACTION 6 (Lecce, 2004).

[44]W. Blumenthal, *The Relationship Between Competition Agencies and Other Units of Government, Remarks before the Ministry of Commerce, Asian Development Bank and OECD,* International Seminar: Review of Anti-Monoply Law (May 19, 2006).

also regulated by a sectoral regulator and hence it leads to tussle of jurisdiction between the sectoral regulator and competition authority.
Therefore, establishing a relationship between competition authorities and sectoral regulators becomes imperative for the proper functioning of the market and in turn the growth of the economy. Establishing a proper relationship is a challenge which has been found out various jurisdiction of the world.
Establishing the proper relationship between the competition agency and regulators is a significant and ongoing challenge in most countries. The issue has been discussed and debated in international fora in recent years. No single solution has emerged. Different jurisdictions have different approaches and even within a single jurisdiction the approach to the relationship can vary. In one jurisdiction a competition agency has statutory powers for some aspects of sector regulation. In another, sector regulators and the competition authority exercise concurrent jurisdiction. In yet another, a formal agreement establishes a framework for cooperation between the sectoral regulators and the competition authority.[45]
In a country like India, the public sector banks play a very vital role in the economy. The public sector banks like many enterprises are regulated and governed by a Sectoral/ Prudential regulator. Therefore, establishing a relationship between the sectoral regulators and competition authority becomes all the more imperative to ensure a competitive market. At present no specific relationship between the RBI and CCI exist and this has lead to a tussle of jurisdiction between the two with regards to issue pertaining to competition related aspects of consolidation of banks. Therefore, in order to avoid such conflict, the competition considerations and regulatory functions can be reconciled through the following mechanism:

[45]W. Blumenthal, *Presentation to the International Symposium on the Draft Anti-Monopoly Law of the People's Republic of China* (Dec. 11, 2009), www.ftc.gov/speeches/blumenthal/20050523SCLAOFinal.pdf.

Competition law and sectoral law may operate in parallel, with overseeing competition considerations and sectoral regulators dealing with regulatory considerations. This refers to the conventional *ex ante* and *ex post* control and supervision of the markets. Therefore, the sectoral regulator shall be vested with *ex ante* control powers whereas the CCI shall be given the *ex post* authority. For example, reviews of company documents for compliance, licensing requirements clearly require an *ex ante* control whereas anticompetitive practices in the relevant market may require an *ex post* review. Or for example approval of prices should be within the *ex ante* authority of the regulator unless the prices are claimed to be excessive or predatory which then may require an *ex post* review by the Competition Authority.[46]

Therefore, RBI should perform the *ex-ante* regulation of the banking sector and the CCI shall have the *ex-post* authority that is when it comes to determining whether the consolidation of bank merger is anti-competitive or not it shall be the authority of CCI. Therefore, the RBI shall examine bank mergers and acquisitions on the touchstone of prudential norms and if it is approved by RBI than it should be the duty of CCI to govern it on the touchstone of competitiveness. This distinction between the *ex ante* and *ex post* functions of the authorities would only be successful if a clear cut demarcation of what constitutes an ex ante function and ex post function is laid down. Another important requirement is establishment of a channel of continuous communication between the sectoral regulators and CCI whereby all the relevant information is exchanged. Hence what is required today is a comprehensive relationship incorporating the aforementioned suggestions to ensure a co-operative and coordinated effort to make Indian economy free anti-competitive practices.

[46]Laurence I, Relationship between antitrust agencies and sectoral regulators – Subgroup 2 "Who should regulate, and how should they regulate?" Bonn/ICN/7th June in Dr. Gamze Ascyoglu Oz, *The Role Of Competition Authorities and Sectoral Regulators: Regional Experiences* (Dec. 11, 2009), http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p17_en.pdf.

APPOINTMENT OR DISAPPOINTMENT: PROBLEM AND PERSPECTIVE TO THE APPOINTMENT OF JUDGES IN THE INDIAN JUDICIARY

Harsh Gagrani[*]

I. INTRODUCTION

The judiciary is one of the institutions on which rests the noble edifice of Democracy and Rule of Law. It is the judiciary which is entrusted with the task of keeping every organ of the state within the limits of power conferred upon it by the Constitution and the laws, thereby making the Rule of Law effective and meaningful. Besides ensuring Rule of Law and realization of human rights, it also ensures prosperity and stability of a society. According to Justice H.R. Khanna, the role of the judiciary has passed from one of "*settling disputes between private citizens*" to acting "*as the arbiter of disputes between the state and the citizens*." Since persons who are to decide such disputes should not be susceptible to the pressures of the citizens and of the state, the independence of judges has come to be accepted as an essential trait of a democratic society.[1]

Independence of judiciary includes independence from other organs of the state viz. the executive and the legislature, as well as independence of individual judges, so that they can decide a dispute, uninfluenced by any other factor. A judge should fulfill his duties in the true spirit, and must hold his scales even in the interpretation of laws and administration of justice. This brings into light one of the

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[1]H.R. KHANNA, JUDICIARY IN INDIA AND JUDICIAL PRACTICE 16, (Ajoy Law House, S.C.Sarkar and Sons Pvt. Ltd., Calcutta, 1985).

underlying objectives of an independent judiciary i.e. to secure appointment of men of requisite qualities.

However, in India, the judicial institutions by tradition have surrendered to political commitments due to a final veto power of the executive in judicial appointments. Thus, assurance of a non-political judiciary has always been contentious. This resulted in a nine-judge bench evolving the self-serving concept of "collegium" whereby the Chief Justice of India and a collegium of four senior most judges of the Supreme Court shall have the final say in appointments to the Supreme Court. Unfortunately, even this process has been found to be flawed with a plethora of arbitrary and controversial appointments, and no system for keeping a check on the same. The founding fathers of our Constitution apparently foresaw this struggle for supremacy, and therefore they brought into play a collective process, involving both the executive and the judiciary in appointing the judges of the Supreme Court and the High Courts. However, controversies regarding judicial appointments soon arose.

II. BACKGROUND- THE CONSTITUTIONAL ASSEMBLY DEBATES

The procedure of appointment of the Supreme Court and the High Court judges was one of the most debatable themes before the Drafting Committee. Under the Government of India Act, 1919 and the subsequent Government of India Act, 1935, it was the prerogative of the crown to appoint the High Court judges, with no specific provision for consulting the Chief Justice in the process. But the Drafting Committee was against an unquestioned discretion to rest with the executive. The Sapru Committee in 1945 recommended in its Constitutional Proposal that "*the justices of the Supreme Court and High Courts should be appointed by the head of the state in consultation with the Chief Justice of the Supreme Court and in case*

of High Court Judges, in consultation additionally with the High Court Chief Justice and the head of the unit concerned."[2] Even the Ad Hoc Committee of the Union Constitution, in the beginning of 1947 reported that it did not think it "*expedient to leave the power of appointing judges…to the unfettered discretion of the President*" and recommended two alternative methods. One of the methods authorized the President to nominate a person for the appointment to the Apex Court, with the consultation of the Chief Justice. This nomination will then require confirmation by a panel of seven to eleven members comprising Chief Justices of High Courts, Members of Parliament and Law officers of the Union. The other method required a recommendation of three persons to come from the above panel, one of whom has to be appointed by the President in consultation with the Chief Justice of India. The same procedure was to be followed for the appointment of the Chief Justice of India, except that the Chief Justice was not to be consulted.[3]

Sri B.N.Rau, the Constitutional Advisor in the Memorandum of Union Constitution submitted a few days later, suggested that the Judges should be appointed by the President with the approval of at least twothird of the Council of States, in which the Chief Justice of India was an ex-officio member.[4] Even the Union Constitution Committee differed from the recommendation of the Ad Hoc Committee and proposed that "*a Judge of Supreme Court shall be appointed by the President after consulting the Chief Justice and such other judges of the Supreme Court as also such judges of the High Courts as may be necessary for the purpose."*[5]

In the Assembly, a unanimous opinion was that the President should have the primary authority in the appointment of judges. However,

[2]G. AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 176 (Oxford Clarendon Press, 1966).

[3]B. SHIVA RAO, THE FRAMING OF INDIA'S CONSTITUTION: A STUDY 590 (IIPA, New Delhi).

[4]B.N. RAU, INDIA'S CONSTITUTION IN THE MAKING 72, 86 (Allied Publishers, 1960).

[5]Shiva Rao, *supra* note 3, at 600.

there were debates regarding who should advise and recommend him for the same. Some members suggested concurrence of Chief Justice, whereas other members proposed an approval of the Parliament or the Council of States. Dr. B.R. Ambedkar referred to the process of appointment in England and U.S.A. In England, the judges are appointed on the sole discretion of the executive, whereas in U.S.A, approval of the Senate is also required. He considered it dangerous to leave the appointment of judges to the exclusive discretion of the President. With this reference, he concluded:

"...Apart from its being cumbersome, it (sole discretion of executive in appointing judges) also involves the possibility of appointment being influenced by political pressures and political considerations. The draft article therefore steers a middle course. It does not make the President the supreme and absolute authority in the matter of making appointments. It does not also import the influence of the Legislature…."

"With regard to the question of the concurrence of Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore, think that that is also a dangerous preposition."[6]

The Assembly, therefore, adopted a middle path, and neither gave the executive nor the judiciary an absolute authority in matters of appointments. The executive is required to consult persons who are *ex hypothesis* well-qualified to give proper advice on this matter. The

[6]Constituent Assembly Debates Official Report, 258, www.parliamentofindia.nic.in.

following two provisions were laid down by the Assembly for the appointment of the judges of the Supreme Court and the High Courts:

1. Every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the judges of the Supreme Court and of the High Courts in the states as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years. Provided that in the case of appointment of a judge other than the Chief Justice, the Chief Justice of India shall always be consulted.[7]
2. Every judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the state, and, in the case of appointment of a judge other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two years.[8]

III. THE FOURTEENTH LAW COMMISSION REPORT

The Law Commission, chaired by Attorney General M.C. Setalvad was established in August 1955 in response to widespread demands for the reform of the legal system. It produced thirteen reports by autumn 1958. The Commission's famous Fourteenth Report, which was submitted in September 1958 included in its terms of reference 'recruitment to the Judiciary.'

The Commission sent questionnaires to ascertain the views of judges, lawyers and political leaders and discovered harsh criticisms of the selection process. It reported that it had heard 'bitter and revealing' condemnation of the recent appointments to the higher judiciary from Supreme Court, High Court, retired judges, lawyers and law school

[7]INDIA CONST. art. 124(2).
[8] INDIA CONST. art. 217(1).

faculty. Former Chief Justice M.P. Sastri said that there had been a marked deterioration in the standards (in High Courts) mainly due to methods of selection which is often influenced by political and other extraneous consideration.[9] K.M.Munshi, former Governor of U.P, in reply to the questionnaire said that he believed that the High Court Judiciary has deteriorated in the recent years owing to the faulty selection process. He pointed out the following three reasons for such deterioration:

1. The Chief Minister acts as a 'source of patronage' under the selection system of Art.217.
2. The judges promoted to the High Courts from the District Courts are individuals who have little physical and judicial vigor left.
3. The methods of selection are often influenced by political and other extraneous considerations.[10]

Later, few letters were exchanged between M.C.Setalvad and Home Minister G.B.Pant, in which the former criticized the selection process and concluded that "*some High Court appointments are being made on political expedience or communal sentiment"*.[11] In light of the research done and views obtained, the Law Commission drafted the final recommendations on judicial appointments. Some of the recommendations were:

1. The appointment to the Supreme Court must be on merit alone, without reference to communal or regional considerations.

[9]G. AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE 130 (Oxford University Press, 1999).

[10]MUNSHI 'REPLIES' TO LAW COMMISSION QUESTIONNAIRE, K M MUNSHI PAPERS, Microfilm Box 67, File 183, NMML.

[11]For a detailed discussion on these letters, see G. AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE, 131-136, (Oxford University Press, 1999).

2. The Chief Justice of India should be chosen not merely on the basis of seniority but should be the most suitable person, whether taken from the Supreme Court, the Bar or the High Courts.[12]
3. Appointment to the High Courts should be made solely on the basis of 'merit' and 'only' on recommendations of the Chief Justice of the concerned High Court and with the concurrence of the Chief Justice of India.[13]

The recommendations, thus emphasized on making the selection process more inclined in favor of meritorious judges. However, these recommendations were, for a long time, kept in cold storage, and as will be seen further, invoking one of them twice over the next two decades created huge national hue and cry.

IV. EXECUTIVE V. JUDICIARY - A REGRETTABLE DECADE

The period from 1973 to 1983 has always been regarded as a deplorable decade, marked by unending tussles between the ruling party and the judiciary. The decade saw two supersessions of competent, experienced and senior judges for the post of Chief Justice of India, mass transfers of High Court Judges and later, the Supreme Court giving a self-inflicting blow affecting the independence of judiciary.

A. Supersession of Judges

Appointment of the Chief Justice of Supreme Court or High Courts was seldom controversial as long as the central government observed the convention of promotion by seniority. This convention was broken for the first time in 1973, when after the retirement of Sikri

[12] 14th Law Commission Report, *Reform of the Judicial Administration: Classified Recommendations* 2, (1958) (India) https://lawcommissionofindia.nic.in/1-50/report14vol1.pdf.
[13] *Id.* at 2, 20.

CJ.; Justice A.N. Ray was appointed as the Chief Justice, superseding Shelet J., Grover J., and Hegde J., in order of seniority. The three by-passed judges resigned from the Court in protest. This led to a national uproar and the Government was accused of tampering with the independence of the judiciary. However, to justify this step, the Government invoked the 14th Law Commission Report which emphasizes on 'merit' and not 'seniority' for appointing the Chief Justice of India.

The appointment of the Chief Justice was even challenged in the Delhi High Court through a petition for quo warranto under Art.226 on the following grounds: -

a) it was mala fide,
b) it was against the rule of seniority inherent in Art. 124(2), and
c) the mandatory consultative process envisaged in Art. 124(2) had not been resorted to.[14]

Without giving any definitive opinion on points (b) and (c), the High Court dismissed the petition, holding that in a quo warranto proceeding, the motive of the appointing authority is irrelevant. The Court held that even if these contentions are correct, any writ issued will be futile as Ray J., is now the seniormost judge (as the other senior judges have resigned) and can immediately be reappointed.

The convention of appointing the seniormost judge was broken successively for the second time in 1976, when after the retirement of Ray CJ., Beg J. was appointed the Chief Justice superseding Khanna J., who was senior to him. Consequently, Khanna J. resigned in protest. "*Mrs. Gandhi had struck a 'grievous blow' to the independence of the judiciary*" remarked Justice Khanna.[15] Indeed, the independence of judiciary had been interfered with. Apparently, the supersession of the three judges in 1973 was a result of anti-government judgments in the famous *Kesavananda Bharti case*[16] and

[14]P.L.Lakhanpal v. A.N.Ray, A.I.R. 1975 Del. 66(India).
[15]Khanna, *supra* note 1, at 22.
[16]A.I.R. 1973 SC 1461(India).

they were 'awarded' with supersession on the very next day after they pronounced their judgments.[17] Moreover, Ray J. had ruled for the government in the *Bank Nationalization case*[18] and was one of the two dissenters in the *Privy Purse case*.[19] Khanna J., who was superseded in 1978, paid this price for an anti-government, but a brave dissenting opinion in the *Habeas Corpus case*.[20]

B. The first judges case

The controversies regarding the procedure of appointment of judges came for determination before the Apex Court in the *First Judges case*.[21] Different judges expressed their views on various issues, which also included transfer and appointment of judges.

On the issue of appointment of judges, the Court gave primacy to executive actions. The Court held with regards to appointment of High Court Judges, that there must be "full and effective consultation" between each of the constitutional functionary viz., the Chief Justice of the High Court concerned, the Governor of the state, the Chief Justice of India and the President. During such consultation, in case of any difference of opinion amongst these authorities, the opinion of the President will have an overriding effect and will thus prevail over other opinions. The majority held that the decision of the President cannot be challenged in the Court either on *mala fide* intentions or on the ground that it was based on irrelevant considerations. This case, therefore, virtually gave the President a power of veto over the appointments.

[17]Austin, *supra* note 2, at 278.
[18]R.C.Cooper v. Union of India, A.I.R. 1970 SC 564(India).
[19]Madhav Rao Jivaji Rao Scindia v.Union of India, A.I.R. 1971 SC 530(India).
[20]A.D.M., Jabalpur v. Shivkant Shukla, A.I.R. 1976 SC 1207(India).
[21]S.P.Gupta v. Union of India, A.I.R. 1982 SC 149(India).

V. POSITION AFTER 1994

In 1991, in the judgment of *Subhash Sharma v. Union of India*[22], a three-judge Bench expressed the view with regards the word 'consultation' in Art.124 (2) that "*the Constitutional phraseology would require to be read and expounded in the context of constitutional philosophy of separation of powers to the extent recognized and adumbrated and the cherished values of judicial independence*."[23] The Bench suggested that this question be considered by a larger Bench.

A. The second judges case

Subsequent to *Subhash Sharma case***,** the process of appointment of judges came to be considered by a nine-judge Bench of the Supreme Court in the landmark case of *S.C.Advocates on Record Association v. Union of India*,[24] also known as the *Second Judges Case*. The case arose out of a public interest writ petition filed in the Supreme Court by the Lawyers Association questioning several critical issues concerning the judges of the Supreme Court and the High Courts. The majority opinion was given by J.S.Verma J., and four other judges.

The Court, referring to the 'consultative' process envisaged in Art 124(2) emphasized that the executive does not enjoy 'primacy' or 'absolute discretion' in the matter of appointment of Supreme Court judges.[25] The Court also indicated that it was not considered desirable to vest absolute discretion on the Chief Justice on the matter of appointments, and the executive should act as a check, whenever necessary. The Court observed: [26]

"The indication is that in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the

[22]A.I.R. 1991 SC 631, 641(India).
[23]*Id.* at 640.
[24]A.I.R. 1994 SC 268(India).
[25]*Id.* at 429.
[26]*Id.* at 430.

greatest weight. The selection should be made as a result of a participative consultative process in which the executive should have the power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose."

Further clarifying 'the primacy of the opinion of the Chief Justice of India', the Court said that it is not merely his individual opinion but *'the collective opinion formed after taking into account the views of some other judges who are traditionally associated with this function.*'[27] The process for appointment of the Supreme Court and High Court judges as laid down by the nine-judge bench can be summarized into the following points:-

1. The proposal for appointment of a Supreme Court judge should be initiated by the Chief Justice of India.
2. All the appointments of the judges of the Supreme Court should be in conformity of the Chief Justice of India and the consulted judges.
3. The appointment recommended by the Chief Justice may not be made only in exceptional cases, only after stating cogent reasons. However, if these reasons are not accepted by the Chief Justice and other consulted judges; the appointment should be made as a healthy convention.
4. Everyone involved in the consultative process, including the consulted judges should give their opinion in writing as it acts as an inbuilt check on the exercise of power.
5. The senior-most judge fit to hold the office should be appointed as the Chief Justice of India. In case there are any doubts regarding his fitness to hold the office, it should be clearly stated, which alone may permit a departure from the long standing convention.
6. Unless there is a strong cogent reason to justify departure, seniority should be the basis for making appointment from amongst the High Court judges to the Supreme Court.

[27] *Id.* at 434.

The Court thus, by the way of this judgment, minimized political influence on the part of the executive and individual discretion on the part of all the constitutional functionaries involved in the process of appointment of Supreme Court judges.

B. The third judges case

In 1999, the Supreme Court further clarified certain points arising out of the above judgment in an advisory opinion on a reference made by the President under Art.143, also known as the *Third Judges case*.[28] A nine-judge Bench unanimously held with regards to appointment of judges that the Chief Justice of India shall consult "*a collegium of four senior-most judges of the Supreme Court*" thereby widening the scope of consultation process. Before this opinion was delivered, this collegium consisted of the Chief Justice of India and two senior-most judges of the Supreme Court. The Court specifically stated that an opinion formed by the Chief Justice of India in any other manner has no primacy in the appointments to the Supreme Court and the Government is not obliged to act thereon.[29]

Further, the Court held that if majority of the collegium is against the appointment of a particular person, that person shall not be appointed. The Court even went to say that if two of the judges forming the collegium express strong views for good reasons, that are adverse to the appointment of a particular person, the Chief Justice shall not press such appointment.

The process of appointment of the judges of the High Courts should be initiated by the Chief Justice of the High Court concerned, who must form his opinion after ascertaining the views of at least two senior-most judges of the High Court. Before making its opinion, the collegium of the Supreme Court judges shall consider the recommendations of the Chief Justice of the High Court and consult other High Court judges and judges from the Supreme Court who

[28] *In re,* Presidential Reference, A.I.R. 1999 SC 1(India).
[29] *Id.* at 16.

may be conversant with that High Court. In case of disagreement between the President of India and the Chief Justice, the opinion of the latter will prevail.

Regarding the rule of seniority among the High Court judges for appointment to the Supreme Court, the Court listed the following two points: -

1. Regardless of his standing in the seniority list, a High Court judge can be appointed as a Supreme Court judge *if* he has outstanding merit.
2. From amongst several High Court judges of equal merit, a judge may be appointed as a Supreme Court judge for "good reasons", as for example, the particular region of the country in which his parent High Court is based is not represented in the Supreme Court Bench.

By the way of this opinion, the Court tried to diminish any scope of arbitrariness, even on the part of the judiciary, as the size of the collegium was increased from two to four senior-most judges other than the Chief Justice of India and due consideration has to be given to the opinion of each of the judge of the collegium. But even with all the good intentions and honest attempts on the part of the Supreme Court judges to make the selection process transparent and less arbitrary, we will find that the collegium has completely failed to fulfill its purpose.

VI. EXECUTIVE FAVORITISM REPLACED BY THE JUDICIAL SUBSTITUTE?

The formation of the collegium and vesting the final say on the appointment to the Supreme Court judges was conceived of as a noble step. However, a careful perusal of the existing system shows that it has been no less than a failure. This can perhaps be aptly demonstrated by a few recent controversial appointments to the Supreme Court and various High Courts. In a case involving a judge

of Calcutta High Court, he was appointed to the High Court when he was already facing proceedings of misappropriation in the same court.[30] Very recently, the Chief Justice of Karnataka also joined the list, when he was recommended for elevation to the Supreme Court by the collegium. Amongst other allegations, he has been accused of acquiring more than 450 acres of land meant for distribution to landless dalit families, and other immovable property including a commercial complex.[31] Apart from these, few other examples like '*Provident Fund case*' (where 34 judges were involved in misappropriation) and the 'Cash-for-judge scam' (involving two judges of Punjab & Haryana High Court) also underlines the arbitrary and totally unsatisfactory manner of selecting and appointing judges to the higher judiciary.

The interpretation of Article 124 and Article 217 as given in the *Second* and the *Third Judges cases* move towards giving an unlawful privilege to the judiciary in case of appointments. It separates the judiciary and more specifically the collegium of judges from the executive in appointment of judges but does not provide for a supervising authority which will act as a watchdog over the judicial appointments. This brings into light another chief problem in the present system i.e. lack of accountability of the judges of the collegium.

Justice Jackson of the US Supreme Court once remarked *"We are not final because we are infallible; we are infallible because we are final."*[32] Judges are humans, and humans are prone to errors, intentional or otherwise. They cannot shield their doings and misdoings from the public in the name of judicial independence. "*What's questionable about the current system is that it is carried out in secret"* remarked a recently retired Chief Justice of the Delhi High

[30]V. Venkatesan & S.S. Chattopadhyay, *Judges in the Dock*, 25 FRONTLINE, Sept. 25- Oct. 10 at 32, 2008.

[31]Prashant Bhushan, *The Dinakaran Imbroglio: Appointments and Complaints against Judges*, ECONOMIC AND POLITICAL WEEKLY, Oct. 10, 2009.

[32]Brown v. Allen, 344 US 443 (1953).

Court.[33] There is no criterion laid down for selection of judges. The present system also opens door for corruption at the highest level as the collegium has wholly unchecked powers of appointment of judges. However, neither the judiciary nor the executive has seriously bothered to place an independent and transparent system of appointments and taking actions against those involved in misconduct, and it seems that the judiciary has effectively become a law in itself.[34]

The Indian Courts are further characterized by vacancies, unjust procrastination in the appointments, difference of opinions and regional favoritism. We have around six hundred sanctioned judges' posts in the country, but about 150 of them lie vacant since no appointments have been made for long spans. Justice Krishna Iyer remarked on the present state of affairs of the judiciary that *"Maybe, the high functionaries shouldering the burden of processing judge's fitness for office are faithful to their anfractuous protocol, meditate to resolve differences and remain in a wise and masterly inactivity! How else do we explain the pathetic (or bathetic) delay in finalizing the suitable candidates- a few from each High Court once in a blue moon!"*[35] *Whoever is to blame, injustice due to absence of Justices and dysfunctional judicature due to diminishing judge strength are a bizarre kind of contempt of court."*[36]

[33]Shobhitha Naithani, *The Curious Incident of Underdog's Defence*, TEHELKA, Mar. 13, 2010.

[34]Even the Law Commission in its 214th Report has shown deep concern for the working of the collegium. It concluded in this report that the Supreme Court has virtually rewritten Articles 124(2) and 217(1), and stated that the collegium has failed to deliver the desired results. It recommended that "Two alternatives are available to the Government of the day. One is to seek a reconsideration of the three judgments aforesaid before the Hon'ble Supreme Court. Otherwise a law may be passed restoring the primacy of the Chief Justice of India and the power of the executive to make the appointments". See Law Commission of India, 214th Report on the proposal for reconsideration of *Judges cases I, II, III*, at p 60, (Date??) http://lawcommissionofindia.nic.in/reports/report214.pdf.

[35]*Id.* at 180.

[36]*Id.* at 181.

The media, popularly known as the Fourth Estate of the country, has a major role to play in absence of accountability on the part of the higher judiciary. They have powerful weapons of investigative journalism and sting operations which can be used to uncover the hidden truth. However, even the media persons and other authorities are deterred from expressing their views freely on appointments as the judiciary has often used the sword of 'Contempt of Court' for any comment which may doubt their integrity. Further, the Supreme Court also sought exemption from the Right to Information Act, 2005 for any information which, in the opinion of Chief Justice of India or his nominee, may adversely affect or tends to interfere with the independence of judiciary, which thankfully has been rejected by the Chief Information Commissioner (CIC). Such actions in the name of judicial independence will contribute more and more towards undue discretion on the part of the judges of the collegium in case of appointments and will do more harm than good by lowering down the faith of the people in the already dilapidating judiciary.

VII. PROPOSAL FOR SETTING UP A NATIONAL JUDICIAL COMMISSION

In the *First Judges Case*, Bhagwati J., suggested the appointment of a judicial committee on the lines of the Australian Judicial Commission, for recommending names of persons for the appointment of judges. Later, in its 121st Report issued in 1987, even the Law Commission advocated the setting up of a National Judicial Commission ("**NJC**"). Since the *First Judges case*, the Law Commission had feared arbitrariness on the part of the executive as it had overriding powers in the matter of selection and appointment of judges, and thus wanted to remove some powers from the executive's clutches. Though the Law Commission did not work out its composition, it tentatively suggested the following composition: Chief Justice of India ("**Chairman**"), three senior most judges of the

Supreme Court, retiring Chief Justice of India, three Chief Justices of the High Courts in the order of seniority, Minister of Law and Justice, Government of India, Attorney General of India, and an outstanding law academic.

The then Law Minister in 1990 accepted these recommendations of the Law Commission and introduced the 67th Constitutional (Amendment) Bill with substantial changes. However, the Bill lapsed as a result of the dissolution of the Lok Sabha.

Another Bill which sought to amend Article 124 and 217 and establish NJC was introduced in the Rajya Sabha on December 18, 1998. This Bill proposed the Prime Minister as the Chairman of the NJC which was primarily to dilute judicial power in the appointment of judges. However, much like the fate of the earlier Bill, even this Bill remained only a paper tiger and lapsed with the dissolution of Rajya Sabha. Later, the proposal to introduce NJC was resurrected by the 98th Constitutional (Amendment) Bill, 2003, but yet again the Bill never saw light of the day and was never passed.

VIII. CONCLUSION AND RECOMMENDATIONS

If appointment of judges by the executive created problems, taking up of the task in its own hands by the judiciary has further aggravated such problems. The Indian Judiciary has been through both the system of appointments viz. one in which the executive has the final say, and the one in which the judiciary does. Unfortunately, it is still marred by vacancies, corruption, lack of accountability etc, owing to politicized appointments in the former and delayed appointments in the latter.

Perhaps, the non-establishment of the NJC has also exaggerated the problems surrounding the appointment of judges. Though its establishment has been unsuccessfully mooted thrice in the Parliament, its composition has always been debated. Recently the sitting Chief Justice Balakrishnan CJ., said that the judges constitute a

"*self-respecting*" class of the society and will not tolerate any non-judge member in the NJC.[37] This means that such commission, if ever it comes into being, will practically be the same body which the Supreme Court Collegium is and will increase the chances of arbitrary appointments as the same will now take place under a more formalized and institutionalized method.

The present state of affairs of judicial appointments demands for a concretized action towards the establishment of the NJC. This body should comprise of the retiring Chief Justice of India as its Chairman, the President of India, three senior-most judges of the Supreme Court, three senior-most Chief Justices of the High Courts, the Law Minister of India and an outstanding law academic, selected by the President of India. Such a composition will ensure multiple brains and collective efforts in the process of appointments, and will be more in consonance with an old Roman saying *"Whatever touches us all, should be decided by all."* There is no harm in giving the judiciary the final say in appointments, but they should be accountable for their actions to the public. The names of the judges proposed to be appointed should be in public domain, and appointments should only be made through an open, accountable and a participatory procedure. The functioning of the NJC should not be outside the purview of the Right to Information Act, 2005 or any such legislation questioning their answerability. This will further ensure transparent functioning and more accountability. Further, the laws preventing the media from probing into judicial matters should also be loosened and relaxed. After all, media seems to be working more with democratic accountability than any other organ of the government. The two pillars of democracy could not fulfill their responsibilities in the way in which it was expected of them, and therefore, the only recourse left now is a formation of an independent body. Only such measures can

[37]PROF. N.S. POONIA, *Judicial Independence is not Constitutional Provision but merely Declaratory Law- Judges Inquiry Bill for NJC getting sabotaged*, AIR, 154-158 (2007).

work towards restoring the faith of the people in the slowly degrading judiciary.

CONSTITUTIONAL VALIDITY OF SECTION 21 OF THE HINDU SUCCESSION ACT, 1956

Varun Chablani and Alok Nayak[*]

I. INTRODUCTION

Section 21 of the Hindu Succession Act reads out as where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other then, for all purposes affecting succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder.[1] There has never been any research on this topic before. So the primary method to test its constitutional validity is to view the section logically. There seems to be absolutely no logic as to why has there even been a classification on age (or maturity, depending on how *younger* is interpreted). A better way to interpret and presume who would survive whom, even if it is by a split second, would be to classify on the basis on fitness. In fact, even the English and the Scottish Law believe that the younger issue is deemed to be the fitter one. But we all know for a fact that this may not necessarily be the case. In fact, the authors would also go to the extent of saying that the preventable lifestyle disorders which primarily affect the new generation youth is on an all time high. On the other hand, the unpreventable diseases of the older generation are currently at an all time low due to medical advancements and increase in disposable income. Furthermore, a younger person is less likely to live a certain old age (say, 100 years) as compare to an older person.

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[1]Presumption in cases of simultaneous deaths.- Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other then, for all purposes affecting succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder.

II. COMPARING THE PRESUMPTION IN INDIAN, ENGLISH AND SCOTTISH LAW

England does not have a succession law, especially for Hindus, probably because they interpret secularism in such a way that the state should be equidistant from all religions. On the other hand, India's view of secularism is interpreted as equal respect in all religions and equal interest in all religions. The most relevant statutory presumption is Section 184 of the Law of Property Act, 1925.[2] This provision is very similar to Section 21 of the Hindu Succession Act, 1956.[3] Here two fallacies are observed.

Firstly, making a classification on devolution of property through succession by understanding age is absolutely arbitrary. Other aspects need to be considered like strength, agility, presence of mind and skill to deal with a particular situation. This has partly been illustrated in the House of Lords Case of *Hickman and Ors.* v *Peacey and Ors.*[4], where Viscount L.C., assenting with the majority had quoted,

> "*If A and B are swept off the deck of a ship by the same wave in a storm and both are drowned, there is usually no material which would justify the conclusion that they both died at exactly the same instant; there may sometimes be sufficient proof that A survived B, e.g., if B was not able to swim and was seen to sink at once whereas A was a fine swimmer who could be observed holding his own for a considerable time. In*

[2]Presumption of survivorship in regard to claims to property.
In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.
[3]William Wing v. Richard Angrave, John Tulley, and Others, (1860) VIII House of Lords Cases (Clark's) 183.
[4](1945) A.C. 304.

> *such a case there would be no uncertainty as to who was the survivor, and there would be no justification for applying the section. If, however, the facts do not enable a conclusion to be reached as to which of them survived the other, while the circumstances do not justify the conclusion that they both died at the same moment, then the section operates to establish a conventional order of succession."*

The authors would humbly like to build on the logic put forth above. If it is known previously that A was a better swimmer than B was, then such evidence should be reasonable enough to believe that A would have survived B, even if it was for a split second. The reasons that such presumptions appear valid is because in personal laws relating to succession in India, determining who survived whom is very crucial. With respect to proving strength, agility, presence of mind or skill of the deceased, it shall be dealt with as a question of fact.

Secondly, case laws in India have established that the younger one survives the older one, irrespective of the absolute age of the deceased. This is also a fallacy. Children of a very young age would probably not be able to survive their elder siblings or their parents in cases of simultaneous deaths. Such intuitive knowledge was not appreciated by the Hon'ble Supreme Court. In *Jayanti Mansukhlal* v. *Mehta Channalal*[5] the mother and eight year old daughter died in a fire accident together. The daughter was presumed to have survived the mother. This seems completely arbitrary and hence, violative of Article 14 of the Constitution of India.

Even Section 31 of the Succession (Scotland) Act, 1964 appreciates the presumption.[6]

[5]A.I.R. 1968 Guj 212(India).

[6]Presumption of survivorship in respect of claims to property.

(1) Where two persons have died in circumstances indicating that they died simultaneously or rendering it uncertain which, if either, of them survived the other, then, for all purposes affecting title or succession to property or claims to legal rights or the prior rights of a surviving spouse or civil partner,

Probably one way to ascertain that why would the same law exist in different jurisdictions, despite being *prima facie* arbitrary is to understand the intention of the legislatures. From what the authors can understand, there is an interest in devolution of property from one generation to another so that the property does not remain in the hands of one person for a long period of time. But even by this understanding, the provisions appear unreasonable. If the law makers had such an intention, a presumption would have been made only to the extent of simultaneous deaths of members of a family of different generations (for example parents and children as against siblings or first cousins). Again, such classification is not made. On the other hand, there has been an omnibus presumption of survivorship of the younger issue irrespective of which generation of the family the deceased belongs to.

III. SECTION 21 WITH RESPECT TO ARTICLE 14 OF THE CONSTITUTION OF INDIA

It has already been observed with hypothetical examples in the previous chapter that the provision is arbitrary. Unfortunately, this is also supported with various case laws. Further, to the knowledge of the authors, no authority on Hindu law, property law or evidence law has opined on the unreasonableness of the section or the broader jurisprudence behind this doctrine. The courts lately have increased

(a) where the persons were husband and wife[or civil partners to each other], it shall be presumed that neither survived the other; and
(b) in any other case, it shall be presumed that the younger person survived the elder unless the next following subsection applies.
(2) If, in a case to which paragraph (b) of the foregoing subsection would (apart from this subsection) apply, the elder person has left a testamentary disposition containing a provision, however expressed, in favour of the younger if he survives the elder and, failing the younger, in favour of a third person, and the younger person has died intestate, then it shall be presumed for the purposes of that provision that the elder person survived the younger.

the ambit of Article 14 from having unreasonable classifications, to arbitrariness, unreasonableness and tackling violations of the principles of natural justice.[7]

Article 14 of the Constitution of India is the cornerstone of avoiding arbitrariness in law. In the words of Bhagawati, J,

> "*Rule of Law which permeates the entire fabric of the Indian Constitution excludes arbitrariness. Wherever we find arbitrariness or unreasonableness, there is denial of rule of law.*"[8]

Even though there is *strictu sensu* no fundamental right involved, the authorities who exercises their statutory power should exercise in conformity with article 14 bonafide and non arbitrary.[9]

Hence, the authors would like to humbly opine that the doctrine of the younger one surviving the elder one is violative of Article 14 of the Constitution of India.

As discussed in the previous chapter, a better classification would be to allow the fitter one surviving the one who is not as fit. Also asserted was that the younger issue need not necessarily be the fitter one. Both of these would be analysed in the upcoming chapters. This shall be done through studying evolution, medical records and economics.

IV. EVOLUTION - CHARLES DARWIN'S NATURAL SELECTION THEORY

"Veera Bhoggya Vasundhra - the strong one survives"[10]

[7]Equality before law : The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

[8]Bachan Singh v. State of Punjab, A.I.R. 1982 SC 1336(India).

[9]S.M. Rao v. Deputy Commissioner and Deputy Magistrate, Bangalore, A.I.R. 2004 NOC 235 (Kant)(India); 2004 A.I.R. Kant HCR 468(India).

[10]*Ishavashyopanishad*.

Probably the most famous theory ever propounded by an individual, Charles Darwin's words re now more relevant than ever. In short, his theory of *Survival of the Fittest* envisages that if

- Under changing conditions of life organic beings present individual differences in almost every part of their structure, (and this cannot be disputed);
- If there be, owing to their geometrical rate of increase, a severe struggle for life at some age, season or year, and this certainly cannot be disputed; then,
- Considering the infinite complexity of the relations of all organic beings to each other and to their conditions of life, causing an infinite diversity in structure, constitution, and habits, to be advantageous to them,
- It would be a most extraordinary fact if no variations had ever occurred useful to each being's own welfare, in the same manner as so many variations have occurred useful to man.

Also, if variations useful to any organic being ever do occur, assuredly individuals thus characterised will have the best chance of being preserved in the struggle for life; and from the strong principle of inheritance, these will tend to produce offspring similarly characterised. It leads to the improvement of each creature in relation to its organic and inorganic conditions of life; and consequently, in most cases, to what must be regarded as an advance in organisation. Nevertheless, low and simple forms will long endure if well fitted for their simple conditions of life.[11]

This simple prophesy had become so dynamic that the modern society runs on this doctrine. This theory having being accepted in mainstream society wholeheartedly, it may be appropriate to believe

[11]CHARLES DARWIN, THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION; OR THE PRESERVATION OF FAVOURED RACES IN THE STRUGGLE FOR LIFE (6th London Edition, project Gutenberg ebook no. 2009).

that the stronger one will only survive, no matter how the conditions change.

In fact, Darwin has also quoted,

> *"Let us take the case of a wolf, which preys on various animals, securing some by craft, some by strength, and some by fleetness; and let us suppose that the fleetest prey, a deer for instance, had from any change in the country increased in numbers, or that other prey had decreased in numbers, during that season of the year when the wolf was hardest pressed for food. Under such circumstances the swiftest and slimmest wolves have the best chance of surviving, and so be preserved or selected, provided always that they retained strength to master their prey at this or some other period of the year, when they were compelled to prey on other animals. I can see no more reason to doubt that this would be the result, than that man should be able to improve the fleetness of his greyhounds by careful and methodical selection, or by that kind of unconscious selection which follows from each man trying to keep the best dogs without any thought of modifying the breed."*

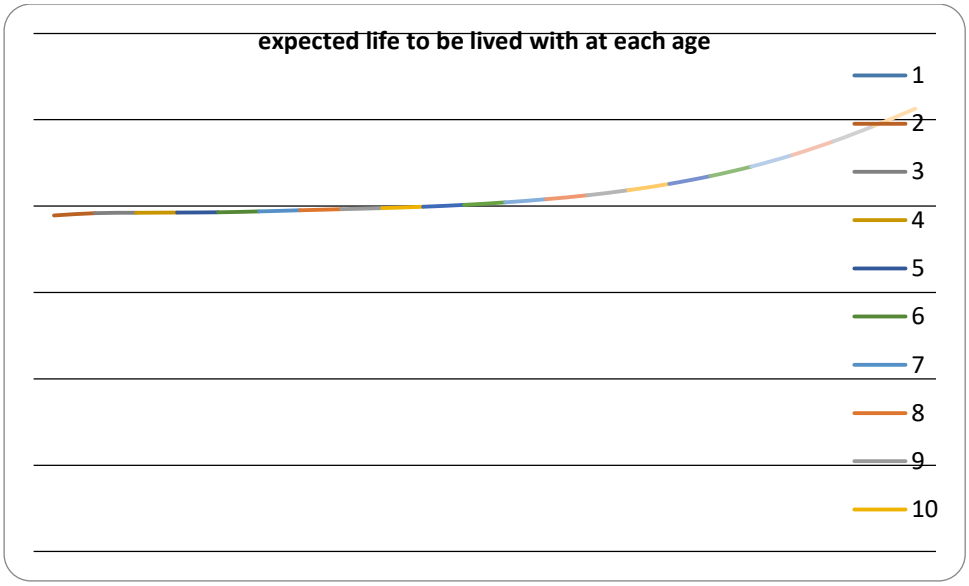
If the same logic is to be applied in knowing who survived, then the doctrine behind the provision fails the test of evolutionary biology. Hence, the alternative doctrine propounded by the authors appears more logical.

V. MEDICAL DATA WITH RESPECT TO ASCERTAINING FITNESS WITH RESPECT TO AGE

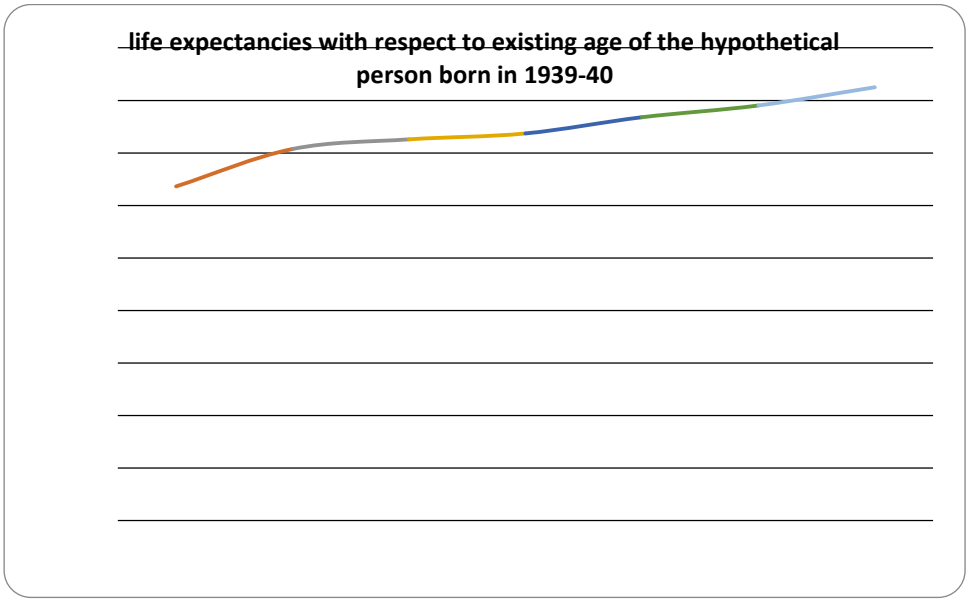
We have already seen that fitness is a very dynamic word. When it comes to a life and death situation, different dimensions of fitness crop up. Probably one reason that the doctrine of *younger one survives* derives logic from believing that the younger issue is the fitter one. The authors humbly believe that this presumption may have

been valid many years ago when the life expectancy of the elderly was much lower than what it is today. Another factor is that the preventable lifestyle disorders acquired by the younger generations are at an all time high. These would include HIV/AIDS, Type II Diabetes, lung cancer etc. which nowadays affect the youth at the peak of their lives. On the other hand, due to medical advancements, the duration of lives of the elder generation in increasing. Science has found cures for various previously unpreventable diseases. It has also at the same time, prolonged the inevitable death of other diseases. We have seen, for example, that deaths in the USA caused by HIV/AIDS affect the victims before they reach their old age.[12] At the same time, more people are today dying from HIV/AIDS than some of the other traditional age related diseases. Hence, at this rate, there will come a time, due to constantly differing values of the younger generation with respect to the older generation, which the younger generation will be less healthy than the older generation. Intuitively, this is well known. But when the life expectancy of each age group is compared (of the USA)[13], it is observed that an person of an older age is more likely to reach a particular milestone age as compared to one of younger age. For example, a person of 20 years of age is expected to live another 58.8 years, which will make him, live up to 78.8 years. On the other hand, a sixty-year-old person is expected to live another 22.5 years, which expects him to live up to 82.5 years.

[12]Mortality by underlying cause, ages 18+: US/State, 2001-2006 (Source: NVSS).
[13]Life Expectancy in the United States available at *aging.senate.gov/crs/aging1.pdf* visited on 31st March, 2010.



While this data may appear to be intrinsically in favour of the older generation, it is but true that to reach a particular age, an older person is more likely to reach it than a younger one. Even if the expected life of one person is considered with the advancing number of years, still the older self of the person is more likely to reach a particular age than the younger self of the person. The following chart is the example of a hypothetical person born in 1939-40 and his life expectancies thereafter with each subsequent time period.



Hence, if fitness is considered with respect to number of years that one can live, then the younger one cannot be the fitter one. Please note that the authors have not used predicted life expectancies in the future years with respect to different age groups because such data is unreliable.

VI. ECONOMICS OF PROVIDING VALUE TO THE LIFE WITH RESPECT TO AGE

We have already seen that an older person is more likely to live a certain age than a younger person. There is yet another concept in which the authors believe that the younger one need not necessarily be the fitter one. A younger person may not value his life as much as an older person. This also is known intuitively. For example, a younger person is more likely to have an unhealthy diet and lifestyle. On the other hand, an older person is more likely to take his medicines in time and follow the prescribed diet and lifestyle. While

this notion may not outrightly declare that a person of which age is fitter, it definitely gives us an idea as to who has more value to their life. If the younger person does not have as much value of life as an older person, then why should law give the younger person the benefit of doubt?

Please note that the authors are not here to establish that there should be an omnibus presumption of the elder one surviving the younger one. A fit person also most likely values his life well. This is probably why he is fit in the first place. The law should thus presume that that fitter one survived the one who is not fitter.

A conflict that can arise here is that one person who may not value his life as much as the other person can still be deemed fit. One important point to be noted here is that deciding the perceived value of the life of the two deceased is just one of the aspects to determine who is fitter. Determining the relative fitness of the deceased should be a question of fact. Even though such conflicts could arise, if preference is given to the one who valued his life more than his actual fitness, the presumption may still be reasonable when observed on humanitarian grounds. Yet, there should be some balance of value of life vis-a-vis relative fitness. This is somewhat related to the theory of karma, wherein the good deeds (valuing of life) at one point of time of the person's life has reaped the benefits in terms of devolution of property to their successors. Yet, such humanitarian believes should not come intrinsically in the way of defeating the initial purpose of the proposed doctrine of survivorship in cases of simultaneous deaths. To what extent the balance needs to be achieved should be a decision of the higher judiciary (High Courts and Supreme Court).

It is in analysing these conflicts of choices that the authors put forth that when a person does not value his life as much as his peer who has also deceased at the same time, then the law presuming survivorship to the one who happens to not value his life as much, is absolutely illogical.

VII. INTERPRETATION OF THE PROVISION SO AS TO MAKING IT CONSTITUTIONAL AND WORKABLE

Every provision has a presumption of constitutionality. The courts need to follow the maxim "*ut res magis valeat quam pereat*." It is an application of this principle that the courts while pronouncing upon the constitutionality of a statute start with the presumption in favour of the constitutionality and prefer a construction which keeps the statute within the competence of the legislature.[14] The above principle in its application as a rule of construction is that if on one construction a given statute will become *ultra vires*, the powers of the legislature whereas on another, which may be open, the statute remains effective and operative, the court will prefer the latter, on the ground that the legislature is presumed not to have intended as excess of its jurisdiction.[15] It is probably on these lines that the constitutional validity of the provision was never challenged.

One way to construe the provision to be constitutional is to interpret the word *younger*. *Young* or *youth* is defined both as:

1. These adjectives mean of, relating to, characteristic of, or being in an early period of growth or development. *Young* is the most general of the terms.[16]
2. *Youthful* suggests characteristics, such as enthusiasm, freshness, or energy, that are associated with youth.[17]

If *younger* is interpreted as the latter, then the provision can be construed as constitutional and workable. It is already discussed before that an infant or a baby would probably not survive its parents or siblings in cases of simultaneous deaths. Hence, if the meaning is

[14]Corportation of Calcutta v. Liberty Cinemas, A.I.R. 1965 SC 1107(India).
[15]JUSTICE G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION 532 (Wadhwa, Nagpur, 10th ed. 2006); see also Daniel Latif v. Union of India, (2001) 7 S.C.C. 740(India).
[16]The Free Dictionary, Young, http://www.thefreedictionary.com/young.
[17]*Id.*

construed as the former, then the provision will remain unconstitutional. On the other hand, if the word is interpreted as the latter definition, then characteristics like *enthusiasm*, *freshness* and *energy* may be construed to include fitness. Even after such a bold interpretation there is one major flaw in interpreting *youth* with fitness. There may arise a case where an elder person is more fit than the person of lesser age. Here a conflict of interpretation also arises, as to whether

- The elder and fitter person should be considered as *youth* or which appears contrary to the basic definition of *youth*, or
- Should the person of lesser age but not as fit be considered as youth, in which case the purpose of changing the doctrine would fail.

Such a conflict needs to be resolved by the higher judiciary and the authors feel incompetent to answer the question. Even though such interpretation is very vague and indirect, it is worth it. When the statute has some meaning even though it is obscure, or several meanings, even though there is very little to choose between them, the courts need to take the meaning of what the court needs to bear rather than reject it as a nullity.[18]

Even if the statute can be workable, it is the duty of the courts to make sure that the statute is interpreted in such a way. Unfortunately, as already analysed before, that has not been the case.[19] The Supreme Court has presumed the eight year old child to have survived her mother. This has totally destroyed the principle of "*ut res magis valeat quam pereat.*"

Hence, either the Hon'ble Supreme Court had interpreted the provision wrongly, or the provision was meant to be interpreted in such a way which the authors believe to be illogical.

[18]Tinsukhia Electric Supply Co. Ltd. v. State of Assam, (1989) 3 S.C.C. 709 (India).
[19]*Supra* note 5.

VIII. CONCLUSION

It is very rare that such situations of simultaneous deaths occur and it is impossible to ascertain who survived whom. Hence, the topic has not been discussed much in the legal fraternity. But it is still an important aspect of law which some common law countries have made a blanket presumption on survival of the younger one. Another reason this topic has hardly been discussed is because new scientific methods and better understanding of the law of evidence in general have made it easier to determine who survived whom. Thus the presumption is used to a lesser extent now. Yet another reason why there has not been much talk about this provision or doctrine is because nowadays family law disputes are more likely to be settled out of court as opposed to the traditional legal system. This has impaired the courts to have an opportunity to have another look at the law and give an opinion which is similar to the one humbly established in this paper. Further, Hindu law in general and the Hindu Succession Act is particular has seen heavy winds of change in the 2005 amendments. There is a dire need of another amendment to correct Section 21 and some other sections. If and when such an amendment happens, the march of Indian Law would even go further and set standards for change in English and Scottish law.

If and when the legislature adopts this amendment, it will be another endeavour towards justice and an opportunity for the public to pursue their happiness.

DRT – A COURT OF CIVIL MATTERS YET NOT A CIVIL COURT

Prashant Abhilekh and Chandra Sen[*]

I. INTRODUCTION

The Debts Recovery Tribunal ("**DRT**"), is the outcome of a unique, self empowered enactment. What is so interesting about this Tribunal is that only Banks, Financial institutions are entitled to initiate a proceeding and invoke its jurisdiction (i.e., only one party to the dispute). Borrowers are placed in a seemingly disadvantaged position in terms of seeking remedy, and are even barred from using an alternative forum. The question of constitutionality to this effect has also been raised and challenged earlier. In the light of recently decided cases, the legal position seems to have become clearer with respect to remedies available with a borrower and conflicting jurisdictional powers of civil courts and the DRT.[1]

The DRT was set up for expeditious recovery of debts,[2] it is entitled to pass such orders and grant such remedies as may be granted by a civil court A bare perusal of the sections of the Act, makes it clear that any action for which DRT is the forum for adjudication of a dispute, can be tried only by it since jurisdiction of courts and authorities is expressly barred. However, time and again its jurisdiction and power to try and provide adequate remedies has been questioned. Courts have curtailed its jurisdiction in matters relating to detailed trial for misrepresentation and fraud. At a different occasion it has been held that DRT can issue a certificate only for recovery of

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[1]A.I.R. 1997 Del 355(India), DRT is not a court, it exercises powers of a civil court only in respect of limited matters.2009 (8) S.C.C. 646, we have held that the Tribunals are neither civil courts nor courts subordinate to the High Court.

[2]Shri T. Tiwari Committee, 1981 as also recognized in 2009 (8) S.C.C. 646(India).

dues of a bank, it cannot pass a decree thereby providing a level ground to the courts as against the DRT in similar nature of matters.
Raging conflict that has been haunting the courts for a long time is that whether a borrower can approach a court independent of a proceeding initiated or to be initiated by the bank under the DRT Act, and, if so, under what circumstances? Existing provisions of the Act prima facie give the impression that they do not provide a right to the borrower to approach the DRT. If the borrower has approached the court (not DRT) and, simultaneously, the bank has approached the DRT to recover its dues, does the Act require such suits to be compulsorily transferred to the DRT, or can independent and parallel proceedings continue? This write up analyses the legal position, whether the borrowers must accept this imposed remedy (of being part of the Bank's application at DRT) or they are entitled to an alternate forum of civil courts along with a right to institute an independent suit in the tribunal.

II. PROVISIONS EMPOWERING THE DEBT RECOVERY TRIBUNAL

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 provides for some very powerful and authoritative provisions, beefing up the muscles of DRT to the extent that it springboards a series of conflicting cases struggling to determine the scope of play for other available forums. Section 17[3] of the Act deals with jurisdiction, of the Tribunal from the date of its appointment and has been vested with power and authority to decide applications made by Banks and Financial Institutions, for recovery of debts due to them. "Debt" is

[3]Jurisdiction, powers and authority of Tribunals. — (1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.

defined very widely under section 2(g)[4] of the Act; it is wide in the sense that it incorporates *any liability* which is claimed as due by a bank during the course of its business activity. Thus, the jurisdiction of the DRT extends not just to debts as traditionally understood, but to *any claim of money* that a bank makes during the course of business e.g., claim arising out of a derivative transaction,[5] mortgage as security claim,[6] etc.

Further section 18 provides for an extensive bar on jurisdiction of other courts. It provides that, on and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to the matters specified in section 17. This has been the major stimulus responsible for stirring debate of validity and extent of civil court's jurisdiction in matters of similar nature. Looking at the wide and express provisions of the Act, the indication is amply clear that this Act is meant to provide for expeditious adjudication and recovery of debts due-to banks and financial institutions[7], to that extent it's a positive legislation but at the same time the Act presumes the borrower to be at fault and not only curtails his rights to get remedied through a civil court but also devoids it of right to initiate an independent suit against the Financial Institutions, which is in grave violation of principle of Natural Justice.

[4]"debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank of a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application.

[5]Rajshree Sugars & Chemicals v. Axis Bank Ltd., 2009 (1) C.T.C. 227(India).

[6]Mardia Chemicals Ltd. v. Union of India (UOI) and Ors, 2004 (4) S.C.C. 311(India).

[7]Virendra Singh Rawat, *Banks Want Faster Disposal of DRT Cases*, BUSINESS STANDARD, Mar. 27, 2008.

Section 19 related to the procedure of Tribunal, in regard to filing of applications. Section 19, as it originally stood, was substituted in entirety by Act 1 of 2000. Sub-section (1) of Section 19 provides that a Bank or financial institution can make an application to jurisdictional Debt Recovery Tribunal. Sub-sections (6) to (11) of new Section 19, is relevant for our purpose.

Section 19(6), where the defendant claims to set-off against the applicant's demand any ascertained sum of money legally recoverable by him from such applicant, the defendant may, at the first hearing of the application, but not afterwards unless permitted by the Tribunal, present a written statement containing the particulars of the debt sought to be set-off.

Section 19(7), the written statement shall have the same effect as a plaint in a cross- suit so as to enable the Tribunal to pass a final order in respect both of the original claim and of the set-off.

Section 19(9), a counter-claim shall have the same effect as a cross-suit so as to enable the Tribunal to pass a final order on the same application, both on the original claim and on the counter-claim.

Section 19(11) entitles a Bank to contend before the DRT that the claim made by the borrower should not be disposed of by way of counter claim, but should be tried only as an independent action. If such a contention is raised by the Bank in an application taken out before issues are settled in relation to the counter claim, then the Tribunal is entitled to pass an order.

Unfortunately, after having conferred a right upon the Bank to oppose the claim of a borrower from being treated as a counter claim and after having conferred discretion upon the Tribunal to treat such a claim as an independent action, Section 19 is silent as to what would happen next. If the claim made by a borrower in an application before the DRT is chosen not to be treated as a counter claim but to be treated only as an independent action, the very maintainability of such an independent action, may be in jeopardy, on account of the fact that Section 19(1) enables only a Bank or Financial Institution to file an

application before the Tribunal. But if the counter claim is treated as an independent action, the borrower would become the applicant. To this also extent, there is no clarity in the Act.

In the landmark and among first of the series of cases in this dispute *United Bank of India, Calcutta* v. *Abhijit Tea Co. Pvt. Ltd. and Ors*[8], Hon'ble Supreme Court held that an independent suit of a borrower (against the Bank's application) should be deemed to be a counter claim and be transferred to the Debt Recovery Tribunal, subject to meeting of certain conditions thereby limiting and restricting any scope of an independent proceeding for the borrower.

A. Constitutionality of the provisions

The Debts Due to Banks and Financial Institutions Act, 1993 in section 17 provides for 'Jurisdiction of the Debt Recovery Tribunal', which is very limited and restricted, in the sense that it vests tribunal with the power and authority to entertain applications only from banks and financial institutions. Borrowers have no scope of approaching the Tribunal in the first place, and can be forced to accept a joint trial once the bank or the financial institution approaches the tribunal. The summary procedure provided in the Act provides for an expeditious recovery of debt without considering the cause since the Tribunal is not permitted to entertain any claim of the borrower against the Bank or Financial Institution.

The Act, also provides the lender recourse to a summary trial against the borrower while no such proportionate relief is available to the borrowers. This amounts to an unequal treatment to one of the two parties to the same transaction. State has made a law that takes away protection of the normal legal construct and deprives of a fair opportunity of representation available to all citizens, this inequality raises doubt of serious nature and questions the consideration of 'Justice' as enshrined in the Constitution.

Further the Act provides that a borrower shall be able to prefer an

[8]A.I.R. 2000 SC 2957(India).

appeal against the order of the Tribunal only if[9] the borrower has deposited seventy five per cent of the debt due as determined by the Tribunal, within the limitation period of the receipt of the order of the Tribunal. The Act completely ignores that a commercial transaction involves two persons - lender and borrower, law must treat both as equal. Right to be treated with equality is provided as a Fundamental Right by the Constitution and that the equality before law provided under Article 14 is not confined to individuals only. It extends to all persons including legal persons like Banks,[10] Companies, Financial Corporations, Private Companies, other Authorities,[11] etc.

B. Dispute regarding jurisdiction of DRT & civil courts

Legal position has remained unclear as to whether a borrower in such a dispute of debt due to Financial Institutions, is entitled to an alternate civil remedy which he can initiate himself (for instance an independent suit in civil court as against a counterclaim to Financial Institution's application) or the remedy lies only with Debt Recovery Tribunal which can be initiated exclusively by Financial Institutions. Is it that the remedy available with DRT completely ousts jurisdiction of civil court? If latter is the case, then this position has not been made clear with catena of cases as have been decided over the last decade till recently the Nahar Industrial case which has been decided by Supreme Court.

In the list of important cases *United Bank of India, Calcutta* v. *Abhijit Tea Co. Pvt. Ltd. and Ors*[12,] comes first, the question raised in this case was whether the borrower's suit should be transferred to the

[9]Deposit of amount of debt due, on filing appeal.—Where an appeal is preferred by any person from whom the amount of debt is due to a bank or a financial institution or a consortium of banks or financial institutions, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal seventy-five per cent of the amount of debt so due from him as determined by the Tribunal under section 19.

[10]A.I.R. 2003 SC 858(India).

[11]A.I.R. 1981 SC 487(India).

[12]A.I.R. 2000 SC 2957(India).

Tribunal by treating the independent suit of the borrower as a counter-claim in the application of the Bank. The Apex Court decided that an independent suit can be transferred to the Tribunal if it can be established that the subject-matter of the borrower's suit pending before the Court, and the Bank's application pending before the Tribunal are inextricably connected. In this case the additional quotient was that the case was decided under Article 142 which only Supreme Court can invoke, meaning thereby that this case could not be used under Article 141, as a precedent for subsequent cases to be decided accordingly by lower courts.

In the *Indian Bank* v. *ABS Marine Products Pvt. Ltd.*,[13] the question was similar, the case of *Abhijeet Tea* was discussed and distinguished. Question discussed in detail was:

> *Whether the provisions of Debts Recovery Act mandate or require the transfer of an independent suit filed by a borrower against a Bank before a civil court to the Tribunal, in the event of the Bank filing a recovery application against the borrower before the Tribunal, to be tried as a counter-claim in the Bank's application?*

Supreme Court, here, held that it is not necessary for a borrower to file a counter-claim in the same application for recovery of money filed by the bank before the Tribunal and that a borrower is well entitled to file an independent suit before a Civil Court for damages. Such a suit was also held to be not liable to be transferred to the Tribunal against the wishes of the borrower, when on facts, they were not inextricably connected. *Abhijit Tea* was clarified to the effect that where the respective claims of the parties were not inextricably connected, the transfer of a suit to the Tribunal can be only on the basis of consent of the parties and not otherwise.

In the said judgment the Apex Court also held that:

> *"the jurisdiction of Civil Courts is not barred in regard to any suit filed by a borrower or any other*

[13]A.I.R. 2006 SC 1899(India).

> *person against a bank for any relief*[14]."

Further the law on the point was made clearer, court observed:

> *"What is significant is that Sections 17 and 18 have not been amended. Jurisdiction has not been conferred on the Tribunal, even after amendment, to try independent suits or proceedings initiated by borrowers or others against banks/financial institutions, nor the jurisdiction of Civil Courts barred in respect of such suits or proceedings."*

State Bank of India v. *Ranjan Chemicals Ltd and Anr.*[14] is the next big decision in this line, primarily arising out of the refusal of a Civil Court to transfer a suit filed by the borrower, to the Tribunal for being tried jointly with an application of the bank pending before the Tribunal. It was observed in the said decision that in both the proceedings, the rights and liabilities of parties arose out of the same transaction and that the same basic evidence was to be taken in both cases. Subsequently at the appellate stage in Supreme Court, it was decided that the matter be transferred to the DRT for joint trial without having the need to take consent of the borrower, under the inherent power of the Court relying on Section 151 of the Code of Civil Procedure, 1908. It is not possible to accept the argument that every time the Court transfers a suit to another court or orders a joint trial, it has to have the consent of the parties. A Court has the power in an appropriate case to transfer a suit for being tried with another if the circumstances warranted and justified it. Therefore, ultimately the Court has to consider whether in the facts and circumstances of the case the joint trial is necessary. This decision was followed in *Industrial Investment Bank of India* v. *Marshal's Power and Telecom (I) Ltd*[15] case.

On the point of consent of the parties, *Indian Ban case* and *State Bank of India case* are opposite to each other. The difficulty that arose was

[14]2007 (2) M.L.J. 787(India).
[15]2007 (2) M.L.J. 796(India).

that both the judgments, were from the Bench of equal strength of the Apex Court. As a result of this what followed from these conflicting decisions is that in subsequent cases Borrowers relied upon *Abhijit Tea Co. case* along with ABS Marine Products' case and submitted that the suit of the Plaintiff cannot be transferred to the Debt Recovery Tribunal, while the Financial Institutions relied upon *Abhijit Tea Co., (P) Ltd along with Ranjan Chemicals Ltd and Anr.*, and submitted that under the inherent powers the suit in question can be transferred to the Debt Recovery Tribunal.

C. Uncertainty and Borrower's Confusion

The confusion of position sprouting from the initial court rulings (as mentioned earlier) were earlier believed to be judgments that cannot be pulled together to harmonise the long rattled judicial approach and therefore the court will have to select one of the conflicting views for deciding future matters on similar lines, however under these circumstances if the Court moves out of traditional modus operandi and device a larger remedy, the position certainly gets settled.

On the one side there is a convenience that the matter be decided in one forum and on the other hand there is a prejudice to one party losing an opportunity of full-fledged proceeding under the Code of Civil Procedure (1908), and that too without its consent. Supreme Court has stressed that the power to transfer a proceeding is inherent in the Civil Court under Section 151 of the Code of Civil Procedure, however the power inherent in the Court on well accepted principles to order a joint proceeding does not depend upon the volition of the parties but it depends upon the convenience of trial, saving of time, limiting expenses and avoidance of duplicating at least a part of the evidence. Further, a joint proceeding is ordered when a Court finds that such a proceeding, would avoid separate overlapping evidence being taken in the two causes put in suit and will be more convenient to try them together in the interest of the parties and in the interest of an effective trial of the causes. This is vested in the Court as an inherent power.

Power to transfer the suit to Debt Recovery Tribunal, has to be exercised in the interest of justice, Supreme court finds that so far as the *Abhijit Tea Co. case* and *ABS Marine Products'* case has been explained on the point of consent, it is settled and is made amply clear in the *State Bank of India case* i.e., the requirement to obtain consent of both the parties before transfer of the suit is not to be given priority while exercising the inherent power of the civil court, especially when the cause of action is inextricably connected i.e. liabilities arose of same transaction and/or requirement of similar evidence.

The debate is taken further by the decision of *Vakrangee Softwares Limited* v. *Central Bank of India*[16], the borrower here had already filed a suit for misrepresentation with the civil court. Court moves a step ahead in deciding the raging debate between Inherent Power of Civil Court and obtaining consent of the Parties. Court observes that when there is a conflict of decisions from the Supreme Court, it is very painful to make a choice of a judgment out of the two. Full bench of the Apex Court relies on the matter of *Kamlesh Ishwardas Patel* v. *Union of India and Ors.*[17]

The question is now centred around the point that out of the two remedies, one which is larger remedy available in Civil Court to decide the point in issue, and the other speedy and summary remedy available before the Debt Recovery Tribunal, which remedy should be selected by the parties. Court finds that the borrower is justified in selecting Civil Court where a full-fledged trial of the issue in respect of misrepresentation can be properly dealt. Therefore, it will be in the interest of the Plaintiff, who has chosen the forum to keep the suit in civil Court. Court did not deem it fit to disturb the advantageous position which the Plaintiff had acquired as a result of filing of the suit in civil Court. If the suit is to be transferred without the consent of the borrower, he was to lose the larger remedy and the Bank gets saved from a rigorous civil proceeding which was not in the interest

[16]2009(1) Bom CR 657(India).
[17]1994 M. L. J. 1669(India).

of justice. Hence, the civil Court may have inherent powers under Section 151 of the Code of Civil Procedure, 1908, the test laid down and explained in. *ABS Marine* by making reference to the decision in *Abhijit Tea Co.* case and more specifically to Article 142 of the Constitution of India, etc., found acceptable. Finally, since the borrower had not been consenting to transfer his suit to the Debt Recovery Tribunal, High Court declined to transfer the suit to the DRT.

Even in cases where the transaction between a Bank and its customer is one of mere lending and borrowing, it is not as though a Civil suit at the instance of the borrower is barred, in all contingencies, without exception. Supreme Court in *Mardia Chemicals* held that, to a very limited extent jurisdiction of the civil court can be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or their claim may be so absurd and untenable which may not require any probe, whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages.[18]

In this regard one can take cue from the ratio in ABS Marine that was not expressly overruled by any subsequent decision. It can be clearly inferred that a civil suit is maintainable. Subsequent independent suits filed in the Civil Courts have not been thrown out as not maintainable. They were only transferred to the Tribunals for being treated as set off or counter claim and for being tried along with an application of the Bank. Another question that remains unsettled is, whether the civil suit is liable to be transferred to the Tribunal after an application is filed by the Bank before it.

D. Dispute settled with recent supreme court ruling

*a) **Nahar Industrial Enterprises Ltd. V. Hong Kong and Shanghai Banking Corporation**[19]*

[18] A.I.R. 2004 SC 2371(India).
[19] 2009 (8) S.C.C. 646(India).

Facts of the case in brief:

Appellant entered into International Swaps and Derivatives Agreement with the Respondent. Appellant filed a suit in the Civil Court at Ludhiana seeking a declaration that contracts entered into by and between them were void as being illegal and against public policy. An application for grant of injunction was also filed. Respondent, filed transfer application before the High Court of Punjab & Haryana seeking transfer of proceedings pending before the Civil Judge, Ludhiana to the Debts Recovery Tribunal, III, Mumbai.

Issues raised, for our purposes:

> *Whether the High Court/Supreme Court has the power to transfer a suit from a Civil Court to the DRT?*
>
> *Whether the decision of this Court in Indian Bank v. ABS Marine is applicable in the case of transfer of a suit from the Civil Court to the DRT to be tried as a counterclaim, and could a Coordinate Two Judge Bench in Ranjan Chemicals have departed from the ratio thereof after noticing it and without referring the matter to a larger bench of Three Judges?*

Supreme Court made distinction between DRT and a Civil Court with respect to their overlapping jurisdictional ambit, court observed that, if the Tribunal was to be treated to be a civil court, the debtor or even a third party must have an independent right to approach it without having to wait for the Bank or Financial Institution to approach it first. The continuance of its counter-claim is entirely dependent on the continuance of the applications filed by the Bank. Before it no declaratory relief can be sought for, by the debtor. It is true that claim for damages would be maintainable but the same have been provided by way of extending the right of counter-claim.

In a proceeding before the Debt Recovery Tribunal, detailed examination; cross-examinations, provisions of the Evidence Act as also application of other provisions of the Code of Civil Procedure like interrogatories, discoveries of documents and admission need not

be gone into. Taking recourse to such proceedings would be an exception. Entire focus of the proceedings before the Debt Recovery Tribunal centres round the legally recoverable dues of the bank.[20] Only because a court or a tribunal is entitled to determine an issue involving civil nature, the same by itself would not lead to the conclusion that it is a civil court.

Supreme Court held that no independent proceedings can be initiated by a debtor before DRT. Jurisdiction of civil court is barred only in respect of matters which strictly come within the purview of Section 17 of DRT Act and not beyond the same.

With respect to statutory provisions contained in sections 17 & 18 of DRT Act, it cannot be said to have ousted the jurisdiction of the civil court qua the suits filed by the debtor, the jurisdiction of the civil court is barred in relation only to the applications from the bank or recovery of debts due to such bank, even a set off or a counter claim permitted to be raised under sub Sections 6 - 11 of Section 19 of the DRT Act can be lodged only if the proceedings have been initiated by a bank; such set off or counter claim can also be directed to be instituted in civil court on an application of the bank.

On a concluding note court held that the jurisdiction of a civil court is pre-emptive in nature i.e., unless the same is ousted expressly or by necessary indication it will have jurisdiction to try all types of suits.

III. CONCLUSIONS

The role of the Debt Recovery Tribunal has been the subject of a great deal of controversy, the main question has been whether an independent suit filed by a borrower against a bank in a civil court could be transferred to the DRT as a "*counterclaim*" against his wishes. The law on the point was uncertain, with several conflicting judgments.

[20] 2005 S.C.C. OnLine Ker 49(India).

Recently Supreme Court put the controversy to rest with a comprehensive and well-reasoned judgment in *Nahar Industrial Enterprises Ltd.* v. *HSBC.* The case concerned several appeals that had been filed against decisions of various High Courts on this question. Some had held that an independent suit was not barred, while others had held that it was, and transferred it to the appropriate DRT. The two main, and conflicting decisions on the point prior to *Nahar* were *Indian Bank* v. *ABS Marine Product***s** (2006) 5 SCC 72, and *SBI* v. *Ranjan Chemicals Ltd.* (2007) 1 SCC 97. *ABS Marine* had held that an independent suit cannot be transferred without the consent of the borrower even if it inextricably connected with the bank's suit and is in the nature of a counter claim. *Ranjan Chemicals* had held that the consent of the parties is not a limitation on the power of the court to order a transfer. In *Nahar,* the Supreme Court held that *Ranjan Chemicals* could not have departed from the law laid down in *ABS Marine*, as it was a decision of a coordinate Bench. The Court also agreed with the reasoning that a DRT is incapable of adjudicating complex issues of law and fact.

A Tribunal that has the "trappings" of a court is not necessarily a court, and approved decisions have held that DRT is not a court. Moreover, the DRT cannot issue a decree, but only a recovery certificate. Although a DRT is empowered to take evidence in a detailed manner, the Court observed that its function is intended to make this the exception and not the rule. Thus, the position is that the DRT is not a civil court for the purposes of Sections 23, 24 and 25 of the CPC. Nor is it subordinate to the High Court.

A debtor under the common law of contract as also in terms of the loan agreement may have an independent right but until now no such forum has been created for endorsement of that right.

"Jurisdiction of a civil court as noticed hereinbefore is barred only in respect of the matters which strictly come within the purview of Section 17 and the Civil Court, therefore, will continue to have jurisdiction.

SEPARATION OF POWERS: A COMPARATIVE STUDY OF INDIA, USA, UK AND FRANCE

Vinita Choudhury[*]

I. RELEVANCE OF THE DOCTRINE IN INDIA

A. Relevant constitutional provisions

In India, the doctrine of separation of powers has not been accorded a constitutional status. Apart from the directive principle laid down in Article 50, which enjoins separation of judiciary from the executive, the constitutional scheme does not embody any formalistic and dogmatic division of powers.[1] In fact, there are several constitutional provisions, which go on to say that the Indian Constitution does not purport strict separation of powers. There is no provision in the Indian Constitution vesting the legislative and judicial powers in any particular organ.

Article 53(1) confers the executive power on the President of India. Article 246 confers legislative power on the Parliament exclusively. However, Article 79 speaks that the Parliament shall consist of the President apart from the two Houses, the Council of States and the House of the People. On reading Articles 53(1) and 79 together a safe conclusion as to the non-existence of a strict separation of powers in India can be drawn. Same is the scenario in the state level where the executive powers are vested with the Governor (Article 154) who is also a part of the state legislature by virtue of Article 168(1). Moreover, Chapter III of Part V of the Constitution of India reads "*Legislative Powers of the President*." Article 123(1) confers powers

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[1]Upendra Baxi, *The Constitutional Quicksands of Kesavananda Bharati and the Twenty-fifth Amendment*, 4 IJCL (2010); (1974) 1 SCC (Jour) 45.

on the President to promulgate ordinances during recess of Parliament. A similar power is conferred on the Governors of the States by virtue of Article 213. Article 309 confers rule-making power on the President for service related matters. He also exercises this rule making power under Articles 240, 318, 146(1), 77(2), 77(3), 148(5), 101(2), 118(3), 98(2). The Governor exercises his rule making power under Articles 166(2), 166(3), 208(3), 187(3) and under the proviso to Article 229(1). Article 357 grants the exercise of legislative powers to the President under Proclamation issued under Article 356. The important role played by the President as well as the Governor of the States with regard to bills introduced in the legislature cannot be ignored. Thus the executive is bestowed with law making powers.

President also exercises judicial powers by virtue of Article 103 which says that the decision of the President shall be final with regard to the disqualification of members of the House. Similar power rests with the Governor of States under Article 192(1). Under Article 72 the President and under Article 161 the Governor has the power to grant pardons, reprieves, respites etc. in certain cases.

The legislature in India performs judicial function by virtue of Articles 61(1), 124(4), 124(5) with regard to removal of President and Judges. The legislature also performs executive functions when it comes to imposition of surcharge under Article 274, formation of new states, alteration of areas, boundaries, names of existing states under Article 3.

The Judiciary frames rules for the various Courts under Article 227(2) (b) and Article 145. The Supreme Court appoints subordinate staff under Article 146. Similarly, High Courts appoint subordinate staff under Article 229. Thus the judiciary is also involved in legislative and executive functions. These are some of the provisions in the Constitution of India, which reflect the intention of the framers of the Constitution. In the Constitutional Assembly Debates, the proposal made to include specific provisions in the Constitution of India with

regard to separation of powers was rejected by the majority. This again goes on to emphasize the intention of the Constitution makers, which was never in favor of having strict separation of powers in India. One can go on listing such examples yet the list would not be exhaustive.

B. Judicial pronouncements

It has been settled that if the Legislature delegates its essential power to another branch of the government or usurps the essential functions belonging to the latter, such legislative act shall be unconstitutional and void.[2] The Supreme Court has the power to declare void the laws passed by the legislature and the actions taken by the executive if they violate any provision of the Constitution. The power to amend the Constitution by Parliament is subject to the scrutiny of the Court. The Court can declare any amendment void if it changes the basic structure of the Constitution.[3] Such principles and policies are settled after landmark judicial pronouncements in the best interest of the nation and its citizens.

The Constitution has invested the constitutional courts with the power to invalidate laws made by Parliament and State Legislature transgressing constitutional limitations. In a situation where an Act made by the legislature is invalidated by the courts on the ground of legislative incompetence, the legislature cannot enact a law declaring that the judgment of the court shall not operate; it cannot overrule the decision of the court. But this does not mean that the legislature, which is competent to enact that law cannot re-enact the law. Similarly, it is open to a legislature to alter the basis of the judgment.

[2]*Re* Delhi Laws Act, (1951) S.C.R. 747(India); State of Bombay v. Narottandas, (1951) S.C.R. 51; HJarishankar v. State of M.P. A.I.R. 1954 SC 465(India); Rajnarain v. Patna Administration A.I.R. 1954 SC 569(India); Edward Mills v. State of Ajmer (1955) 1 S.C.R. 735(India), Vasanlal v. State of Bombay A.I.R. 1961 SC 4(India), Kesavananda Bharti v. State of Kerala A.I.R. 1973 SC 1461(India).

[3]Kesavananda Bharati v. State of Kerala, (1973) 4 S.C.C. 225(India): A.I.R. 1973 SC 1461(India).

The new law or the amended law so made can be challenged on other grounds but not on the ground that it seeks to in effectuate or circumvent the decision of the court. This is what is meant by "*check and balance*" inherent in a system of government incorporating separation of powers.[4]

a) In re-delhi laws act

The Supreme Court, in the *Delhi Laws Act case*,[5] noticed that our Constitution does not vest the legislative and judicial powers in the Legislature and the Judiciary in so many words, the majority, in effect, imported the essence of the modern doctrine of Separation of Powers, applying the doctrines of constitutional limitation and trust.[6] None of the organs of government under the Constitution can, therefore, usurp the functions or powers, which are assigned to another organ by the Constitution, expressly, or by necessary implication. On the same principle, none of the organs can divest itself of the essential functions, which belong to it under the Constitution.

It was pointed out that though the functions (other than the executive) were not *vested* in particular bodies, the Constitution, being a written one, the powers and functions of each must be found from the Constitution itself. Thus, subject to exceptional provisions like Arts. 123 and 213 and Art. 357 it is evident that the Constitution intends that powers of legislation shall be exercised exclusively by the Legislature created by the Constitution, i.e.; by Parliament as observed by Kania, C.J.:

> *"Although in the Constitution of India there is no express separation of powers, it is clear that a Legislature is created by the Constitution and detailed provisions are made for making that Legislature pass laws. Is it then too much to say that under the Constitution the duty to make laws, the duty to*

[4]P. Kannadasan v. State of T. N., (1996) 5 S.C.C 670(India).
[5]*Re* Delhi Laws Act, 1951 S.C.R. 747(India).
[6]*Id.*

> *exercise its own wisdom, judgment and patriotism in making laws is primarily cast on the Legislature? Does it not imply that unless it can be gathered from other provisions of the Constitution, other bodies-executive or judicial-are not intended to discharge legislative functions?"*[7]

The same thing was expressed by Mahajan, J., as regards the judicial power thus:

> *"...the Constitution trusts to the judgment of the body constituted in the manner indicated in the Constitution and to the exercise of its discretion by following the procedure prescribed therein. On the same principle the Judges are not to surrender their judgment to others. It is they and they alone who are trusted with the decision of a case. They can, however, delegate ancillary powers to others, for instance, in a suit for accounts and in a dissolution of partnership, commissioners can be entrusted with powers authorizing them to give decision on points of difference between parties as to items of account."*[8]

However, the majority decision in this case clearly held that separation of powers is not a part of the Constitution of India. The power of delegation is ancillary to the power of legislation; however, essential legislative functions should not be delegated to the executive. The Supreme Court by 5:2 held that the power to extend a law to other territory is valid. The same Court, in the same case, by 4:3 has held that the power to repeal and amend laws is an essential legislative function and therefore, cannot be delegated.

b) Ram Jawaya Kapur v. State Of Punjab

The question regarding the scope of the executive power has been elaborately discussed by the Supreme Court in *Ram Jawaya Kapur* v.

[7] *Id.*
[8] Gupta v. Union of India, A.I.R. 1982 SC 149(India).

State of Punjab.[9] The decision in this case was greatly influenced by the decision in the *Delhi Laws case.* The recognized schools in Punjab used only such textbooks as were prescribed by the education department. In 1950, the Government embarked upon the policy of nationalizing textbooks, and, thus, took over the work of printing and publishing them. The author of the book selected by the government for the purpose by contract vested the copyright of the book in the government in lieu of royalty. The scheme was challenged on the ground, inter alia that the executive could not engage in any trade or business activity without any law being passed for the purpose. The Supreme court negated the contention saying that the government required no additional power to carry on the business as whatever was necessary for that purpose, it could secure by entering into contracts with authors and other people. In the circumstances, the carrying on of the business of publishing textbooks without a specific law sanctioning the same was not beyond the competence of the Executive.[10] The Court specifically held:

> *"Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can be very well said that our Constitution does not contemplate assumption by one organ or part of the State of functions that essentially belong to another."*

Any account of the application of the doctrine of Separation of Powers in India would be incomplete without mentioning that it has been since the case of *Indira* v. *Rajnarain*[11] elevated even to the constituent sphere, i.e., of amending the Constitution, in exercise of the constituent power conferred by Art. 368. Mrs. Gandhi's election to the House of the People was challenged before the Allahabad High

[9]A.I.R. 1955 SC 549(India).
[10]Sarkari Sasta Anaj Vikreta Sangh v. State of Madhya Pradesh, A.I.R. 1981 SC 2030(India); Bishambar v. State of Uttar Pradesh A.I.R. 1982 SC 33(India).
[11]Indira Gandhi v. Rajnarain, A.I.R. 1975 SC 2299(India).

Court. After the High Court, by its decision of June 1975, set aside the election, finding that Mrs. Gandhi had been guilty of 'corrupt practice', she, who was, by that time, the Prime Minister, obtained from Parliament the Constitution (39th Amendment) Act, 1975 because of which the finding and decision of the High Court was directly superseded. It has been held therein[12] that though the doctrine of rigid separation of powers in the American sense does not obtain in India, the principle of 'checks and balances' underlying that doctrine does, in the sense that none of the three organs of Government can usurp the essential functions of the other organs, constitute a pint of the 'basic structure' of the Constitution or one of its *'basic features"* which cannot be impaired even by amending the Constitution; if any such amendment of the Constitution is made, the Court would strike it down as unconstitutional and invalid.[13]

c) Indira Nehru Gandhi v. Raj Narain

In *Indira Nehru Gandhi* v. *Raj Narain,*[14] Ray, C.J. also observed that in the Indian Constitution there is separation of powers in a broad sense only. A rigid separation of powers as under the American Constitution or under the Australian Constitution, does not apply to India, however, the court held that though the constituent power is independent of the doctrine of separation of powers to implant the theory of basic structure as developed in the case of *Kesavananda Bharati* v. *State of Kerala*[15] on the ordinary legislative powers will be an encroachment on the theory of separation of powers.[16] Nevertheless, Beg, J. added that separation of powers is a part of the basic structure of the Constitution. None of the three separate organs of the Republic can take over the functions assigned to the other. This scheme of the Constitution cannot be changed even by resorting to

[12] *Id.*
[13] *Id.*
[14] A.I.R. 1975 SC 2299(India).
[15] A.I.R. 1973 SC 1461(India).
[16] 1975 supp S.C.C. 161 para 136(India).

Article 368 of the Constitution.[17] The Supreme Court held that adjudication of a specific dispute is a judicial function which Parliament, even acting under a constitutional amending power, cannot exercise.

On scrutinizing all these judgments, the position becomes clear that India recognizes no doctrine of separation between the executive and the legislative wings of the government. Apart from the difficulties inherent in the enforcement of any strict doctrine of separation of powers in the functioning of a modern government, there is also the inherent difficulty in defining in workable terms the division of powers into legislative, executive and judicial.[18] As the Supreme Court has stated, there may be in India a differentiation and demarcation of functions between the legislature and the executive and generally speaking the Constitution does not contemplate that one organ should assume the functions belonging essentially to the other organ, yet, nevertheless, there is no separation between them in its absolute rigidity.[19]

II. SEPARATION OF POWERS IN THE UNITED STATES OF AMERICA

The theory of Separation of Powers; as it was originally enunciated, aimed at a *personal* separation of powers. This is the sense in which Montesquieu,[20] the modern exponent of the doctrine, asserted-

> *"When the legislative and executive powers are united in the same person, or in the same body or magistrates, there can be no liberty. Again, there is no liberty if the judicial power is not separated from the legislative and executive powers. Where it*

[17]*Id*. para 555, at 210.
[18]UPENDRA BAXI, DEVELOPMENTS IN INDIAN ADMINISTRATIVE LAW IN PUBLIC LAW IN INDIA 136 (1982).
[19]Ram Jawaya Kappor v. State of Punjab, A.I.R. 1955 SC 549(India).
[20]Montesquieu, *De L'Espirit des Lois* (1748).

> *joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control; for the Judge would then be the legislator. Where it joined with the executive power, the Judge might behave with violence and oppression. There would be an end of everything was the same man or the same body to exercise these three powers…"*

It is in this sense that the framers of the American Constitution imported the doctrine in framing that Constitution. Thus, Madison[21] said- *"The accumulation of all powers, legislative, executive and judicial, in the same hands whether of one, a few, or many and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."*

A. The constitutional provisions

The framers of the American Constitution vested the legislative, executive and judicial powers in three distinct authorities, by the express letters of the Constitution. Thus,

Art. I states- "*All legislative powers herein granted shall be vested in a Congress*."

Art. II stats- "*The executive power shall be vested in a President."*

Art. III, similarly, states- "The judicial power...shall be vested in one Supreme Court..."

The form of government, characterized as presidential, is based on the theory of separation between the executive and the legislature. The executive power is vested in the President, the legislative power in the Congress and the judicial power in a hierarchy of courts with the Supreme Court at the apex. It is on the basis of this theory of separation of powers that the Supreme Court of the United States has not been given power to decide political questions, so that the Court may not interfere with the exercise of power of the executive branch of the government. The Constitution of America has also not given overriding power of judicial review to the Supreme Court. It is a

[21]James Madison, *The Federalist* (No. 47).

queer fact of American constitutional history that the power of judicial review has been usurped by the Court.[22]

The President is both the head of the state as well as its chief executive. He appoints and dismisses other executive officers and thus controls the policies and actions of government departments. The persons in charge of the various departments, designated as the Secretaries of State, hold office at his pleasure, are responsible to him and are more like his personal advisers. The President is not bound to accept the advice of a Secretary and the ultimate decision rests with the President. Neither the President nor any member of the executive is a member of the Congress and a separation is maintained between the legislative and executive organs. The cabinet is collectively responsible to the Parliament and holds office so long as it enjoys the confidence of the majority there.

B. The practical scenario

The President of the United States however, in practicality interferes with the exercise of powers by the Congress through the exercise of his veto power. He also exercises the law-making power in exercise of his treaty-making power. The President also interferes with the functioning of the Supreme Court through the exercise of his power to appoint judges. In fact, President Roosevelt did interfere with the functions of the Court when he threatened to pack the Court in order to get the Court's support for his New Deal legislation. In the same manner Congress interferes with the powers of the President through vote on budget, approval of appointments by the Senate and the ratification of treaty. Congress also interferes with the exercise of powers by the courts by passing procedural laws, creating special courts and by approving the appointment of judges. In its turn, the judiciary interferes with the powers of the Congress and the President through the exercise of its power of judicial review. It is correct to say that the Supreme Court of the United States has made more

[22]I.P. MASSEY, ADMINISTRATIVE LAW 40 (7th ed. 2008).

amendments to the American Constitution than the Congress itself.[23]
The impossibility of having a rigid personal separation of powers has, however, been illustrated by the American Constitution under which the President has got legislative powers in his right to send messages to Congress[24] and the right to, veto,[25] while Congress has the judicial power of trying impeachments[26] and the Senate participates in the executive power of treaty making and making appointments.
In modern practice, therefore, the theory of Separation of Powers has come to mean an *organic* separation or a separation of functions, viz., that one organ of government should not usurp[27] or combine[28] functions belonging to another organ.

C. Judicial pronouncements

The American Supreme Court observed in 1881 in the case of *Kilbourn* v. *Thompson:*[29]
"*It is essential to the successful working of this system that the persons entrusted with power in anyone 'of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to 'its own department and not other…It may be stated…as a general rule inherent in the American constitutional system, that unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or· judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power*."
An eminent authority illustrated this interaction among the different

[23]*Id.* at 41.
[24]U.S. CONST. art. II §3.
[25]U.S. CONST. art. I §7(2).
[26]1 SCHWARTZ, CONSTITUTION OF THE UNITED STATES 115 (1963).
[27]Kilbourn v. Thompson, (1881) 103 U.S. 168 (190); Satinger v. Philippine Islands, (1928) 103 U.S. 168 (192).
[28]A.G. of Australia v. Boilermakers Society, (1957) 2 All E.R. 45 (P.C.).
[29]Kilbourn v. Thompson, (1881) 103 U.S. 168 (190).

organs with reference to modern conditions thus:

"*Functions have been allowed to courts, as to which Congress itself might have legislated; matters have been withdrawn from courts and vested in the executive; laws have been sustained which are contingent upon executive judgment on highly complicated facts. By this means Congress has been able to move with freedom in modern fields of· legislation, with their great complexity and shifting facts, calling for technical knowledge and skill in administration. Enforcement of a rigid conception of separation of powers would make modern government impossible."*[30]

The most glaring violation of the strict theory of separation of powers is to be found in the administrative agencies in the American system of government today.[31] Most of these administrative bodies combine in themselves the legislative function of subordinate legislation; the executive function of investigation and prevention of complaints against breaches of the statute which it has to administer as well as of the rules and regulations made by itself;[32] and the judicial function of adjudicating disputes and complaints[33] arising under such statute and subordinate legislation.[34] The American Supreme Court has upheld such concentration of functions by resorting to some quibbles:

1) It has said that the functions of subordinate legislation and administrative adjudication are not essential1y legislative or judicial functions, but only *quasi-legislative* and *quasi-judicial.*[35]

2) The Court has also said that it is necessary for effectuating the policy of the Legislature in a matter requiring administrative determination, the subject being not fit for determination by a court of law.[36] Even the charge of bias against an administrative tribunal

[30]Frankfurter, *The Public and its Government*, IN SCHWARTZ(ED), AMERICAN CONSTITUTIONAL LAW 286 (1955).
[31]*Id.* at 25.
[32]Boyce Motor Lines v. U.S., (1952) 342 U.S. 337.
[33]Fed. Trade Commn. v. Cement Institute, (1948) 333 U.S. 683.
[34]Marcello v. Bonds, (1955) 349 U.S. 302.
[35]Humphrey's Executor v. U.S., (1935) 295 U.S. 602.
[36]Marcello v. Bonds, (1955) 349 U.S. 302.

because of its having preconceived views on the subject-matter of adjudication has been brushed aside on the same ground.

Marbury v. *Madison*[37] is often cited as the case that established the power of the Courts to invalidate legislation.[38] The case effectively settled the issue of whether judicial review of some sort may legitimately be exercised. By ruling that Congress could not expand the Supreme Court's original jurisdiction, Chief Justice Marshall invalidated a piece of legislation.

It was stated in the case of *Satinger* v. *Philippine Islands*[39] that:

> *"It may be stated…, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power, the executive cannot exercise either legislative or judicial power, the judiciary cannot exercise either executive or legislative power."*

It needs to be emphasized that although the separation doctrine has been very much diluted over the years because of the emergence of administrative process, the doctrine at times manifests itself with all its force in judicial decisions. One instance of this is found in *Buckley* v. *Valeo,*[40] where the Supreme Court held a congressional act to be unconstitutional because it breached the separation doctrine in so far as the Congress sought to claim the administrative power of making appointments to a federal body, viz, the Federal Election Commission.

The Supreme Court has also applied the separation doctrine in *Immigration and Naturalization Service* v. *Jagdish Rai Chadha.*[41] Section 244(c)(2) of the Immigration and Nationality Act authorizes either House of Congress by resolution to invalidate the decision of

[37](1803) 1 Cranch 137 (United States).
[38]ROBERT P. GEORGE, GREAT CASES IN CONSTITUTIONAL LAW 5 (1st ed. 2001).
[39](1928) 103 U.S. 168(192).
[40]424 U.S. I (1977).
[41]462 U.S. 919 (1983).

the Executive Branch, pursuant to authority delegated by Congress to the attorney general, to allow a particular deportable alien to remain in the United States. The Attorney General suspended the deportation order passed on Chadha. Thereafter, the House of Representatives passed a resolution pursuant to Section 244(c)(2) vetoing the suspension. The Immigration judge consequently reopened the proceedings. Chadha moved to terminate the proceedings on the ground that Section 224(c)(2) was unconstitutional. The matter ultimately reached the Supreme Court which ruled that the Congressional veto provision in Section 244(c)(2) was unconstitutional.

This pronouncement may have far-reaching repercussions on the fabric of administrative process in the U.S.A., particularly, on the question of Congressional supervision and control over the actions of the Administration. Congress confers broad powers on administrative bodies and then imposes veto either by one House or both Houses over the exercise of those powers. It is regarded as an essential check on the expanding powers of the agencies, as they engage in exercising authority delegated by Congress.[42]

Thus, even in the United States of America, the position is that one organ or department of government should not usurp the functions, which *essentially* belong to another organ. Thus, the formulation of legislative *policy* or the *general principles* of law is an essential function of the Legislature and cannot be usurped by another organ, say, the Executive.[43] It also includes the converse of this proposition, namely, that no organ can abdicate its essential functions.

In order to function efficiently, each department must exercise some *incidental* powers which may be said to be strictly of a different character than its essential functions. For example, the Courts must, in order to function efficiently possess the power of making rules for

[42]M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW 34 (6th ed. 2007).
[43]Mutual Film Corporation v. Industrial Commission, (1915) 236 U.S. 230; Yakus v. U.S. (1943) 321 U.S. 414.

maintaining discipline or regulating procedure, even though that power may be of the nature of a legislative power. The power of making rules of procedure in the Courts is not regarded as of the *essence* of the functions of the Legislature.[44] Again, in interpreting laws and in formulating case laws, the Courts do, in fact, perform a function analogous to law making. In particular, in dealing with new problems where authority is lacking, the Courts have to create the law, even though under color of interpretation of and deduction from the existing law. Similarly, the ascertainment of a state of facts upon the testimony of witnesses may be incidental to some executive action and is not confined to the judicial powers.[45]

III. SEPARATION OF POWERS IN THE UNITED KINGDOM

The theory of separation of powers signifies three formulations of structural classification of governmental powers:

(i) The same person should not form part of more than one of the three organs of the government. For example, ministers should not sit in Parliament.

(ii) One organ of the government should not interfere with any other organ of the government.

(iii) One organ of the government should not exercise the functions assigned to any other organ.[46]

It may be pointed out that in none of these senses does a separation of powers exist in England. The King, though an executive head, is also an integral part of the legislature and all his ministers are also members of one or other of the Houses of Parliament. Furthermore, the Lord Chancellor is at the same time a member of the House of Lords, a member of the government, and the seniormost member of the judiciary. Therefore, in England the concept of "*parliamentary*

[44]Wayman v. Southward, (1825) 10 Wh. 1 (42).
[45]D.D.BASU, ADMINISTRATIVE LAW 24 (6th ed. 2004).
[46]I.P. MASSEY, ADMINISTRATIVE LAW 38 (7th ed., 2008)

executive" is a clear negation of the first formulation that the same person should not form part of more than one of the three organs of the government.[47]

As regards the second formulation, it is clear that the House of Commons ultimately controls the executive. The judiciary is independent but the judges of the superior courts can be removed on· an address from both Houses of Parliament. As to the exercise by one organ of the functions of the other organs, no separation exists in England. The House of Lords combines judicial and legislative functions. The whole House of Lords constitutes, in theory, the highest court of the country; in practice, however, by constitutional convention, judicial functions are exercised by specially appointed Law Lords and other Lords who have held judicial office. Again, legislative and adjudicatory powers are being increasingly delegated to the executive. This also distracts from any effective separation of power.

A. Recent development

The House of Lords has served as the highest court in the UK for over 130 years. Since 2009 a new UK Supreme Court has taken over its judicial functions, closing the doors on one of the most influential legal institutions in the world, and a major chapter in the history of the UK legal system. This brought about a fundamental change to the work and role of the House of Lords. The new Supreme Court has separated the judicial function from the Parliament from 1st October 2009. It now has an exclusive jurisdiction over civil and criminal cases.[48]

It is a paradox that the theory of Montesquieu was inspired by the political system as it obtained in England in the 18th century; the concentration of power in an absolute monarch had been replaced by legislative function being exercised by Parliament and judicial powers

[47] *Id.*

[48] (March, 20 2010) http://news.parliament.uk/2009/07/from-house-of-lords-to-supreme-court/.

being exercised by the Courts. But the emergence of the Cabinet system of government presented a standing refutation to the doctrine of separation of powers because the Cabinet, as *Bagehot* observed, "*is a hyphen which joins, a buckle which fastens, the legislative part of the State to the executive part of the State.*"[49] In personnel, it is virtually a committee of the Legislature, but it is the real head of the executive power of the State, the Crown being only a constitutional or nominal head. On the other hand, the Cabinet initiates legislation and controls the Legislature, wielding even the power to dissolve the Legislature. There is thus a complete 'fusion' in spite of a separation of the legislative and executive powers in the same hands.

So far as the Judiciary is concerned, however, there is a shred of opinion that the Judiciary in England is independent of any control by the Executive, so that the doctrine of separation of powers has its relic in England, in the share of independence of the Judiciary,[50] in its function of administration of justice.[51]

IV. DROIT ADMINISTRATIF IN FRANCE

The constitution of France provides for a separation of powers between the executive, the legislature and the judiciary. In France there is a separate system of administrative courts which deal with administrative cases exclusively. As a result administrative law develops on its own independent line and is not enmeshed with the judicial system.[52] The judiciary is independent and is based on a civil law system which evolved from the Napoleonic codes.

The Court of Cassation is the highest court in the French judiciary. Civil, commercial, social or criminal cases are first ruled upon by

[49]BAGEHO, ENGLISH CONSTITUTION (1867); WORLD'S CLASSICS 12 (1963).

[50]1 HALSBURY, HALSBURY'S LAWS OF INDIA 5 (4th ed.); HOOD PHILLIPS, CONSTITUTIONAL & ADMINISTRATIVE LAW 31 (1978); WADE & PHILLIPS, ADMINISTRATIVE LAW 32 (1970).

[51]*Id.*

[52]H.W.R. WADE, ADMINISTRATIVE LAW 11 (9th ed. 2006).

courts of first instance or lower courts. Decisions rendered at last instance may be challenged in a court of appeal, where all aspects of them are re-examined, as to both facts and law.[53]The legislature (the Parliament) functions independently and frames laws.

Droit Administratif in France, as interpreted by French history, by French legislation, and by the decisions of French tribunals, means more or less than the maintenance of the principle that while the ordinary judges ought to be irremovable and thus independent of the executive, the government and its officials ought to be independent of and to a great extent free from the jurisdiction of the ordinary courts.[54] The ordinary courts exercise no control over administrative functioning.[55] It essentially means organisation of public administration within the French legal system.[56]

In France, a person has no avenue for redress of grievances against the administration through the courts. This is the important point of deviance between the *Droit Administratif* and the British or the Common-law system of Administrative Law.[57] Autonomy of the Administration from judicial control does not however mean that it is free from all control. Administration has been able to develop its own tribunals to supervise it. It is another characteristic feature of *Droit Administratif viz.*, that administrative tribunals supervise administrative functioning.[58]

The French *Droit Administratif* has sought to draw a balance between private rights and public benefit. On the one hand, it maintains and supports administrative powers; on the other, it has developed a mechanism for protecting individual rights and civil liberties against

[53](March 27, 2010) Retrieved from http://www.courdecassation.fr/about_the_court_9256.html.

[54]A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 337 (10th ed. 2008).

[55]M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW 25 (6th ed. 2007).

[56]A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 475 (10th ed. 2008).

[57]*Id.*

[58]*Id.*

possible attacks by public authorities. Although the prerogatives of public authorities are very extensive, they are not absolute.[59] In order to defend private citizens against the public corporations, the administrative courts have established two limitations on their activities: viz they must not act against the law and they must pay damages when they cause injuries. This system has now come to be regarded as providing better protection to individual rights against the despotism of public administration than the Common-law system provides at present.

The crucial test to determine the effective nature of Administrative Law is to determine how well Administration is controlled in exercising its powers and whether or not a citizen has an adequate redressal mechanism in case he is hurt by the Administration. From both these tests, *Droit Administratif* is found to be more satisfactory than the common-law system of Administrative Law.[60]

A. The Conseil d' Etat

France has a large number of administrative tribunals, but the most significant of these is the *Conseil d 'Etat.* It consists of judges of great professional expertise. There is a network of local tribunals of the first instance. While on the face of it, this body may not seem to be as independent and impartial as an ordinary court, but, as a matter of fact because of the emergence of certain practices and conventions, the *Conseil* is very independent in practice.[61] The *Conseil* is composed of the cream of the French Civil Service. It is an important administrative tribunal. It acts as the court of appeal from all other administrative tribunals. All tribunals whether specialized or not are subject to the *Conseil's* control, as all decisions of administrative tribunals are subject to review by the *Conseil* on points of law.

[59]A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 486 (10th ed. 2008).
[60]M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW 25 (6th Ed., 2007).
[61]A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 340 (10th ed. 2008).

Because the *Conseil* acts as the central appellate administrative tribunal, it has been possible to secure the unity of *Droit Administratif*, and also the tribunals in France have come to have a cohesion and autonomy unknown in common law countries where many tribunals function without any single general administrative appellate tribunal. The *Conseil* also acts as the court of first instance for cases for *recourse pour excess de pouvoir* against the decrets of the Administration. To further protect administrative tribunals from interference from the ordinary courts a separate *Tribunal des Conflicts* has been established which decides whether a matter should go before the ordinary courts or the tribunals. It has judges and civil servants in equal numbers with the Minister of Justice as the President but he rarely presides over it.[62] Only when members of the tribunal are equally divided it becomes necessary for him to use his veto.

The administrative tribunals have spelled out two principal limitations on administrative bodies. One, these bodies must not act against the law; two, they must pay damages when they cause injuries. If an administrative action is *ultra vires*, it can be nullified by the tribunal on an action brought by the affected private citizen. The scope of this action is very broad and it constitutes the best means to protect citizens against abuse of power. The *Conseil* can supervise the form and content of administrative decisions. It can also supervise the grounds on which administrative action is taken. As regards the action for damages, damages can be granted to an individual when he is injured by an administrative action not only when the state is at fault but also when not at fault. This gives significant protection to the individual against the wrongs of public administration. The *Conseil d'Etat* has been characterized as the "bulwark of civil liberties." and also as the "*guardian of administrative morality*."[63]

[62]M.P. JAIN & S.N. JAIN, PRINCIPLES OF ADMINISTRATIVE LAW *25* (6th ed. 2007).
[63]*Id.*

B. Criticism by dicey

Dicey believed that administrative tribunals would be partial to the Administration. He regarded it as a prime virtue of the rule of law that all cases came before the ordinary courts, and that the same general rules applied to an action against the government official as applied to an action against private individual. But the truth is that the *Conseil d' Etat* in discharging its judicial and controlling functions has achieved a high degree of objectivity.[64] Even today English judges speak of *droit administratif* as a system for putting the executive above the law. However, in fact French administrative law has a system of compensation for the acts of public officers which in some respects is more generous than that of English law.

C. The nature of droit administratif

Droit Administratif is essentially judge made law, case law and it resembles the English law far more closely than does the codified civil law of France.[65] Generally the fundamental principles of *droit administratif* are not enacted; they flow from the decisions of the *Conseil d' Etat.*[66] Although it is case law, there exists a written *code administrative.* Moreover, there is now a trend towards the codification of *droit administratif.* However, these codifications are not the enactment of customs and general principles applied by the Courts, but merely either the grouping of the principle administrative laws and regulations or the methodical editing of the laws and regulations in force at the date of publication and governing some very definite subject matter, such as public health, mines and town

[64]BROWN & GARNER, FRENCH ADMINISTRATIVE LAW (1983); MNCHELL, CONSTITUTIONAL LAW (1968); SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD (1954)*;* CAROL HARLOW, REMEDIES IN FRENCH ADMINISTRATIVE LAW (1977).
[65]A.V.DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 486 (10th ed. 2008).
[66]*Id.*

planning.[67] As the rules of *Droit Administratif* are not written, they have flexibility which permits constant adaption to changes in the administrative life.

But the French system is not without its disadvantages. Its remedies are narrow in scope and are not always effective, and the division of jurisdictions between civil and administrative courts is the subject of technical rules which can cause much difficulty.[68]

V. CONCLUSION

Though it may still be possible to acknowledge that the functions of government are divisible into three categories it is impossible, in a modern State, to assign these functions exclusively to the three organs i.e., the Legislature, the Executive and the Judiciary. In practice, most constitutions put in place a system of checks and balances characterized by a partial separation of powers. This is essentially because the problems and working of the government in a present day scenario are interdependent. Therefore, it is not possible or practical to create watertight compartments and define the functions of the three organs with mathematical precision and say that the business of the Legislature is to make the law, of the Executive, to execute it, and of the Judiciary to interpret and apply the law to particular cases.

It is precisely for the same reason that although the Constitution of the United States recognizes the existence of separation of powers clearly and explicitly, yet strict separation of powers is not practiced in the United States in reality. The President of the United States exercises both legislative and judicial powers, which is sanctioned by the Constitution itself. The Congress interferes into the executive domain by virtue of its power under the Budget and Accounts Act to make changes in the budget passed by the executive. The Congress also exercises judicial function with regard to punishing and expelling the

[67] *Id.* at 487.

[68] H.W.R. WADE, ADMINISTRATIVE LAW 11 (9th ed., 2006).

members of the Senate and the House of Representatives. Moreover, impeachment of judges is instituted before the Senate. This also, to an extent, gives judicial power to the Congress.

The Indian Constitution does not differentiate the legislative, executive and judicial functions of the government at all. If there are provisions, which provides for separation of power, there are also provisions, which clearly goes against the concept of separation of powers. It has been laid down in Supreme Court cases that there exists no strict separation of powers in India. Thus, it can be safely concluded that strict separation of powers does not exist in India. The principle laid down by Montesquiue is clearly not applicable in the Indian context.

In the United Kingdom, there exists no separation of powers. However, with the recent constitution of the Supreme Court in October 2009, a separation of powers has been attempted between the judiciary and the other institutions of the Government. Until October 2009 the House of Lords served as the court of last resort. Until then there existed no separation of powers at all in the United Kingdom. The establishment of the Supreme Court goes on to highlight the importance of separation of powers, which has been recognized by the United Kingdom. However, there remains a fusion of legislative and executive powers.

France recognizes separation of powers in its Constitution. French Administrative Law is unique and different in the sense that it provides for two sets of courts—one for civil disputes and the other for administrative disputes. This, in a way, ensures separation of powers since the administrative disputes will remain within the administrative domain and not perpetrate outside its domain. This also reduces the burden of the civil courts and ensures speedy justice. Laws are framed in the Parliament.

Therefore, in any government, one institution of the government cannot exercise the powers essentially belonging to another institution but it can exercise some of the incidental powers of another organ

without violating the principle of separation of powers in its strict sense.

If the doctrine of separation of powers in its classical sense cannot be applied to any modern government, it does not mean that that the doctrine has no relevance in the present day world. The logic behind this doctrine is sound and valid as it seeks to ensure that the centre of authority must remain dispersed to avoid absolutism and the idea is not to create rigid classifications, bereft of even limited flexibility. The fulfillment of this logic is absolutely necessary for the smooth functioning of any government.

PRE-ARBITRATION PROCEDURES (SECTION 1-SECTION 15) OF THE 1996 ARBITRATION ACT: A COMPARATIVE ANALYSIS BETWEEN THE UNCITRAL MODEL LAW AND THE INDIAN JUDICIAL (MIS) INTERPRETATIONS OF THE PRE-ARBITRATION PROCEDURES OF THE INDIAN ARBITRATION ACT, 1996

Shubhang Setlur and Zehaan Trivedi[*]

I. INTRODUCTION

The main objective of India's Arbitration and Conciliation Act, 1996 was the modernization of the arbitration regime in India for both domestic and international arbitration. It also reflected the increased acceptance of party autonomy, and the Parliament's will to keep judicial intervention to a minimum has manifested itself in a number of provisions of the Act. Unfortunately, insofar as the 1996 Act is concerned, the reality has been far removed from the ideals professed by the legislation. Arbitration in India and the regime governing it have been subjected to criticism for the lack of expedition in the arbitration process, thereby escalating costs. The problems have been exacerbated by judicial intervention where the Indian Supreme Court enjoys a mixed track record in the appropriateness of getting involved when it perhaps should have not, and in its efforts at striking a balance between fair trial and party autonomy. The current practice is certainly a far cry from that envisaged by the objectives of the Act and the UNCITRAL Model Law. The lack of standards in conducting

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arbitration in India has driven parties to opt for arbitration outside the country, or even choose litigation in Indian courts as an alternative to having an arbitration clause in their contracts. The Indian Supreme Court has been confronted with a number of cases pertaining to the interpretation of various provisions of the Act, and has reviewed and overruled its judgments on more than one occasion.

This article seeks to evaluate the functioning of the Act with insights from comparable jurisdictions, and in the light of the objectives of the UNCITRAL Model Law.

II. OBJECTS AND LEGISLATIVE SCHEME OF THE ARBITRATION AND CONCILIATION ACT, 1996

The Arbitration Act was designed primarily to implement the UNCITRAL Model Law on International Commercial Arbitration and create a pro-arbitration legal regime in India. Its enactment was also a watershed moment in the annals of the alternative dispute resolution movement in India. Litigation in India is generally time-consuming and expensive, without a fully developed regime of awarding costs to the successful party. A huge backlog of cases had been built up over the years due to the enormous time taken in the disposal of cases by state established courts. Consequently, there has been a market demand for a speedy and effective method of dispute resolution which could posit itself as an alternative to litigation in courts.

The Supreme Court itself stressed the importance of arbitration in *State of J&K* v. *Dev Dutt Pandit*[1] in the following words,

> *"Arbitration is considered to be an important alternative dispute resolution process which is to be encouraged because of (the) high pendency of cases in the courts and (the high) cost of litigation. Arbitration has to be looked up to with all*

[1](1999) 7 S.C.C. 339(India).

> *earnestness so that the litigant public has faith in the speedy process of resolving their disputes by this process."*

Arbitration under the new Act was advertised as the private sector alternative to the public institutional machinery represented by the judiciary. The Act was also intended to lend a fillip to India's liberalization and market friendly policies which the Union government had embarked upon in 1992.[2]

The 1996 Act represents a significant improvement over its predecessor, the Arbitration Act of 1940 and attempted to rectify its shortcomings by narrowing the basis on which awards could be challenged, minimizing the supervisory role of courts, ensuring finality of arbitral awards and expediting the arbitration process.

The Supreme Court, considering the sorry state of affairs, lamented on the old act:

> *'Indeterminable, time-consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to the Arbitration Act. However, the way in which proceedings under the Act are conducted and, without exception, challenged in courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by an unending prolixity, at every stage providing a legal trap to the unwary. Informal forums chosen by the parties for expeditious disposal*

[2]The importance of an efficient law of arbitration as a handmaiden to economic reform was stressed in the Statement of Objects and Reasons to the Indian Arbitration and Conciliation Act, 1996 (herein after referred to as "the Act") which reflected the fear that economic reforms may not become fully effective if the law dealing with settlement of both domestic and international commercial disputes remains out of tune.

> *of their disputes have, by the decision of the courts, been clothed with legalese of an unenforceable complexity':*[3]

The Act borrows heavily from the legislative template of the UNCITRAL Model Law,[4] with some important deviations. While the New York Convention was concerned only with the enforcement of the arbitral agreement at one extreme and with the enforcement of arbitral awards at the other, the UNCITRAL Model Law had a rather more ambitious agenda. It seeks to cover most, though not all, aspects of the arbitral process, including most importantly, the supervisory powers of the local courts antecedent to enforcement.

The Act also provides a unified legal regime for domestic as well as international arbitration based on the premise that what is good for international arbitration is also good for domestic arbitration. It substantially consolidates and amends the legal regime relating to all kinds of arbitration, and in addition, gives statutory recognition to the process of conciliation to the settling of business and other general disputes. A challenge to the constitutionality of the Act was repelled by the Supreme Court which held that the Act did not seek to exclude judicial review of arbitral awards.[5]

The 1996 Act is divided into three distinct parts. Part I deals with domestic and international arbitrations taking place in Indian Territory. Part II contains provisions for the recognition and enforcement of foreign arbitral awards under the New York and Geneva Conventions, whereas Part III statutorily recognizes conciliation as a mode of alternative dispute resolution.

[3]M/s. Gurunanak Foundation v. M/s Rattan Singh & Sons, A.I.R. 1981 SC 2075(India).

[4]The Model Law began with a proposal to reform the New York Convention and led to a report from UNCITRAL to the effect that harmonization of the arbitration laws of different countries could be achieved more effectively by a model or uniform law. The Model Law is designed to assist states in reforming and modernizing their laws on arbitration and has been designed to be a template for domestic legislation.

[5]Babar Ali v. Union of India, (2000) 2 S.C.C. 178(India).

III. THE ARBITRATION AGREEMENT

The Act follows the UNCITRAL Model Law in recognizing that the foundation of arbitration proceedings and the source of jurisdiction of an arbitral tribunal is the existence of an arbitration agreement between the parties. It recognizes the validity and effect of a commitment by the parties to submit to arbitration, an existing dispute or a future dispute, as long as the same is in writing, though it may be contained in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement.[6] An arbitration agreement will also be presumed to exist when there takes place an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.[7] An arbitration agreement shall not be discharged by the death of any party and in the event of death; it shall be enforceable by or against the legal representative of the party.[8]

IV. ARBITRABILITY OF DISPUTES UNDER INDIAN LAW

Whether or not a particular dispute is arbitrable under a given system of law is in essence, a matter of public policy for that system of law to determine. Each state determines which matters may or may not be resolved by arbitration in accordance with its own political, social and economic policy. There are no explicit provisions defining the scope and limits of arbitrability under the 1996 Act. Section 7(1) employs the language of Article I of the UNCITRAL Model Law and permits parties to refer to arbitration those disputes that have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not.

[6]The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, §7 (1996).
[7]KBJNL v. G. Harischandra Reddy and Another, 2005 (2) Kar LJ 409(India).
[8]The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, §40(1) (1996).

Even disputes having a tortuous character may be referred to arbitration in India. In *Renusagar Power Co.* v. *General Electric Co.*[9] the Supreme Court held: The question is not whether the claim lies in tort but the question is whether even though it has lain in tort, it arises out of or is related to the contract, that is to say, whether it arises out of the terms of the contract or is consequential upon any breach thereof. The court cited with approval the judgment of the Court of Appeal in *Woolf* v. *Collis Removal Service*[10] where it was held that though a claim in negligence was a claim in tort and not under contract, yet there was a sufficiently close connection between that claim and the contractual transaction to bring the claim within the arbitration clause. The Supreme Court concluded:

> *"This authority clearly shows that even though a claim may not directly arise under the contract which contains an arbitration clause, if there was a sufficiently close connection between that claim and the transaction under the contract, it will be covered by the arbitration clause."*

Section 2(3) of the Act clarifies that it shall not affect the operation of any other law by virtue of which certain disputes may not be submitted to arbitration. The Act (like its predecessor Act of 1940) however does not contain any intrinsic guidance as to what kinds of disputes are considered to be non-arbitrable under Indian law.

Disputes which involve a determination of rights or obligations in rem and not rights or obligations in personam are generally considered not to be arbitrable in India. Therefore, disputes pertaining to taxation, matrimonial disputes, bankruptcy and insolvency cases, appointment of guardians, disputes relating to testamentary and intestate succession, matters concerning criminal offences, matters pertaining to public law or welfare legislation, etc. may not be arbitrable in the Indian context. Certain matters regulated by special statutes which confer exclusive jurisdiction on specified courts may also fall outside

[9](1984) 4 S.C.C 679(India).
[10](1947) 2 All ER 260.

the ambit of arbitrability in the Indian context. These include matters pertaining to the validity and revocation of patents under the Patents Act 1970; matters regarding infringement and rectification of trademarks under the Trademarks Act 1999; infringement of copyright under the Copyright Act 1957; matters relating to the amalgamation and takeover of companies and so on. The jurisdiction to hear an application for the winding up of a company is vested exclusively with the Company Court under the provisions of the Companies Act 1956 and a relief of this nature cannot be granted by an arbitral tribunal.[11]

In *Olympus Superstructures Pvt Ltd* v. *Meena Vijay Khetan,*[12] the Supreme Court held that arbitrators do have the power to order specific performance of a contract, thereby putting to rest a judicial controversy created by conflicting High Court judgments on the issue. The Apex Court repelled the contention that the granting of this discretionary remedy was conferred by the Specific Relief Act, 1963 exclusively on the civil courts.[13]

V. ENFORCING AN AGREEMENT TO ARBITRATE

The 1996 Act contains two sections which empower courts to ensure that parties, who have agreed to arbitrate, do arbitrate. Whilst Section 8 confers such a power in case of domestic arbitration agreements and agreements where the seat of arbitration is in India, Section 45 confers a similar power to enforce agreements to which the New York

[11]Haryana Telecom v. Sterlite Industries, (1999) 5 S.C.C. 688(India).
[12](1999) 5 S.C.C. 651(India).
[13]The court cited with approval the principle laid down by the Calcutta High Court in Keventer Agro Ltd v. Seagram Comp. Ltd, (1997) Cal HC to the following effect merely because the sections of the Specific Relief Act confer discretion on courts to grant specific performance of a contract does not means that parties cannot agree that the discretion will be exercised by a forum of their choice. If the converse were true, then whenever a relief is dependent upon the exercise of discretion of a court by statute e.g. the grant of interest or costs, parties should be precluded from referring the dispute to arbitration.

Convention applies. Section 8 of the Act empowers a judicial authority before which an action is brought in a matter which is the subject matter of an arbitration agreement, to refer the parties to arbitration.[14]

Although the language of the provision does not seem to allow the courts any discretion in referring parties to arbitration,[15] there may be possible exceptions to this general rule which would empower a judicial authority to continue with the proceedings before it, notwithstanding the existence of the arbitration agreement.

In *Hindustan Petroleum Corp. Ltd* v. *Pinkcity Midway Petroleums,*[16] interpreting Section 8 of the Act, the Supreme Court was emphatic in holding that a civil court ought not to examine the applicability of the arbitration agreement to the dispute between the parties before referring them to arbitration. The appropriate course for the litigants would be to raise such a contention before the arbitral tribunal which was competent to examine it by virtue of its competence-competence under Section 16 of the Act. While the court's eagerness for an early commencement of arbitral proceedings is commendable, the ratio seems to be a rather over- broad formulation given the clear language of Section 8 which requires the judicial authority to be satisfied that the matter before it is the subject matter of an arbitration agreement. Therefore, on a textual interpretation, it is clear that the judicial authority is obliged to make such a prima facie determination before referring the parties to arbitration.

A. Shin-etsu: a balanced view

Section 45 (which occurs in Part II of the Act) obliges a judicial authority to refer the parties to arbitration unless it finds that the

[14]The Supreme Court has also clarified that as soon as the matter before any judicial authority is referred to arbitration, the suit or legal proceedings pending before it stands disposed of: P. Anand Gajapati Raju v. P.V.G. Raju, (2000) 4 S.C.C. 539(India).

[15]Shin-Etsu Chemical Co. Ltd v. Aksh Optifibre and another, (2005) 7 S.C.C. 234(India).

[16](2003) 6 S.C.C. 503(India).

arbitration agreement is null and void, inoperative or incapable of being performed. While an Indian court would certainly be acting within its powers when reviewing the existence or validity of the arbitration agreement, the tricky issue is deciding on the standard to be applied by the courts in determining whether an arbitration agreement is or is not null and void, inoperative or incapable of being performed. One possible approach would be for courts to embark on a full-fledged enquiry on merits into the existence and validity of the arbitration agreement; the more liberal approach would be for them to confine themselves to a prima facie examination and to reserve a full-fledged review at the stage of setting aside or enforcing an arbitral award.

This issue had to be considered by the Supreme Court in *Shin-Etsu Chemical Co. Ltd* v. *Aksh Optifibre and another*. Speaking for the majority, Srikrishna J held that Section 45 did not require the court to make a final and determinative finding on the issue. Rather, the judicial finding under Section 45 would only be a prima facie view and neither the arbitral tribunal nor the court enforcing the arbitral award would be bound by the view expressed by the court and could for cogent reasons arrive at a different conclusion.

The majority held that there were distinct advantages in endorsing the view that Section 45 did not require a conclusive adjudication by the court.

Firstly, if the court had to make a final and determinative ruling on the validity of the arbitration agreement, then it would often have to do so, on the basis of a foreign law chosen by the parties. Foreign law has to be proved as a matter of fact in Indian courts, and this could render the proceedings becoming long-drawn, complex and expensive.

The court's decision was based upon respect for the principle of competence-competence. Were courts to fully scrutinize the arbitration agreement, an arbitral proceeding would have to be stayed until the court delivered a final decision on the existence or validity of

the arbitration agreement. On the other hand, this matter could well be one of the issues to be considered by the arbitral tribunal during the course of the arbitral proceedings, and if called upon to decide the issue at a later stage, the court would have the additional benefit of the reasoning of the arbitral tribunal.[17] If the determination under section 45 were to be conclusive, the court would necessarily have to hold a full-fledged trial prior to arriving at its decision which would cause inordinate delay. Srikrishna J held that the purpose of the Act would be defeated if proceedings remain pending in the court even after commencing of the arbitration. He stated,

"It is precisely for this reason that I am inclined to the view that at the pre-reference stage contemplated by section 45, the court is required to take only a prima facie view for making the reference, leaving the parties to a full trial either before the arbitral tribunal or before the court at the post-award stage."[18]

If the finding made under Section 45 as to the existence or validity of the arbitration agreement were to be treated as final, then a court faced with an application for enforcement of a foreign award would have to decline to examine the same question again. Such a result would have the effect of rendering Section 48(1) (a) (which empowers a court to refuse recognition and enforcement of a foreign

[17]The premise of the court's judgment was that the arbitrators' power of competence-competence to rule on their own jurisdiction was counterbalanced by the power of the courts to review the existence and validity of the arbitration agreement under s. 48(1)(a) of the Act.

[18]The court also delved into the practice in comparative jurisdictions, and referred to the French Code of Civil Procedure, the Swiss Private International Law Statute of 1987, and case law from Hong Kong and Ontario, which had both adopted the UNCITRAL Model Law. It placed particular reliance on the judgment of the High Court of Hong Kong in Pacific International Lines (Pte.) Ltd v. Tsinlien Metals and Minerals Co. Ltd., (1993) XVIII YB Comm. Arb. 180 where the judge concluded: "*If I am satisfied that there is a plainly arguable case to support the proposition and there was an arbitration agreement which complies with Article 7 of the Model Law, I should proceed to appoint an arbitrator in the full knowledge that the defendants will not be precluded from raising the point before the arbitrator and having the matter reconsidered by the court subsequent upon that preliminary hearing.*".

award on the ground of the invalidity of the arbitration agreement) a dead letter. To avoid such a result, the court pressed into service the well-established principle of statutory interpretation that a court must make every effort to give effect to all words of a statute.[19]

Dharmadhikari J, who concurred with the judgment of Srikrishna J, added a rider. He held that,

"If, on a prima facie view of the matter, the judicial authority was inclined to reject the request for reference on the ground that the agreement is null and void, inoperative or is incapable of being performed, then it would have to afford a full opportunity to the parties to lead oral and documentary evidence and then decide the question in a full-fledged trial."

The Shin-Etsu judgment safeguards the arbitral tribunal's power to determine its own jurisdiction and postpones judicial control of such power to the post-award stage. This nuanced approach is in consonance with the ethos of the Act to avoid delay at different stages, and gives full effect to the objectives of the Model Law.

VI. GROUNDS OF CHALLENGE TO AN ARBITRATOR

Section 12 of the Arbitration Act is modeled on the lines of Article 12 of the Model Law. It requires arbitrators to be independent and impartial, and obliges them to make a full disclosure in writing of any circumstance likely to give rise to justifiable doubts about their independence or impartiality. The existence of any such circumstance entitles a party to challenge an arbitrator's authority. An arbitrator may also be challenged for not possessing the qualifications agreed to by the parties.

[19]The court relied on the principle of statutory interpretation laid down in J.K. Cotton Mills Ltd v. State of Uttar Pradesh, A.I.R. 1961 SC 1170(India): In the interpretation of statutes, the courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect.

The 1996 Act replicates the Model Law when it prescribes that parties are free to agree on a procedure for challenging an arbitrator and that in the absence of such an agreement, the party challenging the arbitrator must, within 15 days of the constitution of the tribunal or becoming aware of any circumstance mentioned in Section 12, send a written statement of the reasons for the challenge to the arbitral tribunal which is competent to decide the challenge. However, in a departure from the Model Law, where the challenge of the party is not successful before the arbitral tribunal, the aggrieved party is not afforded the opportunity to approach a judicial authority to decide on such a challenge.[20]

The Act enjoins the arbitral tribunal to continue the arbitral proceedings and make an award. The remedy for an aggrieved party would be to make an application for setting aside the award, in terms of Section 34 of the Act.[21] The rationale for this important deviation from the Model Law is nowhere stated. It may have been that the framers of the Act wanted to keep judicial intervention during the course of arbitration proceedings to the minimum.[22]

There does exist, a very common practice in India, sanctified by usage, that an employee or nominee of one of the parties is appointed as an arbitrator. This is particularly common in contracts where one of the contracting parties is the government, a public sector undertaking

[20]The Model Law provides such an opportunity in Art. 13(3) which reads: If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

[21]The relevant grounds under s. 34 to challenge the award in such a circumstance would be under s. 34(2)(a)(ii), i.e., for violation of principles of natural justice; and s. 34(2)(v), that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

[22]S. Gupta, *No Power to Remove a Biased Arbitrator under the New Arbitration Act of India*, 17(4) J. INT. ARBITR. 123-30 (2000).

or a statutory corporation. The legality of this practice is yet to be comprehensively tested under the provisions of the 1996 Act,[23] although the Law Commission has addressed this issue in its 176th Report and recommended the insertion of a new section to address the concerns associated with this practice.

VII. INTERIM MEASURES OF PROTECTION

During the course of an arbitration (or pending commencement of the arbitration and even subsequent to the making of the arbitral award), it may be necessary for interim measures of protection to be made either by national courts, or the arbitral tribunal. Such interim measures in arbitration can be grouped under three broad categories:

(i) Measures related to the preservation of evidence;

(ii) Measures intended to prevent aggravation of a dispute or delay and disruption of arbitration proceedings; and

(iii) Measures aimed to facilitate later enforcement of an arbitral award.[24]

A. Concurrent Powers of The Courts and The Arbitral Tribunal

The 1996 Act invests in the arbitral tribunal as well as the courts, the power to grant interim measures of protection. Section 9 empowers the courts to grant interim measures of protection, and section 17 of the Act similarly empowers an arbitral tribunal to do so. Section 9 of the 1996 Act, while being modeled on the lines of Article 9 of the UNCITRAL Model Law, is wider in scope than Article 9 since it empowers a court to order interim measures even after the pronouncement of the arbitral award. The court which is empowered

[23]However, in the context of the 1940 Act, the Supreme Court held that if parties had, with open eyes, agreed that the employee of one of them is to be an arbitrator, it was not permissible for the parties to challenge the arbitrator on the ground of lack of independence. Nandyal Corp. Spinning Mills v. KV Mohan, (1993) 2 S.C.C.

[24]ALI YESILIRMAK, PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION (2005).

to grant interim measures of protection is that which would have had the jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject matter of a suit.[25]

Section 17 enables the arbitral tribunal to order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute.[26] Before awarding interim measures of protection, courts and arbitral tribunals are expected to carefully examine factors such as urgency, imminent harm, prevention of aggravation, importance of preservation of the parties' position, and the likelihood that the requesting party will receive a final arbitral award. Orders passed under Sections 9 and 17 by courts and arbitral tribunals respectively are both appealable under Section 37 of the Act.

It may be asked as to why national courts should be empowered to order interim measures of protection when the arbitral tribunal is equally competent to do so. The reasons are not far to seek:

(1) The arbitral tribunal cannot issue interim measures until the tribunal itself has been established. This sounds fairly obvious, but its importance cannot be over- emphasised. It takes time to constitute an arbitral tribunal and during this interregnum, there may be compelling reasons to seek interim or conservatory measures from national courts.

(2) It may be necessary to obtain interim measures even after the making of the arbitral award, e.g. to prevent dissipation of assets and facilitate the enforcement of the award. After the making of an arbitral award, the arbitral tribunal becomes functus officio and has no power to grant interim measures of protection.

[25]DLF Industries Ltd v. Standard Chartered Bank, A.I.R. 1999 Del 11(India), the contract provided for exclusive jurisdiction of courts at Bangalore. The applicant however filed an application for interim relief before the Delhi High Court which rejected the application holding that only courts in Bangalore could entertain the application in view of s. 2(e) of the Act and the exclusive jurisdiction clause contained in the contract.

[26]MD, Army Welfare Housing Organisation v. Sumangal Services Pvt. Ltd, (2004) 9 S.C.C 619(India).

(3) On a textual interpretation of Sections 9 and 17, the power of the arbitral tribunal to order interim measures is restricted to the parties to the arbitration itself,[27] whereas there is no such express limitation on the power of the courts under section 9.

In *Sundaram Finance* v. *NEPC*,**[28]** the Supreme Court affirmed that civil courts were empowered to award interim measures of protection even before the commencement of arbitration. The courts would also be empowered to make conditional orders requiring the applicant to take effective steps for commencing the arbitral proceedings.

The experience over the last decade has been that litigants have often been willing to strike from the shadows and obtain ex parte relief against the other party. It is common for section 9 petitions to be filed before the civil courts in India, seeking urgent ex parte relief on the mere assertion of parties that they would commence arbitration.

Faced with this trend, courts have begun to make interim orders conditional on the applicant initiating arbitration within a specified timeframe. In *Firm Ashok Traders* v. *Gurumukh Das Saluja and others*,**[29]** the Supreme Court held that a court when approached by a party under Section 9 was obliged to ask the party as to how and when it proposed to commence arbitral proceedings. If arbitral proceedings were not commenced within a reasonable time after an order under Section 9 had been, the interim order could be recalled by the court which passed the order.

The Bill introduced in Parliament to amend the Act also seeks to prevent the abuse of Section 9. It provides that if the court is approached before the start of arbitral proceedings, then the applying party would have to take effective steps to constitute the arbitral tribunal within a period of thirty days from the date of the court's order and if such steps were not taken within this specified timeframe, the interim order would automatically lapse.

[27]The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, §17 (1996).
[28](1999) 2 S.C.C. 479(India).
[29](2004) 3 S.C.C. 155(India).

B. Enforcement of interim measures of protection ordered by the arbitral tribunal

The 1996 Act does not expressly address the issue of enforcement of interim measures of protection ordered by the arbitral tribunal. Apprehensions have been voiced that this could lead to a situation where even if an interim measure of protection is awarded by an arbitral tribunal, the party against whom the order was made will not abide by the order.[30]

One way out would be to enforce the interim measures through the national courts.[31] However, the 1996 Act only requires courts to enforce arbitral awards and does not in express terms require them to enforce interim measures of protection ordered by an arbitral tribunal.[32] However, by approaching national courts for enforcement, many of the advantages sought in choosing to arbitrate are diminished. Lengthy delays, jurisdictional problems and the possibility that national courts will substitute their reasoning for that of the arbitral tribunal are some of the problems a party in arbitration may face when their only recourse is to seek enforcement of an interim measure of protection in court.

In 1999, UNCITRAL began an effort to improve international commercial arbitration rules, procedures and practices and one of the possible areas for improvement identified by the Secretariat was enforceability of interim measures of protection. The UNCITRAL Working Group has proposed that Article 17 of the Model Law (which at present consists of a single paragraph) be substantially amended. The amended provision would describe what is meant by an

[30]Possible Future Work in the Area of International Commercial Arbitration: Note by the Secretariat, UN GAOR UNCITRAL, 117 UN Doc. A/CN.9/460, 32nd Sess. (1999).

[31]S. Harris and J.P. Smith, *Statutory Enforcement of International Arbitration Awards in the United States*, 15 SPG INT'L L PRACTICUM 54 (2002).

[32]Section 2(c) of the Act defines an arbitral award to include an interim award, and an interim award may be recognised and enforced in the same manner as a final award.

interim measure of protection, state what is required in order to obtain such a measure (including proof that irreparable harm would result if not granted), provide for appropriate security to be given by the requesting party and define the situations where an ex parte interim measure of protection can be granted.[33]

The Indian Parliament will do well to take note of the work of the UNCITRAL Working Group when debating and adopting amendments to the 1996 Act. Another alternative would be to consider adopting the approach of the English Arbitration Act of 1996 which gives arbitral tribunals the power to issue further directions, draw negative inferences, make final awards, or charge the breaching party with all the arbitration costs if the interim measures of protection have not been followed.[34]

C. Judicial legislation in bhatia international

The Indian Supreme Court made an interesting judicial innovation with respect to the power of the court to grant interim measures of protection in *Bhatia International* v. *Bulk Trading SA.*[35] The court's jurisdiction was invoked by a party seeking interim measures of protection in relation to an ICC-administered arbitration to be conducted in Paris.

Section 9 of the Act to grant interim relief, but this provision is contained in Part I of the Act which would only come into play in cases where arbitration is seated in India. The Supreme Court was thus faced with a situation where it could not make an order for interim measures since the arbitral clause provided for a Paris seat. Faced with this legal hurdle, the Supreme Court was motivated by an overarching desire to intervene in the case went on to hold that the general provisions of Part I would also apply also to offshore arbitrations, unless the parties impliedly or expressly excluded the

[33]*Supra* note 30.
[34]A. REDFERN, INTERIM MEASURES IN NEWMAN AND HILL (EDS) 227 (The Leading Arbitrators Guide to International Arbitration 2004).
[35](2002) 4 S.C.C. 105(India).

applicability of the Act. The result-driven decision-making of the Supreme Court led it to reason thus:

By omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India the effect would be that Part I would also apply to international commercial arbitrations held out of India. The court ruled that Part I of the Act would also apply to arbitrations with seats situated outside of India because upholding the contrary position would leave a party remediless inasmuch as in international commercial arbitrations which take place out of India, the party would not be able to apply for interim relief in India even though the properties and assets are in India.[36] It concluded,

> *'The provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India, the provisions of Part I would apply. In cases of international commercial arbitrations held out of India, (the) provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case, the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply.'*

It must be admitted that practical considerations may often demand that Indian courts be empowered to grant interim measures of protection. A party could often be handicapped if Indian courts were not empowered to make interim orders, especially if the courts in India were to have the closest jurisdictional link with the subject matter of the controversy and would be best equipped to order urgent, effective interim measures. Yet, there can be no denying that the judgment in Bhatia International represents a clear instance of judicial legislation. It runs contrary to the legislative scheme of the Act which is clear that the provisions of Part I of the Act would be inapplicable to arbitrations with seats outside India. Although it did not

[36]Tunnel Group v. Balfour Beatty Construction Ltd, (1993) 1 AC 334(India).

specifically use the term seat of arbitration,[37] the Indian Parliament was clear that the power to grant interim relief could only be exercised by Indian courts if the seat of the arbitration was to be seated in India.

The rather overbroad ratio of Bhatia International has other anomalous consequences. If the provisions of Part I of the Act were to apply even to international commercial arbitrations which take place outside India, then it may be possible as per this judgment for a party to approach the designated appointing authority for assistance in the constitution of the arbitral tribunal even where the seat of the arbitration is outside the territory of India. This will be so even where such power is invested with an international arbitral institution.

Further, it may also render a foreign award liable to challenge under Section 34 of the Act before Indian courts.[38] Thereby, a party can have two remedies against such an arbitral award: to challenge the arbitral award in terms of Section 34 of the Act; and subsequently, resist the recognition and enforcement of the arbitral award in terms of Section 48 of the Act. Such a consequence would be absurd and there can be no denying that this decision requires to be urgently reconsidered by the Supreme Court.

This judgment also sits rather uneasily with a later decision of the appointing authority (a judge of the Supreme Court in this instance) in *Shreejee Traco(I) Pvt Ltd* v. *Paperline International Inc.*[39] In this case, the assistance of the appointing authority was sought under Section 11(4) of the Act for the appointment of an arbitrator to kick-start an international commercial arbitration. The power of the appointing authority to appoint an arbitrator in case of an international commercial arbitration is contained in Part I of the Act. The judge declined to exercise jurisdiction and held the petition to be not maintainable in view of the fact that the arbitration clause in the

[37]Union of India v. McDonnel Douglas Corp., (1993) 2 Lloyd's Rep. 48.
[38]Golderest Exports v. Swissgen N.V., 2004 SCC OnLine Bom 991(India).
[39](2003) 9 S.C.C. 79(India).

agreement admittedly contemplated arbitration proceedings to be held at New York. He reasoned that Section 11 fell within Part I of the Act and would only apply to those arbitrations which have India as its seat. This judgment is clearly indicative of judicial discomfort with the overbroad ratio of Bhatia International.

Recognizing the flaws in the reasoning of the Bhatia judgment, the 176th Report of the Law Commission has suggested an amendment to the 1996 Act to set the controversy at rest. The Amendment, if approved by Parliament, would expressly empower courts to apply certain enumerated provisions of Part I of the Act (including the power to grant interim measures in support of the arbitration) even in respect of international commercial arbitrations which have their seats outside the territory of India.[40]

VIII. COMPOSITION AND CONSTITUTION OF THE ARBITRAL TRIBUNAL

The 1996 Act follows the Model Law in granting parties the freedom to determine the number of arbitrators, but departs from it slightly to the extent that it restricts the determination to an odd number.[41] The Act also differs from the UNCITRAL Model Law, when it stipulates that failing such determination of the number of arbitrators by the

[40]The Law Commission has suggested the insertion of the following clause after s. 2(2) of the Act: Sections 8, 9, 27, 35 and 36 of this Part shall apply also to international arbitration (whether commercial or not) where the place of arbitration is outside India or is not specified in the arbitration agreement.

[41]The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, §10(1) (1996). A rather uncommon case presented itself before the Supreme Court in Narayan Prasad Lohia v. Nikunj Prasad Lohia, (2002) 3 S.C.C. 572(India). (In this case, the parties had agreed to resolve their disputes by referring them to an arbitral tribunal comprising of two arbitrators. The award was challenged by the unsuccessful party on the ground that the arbitration by an even number of arbitrators was contrary to the mandatory requirements of s. 10(1). The High Court accepted this contention, but the Supreme Court upheld the award by holding that the requirement of an uneven number was not mandatory and parties could derogate from this statutory requirement).

parties, the tribunal would consist of a sole arbitrator.[42] The Indian Act mirrors the provisions of the Model Law in respect of appointment of arbitrators (Section 11 corresponds to the Model Law's Article 11) in all the situations that the Model Law envisages: inability of the parties to agree on the procedure for the appointment of three arbitrators or a sole arbitrator or where difficulties arise like the failure of a party according to an agreed upon procedure for constituting the tribunal or in case of failure on the part of the arbitrators to reach an agreement, etc.

A. Role of the appointing authority in constituting an arbitral tribunal

In a significant departure from the Model Law, the 1996 Act empowers the Chief Justice of a State High Court to act on an application filed by a party in respect of the various circumstances listed above in which the parties are unable to agree on a procedure for the appointment of an arbitrator. Of equal significance is the fact that the Chief Justice of India has been designated as the appointing authority in the event of a deadlock pertaining to the appointment of arbitrators for an international commercial arbitration.

The Supreme Court in *Konkan Railway Corp.* v. *Rani Construction Pvt Ltd,*[43] considered the rationale of this provision to be that:

'[t]he function has been left to the Chief Justice or his Designate advisedly, with a view to ensure that the nomination of the arbitrator is made by a person occupying high judicial office or his designate, who would take due care to see that a competent, independent and impartial arbitrator is appointed.'

Realising the fact that the two Chief Justices or their delegates (appointing authority) may have practical difficulties in devoting sufficient time for the appointment of arbitrators, Section 11 gives

[42]Article 10(2) of the UNCITRAL Model Law states: Failing such determination, the number of arbitrators shall be three.

[43](2002) 3 S.C.C. 388(India).

them the option of delegating this power to a person or an institution to act instead of them. In appointing arbitrators, the law requires these authorities to have due regard to:

(i) Any qualifications required of the arbitrator by the agreement of the parties;

(ii) Other considerations as are likely to secure the appointment of an independent and impartial arbitrator.[44]

Section 11 has proved to be a much-litigated provision of the Act, and has led to long delays in the commencement of arbitration proceedings in India. The power of the appointing authority to appoint an arbitrator has been often invoked by parties when faced with a reluctant counter-party who is in no hurry to commence the arbitration process. However, even at this pre-arbitral stage, the courts have displayed a needless willingness to delve into issues such as the arbitrability of the dispute, the existence or validity of the arbitration clause and other contentious issues. This is in spite of the fact that Section 16 of the Act specifically vests the arbitral tribunal with the power to decide these jurisdictional issues.

The debate has been couched in terms of whether the function of the appointing authority in appointing an arbitrator is exercised in an administrative or judicial capacity. The line of reasoning has been that if the power is to be exercised in a judicial capacity, the appointing authority could delve into questions concerning the existence and validity of the arbitration agreement and such other issues before deciding whether or not to appoint an arbitrator. This could even lead to a binding decision on merits or on jurisdiction although this very issue may well be one to be decided by the arbitral tribunal, thereby embarrassing the arbitrators' jurisdiction to decide these issues independently.

[44]The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, §11(8) (1996).

B. Konkan Railway v. Rani Construction

It was presumed that the matter was finally settled by a Constitution Bench of the Supreme Court in *Konkan Railway* v. *Rani Construction.*[45] In that case, a five-judge Bench of the Supreme Court held that the appointment of an arbitrator was in the nature of an administrative act and not a judicial one. The appointing authority was not required to go into the issue of arbitrability of the dispute even if this was raised by the defending party. The court held that one of the primary objects of the law was to have the tribunal constituted as expeditiously as possible. Therefore, in a given case if there existed a controversy as to the existence or validity of the arbitration agreement, it would have to be left to be decided by the arbitral tribunal and the appointing authority would not attempt to decide the issue. The welcome effect of this judgment was that it minimized judicial intervention and ensured that the arbitral process did not get stultified in the process of seeking court assistance for constitution of the arbitral tribunal.

C. Controversy revived and a volte face by the supreme court the S.B.P. judgment

This judgment however proved to be short-lived. In October 2005, a seven-judge bench of the Supreme Court in *S.B.P. and Co*. v. *Patel Engineering Ltd*[46] revived the controversy only to effect a complete judicial volte face and overrule the court's earlier judgment in Rani Construction. The majority in S.B.P. was of the view that the existence of an arbitration agreement was not merely a jurisdictional fact for commencing the arbitration itself; it was also a jurisdictional fact for appointing an arbitrator on a motion under section 11(6) of the Act. The appointing authority could appoint an arbitrator in exercise of its powers only if an arbitration agreement was in

[45](2002) 2 S.C.C 388(India).
[46]A.I.R. 2006 SC 450(India).

existence at the time of such appointment. The majority reached the following conclusions:

(1) The power exercised by the appointing authority in appointing an arbitrator under section 11(6) of the Act was not an administrative act but a judicial one. This power could be delegated by the Chief Justice of the High Court only to another judge of that court and by the Chief Justice of India to another judge of the Supreme Court. The appointing authority would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the appointing authority.

(2) The appointing authority would have the right to decide preliminary jurisdictional issues such as its own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the conditions for the exercise of its power and matters pertaining to the qualifications of the arbitrator or arbitrators.

(3) Since an order passed by the appointing authority would be in the nature of a judicial order, an appeal against that order would only lie to the Supreme Court under Article 136 of the Constitution of India. However, where the appointing authority was the Chief Justice of India (in cases where the arbitration falls within the category of an international commercial arbitration having its seat outside India), there could be no appeal against the order of the appointing authority.

(4) In cases where the arbitral tribunal was constituted by the parties without judicial intervention, the arbitral tribunal could determine all jurisdictional issues by exercising its powers of competence-competence.

D. Palpable errors in the reasoning of the majority opinion in the S.B.P. case

The conclusions reached by the S.B.P. majority are evidently contrary to the scheme of the Act. First, they rely heavily (and rather

mistakenly) on the import of Section 11(7) of the Act. Balasubramanyan J interpreted the finality clause as conferring upon the appointing authority the power to decide all jurisdictional questions. The court virtually rewrote Section 11(7) and obliterated Section 16, when it stated that the effect of Section 11(7) was that the arbitral tribunal could not rule on its own jurisdiction or on the existence or validity of the arbitration clause. The court ought to have recognized that Section 11(7) only confers finality on the decision taken to appoint an arbitrator and not on jurisdictional issues which the arbitral tribunal is perfectly competent to adjudicate on. Further, if the arbitral tribunal was perfectly competent to decide these jurisdictional questions when it was constituted without the intervention of the appointing authority, there surely could not be any compelling reason to deny them this power when the appointing authority was approached to break the stalemate in constituting a tribunal. The wisdom underlying the principle of competence-competence was clearly missed by the S.B.P. majority.

The Supreme Court[47] also seemed to ignore the well-balanced approach it had earlier adopted in Shin Etsu. In that case the court had adopted a nuanced approach to the principle of competence-competence when it stated that the courts review of the arbitration agreement should be confined to a prima facie standard. That decision was made in the context of section 45 which specifically empowered the courts to refuse to refer parties to arbitration when the arbitration agreement was null and void, inoperative or incapable of being performed. Even in the absence of a specific provision to go into the question of whether the arbitration agreement was null and void, inoperative or incapable of being performed under Section 11 of the Act, the Supreme Court in S.B.P. held that the appointing authority was not only competent to make such an enquiry, but also held that any findings made by it on these issues would be conclusive.

[47] A.I.R. 2006 SC 450(India).

Under Section 34(2) (a) (iii), a party aggrieved by an arbitral award is entitled to challenge it on the basis that the arbitration agreement was invalid. If the decision of the appointing authority were to be treated as conclusive, then the competent court while hearing a challenge to an arbitral award might decline to go into the same question rendering Section 34(2) (a) (iii) wholly redundant "*a consequence which the courts are enjoined to avoid as per well- entrenched principles of statutory interpretation*."

If the court's determination of the existence or validity of the arbitration agreement and other jurisdictional questions under section 11 were to be conclusive, it would often have to hold a full-fledged trial for this purpose. It was precisely this consequence that was sought to be avoided by the Shin Etsu court when it held that at the pre-arbitral stage the court is required to take only a prima facie view for making the reference, leaving the parties to a full trial either before the arbitral tribunal or before the court at the post-award stage. The majority in S.B.P. failed to appreciate that the scheme of the 1996 Act expresses a strong ethos to avoid delay at different stages, and to centralize judicial review of all disputes relating to the arbitration at the post-award stage. This could best be achieved by postponing judicial review to the stage when an award was challenged instead of the court having to delve into these issues at the pre-reference stage under Section 11 of the Act.

Most importantly, the court ought to have appreciated that there was no legal or practical infirmity in its earlier judgment in Rani Construction that required it to be overruled, especially when the regime for appointment of arbitrators established by that decision was working well.[48] The S.B.P. judgment evidently defeats the credo and

[48]The court failed to heed the note of caution that another seven-judge bench of the Apex Court had sounded decades back in Keshav Mills Co. Ltd v. CIT, A.I.R. 1965 SC 1636(India) (*When this Court decides questions of law, its decisions are, under Article 141, binding on all courts within the territory of India, and so, it must be the constant endeavour and concern of this Court to introduce and maintain an element of certainty and continuity in the interpretation of law in the country. Frequent*

ethos of the Act, which is to enable expeditious litigation without unnecessary judicial intervention. The correct approach would be for the courts to recognise the benefits of a two-staged procedure. At the first stage, if one of the parties raises one or more pleas concerning the existence, validity or scope of the agreement to arbitrate, the appointing authority would have to satisfy itself of the prima facie existence of the agreement. If it were to be so satisfied that such an agreement did exist, it must permit the arbitration to proceed so that at the second stage the arbitral tribunal could consider these issues at length subject, of course, to ultimate review by the courts.

IX. CONCLUSION

Litigation is an activity that has not markedly contributed to the happiness of mankind.[49] The same complaint could be made of arbitration in India after the experience of the first decade of the Arbitration and Conciliation Act, 1996. It has become amply clear that it will not be enough to simply enact a progressive law on arbitration since the adoption of an adequate legal framework is not sufficient to make a country really favorable to arbitration. It is much like having a brand new stadium, a certified football and a first-rate football field. One also needs well-trained players and referees who know the rules of the game. The Bar, the judiciary and the business community are needed to bring life to legal texts.[50]

The need of the hour is for the inculcation of a culture of arbitration among the key stakeholders the bar, the bench, the arbitrators, arbitral institutions and the consumers of arbitration and for them to display a

exercise by this Court of its power to review its earlier decisions on the ground that the view pressed before it later appears to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided).

[49]F. Nariman, *East Meets Wes: Tradition, Globalisation and the future of Arbitration*, 20 ARBITR. INT. 123, 137 (2004).

[50]*Id.*

sincere commitment towards arbitration. Indian lawyers and judges will do well to be aware of and absorb some of the best arbitration practices from jurisdictions which have a more developed culture of arbitration, if arbitration is to provide the benefits it is capable of delivering. Fourteen years on, arbitration in India under the 1996 Act is still far from having fulfilled its potential and continues to be on probation.

SEXUAL AUTONOMY OF A WIFE: THE INDIAN PERSPECTIVE

Sanchit Agarwal and Sujoy Chatterjee[*]

I. INTRODUCTION

Marriage constitutes the foundation-stone of social organization in India. According to the 71st Report of The Law Commission of India,[1] the essence of marriage is the sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life.

While Hindu, Christian and Parsee laws regard marriage as a sacrament, indissoluble and eternal, Muslim law and the Special Marriage Act regard marriage as a civil contract. It is however undisputed that in India marriage is the golden fabric that holds society together.

Irrespective of what view each religion takes of marriage, it confers a status of legitimacy on the parties and gives rise to certain spousal rights and obligations. The question of whether sexual intercourse between a married couple is regarded as one such spousal obligation is a contentious issue when the sexual privacy of a person is at stake.

The rape laws and provisions for restitution of conjugal rights have been studied to establish the rationale behind their existence and such laws have a tendency to unfairly place the wife on a weaker footing. The authors shall strive to showcase whether India recognizes a married woman's right to her own sexual inviolability.

The Constitutional mandate of our country guarantees certain

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[1]71st Law Commission Report, (Mar 8, 2010) (India), lawcommissionofindia.nic.in/51-100/Report98.pdf.

Fundamental Rights to all. Robbing a wife of her sexual autonomy is a sad testimony to the institution of marriage, since it amounts to a violation of this Constitutional mandate. This paper attempts to ascertain whether the laws of the land recognize this right of a wife to decide when and where her body is to be made a vehicle for sexual intercourse with her husband.

II. MARITAL RAPE: BREAKING THE SILENCE

Marital Rape means a wife being raped by her husband. Common law had exempted marital rape till the 19th century and the justification for the same was that, "*The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract*" stated by Justice Hales.[2]
In India it is still exempted by virtue of the Exception of Marital Rape from the offence of Rape as defined in S.375 of The Indian Penal Code, 1860. The rationale given for taking such a view may be that "*It is for the wife to love, honor, and obey; it is for the husband to love, cherish, and protect*."[3] Thus a husband cannot become guilty of rape by forcing his wife to his own embraces. Considering the fact that rape is considered as a taboo subject in India and victims of rape are stigmatized in Indian society, it is not surprising that there has never been any case dealing with marital rape in Indian jurisprudence. Hence the authors will be relying on the historical perspective and development of marriage and marital intercourse to ascertain the reasons for exempting marital rape and whether such reasons are justified in the present day scenario.

[2]State Of Rajasthan v. Narayan Kohli, A.I.R. 1992 SC 2003(India).
[3]Jill Elaine Hasday, *Contest And Consent: A Legal History Of Marital Rape*, 88 CAL. L. REV. 1373 (2000).

A. Historical treatment

a) Permanent consent rationale and marital unity

Various justifications state that the marriage contract implies permanent consent to sex, have been advanced in support of a spousal exemption in the law of rape. The rationale utilized is that when a woman marries, she gives up her rights to her body because she has formed a contract with her husband which cannot be retracted. [4] This doctrine made the rape of a woman by her husband a legal impossibility since a man could not rape his wife who had given permanently up the right to her body to her husband.[5]

Also, common law rationale for the marital rape exemption was that, upon marriage, the wife's identity merged into the existence of her husband. In 1765, Blackstone stated "*by marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs everything....*"[6]

B. Modern justifications

a) Invasion into the sanctity of marriage

Defenders of the marital exemption who believe that it protects the sanctity of marriage argue that the criminalization of marital rape will destroy any chance of reconciliation and will violate marital privacy.[7] It is indeed likely that a rape prosecution by a wife against her husband would destroy the possibility of reconciliation. The debate over whether marital privacy overrides the individual privacy is to be considered. It has been held by the Delhi High Court that, "*inclusion*

[4]State v. Smith, 85 N.J. 193, 200, 426 A.2d 38, 41 (1981).
[5]Rene Augustine, *Marriage: The Safe Haven For Rapists*, 29 J. FAM. L. 559 (1991).
[6]Weishaupt v. Commonwealth, 315 S.E.2d 847, 850 (Va.1984).
[7]State v. Smith, 401 So.2d 1126, 1129 (Fla.Dist.Ct.App. 1981).

of Constitution in marital matters will not be desirable as it will be a ruthless destroyer of the marital institution and application of constitution will only weaken the bonds in a marriage."[8]

b) Spousal rape is not as serious as non-spousal rape

It has been contested quantitatively as well as qualitatively that marital rape does not happen as often as other forms of rape for the criminal and judicial system to be concerned.[9] It is considered that marital rape is less traumatic as compared to rape by a stranger and a bedroom squabble cannot be equated with a heinous crime like rape.[10] This conclusion was derived from the case of *R* v. *Hind* where the wife even after being raped by her husband used to go to meet him in the jail.[11]

c) Problem with evidence and proof

The argument offered in support of keeping the marital rape exemption is that it would be impossible to prove a marital rape case when the couple has had consensual sex, perhaps hundreds of times before.[12] Also, justification for spousal immunity is that the criminalization of marital rape will lead to women filing false rape charges in order to gain leverage in divorce and custody proceedings.[13]

[8]Harwinder Kaur v. Harmanadar Singh Choudhary, A.I.R 1984 Del 66(India).
[9]Schwartz, *The Spousal Exemption For Criminal Rape Prosecution,* 7 VT. L. REV. 33, 51 (1982).
[10]*Id.*
[11]R v. Hind, As Cited In Shroff, A. And Menezes, N., *Marital Rape As A Socio-Economic Offence: A Concept Or A Misnomer!*.
[12]Abigail Andrews Tierney, *Spousal Sexual Assault, Pennsylvania's Place On The Sliding Scale Of Protection From Marital Rape,* 90 DICK.L.REV. 777, 781 (1986).
[13]Anne L. Buckborough, *Family Law: Recent Developments In The Law Of Marital Rape,* ANN.SURV.AM.L. 343, 345 (1989). S F Waterman, *For Better Or Worse: Marital Rape,* 15 N.KY.L.REV. 611, 613-14 (1988).

d) Other remedies available

Last of all it has been argued that the wife has various other alternatives. She can carry out legal remedies under Section 351 of Indian Penal Code, 1908 or battery and most importantly under Domestic Violence Act, 2005. She can also file for divorce under her personal law. It has been claimed that since marital rape is not considered as grave as rape by a stranger, these remedies are sufficient.[14]

C. Critiquing the exemption

a) Permanent consent is no longer valid

The doctrine of permanent consent recently has been characterized as legal fiction, since it appears unrealistic to assume that modern women give unqualified consent to sexual relations with their husbands during marriage.[15] No one consents to violence when they marry. Though they may consent to sex in the marital relationship, women do not voluntarily consent to being raped by their husbands simply because they have entered into a contract for marriage. Also, earlier it could have been considered that marriage leads to unity but in today's date a woman has a different identity. For example, it is not just the house of the husband which is considered to be a marital home but her house can also be the marital house.[16] The personal laws also provide for separate living which proves that law considers wife to be a separate entity.

b) Qualitative and quantitative perspective

It is submitted that the argument of marital rape being lesser both quantitatively as well as quantitatively than other rape crimes reflects

[14]DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE SEXUAL ABUSE OF WIVES 1 (Henry Holt & Co 1st ed. 1985).
[15]M R Klatt, *Rape In Marriage: The Law In Texas And The Need For Reform,* 32 BAYLOR L. REV. 109, 114 (1980).
[16]Swaraj Garg V. K.M. Garg, A.I.R. 1978 Del 296(India).

on apathy towards the distress of a married woman. Dealing with the quantitative argument first, it is unreasonable to believe that rape does not occur in marriage. Existing data suggests that 14% of married women have been raped by their husbands at least once.[17] Any lack of quantitative information may be due to the fact that marital rape in most states is not a crime for the fear that reporting the crime will be useless, and that the investigative process and accompanying backlash from the guilty spouse may be worse than the crime itself and it may lead to the destruction of the marriage and family. This is the case especially in countries like India where marital rape is not exempted. Also, the quantitative figure does not determine the criminality of an act. A wife who is raped by her husband will be more traumatised because of a sense of betrayal, disillusionment, the upset of the whole marriage, and the fact that rape may be repeated for several years.[18] She will also have to face her rapist every day and be reminded of the violation by her husband.

c) Heinousness of rape in any form

"*The fact that rape statutes exist ... is a recognition that the harm caused by a forcible rape is different, and more severe, than the harm caused by an ordinary assault*." It affects the sexual integrity of a woman and cannot be equated with assault and battery. Also, an important argument is that marital rape may not lead to assault or battery and even in a situation where the husband has assaulted his wife he may go the extent of raping his wife in order to come under the protection. Even the punishment under the Domestic Violence Act, 2005 does not inflict a punishment as much as provided under

[17]Pamela L. Wood, *The Victim*, 11 AM.CRIM.L.REV. 335, 347-48 (1973).
[18]Diana E.H. Russell, *Rape In Marriage* 375-82 (1990) Of The Women Raped By Their Husband, 52% Reported That The Long Term Effects Were Severe, As Opposed To 39% Of Women Who Were Raped By Strangers.

Indian Penal Code, 1860 and hence may not deter the men adequately.[19]

d) Burden of proof

It is stated that it will be very difficult to prove marital rape. But this is no argument as, "*The difficulty of proof has never been a proper criterion for deciding what behaviour should be officially censured by society*."[20] If this is so then cases of battery or incest should also not be a crime. Stating that it will lead to false evidence would be predicated on the assumption that women are vindictive liars, is unconvincing for several reasons. Indeed, "*our jurisprudence is designed to test the very truth or falsity of accusations in all criminal proceedings*."[21]

e) Privacy of a wife

There is an increasing recognition of a wife's own volition and right to her own privacy and space even within the boundaries of marriage. That being the case, she has a right over her own body and a right to decide when and where her body is to be used for sexual gratification. Countering the argument of how criminalizing marital rape would disrupt the reconciliation process, it is hard to imagine how charging a husband with the violent crime of rape can be more disruptive of a marriage than the violent act itself. Moreover, if the marriage has already deteriorated to the point where intercourse must be commanded at the price of violence we doubt that there is anything left to reconcile.[22] Our society should not attempt to protect a

[19]Section 375 Of Indian Penal Code, 1860 provides For At Least 7 Years of Rigorous Imprisonment.
[20]Maria Pracher, *The Marital Rape Exemption: A Violation Of A Woman's Right Of Privacy*, 11 Golden Gate U.L.REV. 717, 730 (1981).
[21]*Supra* note 4.
[22]Weishaupt v. Commonwealth, 315 S.E.2d 847 (1984).

decaying and violent marriage by suggesting reconciliation at the expense of a woman's continuing abuse.[23]

Supporters of this modern justification also suggest that the marital exemption avoids interference with marital privacy. Although our legal system prefers to avoid interfering with problems between spouses, the state has a valid interest in preventing violent sexual assaults. The highest court in the State of New York held that "*just as a husband cannot invoke a right of marital privacy to escape liability for beating his wife, he cannot justifiably rape his wife under the guise of a right to privacy*."[24] Because the state intervenes in other areas of domestic violence, such as wife beating, there is no valid reason to exclude marital rape as an area unworthy of state protection. Also, it is preposterous to argue that the Constitution cannot interfere. An act within the personal law cannot be allowed to infringe the Constitution itself and sexual expression is so integral to one's personality that it is impossible to conceive of sexuality other that consensual intercourse. It offends human dignity. Any form of sexual intercourse with a girl below 16 is considered to be rape but marital rape of a 15-year-old girl by her husband is not considered to be rape!

In spite of marital rape being recognized as a crime in various countries[25] Indian legislature still advocates the historical view of marital unity and marriage being a permanent consent. While Section 376(A) of The Indian Penal Code views sexual intercourse with a wife without her consent by a judicially separated husband as an offence of rape, the offence still does not include similar sexual intercourse when it occurs within the precincts of marriage.

[23]Geannie A. Morris, Note, *The Marital Rape Exemption,* 27 LOY.L.REV. 597, 598 (1981).

[24]People v. Liberta, 64 N.Y.2d 152. 474 N.E.2d 567, 574 (N.Y.1984) (Holding That the Supreme Court Of New York Recognized That The Court In Griswold v. Connecticut, 381 U.S. 469 (1965), Only Extended The Right Of Marital Privacy To Include Consensual Acts).

[25]Dhruv Desai, *Sexual Harrassment and Rape Laws in India,* (Mar. 6, 2010) http://www.legalserviceindia.com/articles/rape_laws.htm.

III. AN ANALOGOUS STUDY: RESTITUTION

The conspicuous absence of any case laws regarding marital rape in India may lead to an inference that forceful sexual intercourse in a marriage has not been addressed by the Indian judiciary as such. However, this issue of personal autonomy and sexual independence within a marital relationship has tangentially arisen in a few judgments pertaining to restitution of conjugal rights.

A decree of restitution effectively results in an unwilling party, who has left the company of the other spouse or withdrawn from his or her society, being forced to cohabit with such spouse for a period of one year. Hence an analysis of the provisions of restitution and the jurisprudence surrounding it will assist in understanding how the legal position regarding the sexual integrity of a married woman has been shaped in our country.

A. The concept of restitution

Of the various remedies available in marital discord, one is that of 'Restitution of Conjugal Rights'.[26] The remedy of restitution of conjugal rights is a positive remedy that requires both parties to the marriage to live together and cohabit.

Restitution of Conjugal Rights is a relatively new notion in Indian matrimonial jurisprudence that finds its origin in the Jewish laws. The remedy was unknown to Hindu law till the British introduced it in the name of social reforms. In fact it is the only matrimonial remedy

[26]S.9, Hindu Marriage Act, 1955; S.22, Special Marriage Act, 1954. The provision is different worded in the Parsi Marriage and Divorce Act, 1936, but it has been interpreted in such a manner that it has been given the same meaning as under the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954. However, the provision is different under the S.32, Indian Divorce Act, 1869 but efforts are being made to give it such an interpretation so as to bring it in consonance with the other laws. The provision under Muslim law is almost the same as under the modern Hindu law, though under Muslim law and under the Parsi Marriage and Divorce Act, 1936 a suit in a civil court has to be filed and not a petition as under other laws.

which was made available under the British rule to all communities in India under the general law.[27]

The remedy dates back to feudal England, where marriage was considered a property deal, and wife was part of man's possession. India, being a British Colony, inherited this law along with the several other laws as well.[28]

There is a very popular proverb that one can take the horse to a pond, but cannot force him to drink water. The provision of Restitution of Conjugal Rights is along similar lines. After the solemnisation of marriage, if either the husband or the wife, without reasonable cause or excuse, withdraws from the society of the other, the aggrieved party may approach the Court for restitution of conjugal rights to ensure cohabitation and resumption of marital 'consortium.'[29]

B. Consortium

Where either the husband or the wife has withdrawn from the society of the other party without just cause, the court orders the withdrawing party to return to the conjugal fold, so that the consortium is not broken.[30] Consortium in the context of marriage has been defined as "*companionship, love, affection, comfort, mutual services, sexual intercourse*."[31]

The cohabitation of two people as husband and wife means that they must live together not merely as two people living in one house, but as husband and wife.[32] This implies that cohabitation as a result of restitution has to involve all aspects of marital consortium, which *inter alia* include sexual intercourse.

[27]Paras Diwan, *Law of Marriage And Divorce* (4th ed., Universal Law Publishing House).
[28]Hazel D. Lord, *Husband and Wife: English Marriage Law From 1750,* S. CAL. REV. L. & WOMEN'S STUD. (2001).
[29]Harwinder Kaur v. Harmanadar Singh Choudhary, A.I.R. 1984 Del 66(India).
[30]*Id.*
[31]Crabtree v. Crabtree, (No. 2) (1964) Australian Law Reports 820 (10), Per Selby, J., At 821.
[32]Wheatley v. Wheatley, (1950) I K.B. 39 (9) Per Lord Goddar CJ. At 43.

C. Sexual Intercourse in Restitution

The Delhi High Court has held that the remedy of restitution aims at cohabitation and consortium, not merely at sexual intercourse.[33] This line of argument that sexual relation constitutes an important part of marriage but is not the *summum bunum* of a matrimonial consortium has been reaffirmed by the Supreme Court as well.[34]

In this regard it is pertinent to note that in 1983 the Andhra Pradesh High Court had held S.9 of The Hindu Marriage Act, 1955 (restitution of conjugal rights) to be unconstitutional in *T. Sareetha* v. *T. Venkata Subbaiah.*[35] Choudhary, J., had argued in this case that a decree for restitution against a wife who had left her husband may be misused by a husband for enforcing coerced sexual intercourse upon her. While stating that the right to privacy and sexual autonomy was retained by a wife even after marital association, it was held by the Court that the provisions for restitution were violative of Art.19 and Art.21 of the Constitution. The Court further went on to declare that since a decree for restitution and subsequent cohabitation (and *inter alia*, sexual intercourse) would irretrievably alter the life-pattern of a wife if she conceived from her husband during the restitution period, it would cripple her future plans in life if she were to seek for divorce later. In this manner the Court established that the remedy of restitution would in reality become one-sided and available only to the husband, thus violating the pledge of equal protection of laws as envisioned in Art.14.

However this decision in *T. Sareetha* was rejected by the Delhi High Court in 1984 in *Harwinder Kaur* v. *Harmanadar Singh Choudhary*[36] where it was held that the objective behind restitution was not to enforce sexual intercourse but rather to act as a cooling-off period for reconciliation between a couple so as to avoid a sudden breakdown of

[33] *Supra* note 29.
[34] Saroj Rani v. Sudarshan Kumar Chadha, A.I.R. 1984 SC 1562(India).
[35] A.I.R. 1983 AP 356(India).
[36] A.I.R. 1984 Del 66(India).

marriage. T.Sareetha was scathingly criticised by Rohatgi, J., who opined that Justice Choudhary's observations in that judgment were the result of a misconceived view of marriage being nothing more than a legalised means of sexual self-satisfaction. The Supreme Court over-ruled *T. Sareetha* in *Saroj Rani v. Sudarshan Kumar Chadha*[37] by declaring that the institution of marriage stood for much more than mere sexual congress and holding that S.9 of The Hindu Marriage Act, 1955 was not unconstitutional when viewed from the proper perspective of ensuring matrimonial reconciliation.

IV. THE INTERFACE OF MARITAL RAPE WITH RESTITUTION: PLAYING THE DEVIL'S ADVOCATE

It is humbly submitted that the above discourse on restitution reveals that while sexual intercourse is recognised as one of the elements of marital consortium, it is not the *summum bunum* in a decree for restitution. It has further been established that the Court's rationale behind a decree for restitution is not to enforce sexual intercourse but to provide the married couple with an opportunity to reconciliate and sort out their differences.

However, it is contended that while there may be an ennobling objective behind restitution, it does not negate the fact that there is scope for abuse of such a provision as was envisioned in *T. Sareetha*.

Marital rape has been carved out as an Exception to S.375 of The Indian Penal Code. As has been discussed above, the traditional view of a wife's identity merging into the existence of her husband is still prevalent in India with regard to the offence of rape. It is submitted that in such a scenario, when the Supreme Court itself has recognised sexual intercourse as one of the elements of matrimonial cohabitation, it is reasonable to assume that a situation may arise where during a period of restitution a husband chooses to have forced sexual

[37] A.I.R. 1984 SC 1562(India).

intercourse with such wife who was unwilling to live with him in the first place.

While it can be argued that forced sexual intercourse with a wife may be considered as "*reasonable cause*" for such wife leaving her husband in the first place and a Court would not be expected to grant a decree for restitution in favour of the husband in such circumstances, it still leaves the wife without a criminal recourse when such intercourse is forced upon her subsequent to the decree for restitution.

The authors contend that marital rape is not recognised as an offence in India in the first place, and a decree of restitution in favour of a husband acts as a tacit, albeit minute, recognition of marital rape as a conjugal right. The authors submit to the Supreme Court's observation in *Saroj Rani* that sexual intercourse cannot be enforced through a decree for restitution. However, the authors further extend this argument to propound that while a decree for restitution does not enforce sexual intercourse *per se*, such a decree amounts to a facilitation of such an act.

T. Sareetha had been criticised and over-ruled by the apex court on the ground that it had oversimplified the concept of restitution to imply only sexual intercourse. The erstwhile Attorney General of India had dismissed the observations in *T. Sareetha* by stating "*that a few freak instances of hardship may arise on either side cannot be a ground to invalidate a piece of legislation*."[38] The authors contend that the arguments put forth by Choudhary, J., in T. Sareetha for invalidating S.9 of The Hindu Marriage Act, 1955 are based on recognised principles of Indian constitutional jurisprudence, and the situations and circumstances referred to in the case are practical examples which can plausibly exist anywhere in the country.

The authors contend that the Delhi High Court and the Supreme Court mainly took objection to the fact that Choudhary, J., had equated restitution solely with sexual intercourse. It is further submitted that

[38] *Supra* note 26.

the rationale behind the judgment in *T. Sareetha* was the upholding of the Fundamental Rights of a married woman.

It is submitted that these same arguments of *T. Sareetha* would pose a serious threat to the Constitutional validity of the Exception to Rape if such a case were to be brought before the judiciary.

V. CONSTITUTION VIS-A-VIS PERSONAL LAWS

The judiciary has for some reason been reluctant in applying the constitutional mandate to personal laws. Rohatgi, J., had opined in *Harvinder Kaur*, that 'Introduction of constitutional law in the home is most inappropriate. It is like introducing a bull in a china shop.'

In this regard it would be useful to understand the concept of the Constitution, and the rationale (if any) behind excluding the constitutional mandate when dealing with personal laws.

A. Constitution suprema lex

Supremacy of the Constitution is a concept well established as a vital part of the basic structure of the Constitution.[39] It may be compared to Kelsan's Concept of Grundnorm[40] or basic law that remains constant and same.

'Supremacy of the Constitution' which has been accepted by the Apex Courts in numerous cases, originated from H.L.A. Hart's Ultimate Rule of Recognition. As per H.L.A. Hart, legal system is a combination of Primary and Secondary rules. Primary rules are rules of obligation while secondary rules are parasitic upon primary rules and are rules about primary rules. While primary rules impose duties, secondary rules confer power, public or private.[41]

Besides these two types of rules, Hart identifies an 'ultimate rule of recognition'. If a primary or secondary rule satisfies the criteria which

[39]Keshavananda Bharti v. State of Kerala, A.I.R. 1973 SC 1463(India).
[40]Sheela Rai, *Hart's Concept of Law and The Indian Constitution*, (2002) 2 S.C.C. 1(India).
[41]H.L.A. HART, THE CONCEPT OF LAW 94 (2d ed. Clarendon Press, Oxford.)

are provided by the ultimate rule of recognition, then that rule is legally valid.[42] The Constitution of India is the ultimate rule of recognition[43] and all laws derive their validity from this ultimate rule of recognition, i.e. the Constitution.

It essentially propounds that the Constitution is the Supreme Law of the Land and all other laws are to be read and enforced in light and within the limitations of the constitution including all personal laws.

B. Constitutional mandate in personal laws

It is submitted that one of the reasons for negating the supremacy of the Constitution when personal laws are in question may be that if the constitutional mandate was applied to personal laws, quite a few of the personal laws would become void. However, the authors contend that it is not up to the discretion of judges as to whether to apply the constitutional mandate to a particular set of laws or not. Principles of our Constitution must govern all laws that are in force in the country.

Every law, being enforced within the territory of India, must under all circumstances be recognized by the *ultimate rule of recognition* or the Constitution It is not the discretion of judges to selectively apply the constitutional mandate. This point of view has been affirmed by the Bombay High Court in *In Re Amina.*[44] Dhanuka, J., while delivering the judgment, took a bold step and for the first time declared that all personal laws are subject to the constitution. Even customs and usages having the force of law are void if found inconsistent with any of the fundamental rights guaranteed by the Constitution. He held that, "*It could not be the intention of the founding fathers of our Constitution to create any immunity in favour of personal laws."*[45]

Such an interpretation has been resorted to by the Supreme Court itself in a number of cases. The apex court has on certain occasions tested personal laws on the touchstone of fundamental rights and read

[42] *Id.* at 110.
[43] *Id.*
[44] A.I.R. 1992 Bom 214(India).
[45] *Id.*

down these laws or interpreted them so as to make them consistent with fundamental rights.

In *Githa Hariharan* v. *Reserve Bank of India*[46] a three judge Bench of the Supreme Court was considering the Constitutional validity of S.6 of the Hindu Minority and Guardianship Act. The challenge was on the basis that the section discriminates against women, as the father is the natural guardian of a minor and not the mother. The Court did not reject the Petition on the ground that it could not go into Constitutional validity of personal law. Instead it read down S.6 so as to bring it in consonance with Articles 14 and 15.

In *John Vallamattom* v. *Union of India*[47] a three Judge Bench of the Supreme Court had considering the Constitutional validity of S. 118 of the Indian Succession Act, 1925, a pre-Constitutional personal law applicable essentially to Christians and Parsis and struck it down as being violative of Article 14 of the Constitution.

Commenting on this aspect of whether personal laws are subject to the provisions of Part III of the Constitution and hence governed by the principles of Art.13, eminent Constitutional expert H.M. Seervai has opined, "*We have seen that there is no difference between the expression 'existing law' and 'law in force' and consequently. Personal law would be 'existing law' and 'law in force'. This conclusion is strengthened by the consideration that custom, usage and statutory law are so inextricably mixed up in personal law that it would be difficult to ascertain the residue of personal law outside them."*[48]

The authors contend that the above position of including personal laws within the ambit of 'laws in force' as stated in Art. 13 of the Constitution of India and therefore making them subject to all constitutional tests is the correct position of law. All laws in the

[46](1999) 2 S.C.C. 228(India).
[47](2003) 6 S.C.C 611(India).
[48]H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 491 (Universal Book Traders 2002).

country must be recognized by this *ultimate rule of recognition*, failing which, they must be declared void. A law which is violative and contrary to the provisions and norms of the Constitution or *the ultimate rule of recognition* has to be struck down as unconstitutional. When viewed in this light, a fresh look has to be taken of *T. Sareetha* on merits and all conventional Constitutional tests have to be made applicable to Marital Rape and the Restitution of conjugal rights to ascertain whether they amount to an obliteration of the right to sexual autonomy of a wife in India.

VI. CONCLUSION: ROADMAP FOR THE FUTURE

The authors contend that if the constitutional mandate were to be made applicable to the institution of marriage the exclusion of marital rape from the definition S.375 of The Indian Penal Code would in all probability be held as unconstitutional.

The authors have tried to establish how in the absence of marital rape being viewed as an offence a decree of restitution would facilitate such forceful sexual intercourse with an unwilling wife. Although the objective behind restitution is not to give an unbridled license to the husband to commit rape, the practical outcome of such a decree results in a tacit recognition of coerced sexual intercourse as a part of restitution. While it is conceded that a sexually harassed wife has recourse to various remedies, she will still not be able to claim that she has been raped. Hence the introduction of Constitutional tests in personal law is imperative to give utmost importance to the sexual inviolability of a wife.

The most serious problem in recognizing sexual abuse within the institution of marriage is that it presupposes that the family structure is disturbed. Even though marital rape has become a crime in majority of countries it has to be dealt with differently in our country. Keeping in mind the actual motive behind a relief for restitution, which is to give a married couple time to reconciliate and sort out their

differences, the authors propose the following suggestions to be kept in mind if and when the Legislature decides to address this issue:

1. India is said to have a social order characterized by a strong family ties and a low divorce rate. Hence, a blanket criminalization of family problems would only result in the complete breakdown of a home.
2. Indian culture is vastly different from western society where marriage is a contractual and temporary phenomenon. Considering the sensitivity of this problem it is best advised that such matters should be dealt with by the family court only and not a criminal court.
3. While conceding that marital rape is difficult to prove especially when both partners are known to have voluntarily engaged in sexual activity in the past and the issue of consent arises at a later point when there is non-consensual sex, it is equally true that no such heinous act should go unpunished.
4. Marital rape should not be denigrated as a lesser offense merely because it occurs within the precincts of a marital relationship.
5. The present need is for the legislature and the judiciary to actively intervene in this area, by following the recommendations of the National Commission for the Women, India[49] and the draft bill suggested by them, which should be implemented along the lines of the Canadian Model that combine marital rape with the offense of assault.
6. Such steps will fill in the lacunae present in the existing legislations, which discourage women from reporting crimes of sexual assault against their husbands, and otherwise curtail any effective exercise of right to judicial redress.

[49](Mar 11, 2010), ncw.nic.in/.../Recommendations_on_amendments_to_the_laws_relating_to_rape_and_related_ %20provsions.pdf.

7. Hence the urgent need to amend the existing provisions of the law with regard to procedure evidence, punishment and conviction in order to ensure that sexual assault is perceived and treated as a social evil, without tampering with the laws of restitution and matrimonial reconciliation.

In conclusion marital rape should be included within the definition of sexual assault, in order to ensure that Indian society does not continue to tread on rights of women in the guise of promoting social cohesion and protecting the sanctity of marriage. The makers of the Constitution always fostered relations out of the free volition of the parties and that is how it should be.

DISABILITY CARE AND INDIAN INFRASTRUCTURE

Kunika Pandey[*]

I. INTRODUCTION

A. An Insight into the Malaise of Disability

Disability is often described as lack of normal functioning of physical, mental or psychological processes. It is also defined as the learning difficulties or difficulties in adjusting socially, which interferes in a person's normal growth and development. Disability rates are significantly higher among groups with lower educational attainment in the underdeveloped countries. The World Bank estimates that 20 percent of the world's poorest people are disabled, and tend to be regarded in their own communities as the most disadvantaged.

The persons with disabilities have outstanding abilities. In recent times the abilities of these people have been recognised and encouraged to help integrate them into main stream of the society. Many preconceived notions of disability are culpable for the misery of physical disabled. Introspection to directly linked traditional societal attitude towards the disabled unfolds that they are judged by their outer appearance and treated accordingly with pity, sympathy and charity.[1] They are often neglected, ignored, ridiculed inculcating a sense of social insecurity among them at both physical and emotional front.

There is a dire need to realize the rights of the persons with special needs and to facilitate their inclusion in the mainstream of the society.

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[1]*Infra* note 14, at 100.

B. Research objective

Disability is undoubtedly one of the biggest problems faced by the country. The disabled suffer various kinds of social, economic and political setbacks in the society. There have been various initiatives by the government through legislations to remove all discrimination against them by identifying and promoting their rights. This article aims at analyzing various legal provisions and Schemes implemented by the government; and estimating the quality of infrastructure in the country to understand and promote their interests. The research question of the article is to determine the effectiveness of the infrastructure of our country in the process of identification and promotion of the rights of the differently abled section of the society.

C. Scheme of the Article

With an aim of facilitating the understanding of the article, the researcher has divided the article into various sections. The first section provides an insight into the malaise of the disability in the society. The second section provides a conceptual framework to understand the meaning of the term disability. The critical appraisal of the various initiatives of government is discussed in the third section. The next section discusses the shift in the understanding of disability from welfare based approach to rights based approach and the concluding section summarises the article by providing suggestions.

II. UNDERSTANDING 'DISABILITY'

A. Meaning of the Term

Disability, a multifaceted term encompassing a plethora of complex phenomena of malfunctioning or dysfunction of features of a person's

body, is defined by WHO[2] as 'an umbrella term covering impairments, activity limitations, and participation restrictions, where an impairment is a problem in body function or structure; an activity limitation is a difficulty encountered by an individual in executing a task or action; while a participation restriction is a problem experienced by an individual in involvement in life situations'. The Directorate of welfare of Disabled and Senior Citizens defines disability as 'lack of normal functioning of physical, mental or psychological processes.'[3] It is also described as learning difficulties or difficulties in adjusting socially which interfaces with a person's normal growth and development.

In defining disability, it is difficult to accommodate the expectations of all the disabled groups. There are innumerable types of disabilities and as many reasons for the same, which makes the process of its specification and categorization an arduous task. Some people are born with disability, whereas others become disabled at a later period in life; some disabilities exhibit themselves periodically, whereas others are constant and life- long; some disabilities can be cured, whereas others still baffle the experts, some include total or partial impairment of senses and physical and intellectual capacity while defining disability.[4]

The meaning of the term is widely comprehended through three sources- medical, social and legal. These sources facilitate the understanding of the subject, which is otherwise complex and controversial. The medical model is concerned with viewing disability as the problem of a person directly caused by disease, trauma or other health condition which requires constant medical treatment. This model uses the definition provided by the World Health Organisation of disability outlining the relationship between

[2]www.who.int/topic/disability.accessed on 16th November, 2009.

[3]The Persons with Disabilities (Equal Opportunities, Protection of Rights And Full Participation) Act, 1995, No. 1, Acts of Parliament, 1995.

[4]DR. BHUPINDER ZUTSHI, DISABILITY STATUS: A CASE STUDY OF DELHI METROPOLITAN REGION (Ford Foundation).

impairment, disability and handicap.[5] It focuses on functional difficulties meaning loss or abnormality of the psychological, physiological or anatomical structure or function.[6] In the medical model, medical care is viewed as the main issue, and at the political level, the principal response is that of modifying or reforming health care policy.

The social model of disability views the issue of disability as a socially created problem and a matter of full integration of individual into society. In this model, disability is not an attribute of an individual, but rather a complex collection of conditions, many of which are created by the social environment. Hence, the management of the problem requires social action and is the collective responsibility of society at large to make the environmental modifications necessary for the full participation of people with disabilities in all areas of social life. It considers a person with 'impairment' to be 'disabled' when he is excluded from the mainstream activities of the society.

The third model, or the legal model, incorporates the legal aspects and aims at realising the rights of the disabled people. It is a comprehensive aspect which helps the disabled people and their families in understanding their rights and the responsibilities of state towards their realisation. It aims at making special provisions at every level for the people with certain disabilities which impairs their ordinary livelihood. It empowers them by providing social, political and economic benefits by the government.

Among the other prevalent models, economic model is of paramount significance as it focuses on the development of the differently able individuals economically. It defines disability by a person's inability to participate in work and assesses the degree to which impairment affects an individual's productivity and the economic consequences

[5] *Supra* note1.

[6] 1 WEST'S ENCYCLOPEDIA OF AMERICAN LAWS (2nd ed. 1997).

for the individual, employer and the state.[7] The economic model is used primarily by policy makers to assess distribution of benefits to those who are unable to participate fully in work.

B. Definition of 'Disability'

The landmark piece of legislation formulated in the year 1995 to alter the condition of the persons with disability, *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act of 1995*, in its clause (i) includes the following in the meaning of disability-

1. blindness
2. low vision
3. leprosy- cured
4. hearing impairment
5. locomotor disability
6. mental retardation
7. mental illness

A person with disability is defined in clause (t) of the Act to be a person suffering from not less than forty percent of any of the above disabilities as certified by a Medical Board which includes State Level, District Level and Taluk Level Medical Boards.

The scope of disability has also been laid down in various landmark judgments. In the case of *Rasala Gopal* v. *Andhra Bank and others*[8] it was held that "*it is only when the disability or deficiency is to such an extent as would differentiate the person from other with ordinary faculties, that he can be treated as physically disabled. If every minute deficiency as to functioning of the sense organs is to be treated as a physical disability, a situation would arise wherein the exception would eat away the rule*." In the case of *Smt. Chuneela Kumari* v. *Karunashanker*,[9] it was held that disability is a force which has the tendency to reduce or impair functional capacity of a person. In

[7]http://www.who.int/topics/disabilities/en/ accessed on 18th December, 2009.
[8](2003) I.I.L.L.J. 916 AP(India).
[9]A.I.R. 1988 MP 232(India).

Quebec v. Montreal (City)[10] it was held that in the context of human rights law "*handicap*" - and other similar terms - must be analysed in terms of the collective impact of the limitation or complaint and its social construct. It was noted that such terms cannot be defined solely on the basis of biomedical criteria. A Court must also determine whether the individual experiences "*the loss or limitation of opportunities to take part in the life of the community on an equal level with others*"

The United Nations Convention on the Rights of Persons with Disabilities (the Disability Convention),[11] in its Article 1 sets out the definition of disabled people as "*those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others and the definition of 'discrimination on the basis of disability' which defines discrimination as any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*."[12]

The definition of disability set forth in the *Americans with Disabilities Act* of 1990 (ADA) includes-

(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(b) a record of such impairment; or

(c) being regarded as having such impairment.

The Building Act 1991 of New Zealand defines a person with a disability as "*any person who suffers from physical or mental disability to such a degree that he or she is seriously limited in the*

[10](2000) 1 S.C.C 27(India).

[11]www.un.org/disability accessed on 26th October, 2009.

[12]www.un.org/esa/socdev/enable/rights/comp-element2.htm accessed on 5th November, 2009.

extent to which he or she can engage in the activities, pursuits and processes of everyday life."

III. CRITICAL APPRAISAL OF SCHEMES ON DISABILITY

There have been smorgasbords of schemes and Acts launched by the government for the enhancement of the deplorable condition of the disabled in the country. The government has undertaken the rechristening of the term from 'disabled people' to 'differently abled' or 'specially abled' people. It facilitates the process of adopting a different approach towards this section of society which requires 'rights based' rather than 'welfare based' approach. Previously all the approaches adopted by the government were based on the appraisal of welfare of the differently abled people, however recently there has been a shift with the realisation of the amalgamation of the rights of these people in the mainstream of the society. This section provides a critical understanding of the numerous schemes launched by the government.

A. Legislative framework

The grievous conditions of this section of the society dependent on others due to the difference in their physical or mental status were being recognised. In the year 1987 the first initiative in this direction was undertaken with the enactment of the *'The Mental Health Act of 1987'* with an aim to consolidate and amend the law relating to the treatment and care of mentally ill persons, to make better provision with respect to their property and affairs and for matters connected therewith or incidental thereto.[13] It provides for establishment of psychiatrist hospital and nursing homes with license and also appoints inspectors for the purpose of inspection of the same. It replaced the *Indian Lunacy Act* of 1912 as it was realised that with the rapid advance of medical science and the understanding of the

[13]The Mental Health Act, 1987, No. 14, Acts of Parliament, Preamble (1987).

nature of malady, it had become necessary to have fresh legislation with provisions for treatment of mentally ill persons in accordance with the new approach.

The Rehabilitation Council of India Act, 1992 was passed to provide for the constitution of Rehabilitation Council of India for regulating the training of rehabilitation professionals and the maintenance of a Central Rehabilitation Register and for matters connected therewith or incidental thereto. It provides a definition for the term 'handicapped' as including visually handicapped, hearing handicapped, suffering from locomotor disability or suffering from mental retardation. It also provides for training of rehabilitation professionals which includes audiologists, psychologists, special teachers for training handicapped and rehabilitation therapists.

In the subsequent year a *National Policy for Persons with Disability, 1993* laid down the National Policy Statement which "recognises that persons with Disabilities are valuable human resource for the country and seeks to create an environment that provides to them equal opportunities, protection of their rights and full participation in society". The areas identified for the purpose of this policy framework were prevention, rehabilitation and counselling for disability. It provided for education, employment and security of the persons with disability by providing a barrier- free environment. It recognised the immeasurable stigma faced by women with disability and contained special provisions of providing short duration stay homes for women with disabilities, hostels for working disabled women, and homes for aged disabled women and financial aid in order to hire services to look after their children. It provides social protection by –

i. A system of regular review of the policies of tax relief granted to the persons with disabilities so that necessary income tax and other tax relief remain available to persons with disabilities.

ii. Encouraging State Governments and Union Territories Administrations to rationalize the amount of pension and unemployment allowance for persons with disabilities.
iii. Life Insurance Corporation of India has been providing insurance cover to persons with specific type of disabilities. There is a need to encourage all insurance agencies to cover persons with disabilities without exception.

It also aims at facilitating research in this field by determining the socio- economic aspect, developing social indicators and promoting research in the fields of genetic studies and adaptive technologies. It makes the Ministry of Social Justice and Empowerment more responsible to coordinate all matters relating to the implementation of the Policy. It recognises the crucial role to be played by Panchayati Raj Institutions in the implementation of the National Policy to address local level issues and draw up suitable programmes, which will be integrated with the district and State plans. These institutions will include disability related components in their projects.

It was in the year 1995 that the landmark initiative was undertaken in this field by the unprecedented efforts of the legislative assembly with the passing of *Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act of 1995.* It defines various types of disabilities which facilitate the process of identification. It provides for institution of coordinating and executive committees at central and state levels for the purpose of developing a national policy to address issues faced by persons with disabilities; advise the Government on the formulation of policies, programmes, legislation and projects with respect to disability; take up the cause of persons with disabilities with the concerned authorities and the international organisations with a view to provide for schemes and projects for the disabled in the national plans and other programmes and policies evolved by the international agencies, take such other steps to ensure barrier free environment in

Public places, work places, public utilities, schools and other institutions. It also identifies the thrust areas such as health, education and employment for the persons with disability and provides for legislative framework for the upliftment of the same. Thus, it provided for an overhaul in the entire approach undertaken by the various government agencies and lays down policy bases for building the entire edifice of the governmental framework.

The people with disability often suffer from discrimination regarding inheritance in the family. Due to their disability to protect their rights they are discriminated even at the family level. People with physical and mental impairment were considered incapable of holding and owning any kind of property which became a cause of their impoverishment in the society due to the discrimination faced at the family level. There has been an insignificant effort towards recognising the inheritance rights of the disabled. It was in the year 1928 that *The Hindu Inheritance (Removal of Disabilities) Act* was enacted with an aim to amend the Hindu law relating to exclusion from inheritance of certain classes of heir, and to remove certain doubts.[14] The Act contains three Sections wherein Section 2 states that

> *"notwithstanding any rule of Hindu Law or custom to the contrary, no person governed by the Hindu Law, other than a person who is and has been from birth a lunatic or idiot, shall be excluded from inheritance or from any right or share in the joint family property by reason only of disease, deformity or physical or mental defects."*

Thus, the Act ensured that every person including the persons suffering from mental or physical inabilities with an exception of the person suffering from mental infirmity from birth are to be protected under the inheritance laws. The Act was subsequently interpreted in various cases. In the case of *Pakkirriswami Mudaliar*

[14]The Hindu Inheritance (Removal of Disabilities) Act, 1928, Acts of Parliament, Preamble (1928).

v.Krishnaswami Mudaliar[15] it was held that "*from the terms of the statute itself, it is clear that the only disqualification out of the many that the textual Hindu law had prescribed, which had been preserved by the statute is the disqualification arising from congenital lunacy or idiocy and that all the other disqualifications have been wiped out. Prohibition laid down by the Hindu law texts debarring persons of unsound mind from claiming a share is removed by the Act. Any right means all right which includes a right to claim partition. The Act placed a coparcener of unsound mind in the same position as that of a sane coparcener*."

In the case of *Vedvyas Rao* v. *Narayan Rao*[16]it was held that "*the Act in question is a social legislation intended to remove certain social disabilities imposed by the customary Hindu Law. It calls for a benevolent construction. In our judgment, 'the Act' placed a coparcener of unsound mind in the same position as that of a same coparcener*."

The disqualification regarding inheritance by physically or mentally disabled people were later extinguished with the passing of Hindu Succession Act of 1956. It removed all kinds of restrictions imposed upon persons with disability in inheriting property as prevalent under the customary Shastric law.

Thus, the plethora of legislations devised by the legislators has the sole aim of making the availability and realization of the rights of disabled people a reality.

B. Schemes implemented by government

For the purpose of specific implementation and realisation of the aims of the aforementioned Acts by the government, various schemes have been employed which are discussed below-

[15]A.I.R. 1937 Mad 36(India).
[16]A.I.R. 1962 Kant 18(India).

a) Educational schemes

Education is the most effective vehicle of social and economic empowerment. In keeping with the spirit of the Article 21A of the Constitution guaranteeing education as a fundamental right and Section 26 of the Persons with Disabilities Act, 1995, free and compulsory education is to be provided to all children with disabilities up to the minimum age of 18 years. According to the Census, 2001, fifty-one percent persons with disabilities are illiterate which necessitates for mainstreaming of the persons with disabilities in the general education system through inclusive education. Recently the Central Board for Secondary Education ("**CBSE**") has taken a huge step towards offering equal opportunities to all children seeking an education, including those with "*special needs.*" The Board has reminded its schools that admission cannot be denied to differently abled students. A circular of the Board to all the schools notified "*it is being reiterated that any school which fails to provide attention to a child with special needs or makes a pretext of denying admission to any category of differently abled children will be liable to stringent action, even of disaffiliation*."[17] It also devises individual evaluation programme for such kids.

There are special provisions for establishing schools for visual and hearing impaired as they require entirely different approach towards learning. Such institutions provide free education along with providing clothing and medical facilities. To encourage enrolment and to continue the studies of the PWDs these institutions extend scholarships and monetary incentives. The government also provides for special training for the teachers to teach such kids.

Sarva Shiksha Abhiyan ("**SSA**") launched by the Government has the goal of eight years of elementary schooling for all children including children with disabilities in the age group of 6-14 years by 2010. Children with disabilities in the age group of 15-18 years are

[17] *Admit Special kids or face action: CBSE*, TOI, Feb. 4, 2010.

provided free education under Integrated Education for Disabled Children ("**IEDC**") Scheme. Under SSA, a continuum of educational options, learning aids and tools, mobility assistance, support services etc. are being made available to students with disabilities. This includes education through an open learning system and open schools, alternative schooling, distance education, special schools, wherever necessary home based education, itinerant teacher model, remedial teaching, part time classes, Community Based Rehabilitation ("**CBR**") and vocational education. There is concerted effort on the part of the Government to improve identification of children with disabilities through regular surveys, their enrolment in appropriate schools and their continuation till they successfully complete their education. The Government endeavours to provide right kind of learning material and books to the children with disabilities, suitably trained and sensitized teachers and schools which are accessible and disabled friendly.

b) Employment schemes

Economic rehabilitation of Persons with disabilities comprises of both wage employments in organized sector and self-employment. Supporting structure of services by way of vocational rehabilitation centres and vocational training centres is developed to ensure that disabled persons in both urban and rural areas have increased opportunities for productive and gainful employment.

The Government provides for 3% reservation in employment in the establishments of Government of India and Public Sector Undertakings ("**PSUs**") against identified posts. The status of reservation for Government in various Ministries/ Departments against identified posts in Group A, B, C & D is 3.07%, 4.41%, 3.76% and 3.18% respectively. In PSUs, the reservation status in Group A, B, C & D is 2.78%, 8.54%, 5.04% and 6.75%, respectively. Government ensures reservation in identified posts in the Government sector including public sector undertakings in accordance with the provisions of the PWD Act, 1995. Vocational

rehabilitation and training Centres engaged in developing appropriate skills amongst persons with disabilities keeping in view their potential and abilities are encouraged to expand their services. Considering rapid growth of employment opportunities in service sector, persons with disabilities are encouraged to undertake skill training suitable to the market requirement. Self employment schemes are also promoted.

c) Social security schemes

The various social schemes launched with the purpose of securing a socially secured environment for the disabled are-

1. Disabled person who is poor and not able to maintain himself with food clothing and shelter and could not meet other basic needs is given monthly maintenance allowance.
2. Identity cards are given or issued to disabled persons to enable them to avail the benefits extended to them under various governmental schemes, the details of which can be obtained in the office of the District Disabled Welfare Officer attached to the Deputy Director, Women and Child Development Department at the District level.
3. There is insurance scheme for mentally retarded person under which for the parents / guardians of persons with mental retardation whose annual income is Rs.12,000/- or less per year the Directorate of Disabled Welfare contributes the annual premium to Life Insurance of Corporation of India towards a specially designed group Insurance policy. Under this policy, after the demise of the parents / guardians of the mentally retarded person, the nominee will get a one- time lump sum amount of Rs.20, 000/- for the maintenance of the mentally retarded persons.

d) Rehabilitation scheme

Medical, educational and social rehabilitation programmes is developed with the assistance of medical and rehabilitation

professionals and with the participation of persons with disabilities and their families, legal guardians and communities. Convergence of Government programmes is ensured and the following specific measures are taken:

1. State level centres for providing composite rehabilitation services including human resource development, research and long term specialized rehabilitation is set up.
2. Community based Rehabilitation programmes is encouraged. Self help groups of persons with disabilities and their family member are to be effectively involved in the process of rehabilitation.
3. Setting up of mental health care homes for severely mental ill persons is encouraged under district level Panchayati Raj institution with the involvement of NGOs. Alternatively, family support groups are encouraged to setup Custodial Care Institutions for persons with mental disabilities without community and / or family support.

e) Miscellaneous schemes

1. The government has directed all the public places and public buildings to be disabled- friendly and any tender for such construction is not passed in the absence of such provision.
2. Travelling concessions upto 75% are provided wherein the PWDs and his/her attendant by railways and 50% concession is provided in air fare.
3. Income tax rebate or Rs. 50,000 to 75,000 is provided to the parents or guardians of the persons with disability for medical expenses.
4. Deduction under Section 80D in respect of maintenance, including medical treatment of a dependent who is a person with severe disability is raised from the present limit of Rs 75, 000 to 1 Lakh in the Union Budget 2009- 10.
5. Various NGOs have been assigned the task of organising picnics and outings for such kids with their parents in order to enhance social mobility.

f) Critical Evaluation of the Schemes

The Acts and Schemes undoubtedly present a bright picture of the disabled in the country. However, due to the faulty implementation most of the above Schemes fail to accomplish its objectives. The various technical snags in their implementation are provided below[18]-

1. The Tenth Five Year Plan advocated the introduction of a 'Composite Plan for the Disabled' in the budget of all the concerned Ministries/Departments for this purpose. However, none of the Annual Reports of various Central Ministries mentioned about the Composite Plan, as envisaged by the Tenth Plan.
2. Though the plans/policies/schemes are meant to reach all categories of disabled people, especially those who are most in need, special focus is needed to include girls/women with disabilities, persons in rural/tribal/slum areas or in economically backward regions and families living in regions affected by terrorism or by natural calamities. However, a large population in the country is denied of the special attention. Moreover, women with disabilities continue to have minimum access to medical facilities & legal aid, and to educational & livelihood opportunities.
3. The Scheme of Assistance to Disabled Persons for Purchase/ Fitting of Aids and Appliances ("**A.D.I.P**") provides grant-in-aid to voluntary organisations, Red Cross Societies, National Institutes and to ALIMCO for the purchase, fabrication and distribution of aids and appliances, usually through camps. However, it does not reach adequately.

[18] *Disabled people in India: The other side of the story*, www.ncpedp.org/policy/pol-res02.htm.

4. The monthly newsletter of NHRC showed its negligible involvement in safeguarding the human rights of disabled people, as compared to other vulnerable groups in the country.
5. The Annual Report of Ministry of Human Resource Development (2003-2004) did not mention disabled children under Sarva Shiksha Abhiyan, which is a matter of huge concern.
6. Out of nearly 300 universities in the country, not even 30 colleges/universities seem to have benefits for disabled students.
7. Children with severe disabilities, girls in particular, coming from financially backward families or living in remote areas have till today no access to any form of education. Children with speech/hearing impairment face a major setback due to verbal methods of teaching and lack of knowledge in sign language.
8. No status regarding percentage of disabled persons employed in Government services under the scheme regarding 3% reservation in the government employment is provided in the past four years.
9. The National Handicapped Finance and Development Corporation (N.H.F.D.C.) in 1997. The corporation provides loans to disabled people at low rates of interest. A study conducted by N.C.P.E.D.P. in 2003 revealed that the schemes of N.H.F.D.C. had not reached disabled persons through its State Channelizing Agencies (SCAs) in 13 out of 35 States / Union Territories.
10. Public transport is completely inadequate for people with disabilities.
11. Systematic initiatives to include access features in railways are not included for the estimated 60 million disabled citizens of the country, their families, and the aged and ill people.

IV. A SHIFT TO RIGHT BASED APPROACH

The malady of persons with disability in our country is not a recent phenomenon and has affected our society for a long time. However,

there has been a shift in the understanding of the term and there has a significant and welcome change from 'welfare' approach to 'rights based' approach. There is an enhanced awareness pertaining to the various rights of the people with special needs. This section of society needs special welfare schemes, and the aim is to provide framework which can facilitate the empowering of such people so as to bring them in the mainstream of the society. It also helps in providing them a right to life with dignity as mentioned in the multifarious Article 21 of our Constitution. People with disabilities emerged with a hope to assert their rights with this shift in the approach of the government as befitting platform.[19]

The aim is to enhance the quality of life, and promote and protect the rights and dignity of people with disabilities through local, national and global efforts. Additionally, to increase awareness about disability issues, improve disability data, scale up public health programmes and community-based initiatives that promote health and rehabilitation and make assistive devices available to persons with disabilities.[20] The requirement now is Community based Rehabilitation or CBR, which focuses on enhancing the quality of life for people with disabilities and their families, meeting basic needs and ensuring inclusion and participation. CBR is a multi-sectoral approach and has 5 major components: health, education, livelihood, social and empowerment. CBR was developed in the 1980s, to give people with disabilities access to rehabilitation in their own communities using predominantly local resources. A 2004 joint ILO, UNESCO and WHO paper repositioned CBR as a strategy for rehabilitation, equalization of opportunity, poverty reduction and social inclusion of people with disabilities.

The goals of CBR are to ensure the benefits of the Convention on Rights of Persons with Disabilities reach the majority by:

[19]PRANAM KUMAR ROUT, RIGHTS OF PHYSICALLY CHALLENGED - A LEGAL DIMENSION 101 (Nyaya Deep).
[20]www.who.int/disability.

1. supporting people with disabilities to maximize their physical and mental abilities, to access regular services and opportunities, and to become active contributors to the community and society at large;
2. activating communities to promote and protect the human rights of people with disabilities for example by removing barriers to participation;
3. facilitating capacity building, empowerment and community mobilization of people with disabilities and their families.

CBR is implemented in more than 90 countries through the combined efforts of people with disabilities, their families, communities, and relevant governmental and non-governmental organizations working in disability and development. Involvement and participation of people with disabilities and their families is at the heart of CBR.

Another aspect of the rights based approach is capacity building which provides for medical care and rehabilitation services for people with disabilities. There is a lack of training for health professionals, in the provision of appropriate medical care and rehabilitation services for people with disabilities. There is a pressing need to develop the capacities of a variety of trained health professionals and training institutions in this area. Most schools of public health, medical schools and other institutions involved in training health professionals around the world do not include disability and rehabilitation in their curricula. Nor are disability issues included in the curricula of other technical or professional schools, such as those training architects, urban planners, and engineers.[21]

Right to empowerment through participation is one of the essential requisites. Every citizen of this country, without any exception, has an inherent right to vote under the system of adult suffrage. Thus, a disabled person cannot be excluded from doing the same. Disabled persons have the same civil and political rights as other human beings. The news caption "*poll panel offers no hope to disabled*" reflects how the right to vote of physically disable is being

[21] *Supra* note 15.

neglected.[22] This issue has been contended in various cases like *Disabled Rights Group* v. *Chief Election Commissioner*[23] and *State v. Radhamal*,[24] where various direction were issued for making the entire polling procedure disabled friendly by providing for wooden ramps and special Electronic Voting Machines at the polling booths. However, there has been a dearth of willingness on part of the Election Commission and government to implement the order in providing the facilities. Government should take initiatives to implement the political rights of the disabled as far as practical with special attention to right to vote.[25]

With the realization of the rights of the people with disability there is a giant leap in the movement for the removal of all kinds of discrimination against this section of society though large scale inclusion in the mainstream.

V. CONCLUSION

Right to life is a fundamental and supreme right which assures a plethora of rights such as right to liberty, privacy, family life and other analogous rights which constitute a life with dignity. Every individual has the inherent right to get respect towards his/her human dignity which in turn is a mandate for the government of every country. Any person cannot be debarred from exercising these rights owing to his/ her mental or physical disabilities. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and full as possible. The discrimination, sympathy factor and disparity in socio- economic

[22]The Times of India, Sept. 27 2004, *supra* note 14.
[23]2004 S.C.C. OnLine AP 717(India).
[24]A.I.R. 1960 Bom 526(India).
[25]*Supra* note 14.

structure are denigration to right to life with dignity of disabled persons.

It is one of the foremost obligations of the government to develop such infrastructure which facilitates the inclusion of the persons with certain impediments in the socio, economic, political sphere of the country. As per the survey conducted by NSSO in 2001 there are 2.19 crore people with disabilities in India who constitute 2.13 per cent of the total population. Seventy-five per cent of persons with disabilities live in rural areas, 49 per cent of disabled population is literate and only 34 per cent are employed. [26] The trace of violation of right to life can be very well noticed from the instances where the parents of kids with disability are compelled to take away the lives of their children due to the paltry efforts of government initiatives towards providing appropriate medical and economic benefits. Disability is the cause as well as an effect of poverty wherein such people are forced to live in abject poverty due to the lack of infrastructure. This section of society is often marginalised and excluded from the society due to the social stigma and also due to the lack of provisions for their free social mobility. The various schemes launched by the government often fail to achieve their object due to their inability to reach to the people who actually need them. The implementation of such schemes is required to be pervasive with special emphasis in the rural areas which are the worst victim of this malaise. The benefits should permeate deep in the society till the lowest strata as people in such areas suffer from worst kind of discrimination and exclusion.

In order to have an equitable society there is a dire need to protect and promote the basic requirements of this deprived section of society as well. The areas to be focused upon to this effect are health, education, livelihood, social empowerment. Health includes promotion, prevention, medical care, rehabilitation and assistive advices. Education at every level starting from primary to higher is

[26]Directorate of Welfare of Disabled and Senior Citizens.

to be promoted. Livelihood includes skill development, self employment and social protection. The social sphere includes relationships, personal assistance, leisure and sports and access to justice. Communication, social mobilisation and political participation form the part of empowerment.

The differently-abled people constitute a significant section of our society and as such it is necessary to encourage their participation in every walk of life. The disesteemed human resource is a great loss for our national development. Hence, the productivity and potentiality of such people are to be recognised and valued by preserving, protecting and promoting their rights so that instead of considered a burden they are enabled to participate in the activities of the society. There is a need of drastic action at this juncture to eradicate the issues related to the rights of persons with disability in the society.

WATCHING THE WATCHDOGS: IMPROVING REGULATION AND ACCOUNTABILITY OF NGOS

Aniket Deepak Agrawal[*] *and Abhiroop Mukherjee*[**]

I. INTRODUCTION

India is estimated to have 3.3 million registered not for profit organizations, popularly known as NGOs.[1] The sector's credibility is often questioned by most stakeholder groups due to lack of information (about existence, performance, finances, output and outcome), absence of performance benchmarks, government licenses and permissions not being sufficient indicators of performance or credibility, media reports usually being centred around stories of what went wrong and the general lack of awareness of the common man about the voluntary sector.[2] One of the major criticisms of international non-governmental organizations ("**INGOs**") and local civil society organizations ("**CSOs**") has been that they are insufficiently accountable.[3] Unlike their counterparts in the private and public sectors, INGOs and CSOs do not have shareholders and are not elected;[4] thereby the stake of the general public in monetary terms is considerably reduced to provide for public accountability.

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[1]*A Survey on Non Profit Institutions in India - Some Findings*, Central Statistical Organisation, Ministry of Statistics and Programme Implementation, India, Sept. 2009.
[2]Pushpa Aman Singh, *NGO Accountability in the Indian Context* (Dec. 2009), http://www.guidestarinternational.org/SiteImages/file/NGO%20Accountability%20in%20the%20Indian%20Context.pdf.
[3]Michael Szporluk, *A Framework for Understanding Accountability of International NGOs and Global Good Governance*, 16 IND. J. GLOBAL LEGAL STUD. 339 (2009).
[4]I.R.C. § 501(c)(3).

The governance of NGOs implies the totality of functions that are required to be carried out in relation to the internal functioning and external relations of organizations. The governance of NGOs focuses on issues of policy and identity, rather than the issues of day-today implementation of programmes. Thus, governance implies addressing the issue of NGO vision, mission and strategy; it focuses on future directions and long-term strategic considerations; it addresses the issues of policy in relation to internal programming, staffing and resources; it defines norms and values that are the basis of institutional functioning; it includes obligations entailed in fulfilling statutory requirements applicable to the NGO; and focuses on defining the external positions that are consistent with the overall thrust of the NGO as an institution in civil society. Most importantly, the governance of an NGO is concerned with its effective functioning and performance in society. This is both a legal and a moral obligation. Therefore, governance requires the creation of structures and processes which enable the NGO to monitor performance and remain accountable to its stakeholders.[5] This article deals with the various aspects dealing with the need of effective governance principles and accountability standards in order to enable NGOs and CSOs to restore themselves as effective means of governance and growth in any developing country.

*Role of NGOs and CSOs Non-governmental organizations (NGOs***)** are increasingly injected into many areas of national and international affairs.[6]

A. Policy formulation

Although direct NGO involvement is "*less frequent in the areas of rule setting and implementation*",[7] it nevertheless exists and is likely

[5]Rajesh Tandon, *Board Games: Governance and Accountability of NGOs*, http://www.wtrc-tmed.org/wtrc/resources/Board%20Games.pdf.

[6]Christopher Tracy, *The Growing Role of Non-Governmental Organisations,* 89 AM. SOC'Y INT'L L. PROC. 413 (1995).

to increase in the future.[8] There are a number of different functions falling within the broad category of policy formulation relying upon the purpose and representativeness of the NGOs seeking to perform those actions.

Agenda-setting is one of the most important governance functions an organization can perform, as it places items onto the table for discussion and analysis, initiating the possibility of governance changes.[9] Where NGOs are instrumental in the formulation of the overarching policy framework or where they are incorporated into a state's delegation directly, they may have the ability to set the agenda for discussion. The World Conservation Union ("**IUCN**") is the proto-typical example of this. The IUCN drafted the first version of the Convention of Biological Diversity and then was successful in setting the agenda of the Convention's negotiations.[10]

Norm and rule formation, or rule-setting, is the most contentious role NGOs play in governance. NGOs are primarily involved as rule setters through incorporation into official delegations, which has occurred in the nuclear non-proliferation treaty regime, for instance.[11] Amnesty International was crucial in shaping the Convention against Torture and in establishing the International Criminal Court.[12] Similarly, the International Campaign to Ban Landmines had the right to make statements and table treaty language during negotiations of

[7]TANJA A. BORZEL & THOMAS RISSE, COMPLEX SOVEREIGNTY: RECONSTITUTING POLITICAL AUTHORITY IN THE TWENTY-FIRST CENTURY 195, 203-06 (Edgar Grande & Louis W. Pauly eds., 2004).
[8]*Id.*
[9]P.J. SIMMONA & CHANTAL DE JONGE OUDRAAT, MANAGING GLOBAL ISSUES: LESSONS LEARNED 3, 12 (P.J. Simmons & Chantal de Jonge Oudraat eds., 2001).
[10]TANJA BRUHL, PROCEEDINGS OF THE 2001 BERLIN CONFERENCE ON THE HUMAN DIMENSIONS OF GLOBAL ENVIRONMENTAL CHANGE: GLOBAL ENVIRONMENTAL CHANGE AND THE NATION STATE 371, 376-77 (Frank Biermann et al. eds., 2002).
[11]BORZEL & RISSE, *supra* note 7.
[12]WILLIAM KOREY, NGOS AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A CURIOUS GRAPEVINE (Palgrave, New York, 1998).

the Convention on the Prohibition of Anti-Personnel Landmines.[13] NGOs are also involved in the World Trade Organization and help to shape its outcomes.[14]

General Participation and Lobbying is most widely recognized role of NGO participation in governance.[15] NGOs are renowned for their ability to mobilize public awareness and opinion and catalyze action on particular issues.[16]

B. Administrative duties

Administrative duties differ from political activities because rule-implementation is the function, rather than rule-setting.

Certification of actors for participation in the regime itself is a powerful role NGOs may play in the administration of international governance. The power to enable participation is significant.[17] For instance, the Framework Convention on Climate Change, under which the Kyoto Protocol on climate change operates, provides the opportunity for NGO participation as a certification body, without significant co-regulation by the regime, though delegation authority is retained by the regime.[18]

NGOs are involved on a somewhat limited basis in actual *standard setting* in the administrative context. A powerful example of NGO involvement in standard-setting is the International Labour

[13]MOTOKO MEKATA, THE THIRD FORCE: THE RISE OF TRANSNATIONAL CIVIL SOCIETY 143 (Ann M. Florini ed., 2000).

[14]Peter Sutherland, *The Doha Development Agenda: Political Challenges to the World Trading System- A Cosmopolitan Perspective,* 8 J. INT'L ECON. L. 363, 374 (2005). (Discussing the WTO Secretariat's interest in creating a low-level partnership between the WTO and NGOs).

[15]SIMON ZADEK & MURDOCH GATWARD, BEYOND THE MAGIC BULLET: NGO PERFORMANCE AND ACCOUNTABILITY IN THE POST-COLD WAR WORLD 169 (Michael Edwards & David Hulme eds., 1996).

[16]Ann Marie Clark, *Non-Governmental Organizations and their Influence on International Society*, 48 J. INT'L AFF. 507 (1997).

[17]Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance,* 18 MICH. J. INT'L L. 183 (1997).

[18]Peggy Rodgers Kalas & Alexia Herwig, *Dispute Resolution under the Kyoto Protocol,* 27 ECOLOGY L.Q. 53 (2000).

Organization ("**ILO**"), designed to protect workers from exploitation and poor working conditions.[19]

C. Enforcement

NGO involvement in the enforcement of established codes has been characterized as moderate in scope and nature.[20]

Arbitration is a major way international regimes are enforced.[21] The leading international arbitration organization providing for the settlement of these disputes is the International Centre for the Settlement of Investment Disputes ("**ICSID**"), which is an "*autonomous international organization*", established by the World Bank through an international convention and comprised of World Bank Member States.[22]

In some regimes, NGOs have been provided the authority to act as *enforcement agents,*[23] where States are believed to have violated international rules.[24] For instance, under the Montreal Protocol, NGOs may act as enforcement agents by notifying the Secretariat of non-conforming States, who in turn may sanction the non-conforming States.[25]

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[19]Erik B. Bluemel, *Overcoming NGO Accountability Concerns in International Governance,* 31 BROOK. J. INT'L L. 139 (2005).

[20]Jonathan P. Doh & Terrence R. Guay, *Globalization and Corporate Social Responsibility: How Nongovernmental Organizations Influence Labor and Environmental Codes of Conduct,* 44 (2) MIR 7-29, (2004).

[21]Joanne K. Leweler, *International Commercial Arbitration as a Model for Resolving Treaty Disputes,* 21 N.Y.U. J. INT'L L. & POL. 379 (1989).

[22]Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Oct. 14, 1996, 17 U.S.T. 1270, 575 U.N.T.S. 159.

[23]RUTH MAYNE, REGULATING INTERNATIONAL BUSINESS: BEYOND LIBERALIZATION 235 (Sol Picciotto & Ruth Mayne eds., 1999).

[24]Paul Wapner, *Politics Beyond the State: Environmental Activism and World Civic Politics,* 47 WORLD POL. 311 (1995).

[25]*Montreal Protocol on Substances that Deplete the Ozone Layer,* Art. 11(5), Annex III, para. 1, Annex IV(10), Sept. 16, 1987, 1522 U.N.T.S. 3, 26 I.L.M. 1541, adjusted by London Amendments, June 29, 1990, 20 I.L.M. 537, Nairobi Amendments, June 21, 1991, and Copenhagen Amendments, Nov. 23-25, 1993, 32 I.L.M. 874.

II. NGOS IN INDIA

NGOs in India are engaged in diverse activities- education, health, family planning, environment, human rights, women and children welfare, population control, development, water conservation, agriculture, natural resources, microfinance, disabilities, housing, emergency relief, etc.[26] Most NGOs rely upon funds received from the government and other foreign sources, like international NGOs, development partners, foreign private organizations, and multinational organizations.[27]

NGOs are required to register with the Income Tax Department under Section 12-A, however the registration is spread across 100+ locations. Moreover, the annual returns of Income Tax filed by NGOs are not subject to public disclosure. NGOs need permission from the Ministry of Home Affairs under the Foreign Contribution Regulation Act ("**FCRA**") to receive any form of foreign contribution. These registrations are centralized and require annual filings, however this covers only a very small number (35,972 NGOs as of September 2008). The scenario described above indicates that the statutory framework does not require NGOs to be accountable directly to the public and in many cases, the administrative authority is not equipped with resources to monitor and penalize those defaulting in making necessary filings.[28]

In India, the state has consistently viewed the role of NGOs to be that of a gap-filler, stepping in where the government has stepped out and serving as a bridge between the state and the people.[29] Because of the wide variety of functions of NGOs, and the dependence of the overall

[26]NGOs India, http://www.ngosindia.com/a-z/index-D.htm

[27]Problems of Governance in the NGO Sector: The Way Out, (Transparency International, Executive Summary), http://www.ti-bangladesh.org/research/ExecSum-NGO-English.pdf.

[28]*Supra* note 2.

[29]Qiusha Ma, *The Governance of NGOs in China Since 1978: How Much Autonomy?* 31 NONPROFIT & VOLUNTARY SECTOR Q. 305 (2002).

governance structure on them, it becomes absolutely necessary to provide a sound regulatory framework for the NGOs for them to function effectively fulfilling their goals and objectives.

III. CHALLENGES FOR NGOS

NGOs work under many constraints and challenges. Some of these challenges are: (a) lack of financial sustainability; (b) shortage of efficient employees and high employee attrition; (c) inadequate infrastructure; (d) undue interference and control by the government; (e) lengthy fund release process; (f) low level of inter-sectoral cooperation; (g) inadequate training and low level of true professionalism among employees often aggravated by lack of job security; (h) lack of information and relevant research; (i) religious conservatism and militancy, and threat of terrorism; (j) political pressure and political instability; (k) Unfavourable tax regime; (l) natural calamities, (m) misplaced focus on compliance reporting, and (n) lack of institutional infrastructure.[30]

IV. CURRENT REGULATORY FRAMEWORK

In India, public charitable organizations can be registered as trusts,[31] societies,[32] or not-for-profit companies.[33] NGOs in India (*a*) exist independently of the state; (*b*) are self-governed by a board of trustees or 'managing committee'/ governing council, comprising individuals who generally serve in a fiduciary capacity; (*c*) produce benefits for others, generally outside the membership of the organisation; and (*d*),

[30]*Supra* note 27.
[31]No national law governs public charitable trusts in India, although many states (particularly Maharashtra, Gujarat, Rajasthan, and Madhya Pradesh) have Public Trusts Acts. In the absence of a Trusts Act in any particular state or territory the general principles of the Indian Trusts Act, 1882 are applied.
[32]Societies Registration Act, 1860, No. 21, Acts of Parliament, § 20 (1860).
[33]Companies Act, 1956, No. 1, Acts of Parliament, § 25 (1956).

are 'non-profit-making', in as much as they are prohibited from distributing a monetary residual to their own members.

Charitable purpose includes 'relief of the poor, education, medical relief and the advancement of any other object of general public utility.'[34] A purpose that relates exclusively to religious teaching or worship is not considered as charitable. A public charitable purpose has to benefit a sufficiently large section of the public as distinguished from specified individuals.

The main instrument of any *public charitable trust* is the *trust deed***,** wherein the aims and objects and mode of management (of the trust) should be enshrined. In every trust deed, the minimum and maximum number of trustees has to be specified. The trust deed should clearly spell out the aims and objects of the trust, how the trust should be managed, how other trustees may be appointed or removed, etc.[35]

The main instrument of any *society* is the *memorandum of association* and rules and regulations (no stamp paper required), wherein the aims and objects and mode of management (of the society) should be enshrined. Registration can be done either at the state level (i.e., in the office of the Registrar of Societies) or at the district level (in the office of the District Magistrate or the local office of the Registrar of Societies).[36]

According to Section 25(1)(a) and (b) of the Indian Companies Act, 1956, a company can be established 'for promoting commerce, art, science, religion, charity or any other useful object', provided the profits, if any, or other income is applied for promoting only the objects of the company and no dividend is paid to its members. The main instrument is a *Memorandum and articles of association* (no stamp paper required).[37]

[34]Income Tax Act, 1961, No. 43, Acts of Parliament, § 2(15) (1961).
[35]Microfinance Gateway, http://www.microfinancegateway.org/redirect.php?mode=link&id=32967
[36]*Id.*
[37]*Id.*

In certain cases, special licensing of NGOs through the Inner Line Permit, or registration under the Shop and Establishment Act, may be allowed.

V. MODELLING LEGAL FRAMEWORK FOR NGO REGULATION

A vibrant NGO sector has a significant economic and political value to a country.[38] The rapid growth in the number, influence and effectiveness of non-governmental organizations ("**NGOs**") in recent years has produced greater demands for NGO accountability and governance. These demands call for assurance that NGOs are responding to the needs and expectations of their many stakeholders and fulfilling their varying missions and objectives.[39]

A. Why NGO Regulation is Important?

There are many reasons why a country should want to have laws that assure the existence of a strong, vigorous, and independent civic sector. The most important of these is to protect the internationally recognized freedoms of expression, association, and peaceful assembly;[40] along with encouraging pluralism, promoting respect for the rule of law, supporting democracy, promoting economic efficiency, and addressing "*public sector market failure.*" A clearly defined operating space allows NGOs to be more ambitious in their work, and promotes good governance, both directly through improvements to the local regulator and to the NGOs, as well as

[38]NGO Regulation Network, http://www.ngoregnet.org/
[39]JEFFREY E. GARTEN, GLOBALIZATION WITHOUT TEARS – A NEW SOCIAL COMPACT FOR CEOS (Harvard Business School Press, 2002).
[40]INDIA CONST. art 19.

indirectly by improving an NGO sector's ability to suggest change in governance. [41]

B. Principles of NGO Regulation

a) Establishment

In order to acquire the status of a legal entity and to have limited liability, legal systems generally require that an organization be formally established.[42] For a civic organization to become established as a legal entity, the founders ordinarily must hold a founding meeting and adopt the governing documents of the organization.[43]

The principal documents that should be required for establishment are the governing documents of the organization (e.g., charter or statute, deed of trust, bylaws, articles of incorporation, etc.). Those documents should be updated periodically, state the nature and purpose of the organization; provide an adequate governance structure; identify the founders, board members, and managers; state

[41]NGO Regulation Net, *Why is Regulation Important*, http://www.ngoregnet.org/About_effective_regulation/Why_it_is_important/Why_regulation_is_important.asp

[42]The opposite is true in, e.g., *Switzerland*. C. Civ., tit. II, ch. 2, art. 60(1). ("Associations which have a political, religious, scientific, artistic, charitable, social, or any other than an industrial object, acquire the status of a person as soon as they show by their constitution their intention to have a corporate existence.") *Mongolia* is similar: "An NGO shall be considered established after the founders have issued a decision to establish the NGO and have approved the NGO's by-laws." Such an organization cannot exercise its rights as a legal entity, however, until it has completed the establishment process. The Law of the State of Mongolia on Non- Governmental Organizations, ch. 1, art. 6 (January 31, 1997). Under these laws a civic organization is established when a group of individuals completes required acts, such as the adoption of a constitution, without any involvement of the state.

[43]The Law of the *Kyrgyz Republic* on Non-Commercial Organizations, Ch. 2, art. 18 (October 1, 1999). ("Founders of a public association shall convene a constituent meeting and adopt a decision on establishing a public association, approving its Charter, and forming governing and audit bodies.").

the location of the headquarters; and identify the general representative(s) of the organization.[44]

Decision-making authority regarding establishment should be carefully circumscribed so that it is only concerned with meeting legal requirements, and civic organizations should be entitled to appeal adverse decisions.[45] Refusal to permit establishment should occur during the stated time period and be accompanied by a written explanation and an opportunity to correct any defects in the application.[46]

The law should ordinarily have a broad list of purposes that constitute public benefit activities and there should be a catchall category so that the law will be flexible.[47] The law should clearly state which obligations incurred between actual creation and formal establishment will be considered to carry over to the organization once it becomes a legal entity.[48]

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[44]*Kenya* Societies Act, part IV, § 17 (1998).

[45]The system in *Mongolia* may serve as an example. After a completed application is filed, the establishing authority has 30 days within which to establish the civic organization or to refuse establishment. Refusal must be on one of two grounds: The purpose of the organization violates the Mongolian law or another organization with the same name is already established. If neither of these conditions is met, the authority must establish the organization. (Mongolian NGO Law, Art. 16(2)).

[46]The law of the *Republic of Yemen* provides ("In the event that the application is refused pursuant to this Law [the Ministry] should notify the founders of the decision to reject the application in writing, giving the reason thereof, and should post this in its bulletin board of the Ministry or the relevant office within ten days of the date of decision.") Article 11 creates a 60-day appeal period from the day that the applicants are notified of the rejection.

[47]The *European Parliament* issued a resolution requesting that "all discriminatory measures based on nationality that affect the right to belong to, form or administer an association be rapidly abolished throughout the Community, in respect of citizens of Member States." Eur. Parl. Doc. A2 196/86 (March 13, 1987). The European Court of Justice ruled against Belgium's nationality restrictions for participation in civic organizations. Case C-172/98, Kingdom of Belgium v. Commission (June 29, 1999); On June 30, 2000, the existing legislation was amended to remove the requirements.

[48]The *Estonian* law provides that people acting on behalf of an association in the process of establishment are liable for the actions on behalf of the organization. When the organization is established, the obligations automatically transfer to the

b) Responsible state agency

There is considerable variety among legal systems in the choice of the responsible state agency that is empowered to establish civic organizations. Civic organizations may seek establishment with a variety or agencies like the ministry responsible for the subject matter of their proposed activity;[49] courts;[50] a single ministry in charge of establishing and supervising civic organizations;[51] or the local branches of a single ministry (e.g., the ministry of justice).[52]

There is no uniformly correct answer to the question of where to place authority for establishment of civic organizations; the system chosen will depend on the legal and political traditions and realities of the

organization "if the persons who entered into the transaction had the right to enter into the transaction in the name of the association." If the person did not have that right, then the obligations only transfer from the individual to the organization if all the members agree. The law does not specify what constitutes "having the right" to enter into a transaction on behalf of an organization. (The Non- Profit Association Acts of the Republic of Estonia, ch. 1, Section 11(2-3) (June 6, 1996, amended June 5, 2002).

[49]In *Japan*, special types of legal persons (e.g., "Public Interest Legal Persons" such as associations and foundations, social welfare corporations, educational corporations, religious corporations, and medical corporations) are all permitted to be established under different laws and by different ministries. The creation of the new "special nonprofit activities legal person" created in 1998 simply added another category and another responsible state agency (the Economic Planning Agency) to this already complex system. Thus, choice of form is a very important issue in Japan.

[50]*Greece* is one example. See the Greek Civil Code, C. Civ., ch. 4, § 79, § 81. Albania is another. See Law on the Registration of Non-profit Organizations, no. 8789, ch. 2, art. 5 (May 7, 2001).

[51]Some countries use the ministry of justice. See e.g., Law of *Mongolia* on Non-Governmental Organizations, ch. 3, art. 15 (Jan. 31, 1997); In *South Africa*, *Egypt, and Pakistan*, the ministry of social welfare or its equivalent is the place where civic organizations are established. (Nonprofit Organisations Act of the Republic of South Africa, ch. 3, Section 11 (1997); Law on Private Associations and Establishments Law No. 84 of 2002 of Egypt, ch. 1, art. 3; Registration as a Non-Profit Company under Section 42 of the Companies Ordinance Act 1984 of Pakistan, Section 4.3.1).

[52]The Regulations on the Registration of Social Organizations of the *Peoples' Republic of China* state that the registration may occur at the national level or at local branches of the Ministry of Civil Affairs.

country involved. Any of the described arrangements can be made to work well by able people of good will, and any arrangement can also be administered badly or incompetently.

Some of the problems of agency expertise, regulatory capacity, and bias can be solved if supervisory powers over civic organizations are delegated to a specialized agency or commission whose members consist not only of government officials but also of representatives of the public and civic organizations themselves.[53]

The general purposes of such a commission are to establish civic organizations, determine the public benefit status of civic organizations, supervise legal compliance, and provide education and training to ensure compliance, impose sanctions in case of any violations of the law, and develop expertise in a staff whose only function is to deal with civic organizations. The existence of a single agency eliminates all too frequent inter-ministerial conflict and inconsistency, especially if each concerned ministry is represented on the commission. By having independent citizens sitting on the agency or commission, there can be greater public assurance that decisions will be made on principle and with consistency.[54]

c) Public registry

It is important that a single national registry[55] of all formal civic organizations be maintained and that the public has access to it. For

[53]See, e.g., The Charity Commission in *Moldova* has nine members, with at least three members who represent the public sector and who are not employed by the state. Commission members have a five-year term, which permits a degree of professionalization that comes with time. (Law of the Republic of Moldova on Public Associations, No. 837-XIII, ch. 5, art. 34-37 (May 17, 1996).

[54]Leon E. Irish, Robert Kushen, Karla W. Simon, *Guidelines for Laws Affecting Civic Organisations*, (Prepared by Open Society Institute in cooperation with the International Center for Not-for-Profit Law, New York, Second Edition).

[55]*South Africa* has placed its registry on the Internet. The online registry lists each civic organization's name and address, the registration number, the date registered, and any date that the organization was deregistered, wound up, or dissolved. The online registry fulfills the legal obligation of the director of nonprofit organizations to publish annually the registry and the names of all organizations removed from the registry in the previous year "in the Gazette and at least one other widely

their own protection, citizens need to be able to check whether a purported civic organization is actually established as a legal person. The public would also benefit from being able to find out what the purposes of the organization are, where its headquarters are, who is on its governing body, who its legal representative is, etc.

d) Termination, Dissolution and Liquidation

Voluntary termination, dissolution, and liquidation of a civic organization should be allowed pursuant to reasonable procedures designed to protect creditors and other stakeholders of the organization. As to involuntary termination and dissolution, in order to assure a vigorous and independent civic sector, the law should provide for intermediate sanctions (e.g., fines) for various types of violations. Termination of legal existence and dissolution of a civic organization should be the last resort.[56]

If a state agency is given the right to terminate establishment administratively, there should be a right of judicial appeal from such a decision; or in all cases the state agency or the state attorney should apply to the court for a judicial termination of the organization.

Upon termination, the assets of an organization should go to another civic organization with a similar purpose pursuant to the terms of the terminating organization's governing documents or a resolution of the highest governing body, or the state.

e) Governing documents

The law should stipulate the rights, powers, and limitations for civic organizations. The governing documents should include any

circulated means of communication." (Nonprofit Organizations Act, no. 71, vol. 340, no. 18487, ch. 2, Section 24(7) (Dec. 3, 1997). The *Czech Republic* and a number of other countries in Central and Eastern Europe have also placed their registries on the Internet.

[56]For example, the law of the *Republic of Yemen* requires that the government, prior to suing for dissolution, issue "the association or foundation three notices within six months to remedy the violation." (The Law on Associations and Foundations of the Republic of Yemen, Law No. (1) for the Year 2001, ch. 4, Section I, art. 44 (2).

limitations imposed by law, such as a prohibition on the distribution of profits.[57] The law should require that the documents state the purpose(s) of the organization and set forth its basic governance structure.

A minimum number of members of a governing body may be defined, although this number should be kept quite small (e.g., three). The basic powers of the highest governing body should be spelled out, together with any restrictions on its power to delegate duties to others.

f) Fundraising

There are countervailing public interests that favour certain, though limited, regulation of fundraising. Similarly, rules requiring fundraisers to prove to a public agency that they have authority to fundraise from the public for a particular organization may ward off imposters seeking to capitalize on the good name of a particular civic organization.[58]

Organizations raising money from the general public may not only require registering their fundraising campaigns in advance but also to file reports about the monies received and how they are spent. Adopting accounting principles for civic organizations should be a priority. The next step should be to adopt voluntary standards for public disclosure of such key numbers as the amounts paid to fundraisers and the percentage of revenues spent on overhead and fundraising.[59]

If it is discovered that an individual or organization engaged in deceptive fundraising (e.g., fundraising for an organization that does not exist or intentionally misleading prospective donors about the

[57]Law of the Republic of Indonesia, 2001, No. 16, Concerning Foundations, ch. 2, art. 17 (2001).

[58]The limits on fundraising regulation in the *United States* are largely a product of jurisprudence under the First Amendment to the Constitution, which protects freedom of speech.

[59]unpan1.un.org/intradoc/groups/public/.../UNPAN016333.pdf.

manner in which donations will be used), it should be possible to apply general fraud and criminal laws.

g) Reporting, Supervision and Enforcement

Delegation of detailed financial oversight to a responsible finance committee is permissible. The civic organization law or the accounting law or standards should make such audits mandatory for sizable PBOs.[60] The reporting requirements imposed by donors will be contractual obligations enforceable in court. By imposing appropriate contractual conditions, donors can play a significant role in assuring the health and proper operation of the civic sector.

h) Tax preferences

Tax preferences are sometimes available to all formal civic organizations, but more frequently to only a smaller class of formal civic organizations.[61] Typical sources of revenue for civic organizations include donations, membership dues, fees under government contracts, and interest, dividends, and capital gains on investments; which are generally not subject to tax.[62]

[60]The United Nations Mission in *Kosovo* (UNMIK) decided not to require audited financial statements by civic organizations immediately after the transition precisely because of concerns over the availability of qualified, independent accountants. See UNMIK Administrative Direction No. 2002/9, Section 1 (Mar. 29, 2002). This is not, however, a common situation, given the range of accounting skills taught in modern universities around the world.

[61]A civic organization that receives some tax benefits need not be offered all available tax benefits in the jurisdiction. It may be that some tax benefits are offered to a subset of PBOs, and further tax benefits are extended to a smaller subset. In the *United States*, a distinction is made between "charitable" organizations, to which tax-deductible contributions can be made, and "social welfare" organizations, for which tax deduction is not available. (26 U.S.C. Section 501 (c)(3) & Section 501 (c)(4) (2000) Both types of organizations, however, are generally exempt from income taxes.

[62]*Mongolia* exempts MBOs from taxation on membership fees and members' contributions. It exempts PBOs from taxation on membership fees, all contributions and inherited funds, and income from mission related economic activities.

Provision should be made for tax reclaim schemes[63] or for tax designation schemes.[64] Such tax preferences are important and useful tools for encouraging NGO-business-government partnerships for social and economic development. Another question that must be dealt with in any scheme of taxation is the limit, if any, to put on the amount of tax benefit that can be achieved.[65] Floors have been used in some countries to avoid the necessity of keeping track of small contributions.[66]

In a country with a developing market economy, it may be appropriate to strike the balance in favour of a "destination of income" test for all profits used or set aside by a civic organization to carry out its purpose-related activities. Unfortunately, it is extremely difficult to distinguish "related" economic activities from "unrelated" economic activities, and hence the related/unrelated rule is very difficult to administer in practice.

Some countries require that business activities of civic organizations be conducted in a subsidiary rather than directly by the organization itself.[67] There are advantages to this system, in that it can provide greater transparency with respect to the activities. On the other hand, it is administratively burdensome, and it costs more to set up a

[63]The International Centre For Not-for-Profit Law, http://www.icnl.org/journal/vol3iss2/ar_bater.htm.

[64]Under a tax designation scheme adopted in *Hungary*, however, an individual may direct that 1% of the taxes he or she pays go to an "eminent" PBO of his or her choice. (Act No. CXXVI on the Public Application of a Certain Portion of Personal Income Tax upon Taxpayer's Order, Section 3(1) (1996) *Lithuania, Slovakia, and Poland* have adopted similar laws. Such tax designation schemes do not give a deduction or credit and do not require the individual to file a tax return, which means that all taxpayers are able to participate in supporting civic organizations.

[65]In *Russia* individuals can claim deductions only up to 1 percent of their income, and business entities are limited to 3 percent. In the *United States*, by contrast, individuals can claim up to 50 percent and businesses can claim up to 10 percent. In *Australia*, there is no limit at all.

[66]Industry Commission, *Charitable Organizations in Australia,* APP. J 311-312 (1995).

[67]Europa, http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31977L0388&model=guichet.

subsidiary to conduct business activities. The same transparency objective can be met by requiring that a civic organization maintain separate books and records for all of its economic activities.

VI. CONCLUSION

In this article, the authors have laid emphasis on the pivotal roles of non-governmental organizations and other civil society organizations in national, international and transnational development, growth, rehabilitation, welfare policy formulation and their role as pressure groups. In the light of such functions, both assumed and delegated, these institutions assume a fundamental role in governance inside as well as outside the nation. In India, it is no different.

Although this article has dealt with many of the structural and administrative reforms required for efficient governance of such institutions, the authors state that there is no hard and fast rule towards providing a means of ensuring accountability and transparency in any organization. At the same time, it is essential that every *legal persona* (societies, trusts and other organizations) be subjected to some basic guidelines to ensure necessary public accountability and effective fulfilment of its goals. It is these basic principles that are the primary highlight of this paper. In spite of having a sound legislative setup and organizational structure, there is no way of guaranteeing absolutely successful functioning. Any system, however sound, can be put to abuse.

It is of crucial importance that NGOs, their supporters and their donors begin to understand the meaning and significance of effective governance and its contribution to NGO accountability. There is also a need to document, analyze and promote good practice in relation to NGO governance and accountability. Such interventions need to be viewed as part of the fabric of institutional development efforts needed to strengthen an NGO. Strategic planning and capacity-

building need to include interventions directed at making its structures and processes of governance more effective. A number of such efforts, studies and manuals developed and used in countries in the North can help to clarify and support this challenge in the South.[68] Furthermore, it is necessary to understand that improved governance of NGOs will invariably have a positive and affirmative effect on the governance at national and international levels.

[68] *Supra* note 5.

SEXUAL HARASSMENT AT WORK PLACE AND ITS IMPLICATIONS

Pritanshu Shrivastava & Rohit Padhi[*]

I. INTRODUCTION

Women as a component of human species has somehow remain an endangered species all over the world and more so in India were they even idealized as "*devis*." India is a country where Goddesses are worshipped and yet ironically disgraceful victimization against women like child rape, molestation, eve teasing and sexual harassment are increasing day by day. Victimization of women is a part of our existing social life. The problem of sexual harassment at work place is not a new phenomenon and thus it is not surprising anymore. But until two decades ago sexual harassment at work place was just about a buried happening in the entire world over.

The consequences of sexual harassment at work place are so tragic and everlasting that these are deep scars on a woman because of barbaric act by a human in animal form, a victim-woman has to suffer without the least of her fault for a life time. Many women, who are not able to bear the stigma for trauma as commit suicide and leave this cruel world forever.

Such instances are a very poor reflection of our society that we are not able to protect the nobility and safety of women for which she is entitled from national and international laws. Every occurrence of sexual harassment of woman at workplace results in violation of "*gender equality*". The gender equality includes protection from sexual harassment or abuse and right to work with dignity, which is a universally recognized basic human Right. A number of countries like

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U.S., U.K., Japan, Canada, Australia, India and several European nations have laws that prohibit sexual harassment at work place.[1]

II. TERMINOLOGY

Broadly in title *"sexual harassment at work place"* two terms need clarification. According to The Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal) Bill, 2006[2] the former term 'sexual harassment' refers to is such unwelcome sexually determined behavior such as physical contact, advances, sexually coloured remarks, showing pornography or making sexual demands, whether verbal, textual, graphic or electronic or by any other actions, which may contain:

(i) Implied or overt promise of preferential treatment in that employee's employment or

(ii) An implied or overt threat of detrimental treatment in that employee' employment or an implied or overt threat about the present or future employment status of that employee

and includes the creation of a hostile Working environment.

(iii) The conduct interferes with an employee's work or creates an intimidating, hostile or offensive work environment or

(iv) Such conduct can be humiliating and may constitute a health and safety problem.

'Workplace' means (i) Any department / organization, establishment or undertaking wholly or substantially controlled by the Central Government or the State Government or local or other authority under the control of the central or the state government (ii) Any venture, business, organization or institution or department carrying on systematic activity by co-operation for the production, supply or distribution of goods and/or services irrespective of whether it is an "*industry*" within the meaning of section 2 (j) of the Industrial

[1]http://www.articlealley.com/article_77801_18.html.
[2]http://ncw.nic.in/PDFFiles/sexualharassmentatworkplacebill2005.pdf.

Disputes Act, 1947 or whether it is performing any inalienable sovereign function and irrespective of whether the goods and/or services are provided for any remuneration or not and (iii) Includes any place where an aggrieved woman or defendant or both is/are employed or work/s, or visits in connection with work during the course of or arising out of employment, and (iv) Such other statutory and/or professional bodies, contractual and other services.[3]

Opening the door on the subject of sexual harassment at work place the world's females is like standing at the doorstep of an enormous gloomy chamber shaking with collective suffering, but with the sounds of protest throttled back to a murmur. Where there should be annoyance aimed at an intolerable status quo there is instead denial, and the mostly submissive acceptance of the way things are.

III. THEORETICAL FRAMEWORK OF SEXUAL HARASSMENT

The development of modernization and urbanization in the attitudes of men gives rise to a lot of functional division of status and role of human beings in society. The role of a man is always changed as usual to woman in the society. The dominant behavior of man gives rise to imbalance of power in the democratic, which gives rise to feudalistic attitude in the modern society. After having huge number of cases of sexual harassment at work place, this is a very natural question, which arises in every intellectual, mind that why such incidents occur against women.

To solve this question researcher identified some important theoretical propositions, which are seem to be responsible for crime against women. Different theoretical frame may be useful to understand root causes of sexual harassment at work place. They are:[4]

[3] *Id.*

[4] PURAN BATRIA, SEX CRIME IN INDIA 134-152 (Uppal Publications, New Delhi, 1992).

1. The psychiatric approach or the psychopathological analysis.
2. The socio-psychological approach or the psychological analysis.
3. The socio-cultural approach or the sociological model.

A. The psycho-pathological theory

The psychopathological or psychiatric theories illustrate the root of crime by men to their psychological characteristics. The psycho-pathological model focuses on the offender's personality characteristics as the chief determinants of criminal violence. This model includes analysis that links mental illness (i.e., a very small portion of mentally ill persons are violent), alcohol (i.e., what one does under the influence of alcohol and other drugs) and other intra-individual phenomenon to acts of violence. This theory gives two different explanations. According to one, the causes of crime against women arise from the offender's psychological problems. According to the other, crime against women arises out of the psychological problems of the victims. There are however no adequate data to support either of these points of views. If women who are battered, rape or kidnapped behave strangely, it is possibly the consequence and not the cause of being battered or raped or kidnapped. The evaluation of psycho-pathological approach to crime has also shown that the proportion of individuals who use crime against women and suffers from psycho-pathological disorders is no greater than the proportion of the population in general with psycho-pathological disorders. The basis of above two explanations i.e. men being abusive because of some psychological disorders and women bringing violence upon themselves, studies shows that individual who use crime against women do not suffer from psychopathological disorders in a disproportionate number. It is difficult that all acts of crime arise out of psycho-pathological disorders. The role of environment and other social forces that influence actions cannot be under estimated**.**

B. Socio-psychological theories

The socio-psychological approach assumes that violence can best be understood by a careful examination of the external environmental factors, which have an impact on the individual.

C. Socio - cultural theories

a) Structural theory

This theory asserts that social groups differ in respect to their typical level of stress, deprivation and frustration and in the resources at their disposal to deal with these stresses. It explains that those individuals would be more violent which combine high stress with low resources. This theory thus explains an individual's action in terms of the ways it is shaped or determined by social forces of one kind or another. The offender's violence is seen as determined by the degree of his integration in the system.

One consequence of accepting this position is that the action of individuals' has nothing to do with their personalities and values, and that violence cannot be described in terms of conflict, suppression, sublimation, guilt, and so on. The role of "rationality" also has to be rejected in social action. The structuralism perspective, thus, leaves some questions unanswered because of which it cannot be accepted.

b) Anomic theory

Anomic theory discusses socially learned needs, goals and aspirations and the restricted structural access or institutionalized means to their attainments maintained. It explains that some social structures exert a definite pressure upon certain persons in the society to engage in non-traditional rather traditional person conduct.

(i) When there is a tendency to overemphasize the goals without sufficient attention to institutional means, it leads to a willingness to use any means, regardless of their legality, to see that goal is attained.

The theory thus describes the relationship between one's social position, the strain which accompanies that position, and the resulting deviant and non-deviant adaptations. The possible adaptations that can occur when the goals have been internalized but cannot be legitimately attained. However, the major concern is with the innovator: the person who uses unlawful, but nonetheless effective, means to goals. This theory reveals that all crimes are not explained in terms of anomie. The rapists, the kidnappers, the murderers and the batterers do not have any monetary success goal in their minds, which may push them in the direction of illegitimate behavior. In fact, the anomie theory poses many questions - for instance, those of the validity of assuming a dominant value system, the location of anomie within the individual or the normative system, and the nature of the conflict between the norms of the general culture and those of the norms internalized by the individual.

c) Social learning theory

This theory asserts that human aggression and violence are learned conduct, especially through direct experience and by observing the behavior of others. According to this theory, the individual learns violence through imitation, Individuals pick up the behavior patterns of those they are taught to respect and learn from. Whether observed in the flesh or via visual media, the individuals readily imitate the behavior of aggressive models. Aggressive behavior patterns learned through modeling and imitation remain part of our range of social responses over time.

Sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones whether directly or by implication, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her. Any action of

gesture, whether directly or by implication, aims at or has the tendency to outrange the modesty of a female employee, must fall under the general concept of the definition of sexual harassment.[5]

IV. SEXUAL HARASSMENT: VIOLATION OF FUNDAMENTAL RIGHT

Sexual harassment and sex discrimination are considered to be violation of Human Rights. All human rights derive from the dignity and worth inherent in the human person and the human person is the cultural subject of Human Rights and Fundamental Freedoms. The United Nations Organization (UNO), keeping with its character to promote and encourage respect of Human Rights and Fundamental Freedoms for all without distinction, came out with an International Bill of Human Rights consisting of:[6]

(a) Universal Declaration of Human Rights, 1948

(b) The International covenant on civil and Political Rights, 1966

(c) The International covenant of Economic, Social and Cultural Rights, 1966 and

(d) The Optional Protocol, 1966 providing for the right of the individual to petition International agencies. The following are the principles on which the above charters were introduced:

1) All Human beings, without distinction, have been brought within the scope of human rights instruments.

2) Equality of application without distinction of race, sex, language or religion

3) Emphasis on international co-operation for implementation.

Article 1, 2 and 7 of Universal Declaration of Human Rights, 1948 deals with equal in dignity, rights & freedoms and equal protection against any discrimination.

[5] *Supra* note 1.
[6] *Supra* note 1.

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another n a spirit of brotherhood.

Article 2: Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind such as race, colour, sex language, religion, political or other opinion, national or social origin, property, birth or other status (first part of Art.2).

Article 7: All are entitled to equal protection against any discrimination in violation of this Declaration against any incitement to such discrimination (Second sentence of Art.7).

Part II of Article 2 (2) and 3 of International covenant on Economic, Social and Cultural Rights, 1966 also deals with discrimination of any kind and equal right of men and women.

Article 2 (2): The States Parties to the present covenant undertake to guarantee that rights enunciated in the present covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3: The States parties to the present covenant undertake to ensure the equal right of men and women to the enjoyment of all Economic, Social and Cultural Rights set forth in the present covenant.

According to the Protection of Human Right Act, 1993 "human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India. It is necessary and expedient for employers in work places as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women as to live with dignity is a human right guaranteed by our Constitution.[7] The Constitution of India guaranteed fundamental rights to its citizens. When we compare provisions of the Constitution of India to that of

[7]http://www.legalserviceindia.com/articles/sexual_har.htm.

Universal Declaration of Human Rights, we find many Articles have the same spirit. Article 14, 15 and 21 of Constitution of India mentions key words on Equality before law, prohibition of discrimination on grounds of religion, race, caste, sex or place of birth and protection of life and personal liberty.

Recognizing the invisible nature of power structures that marginalize women at the workplace, the Supreme Court in the landmark *Vishaka* v. *State of Rajasthan*[8] identified sexual harassment as violative of the women's right to equality in the workplace and enlarged the ambit of its definition. The judgment equates a hostile work environment on the same plane as a direct request for sexual favours. To quote: *"Sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as: physical contact and advances; a demand or request for sexual favour; sexually coloured remarks; showing pornography; any other unwelcome physical, verbal or non-verbal conduct of sexual nature."*

The Supreme Court of India rendered yet another Judgment on sexual harassment in *AEPC* v. *A.K. Chopra*[9] in the instant case is about a woman employee of Apparel Export Promotion Council, who worked as the private secretary to A.K. Chopra, the Chairman of the company. She complained to the Personnel Director that the chairman was sexually harassing her. Despite her repeated protests, he was making sexual advances by 'trying to touch her' and 'sit close to her.' The company immediately suspended him and ordered a departmental enquiry. The enquired confirmed female employee's position that the chairman tried to touch her with a sexual motive and the chairman was dismissed from service.

The chairman challenged the disciplinary committee order in Delhi High Court and the harasser was successful on the ground that the chairman only 'tried to molest' but did not 'in fact molest' the female employee. By shocking with the verdict, the company filed appeal

[8] A.I.R. 1997 SC 301(India).
[9] 1999 (1) S.C.C. 759(India).

before the same High Court which was heard by Division Bench. Interestingly, the Division Bench agreed with the findings of single judge and reiterated that the chairman not 'actually molested' the female employee.

As against the Judgment, the company once again filed an appeal in the Supreme Court. One of the issues that was deliberated at length by this court was "*whether physical contact with the woman was an essential ingredient of a charge of sexual harassment*."

The Supreme Court while setting aside the High Court and upholding the dismissal of chairman held that:

a) The attempts by the superior to sit close to the female employee and touch her, though unsuccessful, would amount to 'sexual harassment'. The behaviour of the superior did not cease to be outrageous in the absence of an actual assault by the superior.

b) In the context of a female employee the sexual harassment at the work place is a form of sex discrimination which any be projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication. This would be particularly so when submission or rejection of such conduct by the female employee could be used to affect her employment by unreasonably interfering with her work performance thereby, creating a hostile working atmosphere for her.

c) Where the conduct of a superior towards his junior female employee was wholly against moral sanctions and was offensive to her modesty, any lenient action would demoralize working women. Therefore, the punishment of dismissal from service was commensurate with the gravity of the superior's behaviour.

d) Each incident of sexual harassment at workplace violates the fundamental right to gender equality and the right to life and liberty guaranteed by the constitution of India. The fundamental right in the Constitution cover all facts of gender equality including prevention of sexual harassment and abuse. The courts are under a constitutional

obligation to protect and preserve those rights.
e) International instruments like Convention on Prevention of All forms of Discrimination Against Women, Beijing Declaration on Women and International Covenant on Economic, Social and Cultural Rights cast an obligation on the Indian Government to sensitize its laws. The courts are under an obligation to see that this message is accepted and followed.

The judgment mandates appropriate work conditions should be provided for work, leisure, health, and hygiene to further ensure that there is no hostile environment towards women at the workplace and no woman employee should have reasonable grounds to believe that she is disadvantaged in connection with her employment. Not surprisingly many cases go unreported. However, given the complexities involved, company policy is the first step and cannot wish away the problem. The U.S. Equal Employment Opportunity Commission ("**EEOC**") has made certain parameters to test sexual harassment at work places.

- The victim as well as the harasser may be a woman or a man.
- The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee, a teacher or professor, a student, a friend or a stranger.

  The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
  The harasser's conduct must be unwelcome.

India and other countries should on the same lines of EEOC design some parameters too to check the menace of sexual harassment at work place.

V. IMPACT OF SEXUAL HARASSMENT

To understand the collision of sexual harassment on women one must pay attention to the explanation of its victims as no one expresses the meaning and fact of sexual harassment better than the women who have undergone it. In response to the question "*what sort of disturbing reply does sexual harassment call to mind in you*", no one indicates the class of "uncaring". Women often internalize male perceptions of sexual harassment and blame themselves for having brought on the harassment. They not only doubt the validity of their own experiences but begin to believe that they themselves must be 'abnormal', 'cheap', 'indecent' or deserving the violence that comes their way.

Most respondents, men and women, described 'verbal harassment' as eve teasing and contrasted this with 'physical harassment' which has been seen as sexual harassment. They described eve teasing as relatively harmless behavior committed usually by strangers, while sexual harassment would be serious committed by acquaintances or men in positions of institutional power. In addition, most men and women described eve teasing as isolated incidents while sexual harassment would typically be repetitive and sustained over a long period of time. Many respondents said that they felt extreme anger, frustration and helplessness at not being able to do anything about the harassment.[10] Women stated that sexual harassment has affected women's personal or academic development in one way or another.

VI. SUGGESTIVE MEASURES

The prosecutors, police officers & judges play important roles in the legal system's response to sexual harassment, Because they are generally the final authority in civil and criminal matters involving sexual harassment abuse, judges hold substantial power to sanction

[10]http://www.legalserviceindia.com/helpline/help6.htm.

batterers, protect battered women, and to send messages to the community, the victim, and the batterer alike that sexual harassment will not be tolerated.[11]

Although prosecutors in India often have considerable control over the initiation and course of criminal proceedings, to the extent judges are able to make choices regarding sentencing or other aspects of the criminal trial, these choices may be influenced by myths about sexual harassment. If, for example, judges believe that alcoholism causes sexual harassment, Judges may not understand that sexually harassed women are most vulnerable when they attempt to leave a relationship and therefore may fail to take steps to ensure that women are protected inside and outside of the courtroom.

Judicial responses to sexual harassment can, however, further victim safety and offenders' accountability in many ways. In the courtroom, judges are enforcers and interpreters of existing laws; they may also have the ability to establish courtroom policies and procedures that promote victim safety and are respectful of all parties.

Advocates can work to improve judicial responses to sexual harassment in a number of ways. Court monitoring, for example, helps to systematically identify needed improvement in judicial responses and also increase the visibility of these issues; the presence of monitors in courtrooms can itself cause judges to improve their handling of sexual harassment cases. Trainings for judges can provide judges with the information they need to better address the needs of sexually harassed women and ensure offenders accountability. Finally, dedicated courts and court processes can also help ensure offenders accountability and victim protection by streamlining navigation of the court system, increasing victims' access to resources, and ensuring a greater expertise of the judges and other personnel addressing these issues.

[11]Reddy, C.R., *Eve- teasing - A Sociological Approach,* 28(1) IJSR 99-100 (Mar. 1987).

IN RE OCL INDIA LTD. - AN ANALYSIS

Shubham Khare[*]

I. INTRODUCTION

Buy Back of securities means where the company or the promoters of the company buyback the shares issued by them from the shareholders.

The provisions regulating buy back of shares are contained in Section *77A, 77AA and 77B of the Companies Act, 1956*. These were inserted by the Companies (Amendment) Act, 1999. The Securities and Exchange Board of India (SEBI) framed the *SEBI(Buy Back of Securities) Regulations, 1999* and the Department of Company Affairs framed the *Private Limited Company and Unlisted Public company (Buy Back of Securities) rules, 1999* pursuant to Section 77A(2)(f) and (g) respectively.[1]

A company may undertake buy back of shares for number of reasons major amongst them being (i) To increase promoter holdings (ii) To increase earnings per share (iii) Rationalizing Capital structure (iv) To support share value (v) To thwart takeover bid (vi) To pay off surplus cash not required by business.[2]

The Buy Back of Share undertaken by a listed company is regulated by *SEBI (Buy Back of Securities) Regulations, 1999* and also by the *SEBI (Substantial Acquisition of Shares and Takeover) regulations, 1997* (takeover code)**.**

This case note analyses the recent order passed by the SEBI in the matter of acquisition of voting rights of *OCL India Limited* pertaining to question that whether buy back of Securities triggers an open offer

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[1]G.P. Sahi, *Buy back of Shares under the Companies Act, 1956* (Mar. 16, 2010), http://www.legalserviceindia.com/articles/shares.htm.

[2]*Id.*

under the takeover code. The case deals with the interplay of buy back of shares and takeover code. This order becomes all the more important in the current scenario wherein SEBI has appointed a Takeover Amendment Committee to examine the existing takeover code and to give recommendations for its overhaul. The case basically deals with the question that whether buy back of shares which entitles the promoters to exercise voting rights beyond the benchmarks prescribed by the takeover code would trigger the open offer for further acquisition of shares or not?

II. IN RE OCL INDIA LIMITED

A. Facts

1) The Securities and Exchange Board India issued a notice to the Promoters of OCL India Limited (collectively known as the Acquirer[3]) in respect of their acquisition of 12.44% voting rights of the Target Company[4] and subsequent alleged contravention of Regulation 11(1) of the takeover code. The show-cause notice was an outcome of examination undertaken by SEBI pursuant to the order of the Delhi High Court in the matter of Jindal Securities Pvt. Ltd v. Securities and Exchange Board of India and Ors. The High Court disposed off the petition stating that *"The order be treated as a petition to the Respondent No. 1 (SEBI), the learned counsel appearing on the behalf of Respondent No. 1 states that it shall so consider this petition and deal with it in accordance with the law indicating the outcome to the proceedings to the parties.*

[3]Regulation 2 (b) of SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997 defines Acquirer as "any person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in the target company, or acquires or agrees to acquire control over the target company, either by himself or with any person acting in concert with the acquirer."

[4]Regulation 2(o) of SEBI *(Substantial Acquisition of Shares and Takeover) Regulations, 1997* defines Target Company as "means a listed company whose shares or voting rights or control is acquired or is being acquired."

This is without prejudice to the rights and contentions of the parties."[5]

2) The writ petition was filed for a direction quashing the decision of the target company to open the Rights issue alleging it was done in violation of the takeover code. It was alleged that the petitioner has informed the target company that the shareholding of its promoters showed the violation of Reg. 11(1) and 11(2) of the takeover code. In pursuance to this the Target Company has communicated it to the petitioner that the increase in the shareholding of the promoters is by virtue of buy back of shares. The petition stated that even if the increase in the shareholding of the promoters is because of buy back of shares, the law makes an obligation on the Acquirer to make an open offer to shareholders for acquisition of further 20% of the shares.
3) SEBI in pursuance to the order observed that the target company came out with a buy back offer for 11, 83,708 at a face value of Rs. 10/- each. Pursuant to the Buy back offer the promoter shareholding increased from 62.56% to 75%. As per the provision of the takeover code in the year 2003, the Acquirer is supposed to make an open offer. On their failure to do so SEBI issued a show cause notice to the Acquirer stating the following:
    (i) The Acquirer is liable to penal action under Takeover code and SEBI Act, 1992.
    (ii) To show cause as to why the Acquirer should not be directed to make an open offer to the shareholders.

B. Issue

The issue under consideration in the present case is whether increase in voting rights of the promoters from 62.56% to 75% in pursuance to a buy back is in violation of 11(1) of the *SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997* as existed in

[5]The order of SEBI in the matter of OCL India Limited, 2010 S.C.C. OnLine SEBI 188.

the year 2003 made it imperative on them to make an open offer for acquisition of further 20% of the shares from the shareholder company and the failure to do so makes them liable of contravention of Regulation 11(1) of the takeover code.

C. Law on the Point

The present case is governed by Regulation 11(1) of the *SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997* as it existed in the year 2003. It is stated as follows *"No acquirer who, together with persons acting in concert with him, has acquired, in accordance with provisions of law, 15% or more but less than 75% of shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares and voting rights entitling him to exercise more than 5% of the voting rights, in any financial year ending on 31st March, unless such acquirer makes a public announcement to acquire shares in accordance with the takeover regulations."*

D. Contentions Put Forward by the Acquirer

1) The Contention put forward by the Acquirer is that they have not acquired any shares in the target company. According to them acquisition of shares is a condition precedent to trigger the takeover code. They relied on the meaning of the word 'Acquirer' as stated in the Black's Law Dictionary. It defines Acquirer as *"to gain by any means, usually by one's own exertion; to get as one's own; to obtain by search.*"
2) They contended that the increase was incidental to Buy Back and not due to acquisition of shares; hence public announcement is not required.
3) They had further submitted that the promoters had not participated in the buy back.
4) The Acquirer also contended that the word *'or'* used in Regulation 11(1) shall be interpreted as *'and'*. They contended that since they

have not participated in the buy back the word *'shares or voting rights'* shall be interpreted as '*shares and voting rights.'*

5) The Acquirer also contended that they are not liable of contravention of Regulation 11(1) as they would have achieved an exemption from making the open offer under Regulation 3 of the takeover code.

E. Order

SEBI after examining the contentions raised by the Acquirer observed that what was required to establish in the matter was whether the Acquirer are liable for contravention of Regulation 11(1) of the takeover code. It observed Regulation 11(1) clearly lays down that acquisition of additional shares or voting rights that entitles Acquirer to exercise 5% or more voting rights in a year shall not be allowed unless the Acquirer makes an open offer for acquisition of further 20% shares from the shareholders of the target company. In the present case the voting rights of the Acquirer increased from *62.56% to 75%* which amounts to an increase of *12.44%* voting rights. Hence the contention of the Acquirer that 11(1) would not be applicable to them would not hold good. The law laid down in Regulation 11(1) is unambiguous and clear and also under the scheme of Takeover code it is not the mode of acquisition but the resultant of acquisition that matters. The right accrued upon the Acquirer to exercise such additional voting rights (more than 5%) is what matters irrespective of whether it is a direct acquisition or consequential acquisition; subsequently it becomes imperative for the Acquirer to make an open offer unless he is exempted under Regulation 3 of the takeover code.

It further observed that the contention of the Acquirer that the word *'or'* in Regulation 11(1) of the takeover code shall be read as *'and'* in a case where the increase in the voting rights is consequential to the action of the shareholders. This contention of the Acquirer was also rejected by SEBI on the ground that Regulation 11(1) clearly states that *"……additional shares* ***or*** *voting rights entitling him to exercise more than 5% of the voting rights…."* There is no ambiguity

in the provision. It also relied on the judgment of the apex court in *Puran Singh v. State of Madhya Pradesh*[6] wherein the court observed that *"the reading of 'or' as 'and' shall not be resorted to unless some part of the same statute or the clear intention of it requires that to be done."* As the use of the word 'or' in Regulation 11(1) does not give any absurd or unintelligible meaning the use of 'and' is not warranted in place of 'or' in the said regulation. The regulation clearly lays down that the transfer of control either by acquisition of shares or acquisition of voting or by both shall trigger the takeover code if it goes beyond the prescribed benchmarks. It further relied on the judgment of Securities Appellate Tribunal in the matter of *Shri. Kiron Margadasi Financiers v. Adjudicating Officer, SEBI,* wherein it was observed *"it is not the manner in which the shares are acquired. It is the effect that triggers the action. If the acquisition has no effect on the voting rights, regulation is not attracted."*

The Acquirer also contended that they are not liable as if they would have applied for exemption they would have been eligible to be exempted from making an open offer under Regulation 3 of takeover code. It further stated that SEBI had in the past granted exemptions in similar cases. SEBI observed that this contention of the Acquirer would also not hold well because in all cases where SEBI has granted exemption under Regulation 3 in the past, an application from the side of the Acquirer was made through the panel route. The application was considered by the takeover panel and the takeover panel had recommended that Acquirer shall be granted exemption thereafter the recommendation along with said documents and application was examined by SEBI before granting an exemption. In the present case admittedly there was no application for exemption under Regulation 3 was filed by the Acquirer.

It finally concluded that the Acquirer is liable for the contravention of Regulation 11(1) of the takeover code. It observed that the value of shares of the target company during 2002- 2003 was at its lowest at

[6]A.I.R. 1965 SC 1583(India).

Rs. 40 per share (September 2002) and highest at Rs. 77 per share (March 2003) as compared to the present market price that is Rs. 134.90 per share. The pricing formula as prescribed in the takeover code will not benefit the shareholders and hence the Acquirer was not ordered to make an open offer. SEBI in furtherance of the power granted to it under Regulation11 and 11B of the SEBI Act, 1992 read with section 19 thereof along with Regulation 44 and 45 of the takeover code directed that adjudication proceedings shall be initiated against the Acquirer.

III. CONCLUSION

The rapidly advancing Indian economy provides huge opportunities for companies and enterprises to grow organically and inorganically. Organic growth is limited in nature and hence it is the inorganic growth that is most sought after. The companies grow inorganically by takeover, amalgamation or merger. The *SEBI (Acquisition of Shares and Takeover) Regulations, 1997* is the legal framework governing and regulating takeovers and acquisitions of listed companies in India. The legislative intent behind the takeover code is to regulate the transfer of control. The control could be transferred by acquisition of either shares or voting rights by an Acquirer. The control could also be consolidated by the promoters by buy back of securities issued to the shareholders. Any kind of buy back that increases the voting rights of the promoter beyond the benchmark prescribed in the takeover code shall trigger the takeover code.

In the afore discussed case it has been laid down by SEBI that even if the promoter does not participate in the buy back directly or they do not acquire any shares but if the buy back results in increase in the voting right beyond a certain limit they would be liable to make an open offer. The case basically lays down that any form of transfer of control of a listed enterprise either by way of acquisition of shares by an outsider or by way of buy back of shares by the promoters shall be

governed as the provisions laid down in the takeover regulations. It reiterates the fact that changes in control of a listed enterprise shall be regulated by the takeover code. It further establishes that it is not the mode of acquisition but the effect of the acquisition that would trigger the takeover code. This case though gives effect to Regulation 11(1) of the takeover code, 1997 as it prevailed in 2003 can be used as a guiding light in deciding cases of creeping acquisitions by buy back of share under the present takeover code.

RAJESH KUMAR V. STATE OF HIMACHAL PRADESH: IS TO ERR JUSTICE?

Salmoli Choudhuri[*]

I. INTRODUCTION

'*Judges as persons or courts as institutions are entitled to no greater immunity from criticism than other persons or institutions (Frankfurter).*'[1]

Iyer's reminiscence of this plutocratic ideal lubricates the psychological and intellectual intent of the author to ponder over the diktat of the case, *Rajesh Kumar* v. *State of Himachal Pradesh.*[2] Law and justice should share a symbiotic relationship and synchronization of the symmetry of the legal lexicon with ideals of universal goodness, utilitarianism and egalitarianism must be pronounced for a construction of a democratic polity. The voice of Austin that had echoed in the Classical legal sky had long been subdued by the revolutionizing faith of equity and good conscience. The lapse in the judgement does not call upon any exterior normative sense to be structured on the mind of the justice, but it merely indicates error in the perception of the codified law. Absolute justice rests on a Platonic ideal plane as judges are human and it is humane to err; however, partial justice in the form of conformity to the extant guiding and grounding administrative and judicial materials is to be achieved. The decision of the present case reveals a faulty perception of the law and facts of the case that form the structure of justice delivery.

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[1]JUSTICE V.R. KRISHNA IYER, JUSTICES AND JUSTICING, OFF THE BENCH 13 (Universal Law Publishing Co. Ltd., Delhi).

[2]A.I.R. 2009 SC 1(India).

The question of law dwells with one of the most discussed provisions of the Indian Penal Code, namely, Sec 302 read with Sec 34. Intention along with several other human mental intent forms the foundation of criminology. It is not only the overt act that imputes the person with liability, but also the psychology that had induced him to indulge in such deviant behaviour.

II. FACTS OF THE CASE AND RULING OF THE COURTS

The facts of the case are such that the deceased and the two accused belonged to the same village. The deceased had gone to a market where he met two of his friends, PW 14 and PW 15 and the former expressed his desire to excrete which led them to travel on his scooter to a secluded area. As the deceased and PW 15 waited, PW 14 came within a short period of time. The two accused happened to pass the place at that point of time and on seeing the deceased, they pounced on him, one wielding a *drat* and other a *danda*. Surjit Singh, one of the accused, hit the deceased on the head with a *drat* and Rajesh Kumar, the other accused, gave several blows to the other parts of the deceased's body. PW 14 could overpower the latter and somehow, freeing himself from the clutches of the former, the deceased ran for life, although he soon fell unconscious. Both the accused fled after the occurrence. Later that day, the deceased passed away and the report opined that the injury inflicted on the head was sufficient to cause death in the ordinary course of nature. The trial court established common intention of the accused and convicted both of them under Sec 302 read with Sec 34 of the IPC. The High Court also upheld the judgement. Both the accused appeared before the Apex Court under the Special Leave Petition. Though it was dismissed as far as Surjit Singh is concerned, yet the issues were debated widely in case of Rajesh Kumar. The court held the latter guilty merely under Section 326 of the Code.

III. PRINCIPLE OF LAW

'They also serve who only stand and wait.'

These words of Milton which tune the humanitarian chords of the mortal hearts, most melodiously in an unfathomable bliss, also serve as a guiding tenet to deciding a point of law. Sec 34 lays down the rule, "*when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone*." There are, thus, three main ingredients of the Section:[3]

a. A criminal act must be done by several persons
b. The criminal act must be to further the common intention of all, and
c. There must be participation of all persons in furthering the common intention.[4]

Sec 33 states that an 'act' implies a 'series of acts' and in the instant section where 'co-operative criminal act' is being delved on, then it is very much likely that the acts of the persons involved would not be of the same nature. There must be presence of a general intention and the act must be done in furtherance of a common design. Although, prior meeting of mind is important, however, a long duration between the formation of the intention and the actual execution of the act is not necessary.

In the case of *Barendra Kumar Ghosh* v. *King Emperor*,[5] a landmark in this regard, a person who stood guard to the locus operandi was also convicted in the same manner as the accused who had committed the crime. The Section is the evidentiary expression of the unity of criminal behaviour. In the case of *Ch Pulla Reddy and others* v. *State of Andhra Pradesh*[6] it was held that the accused can be held liable

[3]K.I. VIBHUTE, PSA PILLAI'S CRIMINAL LAW 349 (Lexis Nexis Butterworths, Wadhwa, Nagpur, 10th ed., 2008).
[4]Parichhat v. State of Madhya Pradesh, A.I.R. 1972 SC 535(India).
[5]A.I.R. 1925 PC 1(India).
[6]A.I.R. 1993 SC 1899(India).

even if no overt act has been accomplished by him. Quite interestingly, the same justice had been a part of the Division bench that had given its verdict in the case, *State of MP* v *Deshraj*[7] and to the utter astonishment of the author similar facts as of this case has been painted with the true colour of justice. The death of the deceased in that case, according to the report, was the result of the single fatal blow on the head and not the other injuries that were inflicted to him by other agents. The High Court's plea of frailty of evidence was not met with pleasure in the Supreme Court which pronounced, 'the provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them'. Thus it is not the overt act that should govern the juristic intellect; rather, it is the intention that should relish the aura of prominence.

IV. FAILED JUSTICE?

In the same case,[8] it was inferred that direct proof of common intention is seldom available and therefore it must be concocted from the set of facts and circumstances. The paradoxical stand of the judge has been virtually potent of shocking the good sense of justice. There has been no reason stated in the judgement that appeals the apt chord of understanding. The judge had put forth very few points to further his temperament.

Firstly, he reasoned that as the accused did not make any attempt to recover the *lathi* once made devoid of it, he cannot be held to nurture the same intention as his brother.

Secondly, the report of the medical practitioner clearly revealed that the blow on the head was grave enough to cause death in the ordinary course of nature.

[7] A.I.R. 2004 SC 2764(India).
[8] *Id.*

Thirdly, he opined that as the accused had hit only the non-vital parts of the body of the deceased, he cannot be held liable.
The depravity in comprehension can be gauged by arguing in similar lines.

Firstly, human psychology cannot be predicted or hypothesized with that relaxing lucidity. The ground put forth in the judgement is feeble and does not take into account of the several other instances where the intention of the accused explicitly came to the fore. That the accused did not stop his brother when he pounced on the victim with the 'drat' (the severity of the blow of which is well comprehensible) and that he accompanied him with a *lathi* clearly reveals that he shared the common intention.

Secondly, the doctor had used the term 'could' before his interpretation of the causal factor behind the demise of the victim. The divergence in the degree of certainty can be questioned in this instance. However, even if the singular blow was potential enough to cause the death of the deceased, it did not make much difference with regard to the affective stretch of the Section. In the case of *Rishideo Pandey* v. *State of Uttar Pradesh,*[9] where the facts were very much similar to the case under discussion and the appellant had only been holding a *lathi* without striking any blow when the accused had hit the deceased with a *gandasa*, the Supreme Court had observed that he is guilty of the same offence as committed by the other as he was in full knowledge of the fact that the act of the latter would inevitably lead to the death of the deceased. Thus, though he had remained dormant in case of striking the deceased, yet he definitely shared the common intention. In the case under discussion, as can be comprehended from the facts of the case, the accused were not in the knowledge that the victim would be found in the place of occurrence. However, the enmity must have existed from before that led to their prompt action. This could have been the reason for their less preparedness, for the reason of which the accused was carrying merely a *lathi*. Their

[9]A.I.R. 1955 SC 331(India).

immediate attack on the victim does not go to contradict the principles of Sec 34. It was held in *Krishna Govind Patil* v. *State of Maharashtra*[10] that the pre-arranged plan may develop on the spot during the course of the commission of the offence; the crucial circumstance is that the said plan must precede the act constituting the offence.

The reason, as stated above nullifies the third reasoning of the court also.

The order has absolutely not been a reasoned one and such discrepancy in a judgement delivered by the Court occupying the highest pedestal in the nation is highly unfortunate. Such understanding completely dissolves the principle of joint liability. If such comprehension be given utmost priority, then a multitude of cases of the similar fervor which had been decided at a prior date would be considered to be completely flawed. It would not be a deviance from the discussion if the author furnishes the following example. In a case of gang-rape, if seven individuals are present and six were able to rape the victim whereas, the other could not perpetrate the act due to some reason or the other, then going by the present decision, he would not be held guilty. If this be the understanding, then the dome of justice would demolish in its entirety.

The sense of justice attained plutocratic leaps as the resonance of the verbatim reverberated in the court room:

> *'My Lords, murder is widely thought to be the gravest of crimes. One could expect a developed system to embody a law of murder clear enough to yield an unequivocal result on a given set of facts, a result which conforms with apparent justice and has a sound intellectual base,*' (as per Lord Mustill at p.938).[11] The culpable causing of another person's death

[10]A.I.R. 1963 SC 1413(India).

[11]DAVID ORMEROD, SMITH AND HOGAN'S CRIMINAL LAW (Oxford University Press, New York, 9th ed., 2006).

> may fairly be regarded as the most serious offence in the criminal calendar.[12] Death is final and it is this finality that makes it proper to regard the culpable causing of death without justification or excuse as the highest wrong.[13]

If for instance two persons go together to kill a particular person and several wounds are inflicted on him by a person, with a knife, which are sufficient enough to lead to his death and subsequently, to make sure of the fact of his death the other stabs him for the first time. However, by the time the latter stabs the deceased he had already breathed his last. Then also for the upholding of a sound principle the person inflicting the last stab after the death of the person should be convicted in a similar manner as the person afflicting the former stabs.[14] If such be the nature of stricture, then it blandly puts forth the argument of the author.

Sec 300 of the IPC defines murder and Sec 302 lays down the punishment for the offence. With respect to the present case, the issue related to this provision has not gained much significance as it has not come up in the dais of discussion. The main ingredient to reason the conviction of a person for murder is his mens rea. The act as committed in the case under discussion has been denoted as the third part of the definition of murder as engraved in Sec 300. The idea that the provision beholds is that there must be some infliction of bodily injury and the intention must be the causing of the death of the person which would happen in the ordinary course of nature due to the bodily injury. Though in the instant case, the blow was given by one person, yet the presence of the other explicitly indicated the latter's intention, which was, to kill the deceased.

[12]ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 249 (Oxford University Press, New York, 5th ed., 2006).
[13]*Id.*
[14]Example influenced by the one cited in GLANVILLE WILLIAMS, TEXT BOOK OF CRIMINAL LAW 225 (Universal Law Publishing Co. Pvt. Ltd, Delhi, 2nd ed., 2009).

V. CONCLUSION

Intention should be given its normal meaning. Lord Asquith in *Cunliffe* v. *Goodman*[15] explained that "*intention connotes a state of affairs which the party intending…does more than merely contemplate; it connotes a state of affairs which on the contrary, he decides, so far as in him lies, to bring about."*[16] The jury can draw the inference from the surrounding circumstances including the presumption of law that a man intends the natural and probable consequence of his acts.[17] Common intention should be constructed from the facts and circumstances of the cases. Sec 34 of the IPC is not a substantive section but one of evidence, thus, involving greater technicalities with respect to those of other sections. A show of greater prudence is demanded from such a high pedestal of justice delivery mechanism. We should not be oblivious of the fact there is left a scope for rectification of the error that can be committed by the subordinate judiciary. However, no such opportunity is vested with the system in case of any miscarriage of justice by the Apex Court. Ergo, such blatant errors, as displayed in this case, would hammer the last nail to the coffin of pervasive ideas of right and proper.

[15](1950) 2KB 237, 253 (CA).

[16]JONATHAN HERRING, CRIMINAL LAW TEXT, CASES AND MATERIALS (Oxford University Press, Great Britain, 3rd ed., 2006).

[17]STEPHEN FORESTER, CRIMINAL LAW AND PRACTICE 38 (Thomson, Sweet and Maxwell, London, 1st ed., 2008).

ELPRO INTERNATIONAL LTD. IN RE. - AN ANALYSIS

Niharika Maske[*]

I. INTRODUCTION

The '*reduction of share capital'* means '*the process of decreasing a company's shareholder equity through share cancellations and share repurchases.*[1] A company limited by shares or by guarantee and having share capital can, if authorised by its articles of association, by special resolution and subject to confirmation by the court on petition reduce its share capital in the manner prescribed under the Companies Act 1956 (hereinafter the Act).

The relevant legal provisions which deal with the reduction of share capital are section 100 to Section 104 of The Companies Act, 1956. These provisions are an exception to the general principle that a company which is limited by shares or guarantee is not allowed to reduce its capital. These sections lay down the ways in which the share capital of a company is allowed to be reduced and the procedure to be followed thereafter.

This case note analyses the recent order passed by the Bombay High Court in the matter of *Elpro International Limited, In re*[2] which deals with the issue that whether selective reduction of share capital is permissible under The Companies Act or not. This case becomes important because it raises the question -is there any legal requirement for the scheme of reduction of capital to be applicable to all shareholders or else can the scheme can be made applicable to a

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[1]Investopedia, *Meaning of Capital Reduction*, http://www.investopedia.com/terms/c/capitalreduction.asp (last visited on Mar. 18, 2010).

[2]2009 4 COMP LJ 406 (Bom).

select group of shareholders? This case basically balances the rights of active and minority shareholders. It also gives primacy to shareholder activism in the management of the company.

II. ELPRO INTERNATIONAL LIMITED, IN RE

A. Facts

1. Elpro International Limited ("**Company**"), a company listed on the Bombay Stock Exchange ("**BSE**") proposed to extinguish and cancel 8,89,169 shares held by its shareholders constituting 25 per cent of the issued and paid up share capital at a price of Rs. 183 per equity share in accordance with section 100 of the Act.
2. On January 27, 2006, a board resolution for effecting the reduction of the issued and paid up share capital was passed seeking shareholder approval for the scheme for reduction of capital by postal ballot. The scheme propounded that the reduction of share capital would take place from amongst shareholders who either vote in favour of the Scheme or do not object to the same.
3. The Scheme was approved by more than 95% shareholders and creditors, and a petition was proposed to be filed with the Court under Section 102 of the Act seeking an order for confirmation of the reduction of share capital. On July 25, 2006, a copy of such petition was filed with BSE as prescribed under Clause 24(f) of the Listing Agreement.
4. On August 22, 2006, BSE issued a letter to the Company stating that the Scheme should be made applicable either to all the shareholders of the Company or only to those shareholders who have furnished a positive assent to the special resolution. The Company was also advised not to file the Scheme with the Court unless a no-objection is granted by BSE.

B. Issue

Whether a selective reduction of share capital is permissible under the Companies Act, 1956?

C. Law applicable

Section 100 of the Act provides for "*Special resolution for Reduction of Share Capital.*" It says that -

(1) Subject to confirmation by the Tribunal[3]*, a company limited by shares or a company limited by guarantee and having a share capital, may, if so authorised by its articles, by special resolution, reduce its share capital in any way; and in particular and without prejudice to the generality' of the foregoing power, may--*

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up;

(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid- up share capital which is lost, or is unrepresented by available assets; or

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid- up share capital which is in excess of the wants of the company; and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2) A special resolution under this section is in this Act referred to as "a resolution for reducing share capital."

Section 101 of the Act deals with the *application to be filed with Tribunal for confirming order, objections by creditors, and settlement of list of objecting creditors.* It says that where a company has passed a resolution for reducing share capital, it may apply, by petition, to the Tribunal, for an order confirming the reduction. Sub-section (2) provides that where the proposed reduction of share capital involves either the diminution of liability in respect of unpaid share capital or

[3]Substituted by Act 11 of 2003, sec 14 for "Court". But this amendment is yet to be notified.

the payment to any shareholder of any paid-up share capital, and in any other case if the Tribunal so directs, the provisions which have been made there under shall have effect.

D. Contentions of the parties

a) BSE's arguments

BSE contended that –

- Out of 3,835 shareholders only 112 shareholders voted in the course of the postal ballot and 3,723 shareholders did not even cast a ballot. To that extent, balance shareholders who did not cast their votes were also being treated as if they had accepted the proposed Scheme.
- Besides, the promoters held 60% of the issued share capital, which made the resolution a foregone conclusion.
- Other arguments emphatically put forth were with respect to pricing, (a) there had been a substantial increase in the prices of the shares since the date of the board meeting held for reduction – the price of the shares as on August 22, 2006 (date when the letter was issued by Bombay Stock Exchange); and (b) the promoters of the company would have the benefit of realizing a higher market value, if there is a need to increase the non-promoter shareholding to comply with the minimum public float of 25%.
- Thus the reduction ought to be effective only if the Scheme allows the surrender of shares of only those shareholders who have specifically agreed to a reduction of their capital or otherwise said Scheme shall be applicable across the board.

b) Company's arguments

The Company argued that –

- Selective reduction of capital is permissible and lawful and there is nothing provided under the Act which prohibits such selective reduction.

- The Scheme was approved by more than the required majority of shareholders and provided an exit opportunity to all the shareholders who made a positive act of casting a ballot in favour of the scheme.
- Further, the Company also averred that the price at which share capital was proposed to be returned to the shareholders was the highest of the parameters taken into consideration by the valuers in preparing the weighted average value of the shares and was at a premium over the weighted average value of each share as determined by the valuers as well as the current market value of the shares immediately before the meeting of the Board of Directors. Accordingly, there was no requirement for the Scheme to be extended to all the shareholders of the Company and the procedure stipulated under Section 101(3) of the Act was duly followed.

E. Judgement

The Court held that a classification of shareholders for the purposes of effecting the reduction of capital is not an act which is extraneous to the provisions of section 101. Court further noted that effect must be given to the plain meaning and intendment of the provisions of section 101, and corporate autonomy must have a wholesome recognition in law and unless the law circumscribes it by a clear provision, courts would not read limitations where the Legislature has not imposed them.

The Court relied on a recent decision of the Delhi High Court in the case of *Reckitt Benckiser (India) Limited*[4] where it underlined the following principles which emerge from the law relating to a reduction of share capital:

(i) The question of reduction of share capital is treated as a matter of domestic concern, i.e., it is the decision of the majority which prevails;

[4]2005 S.C.C. OnLine Del 674.

(ii) If a majority by special resolution decides to reduce share capital of the company, it has also the right to decide as to how this reduction should be carried into effect;
(iii) While reducing the share capital the company can decide to extinguish some of its shares without dealing in the same manner as with all other shares of the same class. Consequently, it is purely a domestic matter and is to be decided as to whether each member shall have his share proportionately reduced, or whether some members shall retain their shares unreduced, the shares of others being extinguished totally, receiving a just equivalent;
(iv)The company limited by shares is permitted to reduce its share capital in any manner, meaning thereby a selective reduction is permissible within the framework of law;
When the matter comes to the Court, before confirming the proposed reduction the Court has to be satisfied that (i) there is no unfair or inequitable transaction; and (ii) all the creditors entitled to object to the reduction have either consented or been paid or secured.
In light of the above, the Court held that since the majority of the shareholders had approved the resolution and that the price offered per share in the reduction of share capital exercise was fair, selective reduction of share capital was permissible.
Negating Bombay Stock Exchange's argument that shareholders abstaining from voting on the resolution should not be counted as consenting, the Court noted that that the touchstone laid down by the Act is votes by persons who are entitled to vote and who in fact cast their votes at the meeting. The fact that some shareholders may decide to abstain from the meeting will not dilute the efficacy of the resolution, general or special, provided the requisite statutory majority is found to exist. The Court also confirmed that the price being offered to the shareholders was fair and in accordance with the statutory provisions.

III. ANALYSIS

The law regards the capital of the company as something sacred[5]. The general principle of law which is founded on the principles of public policy and is rigidly enforced by the Tribunals is that no action resulting in reduction of share capital of a company is permissible except when sanctioned by court. Conservation of capital is one of the main principles of company law.[6] Share capital in effect act as security given by the company to the creditors and the creditors rely on this security for realisation of their interest. So when reduction of share capital takes place, it diminishes the fund out of which the creditors are to be paid. This is the basic reason why a company which is limited by shares or guarantee is not allowed to reduce its share capital except when sanctioned by court and in accordance with the procedure prescribed by the Act. Section 100 to 104 of The Companies Act, 1956 lays down the three different ways by which a company can reduce its share capital and its procedure.

In the present case the basic issue in question was whether selective reduction of share capital is permissible under the Act. The Court answered the question in affirmative relying on law on the point and previous case laws. The Court held that there is no legal requirement for the scheme of reduction of capital to be applicable to all shareholders and the scheme can be made applicable to a select group of shareholders so long as the prescribed consents envisaged under the Act have been procured.

Section 100 of the Act authorizes a Company to reduce its share capital and lays down the procedure which is required to be followed. Sub-section (2) of Section 101 then provides that where the proposed reduction of share capital involves either a diminution of the liability in respect of unpaid share capital or the payment to '*any*

[5]KAPOOR N.D., ELEMENTS OF MERCANTILE LAW (29th ed., Sultan Chand & Sons, 2007).

[6]AVATAR SINGH, COMPANY LAW (15th ed. Eastern Book Company, Lucknow, 2008).

shareholders' of any paid up share capital and in any other case, if the Court so directs, then the provisions which have been made there under shall have effect. The adoption by Parliament of the words *'any shareholders'* in Section 101 of the Companies Act, 1956 indicates that a reduction of share capital need not necessarily be qua all shareholders of the company, but can take place from one or more amongst the body of shareholders. The Court held that a classification of shareholders for the purposes of effecting the reduction of capital is, therefore, not an act which is extraneous to the provisions of Section 101.

The arguments put forth by the Bombay Stock Exchange that shareholders abstaining from voting on the resolution should not be counted as consenting was negated by the Court. The Court noted that the touchstone laid down by the Act is votes by persons who are entitled to vote and who in fact cast their votes at the meeting. The fact that some shareholders may decide to abstain from the meeting will not dilute the efficacy of the resolution, general or special, provided the requisite statutory majority is found to exist. The Court also confirmed that the price being offered to the shareholders was fair and in accordance with the statutory provisions.

The Court is under an onerous duty to strike a balance between the interest of shareholders and creditors and the company when it is faced up with issues relating to reduction of capital. Although the court must see that the interest of the minority have been protected and there is no unfairness shown to them, but in doing so the court shall keep in view the consideration that the decision has been arrived at by the businessmen who are fully cognizant of their necessities and are the best custodians of their interest and should therefore be slow to interfere[7].

So according to me the decision arrived at by the High Court was correct having regard to the law on the point and the previous case

[7]Rourke B.O., *Reduction of Share capital – the reassertion of discretionary power*, 87 SALJ 161 (1970).

laws. This is the second judgment delivered by the Court after the *Sandvik Asia Limited* v. *Bharat Kumar Padamsi and Ors*[8] wherein the Court had also held that selective reduction of capital is permissible under the Act. Such cases are building up strong jurisprudence in favour of selective reduction of capital.

[8]2009(3)BomCR57(India).