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MESSAGE FROM THE PATRON-IN-CHIEF

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20th February, 2013

MESSAGE

It gives me immense pleasure to know that National Law Institute University (NLIU), Bhopal, is planning to publish the next volume of its 'NLIU Law Review'

The sincere efforts on the part of NLIU, Bhopal, in publishing 'Law Review', from time to time, are laudable inasmuch as, articles, case notes and book reviews would definitely encourage and guide the students to enhance their knowledge in law.

I believe the present 'Law Review' will not only be beneficial to students and lawyers, but also to Judicial Officers and be widely acclaimed by all others engaged in the field of law.

I extend my warm greetings and felicitations to all those associated with the publication and send my good wishes for its grand success.

(Sharad A. Bobde)

MESSAGE FROM THE PATRON

It gives me great pleasure to place the fourth issue of the NLIU Law Review in your hand. The idea behind this journal was conceived and implemented with a view to encourage intellectual awareness and scholarship in myriad areas of law. Over the past, the journal has attempted to recapitulate the very latest in law through contributions from students and academicians alike. This variety has, in turn, led to versatility of opinion and perspective, and dissemination of knowledge throughout.

The journal encourages authors to submit contributions in different forms – be it an article, a comment, a case note or even a book review. This ensures that a holistic perspective may be achieved. The journal has a well-defined review procedure and after sifting through the best articles by the various Boards, the content is further evaluated by a Peer Review Mechanism. We have been fortunate to have had the support and guidance of legal luminaries who have helped the law review attain greater heights.

The law review has dealt with issues like criminal law, Constitutional law, intellectual property rights and the special issue on 'Judicial Accountability' focused on a contemporary debate as well. Keeping these in mind, it shall be the endeavour of the journal to continue to enrich and provide literature and research on such critical issues, and move from strength to strength with each upcoming issue.

Prof. (Dr.) S.S. Singh

Director, National Law Institute University, Bhopal, India

MESSAGE FROM THE FACULTY ADVISOR

It has been a matter of great satisfaction to work with the NLIU Law Review team of students. The tremendous energy, dedication and commitment demonstrated by the students in bringing out this Issue of Law Review are worth acknowledging. During the course of time, this Law Review has been able to make noticeable progress.

The writings included in this Issue, according to their respective authors, have some conclusions. These conclusions, however, in no way conclude the discussion and debate on the topic – as no research ever can claim to do so. It is a common knowledge that every research only opens the new doors for further research. We will consider ourselves successful in our endeavor if the writings included in this Issue get criticized and commented upon. We intend to publish only those writings which can, at least, bear the scrutiny of non-obviousness and usefulness. The writings must reveal some unrevealed – must throw some light on some dark area of law or otherwise. They must suggest some doable solution of a problem through law. The idea discussed in the writing may old may be new. But, the treatment of the idea must be distinct. Slowly and gradually we are inching in this direction. I may be mistaken and want to be proven mistaken as to the contemporary writings in law. In my opinion, most of the writings in law are repetitive. Hardly one may come across a writing which is worth reading – maybe I am mistaken. Generally we are short on new ideas and long on repetition of existing ideas. Are we writing the same thing again and again for nobody reads them? Or, we are repeating the same idea for we cannot come up with something new. Whatever may be the reason of repetition, none of the reasons seems to be plausible. Therefore, we request the readers of this Law Review – the only constituency who can help realize our dream – please do not to praise the writings included herein, please question them. We will be very happy if the readers can

make ruthless, honest and fair criticism and comments on these writings. This is how we can create new ideas and useful knowledge.

I am thankful to Professor (Dr.) Sheo Shankar Singh, the Director of NLIU, Bhopal whose constant support and encouragement always invigorated our team to accomplish this task. I am also thankful to the authors whose writings are included in this Issue.

I take the opportunity to congratulate the Editorial Board, the Management Board, and the Publication and Design Board for their commendable job in making the publication of this Issue a reality.

Prof. (Dr.) Ghayur Alam

Faculty Advisor

EDITORIAL NOTE

The shocking suicide of Aaron Swartz has jolted academicians to review copyright issues and the principle of crime being disproportionate to the punishment. How distribution of notable articles is a crime can only be answered by those who vouch by the copyright law. This devastating news has certainly jerked us out of the academic utopia to rethink why in the first place one unifies their research in an article; calls definitely for some soul searching.

The present issue of NLIU Law Review, forces us like in the above to rethink conventional stands and visit the strands of arguments not generally deemed acceptable in the legal arena. It comprises articles bordering on the unquestioned and unexplored.

Richard M Calkins take on the 'Future of Mediation of India', is a broad piece on the burgeoning rise of this branch of law and how it is incumbent to channelize it for the benefit of both the litigant and legal fraternity. The author draws comparatives with the mediation model in USA and reasons how India like the rest of Asian countries is a perfect candidate for the success of 'non-adversarial and conciliatory approach to conflict resolution'. Another article on the problem of holding hearings outside the country of dispute in arbitration matters, pertinently questions whether the choice of place of arbitration is an irrelevant consideration or not and calls for a cautionary solution.

US invasion of Pakistan to ouster and kill Osama Bin Laden became the bone of contention within the realm of international law. An article on targeted killings brings to the fore the need for coming with a practicable solution to the 'unable and unwilling test' without compromising the principles of international law. As was evident in the recent Indo-Pak military excursions, it becomes all the more imperative to reappraise the rules of equity with respect to the

delimitation of continental shelf. This also seeks to highlight the importance of this principle in India's border dispute with Bangladesh and Myanmar.

The judicial process in India especially the appointment of judges is analyzed in comparison with the US in a Constitutional law article. In the same circuit, another article on the impeachment process of judges, debates whether resignation is preferred over removal.

An article discussing the contentious issue of consent orders in securities regulations reviews the SEBI and SEC mechanism especially in the context of the 2012 amendments, makes for an interesting read. On an oblique note, an article on the laws and protocol of comparative advertisements, addresses how market forces and brutal competition have made a revision of the same the need of the hour. An article examining the role of the illusive nominee kicks around the age-old identity of the nominee as a bare collector or an exclusive owner.

With such a vibrant brew of academic articles, the Law Review team hopes and wishes that the journal is a success for all its readers. Suggestions to improve the same are welcome.

Editorial Board

THE FUTURE OF MEDIATION IN INDIA

Richard M. Calkins[*]

ABSTRACT

Problems with India's Judicial System might be similar to U.S. – Decline in Courtroom Trials in U.S. – Mediation Winning Out in Marketplace – Mediation is by Contract – Advantages of ADR – Qualities of Successful Mediator. This article discusses problems with the U.S. trial system and why mediation became a necessity. It also covers reasons why the American mediation model became so successful and is winning out in the marketplace over the courtroom trial. Mediation is successful because (1) it is by contract, (2) mediators are trained to be peacemakers, (3) mediators are trained to be patient, positive and persistent, (4) mediators are trained to identify the real needs of the

[*]Richard M. Calkins is a graduate of Dartmouth College and Northwestern University Law School. Admitted to bar, 1959, Illinois; 1981, Iowa. From 1969-1980, he was a founding partner of the Burditt & Calkins Law Firm. During the years 1980-1988, he served as dean of the Drake University Law School, and from 1988 to 1993, was a partner in the law firm of Zarley, McKee, Thomte, Voorhees & Sease. In 1993 he entered the full-time practice of mediation and arbitration. Mr. Calkins was president of the American Mock Trial Association from 1984-2004; President of the Blackstone Inn of Court from 1992-94; President of the American Academy of ADR Attorneys from 1999-00 and Dean from 2000-02. He has completed over 2000 mediations and arbitrations, and regularly holds classes in mediation training, having taught over 250 lawyers and 300 law and undergraduate students. He is also co-author of the treatises 'Mediation: A Quest For Peace' and the 'Mediation Practice Guide'. The author can be reached at r.calkins.law@gmail.com.

parties, (5) the mediator is supportive of counsel, (6) caucus mediation is ideal to handle complex cases, and (7) mediation can accommodate more than a dollar resolution. The article also contends that India's rich history makes it a perfect candidate for extensive application of mediation to resolve long pending disputes. Finally, it discusses where proponents of mediation might find resistance and how this can be overcome.

I. INTRODUCTION

India's legal system has reached the point where a push to mediation could reap huge benefits. The problems the Indian legal system faces are not unique; they are similar to those faced by the courts in America. Former Chief Justice Warren E. Burger of the United States Supreme Court summarized the problems faced by the American legal system in 1984, in these words: *"The American legal system is too costly, too lengthy, too destructive, and too inefficient for a civilized people."*[1] He criticized American lawyers because they pushed costs of litigation so high only the rich and those insured could utilize the courts.[2] He criticized judges because they permitted

[1]Warren E. Burger, Mid-Year Meeting of the American Bar Association, 52 U.S.L.W. 2461, 2471 (1984).

[2]All recognize that one of the fundamental defects in the American judicial system is the soaring costs of litigation. Lawyer's fees in many instances exceed $1000 (RS 50,000) per hour and costs of litigation are in the hundreds of thousands and even millions of dollars. In one case $40 million was spent in pretrial discovery, and in another $80 million. See, Richard M. Calkins, *The ADR Revolution*, 6 RUTGERS CONFL. RESOL. L. JOURNAL (2008). In one major antitrust class action, which had gone to trial, the defendant was spending $5 million per week supporting 20 lawyers and 30 support staff attending the trial.

One federal judge (U.S. District Judge John A. Jarvey, Southern District of Iowa) lamented that he could not afford to utilize the legal system he cherished. He added

cases to languish in the courts for five, ten, and even twenty years.[3] He expressed grave concern with the inefficiencies of the system because it left many venues overburdened and facing gridlock.[4]

Chief Justice Burger's answer to what was becoming a crisis was mediation. He charged the American bar to explore mediation, to provide *"mechanisms that can provide an acceptable result in the shortest possible time, with the least possible expense, and with minimum stress on the participants. That is what justice is all about."*[5]

Chief Justice Burger urged the profession, for the most part, to remove civil cases from the courtroom to the conference table. But he admonished lawyers to do much more. He directed them to shed

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that although *"we have created the fairest system in the world for resolving civil disputes, it is so expensive that very few in America can afford to use it. The court system serves the rich, those with insurance, and those who can shift the costs of litigation to the rich and those with insurance."*

[3]In the *Midwest Milk Monopolization case*, the case languished in the courts for 20 years, with another three years anticipated before it could be resolved, when the parties settled through mediation. See, In re Midwest Milk Monopolization Litig., 510 F.Supp. 381 (1981), *aff'dinpart*, *revs'd in part*, 687 F.2d 1173 (8th Cir. 1982); *on remand*,Alexander v. Nat'l Farmers Org., Inc., 614 F.Supp. 745 (W.D. Mo. 1985); *aff'd in part, rev'd in part sum nom,*Nat'l Farmers Org. Inc. v. Associated Milk Producers, Inc. 850 F.2d 1286 (8th Cir. 1988), *amended by* 878 F.2d 1118 (8th Cir. 1989).

In his valedictory speech to students participating in the First Annual National Indian Mediation Tournament, Justice A.K. Patnaik of the Indian Supreme Court, stated that, *"Justice delayed is justice denied."*

[4]The causes for the increase in cases filed are several: first, there was an increase in statutory and regulatory promulgations opening the courts to new claims and causes of action. Chief Justice Burger stated:

One reason our courts have been overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal 'entitlements.' The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity.

Warren E. Burger, *Isn't There A Better Way?* 68 A.B.A.J. 274, 275 (1982).

[5]*Id.*

their coats of advocacy and done the cloaks of peacemakers and healers of human conflict. He urged:

[Lawyers] must be legal architects, engineers, builders, and from time to time, inventors as well. We have served, and must continue to see our role, as problem-solvers, harmonizers, peacemakers, the healers – not the promoters – of conflict.[6]

The American legal profession responded favorably and mediation became a way of life. It quickly became the primary mechanism for resolving disputes so much so that it pushed the courtroom trial into the category of last resort. Indeed, mediation took America by storm. As one federal magistrate stated: *"Civil trials in the federal courts in Iowa are disappearing. That is a statistical fact. Most cases that were previously tried are now settled, mainly with the aid of mediation."*[7]

The impact of mediation has been dramatic and severe. In spite of the increased number of lawyers and cases filed over the past thirty years, both the percentage and absolute number of civil trials have dramatically decreased. The portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2007.[8] More

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[6]Warren E. Burger, *The Role of the Law School in Teaching Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 377, 378 (1980). Chief Justice Burger also stated: *"The obligation of your profession is to serve as healers of human conflicts."*

[7]Federal Magistrate Paul A. Zoss, Northern District of Iowa. A federal judge stated: *Mediation took Iowa by storm for several reasons. First, while courts were loath to sponsor settlement conferences until the eve of trial, mediation is now conducted earlier and often prior to filing. Second, the process typically takes four to six hours and facilitates more rapid exchange of proposals. Third, people are naturally attracted to a process that gives them more control over the outcome of the dispute. Finally, compared to the jury trial, mediation is exceedingly inexpensive.*

Federal Judge John A. Jarvey, Northern District of Iowa.

[8]Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 462-63 (2004).

startling is the 60 percent decline in absolute number of cases tried just since the mid-1980s.[9]

The bottom line is that there was a drastic need for change in America, which was born of necessity. The high costs, length of time to resolution and inefficiencies in the system itself dictated this change.[10]

Once mediation was introduced in America and the public saw its advantages, it won out in the marketplace. As one federal judge stated: *"There is now a dispute resolution marketplace and mediation seems to be prevailing in that market."*[11] When parties have a choice whether to go to trial and face the uncertainties of the result, bear substantial costs, face the prospects of protracted proceedings, they will choose mediation. It is inexpensive, it is expeditious and can resolve a matter in a day rather than months or years, and it is kinder on the parties participating.

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[9] *Id.* at 462-63. Professor Galanter stated: *"The phenomenon is not confined to federal courts; there are comparable declines of trials, both civil and criminal, in state courts, where the majority of trials occur."Id.* at 460.
In 1938, close to one in five cases were terminated by trial. Now it is close to one in one hundred, and in twenty years will be one in two hundred. Peter L. Murray, *The Privatization of Civil Justice*, 91 JUDICATURE 272 (2008).

[10] Initially, the courts and lawyers saw mediation as a nice way to resolve claims in small claims court or neighborhood disputes; JENNIFER E. BEER, PEACEMAKING IN YOUR NEIGHBORHOOD: REFLECTIONS ON AN EXPERIMENT IN COMMUNITY MEDIATION 3-4 (1986). Raymond Skenholtz, *Neighborhood Justice Systems: Work, Structure, and Guiding Principles*, 5 MEDIATION Q. 3 (1984) (advocating new justice systems focused on addressing conflicts at family, school, and neighborhood levels before they require action by the state). Today, however, mediation has found success even in the most complex of cases. In fact, there is no area of law that mediation has not touched from the simple to complex. Mediation is as effective in the multiparty complex class action as the small personal injury tort.
The author has mediated over 2000 cases, including eight major antitrust cases, as well as copyright, trademark, construction, contract, personal injury, sexual abuse, medical and legal malpractice, wrongful death, etc.

[11] Federal Judge John A. Jarvey, Northern District of Iowa.

There is another important reason mediation is winning out in the market. It places in the hands of the parties control over their case. They alone decide whether to settle and on what terms or return to the courts. They are no longer at the mercy of a judge or even their own attorneys, making life decisions for them. In mediation, the parties are empowered unless they voluntarily relinquish it.

Finally, another reason mediation has flourished in America is because it is accommodating and user friendly. The courtroom trial with its adversarial underpinnings is stressful and often destructive to those who participate. Even trial lawyers are impacted.[12] For parties subject to cross-examination and impeachment by skilled lawyers, the process is at least demeaning. Indeed, Judge Learned Hand, a very famous American jurist, observed, *"I would say as a litigant, I should dread a lawsuit beyond almost anything short of sickness and of death."*[13] A trained mediator, on the other hand, will seek to establish rapport and trust with the parties, will show interest and compassion, and will seek a resolution which will lift the burden of litigation from parties' shoulders. The mediator will seek not only resolution but conciliation, peace and even healing.[14]

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[12]Chief Justice Burger observed: *"The entire legal profession, lawyers, judges, and law professors has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers of conflict."* WARREN E. BURGER, ANNUAL REPORT OF THE STATE OF THE JUDICIARY (1984).

[13]Learned Hand, *The Deficiencies of Trial to Reach the Heart of the Matter*, LECTURES ON LEGAL TOPICS 89, 105 (1926).

United States Supreme Court Associate Justice Antonin Scalia noted that, *"I think we are too ready today to seek vindication or vengeance through adversary proceedings rather than peace through mediation."*, Antonin Scalia, *Teaching About the Law*, CHRISTIAN LEGAL SOC'Y Q. 6, 8 (1987).

The author has witnessed two fatal heart attacks and one suicide directly related to trial. The stress of trial can affect both the mental and physical well-being of those participating.

[14]*Case Study:* Thirteen high school and college students were traveling in a van in northern Wisconsin. They were selling magazines door to door in various towns. Traveling 84 mph, the van was spotted by a police cruiser. A 16-year old was driving the van and did not have a driver's license. He tried to switch with the girl next to him and the van crashed. Seven students were killed, one ended up with a

This article discusses (1) how the American model might be replicated in India, (2) the impact mediation can have on the Indian legal system, and (3) try to answer those who are resistant to change.

II. THE AMERICAN MODEL

A Historical Perspective of Non Adversarial Resolution

Historically, India is a much more fertile ground for mediation than the United States. It has rich ties to ancient mediation, which began over 2000 years ago in China, going back to the time of Confucius. *"Islamic, Hindu, Buddhist, Confucian, and many indigenous cultures have extensive and effective traditions of mediation practices."*[15] Eastern Asian thought viewed mediation as superior to recourse to an adversarial system of law.[16] Litigation was considered *"a shameful*

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serious closed head injury, and one a quadriplegic. Suit was filed against the owner of the magazine company that had hired the students. The matter was mediated and a settlement worked out. However, all parents representing the students had to agree to the settlement. One father who lost a daughter and mother who lost a son refused to sign. It was not the money but a desire to punish the owner of the company. A second mediation was conducted and the two parents finally agreed to the settlement. The mediator then asked if the two would like to speak to the owner, whom they had not seen up to that point. The mother said she would. The two met and the mother told the owner how evil she was to allow such a tragedy. After ten minutes, she stopped. The owner then said she would feel the same as the mother, that she would have said the same thing; however, she added, that the tragedy had put her in the hospital with depression. She explained that the business was her whole life, and when the tragedy occurred, she could not handle it. She finally explained that only through prayer was she able to overcome the depression. She added that the mother had to pray to overcome her grief. The mother said she did not believe there was a God who would allow such a tragedy to occur. The women talked for an hour and when they finished they hugged each other, exchanged cards, and said they would pray for each other. Real healing had taken place and the mediator recognized the power of mediation.

[15] 3 CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 20 (3d ed. 2003); see also, Jerome A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1205 (1966).

[16] Professor F.S.C. Northrop noted, that pursuant to Confucian thought.

last resort, the use of which signifies embarrassing failure to settle the matter amicably."[17] Today, both China and Japan place great emphasis on a conciliatory, non-adversarial approach to conflict resolution.[18] In Japan, for example, *"a conciliatory relationship between disputants is the foundation to resolving differences. In any dispute, time is first spent building that relationship without which a final agreement cannot be reached."*[19]

Modern day mediation places emphasis on the peacemaking and healing effects of the process. It emphasizes the need for mediators not only to be problem-solvers but harmonizers, peacemakers and healers.

B Success of Mediation Using the American Model

There are any number of reasons mediation has proven so successful in America.

The 'first best' and socially proper way to settle disputes, used by the 'superior man,' was by the method of mediation, following the ethics of the 'middle way.' This consisted in bringing the disputants to something they both approved as the settlement of the dispute, by means of an intermediary. . . . 'Good' dispute settling consisted in conveying the respective claims of the disputant's back and forth between them until the disputants themselves arrived at a solution which was approved by both.

F.S.C. Northrup, *The Mediation Approval Theory of Law in America Legal Realism*, 44 VA. L. REV. 347, 349 (1958).

[17]Leonard L. Riskin, *Mediation and Lawyer,* 43 OHIO ST. L. J. 29 (1982). Today, mediation boards in China called Peoples Mediation Committees, are the primary institutions for resolving disputes. They handle over 7.2 million cases each year. Donald C. Clarke, *Dispute Resolution in China,* 5 J. CHINSESE L. 245, 270, n. 95 (1991).

[18]JAY FOLBERG & ALLISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION (Jossey-Bass, 1984) (noting the widespread use of conciliation and mediation to resolve disputes).

[19]Richard M. Calkins, *Caucus Mediation Putting Conciliation Back Into the Process: The Peacemaking Approach to Resolution, Peace and Healing,* 54 DRAKE L. REV. 259, 265-66 (2006).

a) Mediation is an Extension of Negotiation –

Mediation is really nothing more than a form of negotiations, which the parties nearly always engage in, with a trained third party, the mediator, participating. The presence of that third person, however, overcomes many of the shortcomings of straight negotiations, such as, one, straight negotiations tend to be adversarial in that counsel use advocacy skills to further their clients' causes. The skilled mediator, however, will try to neutralize the advocacy and encourage the parties and counsel to seek common ground.

Two, serious negotiations generally occur after discovery is completed and counsel understands the implications of both sides of the case. In mediation, discovery does not have to be completed. In fact, much mediation takes place before the case is even filed. Indeed, a certain amount of discovery will actually take place during the mediation itself.[20]

Three, because discovery is generally completed when serious negotiations take place, the heavy costs of litigation have already been incurred. Because discovery does not have to be completed in mediation substantial costs are avoided.

Four, negotiations can often be as stressful for the parties as going to trial. Mediation, on the other hand, vastly reduces the stress level.

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[20]*Case Study:* Two women threatened lawsuits against a national bank for gender discrimination under Title VII of the Civil Rights Act of 1964. They contended that as branch managers they were not paid on a par with men holding the same position. Before suit was filed, the parties agreed to mediate. At the mediation, the mediator got the parties together and had the woman explain how they were discriminated against paywise compared to men, which they contended was as much as $25,000 (per year). The bank officials attending the mediation then emailed the home office and had the W2 forms (required by U.S. taxes which lists the income of the individual) of the male branch managers in the area of the country which was relevant forwarded to the mediator. When they were examined, it turned out the women had miscalculated and there was no discrepancy. In fact, one of the women was the second highest paid of the 15 W2 forms reviewed. With this disclosure the women settled their claims for nominal amounts. Allowing this discovery in the mediation avoided the filing of the case and a substantial amount of money and time being spent in pretrial discovery.

b) Mediation is by Contract –

A primary reason mediation is so successful is because it is by contract. It gives the parties total flexibility as to how they will conduct the process.[21] Unlike the courtroom trial with its fixed rules of evidence and procedure, which cannot be deviated from, mediation has no limitations or restrictions. Parties can contract to resolve their differences any way they wish, even create a new process on the spot. That is its genius. For example, when a new regional airline came on line in the United States, it had a trademark which was quite similar to another regional airline, so much so that one would have to give it up. However, neither liked the prospects of becoming embroiled in trademark litigation, which could cost in the millions of dollars. The two CEOs decided litigation was not the road to travel inasmuch as the loser would only incur an expense of $30,000 or so to develop a new trademark. Instead, they created a very different inexpensive process. They agreed to arm wrestle. For the cost of a party, the two CEOs resolved their dispute, two out of three.[22]

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[21]Although the parties can use any mediation format they wish, the most common format is caucus mediation. It commences with the mediator and parties conducting an opening session with the mediator making introductory remarks and each attorney stating the merits of their cases. Thereafter, the parties are separated to different rooms and the mediator shuttles back and forth between them. In the caucus with each side, the mediator will inquire (1) the strengths of the party's case; (2) the weaknesses of a party's case; (3) what counsel feels is the party's best case/worse case before the judge; (4) what settlement discussions there have been; and (5) a new demand (plaintiff) or offer (defendant) is requested. If there is insurance involved as in an automobile accident, the mediator will inquire (6) as to the policy limits (an insurance company will not pay more than policy limits). If health insurance has been paid, the mediator will inquire (7) whether there are any subrogated liens. Finally, the mediator might inquire (8) what costs will be incurred to litigate the case.

[22]*Execs "Plane" Fun Avoid Lawsuit,* PITTSBURGH PRESS, March 21, 1992, at A4.
Case Study: The total flexibility of mediation was illustrated in a case involving partners who ran a lawnmower, snow blower, snowmobile repair shop. As the business grew, they opened a second shop in another place in town. After several years, differences arose and the partners could no longer get along. They decided to separate but could not agree on how to divide the business. Matters became so

Not only can the parties use any mediation format they wish, but they can change it even after the process has commenced. There is total flexibility to modify it, interrupt it, continue it, whatever. For example, they can stop the mediation and conduct a nonbinding summary trial,[23] to help the parties better evaluate the case, and then return to the mediation. A mediation can be continued to give the mediator a chance to investigate the case further,[24] or an expert

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acrimonious that they could no longer even speak to each other. Their lawyers recommended mediation.

Arriving at the mediation, the mediator recognized that it would be most difficult to get agreement. He also recognized that the parties had to settle because allowing the matter to go to court would bankrupt both. To avoid this, the mediator suggested that the parties give him the authority to make a binding decision as an arbitrator. With the encouragement of counsel, the parties agreed and a written agreement was signed by the parties.

Because the partners could not face each other, the mediator put them in separate rooms and met alone with their attorneys. The group then discussed each issue in dispute and when the attorneys agreed, that became the ruling. The attorneys then relayed the result to their respective clients for approval and the group moved on to the next issue. In eight hours, the matter was resolved to the relief of all concerned.

[23]Thomas D. Lambros, *Summary Jury Trial – An Alternative Method of Resolving Disputes,* 69 JUDICATURE 286 (1986). The process, which normally takes a day to complete, permits the parties to submit their dispute to a private judge, or lawyer acting as a judge, who, after hearing will render a nonbinding decision as to the value of the case. Each lawyer presents his case in summary form and the judge renders a nonbinding decision. After, the parties can meet separately with the judge who will explain the basis of his decision. The parties can then resume the mediation.

[24]*Case Study:* Plaintiff became a paraplegic as a result of a single car accident. He and three underage teenagers had been drinking beer. Driving home, the owner of the car, a 16 year old boy, allowed his girlfriend, who was intoxicated, to drive the car. She lost control on a dirt road and the car crashed. Only the plaintiff was injured. He sued the owner of the car and the latter's insurance carrier attended the mediation. It defended on the ground that plaintiff, 21 years old and of age, bought the beer consumed by the underage passengers, including the driver. Plaintiff denied the allegation asserting that he only bought four wine coolers for himself. When the carrier would not pay plaintiff's demand of $1 million, the mediator asked permission to investigate further. He interviewed the passengers and owner of the car. The latter explained that he could not have purchased the beer because he was underage and there was no alcohol in his home. The mediator then met again with the plaintiff, who finally admitted he purchased the beer in question only the

witness can be called on the phone and asked his opinion even though not under oath.[25] A witness can be asked to attend the mediation over the lunch hour to meet with the insurance adjuster to discuss the individual's testimony if called at trial.[26]

Not only is there total flexibility as to the format used and as to how it is conducted, but also as to what can be included in any settlement. Unlike an action in a court of law, which can only render a money judgment, a mediated settlement can include anything the parties wish, even matters outside the scope of the lawsuit. For example, the parties can agree to include a written apology, or a letter of commendation or recommendation, or the naming of a conference

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night before and not the night in question. With this admission, the case quickly settled at the next mediation session.

[25]*Case Study:* Plaintiff was injured in surgery when the surgeon negligently punctured his colon. This left him incontinent and unable to prevent the escape of gas, which was most embarrassing. Plaintiff demanded $300,000 and defendant offered $200,000. There was an impasse and the mediation was about to fail when the mediator asked plaintiff why he would not compromise further when his attorney recommended he do so. He responded that his doctor said the case was worth $300,000.

The mediator then suggested they call the doctor, which they did and the mediator explained the situation. The doctor then asked to speak alone with plaintiff. After five minutes, plaintiff said he would accept the $200,000. In other words, the plaintiff would listen to his doctor but not lawyer.

[26]*Case Study:* Plaintiff had his jaw broken when he entered a tavern and was hit by a red fire extinguisher thrown by the bartender. The latter had gotten into an argument with a patron at the bar, and when he threw the fire extinguisher, the latter ducked and plaintiff was hit.

At the mediation, the insurance carrier raised a coverage question stating that intentional acts, as occurred here, were excluded from the insurance policy. Plaintiff contended that the owner of the bar knew of the bartender's penchant for fighting and allowing him to remain in his employ was negligence which was covered by the insurance policy. The insurance adjuster said there was no such evidence, and plaintiff's counsel answered asserting there was a witness who would testify that six months before, the bartender had gotten into an argument and was reported to the owner. Arrangements were made for the witness to attend the mediation over the noon hour. After conferring with the adjuster, the case settled for a fair figure.

room after a deceased person, who was wrongfully discharged from his employment.[27]

c) Mediators are Trained to be Peacemakers –

The most successful mediators in America are trained to be peacemakers, to heal the wounds of the parties, not just resolve their differences. In other words, it places the profession on the pedestal with the other healing ministries, a wholly new calling for lawyers. And this training begins with self.

Mediators are taught that they must get their own houses in order. In other words, they must have a calm and uplifting demeanor so that their very presence at the mediation, will calm the parties. The mediator should remember that the parties enter the process angry, frustrated, and even hating each other. All are looking for help. They want to speak to someone who will listen with compassion and understanding. Above all, they want to like their mediator, and the latter must give them reasons for doing so. The mediator who is warm and accessible will immeasurably help the parties overcome that initial barrier, which is required to commence the process.[28]

[27]*Case Study:* Plaintiff was discharged from his employment after 29 years of faithful employment. New owners had taken over the company and computerized the accounting department where plaintiff worked. When he was unable to master the computer system, he was discharged. Feeling that he was discharged because of his age, 55 years old, he sued for age discrimination under Title VII of the Civil Rights Act of 1964. Six months later he died from unrelated causes, but his widow, who then sued on behalf of his estate, felt he died from a broken heart.

At the mediation, her final demand was $125,000 and the final offer was $100,000. Neither party would move further and the mediation was failing. The mediator, as a final effort, asked the widow if a written apology would help. She answered in the affirmative. She added that having the new owners take sensitivity training so that they would be more considerate of other employees would also help. The owners readily agreed to both conditions and the case settled for $100,000. In fact, she would have taken less, for her agenda was recognition by the company of her husband’s dedicated years of service.

[28]There is perhaps no more difficult setting for mediation than in family disputes – divorce, child custody, division of property among siblings, etc. Traditionally, when

In entering the mediation, the mediator must prepare emotionally. Some very successful American mediators prepare by meditating, others by praying. One very successful mediator prepared by doing tai chi. The mediator should use any process that works. A warm, smiling, accessible demeanor sets the right tone. Northing will establish rapport and trust faster than the mediator who shows he is concerned and dedicated to finding resolution all can accept.

d) Successful Mediators are Patient, Positive, and Persistent –

Successful mediators in America have learned the value of being patient, positive and persistent. No matter the scenario or challenge, the mediator cannot show impatience, frustration nor discouragement. Such are contagious and undermine the process. Parties will instantly react to any negativity and give up and resign themselves to failure.

i. Patience:

Being patient means the mediator will control his temper and frustration level. To criticize a lawyer for not cooperating or make a sarcastic remark because a person is acting unreasonably, even when justified, undermines the process and probably spells failure. Some lawyers in America have a tendency to waste time extolling their skills and virtues, and there is the temptation to put them in their place. Although warranted, the temptation should be resisted for it is highly counterproductive.

There are even times when a lawyer may challenge the mediator for not moving the process along fast enough, or blaming him when the other side is not making reasonable offers, or is not acting in "good faith." They might even challenge the mediator's neutrality or impartiality. The patient mediator will not react to such negativity. To do so merely reinforces what the person is saying.

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lawyers get involved, it only adds to the rancor and tension. The mediator must be alert to still the storm at the outset.

Being patient also means the mediator must be attuned to how fast he can move the process along. A reluctant party should not be pushed too hard or too fast to compromise. The mediator does not want to appear as though he is impatient or frustrated with the party or is joining with counsel to push for a result that party is not yet ready to accept.[29]

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[29]When a party is resisting the recommendations of counsel, there is the temptation to jump in on the side of the attorney to explain why the party must compromise. This can give the appearance that counsel and the mediator are "ganging up" on the party. This can lead to even further intransigence. The better course is to remain patient, and if a split occurs between counsel and his client, because the latter is not willing to listen, not to join counsel in pushing the party. If a major split occurs, the mediator can then step in and work with the party even if the services of counsel have been terminated.

Case Study: Plaintiff exited her office building and walked down a driveway to reach a mall for lunch. It had snowed heavily that morning and the driveway had not yet been plowed. The front steps of the building and walk had been cleared and plaintiff could easily have exited by way of the front door and safely reached the mall. In walking down the driveway, she stepped on a patch of ice covered with snow and broke her ankle. She sued.

At the mediation, the insurance carrier offered her $35,000, which counsel urged her to take. The mediator joined counsel explaining how difficult it is to recover for slip and fall on ice in a northern climate. Plaintiff resisted demanding $60,000 and not a penny less. Counsel and the mediator pushed harder and plaintiff finally asked, "who's side are you on? Why don't you support me? It was clear that plaintiff felt the two had "ganged up" on her and she was not going to give in. She went to trial and received nothing. A defense verdict.

Case Study: In a later case, the above mediator faced a similar situation but handled it quite differently. Plaintiff had received a settlement of $750,000 in a malpractice action brought against a surgeon on behalf of her deceased husband's estate. She purchased an insurance policy with the proceeds. An insurance agent from another insurance company talked her into switching policies with his company. She did and subsequently had to pay a large income tax, which the agent had not mentioned. With the tax she was considerably worse off.

Plaintiff sued the insurance carrier and agent for fraud. Counsel told her she could possibly recover over $1 million as had occurred in a case in Texas. At the mediation, when the mediator inquired what plaintiff's best case was, and he responded $150,000, she jumped up and slammed her purse on the table and fired her lawyer on the spot for deceiving her. The mediator resisted the temptation to jump in and explain what had happened – in Texas the agent knew of the tax consequences but did not disclose it; therefore, there was fraud which led to punitive damages. In the instant case, the agent had not known of the tax

This raises the question whether the patient mediator should keep the parties at the table until late at night, while the "iron is hot," until the parties capitulate out of exhaustion. The concern is that if the parties are allowed to go home and think about the matter, they will harden their positions, which will make settlement that much more difficult. It is here suggested that the patient mediator will continue the mediation and allow the parties to consider the matter further in a quiet setting. Experience shows that parties, when given the opportunity, will not make their positions worse, and more times than not, will improve them so that settlement becomes possible. Indeed, time works for the mediator, not against.[30]

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consequences; therefore, he was only negligent and there could be no award of punitive damages.

By not trying to explain what happened and remain patient, the mediator was allowed to continue with the process when counsel left. The case then resulted at a fair settlement.

[30]There is a process called "pillow talk." When a member of a family is involved in a lawsuit and is having difficulty settling and other members of the family are concerned about the adverse impact litigation is having, it is productive to continue the mediation and permit the family in a quiet setting to speak to the person. Nearly always members of the family seeking resolution will win out and the matter will settle. As between husband and wife, if one wishes to settle and the other does not, allowing them time to pillow talk the matter usually results in a settlement.

Case Study: Plaintiff, as a healthy newborn little girl, was given a diphtheria, pertussis, tetanus shot and had a severe adverse reaction leaving her crippled. At 17 years of age she had the mentality of a six month old baby. She spent days sleeping in a fetal position. Her parents hired an attorney and he sued the doctor for malpractice. The case was settled and plaintiff received $80,000, which netted her $34,000. Later, the parents learned there was a federal statute, the National Vaccine Injury Compensation Act, which provided up to $2 million for children injured like the plaintiff. Her parents then sued the lawyer for legal malpractice for not informing them of the Act.

At the mediation the insurance carrier was willing to pay the entire $1 million of coverage to settle the case. The father rejected it as an insult. The mother said nothing but her reaction indicated she wanted to get the matter resolved. The adjuster suggested that the matter be continued to allow the parents to have time to consider the matter in a quiet and reflective setting. "They will pillow talk the matter," the adjuster stated. Five days later, the father called accepting the offer.

ii. Positiveness:

The skilled mediator is positive at all times. This means several things: First, the parties are on a rollercoaster ride. They start the mediation feeling that the matter will be settled. However, after a period of time they realize how far apart they are and discouragement sets in. As the day progresses and progress is made, the fires of hope are rekindled, only to be doused at the end of the day when a gap still exists. The mediator cannot be on that rollercoaster. The mediator has to be encouraging at all times, for any negativity is contagious.

The mediator needs to counteract the ups and downs of the parties by assuring them that what they are experiencing is expected, it is a normal reaction that occurs in all mediations. It is not out of the ordinary. And, indeed, the ups and downs do normally occur and yet the case still settles.

Second, in America, top mediators will have a success rate of over 90 percent; some as high as 96 percent.[31] So there is every reason to be optimistic. The mediator should emphasize how successful mediation is and the parties have every reason to expect the matter will be resolved.

Third, the mediator should emphasize positive signs on each side. A party or attorney who is becoming more cooperative should be mentioned. Or, if one side says something positive about the other this also should be mentioned. By contrast whatever is said that is negative and should not be relayed.

Fourth, there are times when parties become frustrated and threaten to terminate the process. Generally, this is for show and is intended to get the attention of the mediator and, in turn, the other side. The mediator must see it for what it is and not panic or show concern.

[31] RICHARD M. CALKINS & FRED LANE, LANE & CALKINS MEDIATION PRACTICE 4-16 (Aspen Publishers, 2008).

Seldom will parties walk out of a mediation until the mediator releases them because he can do nothing more.

Fifth, when the parties make unreasonable demands or offers, the mediator should not react or attempt to force them to be more realistic. Counsel knows when a demand or offer is unrealistic but has chosen to take this approach probably for a reason: he may be testing the mediator for bias expecting him to react negatively, or counsel has done so because the client is not yet ready to be realistic, or counsel is signaling that the client is going to be difficult. Whatever the reason, the mediator should not react negatively, but explain to the other side this is not unusual, it is to be expected parties will start out unrealistically.[32]

Sixth, being positive is also conveyed by body language. If the mediator walks into a caucus room frowning, the parties will interpret this as a bad signal. The mediator should at all times look positive, even when there is little to report. The mediator knows that given time the case will settle even if it starts out slowly for most cases do.

iii. Persistence:

The mediator should be persistent. He should never give up or terminate the process. The biggest complaint the author receives about mediators is that they gave up too soon. The mediator should keep trying until the parties actually terminate his services and refuse

[32]When a plaintiff demands $500,000 in a minor case not worth more than $20,000, for example, the mediator should not show surprise or disapproval. The mediator should take the position, if you don't ask, you don't get. When disclosing the demand to the other side, the mediator can explain that such an initial demand is not unusual nor out of the ordinary. The other side should simply respond in kind and get the settlement process started. As long as the parties understand that nothing unusual is happening and what occurred is expected, they will remain hopeful. Only if the mediator shows concern or frustration will the parties be negatively impacted.

It is interesting, that in America first demands and offers are frequently unrealistic and even outrageous; however, the cases still are settled.

to pay any further fees. Until the parties do terminate him, progress will be made.

There are times when a party or counsel informs the mediator they are packing their bags to leave. More times than not it is a show of force. It is not grounds to terminate. The mediator simply needs to keep the process moving forward.

Persistence also means that if the bidding, the demands and offers, is bogging down and the parties are showing concern, the mediator should assure them there are other ways to proceed. There is a plan B and C, if plan A is failing. Parties can become anxious and frustrated if the bidding breaks down and the other side is not "acting in good faith." Plan B, for example, is the mediator can bracket,[33] or propose a mediator's figure[34] to restart the process.

If the parties are unable to settle the matter during the opening mediation session, the persistent mediator will push the parties to set another day to resume. Or, he will schedule private meetings with

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[33]Bracketing is used in two ways: One, it is used to break a logjam when the parties are unwilling to make further moves in their bidding. For example, if plaintiff announces he will not go below $1 million and the defendant above $500,000, the mediator can approach both and explain that unless plaintiff will go below $1 million the mediation will be terminated. Similarly, defendant must go above $500,000 or the action will be terminated. No effort is made to say how much below $1 million or above $500,000. If the parties agree, the mediation continues.
The second way bracketing is used is for the mediator to ask the parties to consider new figures, a figure below plaintiff's last demand and above defendant's last offer. For example, if plaintiff's last demand is $750,000 and defendant's offer $300,000 the mediator might ask plaintiff if it would lower its demand to $500,000 if defendant would raise its offer to $400,000. If both agree, the gap to settlement has been narrowed.
Richard M. Calkins & Fred Lane, *supra* note 31, at 7-3.

[34]A mediator's figure is offered towards the end of a mediation when the parties are still somewhat apart. The figure is not what the mediator thinks the case is worth, but a figure which will push both parties to accept. Thus, if plaintiff is at $750,000 and defendant at $300,000, the mediator might propose a settlement at $450,000. Both parties are asked to consider the figure and in confidence indicate acceptance or rejection. If both parties accept, the case is settled. If either rejects it, there is no settlement; *Id.*, at 7.6.2.

each side at their offices inasmuch as it is not required the parties physically get back together.[35] The mediator can also continue the mediation by telephone explaining that he will be calling each in the next few days.[36]

e) <u>Mediations are conducted in a Confidential Setting –</u>

Another reason mediations are so successful is because they are conducted in a confidential setting and not open to public scrutiny. In the courtroom, the proceedings are public and all can view them or

[35]If the mediator has scheduled to meet with the parties separately after the initial mediation session, he should prepare carefully. He might prepare a video of depositions or a memorandum explaining the concerns he has with each party's case. Or, he can do research on legal questions that have arisen in the mediation.
Case Study: Plaintiff, a mother, brought a lawsuit against a trucking company, when one of their trucks crashed into her van in a blizzard, killing two of her children. At the mediation, the carrier insuring the trucking firm offered an insufficient amount of money and the mediation ended. The mediator requested an opportunity to meet with a vice president of the insurance company to point out how serious the case was. Arrangements were made. In preparation, the mediator had a thirty-minute video prepared of two depositions taken in the course of discovery. The first was of another trucker who, aware that there were icy roads ahead, straddled the middle of the interstate highway with flashing amber lights to slow down the traffic. He testified that the defendant trucker sped by him traveling on the shoulder of the highway, and as he did he made a profane gesture. The second part of the video showed the defendant driver who had a beard and seemed to be unconcerned that two children had been killed. He blamed the mother for traveling in a blizzard. The mediator showed the video to the insurance company's vice president, who, after seeing it and realizing the implications, raised his offer substantially to settle the case.

[36]Unless the parties outright terminate the mediation, the mediator should inform them that he will contact them by telephone and keep the process going. Thereafter, he should periodically talk to the attorneys on each side to determine if progress is being made. Even if there is no progress to report, the mediator should periodically make contact. This has the benefit of (1) alerting the lawyers that the mediator is still thinking about the case, (2) determining whether there has been any changes in positions, (3) determining whether there are any changed circumstances, (4) alerting counsel that the matter is still pending (they sometimes get busy with other cases and neglect the one in question).

make inquiry. The press can sensationalize a public trial, which could never occur in mediation.[37]

The benefits of confidentiality over a public courtroom encounter are several.

First, it permits the mediator to speak to each side separately, called a caucus, and inquire about confidential matters. The mediator can ask questions never before asked in American jurisprudence. He can ask questions a lawyer, judge, or arbitrator could never ask. For example, he can inquire as to the weaknesses or concerns counsel has in the case, or what counsel believes is the party's worse case before the trier of fact. Counsel generally is willing to discuss such matters because he is assured that his answers will remain confidential and under no circumstances shared with the other side. When the mediator garners such information on both sides, he has a grasp of the case never before enjoyed in American courts. He is positioned to give guidance towards a meaningful settlement.[38]

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[37]Most agreements to mediate provide that any information disclosed in private caucus will be kept confidential. Also, the parties agree not to subpoena the mediator or seek to obtain his notes or work product. Richard M. Calkins & Fred Lane, *supra* note 31, at 3-6.

[38]*Case Study:* Seven plaintiffs as children were sexually abused by the same cleric over a period of several years. The abuse was admitted by the religious order being sued, to which the cleric belonged; however, it defended on the grounds of statute of limitations. In private caucus, counsel for the religious order recognized that although six of the plaintiffs would be barred by the statute, the seventh, who had been in the Marines for twenty-seven years, would not be barred (statute of limitations does not apply under law to those serving in the military). Although counsel could get six of the cases dismissed, the one case going to trial would probably result in a verdict which would exceed for what all seven cases could be settled. He also admitted he was concerned about the timing of the trial because there had been very bad publicity concerning clerics who were pedophiles and that could influence the court.

In caucus with the plaintiffs' attorney, he admitted in confidence that six of his clients would be dismissed because barred by the statute of limitations. He suggested that the six would have to accept whatever the religious order offered. He also recognized that he had been placed in a conflicts of interest situation in that the religious order stated it would not settle unless all cases, including the ex-

Second, maintaining confidentiality may be important to both parties. A public trial might just invite additional lawsuits against the defendant or embarrass the plaintiff.[39] By not allowing the case to go public, both parties are protected.

Third, because each side can speak to the mediator in confidence, ex parte, they can get the mediator's reaction to the merits of the case. They can suggest possible ways the case might be settled and ask the mediator to make inquiry of the other side without disclosing their interest. They can ask the mediator to float a settlement figure, again, without disclosing that they suggested the figure.

Fourth, in confidence the mediator can float his own settlement figure and ask each side to consider it. Only if both sides accept will he indicate a settlement. If one side does accept and the other does not, there is no disclosure. Confidentiality is maintained.

Fifth, confidentiality permits the parties in their separate caucuses to vent and speak to a willing listener, the mediator. Many times parties just want someone to whom they can tell their stories. This can be

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Marine, were resolved. This, counsel felt, put pressure on him to get the ex-Marine settled so that something would be paid to the other six. This might require separate counsel being appointed. With these facts in hand, the mediator got the case settled inasmuch as both had concerns.

[39] *Case Study:* Plaintiff worked in an insurance office as a secretary. Some of the salesmen and other secretaries started telling dirty jokes, putting up pornographic pictures, and exchanging sexually explicit gadgets. Plaintiff was reluctant to complain for fear the others would tease her. She finally did and the result was as she predicted. She quit her job and threatened to sue the insurance company for allowing the conduct to occur (under Title VII of the Civil Rights Act of 1964).

In private caucus, plaintiff explained she wanted to get the matter resolved because a public trial would subject her to ridicule and teasing. This could embarrass not only herself, but her family and school-aged children. The insurance carrier wanted confidentiality because any public hearings would open it up to bad publicity. The conduct in its office was so offensive, that CNN News might pick it up on a slow Sunday evening broadcast. Both lawyers resisted settlement, each feeling they could win at trial. However, confidentiality for very different reasons had great value to the parties and the case settled.

very therapeutic.[40] In the private caucus, this opportunity can be provided without offending the other side. Many times, the mediator is thought of as a judge, which gives the venting even more meaning.

Sixth, caucus mediation, with its umbrella of confidentiality, is ideal when parties cannot face each other such as in divorce. When there has been physical abuse and intimidation, forcing parties to face each other may do much more harm than good. Therefore, the parties can be placed in separate rooms in the beginning and the mediator can shuttle back and forth. They can go to lunch separately, and even sign the settlement at separate times thereby avoiding facing each other.

f) The Private Caucus Permits the Mediator to Identify Hidden Agendas

Another reason mediation is so successful is it facilitates the mediator in identifying the needs and interests of the parties as well as hidden agendas, which might influence the outcome of the case. In the courtroom trial such needs and interests are irrelevant and never addressed. In mediation, they are all important, and, once identified can resolve a matter. One of the critical tasks of the mediator is to search out these hidden agendas.

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[40]*Case Study:* Plaintiff was a senior vice president of a major corporation. He had a dark secret, which he had not even told his wife. He had been sexually abused as a child by a pedophile cleric. When the abuse came to light he only asked for an opportunity to speak to the bishop of the diocese where he went to school. He flew in from Ohio and appeared at the mediation wearing a coat and tie. In a low firm voice he explained how he had been abused and the life –long injury this had caused. Finally, he asked the bishop if he would like to know how angry he was. Without waiting for an answer, he opened up his brief case and pulled out a 12 inch plastic tube. He attached a four inch tube to one end and took tape off the other. He had a dagger which he pointed at the bishop, not as a threat, but to make a point. He was, of course, told to leave the potential weapon at the mediation inasmuch as carrying it on a plane is a federal felony. He did and the case settled.
Two days later, plaintiff's wife called their attorney and explained that plaintiff seemed quite relieved, having told his story. She felt healing had begun.

Being able to talk to a party in private, one on one, without the other side present, facilitates the mediator in identifying the real agenda of the parties. For example, many times a party is distressed by the pendency of the lawsuit and simply wants to end it so the person can go on with life. Knowing this, the sensitive mediator can work towards an immediate resolution fair to both sides.[41] The hidden agenda may be as mundane as settling immediately to have funds to move to a better school district for the benefit of children, or to protect the reputation of a regional heart transplant center.[42] Or, the

[41] *Case Study:* Defendant drove a school bus and ran over a child in her first week of kindergarten. The driver was distracted when a car was speeding towards her stopped bus and did not see the child crossing in front of her when she started forward. She went into serious depression, and two years later, could not be deposed or attend the mediation. The mediator, recognizing that the lawsuit was having devastating consequences on her, pointed out to the plaintiff's counsel that the humane thing was to dismiss her from the lawsuit. He argued that the school district was liable and she had no funds to cover a large judgment. In fact, her presence made plaintiff's case weaker because a judge might feel great sympathy for the driver because of her condition. Plaintiff's counsel agreed and dismissed her from the case. She was immediately informed with the hope the healing process would begin. Here the need was patent and immediately addressed.

[42] *Case Study:* The decedent was 17 years old and had a heart attack at football practice. He was taken to the defendant hospital and hooked up to a portable defibrillator. Later, the equipment was changed and a second one was hooked up; however, the nurse got her wires crossed and decedent died in two hours. Decedent's mother sued on behalf of his estate. The estate demanded $2 million and the hospital offered $500,000. Later, the mediator recommended $1 million, which both parties accepted.

At the mediation, the mediator discovered several hidden agendas which materially furthered settlement. With the hospital, the mediator learned that it wanted to avoid the adverse publicity of a public trial because it was trying to build its reputation as a top heart transplant facility. Also, it felt that if the matter was settled, investigators would drop any criminal charges being brought.

Decedent's mother had a very different agenda. As a single mother, she and her six children lived in the poorest district of the city and attended the weakest schools. She wanted immediately to relocate to the best school district to benefit her other children, ages 7 to 16. Waiting for the case to wind its way through the courts, would mean that four of her children would not benefit because they would be out of school.

Plaintiff's attorney, however, also had an agenda. He wanted the family to move into his school district so that two of the boys, who were excellent basketball

hidden agenda might be to settle immediately to obtain funds for psychiatric treatment of a twice convicted felon, who was sexually abused as a child, to avoid a third conviction on drug charges and mandatory life imprisonment.[43]

Special interests like needs impact on settlement possibilities. When properly identified, the mediator can help a party satisfy those interests as part of the settlement. For example, a company may be planning an initial stock offering and does not wish to include in its prospectus the pendency of a multimillion dollars lawsuit against it. This would seriously affect the initial stock value. It is in the interest of that party to settle the case immediately.[44]

g) The Mediator is Supportive of Counsel –

An important advantage of mediation over the courtroom trial is that the mediator can be supportive of counsel when he has difficulty with an intransigent client.[45] The mediator can be of assistance for several reasons.

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players, could join his son's team. This would assure the team at least a city championship. He had already picked out a house.

[43] *Case Study:* Plaintiff completed a five-year prison sentence for illegal possession of drugs. He had been sexually abused as a child by a cleric and traced his problems back to the abuse. He was willing to compromise on his demand to get immediate funds for psychiatric treatment. He recognized that a third felony conviction would require a life imprisonment sentence.

[44] *Case Study:* Defendant, a computer company, contracted with a bank to install a computer system to handle its newly formed credit card business. After completion of the contract, the bank sued for $8 million, asserting that some of the systems were not completed and some were defective. Ultimately, plaintiff lowered its demand to $2 million and the defendant raised its offer to $800,000. At this point the mediator learned that the computer company was going public and it could not allow an $8 million claim to remain because it would have to include it in its prospectus. This would affect the value of the stock offering.

The mediator did not push the parties well-knowing that defendant had to settle. It did agreeing to pay $1.3 million.

[45] An alert mediator will at the outset of the mediation determine if one or both of the parties are going to be difficult. Many times counsel will simply tell him, while other times the mediator will have to reach such a conclusion by action of the parties reacting to their respective attorneys. For example, if, when the mediator

First, by inquiring what the weaknesses are in the case, and what is the worst result counsel expects from the judge, the mediator can reinforce some of the things counsel has been telling the client. Likewise, the mediator can inquire how long it will take to conclude litigation and what the out-of-pocket costs will be. In doing so, the mediator might impress the party with some of the difficulties of litigation.

On the defense side, different dynamics are at work. If a defendant is being unrealistic in its offers, counsel is often looking to the mediator to explain why more should be paid. Counsel does not want to look like he made an error in what he recommended in the first place. It might show he had inadequate skills in evaluating the case, or he is now fearful of going to trial. In carrying the burden of asking for more, the mediator can help counsel avoid a problem with the client.

Another way the mediator can be supportive is to be quick to compliment counsel for the work being done. If counsel prepared a good pre-mediation statement or made an above average opening statement, this should be commented on in front of the client. On the plaintiff side, these remarks will encourage the client to trust and respect her attorney. On the defense side, it will help cement the attorney/client relationship.

Second, in being supportive of counsel, the mediator needs to be careful not to cross over the line and support the attorney against the client. If a client is being intransigent, there is the temptation for the mediator to join with counsel in explaining why the party must compromise further. If pushed too far, it may appear the two are "ganging up" on the client and this will only make compromise more difficult. The better course is for the mediator to monitor the situation, and if it appears there is the potential for a split between the

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asks for the weaknesses in the case, and the attorney turns to the client and discusses them, this signals a difficult client because previously the client would not listen. Similarly, if the party sits with arms folded and will not look at the mediator, even when spoken to, this also signals intransigence.

attorney and client, the mediator should remain neutral and not side with the attorney. The mediator can then continue the mediation should services of the attorney be terminated.[46]

Third, the mediator can assist counsel with a difficult client by building rapport and trust with the person. This can be done by inquiring about family, interests, sports, whatever they may have in common. The mediator knows that if he can get the party talking about matters of which there is common interest, rapport and trust are built. If a friendship results, the mediator also knows that it will be much more difficult for a party to turn her back and reject a proposal the mediator may be making.

Fourth, the mediator can be of assistance to counsel helping him evaluate the case. The mediator can refer to other settlements similar in subject matter. He can refer to verdicts in the venue or comparable venues. Being neutral, the mediator can also be more objective in helping counsel evaluate the case. He can identify problems counsel might just be overlooking.[47]

[46]*Case Study:* Plaintiff was seriously injured in a car accident. The insurance carrier ultimately offered $125,000, which plaintiff's lawyer and her husband urged her to accept. She resisted saying she wanted $250,000. As the two tried to push her, her resistance increased. The mediator did not side with counsel, but remained quiet. He finally asked if he could speak with plaintiff alone. He then said he understood her feelings and that the others did not fully appreciate how much pain she was in. He explained that if she wanted to go to trial to get more, he would be supportive. However, he added that if plaintiff wanted to get the matter resolved that day and not wait three years, $125,000 was all she would receive. She asked the mediator what he would do and he suggested settling because the lawsuit was having a serious impact on her. She took the mediator's advice and settled.

[47]*Case Study:* Plaintiff was sexually abused by a cleric when he was 14 years old in a parochial high school. He was abused twice; however, the abuse had lifelong adverse effects. He hired counsel and brought suit even though some 58 years had elapsed since the abuse occurred. His attorney demanded $1 million. The religious order, named as a defendant, contended that the action was barred by the applicable statute of limitations. Plaintiff's counsel contended that plaintiff had repressed memory which tolled the statute of limitations until he became aware of the abuse.
The mediator, in private caucus, asked plaintiff's counsel what the statute of limitations was. He thought it was one year after reaching the age of majority, (18

h) Caucus Mediation is Ideally Suited to Handle Complex Cases

Handling a protracted multiparty case can be challenging to the best of judges. No matter the complexity, they must try it as any other case because they must follow the rules of procedure provided. To deviate risks an appeal and reversal. The mediator handling the same case is not so encumbered and has total flexibility how to handle the matter. There are no set of rules carved in granite, no procedure that must be followed, no protocol that must be adhered to. The following procedures could only be utilized in mediation.

i. *Multiple Defendants Seeking a Global Settlement:*

When there are multiple parties in a complex construction case or commercial sales case, parties generally wish to find a global settlement. The mediator can take the following steps:

First, after the opening caucus with the plaintiffs and a global demand is made, the mediator can meet in caucus with all defendants. They can discuss their joint strengths against the plaintiffs. However, discussing their weaknesses should be left to individual caucuses because one defendant's weaknesses may be strengths of another, and if the case goes to trial defendants may be turning on each other in an effort to limit liability.

The mediator can also inquire what the defendants believe is their best case/worse case before the judge. This should be done with each listing on an unsigned piece of paper what it believes is the best

years old), but he wasn't sure because the case was filed in a different state, Ohio. He was from Illinois. A quick search was made. An Ohio Supreme Court case was found which held, to the chagrin of plaintiff's counsel, that Ohio had a 12 year statute of limitations and the state did not recognize repressed memory. As a result, plaintiff's counsel recognized his case would have to be dismissed for more than 18 years had elapsed. Plaintiff quickly came down in his demand and the case settled for $115,000).

case/worse case.[48] The mediator can then collate the responses and announce the collective opinion. A global offer can then be made.

Second, after the global caucus, it is desirable that the mediator schedule individual caucuses with each defendant.[49] At this time the mediator can become better acquainted with each and better understand the defenses each is asserting. More important, at this time, the mediator can ask in confidence what each defendant's weaknesses are. Inquiry can also be made as to how each defendant views the other defendants and what is the best way to proceed.

Third, in the same individual caucus, the mediator can ask each defendant to designate the percentage of fault of each other defendant as he sees it. Dropping the percentage allocated for his own client, the mediator can collate the responses. This gives the mediator the best appraisal possible of the responsibility of each defendant.

Fourth, when a settlement figure is reached with the plaintiffs, the mediator can allocate percentages among the defendants as set forth above.

ii. *The Domino Effect:*

Many times when there are multiple defendants, one or more will decline to pay their fair share of a proposed settlement. Often a primary defendant will insist that all defendants pay equal shares; however, those least responsible will only be willing to pay their fair share.

The mediator can handle such a challenge by encouraging the plaintiff to begin settling with the defendants one at a time, the domino

[48]In America, lawyers tend to compete for clients. If each lawyer is asked orally to state the defendants' best case/worse case, each will attempt to outdo the others present to demonstrate how aggressive and tough he can be, and a candid opinion is not likely to be achieved.

[49]In scheduling caucuses among defendants, it is preferable that the mediator release those not immediately scheduled so they don't sit around all day waiting for a half-hour caucus. Holding them all day only increases their impatience and frustration levels.

effect.[50] Either by settling with the most responsible defendant first (even at a discount to get the dominos falling) and working down the chain, or beginning with the least responsible and working up the chain, the mediator can isolate those defendants not cooperating. With each defendant removed there is one less to share costs, and presumably one less expert to testify.[51] This put more and more pressure on those remaining.

Also, in each case involving multiple parties, lead counsel is normally appointed to coordinate the defense. It is effective if the mediator can target that person and their client for settlement as the first domino.

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[50]There is a concern that settling with some and not all defendants leaves "empty chairs," that the remaining defendants can point to and deflect the blame from themselves. However, fewer defendants increase the burden of those remaining, which offsets the risk.

There is a caveat using this process. When the mediator is using the domino approach, he must always communicate with those remaining in the case and inform them of what is happening. As defendants are dismissed from the case, those remaining will become upset and will feel imposed upon and even betrayed.

[51]*Case Study:* Plaintiff, a plumber, was burned over 50 percent of his body when he was involved in a propane gas explosion. He had been doing pluming work for an elderly lady when she asked him to light her pilot light in the basement. She did not inform him that her propane gas tank had just been filled. Attempting to purge the line of air, he took off the nozzle to the line to increase the size of the opening. He heard a hissing sound, but assumed it was air escaping. After twenty seconds, to determine whether gas was flowing, he lit a match and the explosion leveled the house.

Plaintiff sued the manufacturer of the ethyl mercaptan (odorizer added to the propane gas to give it a smell), the pipeline company that transported the gas, three wholesalers, and the retailer who filled the tank in the first place. The latter, who was primarily at fault, would only agree to split damages six ways equally. If the others would not agree, he would refuse to settle.

The mediator met with plaintiff's counsel and suggested they use the domino process to isolate the retailer. He suggested they start at the low end and work up the chain. Plaintiff agreed. They first contacted the manufacturer of the mercaptan, and, to get the first settlement, offered to settle for less than plaintiff thought the claim was worth. It settled. Thereafter, the mediator met next with the pipeline company and got a second settlement. He then met with the wholesalers and they acquiesced. When the retailer was left without co-defendants, it realized it faced a potential loss exceeding policy limits. With that realization and the increased costs it faced, the retailer settled.

To take lead counsel out of the case has much greater impact on the remaining parties.

iii. Using Pre-mediation Caucuses to Develop Strategies:

In a complex case, it might be desirable to conduct pre-mediation caucuses with each party and counsel.[52] The purpose is three-fold: first, it gives the mediator a chance to learn what the case is about from each party's perspective. This will cut the required time when the mediation in chief is conducted.

Second, it permits the mediator to become acquainted with the parties and counsel, and begin building the required rapport and trust. Because only the strengths are discussed, the mediator has a chance to show interest in the parties and their activities.

And, third, it helps the mediator begin developing a strategy to resolve the dispute. When there are claims, counterclaims, and cross claims, the mediator needs to develop a plan to address each. This might include dropping a party or claim because not covered by insurance, or realizing plaintiff's targets and priorities.[53] To simply

[52]Pre-mediation caucuses should not be utilized unless all parties agree to participate. To caucus with some and not all would give the appearance that the caucusing parties gained an advantage.

[53]*Case Study:* A university president and vice president developed a plan to make the school a for-profit institution and expanding it to foreign lands. Ultimately, the board of governors rejected the plan and they resigned. They contacted another university, which accepted the plan and hired the two to implement it. The first university then sued the second for (1) breach of trade secrets, (2) conspiracy, (3) fraud and deception, (4) intentional interference with contractual rights, (5) breach of fiduciary duty, and (6) breach of contract. The latter two counts covered only the president and vice president who left the university, and were not covered by insurance.

Pre-mediation, the mediator met with counsel for each of the parties and developed the following strategy. First, he felt it was necessary that plaintiff drop the fifth and sixth counts because not covered by insurance and said officers had no assets of their own to satisfy any judgment. Also, the insurance carrier, insuring the first four counts and the second university, would take the position that the whole incident was caused by the two officers and that the second university had no exposure. Second, the two officers were represented by separate counsel; however, the carrier would pay them only two-thirds of their fees because, again, the latter two counts

enter a complex mediation without a plan can increase costs and risk a greater chance of failure.[54]

were not covered. As it turned out those two were the best trial lawyers and if the case went to trial, the carrier wanted them in the case. They indicated they were withdrawing if not paid in full. Third, the mediator encouraged plaintiff's counsel to make a thorough and convincing presentation to impress the insurance representative attending the mediation. They were from New York City and might not appreciate the skill level of an Iowa lawyer. Counsel followed the strategy outlined and the case settled for a substantial sum of money.

[54]*Case Study:* Decedent took out a life insurance policy for $10 million. However, he falsified his medical record at the insistence of the insurance agents who sold him the policy. He died within 18 months of issuance and the insurance company discovered the fraud and filed a declaratory judgment action to rescind the policy. The decedent's estate counterclaimed against the carrier to enforce the policy on the grounds that the insurance agents were agents of the insurance company and therefore knowledge of his medical condition was attributed to it. The insurance company then filed a second action naming the estate and insurance agents as defendants and pleading fraud and conspiracy to defraud. Motions for summary judgment had been filed by both the estate and the insurance company on the issue, were the insurance agents, agents of the insurance company or the decedent?

In the pre-mediation caucuses conducted with the respective attorneys, the mediator began to work out his strategy. First, the insurance agents had a combined $8 million in errors and omission coverage. Second, the agents were most likely agents of the decedent rather than the insurance company because (1) they sold policies for other companies, (2) they did not operate under the auspices of the carrier, and (3) there was another insurance company through which the agents in question operated, which had direct connection with the carrier. Third, even if agents of the carrier, the charge that they conspired with the decedent to defraud the insurance company in question would negate any claim that they were acting on behalf of the carrier. Fourth, and most important of all, as long as the carrier's claim for fraud was in the case, the estate could not reach the agents' $8 million in insurance because there was an exclusion for fraud. Thus, it was important to get the carrier out of the case and sue the insurance agents for their negligence and breach of fiduciary duty. They had induced the decedent to falsify his medical record believing that he would live more than two years and therefore the policy would have become incontestable and collectible. They miscalculated. Fifth, the strategy was, therefore, to convince counsel for the estate to settle with the insurance carrier and have it (1) dismiss all claims against the estate and agents, and (2) pursue the claim against the agents for negligence and breach of fiduciary duty. This strategy was followed and the matter resolved.

i) *Mediation Can Accommodate More Than a Dollar Resolution*

In a courtroom trial, a judge can only award a dollar amount. There is no opportunity to consider non-economic options, such as, as noted above, an apology or letter of commendation, etc. The mediator can consider other possibilities and include them in any settlement so long as the parties agree.

There is, however, another major consideration which could not arise in the courtroom. It is the peacemaker's ultimate tool. If the mediator can get the parties to apologize and forgive, resolution and healing are assured. It is the ultimate goal of any mediator.[55] Forgiveness in particular, takes courage, but with it comes an inner peace and serenity. It gives the person a new sense of dignity whether in divorce, personal injury or sexual abuse.[56]

The great South African president, Nelson Mandela, shows how the power of forgiveness of just one person can help heal a nation. After his stunning election as president of South Africa in 1994 (after being

[55]*Case Study:* The author has mediated over 800 cleric pedophile and ephebophile cases. Victims suffer life-long depression, drug and alcohol abuse, incompatibility with the family, and even criminal conduct resulting in felony convictions. One African American male child was turned over to a cleric because the mother could no longer support the child. The cleric agreed to raise him as his son. Shortly after, the cleric put a ring on his finger and called him his wife. For six long years he abused the child in the worse way imaginable. At the time of the mediation, he was an adult and appeared in a coat and tie. He explained he was happily married, had three beautiful daughters, had a fine job, owned his own house in Atlanta, and felt life was good to him. Asked how he had recovered, he answered simply that he had forgiven the cleric and the church that shielded him. He added, he was a sick man but I loved him as a father.

[56]Mark Bennett & Christopher Dewberry, "*I've Said I'm Sorry": A Study of the Identity Implications and Restraints That Apologies Create For Their Recipients*, 13 CURRENT PSYCHOL. 10, 11 (1994) (documenting a number of positive social consequences that result from apologies); Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, 18 OHIO ST. J. ON DISP. RESOL. 829, 844-47 (2003) (discussing the positive impact of apology on the dispute resolution process); see also, Barry R. Schlenker & Bruce W. Darby, *The Use of Apologies in Social Predicaments*, 44 SOC. PSYCHOL. Q. 271, 271-72 (1981) (discussing various forms of apologies in the contexts in which they are used).

jailed as a terrorist by the government for 27 years), he faced an enormous challenge of how to heal a nation of overwhelming prejudice on both sides of the color line. One of Mr. Mandela's bodyguards asked for more guards to ensure the new president's safety. After careful thought he gave him four – the same white guards that had guarded his white predecessor. The guard opposed this saying that *"not long ago they had tried to kill us."* Mr. Mandela responded, *"Reconciliation starts here. . . . Forgiveness starts here, too. . . . Forgiveness liberates the soul. It removes fear. That is why it's such a powerful weapon."*[57]

III. CAN INDIA EFFECTIVELY ACCOMMODATE MEDIATION?

With mediation dominating in America and spreading throughout the world as the primary means to resolution, can the Indian system accommodate it?

There is not only a framework for mediation in India, but there is a rich legacy. Alternative Dispute Resolution (ADR) methods are not new to India and have been in existence in some form since before the modern justice delivery system was introduced by the colonial British.[58] It now has a constitutional basis, Article 14 and 21, which

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[57] *CHRISTIAN SCIENCE SENTINEL*, March 8, 2010, No 10, at 28.
The Amish church also gives us an example of forgiveness. When a member killed several little girls, the community rushed to the assailant's home and had a prayer session with this wife and family, an act of forgiveness.

[58] Since Vedic times, India has been a pioneer in providing speedy and effective justice through informal processes. Earlier, dispute settlement by Panchayats, a counsel of village elders, was an accepted method of conflict resolution. This led to the emergence of the celebrated Panchayati Raj System in India; *Sitanna* v. *Marivada Viranna*, A.I.R. 1934 PCIO (India), the Privy Council affirmed the decision of the Panchayat in a family dispute. Sir John Wallis, J. stated as follows
"Reference to a village Panchayat is the time-honored method of deciding disputes of this kind, and has these advantages, that it is comparatively easy for the

deal with the Fundamental Rights of Equality before Law and Right to Life and Personal Liberty.[59]

In 1980, the Government of India set up a committee to implement legal aid under the chairmanship of former chief Justice of India, Mr. R.N. Bhaqwafi.[60] Later, Parliament enacted the Legal Services Authorities Act of 1987, which provided a mechanism for the speedy resolutions of disputes. Also, in 1984, the Family Courts Act was enacted to promote conciliation and speedy settlement of disputes relating to marriage and family affairs.

Within this framework, the question arises as to why mediation and conciliation have not had greater impact on the India legal system.

There may be several reasons:

A. Public Resistance to Change

As in America, there may be public resistance to change. For the most part the public will not know the difference between mediation and arbitration and many have probably heard of neither.[61] However,

panchayatdars to ascertain the true facts, and that, as is this case, it avoids protracted litigation which, as observed by one of the witnesses, might have proved ruinous to the estate. Looking at the evidence as a whole, their Lordship see no reason for doubting that the award was a fair and honest settlement of a doubtful claim based both on legal and moral grounds, and are therefore of opinion that there is no grounds for interfering with it".

[59]In 1982, in Juragarh in the state of Gujarat, a forum for ADR was created for the first time in the form of Lok Adalat (People's Court). Lok Adalats helps parties to compromise and reach settlement which is binding on them. It has proven effective in settling money claims, partilition suits, damages, and matrimonial disputes. It provides a mechanism which permits parties to resolve their disputes expeditiously and without cost.

[60]The first major area where conciliation has proven successful is in labor law. The Industrial Disputes Act of 1947, statutorily recognized conciliation as a method of dispute resolution. The Act encourages workers and management to negotiate, or if that fails, to enter conciliation before resorting to litigation.

[61]There have been expressions of concern that mediation undermines the rights of women in family law disputes; *See,* Trina Grillo, *The Mediation Alternative Process, Dangers for Women*, 100 YALE L. J. 1545 (1991). Concern has even been expressed that the informality of ADR fosters racial and ethnic prejudices; See,

public resistance goes only as far as resistance by attorneys. If attorneys recommend parties engage in mediation, they will normally acquiesce.

As mediation took hold in America, the public began to see the benefits. They quickly recognized that it was considerably less expensive, was expeditious and was kinder on the parties themselves. They now see the practice of law as a noble profession. More important, they now demand mediation over the courtroom trial and use lawyers who will accommodate them. In other words, in America, mediation has won out in the marketplace.

a) Lawyer's Resistance to Change

Initial resistance to mediation in America came from the plaintiffs' bar. They felt insurance companies and big businesses were using the process to force an unwary public to accept settlements which were unfair or less than what a judge might do. What they learned was that the presence of a mediator often resulted in settlements which were better than what might occur in court. More important, a mediated settlement avoided the prospects of receiving nothing at trial.[62]

The plaintiff's bar acquiesced first, because attorneys realized a mediated settlement was much better for their clients. They weren't caught up in protracted litigation that cost more than anticipated, and they found the mediation process so much more comforting. Placing

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Richard Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985); See also, Owen F. Fiss, *Against Settlement,* 93 YALE L. J. 1073 (1984); Erick Yamamuto, *ADR, Where Have the Critics Gone?*, 36 SANTA CLARA L. REV. 1055 (1996).

[62]In the past twenty years it has become more and more difficult in America to recover a substantial plaintiff verdict. The author has kept track of cases he did not settle as mediator, and forty percent of those cases came back with a defense verdict. And in each case there was a substantial offer made, only not enough to satisfy the plaintiff or counsel. Even more telling is that seventy percent of the cases tried resulted in a verdict which was $25,000 or less, including the zero verdicts. In America, you cannot try a case for $25,000, the costs are too great.

the interests of their clients first, it was far easier to accept the process.

On the defense side, the challenge was more real. There was great reluctance to suggest mediation or ADR because it could severely impact the economic well-being of the law firm. More than one major large firm in America has failed because of the decline in revenue caused by mediation. The pressure for change, therefore, came from the public and, in particular, industry. Insurance companies and large corporations began to recognize they could save substantial costs by staying out of the courts. They literally forced their attorneys to accept ADR with the threat they would deal elsewhere with attorneys who would. The public created a competitive market in which only those defense lawyers who were effective in mediation would survive.

b) Court Support of Mediation

At first, courts in America considered mediation of limited value, restricted to family disputes, neighbourhood differences, and possibly employment problems. No one envisioned the meteoric rise in the use of mediation in all areas of the law, from patent and commercial dealings to personal injury and small claims. The courts were quick to support mediation for it eased congestion in the courts.

American courts not only accepted mediation, but affirmatively promoted it. They encouraged parties to settle before a case was set for trial. They assisted in the process by holding settlement conferences, even assigning various judges and magistrates to mediate cases. Several appellate courts have also assigned mediators to work with the parties in an attempt to resolve the matter before hearing.[63]

[63]The federal First Circuit Court of Appeals, which mandates mediation in all civil cases on appeal. Federal Rules of Procedure and First Circuit Local Rules, r.33 (2012) www.cal.uscourts.gov/files/rules.pdf.

There can be no question as to the impact mediation is having in America. As noted above, there has been a 60 percent drop in actual cases tried since the mid-1980s.[64] Thus, mediation has been a major relief to an overburdened court system.

IV. HOW INDIA CAN MAKE MEDIATION THE MAINSTAY OF ITS COURT SYSTEM

It is here suggested that the Indian legal system has all the pieces already in place to make mediation flourish. It has a public that is already sensitive to peacemaking based on a culture that has utilized some form of mediation long predating even the founding of America.

Perhaps the place to begin is with the legal profession and courts. Training sessions might be held to train mediators and attorneys representing clients in mediation. The same effort might be made to train judges so that they might see how mediation can help them control their dockets.

At the appellate level, mediators might be appointed to address pending appeals. The appellate courts or Supreme Court might designate routine appeals for mediation. The mere fact a case has been pending on appeal for some time might encourage the parties to resolve it through mediation if given a chance, so they can get on with life.

Another avenue for spreading the word is to introduce mediation classes in the law schools. There are many such courses in American law schools that could be used as models. Professors are more than happy to share their material.

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[64]Galanter, *supra* note 8, at 3.

To spread the word to the business community, lawyers could be designated to speak on mediation at trade association meetings and industry conferences. There is always great interest in how to make dispute resolution more efficient and economical.

Another way to educate the legal profession is to support mediation tournaments at the law school level. The National Law Institute University in Bhopal held the first All-India national mediation tournament to which thirty teams from around the nation attended. It was extremely well run, and a superb model for future tournaments. As Justice A.K. Patnaik of the India Supreme Court stated at the tournament, it is important for our students to become "solders for peace." It is a majestic calling, and mediator training in law schools will help our future lawyers be just that.

V. CONCLUSION

The author and five of his colleagues, H. Case Ellis, president of the International Academy of Dispute Resolution (Chicago, Illinois), Rahim Shamji (vice president of the Academy (London, England), Tom Valenti, secretary of the Academy (Chicago, Illinois), Meghann Sweeney, executive director of the Academy (Chicago, Illinois), and Deborah Queen (Beaumont, Texas), attended the First Annual All-India Law School Mediation Tournament. We were exceedingly impressed with the brilliance of the students and how quickly they understood and implemented the tools of mediation. With students like these, India's legal system is in good hands.

TRANSFER OF SEAT IN INTERNATIONAL ARBITRATION: A FLY ON THE RAZOR'S EDGE?

Devaditya Chakravarti[*] *& Alok Nayak*[**]

ABSTRACT

International arbitration has seen its practitioners and experienced arbitrators address and overcome panoply of problems and issues at various stages. One stifling chokepoint for arbitrators which has posed a recurrent risk is the possibility to convene hearings at venues outside the place of arbitration and interference by the courts of the country of origin of a party. In the course of the findings, some general principles of international arbitration are considered so as to ascertain the wisdom that prevails over the tribunals, institutions or courts for that matter. The present article is restricted to summarily revisiting some issues relating to the place of arbitration which continue to haunt international arbitrations. Since every arbitration agreement is cast upon the favourableness of the legal environment surrounding the seat or place of arbitration, investigation is stimulated on the lines of factors contributing to a change of

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circumstances and its subsequent ramifications on the contractual agreement. A part of the paper is dedicated towards positing how several ubiquitous principles of contract law come into conflict and at the end reach a stalemate. Several case studies are then taken up to explore whether the choice of a place of arbitration is in effect, a banal consideration. Lastly, a fresh Indian perspective is lent with an elaborate criticism of a very recent Supreme Court judgment and how best can it be reconciled with trends in international arbitration.

I. INTRODUCTION

After having enacted the Arbitration and Conciliation Act in 1996, the Indian government was somewhat vindicated of its responsibility to shape up an effective response to its much-complained erratic and sluggish court system. This brought the country a step closer towards demonstrating itself as a center for international commercial arbitration in the global sphere. Nevertheless, there continues to exist a few potholes in the system which need to be filled and looked at, including the slackness of the courts in the interpretation of its myriad provisions such as those of enforcement and challenging of foreign awards[1], interim measures etc. Here, however, the most vexing bottleneck is the one that has to do with the "'transfer of seat"[2].

[1]Sandeep S Sood, *Finding Harmony With UNCITRAL Model Law: Contemporary Issues In International Commercial Arbitration In India After The Arbitration And Conciliation Act Of 1996* (Dec. 21, 2011), http://works.bepress.com/sandeep_sood/1.

[2]Justice K.A. Abdul Gafoor, *Arbitration Law- Need for Reforms*, ICA QUARTERLY (2003).

However, to shed more abundant light on the concept of "transfer of seat", its significance and associated conditionality need to be assessed in the international plane so that Indian courts may strike common ground with international tribunals, institutions etc. This would only go on to ensure a steady flow of intellectual exchanges and ideas that would foster the scope of international arbitration in India and the other way round as well.

II. TRANSFER OF SEAT: A PRIMER

The importance of clearly and conspicuously drafted arbitration clauses cannot be overemphasized. The pre-conditions and the guiding framework would enable the parties to know where to go and how to resolve problems if things do not go quite as expected. Identification of the place where the arbitration will be located in the event a dispute arises between the parties under the contract, i.e. the 'seat' of arbitration is a crucial element in such clauses as it would only determine as to which country's laws would govern the arbitration process and also the magnitude of any legal guarantee or right of a party to challenge the award in a court of law.

It is submitted that one would, for all practical intents and purposes, set out in express terms the choice of the place where any dispute, if arisen, is to be heard and not take the ill-advised risk of leaving open any possibility of more than one place in different countries exercising jurisdiction over any dispute arising out of the contract. However, it is worthwhile to note that it is always not the case for parties to agree to incorporate into their contract an arbitration clause an exclusive 'seat' of arbitration. Whether or not this is a good practice, the present article seeks to examine the ramifications that follow when such scope of ambiguity persists in the arbitration clause and how and to what extent the disposition of the parties is influenced.

International commercial arbitration generally confers upon parties the discretion to choose for them the juridical seat of arbitration[3]. Here it must be pertinent to note that 'seat' is in some ways a more accurate word than 'place'. 'Seat' means the juridical base of the arbitration, whereas 'place' can mean the place (or places) where the parties assemble to hold deliberations, which need not always be at the 'seat'.

It is only obvious to assume that parties are to make the choice of a place of arbitration at any time preceding the commencement of arbitration, in the event that they do not, they may leave it to be made on their behalf by an arbitral institution or by the tribunal itself. After having made the choice, the next question that begs to be interrogated is as to where the arbitration is to be held.[4] For this, though there is no answer that could be given in express, unequivocal terms and be regarded as universally applicable, yet, the nationality of the parties must be taken into account. The general trend in the international scenario shows the proclivity of parties to favour a country that is "neutral", that is to say the countries of which either of the parties are not natural citizens of. Place of business is a preponderant factor just as well, since the over-riding consideration for parties very often is the need to cut down as far as possible on the expense and inconvenience of travelling. Political factors are crucial as well, though only subordinate. The question as to whether any restrictions are likely to be imposed on the entry of parties, their advisers and witnesses are relevant in this regard.[5] The practical suitability of a particular place for an international arbitration depends to a sizeable

[3]Arbitrations conceived and conducted as under the Washington Convention are an exception as here the parties must consult the Secretary-General and obtain the approval of the arbitral tribunal if they are to insist upon the hearing to take place elsewhere than at the International Centre in Washington; *see* ICSID Arbitration Rules, r. 13(3).

[4]K. Iwasaki, *Selection Of Situs: Criteria And Priorities*, 2 ARBITRATION INTERNATIONAL 57 (1986).

[5]Shri K.R. Narayana, *Inauguration of the International Council for Commercial Arbitration Conference*, 17 INTERNATIONAL ARBITRATION 153,154 (2000).

extent on whether there is satisfactory infrastructure to accommodate the parties. Notwithstanding such flights of fancy, the primordial consideration is usually the legal environment. This is relevant both to the conduct of the arbitration and the degree of enforcement of the award. Now, the proposition as to whether or not a particular legal environment is suitable for the conduct of an international arbitration is as much an issue of personal judgment as of legal investigation. As is always the case, there are certain minimum international touchstones on which most arbitrators agree such as the local law must be equipped and sophisticated enough to put into action international arbitration agreements, in consonance with the New York Convention[6] and the Model Law.[7] Constitution of the arbitral tribunal by a transparent mechanism empowering such entities to carry out their mandate more efficiently and effectively, recognition and enforcement of foreign awards are some of the minimum threshold standards for international arbitration to play its course.

However, as it appears necessary to issue a *caveat* at the very outset, views as to what does and what does not constitute a suitable legal environment for the conduct of an international commercial arbitration is often plagued by a situation when the 'place of arbitration' had been agreed upon by the parties[8] but yet when an unforeseen or 'exceptional' change of circumstances made 'unduly difficult' the proper conduct of a fair, free arbitral proceeding in that venue. Here the flux in circumstances could also be extended to mean a transformation in attitude of the State party, or of its political regime.

[6]United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.
[7]Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, G.A. 40th Session, 40/72, Treaty Series, vol.330, No. 4739.
[8]A State or State enterprise and a foreign private company.

It is germane to note here the acceptance of the proposal set forth by one Professor Arthur von Mehren by the Institut de Droit International in its 64th Session in the year 1989. Mehren, among other things had proposed a Draft Resolution containing clause which was formulated after considerable revision by the Institut[9] in the following terms:

> *"Article 3(d) - Should it become unduly difficult to carry on an arbitration at the agreed place, the tribunal is entitled, after consultation with the parties, to remove the arbitration to such place as it may decide."*

This principle so adopted was hailed in the academic circles as well as among the practitioners for being harmonious with the modern conditions and practical imperatives of global commerce and economy.[10] But before we set ahead any further, it would be practicable to differentiate between the venue of hearing versus place of arbitration.

III. VENUE OF HEARING VERSUS PLACE OF ARBITRATION

This distinction is rather banal and has become redundant through overuse. It is essential to note that the place or 'seat' of arbitration is not the physical location but the associating linkage or connecting factor to a given procedure or '*lex arbitri*' of the State in whose territory the 'seat' is situated.[11] For convenience of parties and the arbitrator, hearings and deliberations may be held at a place distinct

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[9] ANNUAIRE (YEARBOOK) DE L'INSTITUT DE DROIT INTERNATIONAL, vol. 63, I, 31–204 (1989); ANNUAIRE (YEARBOOK) DE L'INSTITUT DE DROIT INTERNATIONAL, vol. 63, II, 121–221, 220–221 (1990).

[10] Ph. Kahn, *Le Contrat International*, Brussels, 195 (1975); R. Köbler, *Die 'clausula rebus sic stantibus' als allgemeiner Rechtsgrundsatz,* Tübingen (1991).

[11] 2 J.W. ROWLEY, ARBITRATION WORLD, JURISDICTIONAL COMPARISONS cl. Viii (2nd ed., 2006).

from the 'seat' of arbitration.[12] In a hypothetical case situation, the arbitrators may give assent to a decision to hold a hearing in New Delhi and not at the place of arbitration in State A, which is also a party to the arbitration. Some 'non-legal' factors, that is to say practical considerations should be put into the balance when fixing the venue of such hearing in a territory distinguishable from the place of arbitration. Parties here may need to exercise caution in that the *lex arbitri* may be less flexible and more exacting than the mutually agreed procedural rules. As some national arbitration laws require for the proceedings or at least a part of it to take place physically within the territory of the state, in failure of which the award may lose the degree of its enforceability as the 'host State' just might refuse to acknowledge that such an award has been rendered on its territory.[13]

IV. CHANGE OF THE AGREED PLACE OF ARBITRATION

There may arise situations which may render the performance of an arbitration agreement partially or entirely impossible. It must be remembered that such situations may be of persuasive consideration only after the signature between the parties has already been affected. Some instances which render the proceedings at the agreed place of arbitration difficult or impossible are death or non-availability of an arbitrator named in the agreement, the disbanding of the selected arbitration institution, etc. Whether removing the venue of hearing may suffice to ensure a free and fair proceeding is a question of expediency and is usually found to be effective where physical access

[12]ICC Rules, art. 14; LCIA Rules, art. 16, UNCITRAL Arbitration Rules, art. 16. A recent matter arose in England with respect to the same, *The Bay Hotel and Resort Ltd*. v. *Cavalier Constructions Co. Ltd and Anr*, 16 July 2001, P.C. Lords Nicholls, Cooke, Clyde, Hutton and Millet, unreported; summarized by Stewart R. Shackleton, *Annual Review of English Judicial Decisions on Arbitration*, [Int. A.L.R. 206, 213 (2002).
[13]5 N. BLACKABY, C. PARTISIDES WITH A. REDFERN & M. HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (5th ed. Oxford University Press, 2009).

to the location is impeded by lack of infrastructure, rebellions or civil wars. In a setting where a State intervenes, directly or clandestinely through its courts, with the arbitration to which it might be a party, a change of place of arbitration is warranted for.

By looking back into the pages and annals of the history of international arbitration, a lot many cases come to mind. Teheran, Dhaka, Kabul and Belgrade have given rise to troubles over the years where, more often than not, the private party felt compelled to accept a place situated in the territory of the State contracting party.[14] An arbitration clause providing for a choice of 'place' or 'seat' of arbitration had been concurred with before extenuating circumstances came into play, such as coming into power of a new political regime.[15] What needs to be interrogated is two-fold:

1. Was the change of circumstances unforeseen or unforeseeable?
2. Are the new circumstances so exceptional as to actually prevent the normal and orderly course of the proceedings, in keeping with the fundamental principles of arbitration?[16]

The basic centerfold of international arbitration being based on contract as we know it, such change in the place of arbitration when agreed by the parties would inevitably lead to a confrontation between two fundamental bedrock doctrines of contract law: *pacta sunt servanda* and *rebuc sic stantibus.*[17] While determining the question as to what might have been the common and real intention of the parties when they mutually consented to a place of arbitration, no definitive analysis is required to answer the same. It is universal wisdom that

[14]ANNUAIRE (YEARBOOK), *Supra* note 9, at 188.
[15]Such as advent of the bloody Islamic Revolution in Iran, Slobodan Milosevic putting into place his dictatorial regime.
[16]Pierre Lalive, *The Transfer of Seat in International Arbitration,* LAW AND JUSTICE IN A MULTISTATE WORLD, ESSAYS IN HONOUR OF ARTHUR T. VON MEHREN 515 (2002).
[17]H. Van Houtte, *Changed Circumstances and Pacta Sunt servanda*, ICC/DOSSIER OF THE INSTITUTE 105–114 (1993).

most parties when they choose to arbitrate a dispute, are actuated by the neutrality of the process and thus a place of arbitration will be a mere mechanical modality to implement the parties' fundamental understanding to arbitrate.[18]

V. CHANGED CIRCUMSTANCES: A GENERAL CONCEPTION IN CONTRACTS

It is a universal truth that changed circumstances may alter the effect of a contract.[19] Further, the Vienna Convention on the Law of Treaties also provides for changed circumstances in Article 62 whereby States agree on the binding effect and the limits of the treaties they contract among each other. The International Court of Justice has not stayed behind and has stated in express terms:

"….that the fundamental change of the circumstances that induced a State to adhere to a treaty may justify a termination of the treaty if they lead to a radical transformation of the obligations under the treaty."[20]

The impact of changed circumstances was also a matter of discussion in the Iran-U.S. Claims Tribunal.[21] The Tribunal assumed for itself the authority to decide in situations wherein on account of change in circumstances, an earlier existing forum selection clause in favour of the courts of Teheran had become unenforceable.[22] Problems regarding an agreed place of arbitration have been a recurrent topic in

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[18]Pierre Lalive, *Supra* note 16, at 4.
[19] Principles of European Contract Law,art. 6.111, UNIDROIT Principles Article 6.2, CENTRAL List of *lex mercatoria* principles, rules and standards,art. VIII.1, http://www.tldb.de.
[20]Fishery Jurisdiction,(Germany v. Iceland), Judgment, 1973, ICJ Rep. 1973, 49, 62-65 (Feb. 2).
[21]In re Halliburton Co.et al., 1982 1 Iran-US, CTR, 242 (Nov. 5).
[22]Ted Stein, *Jurisprudence and Jurists' Prudence: the Iranian-Forum Clause Decision*, 78 AM. J. INT'L L1(1984).

international arbitrations as was reflected in one case where the ICC Court refused to follow the Arbitral Tribunal's proposal to transfer the seat as courts had interfered into the matter of the earlier agreed seat at Abu Dhabi.[23]

VI. CHOICE OF PLACE OF ARBITRATION: AN IRRELEVANT CONSIDERATION?

A firm understanding is needed in that the contractual provision for the place of arbitration is, in most cases of secondary or subordinate importance, when compared to the much larger considerations such as impartial decision by free, independent arbitrators and award rendering in accordance with due process, respect of equality of the parties.[24] This can be further justified by the fact that even when no exact, definite or precise place has been specified by the parties, the arbitration clause continues to be perfectly valid and operative. Its importance is however put to test in the case of State contracts where a choice of a particular place is a condition *sine qua non* for one of the parties of the agreement to arbitrate.

Whatever may be the nature of requirement or consideration, the choice must be reasonably exercised on the common understanding that it does not jeopardize or render ineffective the very purpose of the arbitration agreement itself because otherwise the integrity and fairness of the arbitration process would be compromised with and would play out in sheer disregard of the common expectations of the parties. One such plausible expectation would be minimum interference by the courts in the arbitral process. Parties submit to

[23] ASSOCIATION SUISSE DE L'ARBITRAGE BULLETIN, 293 (Volume 4, 1987).
[24] W.M. REISMAN, W.L. CRAIG, W. PARK & J. PAULSSON, INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIAL AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES (University Casebook series, New York, Foundation Press, 1997).

arbitration only to avoid the unnecessary formalities and laches that the court system brings with it, thus if the courts seem to interfere on their own motion or upon direction of the State party, the essential purpose of arbitration itself gets defeated. A sensational illustration in this respect is the *Himpurna* case where the Court at Jakarta obstructed the normal course of the arbitration by attempting to ponder over the merits of the dispute.[25]

A less spectacular, but yet more telling account is to be found in an ICC arbitration in the 21st century. Here, a U.S. company was facing the Republic of Serbia and a State enterprise of that country.[26] Dispute arose between the two parties, leading to claims and counterclaims, as the bone of contention was whether Belgrade, chosen earlier in 1990 as the place of the arbitration in their contract did have the requisite legal environment for fair and unbiased arbitration proceedings as the Serbian State was alleged, through its judiciary, to have expropriated the U.S. company of its shares in a local company. The U.S. party in support of its contentions asserted that the circumstances which prevailed in 1990 when it had accepted to arbitrate disputes in Belgrade had fundamentally changed by 2000 as Mr. Milosevic and his cohorts installed a dictatorial regime which flexed its muscles conveniently to use the judiciary to their ends. Further, it had also contended that the personal safety of its party and some witnesses could not be guaranteed. The Serbian State on the other hand rebuffed such change in circumstances and stated that as a matter of principle, the honing down on Belgrade had been a condition *sine qua non* of the agreement and therefore such change in the place of arbitration was visibly inconceivable.

It could safely be asserted here that the initial choice of place must have been based on a common assumption that Belgrade would continue to remain a legal environment conducive to fair and

[25] ASSOCIATION SUISSE DE L'ARBITRAGEBULLETIN, 583 (1999).
[26] Knoepfler, *Note on the Partial Award in ICC Arbitration Case No. 10373*, *Rev. arb*, 413-421.

impartial international arbitration, in accordance with the ICC Rules.[27] But the situation that followed saw a systematic, iron-fisted crackdown on political expression by citizens and fomenting of a xenophobic hatred of the United States which saw its ultimate culmination in the degrading, manipulating and purging of the Yugoslav judiciary. This would mean that any future award in favour of the U.S. would understandably be annulled in Belgrade. Such a situation would justifiably raise doubts in the mind of a reasonable, prudent man as to the independence of the arbitrators and thus the latter, clearly runs the risk of losing the trust of the parties as well as the respect and acknowledgment of international opinion-makers and readers. This runs contrary to Article 1 of the von Mehren Resolution which states: "*An arbitrator……shall exercise its functions impartially and independently*."[28]

Article 7.1 of the ICC Arbitration Rules also is clear to this extent that "*Every arbitrator must be and remain independent of the parties involved in the arbitration*."

The ICC Court of International Arbitration when called upon to decide on the U.S. company's fate surprisingly reverted the question to the Arbitration Tribunal to resolve whether the 'clause fixing the seat in Belgrade was still binding'. By citing earlier controversial precedents,[29] the Tribunal refused to change the place of arbitration and stated that even if its awards were struck down by the Serbian courts, they could still be enforced elsewhere. The reasoning employed is erroneous as it is for the Tribunal to ensure that its award is enforceable and thus they conveniently avoided the very noble mission that was entrusted to them. Justice must not only be done, but

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[27]P. Lalive, *On the Neutrality of the Arbitrator and of the Place of Arbitration*, SWISS ESSAYS ON INTERNATIONAL ARBITRATION 23-33 (1984).

[28]P. Lalive, *La procédure arbitrale et l'indépendance des arbitres*, BULLETIN DE LA COUR D'ARBITRAGE CCI 119–135 (1991).

[29]*Hilmarton* and *Chromalloy* are the controversial cases that were made reference to.

seen to be done. The totalitarianism prevailing today in Serbia sought to destroy the equality of the parties in arbitration and also affected the very independence of an arbitral tribunal sitting in Serbia and called upon to decide an essentially "Serbian-American dispute". What escapes all rational understanding is how the Arbitrators were seen as enjoying the full confidence of all parties and be considered as exercising their functions impartially and independently when the integrity and fairness of the whole arbitration process was threatened by the prevalence of such violent tendencies on behalf of the State.[30]

VII. TRANSFER OF SEAT: AN INDIAN PERSPECTIVE

In the Indian context, to etch out the evolution of the concept of 'transfer of seat', it is advisable to traverse the decision in Videocon Industries Ltd. Vs Union of India.[31] An arbitration clause in the Production Sharing Contract (PSC) between Union of India and a consortium led by Videocon provided for Kuala Lumpur, Malaysia as the seat of arbitration. The clause of arbitration read as follows:

"34.12. Venue and Law of Arbitration Agreement: The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language. Insofar as practicable, the Parties shall continue to implement the terms of this Contract notwithstanding the initiation of arbitral proceedings and any pending claim or dispute. Notwithstanding the provisions of Article 33.1, the arbitration agreement contained in this Article 34 shall be governed by the laws of England."

In the events that followed, the arbitration proceedings were held in Amsterdam and London due to the onset of SARS disease that had plagued almost the entire stretch of South-East Asia. The Tribunal in October 2003

[30]H. GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD (Kluwer Law International, 2002).
[31]Videocon Industries Ltd vs Union Of India & Anr, (2011) 6 S.C.C. 161 (India).

passed a consent order deeming the seat of arbitration to have been shifted to London. The issue of contention was whether by this, parties had arrived at a consensus to hold the proceedings in London but to retain Kuala Lumpur as the seat or an express transfer of the seat of the arbitration itself. The Supreme Court reasoning was based on the implications of the amendment clause[32] wherein the parties could amend the PSC only through a written instrument as per Article 35.2. Thus, it could not be contended that there was any transfer of seat but a mere shifting of venue for convenience. It further clarified that the Arbitration and the Conciliation Act did not provide for a situation where the seat could be changed by the arbitral tribunal. As distinction between the place of arbitration and hearings taking place in a jurisdiction outside the seat was a clearly established international custom, the SC had seized of the same matter already in Dozco India Ltd. Vs Doosan Infracore. Thus, it contended that there was an agreement merely to hold proceedings outside the seat.

The author here differs in opinion. Firstly, the arbitral tribunal need not have passed any such agreement as the proceedings were already being successfully conducted in Amsterdam and London even before the agreement saw the light of the day. Secondly, since the agreement expressly uses the term "seat of arbitration", the intention of the parties and that of the tribunal was clear to have used it to mean a transfer of jurisdiction which would grant a legal association to the arbitration. Thirdly, Article 35.2 of the PSC provided for three requisites to bring forth an amendment to the PSC, commencing by way of a written instrument, to be signed by all the parties thereafter and eventually followed with the amendment providing for the date from which it would come into force. Agreeing that such steps were not followed, here in the present matter a consensus was reached between the parties to have the seat changed to London by an undertaking given in a court of law. It is submitted here that the manner of performance in a contract can be altered extra-contractually by a concession before a court of

[32]It read – *"This Contract shall not be amended, modified, varied or supplemented in any respect except by an instrument in writing signed by all the Parties, which shall state the date upon which the amendment or modification shall become effective*."

law. In the *Jamilabai* case,[33] the court had stated that the pleader had an implied authority to enter into a compromise on behalf of his client even when the client has not expressly authorized him to do so. Similarly, in the *Commissioner of Endowments* case[34] and that of *Byram Pestonji*[35], the court allowed for compromises and concessions to be made without having to amend the contract. If that be the case, it is difficult to conceive as to why an exception should be made out for counsels for the governments as existence of implied authority of advocates applies with equal force in this situation.

According to the author, the concession made before the tribunal to transfer the seat was not an amendment to the agreement, and the Supreme Court had erred to that extent, as its reasoning, if it were to be tested on the anvil of practicality, would obviate the very purpose of making the compromise in a court of law.

VIII. CONCLUSION

Admittedly, it must be emphasized here that caution is to be exercised by an arbitration tribunal, institution, or as the case maybe by a Court, while seized as to the question of deciding to change a pre-agreed place of arbitration from one country to another. The aforementioned entities should not sway to the allurements of those parties who may claim to justify such transfer on the ground that they had assumed the risk of signing an arbitration clause locating the seat in such State by threat, inducement or otherwise. Due consideration is to be given to the risk of setting aside and to the possibility of enforcing the future awards. Such a change should not be lightly accepted without any reservations. Though seat or place as defined is a constituent part of the agreement, its proper interpretation only goes onto show its rank among the other modalities such as the applicable law, language of the proceedings etc. By dint of such arbitration agreements being of contractual nature, it is submitted that such agreements are not

[33]Jamilabai Abdul Kadar v. Shankerlal Gulabchand & Ors., A.I.R. 1975 S.C. 2202 (India).
[34]Commissioner of Endowments v. Vittal Rao, (2004) MANU S.C. 1003 (India).
[35]Byram Pestonji Gariwala v. Union Bank of India and Ors., A.I.R. 1991 S.C. 2234 (India).

precluded from the operation of general principles and rules of contract law, especially the rule of *rebus sic stantibus* i.e. changed circumstances must be given its due recognition. Even though there is a plethora of possibilities for the arbitration tribunal to circumvent any interference by the courts at the seat of arbitration by disregarding temporary injunctions that only put brakes to the process of arbitration rather than facilitating it, a change of seat is still one of the most effective alternative means to ensure that the parties' sense of comity and reliance find adequate expression in their legitimate expectations and common intentions during the time they entered the arbitration agreement.

In essence, any arbitration tribunal, institution or for that matter a court has to exercise judicious care and caution before it plunges to make a snap judgment as to a request for a transfer of the place or seat of arbitration. If circumstances so appear after the signing of contract that render its very purpose obsolete, diligent circumspection should be used so that the common intention of the parties is preserved and the proceeding does not falter on the touchstone of fairness and equality between parties.

DEMOCRATIC DILEMMAS IN JUSTIFYING MURDER: THE CASE OF TARGETED KILLINGS UNDER INTERNATIONAL LAW

Devdeep Ghosh[*] *& Astha Pandey*[**]

ABSTRACT

In this article, the authors seek to introduce the reader to the practice of targeted killing with an emphasis on the under-theorized 'unwilling and unable' test. The wide leeway afforded to an aggrieved state to exercise force within the territory of another under the umbrage of the test leaves great potential for misuse and undermines any effort at bilateral co-operation between the victim state and the state from whose territory the belligerent non-state actor operates. The article suggests the inclusion of certain parameters which, if imbibed into the test, would serve as a measured and more nuanced approach – one that would encourage cooperation at all stages and minimize the chances of any extraterritorial act precipitating into armed conflict between the victim states and the territorial state.

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I. INTRODUCTION

A Targeted Killings: An Overview

On the 2nd of May, 2011, American forces entered Pakistan with the purpose of carrying out a highly clandestine plan of assassinating Osama Bin Laden without sending any sort of intimation to the Government of Pakistan. The operation ultimately resulted in success despite the palpable ire of Pakistani authorities. Targeted killings, such as the one carried out by the United States in Abbottabad, have been a recurrent phenomenon throughout history[1] despite assassinations or extra-judicial killings being largely illegal under the norms of international law. Compared to other counterterrorism operations, the practice of targeted killing is arguably the most coercive tactic employed,[2] bringing into light the complexities involved in justifying a policy such as this one, be it in the context of war or a law enforcement operation.[3] Moreover, the practice raises

[1]PHILIP ALSTON, REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS¶ 35 (UN Human Rights Council, 2010). See also, *The Ethics and Realpolitik of Assassination*, THE ECONOMIST, May 4, 2011. "Support for a limited right to assassination can be found in Aristotle's *Politics*, Plutarch's *Lives* and Cicero's *De Officiis*."

[2]Targeted killing, as opposed to other methods such as detention or interrogation, is not designed to obtain information from the terrorist neither is its purpose to arrest him or keep a check on his actions. Its sole objective is to eliminate the terrorist;See, Gabriella Blum & Philip B. Heymann, Law of Policy of Targeted Killing, 1 Harv. Nat'l Sec. J. 145 (2010).

[3]PHILIP ALSTON, *supra* note 1. While the scope of this article shall largely deal with targeted killings conducted during armed conflict, it is pertinent to note that such killings may also be conducted as a consequence of law enforcement activities and applies in the cases of lethal force as used by all governmental officials who are empowered to exercise police powers in situations that are outside the context of armed conflict. Such acts are governed by human rights standards as enunciated in the Code of Conduct for Law Enforcement Officials (December 17, 1979). *See also* Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth U.N. Congress on Prevention of Crime and Treatment of Offenders, Havana, Cuba, 1990. International armed conflict is said to exist under the IHL regime when there are hostilities between States 'leading to the intervention of armed forces'. Common Art. 2(1), Geneva Conventions I to IV; Prosecutor v. Tadić, Case No. IT-94-1-l, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

apprehensions of collateral harm inflicted upon innocent bystanders in the course of attacks aimed at the intended target.[4]

The United Nations General Assembly Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions defines a targeted killing as:

The intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator. In recent years, a few States have adopted policies, either openly or implicitly, of using targeted killings, including in the territories of other States.[5]

Targeted killings are often justified as necessary measures adopted in response to "terrorism" and "asymmetric warfare". The hazard with such policies is that they result in overstepping the boundaries of applicable legal frameworks[6] and therefore, the need of the hour is a concerted attempt to crystallize a comprehensive and measured approach to evaluating the legality of instances of targeted killings.[7]

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[4]Gabriella Blum &Philip Heymann, *Law and Policy of Targeted Killing,* HARVARD NATIONAL SECURITY JOURNAL, I (Apr. 5, 2012), http://harvardnsj.org/wp-content/uploads/2010/06/Vol-1_Blum-Heymann_Final.pdf.

[5]PHILIP ALSTON, *supra* note 1, at ¶1.

[6]*Id.* ; See also,David Kretzmer, *Targeted Killings of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Self-Defence?*, EUROPEAN JOURNAL OF INTERNATIONAL LAW, Vol 16, Issue 2, 171, 176(2005). On the one hand, states involved in the practice claim that such killings are legitimate means of fighting the 'war on terror', whose legality must be judged on the basis of the laws of armed conflict, which primarily rests on the standards of international humanitarian law and on the other, those who label these killings as 'extra-judicial executions', rely on a law-enforcement model of legality, which rests primarily, though not exclusively, on standards of international human rights law.

[7]In the opinion of the author, the test, as in operation today, is generalized and over simplistic. Hence, when acting against a non-state actor, reaching a reasonable standard for determining whether the other state is 'unwilling' or 'unable', becomes extremely crucial.

B The 'Unwilling or Unable' Test

Adopting a position on targeted killings involves "complex legal, political and moral judgments with very broad implications."[8] Justifications are often resorted to *ex post facto,* one of them being that the other state, i.e. the territorial state, was 'unwilling or unable' to stop armed attacks launched from its territory against the first state.[9] Philip Alston, the Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions, states that under the laws of inter-state force, "a targeted killing conducted by one State in the territory of a second State does not violate the second State's sovereignty if the second state is unwilling or unable to stop attacks against the first state launched from its territory".[10]

Owing to the retributive nature of targeted killings, such a justification must withstand judicial scrutiny.[11] However, the indeterminate character of the 'unwilling or unable' test has great potential for misuse.

After the Abbottaad assassination, the Pakistani government expressed their disapproval of this unilateral action of the American

[8]Gabriella Blum &Philip Heymann, *supra* note 4.
[9]PHILIP ALSTON, *supra* note 1. Other doctrines pertaining to the determination of what does and does not constitute armed conflict are *rebus sec stantibus*; state responsibility, necessity and proportionality, neutrality, impossibility and the Martens Clause; *The Effect of Armed Conflict on Teaties*: *An Examination of Practice and Doctrine*, INTERNATIONAL LAW COMMISSION (2005), http://untreaty.un.org/ilc/documentation/english/a_cn4_550.pdf. For the purposes of this paper, the authors shall deliberate solely upon the 'unwilling and unable' test and its application.
[10]PHILIP ALSTON, *supra* note 1. "A targeted killing conducted by one state in the territory of a second State does not violate the second state's sovereignty if either (a) the second state consents, or (b) the first State has a right under international law to use force in self-defence under Article 51 of the UN Charter, because (i) the second state is responsible for an armed attack against the first state, or (ii) the second state is unwilling or unable to stop armed attacks against the first state launched from its territory. International law permits the use of lethal force in self-defence in response to an "armed attack" as long as that force is necessary and proportionate."
[11]David Kretzmer, *supra* note 6, at 176.

administration.[12] The American government justified their action by expressing their concern over compromising the operation by notifying the Pakistani forces as they were of the opinion that Pakistan was "unwilling or unable" to apprehend Osama Bin Laden.[13] This episode, and several incidents prior to this one,[14] reveal the loopholes present in the current international legal framework with regard to the norms guiding the action of states seeking to pursue a policy of active extra-territorial self-defence. The fact that states have the right to use force in another territory against an armed, rebel or insurgent group that has initiated an armed attack against the former is well-established and is evidenced by state practice as well. However, in light of the applicable legal regimes, namely, international humanitarian law and international human rights law,[15]

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[12]Jane Perlez & David Rohde, *Pakistan Pushes Back Against U.S. Criticism on Bin Laden*, N.Y. TIMES, May 3, 2011; Karin Brulliard & Debbi Wilgoren, *Pakistan Defends Role, Questions "Unilateral" Action*, WASHINGTON POST, May 3, 2011.

[13]Siobhan Gorman & Julian Barnes, *Bin Laden Raid in Pakistan Shows New Trust Between CIA, U.S. Special Forces*, WALL ST. J., May 23, 2011.

[14]For example, Israel has repeatedly justified their military operations in Lebanon targeting Hezbollah and the PLO by employing the 'unwilling or unable' test. It is of relevance to note Israel's justification of their actions in the United Nations General Assembly (Jul. 17, 1981):

Members of the Security Council need scarcely be reminded that under international law, if a state is unwilling or unable to prevent the use of its territory to attack another state, that latter State is entitled to take all necessary measures in its own defence.

Similarly, Russia used force against the Chechen rebels in the territory of Georgia on the grounds that the Georgian government was both unwilling and unable to counter the rebels' plans. *Statement by Russian Federation President V. Putin* (Jun. 28, 2012), http://archives-trim.un.org/webdrawer/rec/550042/view/Items-in-KAA%20Countries%20%202002%20-%20Russia.PDF; *Russia Kills Chechen Warlord,* BBC (Apr. 25, 2002), http://news.bbc.co.uk/2/hi/europe/1950679.stm. Turkey has also repeatedly justified their use of force in Iraq against the PKK by citing Iraq's unwillingness to prevent the use of its territory to stage armed attacks against the Turkish republic. Letter from the Turkish Foreign Affairs Minister S/1996/479 dated Jul. 2, 1996.

[15]Both regimes find application in the context of armed conflict in that the determination of the legality of a particular killing is dependent on the *lex specialis*. Where there is a vacuum in IHL, it is prudent to draw upon the principles evolved in human rights law to fill it.PHILIP ALSTON*, supra* note 1; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ rep. 226, ¶ 25 (July 8) [Hereinafter, Nuclear Weapons]; Legal Consequences of the Construction of a Wall

it is suggested, that in order to decide whether another state is 'unwilling or unable' to prevent or stop the armed attack, precise guidelines must be formulated as shall be explored in this article.

Part I shall outline the existing legal framework regulating the use of force in self defence. In Part II, the authors endeavour to chart the history of the test with an analysis of neutrality law on which the test is primarily predicated. Part II shall also briefly explain how the test has evolved to include non-state actors within its ambit. In Part III, the authors shall place before the reader certain suggestions that would enhance the applicability and efficacy of the test in ensuring that states do not wantonly use it as a justification for extraterritorial uses of force. Stress is laid on imbibing a democratic element of co-operation so as to prevent any misunderstanding between the victim state and the territorial state. In conclusion, it is submitted that a layered and nuanced version of the test has application in other areas of international law, aside from that of targeted killings.

II. THE USE OF FORCE IN SELF DEFENCE

Under Article 2(4) of UN Charter, states are forbidden from using force in the territory of other states.[16] Under the law of inter-state force, targeted killing conducted by one state in the territory of another does not violate the second state's sovereignty if the second state consents to such use of force or the victim state has the right to use force against the territorial state in self defence under Article 51 of the UN Charter.[17] The right to use self defence

in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep., ¶ 106 (July 9) [Hereinafter, Wall Opinion]; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005, I.C.J. Rep., ¶216(Dec. 19) [Hereinafter, Armed Activities].

[16]When a state is not in an armed conflict with another state and conducts a targeted killing in the territory of another state, whether or not it violates the sovereignty of the other state is determined by the law applicable to use of inter-state force, the question of legality being governed by international humanitarian law or human rights law, as the case may be.

[17]PHILIP ALSTON, *supra* note 1.

becomes operative on an 'armed attack' as described under Article 51.[18] The broad terminology used in Article 51 allows for the view that an armed attack may be at the instance of a non-State actor regardless of whether a State provided any support to such non-State actor.[19] Article 51 also mandates that the steps undertaken in self defence must be reported to the Security Council expediently.

A Qualifications on the Right to Use Force in Self Defence

There are three primary yardsticks on the basis of which a state must take a decision while employing force in self-defence. They are: (1) the principle of 'necessity', according to which the victim state must not respond to the armed attack with force unless other means of defending itself are not available (2) the principle of 'proportionality', under which the defensive measures should not exceed the degree of force needed to achieve the purpose of using counter-force, namely, defending the victim state against further terrorist attack; and (3) whether there has been a significant lapse of time since the occurrence of the armed attack.[20] Such use of force must only be used as a means of last resort and cannot precede the use of diplomatic methods.[21]

B Initiation and Regulation of the Use of Force

Article 51 of the UN Charter provides that a state may exercise its right to self-defence against an armed attack until the Security Council intervenes. Here, the Security Council's power to act is not hindered by the victim state's actions. The Charter thus envisions a period of time in which a state

[18]Over several decisions, the ICJ has specified a high threshold for the type of attacks that justify the extraterritorial use of force in self-defence. It is impermissible to elevate "sporadic, low intensity attacks" to the threshold prescribed. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986I.C.J14 (June 27);Oil Platforms (Islamic Republic of Iran v. United States of America), 2003 I.C.J. 161, 6 Nov. 2003; Armed Activities, 116; Wall Opinion, 136.
[19]Sean Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter*, 43 HARV. INT'L L. J. 41 (2002).
[20]David Kretzmer, *supra* note 6, at 176.
[21]*Id.*

may act in self-defence without Security Council approval.[22] While the victim state often will be the arbiter of the 'unwilling or unable' inquiry, in some cases the Security Council itself may have to make that assessment.[23]

Thus, even though it may seem as though the ultimate decision whether to use force rests with the victim state, this is not true in its entirety. The territorial state therefore has a considerable degree of control over the victim state's decision, either because it decides to act to suppress the threat or because it produces timely information to address the victim state's concerns.[24]

III. HISTORY OF THE 'UNWILLING OR UNABLE' TEST

A Neutral States and the Laws Governing them

The law regulating the use of force against an entity in another state's territory is rooted in neutrality law.[25] The underlying objective of neutrality law was to minimize the damage incurred by states not directly involved in hostilities or armed conflict.[26] In thwarting violations of its neutrality, a neutral state was required to exercise due diligence.[27] This required the aforementioned neutral state to take efforts towards curbing illicit violations of its territory in good faith and to the extent that was permissible keeping in mind its existing capacities at the point of time.[28] Therefore, the 'unwilling

[22] Ashley Deeks, *"Unwilling or Unable: Toward a Normative Framework for Extra-territorial Self Defense,* (52) VJIL 495 (2012).
[23] Jonathan I. Charney, *The Use of Force Against Terrorism and. International Law*, 95 AM. J. INT'L L. 835, 836 (2001).
[24] Corfu Channel Case (United Kingdom v. Albania), 1949 ICJ 4 (Apr. 9).
[25] Several jurists opine that all states are bound by the neutrality rule, regardless of whether they are signatories to the various neutrality treaties, since it forms part of customary international law. John Norton Moore, *Legal Dimensions of the Decision to Intercede in Cambodia*, 65 AM. J. INT'L L. 38, 51 (1971).
[26] Tess Bridgeman, *The Law of Neutrality and the Conflict with Al Qaeda*, NEW YORK UNIVERSITY LAW REVIEW, 1214 (2010).
[27] STEPHEN NEFF, THE RIGHTS AND DUTIES OF NEUTRALS: A GENERAL HISTORY 105 (2000).
[28] NICOLAS POLITIS, NEUTRALITY AND PEACE 21-22 (1935).

or unable' test served as a standard to be adhered to by combatants as to when and how neutrality law ought to be enforced.[29]

B The Evolutionary Inclusion of Non-State Actors within the Ambit of the Test

Neutrality laws have been enacted by several states which preclude their citizens from committing such acts that would amount to making national territory a military or naval base for conducting operations against a friendly state.[30] These domestic laws thus explain how neutrality rules expanded to govern acts by non-state actors during peacetime (and in non-international armed conflicts). Both, neutral as well as territorial states, from which non-state actors operate, are interested in preventing the use of force in their respective territories, preserving their territorial integrity and in being seen as complying with their obligations under international law.[31] Consequently, the 'unwilling or unable' test, being inextricably allied to neutrality law has included non-state actors within its ambit.

IV. MOVING TOWARDS A MORE NUANCED YARDSTICK

The 'unwilling' or 'unable' test has not yet been theoretically developed in its full form, as a consequence of which it is falling short of serving its purpose to its fullest potential.[32] The test, as of now, lacks cogency and precision. In order for the test to be effective and serve its purpose adequately, the test needs to be comprehensively reformulated with detailed

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[29]Evan J. Criddle and Evan Fox Decent, *A Fiduciary Theory of Jus Cogens*, YALE JOURNAL OF INTERNATIONAL LAW, 334 (2009).

[30]Karl S. Chang, *EnemyStatus and Military Detention in the War against Al Qaeda*, TEXAS INTERNATIONAL LAW JOURNAL, 25-45 (2011). Where the author has used the framework of neutrality law to determine who may be detained as an enemy in the American war against Al-Quaeda.

[31]Ian Brownlie, *International Law and the Activities of Armed Bands*, 7 INT'L & COMP. L. Q. 712, 732 (1958).

[32]JUTTA BRUNNEE & STEPHEN TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW 307 (2010). Where the authors argue that a rule of international law that is vague and without "constraining content" will inevitably fail as state practice will seek out loopholes instead of adopting an attitude of compliance.

and precise standards as regards what evaluations victim states should make before using force and how it should make them. The incomplete theorization of the test allows for a situation where a victim state may contemplate the use of force in situations where the territorial state is arguably both willing and able to address the threat.[33] On the flipside, states which may justifiably exercise force in the territory of another state may hesitate from doing so due to the uncertain nature of the protection afforded by the test.[34]

A more well-settled and balanced test primarily provides two methods to substantially reduce the use of force by victim states in the territory of another.[35] First, the territorial state shall have an incentive to prevent or counter the threat itself. This is of pivotal importance because in a situation where the applicable rules are ambiguous, territorial states may not take the requisite measures to prevent acts of aggression or violence by non-state actors on their territory.[36] This increases the probability that a particular territorial state may actually be unwilling or unable to suppress the threat.[37] An unclear rule or unsettled position in law may precipitate into misunderstood conflict between the victim state and the territorial state as the territorial state might be unaware of the reasons and intended target of the victim state.[38] Secondly, strict application of a more nuanced version of the test would see an appreciable increase in the accuracy and verifiability of information used by the victim state to make its decision which would impact the collateral damage of such targeted killing.[39] A victim state's final decision as to whether to use force or not will be greatly affected by the inquiries and exchanges that it undertakes with the territorial state.[40] Finally, a parameterized test would serve to imbibe an element of transparency and

[33]PHILIP ALSTON, *supra* note 1.
[34]*Id*.
[35]LOUIS HENKIN, HOW NATIONS BEHAVE 142 (1979).
[36]Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 541-42 (1999).
[37]Mary Ellen O' Connell, *The Myth of Preemptive Self-Defense*, AMERICAN SOCIETY OF INTERNATIONAL LAW 9 (2002).
[38]Jane E. Stromseth, *New Paradigms for the Jus Ad Bellum?,* 38 GEO. WASH. INT'L L. REV. 561, 568 (2006).
[39]PHILIP ALSTON, *supra* note 1.
[40]*Id.*

accountability in the practice of targeted killing and limit the wanton acts of violence currently legitimized by the ineffectual test and which are violative of the international legal framework.[41] Such transparency is deemed necessary by both IHL[42] and human rights law.[43]

In light of the current climate in which force may be used in self defence in another country's territory, the authors are of the opinion that the following requirements ought to be imbibed in the 'unwilling and unable' test in order to evolve a more nuanced model of the test which would allow the victim state the opportunity to defend its actions against a determinative set of parameters.

A Did the Victim State try to Secure the Co-operation or Consent of the Territorial State?

It is of paramount importance that the state seeking to employ force in another state's territory must first endeavour to obtain the consent of the territorial state prior to applying the 'unwilling or unable' test.[44] Article 51 provides for such consent as justification of the victim state's actions but does not stress on the importance of procuring such consent as a prerequisite.[45] It is a settled principle that a State may provide such consent to another State to use force on its territory.[46] However, such consent does not grant either the entering State or the consenting State immunity from the IHL and human rights regime.[47] It is obligatory upon the consenting State to prevent any arbitrary violation of its citizens' right to life at all times and they cannot renege or depart from this obligation through the granting of

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[41]PHILIP ALSTON, *supra* note 1, at ¶87; Human Rights Committee, *General Comment No. 6,*(1982); Neira Alegria Case, Judgment, 1995, Inter-Am.Ct.H.R. (Ser. C) No. 20 (Jan. 19); *McCann and others* v. *UK,* ECHR, Judgment 1995, Series A, No. 324, 140 (Sept. 27); *Kaya* v. *Turkey*, Judgment, 1998, 1998-I R.J.D. 297, 140 (Feb. 19); *Husband of Maria Fanny Suarez de Guerrero* v. *Colombia*, 1995, Communication No. R.11/45 (Feb. 5).
[42]Geneva Convention, art. 1; Arts. 11, 85 AP I (grave breaches), 87(3); Geneva Conventions I-IV, arts. 50, 51, 130, 147.
[43]Economic and Social Council Resolution 1989/65 (May, 1989).
[44]Military activities, 105.
[45]CHRISTINE D. GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 85 (3d ed., 2008).
[46]*Supra* note 42, ¶ 246.
[47]PHILIP ALSTON, *supra*note 1, at ¶37.

any such consent.[48] The killing may only be consented to if it falls squarely within the applicable IHL or human rights law regime.[49]

Furthermore, the authors believe that application of the 'unwilling or unable' test may only stand judicial scrutiny if it is established that even though the territorial state denied express consent to use force in its territory, steps were taken to procure the co-operation of the territorial state and such steps had met with failure.[50] Such precautionary layers to the application of the 'unwilling or unable' test has its benefits in that it increases bilateral understanding between the victim state and the territorial state aside from pooling their resources which would result in a more efficacious operation.[51]

B If the Territorial State was able, did the Victim State Allow it to Deal with the Belligerent Entities in their own Manner?

Another essential prerequisite ought to be a mandatory obligation on the victim state to entreat the territorial state to take action against the non-state actor itself in the event that the territorial state refuses to consent to the victim state's use of force. Not only must a sincere request be made but adequate time must be afforded to the territorial state to assess the viability of such request.[52] Such a standard would ensure the preservation of the sovereignty of the territorial state. However, such a step would be ill advised in a situation where there is overwhelming evidence that the territorial state is colluding with the non-state actors in executing the acts of belligerence being retaliated against and is 'unwilling' to proceed. In such a scenario, it is likely that informing the territorial state of its intent would render nugatory any opportunity possessed by the victim state of snuffing out the

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[48]International Covenant on Civil and Political Rights (1976), art. 6 [Hereinafter, ICCPR]; UN General Assembly, *Resolution on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism* (Mar. 2005), ¶1.
[49]PHILIP ALSTON, *supra* note 1, at ¶38.
[50]Amos S. Hershey, *Incursions into Mexico and the Doctrine of Hot Pursuit*, 13 AM. J. INT'L L. 558, 560 (1919).
[51]Alan Weiner, *Use of Force and Contemporary Security Threats*, 59 STAN. L. REV. 415 (2007).
[52]ROBERT W. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA 256, 261 (1955).

threat posed by the non-state actor. It was this line of argument that was adopted by Obama's administration in justifying the targeted killing of Osama bin Laden within Pakistani territory.[53] Such concerns are well founded and an exception ought to be carved out from the general rule to provide for such situations. Prior to availing of such an exception, it ought to be made incumbent upon the victim state to establish beyond reasonable doubt that support to the non-state actor has and continues to be extended by the territorial state.[54] Exceptional circumstances aside, the general rule ought to be that the victim state must explore every opportunity to avoid unilateral action and ought to ideally permit the territorial state to deal with the threat in their own manner. The territorial state must be afforded reasonably adequate time to evaluate the victim state's request,[55] the duration of which must be judged in context of the imminence of the threat posed by the non-state actors.[56]

C Did the Victim State Comprehensively Assess the Capabilities of the Territorial State before Deciding that they were unable to Counter the Belligerent Entities?

Should a victim state seek to employ the test on the grounds that the territorial state is *unable* to counter the threat posed by the non-state actor, it ought to be a mandatory obligation upon the victim state to arrive at such a conclusion after a diligent examination of the territorial state's capabilities.[57] In practice, such non-state actors often operate from 'ungoverned or under-

[53]Siobhan Gorman & Julian Barnes, *supra* note 13.

[54] I Note, *International Law and Military Operations Against Insurgents in Neutral Territory*, 68 COLUM. L. REV. 1127, 1132 (1968). The nature of such support extended to the non-state actor must be scrutinized and evaluated as it is plausible that the territorial state may reconsider its patronage of such belligerent activities when faced with the possibility of the use of force within its territory by the non state actor.

[55]SAN REMO MANUAL, INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICT AT SEA¶ 22 (Louise Doswald-Beck ed.) (1995).

[56]BRITISH DOCUMENTS ON FOREIGN AFFAIRS: REPORTS AND PAPERS FROM THE FOREIGN OFFICE CONFIDENTIAL PRINT (PART I, SERIES C) 153, 159 (Kenneth Bourne & D. Cameron Watt eds.) (1986).

[57]W. Michael Reisman, *Private Armies in a Global War System: Prologue for Decision*, 14 VA. J. INT'L L. 1, 5 (1973).

governed'[58] areas of the territorial state wherein they have established their own personal fiefdoms.[59] The United States justified their use of force in Cambodia in 1970 on the grounds that Cambodian authorities lacked territorial control over the areas infiltrated by North Vietnamese entities.[60] In this situation, Cambodia accepted this assessment.[61] However, problems may arise when the territorial state does not agree with such a conclusion which is why it is imperative that the victim state's assessment be accurate and based on verifiable information.

D If the Territorial State Consented to Acting against the Belligerent Entities themselves, did the Victim State Objectively Evaluate the Territorial State's Proposed Methodology before Deeming it as Inadequate?

In the opinion of the author, another relevant question that must be asked before condoning a victim state's decision to employ the 'unwilling or unable' test is whether the victim state took effort to review the territorial state's proposed methodology of countering the threat. Incorporating such a parameter would serve a two-fold function – first, it would go a long way in assisting the victim state's efforts of assessing the territorial state's willingness and commitment to addressing the threat;[62] second, the answer to such a question would be instrumental in evaluating what steps would actually be effective vis-à-vis the capabilities of the non-state actors themselves. This evaluation must necessarily be objective in nature – the question

[58]Rand, *Ungoverned Territories: Understanding and Reducing Terrorism Risks* (Apr. 4, 2012), http://www.rand.org/pubs/monographs/2007/RAND_MG561.pdf.

[59]Fund for Peace, *Failed State Index* (Apr. 4, 2012), http://www.fundforpeace.org/web/index.php?option=com_content&task=view&id=99&Itemid=140.

[60] Richard Nixon, Address to the American People (Apr. 30, 1970) *("The areas in which these attacks will be launched are completely occupied and controlled by North Vietnamese forces.").*

[61]CHRISTINE D. GRAY, *supra* note 45, at 142.

[62]An inadequate plan of action would be indicative of the territorial state's reluctance to act.

ought to be what a 'reasonable' state would, in good faith, believe is adequate for eliminating the threat posed by the non-state actors.[63]

V. CONCLUSION

The purpose of this article was to focus on situations where targeted killings have been carried on by victim states using the justification of the 'unwilling or unable' test and to highlight the indeterminacy of such justification owing to the vague and unsubstantiated nature of the test. The article also seeks to make suggestions on parameters that could be read into the test which would go a long way in concretizing the requirements to be fulfilled by states seeking to employ the test. A more nuanced test would find application beyond the subject of targeted killings as well. It may guide the use of force by one state against another in the territory of a third, the use of force by a state in another in defence of its nationals and may even find application in cyber warfare.[64]

In conclusion, it is submitted that the list of parameters that have found mention in this article is, by no means, an exhaustive list. Owing to the indeterminate nature of the application of this test till date, there is great scope for further additions to the factors stated herein that would serve the purpose of imparting clarity and decisiveness to a victim state's use of force in another state. What is certain, however, is that a more nuanced test would reduce misunderstandings and greatly democratize the process of exercising force in another state's territory vis-à-vis the bilateral relationship between the victim state and the territorial state. If such questions are

[63]Michael Schmitt, *Responding to Transnational Terrorism Under the* JUS AD BELLUM*: A Normative Framework*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 194 (Schmitt & Pejic, ed.) (2007).
[64]Jeffrey Kelsey, *Hacking into International Humanitarian Law: The Principles of Distinction and Neutrality in the Age of Cyber Warfare*, 106 MICH. L. REV. 1427, 1441 (2008).

asked of every aggrieved state seeking to use force extra-territorially, then the world might see fewer instances of targeted killings.

EQUITABLE PRINCIPLES AND THE DELIMITATION OF THE CONTINENTAL SHELF

Sooraj Sharma[*] *& Shujoy Mazumdar*[**]

One of the controversial areas of the International Law of the Seas is the delimitation of the maritime boundary of continental shelf between states with opposite or adjacent coasts. The 1958 Geneva Convention on the Continental Shelf established the equidistant principle, which became the accepted rule as regards the parties to the convention. As regards states which are not parties to the convention as has been the case predominantly in International adjudication bodies the rules of customary international law have to be employed. The first time a maritime dispute of such a nature was submitted to the International Court of the Justice was in the North Sea Continental Shelf Cases where it held that customary international law warrants the application of the rules of equity to delimitate the boundary of the continental shelf. Whereas, the equidistant principle was applied in the Anglo French Arbitration. From an understanding of the decisions of the World Court and arbitral tribunals it appears there exists a

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divergence in opinion on which rule reflects customary international law the equitable principle or the equidistant principle? The object of this paper is summarily to determine at length how the principles of equity have developed and how far they would be applicable in disputes of such a nature with an insight into the India, Bangladesh and Myanmar dispute.

I. INTRODUCTION

Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot; what an uncertain measure would this be? One Chancellor has a long foot, another a short foot, a third an indifferent foot: 'tis the same thing in a Chancellor's conscience. – John Seldon.[1]

Delimitation of maritime areas may be regarded as one of the important problems of the law of the sea. Disputes over the extent of sovereign rights over the sea and submerged areas are inherently the most bitter and protracted, as they involve crucial interests of states. Although rarely, they may develop into serious conflicts as in the dispute between Greece and Turkey.[2] These disputes have become

[1]JOHN SELDON, THE TABLE-TALK 58 (J.M. Dent and co.) (1818).

[2]Republic of Turkey,Ministry of Foreign Affairs, Press Release,*The Outstanding Aegean Issues* (Jul. 28, 2012), http://www.mfa.gov.tr/maritime-issues---aegean-sea---the-outstanding-aegean-issues.en.mfa; Hellenic Republic, Ministry of Foreign Affairs, *Issues of Greek - Turkish Relations* (Jul. 20, 2012), http://www1.mfa.gr/en/issues-of-greek-turkish-relations/; Leo Gross, *The Dispute Between Greece and Turkey Concerning the Continental Shelf in the Aegean* 71

even more problematic to solve with introduction of the notion of continental shelf into International Law, and the acceptance of the right to exclusive economic zones as they, often create overlapping zones where the need for delimitation arises. Further, it has been noted that usually the substance of a dispute over the delimitation of a continental shelf or an exclusive economic zone does not involve exclusively the extension of the disputed area, but rather its natural resources.[3] Other than these difficulties in recognising legal rules to apply to delimitation, the idea of *unicum*[4] makes it impossible to posit fixed rules governing the establishment of maritime boundaries between states. Furthermore the particularity of each case effectively impedes the formulation of customary rules of international law.[5]

In spite of these impediments the process of the delimitation has been marked by two trends throughout its history namely the equidistant method and the equitable method. The 1958 Conventions[6] recognised both these trends and adopted a procedure known as the equidistant-special circumstances principle which encompassed both of them; Article 15 of the United Nations Convention on the Law of the Sea,[7]

A.J.I.L. 31 (1977); Aegean Sea Continental Shelf(Greece v. Turkey), 1978 ICJ Rep.1974, 36 (Dec. 19).

[3]Janusz Symondies, *Delimitation of Maritime Areas between the States with Opposite or Adjacent Coasts,* 8 POLISH YEARBOOK OF INTERNATIONAL LAW 19 (1984).

[4]"Unique" Of unique character or facts for which no general rule of law or precedent provides a clear resolution; See, AARON X FELLMETH AND MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW 284 (2001).

[5]P. WEIL,THE LAW OF MARITIME DELIMITATION- REFLECTIONS (Cambridge University Press; 1st ed. 1989).

[6]The 1958 Geneva Conventions on the Law of the *Sea* (Jun. 13, 2012), http://untreaty.un.org/cod/avl/ha/gclos.html.

[7]The United Nations Convention on the Law of the Sea,1982,art. 15 states, Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

1982 also stipulates it, for the territorial sea. The arrangement has been described as the equidistant principle along with enough elbow room for equity and other methods where they may seem justified.[8] The equidistant method provides a method for delimitation, whereas it remains silent on the result and on the other hand the equitable principle provides a result, that which should be an 'equitable solution' but lacks a method.[9] The abovementioned equidistance-special circumstance combined rule which had been codified in early treaty law had a number of advantages. Firstly, this formula struck a balance between predictability and flexibility, certainty and dynamism and objectivity and discretion. Secondly, in the absence of inequities resulting from aberrated coastlines the rule divides the overlapping territory into equal portions. Finally, it took into account the proximity of marine areas for the purpose of delimitating them. States and International Adjudication Tribunals have interpreted this rule in differing ways and are not unanimous as to which is the rule that reflects customary international law correctly. The United Nations Conference on the Law of the Sea III was faced with one of the most important issues whether in effect to repeat the provisions of the earlier treaty, supporting the view that it reflects customary international law or to modify them after reaching consensus from fresh negotiations. From a reading of the awards of International Arbitral Tribunals and the judgments International Court of Justice it appears that whatever method be employed the result should be an equitable one, thus making equity the cornerstone of maritime delimitation and at the same time not defining clearly the circumstances requisite to provide an equitable result. Summarily, a judgment of the International Court of Justice states,

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[8]Leonard Legault &Hankey Blair. 1996. *Method, Oppositeness and Adjacency and Proportionality in Maritime Boundary Delimitation*, AMERICAN SOCIETY OF INTERNATIONAL LAW (eds.); JONATHAN I. CHARNEY AND LEWIS M. ALEXANDER, 1996, INTERNATIONAL MARITIME BOUNDARIES 203 (Netherlands: Martinus Nijhoff Publishers).

[9]United Nations Convention on the Law of the Sea, 1982, art. 74.

In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such circumstances that will produce this result rather than reliance on one to the exclusion of others.[10]

Thus it becomes important to analyse how an equitable result is achieved with or without the equidistant principle.

II. THE GENESIS OF THE PROBLEM AND THE IDEA OF UNICUM

From the time of the recognition of the doctrine of the continental shelf, the argument has been advanced that geographical features varies so greatly that it was difficult, if not impossible to posit fixed rule governing establishment of maritime boundaries between states.[11] The Jurisprudence of arbitral tribunals and the World Court support this view in a number of instances.

In the Tunisia/Libya case the International Court of Justice held that:

"Clearly each continental shelf case in dispute should be considered and judged on its own merits, having regard to its peculiar circumstances; therefore. No attempt should be made here to over conceptualize the application of the principles and rules relating to the continental shelf."[12]

The Chamber of the International Court of Justice revisited this point in its judgment:

[10]North Sea Continental Shelf Cases(Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), 1969, ICJ Rep. 1969, 50 (Feb. 20).
[11]L.D.M. Nelson, *The Roles of Equity in The Delimitation of Maritime Boundaries*. 84 A.J.I.L837 (1990).
[12]*Continental Shelf* (*Tunisia* v. *Libyan Arab Jamahiriya*),1982 I.C.J. Reports 92, ¶132 (Feb. 24.), *reprinted in* 21 International Legal Materials (I.L.M.) 225 (1982) [*hereinafter* Tunisia/Libya].

"Although the practice is still rather sparse, owing to the relative newness of the question, it too is there to demonstrate that each specific case is, in the final analysis, different from all the others, that it is monotypic and that, more often than not, the most appropriate criteria, and the method or combination of methods most likely to yield a result consonant with what the law indicates, can only be determined in relation to each particular case and its characteristics. This precludes the possibility of those conditions arising which are necessary for the formation of principles and rules of customary law giving specific provisions for subjects like those just mentioned."[13]

Further, the arbitral tribunal in the Guinea/ Guinea- Bissau arbitration[14] citing the *Gulf of Maine Case*[15] proclaimed in its award that:

"The factors and method referred to result from legal rules. Although they evolve from physical, mathematical, historical, political, economic or other facts. However, they are not restricted in number and none of them is obligatory for the Tribunal, since each case of delimitation is a unicum, as has been emphasized by the International Court of Justice."

The almost endless variety of geographical situations, differing historical backgrounds and political factors are main reason which makes each case a *unicum.* According to one learned author Nuno Marques Antunes, the notion of *unicum* stems from the factual matrix which he argues is different in every case, but the difference is not enough to not allow a 'typification', which is the level at which normativity operates. According to him all cases may be typified to

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[13]Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. U.S.A.), 1984 I.C.J. Rep. 290,¶81. (Oct. 12), *reprinted in* 23 I.L.M. 1197 (1984) [*Hereinafter*,Gulf of Maine Case].

[14]*Guinea/ Guinea-Bissau Dispute concerning Delimitation of the Maritime Boundary*, Arbitral Award, 1985, International Legal Materials 251 (Feb. 14) [*Hereinafter*,*Guinea/ Guinea-Bissau*].

[15]Tunisia/Libya*, supra* note 12.

some degree which is why generalisations and legal analogies do operate and normative rules may be applied.[16]

Judge Waldock disagrees with this view and states clearly that:

"The difficulty is that the problem of delimitation the continental shelf is apt to vary from case to case in response to an almost infinite variety of geographical circumstances. In consequence, to attempt to lay down precise criteria for solving all cases may be to chase a chimera; for the task is always essentially one of appreciating the particular circumstances of the particular case."[17]

Some disagreement with idea of *unicum* have been stated as follows:

"An excessive individualisation of the rule of law, which changes from one case to another, would be incompatible with the very concept of law. Every legal rule presupposes a minimum of generality. A rule which is elaborated one a case by case basis rests on the discretionary power of the judge, on conciliation, on distributive justice- in brief of ex aequo et bono."[18]

In this regard it may be important to refer to the opinion of the International Court of Justice in the Libya/Malta Case[19], which found equity to the principle of normative application in maritime boundaries. The court stated that:

"The justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its

[16]NUNO MARQUES ANTUNES, TOWARDS THE CONCEPTUALISATION OF MARITIME DELIMITATION: LEGAL AND TECHNICAL ASPECTS OF POLITICAL PROCESS, Vol. 42 260 (Martinus Nijhoff Publishers, 2003).

[17]H.M. Waldock, *The International Court and the Law of the Sea,* Cornelis van Vollenhoven Memorial Lecture, University of Leiden (1979).

[18]Counter- Memorial submitted by the Republic of Malta (*Libya* v. *Malta*), 1983 I.C.J. Pleadings 59 ¶111. (Oct. 26); D.W. Bowett, *The Arbitration between the United Kingdom and France Concerning the Continental Shelf Boundary in the English Channel and South-western Approaches,* 49 BRITISH YEARBOOK OF INTERNATIONAL LAW14 (1978).

[19]Continental Shelf (Libyan Arab Jamahiriya v. Malta), 1985 I.C.J. Rep. 13 (June 3), *reprinted in* 24 I.L.M. 1189 (1985) [Hereinafter, *Libya/Malta Case*].

application should display consistence and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application."

According to Nelson a conclusion may be drawn that the persistence of the viewpoint of the notion of a *'unicum'* leads one to believe that the law seems here to be faced with a stubborn fact of nature. Inevitably, it will be the law that will have to accommodate itself to this phenomenon, perhaps shedding in the process what some consider its most fundamental characteristic, its universality.

III. EQUITY IN INTERNATIONAL LAW

From the above chapter it becomes clear that each continental shelf is a *unicum* and requires the subjective application of rules for its delimitation. The absence of concrete legal rules in providing a remedy had been a problem for the common law a long time ago, against the backdrop of which emerged the doctrine of 'equity'. At the time when the common law and equity were distinct from each other the Lord Chancellor would have the power to give certain judgements based on morality and reasoning and provide remedies where the common law had failed. The doctrine of estoppel, unjust enrichment and specific performance all have their roots in equity, but are now part of almost every legal system in the world. Equity is the name given to the set of legal principles, in jurisdictions following the common law tradition, which supplement strict rules of law where their application would operate harshly. Equity can be identified in many societies and religions even if in different forms, in fact a form of *justitia distributive* which has enteredall legal systems of the world.[20] The Greeks called it clemency. The Romans termed it as '*aequitas'* or equality. Ancient Chinese law described it as

[20]*Supra*note 18 at 21, ¶17.

compassion and in Hindu Philosophy is found in the doctrine of righteousness. In some Islamic schools '*Istihan'* is employed to avoid undue hardship form the application of the law.[21] A better understanding of equity may be drawn from the explanation given by the Lord Chancellor Woolsey:

"The King ought of his royal dignity and prerogative to mitigate the rigour of the law, where conscience hath the most force; therefore, in his royal place of equal justice, he hath constitute a chancellor, an officer to execute justice with clemency, where conscience is opposed by the rigour of law. And therefore the Court of Chancery hath been heretofore commonly called the Court of Conscience; because it hath jurisdiction to command the high ministers of the common law to spare execution and judgment, when conscience hath most effect."[22]

In International Law there has been a divergence of opinion whether equity is a source of International Law or not.[23] In spite of the divergence International Tribunal have made reference to equity in a number of occasions. The most famous decision on these lines was the of Judge Hudson in the *Diversion of Water from the Meuse*[24] case regarding a dispute between Holland and Belgium. Judge Hudson pointed out that what are regarded as principles of equity have long been treated as part of International Law and applied by the courts. 'Under article 38 of the Statute he declared, "if not independently of that article, the Court has some freedom to consider principles of equity as part of the international law which it must apply." In the

[21]M. White, *Equity- A General Principles of Law Recognized by Civilized Nations*,4 QUEENSLAND UNIVERSITY OF TECHNOLOGY LAW AND JUSTICE JOURNAL 103 (2004).
[22]SIR WILLIAM SEARLE HOLDSWORTH,A HISTORY OF ENGLISH LAW 381 (Methuen Sweet & Maxwell, 1945).
[23]Micheal Akehurst, *Equity and General Principles of Law*, 25 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY801 (1976).
[24]INTERNATIONAL COURT OF JUSTICE, *SERIES A/B: COLLECTION OF JUDGMENTS, ORDERS AND ADVISORY OPINIONS (FROM 1931)*, NO. 70, 73.

Rann of Kutche Arbitration between India and Pakistan in 1968[25] the Tribunal agreed that equity formed part of international and that accordingly the parties could rely on such principles in the presentation of their cases. The Tribunal had recourse to the principle of equity in delimitation of two deep inlets.[26]

In International judgements[27] and in scholarly writings[28] a distinction is drawn between three different types of equity whose legal quality differs. These are equity *inter legem, preater legem and contra legem (ex aequo et bono).* This relationship of each to international law depends on the particular function which equity is fulfilling. The first category is equity operating within the law- that is as part of positive international law within the traditional sources in article 38(1) of the Statute of the International Court of Justice.[29] Equity *praetor legem* is said to concern the question of whether international law is complete. It is argued that this kind of equity operates where there is apparent absence of a principle or rule to apply to a specific case, or the principle or rule that does exist is insufficient. In other words, it plays a role when there is insufficiency. The thirds criteria of equity *contra legem* is the same as deciding a dispute *ex aquo et bono*, and can be applied by the International Court of Justice by special consent from

[25]*The Rann of Kutch Arbitration* (*India* v. *Pakistan)*, 1968, 50 International Law Reports 2.

[26]M.N. SHAW, INTERNATIONAL LAW. 106 (Cambridge University Press; 6 ed. 2008).

[27]See, the *Jan Mayen case*, I.C.J. Rep. 1993, 38 (June, 14).

[28]*Supra* note 18; Stephen Beaglehole, *The equitable delimitation of the continental shelf,* 14 VICTORIA UNIVERSITY WELLINGTON LAW REVIEW 415 (1986).

[29]The Statute of the International Court of Justice, 1945, art. 38 (1). "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

the parties under the procedure mentioned in article 38(2) of the Statute.[30]

An understanding of equity as applied by the International Court of Justice can be found in the judgment of the court in the *Libya/Malta case:*[31]

Equity as a legal concept is a direct emanation from the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term equity has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law.

In his separate opinion[32] Judge H. E. Eduardo Jiménez de Aréchaga further held that:

To resort to equity means, in effect to appreciate and balance the relevant circumstances of the case so as to render justice not through the rigid application of general rules and principles of formal legal concepts, but through an adaption and adjustment of such principles, rules and concepts to the facts, realities and circumstances of each chase. In other words, the judicial application of equitable principles means that a court should render justice in the concrete case by means of a decision shaped by and adjusted to the relevant factual matrix of that case.

The Chamber in the *Gulf of Maine Case*[33] noted that absence of any "systematic definition of the equitable criteria that may be taken into

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[30]*Id.*; The Statute of the International Court of Justice, 1945, art. 38(2)."This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono,* if the parties agree thereto."
[31]*Supra note* 18, at 60,¶ 71.
[32]*Id.*at 106, ¶24.

consideration for an international maritime delimitation." The Court observed that defining such criteria "would in any event be difficult *a priori*, because of their highly variable adaptability to different concrete situations." In other words the idea of *unicum* prevents systematic definition.

However the court in the *Libya/ Malta Case*[34] held that:

> *While every case of maritime delimitation is different in its circumstances from the next, only a clear body of equitable principles can permit such circumstances to be properly weighed, and the objective of an equitable result, as required by general international law to be attained.*

Even Judge R.Y. Jennings agreeing with this view has noted that a "structured and predictable system of equitable procedures is an essential framework for the only kind of equity that a court of law that has not been given competence to decide *ex aequo et bono*, may properly contemplate."[35]

This opinion may be appreciated in the light of the opinion given by the World Court in the *North Sea Continental Shelf*[36] *case. "It is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles."* These opinions lead us to the conclusion that equity in International Law allows some amount of deviation from legal rules particularly where the resultant of their application would be inequitable; equity too would have its own governing principles and confines to amount of discretion.

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[33]Gulf of Maine Case.

[34]*Supra* .note18, at 33, ¶34.

[35]R.Y. Jennings, *Equity and Equitable Principles,* 42 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 27 (1986).

[36]*Supra* note 18, at 47, ¶ 85.

IV. EQUITABLE PRINCIPLES AND THE DELIMITATION OF THE CONTINENTAL SHELF

In order to identify the equitable principles in the delimitation of the continental shelf it is important first to understand the meaning of 'delimitation'. According to the World Court in the *North Sea Continental Shelf*[37] case "Delimitation is a process which involves establishing the boundaries of an area already, in principles, appertaining to the coastal state and not the determination *de novo* of such an area. Delimitation in an equitable manner is one thing, but the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable or even identical." In short the delimitation means the recognition or declaration of a boundary over which the state previously had an inherent right. It is different from apportionment in process but may mean the same thing when it comes to the result.

The *fons et origio* of much law concerning the continental shelf, the Truman Proclamation of September 28, 1945,[38] declared that in cases where the continental shelf off the coast of the United States extended to the shores of another state or was shared with an adjacent state, the boundary should be determined by the United States and the state concerned "in accordance with equitable principles." A number of subsequent declarations, such as those of Saudi Arabia and the various coastal states on the Arabian Peninsula have contained similar statements,[39] such as the Anglo-Venezuelan Treaty of 1942 and the

[37]*Id.,* at 22, ¶18.
[38]Proclamation by The President with Respect To The Natural Resources Of The Subsoil and Sea Bed Of The Continental Shelf, Signed by Harry S. Truman, President of the United States of America, Presidential Proclamation No. 2667, 3 C.F.R. 67 (1943-48); 13 Department of State Bulletin 485 (1945), 40 American Journal of International Law (Supplement) 45 (1946).
[39]David J. Padwa, *Submarine Boundaries,* 9 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY628 (1960).

Bahrain-Saudi-Arabian Treaty of 1958 with respect to one area of the Persian Gulf.[40]

In the *North Sea Continental Shelf* Case[41] the court relied on the Truman Proclamation as *opinio juris* enough to reflect the prevailing customary international law at the time. In the words of the court:

This regime furnishes an example of a legal theory derived from a particular source that has secured a general following. As the Court has recalled in the first part of its Judgment, it was the Truman Proclamation of 28 September 1945 which was at the origin of the theory, whose special features reflect that origin.

The Court expounded two basic rules of customary international law which were codified in the Truman Proclamation they were:

Firstly, to delimitate the boundary of the continental shelf through agreement and negotiations and secondly, to delimitate boundaries in accordance with equitable principles. The court further relied on Article 33 of U.N. Charter[42] a judgment[43] and an advisory opinion[44] of the Permanent Court of International Justice to strengthen the grounds for the obligation to negotiate. Apart from these principles the court also relied on the Truman Proclamation for another principle. In the words of the court,

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[40]Elihu Lauterpacht,. *The Contemporary Practice of The United Kingdom in the field of International Law-Survey and Comment, VI,* 7 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY514(1958).

[41]*Supra note* 9.

[42]The Charter of the United Nations, 1945, art. 33. "1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. 2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means."

[43]Free Zones of Upper Savoy and District of Gex (France v. Switzerland), Order, 1929 P.C.I.J. (ser. A) No. 22 (Aug. 19).

[44]Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 42 (Oct. 15).

The Truman Proclamation however, soon came to be regarded as the starting point of the positive law on the subject, and the chief doctrine it enunciated, namely that of the coastal state as having an original, natural, and exclusive right to the continental shelf off its shores, came to prevail over all other, being now reflected in Article 2 of the 1958 Geneva Convention of the Continental Shelf.[45]

In a nutshell the court established the principles regarding the delimitation of the continental shelf in the following words:[46]

(1) delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory onto and under the sea, without encroachment on the natural prolongation of the land territory of the other.

Thus the first case regarding the delimitation of the continental shelf lead to the formation of a three cornerstone principles for delimitation, namely first agreement, second equitable principles along with relevant circumstances and lastly the principle of natural prolongation.

V. THE EQUITABLE PRINCIPLES AND RELEVANT CIRCUMSTANCES

The International Court of Justice has stressed that it was impossible to reach an equitable solution for the delimitation of an area without taking into consideration the specific, relevant circumstances related to that area.[47] Along the same lines it was also recognised by the

[45]*Supra* note 12, at 34, ¶ 47.
[46]*Id.* at 54, ¶ 101.
[47]*Supra* note 11, at 4.

Arbitral tribunal in the Anglo- French Arbitration[48] that the righteousness of the application of any principle to reach equitable delimitation is a function or reflection of geographical or other relevant circumstances in any particular case, but before we spell out the relevant circumstances it is important to consider the other principles required for a delimitation according to international law.

A Natural Prolongation

The expression 'natural prolongation' entered the vocabulary of the international law of the sea with the Judgment of the Court in the *North Sea Continental Shelf* Case.[49] There the Court declared as the most fundamental of all rules culled from the Truman Proclamation[50] relating to the continental shelf that:

> *The rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its law territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.*[51]

Thus the court held that in determining rights over the submarine areas the legal regime of the seas follows the land.[52] Therefore the basis of title over the continental shelf was that it constituted a natural prolongation of its land territory. The only reservation to this is that it

[48]Case concerning the delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (U.K. v. France), 1977, 18 R.I.A.A. 3 *reprinted in* 18 I.L.M. 397 (1979) [hereinafter Anglo-French Award].
[49]*Supra* note11.
[50]*Supra* note37.
[51]*Supra* note11, at 22, ¶19.
[52]*Id.* at 52, ¶96. The court held that: The Contiguous cone and the continental shelf are in this respected concepts of the same kind. In both instances the principle is applied that the land dominates the sea.

must not encroach upon the 'natural prolongation of the territory of another state.[53]

The *Anglo- French* Award[54] also relied on this principle in dismissing the French claim of the equitable method of delimitation. The reason for the rejection was that it detached the delimitation almost completely from the coasts actually abutting on the continental shelf. In the words of the court[55]:

The equitable method of delimitation which is advocated by the French Republic, and which invokes a medial line delimited by reference to prolongation of general direction of the Channel coasts of the two countries, does not appear the Court to be one that is compatible with the legal regime of the continental shelf. It detaches the delimitation almost completely from the coasts which actually abut on the continental shelf of the Atlantic region, and is thus not easily reconciled with the fundamental principle that the continental shelf constitutes the natural prolongation of a State's territory under the sea.

Although the theory of natural prolongation was recognised in this case it proved to be of limited use. The Court held that even though the theory of sovereign rights over continental shelf is based on that principle, in the present case it could not give rise to a satisfactory solution because the continental shelf in the Channel was, geologically, the natural prolongation of the territories of both the United Kingdom and the French Republic, not to mention the Channel Island considered as a separate territory. In such a situation the court modified the principle by adding that:

In these cases the effect to be given to the principle of natural prolongation of the coastal State's land territory is always dependent

[53]*Id.* at 54, ¶ 101.
[54]*Supra* note 11.
[55]*Id.* at 115, ¶ 246.

not only on the particular geographical and other circumstances but also on any relevant considerations of law and equity.[56]

In the *Tunisa/ Libya*[57] *case* the Court recognised the dual nature of natural prolongation, describing it as: *"a consideration which they regarded as not only pertaining to the essence of the continental shelf but also a major criterion for its delimitation."*

This was the first case to give any scope for argument based on geology. However, the Court was careful to limit its role while emphasising the factor's fundamental nature.[58] Likewise the court held in the *Libya/Malta case* that:

The Court however considers that since the development of the law enables a State to claim that the continental shelf appertaining to it extends up to as far as 200 miles from its coast, whatever the geological characteristics of the corresponding sea-bed and subsoil, there is no reason to ascribe an role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims. This is especially clear where verification of the validity of title is concerned, since, at least in so far as those areas are situated at a distance of under 200 miles from the coasts in question, title depends solely on the distance from the coasts of the claimant States of any areas of sea-bed claimed by way of continental shelf, and the geological or geomorphological characteristics of those areas are completely immaterial. It follows that, since the distance between the coasts of the Parties is less than 400 miles, so that no geophysical feature can lie more than 200 miles from each coast, the feature referred to as the 'rift zone' cannot constitute a fundamental discontinuity terminating the southward extension of the Maltese shelf

[56]*Id.,* at 92 ¶ 194.
[57]*Supra* note 11.
[58]*Supra* note 27.

and the northward extension of the Libyan as if it were some natural boundary.[59]

Thus it was concluded that physical prolongation could not be equated with an equitable delimitation and the natural prolongation argument was not a useful criterion as there were no particular features which were sufficiently pronounced. It may be concluded that the natural prolongation argument also no particularly useful in delimitation on its own but aided the court in recognizing the relevant circumstances for equitable delimitation.

B Relevant Circumstances

The older equidistant- special circumstances conventional rule which was correctly interpreted by Arbitral Tribunal in the *Anglo-French* Award[60] recognised the idea of *unicum* and laid down that in the absence of any agreement between the parties who have opposite or adjacent shores the continental shelf will delimited according by drawing a median line from the baseline, taking into consideration the special circumstances. It is important to note that the court considered the equidistant method at par with the special circumstances, proposing the application of both principles harmoniously.[61] Thus whether the delimitation is to be undertaken according to the conventional rule or according to the equitable principle they must consider the relevant circumstances or special circumstance or in other words the factual matrix.

[59]*Supra* note 18, at 35, ¶ 35.
[60]*Supra* note 47.
[61] J.G. Merills, *The United Kingdom – France Arbitration*. 10 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 314 (1978); E.D. Brown, *The Anglo-French Continental Shelf Case*, 16 SAN DIEGO LAW REVIEW 461 (1978); D.M. McRae, *Delimitation of the Continental Shelf between the United Kingdom and France: The Channel Arbitration,* 15 CANADIAN YEARBOOK OF INTERNATIONAL LAW 173 (1977).

a) Geography – The International Court held in the *North Sea Continental Shelf*[62] *Case* that account should be taken of the general configuration of the parties' coasts, as well as the presence of any special or unusual features. Earlier parts of the judgement make clear that the court had in mind the relevance of concave and convex or otherwise irregularly shaped coastlines, which may have effects on the delimitation by means of the equidistance method.

In his opinion in the *Tunisia-Libya*[63]*case*, Judge Oda emphasized *"that delimitation of the continental shelf (or of the exclusive economic 2one) should be effected in accordance with the geography of the area concerned, i.e., so as to secure reasonable proportionality between lengths of coastline and the expanses allocated."*

In this judgment the court stated that for the purpose of achieving an equitable solution, there had been necessary to take into account the factor of a reasonable degree of proportionality between the extent of the continental shelf apportioned to the coastal State and the length of the respective part of its coast, measured in the general direction of the coastal line.

As, regards the length of the coastline as a relevant circumstance to be taken into consideration the arbitral tribunal in the *Barbados-Trinidad and Tobago arbitration* held that:

However, as was observed above (paragraph 236) this does not require the drawing of a delimitation line in a manner that is mathematically determined by the exact ratio of the lengths of the relevant coastlines. Although mathematically certain, this would in many cases lead to an inequitable result. Delimitation rather requires the consideration of the relative lengths of coastal frontages as one element in the process of delimitation taken as a whole. The degree of adjustment called for by any given disparity in coastal lengths is a

[62]*Supra* note 10, at 54.
[63]*Supra* note11, at 270, ¶ 181.

matter for the Tribunal's judgment in the light of all the circumstances of the case.

b) Geology – In the *North Sea Continental Shelf case* the geological structure of the areas of continental shelf was held to be relevant.[64] Presumably, if one part of the continental shelf between states *A* and *B* were geologically more like the territory of state *A,* and another part more like the land mass of state *B,* this could influence a delimitation of the shelf. Whether it would influence the delimitation in a particular case would be a question of fact and degree. In the *Anglo-French Award*[65] the court noted that the Channel Islands archipelago and the seabed and subsoil of the Golfe breton-normand formed part of the same armorican structure as the land mass of Normandy and Brittany. The Golfe breton-normand was characterized by the same essential geological continuity as the rest of the Channel, but a few nautical miles to the north and northwest of the Guernsey and Alderney groups of islands, the geomorphology of the Channel was marked by a distinct fault, known as the Hurd Deep (Fosse Centrale). The court found that the presence of the Hurd Deep should not affect the delimitation.

In the words of the court:

The Court does not consider that the Hurd Deep-Hurd Deep Fault Zone is a geographical feature capable of exercising a material influence on the determination of the boundary either in the Atlantic region or in the English Channel. The Court shares the view repeatedly expressed by both Parties that the continental shelf throughout the arbitration area is characterized by its essential geological continuity. The geological faults which constitute the Hurd Deep and the so-called Hurd Deep Fault Zone, even if they be considered as distinct features in the geomorphology of the shelf, are still discontinuities in the seabed and subsoil which do not disrupt the

[64]*Supra* note 10, at 54, ¶ 101.
[65]*Supra* note 47.

essential unity of the continental shelf either in the Channel or the Atlantic region.

c) Natural Resources – Another factor that could perhaps be called geographic (although it is also an economic one) is natural resources. Natural resources were adverted to as relevant to delimitation by the International Court, but it did not elaborate on this point.[66] One can imagine a situation, however, in which ninety-nine percent of an oil deposit lies beneath what might otherwise be considered the continental shelf of state A and one percent beneath what might otherwise be considered that of state B. If the latter one percent cannot be used economically by state B, whereas the former ninety-nine percent can and is being profitably exploited by state A, an equitable delimitation between states A and B may well be affected by natural resources. In the current era where petroleum resources are being found in the continental shelf, equitable delimitation according to natural resources becomes an idea for the future.

d) Security – The United Kingdom submitted in the *Anglo-French* case that for the purposes of the delimitation in the region of the Channel Islands both legal and equitable principles would be observed if the parties were treated as opposite states and a median line drawn between their coastlines.[67] The United Kingdom contended that for this purpose the Channel Islands formed a part of the coastline of England. On such a basis, the French Republic would be allotted an eastern and a western segment of the continental shelf in the Channel, but a tongue of the United Kingdom's continental shelf would intervene between them, reaching out from its mainland shelf to the Channel Islands.

France argued that such delimitation would be inequitable because it would sever its continental shelf in the Channel into two separate

[66] *Supra* note 9, at 54. ¶ 101; SURYA P. SHARMA, DELIMITATION OF LAND AND SEA BOUNDARIES BETWEEN NEIGHBOURING COUNTRIES 87 (Lancers Books) (1989).
[67] *Supra* note 47, at 77, ¶152 – 155.

zones. Although the allocation of the intervening area to the United Kingdom would theoretically not affect the legal status of the superjacent waters and airspace, France's vital interests in the security and defense of its territory would be put in doubt.

Here, then, is another possible constituent of an equitable decision, the military security of claimant states. (The French Republic also claimed that its economic interests would suffer if it did not have an unbroken stretch of continental shelf.) While the United Kingdom contended that France's claims concerning its security, defense, and navigational interests should not be given weight, it did not maintain that these factors were inappropriate for consideration.

On the contrary, it urged similar considerations in support of its own proposal to establish a continuous link between the continental shelf of the Channel Islands and that of the English mainland. The court found these British and French claims to be mutually counterbalancing, and that finding, together with the fact that the Channel was a major route of international maritime navigation serving ports outside the territories of both parties, led the court to believe that defense and security could not be regarded as exercising a decisive influence on the delimitation of the boundary in the case at hand. “They may support and strengthen, but they cannot negative, any conclusions that are already indicated by the geographical, political and legal circumstances of the region which the Court has identified.”

The court went on to say, however, that considerations of navigational defense, and security did evidence the predominant interest of the French Republic in the southern areas of the Channel, a predominance which was also strongly indicated by France's position as a littoral state along the whole of the Channel's south coast.- *The “Nature” of Islands.* The United Kingdom adverted to a number of considerations it broadly described as related to the “nature” of the Channel Islands. Among those considerations, which the court found to be relevant,

was geography (the size of the islands was held to be significant); but in addition there were some that had not been specifically mentioned by the International Court in the *North Sea Continental Shelf case* - demography, economics, political organization, and legal status. The United Kingdom cited the islands' area of about 75 square miles, their population of 130,000, and their substantial volume of sea and air traffic and commerce, and claimed that they were highly developed, busy territories providing financial facilities of international repute. Moreover, they enjoyed a peculiar legal status, being neither a part of the United Kingdom nor of its colonies, but rather for several hundred years having been direct dependencies of the Crown with their own legislative assemblies, fiscal and legal systems, courts of law, and systems of local administration, as well as their own coinage and postal service. Counsel for the United Kingdom argued that historical, political, and economic factors combined to entitle the Channel Islands to their own continental shelf. They were of sufficient political and economic importance to warrant influencing the course of the median line merely by their presence in a particular location. As has been said, the court did regard the above considerations as relevant. Similarly, when it considered the delimitation in the Atlantic region, the court regarded it as significant that both the island of Ushant and the Scilly Isles were "islands of a certain size and populated." Ushant and the Scillies also constituted "natural geographical facts of the Atlantic region" that could not be disregarded in delimiting the continental shelf boundary without "refashioning geography."

Apparently, there is an overlap between considerations of population and geography. Indeed, "relevant considerations" may be variously named and grouped, as the occasion demands. Those that have been discussed above, as well as those still to be mentioned, presented themselves in certain ways in the two leading cases on the delimitation of continental shelf. By no means are they an exhaustive

list or classification of the considerations that could arise in future cases.

Other than these an authors have offered a few more categories namely navigation, fishing, and conservation.[68]

VI. DISAGREEMENT IN THE BAY OF BENGAL

In the case of the Bay of Bengal delimitation disagreements arose between the Bangladesh Government and India when the Bangladesh Government began signing contracts with oil companies for exploration.

The disputed territory is the region just south of Bangladesh land territory. Bangladesh maintains the position that no rigid principles, i.e. the equidistance- special circumstances should not be applied for delimitation. On the other hand India advocates the application of the equidistance – special circumstances principle.

Furthermore, the rising of new islands in the Bay of Bengal have also lead disputes regarding their territorial sovereignty. Both Bangladesh and India have claimed ownership of these newly emerging island(s)- New Moore/South Talpatty/Purbasha-in the estuary of the Haribhanga River on the border between the two countries. The boundary between Bangladesh and India in this area is the midstream of the main channel of the Haribhanga. The island, formed in the estuary of the Haribhanga and the Raimangal rivers, most probably after the cyclone and tidal bore of 1970, is new terrain, rising initially as a low-tide elevation.15 Known as South Talpatty Island in Bangladesh; it is a U-shaped formation with the eastern arm elongated toward the north. In 1978 its approximate area at low tide was about two square miles, but this may have increased. It was uninhabited at that time, though fisher-men from the Bangladesh mainland were observed on

[68] *Supra* note 2, at 42.

the island during the dry season. The Indian authorities named this island New Moore and claim to have notified the British Admiralty about its location in 1971, during the period that the people of Bangladesh were engaged in their struggle for independence.

According to Professor Rehman[69] On achieving independence, Bangladesh was faced with the equally challenging task of rehabilitation and national reconstruction. At no time during this period did the Indian government specifically draw to the attention of the Bangladesh government their claim upon this island as required under international law and practice despite the close and friendly relations existing between the two countries. Bangladesh lays claim to this island on the assumption that the midstream of the border river Haribhanga flows to the west of the island, while India claims it on the assumption that the midstream flows to the east of the island.

When the Indian Prime Minister visited Bangladesh on April 16-18, 1979, the President of Bangladesh took up the matter with him. In the interest of good neighborly relations, Bangladesh proposed a joint sur-vey to dispel any misgivings about the actual location and rightful owner-ship of the island with the aim of peacefully settling this problem between the two countries. The Indian Prime Minister in a demonstration of the two countries' friendly relations and in a spirit of understanding, agreed to the Bangladesh proposal for a joint survey. This commitment was confirmed by the Indian Prime Minister when the Bangladesh Deputy Prime Minister called on him in New Delhi in the second week of May 1979. Since then, the Indian side has been asked repeatedly to expedite the proposed joint survey. The Bangladesh High Commissioner in New Delhi, in his message of May 30, 1980, informed Dhaka that he had had three meetings in the Indian External Affairs Ministry and that the Indian side had decided to study the situation more thoroughly before taking up a joint survey.

[69]M. Habibur Rehman, *Delimitation of Maritime Boundaries: A Survey of Problems in the Bangladesh Case,* 24 ASIAN SURVEY 1302 (1984).

Moreover, in March 1980, the Indian daily Ananda Bazar Patrika and other West Bengal newspapers carried news of the emergence of a second island on the estuary of the Haribhanga River, reportedly detected by the Indian Naval Hydrographic Survey some time in 1975. It was also reported that the state government of West Bengal called this new island Purbasha. From the description in the West Bengal Press, it appeared that the new island was situated very near to South Talpatty Island on its western side. Satellite images available to Bangladesh indi-cated the presence of a low-tide elevation conforming to the location of Purbasha Island mentioned in the West Bengal press. And a satellite photograph sent by the Indian Ministry of External Affairs in their Note of April 9, 1980, to the Bangladesh Ministry of Foreign Affairs also showed a similar low-tide elevation in the midstream of the Haribhanga. The Indian government subsequently denied that there was, indeed, a second island and adopted the position that New Moore and Purbasha were one and the same island. At this stage it is important to point out that all misgivings regarding the location of newly emerged islands in the estuary of the Haribhanga and their rightful ownership could be easily dispelled by a joint physical survey of this area. This would also remove existing confusion over the names and would establish facts on the ground regarding the number of islands, their location, and ownership. It is clear that if the flow of the mainstream of the Haribhanga is deter-mined, there will be no question of the island's ownership. Considering the importance of the factual matrix in the delimitation of the maritime boundaries there seems to be no doubt that the conflict between Bangladesh and India over the newly emerged island is concerned with matters of fact rather than of law.

VII. ANALYSIS AND CONCLUSION

The equidistance- special circumstances principle and the use of the equitable principles in the delimitation of the continental shelf have

taken up by the parties to a conflict to suit their own goals and advantages. The old rule of equidistance- special circumstances has been taken up by the state whose geography is not aberrated and is in the form of continuous stretch, on the other hand states who have aberrated coasts, concave coasts have advocated the use of the equitable principles. With the acceptance and formalisation of the idea of the *unicium*, and declaration of the equidistance- special circumstances principle to be merely one method of many for delimitation and not part of international custom, the International Court of Justice has created a vacuum for specific legal rules in the absence of conventional obligations. In fact it has had a more unsettling effect than a consolidating one on the law of the maritime delimitation. The *Anglo- French* Award[70] had a consolidating effect on the law as it placed reliance on the intention of the United Nations Conference on the Law of the Sea I. It placed reliance on the *travaux preparatoires* to show that the older equidistance rule complied with the requirements of equitable principles.

In the words of the court:

The role of the special circumstances condition in Article 6 is to ensure an equitable delimitation and the combined equidistance special circumstances rule in effect gives particular expression to a general norm that, failing agreement, the boundary between State abutting on the same continental shelf is be determined on equitable principles.

The adoption of a vague criterion of only equitable principles misguides the parties, and prompts them to advocate adoption of one sided criteria for delimitation. The flexible nature of the relevant circumstances, the absence of positive law, and revelation of new interests in the continental shelf lead to uncertainty and arbitrariness. The median line provides a procedural beginning in the negotiation

[70]*Supra* note 47, at 45, ¶ 70.

process and reflects the need of the times, the adoption of the special circumstances removes any inequity which the this line would lead to.

Recently, the International Court of Justice in the case between Nigeria and Cameroon has held that the procedure for delimitation is the following:

The process involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of the line in order to achieve an equitable solution.[71]

In the view of the researcher this view represents the *de lege lata* as applicable between parties effecting delimitation of their continental shelf.

An appraisal of the recent judgments of the court confirms that the equidistance- special circumstances rule is being followed, with emphasis on development on categories of special circumstances.

In the *John Mayens*[72] *Case* the court applied the old conventional rule of equidistance and differentiated between the special circumstances in the conventional rule and relevant circumstances as the customary rule. It considered economy as additional special factor while delimitating the area. The court also applied and recognised the geographical features and specifically proportionality.

Further in the *Barbados and Trinidad and Tobago arbitration*[73], the parties had taken up conflicting positions as to which rule represents the prevailing customary law. Further a prior customary delimitation based on cultural rights was claimed. The court applied the earlier consolidated principle and did not deviate from it that is drawing a

[71]Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), 2002 I.C.J. Rep. 2002, 442, ¶ 291 (Oct. 10).

[72]Case concerning Martime Delimitation between the area of Greenland and John Mayen, (Denmark v. Norway), 1993, I.C.J. Rep. 93 (June 14).

[73]Barbados and Trinidad and Tobago Arbitration, 2006 27 R.I.A.A. 147.

median line and adjusting it as an when relevant circumstances are recognised and taken into account to adjust the line.

TRANSPARENCY, INDEPENDENCE AND DIVERSITY: DOES THE UNITED STATES HAVE IT BETTER? – A COMPARATIVE ANALYSIS OF THE PROCESS OF APPOINTMENT OF JUDGES TO THE SUPREME COURT IN THE UNITED STATES AND INDIA

Varun Vaish[*] *& Rishabh Sinha*[**]

ABSTRACT

The rise of legal realism has made it manifestly clear that the background and worldview of judges influence cases[1]*. This is evidenced in the United States where the appointment of judges to the higher judiciary is believed to be, at least in some measure, predicated upon the proximity of the political ideology of the judge with that of the appointing party*[2]*. This influence is acknowledged, questioned and somewhat mitigated against by the process of appointment wherein the Senate ratifies the*

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[1]Orley Ashenfelter, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes,* THE JOURNAL OF LEGAL STUDIES Vol. 24, No. 2, 257-281 (1995).

[2]Judith Resnik, *Managerial Judges,* HARVARD LAW REVIEW, Vol. 96, No. 2, 374-448 (1982).

president's choice.[3] *However the lack of acknowledgement of this influence and its consequent securitization, in the appointment of judges is where the difference lies between India and the U.S. This article will compare the appointment procedures of judges in the US as well as in India and demonstrate the comparative lack of transparency in India.*

I. INTRODUCTION

How should a democracy appoint the members of its higher judiciary and more specifically the judges of its Supreme or Apex Court? Keeping pace with India's often disparaged but now institutionalised tradition of learning from processes employed by other states particularly western ones, the author too proceeds to answer this question through a look at another judicial system, which is at least perceived to be proficient, namely that of the United States (US). The appropriateness of such a choice is reinforced by the fact that both India and the US are federal nations with written constitutions recognizing the importance of an independent judiciary.[4] With regards to judges, the power of appointment in both countries has been conferred upon the President in exercise of his executive function, the only difference being that, while in India the appointments are made in 'consultation with judges of the Supreme Court (SC)'[5], in the US they are made after 'Senate Consent'.[6] In this

[3]Timothy B. Tomasi, *All the President's Men? A Study of Ronald Reagan's Appointments to the U. S. Courts of Appeals*, COLUMBIA LAW REVIEW , Vol. 87, No. 4, 766-793 (1987).
[4]H. Gupta, *The Process Of Appointment of Judges In India And U.S.A- A Comparative Study* (Jun. 28, 2012), http://www.scribd.com/doc/13244382/Process-of-Appointment-of-Judges-in-India-and-USAA-Comparative-Study.
[5]Constitution of India, 1950, art. 124(2).

article I do not attempt to provide a comprehensive review of the judicial systems of both the Countries, nor do I canvass the broad and varied powers of the SC and how they exercise them or ought to exercise them. Instead, I will discuss in brief how conducive the processes of judicial appointments in the two states are in furthering the ends of diversity, independence and transparency.[7]

It is understood that the significance attached to diversity, transparency in appointment and operational independence of the SC is to some extent allied with the importance of the role conferred upon it or more importantly expected by society to be performed by it.[8] Therefore a discussion as regards the method of appointment of judges to the SC in both these countries must naturally proceed on the role played by them.[9]

Whether or not Justice Felix Frankfurter's aphorism that the "Court is the Constitution"[10] still holds true today the role of a constitutional court was well summarized when he stated:

> *In a democratic society, courts best perform their institutional role as partners in a larger dialogue: They respond to popular visions of the Constitution's values and help to translate these values into law. Constitutional values come from political mobilizations; Courts do not lead these mobilizations, though they can give them new and distinctive articulation.*[11]

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[6]U.S. Constitution,art. II (2).

[7]The process of appointment referred to here deals specifically with appointments to the Supreme Courts of the two states.

[8]John W. Whitehead, *A Dysfunctional Supreme Court: Remedies and A Comparative Analysis*, 4 CHARLESTON L. REV. 174-180, 181, 186 (2009); Judge Stephen Reinhardt , *Life To Death: Our Constitution and How It Grows*, 44 U.C. DAVIS L. REV. 391-380 (2010).

[9]Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, And Life Tenure*, 26 CARDOZO L. REV. 591-597 (2005).

[10]*The SC: The Passionate Restrainer,* TIME (Mar. 5, 1965), http://www.time.com/time/magazine/article/0,9171,839325,00.html.

[11]J. M. BALKIN,INTRODUCTION TO THE CONSTITUTION IN 2020 5 (Oxford University Press, 2009).

Although the roles originally bestowed upon the two SCs were in essence similar, their eventual embodiments were starkly different. Though both courts, through their decisions, in their capacity as the guardians and interpreters of the constitution, can and significantly do determine broad societal policy and consciousness, the SC of India, has allowed for its jurisdiction to be invoked liberally for cases of inconsequence not requiring it to do so.[12] Though such an action might be attributed to the political realities of a country, where the SC has had to adjust its role from a clarificatory one to one which requires it to also compensate for governance lapses,[13] halt unrestrained government behaviour, and cater to the evident distrust of verdicts of the lower judiciary.[14]

India's politico-judicial reality and constitutional provisions such as Article 136[15] are in stark opposition to the fact that an appeal to the US SC lies only through a writ of certiorari in the case of federal court[16] and only if a questions of federal statutory or constitutional law are to be decided as regards the judgement of the highest court of a state.[17] Therefore one is hardly surprised to learn the fact that the Indian SC has a difficulty in arranging larger benches for constitutional cases ensuring that the Indian SC decides far fewer

[12]S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS, 304-307 (Oxford University Press, 2002); See also, Constitution of India, 1950, art. 136.
[13]*Id.* It does so through methods such as Public Interest Litigation.
[14]Such a change in roles is facilitated by the existence of Indian Constitution, Art. 136; S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS, 304-307 (Oxford University Press, 2002); N. Robinson, *Too many cases*, 26 FRONTLINE 1 (2009), http://www.hindu.com/fline/fl2601/stories/20090116260108100.htm.
[15]Constitution of India, 1950,art. 136 allows the Supreme Court to grant special leave of appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.
[16]U.S. Code title 28, § 1254.
[17]U.S. code Title 28, § 1257.

cases of constitutional significance as compared to the US SC.[18] Such a difference in the constitutional significance of what the court usually decides upon plays a significant role in the attention given to the process of appointment.[19] Only when the realization of an axiomatic existence of legal realism is coupled with the knowledge that critical decisions of constitutional policy are being delivered by the SC, a desire to know the background and worldview of judges which may well influence case outcomes is developed.[20] Such a desire even if existent in India is conspicuous by its absence in its appointment process.

II. INDEPENDENCE

Judges of the SC of India are appointed pursuant to Article 124[21] of the Constitution and the directives formulated by the SC in the case of *SC Advocates on Record Association* v. *Union of India* (Second Judges case)[22] and through its advisory opinion - *In re Special Reference* (Third Judges case).[23] Until 1993 the Presidents power to

[18]With an admission policy of 12 per cent as opposed to the US's 1 per cent the US SC hears only 100 cases a year, whereas the Indian SC admits 6,900 fresh cases each year; TIME, *supra* note 10.

[19]In 2007 the Indian SC disposed of only 13 five-judge-bench matters and one nine-judge-bench matter in 2007.

[20]Orley Ashenfelter, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes,* 24(2) THE JOURNAL OF LEGAL STUDIES 257-281 (1995); B.N. Cordozo, *The Nature of the Judicial Process* (1941); H.J. ABRAHAM, THE JUDICIAL PROCESS 213 (7th ed. 1998); T. FREYER & T. DIXON, DEMOCRACY AND JUDICIAL INDEPENDENCE 261, 263 (1995).

[21]Constitution of India, 1950, art. 124(2) "Every Judge of the SC shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the SC 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."

[22]Supreme Court Advocates-on- Record and Ors. v. Union of India, A.I.R. 1994 SC 268.

[23]Special Reference No. 1 of 1998, Re, [1998] 7 SCC 739.

appoint SC judges was purely of a formal nature, for he would act in this matter, as in other matters, on the advice of the concerned minister, in this case the law minister.[24] The Final power to appoint SC judges rested with the political executive and the views expressed by the Chief Justice were not regarded as binding on them. The *S.P. Gupta case*[25] reaffirmed this supremacy.[26] Nevertheless through the *Second Judges Case*, supremacy was bestowed in turn upon the Chief Justice, with seniority being emphasised as the pre-eminent norm for selection.[27] Clarifying this position, the SC in the *Third Judges Case*[28] finally conferred supremacy of appointments on a Judicial Collegium comprised of the Chief Justice and the four senior most judges of the SC.

In the US, independence is linked not to the process of appointment but to the tenure of service during which no interference by the President or the Legislature is possible.[29] In India, however, judicial independence is linked to the process of appointment, wherein the judiciary has retained supremacy in order to assert its independence.[30] One must realize that, though there should be no interference by the other organs of the government in the functioning of the judiciary, they should share power when it comes to appointment of judges, in a bid to enhance direct answerability, which won't be the case if the

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[24]M.P.JAIN, INDIAN CONSTITUTIONAL LAW, 210 (2003).

[25]S.P. Gupta v. Union of India, 1981 Supp SCC 87 (*First Judges Case*).

[26]Justice Bhagwati opined that the expression 'consultation' used in Art 124 (2) did not mean 'concurrence', and that the Executive could appoint a judge, even if the Chief Justice was opposed to such an opposition; M.P. Singh , "*Merit" in the appointment of judges*, (1999) 8 SCC (JOUR) 1.

[27]M.P.JAIN, INDIAN CONSTITUTIONAL LAW, 210 (Oxford University Press, 2003). This case reiterated the importance of Inter se seniority amongst Judges in their respective High Courts and their combined seniority on all India basis, as the primary basis for appointment to the SC, stating that unless there are strong and cogent reasons to justify a departure, the order of seniority must be maintained.

[28]Third Judges Case, A.I.R. 1999 SC 1.

[29]Special Reference No. 1 of 1998, Re, [1998] 7 SCC 739.

[30]S.P. Sathe, *Appointment of Judges: The Issues,* EPW (August 8, 1998), http://www.jstor.org/stable/4407068.

judiciary is supreme in making appointments.[31]Though the promulgators of both systems decided against the popular election of judges to the SC, the US accounted for some restricted measure of populist representation by allotting the power of appointment between the president and the Senate which is directly representative of the people, even if it is the less populist house of congress.[32] It must be realized that accountability in appointments in no manner takes away from independence either internally or externally.[33]

With respect to independence of the Judiciary, Justice Boggs of the Sixth Circuit Court of Appeals in the US, was straightforward in stating that there existed two categories of the same- internal and external.[34] Internal it is believed is what judges do and external is what could be done to them.[35] It is further believed that independence is not an end but a means to impartial adjudication.[36] US SC judges once nominated by the President and confirmed by the Senate, hold office "during good Behaviour", their salary cannot be reduced once in office and removal is possible only by the process of impeachment in the House of Representatives and conviction in the Senate, by a two-thirds vote, for "Treason, Bribery, or other high Crimes and Misdemeanours."[37] Though the salaries of the judges of the Indian SC are determined by Parliament, their allowances and privileges cannot be taken away once they are in office.[38] Article 124(2) and 124(4) of

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[31]Vicki C. Jackson*, Packages Of Judicial Independence: The Selection And Tenure Of Article III Judges,* 95 GEO. L.J. 974-977 (2007).
[32]JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 188 (1845). Objecting to appointment "by the whole legislature" because they "are incompetent judges of the requisite qualifications" and would favour those to whom favours were owed but who lacked "any of the essential qualifications for an expositor of the laws".
[33]S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS, 304-307 (2002).
[34]Danny J. Boggs, *Judicial Independence*, 11 CHAP. L. REV. 393 (2006).
[35]*Id.*
[36]*Id.*
[37]U.S. Constitution, art. III, §1.; U.S. Constitution, art. II, §4.
[38]Constitution of India, 1950,art. 125(2), ¶2.

the Constitution ensures that they serve till the age of 65 and are removed only by order of the president upon receiving an address from both houses of Parliament, passed by two third majority of the members present and voting on the ground of proved misbehaviour or incapacity. Hence the SC of both India as well as the US, are per Justice Boggs uncomplicated understanding of what others might do to them, are moderately externally independent.

The question which then needs to be asked is whether processes of appointment to the SC in the two countries affect internally the independence of the Higher Judiciary. The US Constitution does not mandate a self replicating professionally guarded selection process as is the case in India with the Judicial Collegium maintaining supremacy.[39] SC Judges in the US undertake no responsibility in the nomination or confirmation of other SC Judges and assume no consultative role either.[40] The process of nomination and subsequent confirmation to a bench which is tenured for life doesn't vest with either the President or the Senate alone, but is shared between two alternate branches of the government, who must collaborate within a framework which necessitates checks on the authority exercised by either one.[41] Integral to this process then, is the Senate Confirmation Hearing (SCH), wherein presidential judicial nominees are questioned on their merit and ideology, before the candidate is appointed.[42] On

[39]Special Reference No. 1 of 1998, Re, (1998) 7 SCC 739; Vicki C. Jackson, *Packages Of Judicial Independence: The Selection And Tenure Of Article III Judges,* 95 GEO. L.J. 974-977 (2007).

[40]U.S. Constitution, art. II provides generally for appointments of federal officers, including federal judges. It states that the President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the SC, and all other Officers of the US, whose Appointments are not herein otherwise provided for, and which shall be established by Law.

[41]S.P. Sathe, *supra* note 30.

[42]CRS REPORT FOR CONGRESS, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE, 12, 17-26 (Denis Steven Rutkus Ed.), http://fpc.state.gov/documents/organization/50146.pdf; RESEARCH AND LIBRARY SERVICES DIVISION LEGISLATIVE COUNCIL SECRETARIAT, THE

the contrary, integral to India's process is the pre-eminence of an entirely judicial collegium, not directly representative of the people.[43] How these facets integral to the appointment processes, namely the Senate Hearings and the Supremacy of the Collegium, affect the internal independence of the Higher Judiciary must be questioned.

Knowing that the Judicial Collegium conscripts typically from amongst High Court judges[44], one becomes conscious of the fact that judges in India are first and foremost employed in the service of a unified judiciary, with aspirations of advancement to the SC.[45] This understanding permeates the consciousness of judges as well, and hence decisions made by and during the tenure of a High Court judge are made under its shadow, furthering stricter conformity with the views SC and hindering independence for want of advancement.[46] Unlike in India, where one criterion for determination is being the Judge of a High Court, the President of the US is not constitutionally required to nominate judges from either the State or Federal courts, and has a free hand in the matter, avoiding fetters to the internal independence of lower courts.[47]

PROCESS OF APPOINTMENT OF JUDGES IN SOME FOREIGN COUNTRIES: THE UNITED STATES,2-10 (Cheung Wai-lam eds.), http://www.legco.gov.hk/yr00-01/english/library/erp01.pdf; Norman Dorsen, *The selection of U.S. Supreme court justices*, 4 INT'L J. CONST. L. 652-59 (2006).

[43]H. Gupta, *The Process Of Appointment of Judges In India And U.S.A- A Comparative Study* (Jun. 28, 2012), http://www.scribd.com/doc/13244382/Process-of-Appointment-of-Judges-in-India-and-USAA-Comparative-Study; S.P. Sathe, *Appointment of Judges: The Issues,* EPW (Aug 8, 1998), http://www.jstor.org/stable/4407068.

[44]See,Constitution of India, 1950, art. 124(3).

[45]S. G. MISHRA, DEOMOCRACY IN INDIA, 532-540 (Eastern Book Corporation, 2000); See also J.S.Verma, *Judicial Independence: Is It Threatened?* (Jun 28, 2012), http://www.hcmadras.tn.nic.in/jacademy/articles/Judicial%20IndependenceIs%20It%20Threatened-JS%20VERMA.pdf.

[46]*Id*.

[47]Norman Dorsen, *The selection of U.S. Supreme court justices*, 4 INT'L J. CONST. L. 652-59 (2006); Research and Library Services Division Legislative Council Secretariat, *The Process of Appointment of Judges in Some Foreign Countries: The*

Regardless, the internal independence of the SC of the US too is affected because of the working of the SCH. Many a times during a SCH, judicial nominees are asked how they would rule as regards crucial constitutional questions of the day.[48] From the standpoint of internal independence, judges having indicated their position beforehand cannot then be reasonably expected to maintain an appearance or actuality of neutrality in the resolution of cases.[49] In addition the existence of no selection criteria, leads to a situation where Presidents ordinarily seek justices who will implement their legal or political philosophy.[50] The legitimacy and internal independence of the SC takes a beating through this partisan selection process, where Judges are nominated specifically for their ideological underpinnings and might be burdened with the expectation to rule in accordance with the same.[51] Therefore as regards the internal independence of the lower courts, India may be at a disadvantage, but as regards the internal independence of the Supreme Court, its appointment process affords greater internal independence.

United States (Jun. 28, 2012), http://www.legco.gov.hk/yr00-01/english/library/erp01.pdf.

[48]Norman Dorsen,The *Strange Case of Justice Alito: An Exchange*, THE SELECTION OF U.S. SUPREME COURT JUSTICES, 4 INT'L J. CONST. L. 652-59 (2006).

[49]Vicki C. Jackson, *Packages Of Judicial Independence: The Selection And Tenure Of Article III Judges,* 95 GEO. L.J. 974-977 (2007); See generally Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2171 (2006); Orley Ashenfelter, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes,* 24 (2) THE JOURNAL OF LEGAL STUDIES257-281 (1995).

[50]Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 871 (2005); Vicki C. Jackson, *Packages Of Judicial Independence: The Selection And Tenure Of Article III Judges,* 95 GEO. L.J. 974-977 (2007); Timothy B. Tomasi, *All the President's Men? A Study of Ronald Reagan's Appointments to the U. S. Courts of Appeals*, 87 COLUM. L. REV., 766-793 (1987).

[51]S. G. MISHRA, *supra* note 45.

III. DIVERSITY

Though not by way of reservation, Sathe is a strong advocate of pluralism in the composition of the SC.[52] Even though the Constitution of Indian is silent upon the SC being representative of any diversity, its importance is recognised by him when he asserts that the legitimacy of a constitutional court is predicated upon its reflection of such Indian pluralism.[53] With the judiciary assuming supremacy in appointments, there exists upon them a greater burden to appear reflective of society and not be perceived as a closed group perpetuating their own clique.[54] With gradual consensus building around the thought that both diversity and professional competence are significant considerations in making appointments to the higher judiciary, the importance of flexibility in the process of appointment, ensuring that various sections of society receive representation, is being understood.[55]

Though the *Second*[56] and *Third judges Cases*[57], have conferred supremacy upon the Collegium, they have also fettered its discretion in so far as they reinforce the convention of viewing seniority amongst the High Court Judges as an important consideration for appointment to the SC.[58] In comparison the absence of a selection

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[52]S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS 304-307 (2002).
[53]*Id.*
[54]M.P. Singh, "*Merit" in the appointment of judges*, (1999) 8 SCC (JOUR) 1; B. MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 243(Cambridge University Press, 1997).
[55] M.P. Singh, "*Merit" in the appointment of judges*, (1999) 8 SCC (JOUR) 1.
[56]Special Reference No. 1 of 1998, Re, [1998] 7 SCC 739; [1998] 7 SCC 766. Seniority is to be maintained and not to be derogated from except for cogent reasons.
[57]Special Reference No. 1 of 1998, Re, [1998] 7 SCC 739.
[58]M.P. Singh, "*Merit" in the appointment of judges*, (1999) 8 SCC (JOUR) 1; S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS, 304-307 (2002).Even though the *Third Judges Case* settled the law in so far as it stated that merit is the predominant consideration and meritorious persons can

criteria in the US constitution does render the appointment process more amenable to furtherance of diversity, as opposed to one which fetters the choice of nominees to judges of High Courts, advocates practicing in High Courts or eminent jurists, coupled with additional restrictions of seniority. A cogent example is the 1980 campaign pledge made by President Reagan to appoint the first female judge the US SC which was eventually carried through in September 1981 when Sandra O'Connor was confirmed by the US Senate.[59]

IV. TRANSPARENCY AS REGARDS IDEOLOGY AND MERIT

It can be argued that a demand for transparency in the appointment of judges is uncalled for when the founding fathers themselves decided not to express its significance in the constitution. This argument holds true for the US as well, whose constitution too is silent on the subject. However even though the founding fathers may not have found transparency in appointments as intrinsically critical, warranting an articulation in the text of the constitutions of either countries, it must be born in mind that the role of the Courts too has changed since the framing of the constitution.[60] The growing acceptance of the SC as an institution not devoid of political consideration, has justified

be appointed without regard to their seniority, what exactly is merit, is yet to be decided. Sathe further recognizes that merit in an unequal society is a dubious concept and he along with M.P. Singh are of the firm opinion that recruitment to the Apex court should never be made on the basis of merit along and considerations of diversity should also factor in the selection process.

[59]More recently President Obama in 2009 successfully nominated to the SC Sonia Maria Sotomayor who is the Court's 111th justice, its first Hispanic justice, and its third female justice. He has also appointed a number of Asian Americans to the Federal Judiciary; See Jonathan Jew-Lim, *A Brief Overview Of President Obama's Asian American Judicial Nominees In 2010,* 17 ASIAN AM. L.J. 227 (2010).

[60]*Judith Resnik*, *Judicial Selection and Democratic Theory: Demand, Supply, And Life Tenure*, 26 CARDOZO L. REV. 591-597 (2005).

transparency in the appointment of its judges, much like it's demanded of members of a legislature who shape the policy of a country.[61]

In the US the "Appointments Clause"[62] states that the President "*shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Judges of the Supreme Court.*" Unlike the constitution of many countries including ours, neither the US Constitution nor any particular statutory law establishes any requirement of age, educational qualifications, experience, or even citizenship for the position of SC justice.[63] Once appointed Judges of the SC are tenured for life.[64] As a consequence of the constitution prescribing no base requirements, the president is bestowed with wide discretion as regards to who he nominates, and such discretion often results in the nomination of close aides or people to whom political favours are owed.[65] However the absence of express selection criteria does not mean that there are none. The convention as evidenced through the SCH has being to regard the merit and underlying ideology of the nominee as important basis for appointment.[66]

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[61]*Id.*

[62]U.S. Constitution, art. II, §2.

[63]U.S. Constitution, art. III, §1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts at the Congress may from time to time ordain and establish.; CRS REPORT FOR CONGRESS, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE 12, 17-26 (Denis Steven Rutkus Ed.); http://fpc.state.gov/documents/organization/50146.pdf.

[64]U.S. Constitution. art. III provides that Judges, both of the Supreme and Inferior Courts, shall hold their Offices during good Behaviour; See also John W. Whitehead, *A Dysfunctional Supreme Court: Remedies And A Comparative Analysis*, 4 CHARLESTON L. REV. 174-180, 181, 186 (2009).

[65]Norman Dorsen, *The selection of U.S. Supreme court justices*, 4 INT'L J. CONST. L. 652-59 (2006).

[66]*Id.*; RESEARCH AND LIBRARY SERVICES DIVISION LEGISLATIVE COUNCIL SECRETARIAT, THE PROCESS OF APPOINTMENT OF JUDGES IN SOME FOREIGN COUNTRIES: THE UNITED STATES 2-10 (Cheung Wai-lam eds.), http://www.legco.gov.hk/yr00-01/english/library/erp01.pdf.

V. MERIT

Mere evidence of merit does not suffice and this is also vigorously tested by the Senate. The efficacy of this testing was evidenced in the *Case of Harriet Miers.*[67] Even though Miers was a distinguished lawyer, having served as the President of the Texas Bar Association, she was found by the Senate to not be adequately familiar with the nuanced field of constitutional law in order to serve on the Supreme Court, leading to her eventual withdrawal.[68]In India however, seniority is the rule with merit superseding seniority being the exception.[69] There exists no criterion as to what constitutes merit and certainly no process to test it even though it may be evidenced on paper.[70] On the contrary there exists a belief evidenced even in the text of the constitution that experience accounts for a measure of merit.[71]

VI. IDEOLOGY

Since the rise of legalism, it has been axiomatic that the background and worldview of judges influence cases and the appointment process in US also does not evidence a denial of such fact.[72] Presidents have in the past sought justices who would implement their legal or

[67]Former White House Counsel and close aide of George W. Bush, who was nominated by him to replace of Sandra O'Conner in the Supreme Court upon her retirement.

[68]Judith Resnik,*supra* note 60;Dan Coats, *Anatomy Of A Nomination: A Year Later, What Went Wrong, What Went Right And What We Can Learn From The Battles Over Alito And Miers*, 28 HAMLINE J. PUB. L. & POL'Y 415 (2007).

[69]S.P. SATHE, *supra* note 52.

[70]*Id.*

[71]As is required by art. 124 (3)(a) and (b) of the constitution i.e. Judge of a High Court of 5 years standing or advocate practicing in the High Court for 10 years.

[72]Orley Ashenfelter, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes,* 24 (2) THE JOURNAL OF LEGAL STUDIES 257-281 (1995); See generally Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2171 (2006).

political philosophy.[73] Hence in addition to merit, ideology of the nominee is also tested in order to ensure the absence of overtly partisan beliefs, which could lead to a reduction in the ostensible legitimacy of the court as an impartial institution.[74] This desire to know the judges ideology is further advanced with the knowledge that a US SC judge sits En Banc with nine other judges as opposed to in a panel as is the case in India, and hence the opinion of one judge could swing an important decision of constitutional policy one way or the other.[75] Ergo specific questions regarding the views of nominees on civil liberties, gay rights, abortion etc. are asked during the SCH and collaborated with their previous decisions and extrajudicial writings if any.[76] A case in point is the dissatisfaction which arose with President Reagan's nominee Robert Bork in the Senate because of his extremely conservative record, and in particular, the fear that he would be the fifth and deciding vote to overrule *Roe* v. *Wade*[77] which lead to his nomination being defeated.[78] Hence the SCH acts not just a check on the power of the president in the absence of specific criteria, but also operates in a manner that provides transparency[79] and representation of community outlook.

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[73]Norman Dorsen, *The selection of U.S. Supreme court justices*, 4 INT'L J. CONST. L. 652-59 (2006).This was witnessed in the 1930's where the implicit test for nomination was loyalty to President Franklin Roosevelt's New Deal Program to combat the Great Depression.

[74]*Id.*

[75]*Id.*

[76]Senators ask nominees to discuss their judicial philosophies, how they would rule on forthcoming cases or would have ruled landmark cases constitutional significance, such as Roe v. Wade; S.P. SATHE*, supra* note 52.

[77]Roe v. Wade, [1973] 410 U.S. 113.

[78]The American Civil Liberties Union fought his nomination to the Supreme Court on the ground that Bork was fundamentally opposed to civil liberties and prevailed with Bork's nomination being eventually defeated. Norman Dorsen, *The selection of U.S. Supreme court justices*, 4 INT'L J. CONST. L. 652-59 (2006); Timothy B. Tomasi, "*All the President's Men? A Study of Ronald Reagan's Appointments to the U. S. Courts of Appeals"*, 87 COLUM. L. REV., 766-793 (1987).

[79]Process of accounts for transparency in that regard especially because hearings are televised; CRS REPORT FOR CONGRESS, SUPREME COURT APPOINTMENT PROCESS:

The process is not tidy, and the line between proper and inappropriate questioning is often unclear, however when the true significance of the court in shaping constitutional policy is understood coupled with the knowledge that its judges are appointed for life, it felt desirable that the Senate and hence the public have access to as much information about a candidate as can be learned without impropriety.[80] India, is either in denial of the power of the SC to shape constitutional policy or perceives a difference in the roles performed by it as compared to the US SC on the basis of its liberal admission policy. Whatever may be the case its appointment process does not warrant any attempt of inquiring into the background and ideology of the judge so as to avoid the possibility of subjective adjudication.

VII. CONCLUSION

It has, hence, been demonstrated that, the manner in which the appointment process has developed in the US as compared to India, probably as a natural result of the non-availability of any selection criteria in the constitution, has led to greater transparency as regards the background and worldview of judges. It is also more conducive to the furthering diversity and is less likely to affect the internal independence of its judiciary. The fact that even before the SCH, Presidential nominees are required to fill out a Senate Questionnaire which requires them to list details ranging from Marital Status, taxes

ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE 12, 17-26 (Denis Steven Rutkus Ed.); http://fpc.state.gov/documents/organization/50146.pdf; Research and Library Services Division Legislative Council Secretariat, *The Process of Appointment of Judges in Some Foreign Countries: The United States,* 2-10 (Jun. 28, 2012), http://www.legco.gov.hk/yr00-01/english/library/erp01.pdf.

[80]Justice McLachlin's of the Canadian SC aptly observes: Yes, candidates for the US SC, unlike nominees in other countries are questioned on their beliefs, their views on the law and their previous decisions. It is a deeply political process, but it reflects the vast authority of the Court on many constitutional issues that are regarded as 'political'. Clifford Krauss, *Canada: New Justices Will Face Public Hearings*, N.Y. TIMES, Feb. 21, 2006; S.P. SATHE, *supra* note 52.

paid, to participation in Political Campaigns etc. lends credence to the fact that the US system of appointments is definitely more scrupulous if not more transparent.[81] India would hence do well to take a leaf out of its book and endeavour a little more to judge its judges before they are appointed.

[81] Potential Judicial nominees are also required to undergo FBI Background check, to avoid an untoward revelation that could embarrass the office of the president once a nominee is finalized; See CRS REPORT FOR CONGRESS, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE12, 17-26 (Denis Steven Rutkus Ed.); http://fpc.state.gov/documents/organization/50146.pdf.
Such a check would definitely not be unwarranted in the Indian context, and could save the institution of the Judiciary from the embarrassment it faced in the Justice Dinakaran's inceident where allegations of corruption surfaced after the announcement that he would be elevated to the Supreme Court.

RESIGNATION V. REMOVAL: THE INDIAN IMPEACHMENT SAGA

Saurabh Bindal[*] *& Dr. Uday Shankar*[**]

ABSTRACT

Acceptance of the resignation of a judge of the High Court of Calcutta by the President of India has raised academic debate on the propriety of impeachment proceedings of a judge. Tendering a resignation and subsequent acceptance in the midst of impending proceedings touches upon the issue of legal process involved in impeachment. . Whether the holder of the highest constitutional office should have waited for the completion of the process undertaken by the constitutional body or the resignation left the matter in fructuous and vitiated the need to drive the impeachment to a logical conclusion, is a question, which, this paper attempts to address. Reliving the nature and scope of impeachment proceeding, the script sheds light on the propriety of the action of the executive when the matter was under consideration before the pillar of democracy i.e., Parliament.

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I. INTRODUCTION

In the midst of an awakening movement on anti-corruption[1], the initiation of impeachment proceedings[2] against Justice Soumitra Sen Judge of Calcutta High Court, attracted attention of the whole nation.[3] The nation was following the proceedings with immense expectation as they surfaced from an instance of corruption in a dignified office.[4] The unprecedented response of the Members of Parliament across party lines, during the impeachment proceedings, raised phenomenal expectation amongst citizens of this country.[5] However, the well-calculated, timely resignation by Judge Soumitra Sen leaves a question mark on such partly concluded proceedings.[6]

There lies a rationale behind devising a procedure of impeachment in high constitutional offices.[7] The special procedure is designed, so as not to subvert the constitutional ideals which the country is cherishing

[1]Pearl Kalra, *India Against Corruption Movement* (Oct. 22, 2011), http://www.theworldreporter.com/2011/04/india-against-corruption-movement-anna.html.

[2]The only Judge to be impeached in India is Shri Justice S.P Sinha. He was impeached in the pre-constitutional era under the provisions of Government of India Act, 1935.

[3]Ifthikhar Gilani, *Justice Sen impeached by Rajya Sabha*, TEHELKA (Oct. 22, 2011), http://www.tehelka.com/story_main50.asp?filename=Ws180811IMPEACHMENT.asp.

[4]Judge Soumitra Sen is not the only judge who has been found indulging in corrupt practices. In recent years, allegations have also surfaced against Justice Jagdish Bhalla, Justice Dinakaran, Justice Nirmal Yadav, Chief Justice F.I Rebello, Justice Mehtab Singh Gill; See, Avinash Dutt, *My Lord's, There's a Case Against You,* TEHELKA (Nov. 9, 2011), http://www.tehelka.com/story_main24.asp?filename=Ne123006My_lords.asp.

[5]Judge Soumitra Sen was charged on two counts and was found guilty by the inquiry committee on both the counts. See, REPORT OF THE INQUIRY COMMITTEE, RAJYA SABHA SECRETARIAT, VOLUME 133 (September, 2010).

[6]*President Accepts Justice Sen's Resignation,* DECCAN HERALD(Sept. 3, 2011), http://www.deccanherald.com/content/188104/president-accepts-justice-sens-resignation.html.

[7]The procedure prescribed by article 124(4) is the only mode of removing a judge of the Supreme Court or the High Court. See Avadesh v. State, [1991] 4 SCC 699.

for over six decades. Acceptance of resignation successfully averted the forgone conclusion of impeachment. Withdrawal of proceedings in the lower house of the Parliament has left the judicial proceeding mid-way and has left its effect, inconclusive. This article endeavours to leave its readers with a lightening rod, which the authors believe will stir a new debate on the purpose and scope of impeachment proceedings. With a challenge to Judge Sen's impeachment proceedings being raised before the honourable Supreme Court[8], this article aspires to shed some light on the nature and importance of such proceedings.

II. IMPEACHMENT

Anecdotal history suggests that impeachment is very old in origin. It relocates the power of indictment from ordinary due process in court of law to special procedure before the legislature.[9]

One of the perennial debates about impeachment is whether "it is" or "should be" christened as a judicial or a political process.[10] Purpose of

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[8]In light of Judge Sen's impeachment proceedings, the petitioner has sought interpretation of Article 124(4) and 124(5) of the Constitution of India, 1950 and section 6 of the Judges Enquiry Act, 1968.

[9]T. F. T. Plucknett, *The Origin of Impeachment*, TRANSACTIONS OF THE ROYAL HISTORICAL SOCIETY, 4TH SERIES, VOL. 24 47-71 (1942).

[10]In interpreting the constitutional provisions in this area the court should adopt a construction which strengthens the foundational features and the basic structure of the Constitution. Rule of law is a basic feature of the Constitution which permeates the whole of the Constitutional fabric and is an integral part of the constitutional structure. Independence of the judiciary is an essential attribute of Rule of law. The constitutional scheme in India seeks to achieve a judicious blend of the political and judicial processes for the removal of Judges. Though it appears at the first sight that the proceedings of the Constituent Assembly relating to the adoption of Clauses (4) and (5) of Article 124 seem to point to the contrary and evince an intention to exclude determination by a judicial process of the correctness of the allegations of misbehaviour or incapacity on a more careful examination this is not the correct conclusion. Accordingly, the scheme is that the entire process of removal is in two parts – the first part under Clause (5) from initiation to investigation and proof of misbehavior or incapacity is covered by an enacted law, Parliament's role being

impeachment process is to protect the Constitution and to prevent abuse of power by the executive and judicial branches. By providing for a mechanism for pursuing and removing high ranking public officials for violations of law; the Constitution makes clear that no one is above the law, and that the nation is committed to rule of law. Perhaps, for this reason the standard of proof to establish misbehavior is very high. Therefore, the nature of impeachment is partly judicial and partly parliamentary. At the stage of voting on the motion, the process is political. The Parliament is sovereign with respect to conduct of its business.[11] Any Court cannot have any say in that political process.[12]

Impeachment from high office is necessary to rehabilitate the damaged constitutional order.[13] The misconduct of the holder of a

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only legislative as in all the laws enacted by it; and the second part only after proof under Clause(4) is in Parliament, that process commencing only on proof in accordance with the law enacted under Clause (5). Thus the first part is entirely statutory while the second part alone is the parliamentary process. The Constitution intended a clear provision for the first part covered fully by enacted law, the validity of which and the process thereunder being subject to judicial review independent of any political colour and after proof it was intended to be a parliamentary process. It is this synthesis made in our Constitutional Scheme for removal of a Judge. Indeed, the Act reflects the constitutional philosophy of both the judicial and political elements of the process of removal. The ultimate authority remains with the Parliament in the sense that even if the committee for investigation records a finding that the Judge is guilty of the charges it is yet open to the Parliament to decide not to present an address to the President for removal. But if the committee records a finding that the Judge is not guilty, then the political element in the process of removal has no further option. The law is, indeed, a civilised piece of legislation reconciling the concept of accountability of Judges and the values of judicial independence. Sub-Committee on Judicial Accountability v. Union of India,[1991] 4 SCC 699.

[11]Constitution of India, art. 122 (1950); See also M.S.M Sharma v. Dr. Shree Krishna Sinha, A.I.R. 1960 SC 1186; Ramdas Athawale v. Union of India, A.I.R. 2010 SCW 2329.

[12]Capt. Virendra Kumar, Advocate v. Shiv Raj Patil, Speaker Lok Sabha, [1993] 4 SCC 97.

[13]Persons holding office to discharge constitutional duties and obligations are in the position of constitutional trustees and the morals of the constitutional trustees have to be tested in a much stricter sense than the morals of a common man. *In* re Dr.

high office is so serious that it justifies impeachment and conviction, leading to the removal from the office.[14] Removal encompasses the element of punishment. The ways in which each impeachment episode is debated, understood, remembered and has produced winners and losers in history can define the terms of the debate in future impeachment disputes.[15]

III. THE CONSTITUTION: THE PROCESS INITIATED

The Constitution of India stands as the real safeguard of our freedoms.[16] It represents the basic document on which the whole framework of this "Sovereign, Socialist, Secular, Democratic, Republic" stands. The foundations of this Republic have been laid on the bedrock of justice.[17] The judges of the Supreme Court[18] and High

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Ram AshrayYadav v. Chairman, Bihar Public Service Commission, [2000] 4 SCC 309.

[14]The holder of office of the judge of the Supreme Court or the High Court should, therefore, be above the conduct of ordinary mortals in the society. The standards of judicial behavior, both on and off the Bench, are normally high. There cannot, however, be any fixed or set principles, but an unwritten code of conduct of well established traditions is the guidelines for judicial conduct. The conduct that tends to undermine the public confidence in the character, integrity or impartiality of the Judge must be eschewed. It is expected of him to voluntarily set forth wholesome standards of conduct reaffirming fitness to higher responsibilities. Krishna Swami v. Union of India and Ors., A.I.R.1993SC1407.

[15]Youngjae Lee, *Law, Politics and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective*, THE AMERICAN JOURNAL OF COMPARATIVE LAW, Vol. 53, No.2 403-432 (Spring 2005).

[16]Constitution is the vehicle of nation's progress. It has to reflect the best in the past traditions of the nation; it has also to provide a considered response to the needs of the present and to possess enough resilience to cope with the demands of the future.H. R. KHANNA, MAKING OF INDIA'S CONSTITUTION (Eastern Book Company, 2nd Edition, 2009).

[17]Bharat Bank Ltd. v. Employees A.I.R. 1950 SC 188.

[18]Constitution of India, art. 124(6). Every person appointed to be a Judge of the Supreme Court shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule. Schedule 3 further provides the form of oath. Form of oath or affirmation to be

Courts[19] are obligated under the Constitution to vow for upholding the Constitution and other laws. They have also been entrusted with the task of safeguarding the fundamental rights of people and upholding the rule of law.[20] Infraction of the Constitution and other laws by the sitting judges of the Supreme Court and High Courts is not only deleterious for the whole state but is also detrimental for the trust which a common man renders on the judiciary. The legitimacy of judiciary flows from the faith of people. Conduct of a judge as a judge must befit the office of judge as it constitutes the foundation of faith. Constitution has placed each and every organ of the state at the same pedestal. Independence and interdependence of each organ lies at the heart and soul of this basic document. It has also placed checks and balances to protect "we the people" from the plague, which results from a malfunctioning limb of the state.[21] Impeachment of the

made by the Judges of the Supreme Court and the Comptroller and Auditor-General of India: 'I, A.B., having been appointed Chief Justice (or a Judge) of the Supreme Court of India (or Comptroller and Auditor-General of India) do swear in the name of God / solemnly affirm, that I will bear true faith and allegiance to the Constitution of India as by law established, [that I will uphold the sovereignty and integrity of India,] that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-with and that I will uphold the Constitution and the laws.'

[19]Constitution of India, art. 219. Every person appointed to be a Judge of a High Court shall, before he enters upon his office, make and subscribe before the Governor of the State, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule. Schedule 3 further provides the form of oath. Form of oath or affirmation to be made by the Judges of a High Court: 'I, A.B., having been appointed Chief Justice (or a Judge) of the High Court at (or of)........do swear in the name of God / solemnly affirm, that I will bear true faith and allegiance to the Constitution of India as by law established, [2] [that I will uphold the sovereignty and integrity of India,] that I will duly and faithfully and to the best of my ability, knowledge, and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws.'. See also Shabbir v. State A.I.R. 1965 All 97(99).

[20]N. Kannadasan v. Ajoy Khose, [2009] 7 SCC 1; Supreme Court Advocate on Record Assn. v. Union of India, [1993] 4 SCC 441.

[21]Terrence J. Brooks, *How Judges Get into Trouble*, HEINONLINE 23 JUDGES J. 4 (1984).Independence of judiciary is not inconsistent with accountability for judicial conduct.

judges, who are proved to have misbehaved or are proved to lack capacity, is one such check which keeps the judicial organ of the state on its toes. The exercise of impeachment has been provided in the Constitution. Impeachment does not mandate overpowering of one limb by the other.[22] The procedure for impeachment prescribes the grounds on which an impeachment proceeding can be undertaken. The grounds being limited to proved misbehavior and incapacity.[23] The term misbehavior has not been defined in the Constitution. It represents a vague and elastic term, the import of which can embrace

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[22]No discussions shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties expect upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided. Constitution of India, art. 121. This article buttresses the premise that independence of judiciary has been given paramount importance in the Constitution.

[23]C. Ravichandran Iyer v. Justice A.M. Bhattacharjee, [1995] 5 SCC 457.The constitutional process of removal of a Judge as provided in Article 124(4) of the Constitution is only for proved misbehavior or incapacity. The founding fathers of the Constitution advisedly adopted cumbersome process of impeachment as a mode to remove a Judge from office for only proved misbehavior or incapacity which implies that impeachment process is not available for minor abrasive behavior of a Judge. Removal of a Judge by impeachment was designed to produce as little damage as possible to judicial independence, public confidence in the efficacy of judicial process and to maintain authority of courts for its effective operation. Judicial office is essentially a public trust. Society is, therefore, entitled to except that a Judge must be a man of high integrity, honesty and required to have moral vigor, ethical firmness and impervious to corrupt or venial influences. He is required to keep most exacting standards of propriety in judicial conduct. Any conduct which tends to undermine public confidence in the integrity and impartiality of the court would be deleterious to the efficacy of judicial process. Society, therefore, expects higher standards of conduct and rectitude from a Judge. Unwritten code of conduct is writ large for judicial officers to emulate and imbibe high moral or ethical standards expected of a higher judicial functionary, as wholesome standard of conduct which would generate public confidence, accord dignity to the judicial office and enhance public image, not only of the Judge but the court itself. It is, therefore, a basic requirement that a Judge's, official and personal conduct be free from impropriety; the same must be in tune with the highest standard of propriety and probity. The standard of conduct is higher than expected of a layman and also higher than expected of an advocate. In fact, even his private life must adhere to high standards of probity and propriety, higher than those deemed acceptable for others. Therefore, the Judge can ill-afford to seek shelter from the fallen standard in the society.

within its sweep different facets of conduct as opposed to what is considered as good conduct.[24] Qualification of the word misbehavior by the term "proved", lays emphasis on the fact that before the parliament takes up the motion for exercising its vote, the conduct of the impugned judge has been proved. Parliament, subsequently, puts a stamp on the incapacity or misbehavior by adopting the motion in both the houses. It is only after such endorsement, the misbehavior or incapacity is deemed to have been proved. Perhaps, the reason of using "proved misbehavior" as a ground of removal is because a high magnitude of dereliction should be considered for impeachment. Therefore, what constitutes proved misbehavior is aptly left with wisdom of time.

IV. THE BEGINNING OF THE IMPEACHMENT

Impeachment proceedings instituted in the Parliament were brought to halt by the executive by accepting the resignation of Judge Sen. During the course of the proceedings; recurrent themes which occupied the limelight were rule of law and independence of judiciary. Article 124(4) and Article 218 of the Constitution of India, 1950, provide for the mechanism of removal of Judges of the Supreme Court and High Courts respectively. Article 218 enjoins that the same procedure as being followed for the removal of a judge of the Supreme Court shall be followed for removing the judge of a High Court. The President cannot on his own remove a Judge of the Supreme Court or a High Court unless an address by each House of Parliament supported by a majority of the total membership of the House and by a majority of not less than two-thirds of the members of

[24]C. Ravichandran Iyer v. Justice A.M. Bhattacharjee, [1995] 5 SCC 457, ¶24; Delhi Judicial Service Association v. State of Gujarat, [1991] 4 SCC 406; Daphtary v. Gupta, [1971] 1 SCC 626.

that House present and voting[25], is passed and presented to him for removal of the Judge on the ground of proved misbehavior or incapacity.[26] Law made by the parliament under Article 124(5), namely, the Judges Enquiry Act, 1968 is to be read along with Article 124(4) to find out the constitutional scheme for the removal of a judge. The Act provides that a requisite number of members have to move a motion for the removal of the judge before the speaker of the house. The speaker then decides whether the matter calls for an enquiry or not.[27] If the speaker decides to take up the matter on the consideration of the available material; she has to constitute a committee in order to investigate the accusations made against the Judge.[28] If the findings of the committee point towards the culpability of the Judge, then the parliament considers the motion for removal of

[25]The term "present and voting" discounts the deemed inclusion of absent members of the Parliament. Abstaining from voting would not tantamount to deemed support for the motion. Lily Thomas v. Speaker, Lok Sabha, [1993] 4 SCC 234.
[26]Constitution of India, art.s 124(4), 218.
[27]Judges Enquiry Act, 1968§3(1). If notice is given of a motion for presenting an address to the President praying for the removal of a Judge signed,(a) in the case of a notice given in the House of the People, by not less than one hundred members of that House;(b) in the case of a notice given in the Council of States, by not less, than fifty members of that Council, then, the Speaker or, as the case may be, the Chairman may, after consulting such persons, if any, as he thinks fit and after considering such materials, if any, as may be available to him either admit the motion or refuse to admit the same.
[28]Judges Enquiry Act, Judges Enquiry Act, 1968§3(2). If the motion referred to in sub-section (1) is admitted, the Speaker or, as the case maybe, the Chairman shall keep the motion pending and constitute as soon as may be for the purpose of making an investigation into the grounds on which the removal of a Judge is prayed for, a Committee consisting of three members of whom (a) one shall be chosen from among the Chief Justice and other Judges of the Supreme Court; (b) one shall be chosen from among the Chief Justices of the High Courts; and (c) one shall be a person who is in the opinion of the Speaker or, as the case may be, the Chairman, a distinguished jurist: Provided that where notices of a motion referred to in sub-section (1) are given on the same day in both Houses of Parliament, no Committee shall be constituted unless the motion has been admitted in both Houses and where such motion has been admitted in both Houses, the Committee shall be constituted jointly by the Speaker and the Chairman: Provided further that where notices of a motion as aforesaid are given in the Houses of Parliament on different dates, the notice which is given later shall stand rejected.

the judge along with the committee's report and other available material.[29] Consideration is to be given by both houses of the Parliament. Copy of the report of the committee shall be forwarded to the impugned judge so that he is given a fair opportunity to defend his case.[30] If the parliament adopts the motion by a requisite majority, then the process culminates by the removal of the challenged judge by the President of India. When stamped by the President, the impeachment proceeding receives its proper fate which results in establishing the misbehavior or incapacity of the impugned judge.[31]

A fait accompli of resignation raises a question of status of impeachment proceeding initiated by the House after receipt of the report of the Committee. The overwhelming support in one of the Houses, the House of Learned and Elderly People, on impeachment motion is to be viewed not only as a requirement of technical procedure but also the voice of the constitutional body on issue of removal of a condemned judge. One house has successfully discharged constitutional function; the other house was under an obligation to undertake the function in order to fulfill the mandate of the Constitution. Non-fulfillment of the function makes the removal a goal too near, yet too far.

[29]Judges Enquiry Act, Judges Enquiry Act, 1968§6(2).If the report of the Committee contains a finding that the Judge is guilty of any misbehaviour or suffers from any incapacity, then, the motion referred to in sub-section (l) of section 3 shall, together with the report of the Committee, be taken up for consideration by the House or the Houses of Parliament in which it is pending.

[30]Sarojini Ramaswami v. Union of India, [1992] 4 SCC 506, ¶95.

[31]Judges Enquiry Act, Judges Enquiry Act, 1968§6(3).If the motion is adopted by each House of Parliament in accordance with the provisions of clause (4) of article 124 or, as the case may be, in accordance with that clause read with article 218 of the Constitution, then, the misbehaviour or incapacity of the Judge shall be deemed to have been proved and an address praying for the removal of the Judge shall be presented in the prescribed manner to the President by each House of Parliament in the same session in which the motion has been adopted.

V. THE RESIGNATION: GOAL TOO NEAR, YET TOO FAR

Resignation of Judge Sen raises the question whether impeachment relates to only the executive and the condemned judge or whether it provides for an obligation to the system of justice and society generally. Legal landscape needs to be different in cases of removal of a holder of high constitutional office than that followed in ordinary service jurisprudence.[32] Impeachment involves the question of position and reputation of office holder on one hand, and on other hand it engages the question of restoration of faith in our cherished constitutional philosophies.

There lies a sea difference between the import of the terms "resignation"[33] and "removal". The moral aspect of indignity and

[32]Union of India v. Sankalchand Himatlal Sheth and Anr., [1978] 1SCR423.So it is that we must emphatically state a Judge is not a government servant but a constitutional functionary. He stands in a different category. He cannot be equated with other 'services' although for convenience certain rules applicable to the latter may, within limits, apply to the former. Imagine a Judge's leave and pension being made precariously dependent on the executive's pleasure: To make the government not the State- the employer of a superior court Judge is to unwrite the Constitution..

[33]Union of India v. Gopal Chandra Misra, A.I.R.1978 SC 694.Resignation' in the Dictionary sense, means the spontaneous relinquishment of one's own right. This is conveyed by the maxim : *Resionatio est juris propii spontanea refutation*. In relation to an office, it connotes the act of giving up or relinquishing the office. To "relinquish an office" means to "cease to hold" the office, or to "loose hold of the office; and to "loose hold of office", implies to "detach", "unfasten", "undo or untie the binding knot or link" which holds one to the office and the obligations and privileges that go with it. In the general juristic sense, also, the meaning of "resigning office" is not different. There also, as a rule, both, the intention to give up or relinquish the office and the concomitant act of its relinquishment, are necessary to constitute a complete and operative resignation, although the act of relinquishment may take different forms or assume a unilateral or bilateral character, depending on the nature of the office and the conditions governing it. Thus, resigning office necessarily involves relinquishment of the office which implies cessation or termination of, or cutting asunder from the office. Indeed, the completion of the resignation and the vacation of the office, are the casual and effectual aspects of one and the same event.

incrimination are absent in resignation. It is for this reason that the terms "removal" and "resignation", as a means for vacating the post of a Judge, have been provided in different provisions of the same Article.[34] Moreover, the benefits which ensue after resignation are different from those which mark removal.[35] In the case of resignation, the High Court or the Supreme Court judge has the privilege to quit their office at their unilateral will, by sending to the President a written letter of resignation.[36] Removal of the judges by forced resignation is not only unconstitutional but also parlous to the independence of the judiciary.[37]

A retired judge, which may include a judge who has resigned[38], is endowed with sundry benefits which include amongst others, pensions[39] and ancillary benefits.[40] A retired judge is also entitled to payment of cash equivalent to leave salary for the period of earned leave at his credit on the date of retirement.[41] Moreover, the Constitution itself provides that a retired judge of the High Court can plead before Supreme Court and the other High Courts.[42] She can also be entrusted with the chairmanship of various statutory and non-statutory bodies.[43] Retirement through resignation[44], in such a case

[34]Constitution of India, 1950art.s 124(2), 217.
[35]National Commission to Review the Working of the Constitution, *Superior Judiciary* (Oct. 22, 2011) http://lawmin.nic.in/ncrwc/finalreport/v2b1-14.htm.
[36]*Supra* note 33.
[37]*Supra* note 23.
[38]Max Radin, *Legal Philology: Resign; Retire; Emolument*, 23 A.B.A. J. 771(1937). As far as public officials are concerned, it is clear that resignation is the form of retirement. There is in fact evidence that "retirement" is slightly euphemistic for resignation.
[39]High Court Judges (Salaries and Conditions of Services) Act, Section 14 (1954).
[40]High Court Judges (Salaries and Conditions of Services) Act, Section 23D (1954); Supreme Court Judges (Salaries and Conditions of Services) Act, Section 23C (1958).
[41]UOI v. Gurnam Singh, A.I.R. 1982 SC 1265.
[42]Constitution of India, 1950 art. 220.
[43]*Supra* note 35.
[44]Burke Shartel, *Retirement and Removal of Judges*, HEINONLINE 20 J. AM. JUD. SOC. 133 (1936-1937).Voluntary resignation leads to voluntary retirement.

apparently seems to be a more lucrative recourse for the erring judges. The authors of this paper argue that just because an easy recourse is available for getting rid of a charged judge; it should not imply that the proper course of removal should not be followed.

Scholars have argued that the Parliament can withdraw the motion presented to it at any stage of the impeachment proceedings.[45] Though the authors endorse this view partially in light of the exit checks which are provided under the Judges Enquiry Act, 1968, such reading of Article 124(4) is contrary to the perception that an accused should, if charged, meet his fate in the form of either vindication or punishment. It can be argued by legal luminaries that the second part of the whole impeachment proceeding, being a political part, cannot be questioned in any Court in light of any irregularity. Such an argumentation, though cogent enough, undermines the aspect that the members of the Parliament are bound to uphold the Constitution.[46] Albeit, parliamentary proceedings are given an inviolable sanctity under the Constitution of India, the same cannot be upheld on grounds of fundamental breach of the Constitution. The function of one institution of the Constitution must be in conformity with the other institution. The impending impeachment proceeding should have been a reason for non-acceptance of resignation by the President. The Head of the Executive should have waited for the logical conclusion of the impeachment proceeding initiated by the Parliament. In any case, the President could have accepted the resignation of the Judge after successful completion of the proceeding. The act of acceptance of resignation by the President and the withdrawal of the proceeding by the Speaker raises a constitutional question of impropriety.

Removal of a judge by forced resignation and any deviation from the principle of "justice for all" would amount to transgression of the Constitution and the same cannot be justified on any ground. All the

[45] M.P SINGH, V.N SHUKLA'S CONSTITUTIONAL LAW, (11th ed. Eastern Book Company, 2010).

[46] Constitution of India, 1950, art. 99.

cant and clichés concerning the Rule of Law that surfaced during the recent impeachment proceedings should not obscure a fundamental truth.[47]

VI. CONCLUSION

Casualty, which has resulted from the acceptance of resignation, has been the deprivation of a just result from the proceedings. Charges against the judge came and went, without consequential result. In impeachment proceedings of a judge of constitutional court, the nation reasonably expects a logical conclusion to the proceedings.[48] Tactical subversion of the proceedings in the garb of technical ground of submission of resignation of the condemner amounts to a fraud on the people of this country.[49]

A thread of reasoning justifies logic. Constitution of India enshrines within it a logical norm which has been placed in that exemplary document with a purpose. The purpose which it serves[50] cannot be subjugated to the whims and fancies of the legislature. This not only defies reasoning, but is also against the constitutional mandate. Removal of judges by way of forced resignation is not what is

[47]Deborah L Rhode, *Conflicts of Commitment: Legal Ethics in Impeachment Context*, STANFORD LAW REVIEW, Vol. 52, No. 2 269-351 (2000).

[48]Jeffrey M. Shaman, *Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 1 (1988-1989).Ajudge holds a dignified place in society and his conduct is subject to high standards of professional and personal conducts.

[49]Arthur J. Goldberg, *The Question of Impeachment*, 1 HASTINGS CONST. L.Q. 5 (1974).We must not, if the circumstances warrant, abjure the use of the sanction the Framers provided. But precisely because the stakes are so high for all of us, we must assure that the impeachment process is, in fact, a fair and principled one, legitimate in the eyes of the people..

[50]Jack E. Frankel, *Judicial Discipline and Removal*, 44 TEX. L. REV. 1117 (1965-1966).The purpose of a procedure for the discipline and removal of judges is to provide a workable system for taking remedial action when a judge, through fault or disability, fails to execute properly the duties of office. The ultimate sanction of the procedure, invoked when a judge is not fit to retain office, is the termination of his tenure..

prescribed in the Constitution of India. Removal by way of impeachment is the route for reinstating the trust of common man in the higher judiciary. That being the case, Justice Soumitra Sen deserves either exoneration or punishment. The purpose which impeachment serves lies in analyzing the direct and indirect repercussions on the public interest.[51] National welfare, by removal of judges, is the paramount duty of the legislature and to abstain from the same appears to be a betrayal from the fundamental tenets of the Constitution. The elusive quest for "justice for all" remains unanswered by the course adopted by the Indian Parliament. Either the judiciary or the legislature has to take the task of filling this hiatus and the authors hope that someday "we the people" will be able to see "justice for all".

[51]William L. Burnell, *Judicial Impeachment*, HEINONLINE 1 W. ST. U. C. L. L. REV. 1 (1972-1973).

CONSENT ORDERS IN SECURITIES REGULATIONS: A REVIEW OF THE SEBI AND SEC MECHANISM

Sujoy Datta[*] *& Uma Lohray*[**]

Consent Settlement, a universal feature of securities regulatory systems internationally, has recently become a source of debate in both India and the USA. SEBI and the SEC both have faced a series of challenges on similar grounds to their systems, and the differing Constitutional and Administrative Laws of the two nations mirror the differing results of these challenges.

While a public interest litigation in the Delhi High Court has successfully galvanized the legal community into increased interest in the mechanism's flaws and ushered in SEBI's May 25th Amendments to its 2007 Circular, the controversial and celebrated order by Judge Rakoff in the Citigroup settlement has been overturned at appeal.

The authors of the paper compare the Indian and American systems in the light of their Constitutional and Administrative laws, contextualizing and analyzing the Indian amendment in the light of differing status of

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the Judiciaries in matters of judicial review of administrative actions and policy decisions and questions of public interest.

While the Amendments in India have indubitably mitigated the lacunae in the system, there are still windows for discretion, which might prove ruinous for the attempt at reform. The paper examines and analyzes these areas of the 2012 amendments and attempts to answer the question that's been pushed to the forefront of the legal community's debates by the recent developments in the Indian and American situations: "Has the Indian Consent Order System Been Saved?"

I. CONSENT ORDERS IN INDIA: A PRE 2012 PERSPECTIVE

A Introduction to the 2007 Circular

Consent settlements have been a persistent theme in commercial laws internationally, appearing in trade[1], investment[2], and financial regulatory[3] systems with a broadly similar concept and system-specific adapted frameworks.

[1]North American Free Trade Agreement, Chapter XIX, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1994).
[2]Convention on the Settlement of Investment Disputes between States and Nationals of Other States,1964, art. 25.
[3]Securities Exchange Board of India, Circular No. EFD/ED/Cir-1/2007 (April 20, 2007).

The consent order system was introduced in India in April 2007 by a circular[4] passed by the Securities Exchange Board of India in exercise of its statutory authority.[5] The circular, which drew inspiration[6] from the Consent Mechanism established by the United States Securities and Exchange Commission (SEC), laid down a system of compounding offences and passing consent orders to settle *prima facie* instances of commission of certain offences.[7]

Paragraphs 8 and 9 of the 2007 Circular established that Consent Orders could be obtained at any stage of a proceeding, from before initial investigations and issuance of a Show Cause Notice to before the final disposal of a civil suit by the apex court, depending only on the gravity of offences to determine whether or not SEBI would insist on fact-finding investigations. A noteworthy aspect of the mechanism in India is that it may involve and admission of guilt[8], and that the range of settlements included barring the accused from trading in securities, along with monetary fines.

The system has been regarded as being in the interest of justice[9] and bringing about a just and equitable resolution of disputes,[10] often approved by the Securities Appellate Tribunal due to its advantages of reduced litigation costs and time[11] and rapid disgorgement to investors and shareholders.[12] Paragraph 11 of the 2007 circular gave certain guidelines to be followed while considering whether to allow or disallow a settlement, of which ground iii. of which reads,

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[4]*Id.*
[5]Securities and Exchange Board of India Act, 1992,§§ 15T, 24A Depositories Act, 1996,§§ 22A, 23A; Securities Contracts (Regulation) Act, 1956§23N.
[6]*Supra* note 3, at¶4.
[7]SEBI Act, Sections 11, 11B, 11D, 12(3) and 15I (1992); Equivalent under SCRA (1956) and Depositories Act (1996).
[8]*Supra* note 3, ¶13.
[9]Adani Properties Pvt. Ltd. v. Securities and Exchange Board of India, [2008] 83SCL76SAT; Fincap PortfolioLtd. v. Securities and Exchange Board of India, [2008] 84SCL424SAT.
[10]Ramanlal D. Shah v. Securities and Exchange Board of India, [2008] 83SCL16SAT.
[11]Luminant Investment Pvt. Ltd. v. Amit Pradhan, [2008] 84SCL423SAT.
[12]Godavari Corporation Ltd. v. Securities and Exchange Board of India, [2008] 84SCL385SAT.

Gravity of charge i.e. charge like fraud, market manipulation or insider trading" and ground iv. reads "*History of non-compliance. Good track record of the violator i.e. it had not been found guilty of similar or serious violations in the past*.

However, the application of this circular proved problematic.

B The Lacunae and Flawed Applications of the 2007 Circular

Increasing numbers of consent orders for grave, market influencing offences were granted after the 2007 circular's introduction. Seemingly indiscriminate granting of settlements in serious offences led to a body of dissent against the mechanism.[13] Even serious violations with market-wide ramifications and harsh implications for investors and shareholders were settled, and repeat offenders were entertained.

In *Securities Exchange Board of India* v. *Prabhu Steel Industries Ltd.*[14], several serious violations of a grave nature were settled with a consent order, the accused who did not file for a consent order got a ban for 3 months. Especially controversial were the immensely expensive settlements for grave offences, such as the January 2011 Anil Dhirubhai Ambani Group settlement worth rupees 50 crores, Haryana Ship Breakers for 11 Crores and HFCL Group for 10 crores.[15]

Insider trading was settled through consent for Rs. 1 lac by ICICI Bank wherein the bank failed to disclose its major shareholding in Jord Engineers thus violating insider trading norms.[16] Other entities that settled serious offences like insider trading, violation of FII Regulations and KYC norms are Indiabulls Securities, Karvy Stock Broking and Centurion Bank of

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[13]Dinesh Unnikrishnan & Aveek Datta, *Sebi Consent Order System Under Review,* ECONOMIC TIMES, Feb. 20, 2012.
[14]Securities Exchange Board of India v. Prabhu Steel Industries Ltd & Ors.,[2008] 79SCL103 SAT.
[15]Ministry of Corporate Affairs, Government of India (Jul. 2012), www.watchoutinvestors.com.
[16]Reena Zachariah, *Sebi Passes Consent Order on ICICI Bank*, ET BUREAU, May 18, 2012.

Punjab.[17] The settlement of offences of this grave nature raised many doubts about the application of guideline 11(iii).

Concern was also raised about the seeming disregard of guideline 11(iv), relating to past history with consent orders. More than 136 individuals or companies got 2 or more consent orders, with Action Financial Services obtaining 8 and SMC Global Securities and Systematix Shares & Stocks obtaining 7 each.[18] Consent orders and compounding of offences are not aimed at doing away with lengthy judicial procedure by merely passing an award in exchange of a penalty fees, yet this rampant trend erred on the side of diluting the punishing nature of securities regulation.

These controversial settlements invoked an increasing amount of debate over the soundness of the consent mechanism. As settlements were approved over more serious offences, the scope of the mechanism widened.

A particularly noteworthy expansive interpretation of the mechanism was attempted and ultimately rejected in the *Shilpa Stock Broker cases*. Shilpa Stock Brokers, penalized by SEBI for trading with unregistered Stock Broker and manipulative trades, appealed to the Securities Appellate Tribunal and the Supreme Court, which upheld the penalty in 2005.[19] Shilpa Stock Brokers commenced the procedure for arriving at a consent mechanism during the pendency of the Review proceedings at the Supreme Court.

After the Review proceedings were finished and the previous order upheld, the HPAC approved a consent settlement. Shilpa Stock Brokers then moved the High Court of Mumbai under Article 226, seeking to enforce the settlement despite it being passed after complete settlement by the Supreme Court, thereby attempting to expand the scope of the Consent mechanism even further.

However, the High Court held in January 2012[20] that doing so would further blur the already dubious limits of the mechanisms, and that allowing such an

[17]*IPO scam: SEBI starts disgorgement process*, TNN, Jun. 6, 2008.
[18]*Id.*
[19]Shilpa Stock Brokers Pvt. Ltd. v. Securities and Exchange Board of India, A.I.R. 2005SC414.
[20]Shilpa Stock Brokers Pvt. Ltd. v. Securities and Exchange Board of India, A.I.R. 2012Bomb.HC34.

expansion would usurp the power of the Supreme Court, which is impermissible.

Industry specialists and experts formed a negative opinion of the mechanism.[21] SEBI's new Chairman, Mr. UK Sinha himself said that he found the system arbitrary in the manner that some serious cases had been settled in the past;[22] other senior officials at SEBI also expressed their consternation over the system's lack of rules to ensure consistency in results and uniformity in penalties.[23] "While in procedural matters, consent is welcome, in other cases (the regulator should not) encourage consent," said C. Achuthan, former president officer of SAT. "Otherwise they (the guilty) will get emboldened to repeat the same. No escape route should be given to market manipulators."[24]

Grave shadows were cast on the credibility of the system with Ex SEBI Board Member, KM Abraham's letter to the PM that he was being pressurized to favourably tackle some high profile cases such as those of Sahara, Reliance Industries Limited, ADAG companies, Bank of Rajasthan and MCX-SX, a new stock exchange that currently offers trading facilities in currency derivatives.[25]

C The UBS Securities Case: A Moral Dilemma

A particularly controversial settlement, The *UBS Securities case* is illustrative to highlight the differing workings Securities regulation and the Consent Order mechanisms pre and post 2012 Amendment is the *UBS Securities case*.

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[21]Tina Edwin, *Does SEBI have the Capacity to Deliver Stricter Prosecution or Penalty Regime?*, ET BUREAU (Jun. 3, 2012), http://articles.economictimes.indiatimes.com/2012-06-03/news/31985590_1_consent-orders-insider-trading-settlement-fee.

[22]BS Reporter, *SEBI to Issue Consent Order Norms in Four Weeks*, SMART INVESTOR (Apr. 14, 2012), http://www.smartinvestor.in/market/read-113069-readdet-Sebi_to_issue_consent_order_norms_in_four_weeks.htm.

[23]Dinesh Unnikrishnan & Aveek Datta, *supra* note 13.

[24]*Id.*

[25]P. Vaidyanathan Iyer, *Ex-SEBI member to PM: ID leaked, Family at Grave Risk*, INDIAN EXPRESS, August 30, 2011.

SEBI, in its investigations into the Stock Market Crash of 17/05/2004, had found UBS Securities liable for insider trader, front running, and other very unfair trade practises which contravened Securities Regulations so majorly as to have had a grave detrimental effect on the health of the stock market. Awarding consent orders for such offences would drop the confidence of the investors in the approach of the authorities.

The case was decided by the SAT in 2005[26], and after the 2007 Circular on Consent Order, it was settled for 50 lac Rupees in 2009 during pendency of appeal to Supreme Court. SEBI drew heavy criticism for this settlement, which is reflective of the change the 2007 circular made. A hypothetical determination of UBS Securities' settlement application after the 2012 amendment would answer several questions regarding the evolution of the Consent Mechanism system in India, and will be attempted at the conclusion of this paper.

D Culmination of the Dissent Against the 2007 Circular

These problems were serious. Industry opinion on the mechanisms were low, questions were being raised over its transparency, repeat offences by the same individuals and companies, settlement of grave offences that effected investors and general market health, and a creeping attempt to widen the scope of the mechanism too was a source of consternation. The dissent came to head in a Public Interest Litigation filed by a Delhi based entrepreneur named Deepak Khosla at the end of 2011.

Khosla challenged the very power of SEBI to pass such Consent Orders, the validity of the 2007 Circular, and the desirability of the current mechanism. In this, it has been joined by Midas Touch Investors. During the pendency of the PIL, the Amendment to the Consent Oder was passed.

As the PIL finally ushered in the amendments, call for which had already been brewing, the confidence in the Consent Mechanism was at an all time low. Not only did the Indian Mechanism seem to be failing, the US SEC,which had been a point of inspiration for it, was itself facing a challenge in the shape of Judge Rakoff's rejection of a 280 million USD settlement. It would be illustrative at this point to draw a comparison with the problems faced by the US SEC, before addressing the issue of whether

[26]UBS Securities Asia Ltd v. SEBI, [2005] 6CompLJ64SAT.

or not, and how far, the amendment is effective at mending the foundations of consent orders in the Indian financial regulatory system.

II. CONSENT ORDERS IN THE UNITED STATES OF AMERICA

At the same time as Consent Orders in Securities matters by SEBI were undergoing a period of legal metamorphosis in India, the laws relating to the same mechanism as implemented by the SEC (Securities and Exchange Commission) in the United States were also being challenged by a series of judicial decisions, galvanizing the American legal community into debate over the efficacy of the mechanism and its effect on matters of public interest.

At roughly the same time as the institution of the Deepak Khosla's Public Interest Litigation in the Delhi High Court, Judge Jed Rakoff created waves by turning down a 285 million dollar settlement between the US financial regulator Securities and Exchange Commission and Citigroup.[27] However, March of 2012 brought around somewhat of a turnabout in the case, bringing the matter to a reversal inappeal.[28]

Interestingly, while the grounds of challenge to the Indian and American mechanisms had striking points of similarity, the evaluation and assessment of these grounds, and thus the outcome of the turmoil, are different in India and the United States. These differences reflect upon the inherent dissimilarities in Indian and American Constitutional and Administrative laws. Thus a study of the US episode on Consent Orders brings into light the context, inter-relation

[27]Dominic Rushe, *Citigroup-SEC settlement rejected by New York judge*, THE GUARDIAN, November 28, 2011.
[28]Jonathan Stempel, *SEC, Citgroup may win appeal in fraud case,* REUTERS, March 15, 2012.

and inter-play of Securities Law with the fields of Constitutional and Administrative laws; it also helps put the old and new Indian mechanisms in contradistinction with that of the United States.

A Pre-Citigroup Status of Consent Orders in America

a) History and Introduction – The United States is undergoing a phase of debate relating to consent orders, a field of law which has there been settled placidly since the 1970s.

The context to the recent disturbance is that of a uniform period of approval: the United States Supreme Court has on several occasions encouraged the use of consent decrees, citing their meritorious sidestepping of "time, expense, and the inevitable risk of litigation"[29] and recommending them for their role as a stream-lined, rapid mode of settlement.[30] This has naturally led to the gradual lessening of judicial intervention in consent orders; "*unless a consent decree is unfair, inadequate, or unreasonable, it ought to be approved*"[31] became first the pattern, then the formula.[32]

This tone of non-intervention in consent-oriented settlement of offences has, in fact, established a dominant presence horizontally across various laws in the United States.[33] Moreover, the often controversial aspect of non-admission of guilt in consent settlement procedures too has been accepted remarkably readily by the American legal system, both generally in business laws[34] and specifically for securities regulation. In recent times, this trend has strengthened if anything, with serious allegations of anti-trust or competition law violations being settled[35] without admission of guilt[36] as readily as

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[29]United States v. Armour & Co., 402U.S.673, 681 (1971).
[30]Swift & Co. v. United States, 276U.S.311, 324–27 (1928.
[31]SEC v. Randolph, 736F.2d.525, 529 (9th Cir. 1984).
[32]SEC v. Wang, 944F.2d.80, 85 (2d Cir. 1991).
[33] Consent Decrees in Judicial or Administrative Proceedings, Securities Act, 1972.
[34]FTC v. Chembio Diagnostic Sys., Inc., 2001WL34129746, (E.D.N.Y. Jan. 16, 2001).
[35]CFTC v. Kelly, 1998WL1053710, (S.D.N.Y. Nov. 5, 1998).

securities law violations. In the 2010 *Vitesse Semiconductor* case involving the Securities and Exchange Commission, this practice was stated as natural and "nothing new".[37]

b) The Goldman Sachs Settlement – In the same year, the comfortably settled position was once again stirred into debate. In April 2010, the SEC filed a suit against Goldman Sachs for misleading investors with respect to subprime mortgage products, specifically that there was incomplete disclosure of vital information. Goldman Sachs settled the matter by a payment of $550 million, among the largest penalties ever exacted in the then 76 year history of SEC, and also just 1% of Goldman's market value at the time and 2% of its cash balance, leading several to question the efficacy of the procedure as real judicial action and leading a former SEC Commissioner, Paul Atkins to famously remark that he was "embarrassed, as an American".

B Stirring the Nest: The Citigroup Settlement

a) Introduction to the Citigroup Settlement – The dissent came to a head with the previously mentioned rejection by Judge Rakoff of the $280 Million settlement with Citigroup over allegations of fraudulent and unfair trade practises including misinformation to investors and shareholders. Judge Rakoff had previously rejectedanother large settlement with Merril Lynch in 2009, only letting it stand reluctantly.[38] The powerful judgment, which promises to have long-standing ramifications on the subject of consent orders, underlines and emphasizes on several questions that are being raised in India in respect to SEBI's consent order circular and which led to the revised 2012 circular.

b) The Grounds for Refusing the Settlement – The grounds on which Judge Rakoff has rejected the settlement were primarily:

i. Such a settlement left the shareholders and public with no recourse (as they couldn't litigate on Citigroup's estoppels as the

[36] United States v. Microsoft Corp., 56F.3d 1448, 1461 (D.C. Cir. 1995).
[37] SEC v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304, 308–10 (S.D.N.Y. 2010).
[38] Peter J. Henning, *Behind Rakoff's rejection of Citigroup settlement*, NEW YORK TIMES, November 28, 2011.

settlement involves no admission of guilt; neither could they litigate on ground of negligence),

ii. It was not just to impose a settlement on Citigroup on mere allegations and without going into the merits,

iii. The opaque procedure merely imposes a small penalty while leaving the public in dark about the real facts of the matter and is thus opposed to public policy

Other grounds raised included that the non-admission of guilt left the court unable to do justice to the aggrieved public, duplicity of positions as Citigroup expressly retained rights to contest the alleged facts in any parallel litigation, and inconsistency with the position adopted in the Goldman Sachs settlement.

The rationale of refusing to allow the Citigroup settlement is better understood when the order is compared with that of the Goldman settlement. Rakoff noted that the Goldman settlement involved a substantially higher civil penalty: a 535 million USD penalty on only 15 million USD in profits, while the Citigroup settlement imposes a 90 million USD penalty on 160 million USD of profits.

Even more significantly, the Goldman case involved an "express admission" from Goldman that its marketing materials and promotion of the securities contained incomplete information, and remedial measures beyond those in the Citigroup agreement.

Returning to the grounds in the judgment, it was reasoned a case of this nature is involved with a matter that has substantial effect on the daily life of American citizens and the economy; that it affects the financial markets "whose gyrations have so depressed our economy and debilitated our lives[39]" and that there was thus an immense call upon the wisdom of the judge to recognize the question of public

[39] U.S. Secs. and Exch. Comm'n v. Citigroup Global Mkts. Inc., No. 11 Civ. 7 7387, 2011 WL 5903733 (S.D.N.Y. Nov. 28, 2011).

interest. The court held that in this matter, there was an "overriding public interest[40]" in favor of disclosure and transparency.

In *eBay, Inc.* v. *MercExchange*[41], the US Supreme Court declared, *"According to well-established principles of equity, a plaintiff seeking a permanent injunction ... must demonstrate that the public interest would not be disserved by a permanent injunction",* and that the extraordinary relief of an injunction can be granted in such cases where public interest would be served.

In *Weinberger* v. *Romero-Barcelo*[42], the court further stated, *"In exercising their discretion, courts should pay particular regard for the public consequences in employing the extraordinary remedy of injunction".* In a similar vein, the Second Circuit Court held in *Salinger* v. *Colting*[43]: *"a court must ensure that the public interests would not be disserved by the issuance of an injunction."*

Thus, the court held that in such a case where public interest was at stake, the court is justified in examining and re-examining the settlement it was to enforce[44] to make sure it was not unfair, unreasonable, or arbitrary, or risk becoming a "*mere handmaiden to a settlement privately negotiated on the basis of unknown facts.*"[45]

Having established the above, the court commented that in this instance, the court would be deprived of any assurance that the relief it was asked to uphold had any basis in fact, and the consent order, without any admissions of guilt, amounts only to a modest penalty and is viewed as a *"cost of doing business"* and for maintaining a working relationship with a regulatory agency.

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[40]*Id.,* at¶23.
[41]**EBAY INC. V. MERCEXCHANGE, L. L. C, 547 U.S. 388, 391 (2006).**
[42]Weinberger v. Romero-Barcelo, 456 U.S. 305, 312.
[43]Salinger v. Colting,607 F.3d 68, 80 (2d Cir. 2010).
[44]Kokkonen v. Guardian Life InsuranceCo., 511U.S.375, 381 (1994).
[45]Dinesh Unnikrishnan & Aveek Datta, *supra* note 13, at ¶24.

Charging Citigroup only with negligence, while allowing it to settle without admitting or denying to the truth of the charges, despite the right to private civil actions individually for recompense, delivers the shareholders and general public to a Procustean bed, dealing a double blow to any assistance the defrauded investors might seek to derive[46]: they cannot bring securities claims for negligence[47] and also can't derive any relief from estoppels due to the non-admission[48] of SEC allegations by Citigroup.

In a strongly-worded conclusion, Rakoff observed, *"The Court concludes, regretfully, that the proposed Consent Judgment is neither fair, nor reasonable, nor adequate, nor in the public interest."*

c) Analysis of Judge Rakoff's Order

While the order seemed to be a welcome step towards a more accountable financial market and in favour of lessening the opaque nature of the settlement mechanism, the reasoning given therein stands open to several criticisms on closer analysis.

Robert Khuzami, Director of the Division of Enforcement of the U.S. Securities and Exchange Commission, has commented that in the United States the purpose of the consent settlement system is to *"put the public on notice of what laws [the Commission] believe[s] have been violated,"*[49] without necessarily litigating the claims through final judgment.

The court cited cases where the importance of an untrammelled consent settlement system had been underline, such as *SEC* v. *Clifton*[50], where it had been held that an agency capable of settling enforcement actions conserves resources- both its own and that of the

[46] *Id.*, at ¶27.
[47] Ernst & Ernst v. Hochfelder, 425U.S.185(1976).
[48] SEC v. Maurice Rind, 991F. 2d 1486, SEC v. Manor Nursing Centers, 458F.2d.1082 (2nd circuit 1972).
[49] Robert Khuzami, *Remarks Before the Consumer Federation of America's Financial Service Conference* (Dec. 1, 2011), http://www.sec.gov/news/speech/2011/spch120111rk.htm.
[50] SEC v. Clifton, 700 F.2d 744, 748 (D.C. Cir. 1983).

courts. In *Heckler v. Chaney*[51] it was added: the agency should consider,

Whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.

As for the question of public interest, in *Citizens for a Better Environment* v. *Gorsuch*[52], it was given that *"Not only the parties, but the general public as well, benefit from the saving of time and money that results from the voluntary settlement of litigation".* The public was said to benefit from the non-reliance on the taxing, drawn out process of court actions.

The ground of public interest for declining to entertain the settlement order was held untenable, noting that there exist grave constitutional difficulties in judicial review of consent judgments on ground of public review[53]. Neither of the leading cases on the same issue, *Winter* v. *Natural Resources Defense Council, Inc.*[54] or *eBay, Inc.* v. *MercExchange*[55], support the reasoning given by Judge Rakoff.

In *Carson* v. *Am. Brands, Inc.*[56], it was recognized that by disallowing the enforcement of a mutually agreeable settlement, the District Court effectively ordered the parties thereto to undergo trial by court to determine their rights and liabilities, foregoing their own settlement of the same.

d) The Appeal from Judge Rakoff's Order

[51]Heckler v. Chaney, 470 U.S. 821, 831 (1985).
[52]Environment v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983).
[53]United States v. Microsoft Corp., 56F.3d.1448, 1461 (D.C. Cir. 1995).
[54]Winter v. Natural Resources Defense Council, *Inc*555 U.S. 7, 24 (2008).
[55]Winter v. Natural Resources Defense Council, *Inc*547 U.S. 388, 391 (2006).
[56]eBay, Inc. v. MercExchange, 450 U.S. 79, 87 (1981).

The decision from Judge Rakoff was reversed in appeal[57]. The appellate court found the judgment mired with legal difficulties that could not be reconciled with the reasoning given, and chose to reverse the order on these problems while not commenting on the larger overarching theme of judicial dissatisfaction with the implementation of the consent order system.

Some of the strongest grounds for reversing the order were that the division of responsibilities between the executive and the judiciary did not permit a federal court to disregard policy decisions of an executive agency, especially in regard to matters such as whether or not these policies serve the public interest, and the agency's expenditure or use of resources. The authority of a court to refuse a private party's decision to settle a dispute, merely because the court is not convinced about the liability of the parties was also called in question.

The first ground for the reversed decision was that S.E.C.'s decision to settle with Citigroup disserved the public interest and was bad policy. However, in the United States, it is not a proper function of federal courts to decide policy for the executive.[58] This position of law was established beyond doubt in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*[59]

In *Motor Vehicle Mfrs.Association of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*[60] it was stated that in reviewing whether agency action is arbitrary, *"a court is not to substitute its judgment for that of the agency".* While a court does have some scope of review over an agency decision to settle[61], the scope of a court's authority to

[57]U.S. Secs. & Exch. Comm'n v. Citigroup Global Markets Inc. 11-5227-cv (L).
[58]TVA v. Hill, 437U.S.153, 195 (1978).
[59]U.S.A., Inc. v. Natural Resources Defense Council, Inc, 467 U.S. 837, 6 866 (1984).
[60]Motor Vehicle Mfrs. Association of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,463 U.S. 29, 43 (1983).
[61]New York State Dep't of Law v. F.C.C., 984 F.2d 1209.

"second-guess an agency's discretionary and policy-based decision to settle is at best minimal".[62] Thus the court was mistaken in not giving the obligatory deference to the S.E.C.'s policy in relation to public interest.

The second reasoning adopted by the court was that the settlement was unfair to Citigroup, as it imposed *"substantial relief on the basis of mere allegations"*[63], which are *"neither proven nor acknowledged"*.[64] It is not, however, any court's concern to *"protect a private, sophisticated, counseled litigant from a settlement to which it freely consents"*. The discretion possessed by the court does not extend to refusing a litigant reaching a voluntary settlement.[65]

In allowing the reversal of Rakoff's order, no "irreparable harm" would be caused, yet both S.E.C. and Citigroup will suffer significant harm if the settlement of their dispute is set side and a trial is ordered. Despite authorities to the effect that refusing a settlement[66] is not "irreparable harm"[67], the balance of utilities in this case is in favor of allowing the settlement to subsist.

The final factor to be considered is the public interest. The court is bound to give deference[68] to an executive agency's assessment of public interest, and the S.E.C. has asserted that public interest is served by the settlement agreement. In *Chevron*[69], the court stated: *"The responsibilities for resolving the struggle between competing views of the public interest are not judicial ones, the Constitution vests such responsibilities in the political branches."* A similar decision was reached in *Publicker Indus. Inc.* v. *United States (In re*

[62]Ass'n of Irritated Residents v. E.P.A., 494F.3d1027, 1031- 33 (D.C. Cir. 2007).
[63]U.S. Secs. and Exch. Comm'n v. Citigroup Global Mkts. Inc., No. 11 Civ. 7 7387, 2011 WL 5903733, at (S.D.N.Y. Nov. 28, 2011).
[64]*Id.*
[65]Cf. Janus Films, Inc. v. Miller 801F.2d.578, 582 (2d Cir. 1986).
[66]State of New York v. Dairylea Coop., Inc., 698F.2d.567, 570 (2d Cir. 1983).
[67]Grant v. Local638, 373 F.3d 104.
[68]*Supra* note 58.
[69]CHEVRON U.S.A., INC. V. NRDC, 467 U.S. 837 (1984).

CuyahogaEquipment Corp.[70] , where it was given that *"courts ordinarily defer to the agency's expertise and the voluntary agreement of the parties in proposing the settlement."*

C Conclusion to the US SEC Consent Order Debate

It is undeniable that the stability of the long-settled position of law from the era of *SEC* v. *Randolph* and *SEC* v. *Wang*, eroded continuously by a growing tenor of dissent in judicial opinions as seen in the Goldman Sachs and Merril Lynch settlements, has been thoroughly disrupted by Judge Rakoff's decision in *SEC* v. *Citigroup Global Markets*.

However, the lasting impact of the order is questionable. While it subsists strongly as an exemplar of the growing concerns regarding the transparency, public interest, and effect on shareholder rights and general rule of law of the Consent Order mechanism, it has failed as an actual standing judgment.

Most fascinatingly for Indian scholars and jurists, this failure, brought about a reversal on appeal, is rooted on grounds of the order's incongruence with American Constitutional and Administrative laws. The order was refused as in the United States,

1. The judiciary must give deference to an executive agency's assessment of the suitability of its allocation and use of resources,
2. An executive agency's assessment of public interest cannot be challenged by the judiciary unless its creates a manifestly absurd position,
3. The scope of judicial review of an executive agency's policy decisions is severely limited.

In India, the situation is radically different:

[70]Publicker Indus. Inc. v. United States (In re Cuyahoga Equipment Corp., 980 F.2d 110, 118 (2d Cir. 1992).

1. The Separation of Powers ingrained in the Basic Structure of the Indian Constitution gives the Judiciary a scope unrestricted by the executive,
2. The judiciary is free to question policy decisions subject to certain caveats,
3. The Supreme Court is the final interpreter of legislations and thus can determine "public interest" with finality, using it to conclude debates over legislations in a manner most suited to the rule of law and India's status of a social welfare state

Thus, the common problems with the Indian and American consent mechanism, that of lack of transparency, the mechanism becoming a route of easy settlement or a cost of doing business and thus diluting the deterrent effect of securities regulation, and the dubious effect on public interest in general and investor/shareholder rights in specific, led to different conclusions.

While hope for reform still lies in the US SEC Consent Order mechanism's future due to the recent judicial challenges; India has, after the series of contested and controversial settlements, the cases questioning the mechanism and culminating in the PIL filed by Mr. Khosla, revised its mechanism effectively and officially.

What remains to be seen is the efficacy of the new Indian Consent Order mechanism.

III. THE 2012 AMENDMENT TO SEBI'S CONSENT ORDER CIRCULAR

A Key Features of the Amendment

The SEBI's amendments to the consent procedure were labeled a "partial modification"[71] intended to "provide more clarity on….scope and applicability".[72]

The most striking element of the new system is included in the very first paragraph: certain offences have been exempted from the mechanism and can no longer be settled. These exemptions include insider trading,[73] front-running,[74] fraudulent trade practices with market-wide implications and substantial effect on investor rights.[75]

The importance of this amendment is not to be understated. The ramifications of such violations have been recognized in several cases.[76] In *Rakesh Agarwal* v. *Securities Exchange Board of India*,[77] it was given that "inequitable and unfair trade practice such as insider trading affect the integrity and fairness of the securities market and impairs the confidence of the investors". Healthy growth and development of securities market depends on the quality and integrity of a market, which can inspire confidence in investors. The factors on which this confidence depends include that they are placed on an equal footing and will be protected against improper use of inside information.

In *Securities Exchange Board of India* v. *Shri Samir C. Arora*,[78] the court held that participation in the securities market by persons who have committed offences of that degree of gravity would be *"prejudicial to the*

[71]Circular No. EFD/1/2012 (May 25, 2012), http://www.sebi.gov.in/cms/sebi_data/attachdocs/1337946507938.pdf.
[72]*Id.*
[73] S*upra* note 70, at¶1(i).
[74] S*upra* note 70, at¶1(iv).
[75] S*upra* note 70, at ¶1(ii).
[76]Hindustan Lever Ltd. v. SEBI, [1998] 3CompLJ 473.
[77]Rakesh Agarwal v. Securities Exchange Board of India [2004] 1 Comp LJ 193 SAT.
[78]Securities Exchange Board of India v. Shri Samir C. Arora, [2002] 38 SCL 422.

interests of the investors and the safety and integrity of the securities market".

Lord Lane has commented on such unfair trade practises, stating,

It is an obvious and understandable concern...about the damage to public confidence which insider dealing is likely to cause and the clear intention to prevent so far as possible what amounts to cheating when those with inside knowledge use that knowledge to make a profit in their dealing with others.[79]

Thus the exemption from consent proceedings of these offences is a step in keeping with the judicial opinion on the desirability of prosecuting them to ensure a healthier and more robust market.

The most striking feature of the new amended circular is Annexure A which lays down guidelines for determining the criteria on which consent settlements shall be carried out. This arrangement is aimed at eliminating ambiguity and inconsistency in the manner in which consent settlements were done. The new model also puts in certain amount of pressure on the HPAC to expeditiously dispose consent application within a period of at least 6 months.[80] The previous model did not stress upon this aspect. However this time stipulation is merely suggestive and not mandatory.

Another bold reform ushered in by the amendment is aimed at curbing the practise of repeat offenders trying to settle cases without admitting guilt. It disallows settlement of more than two violations every three years, further restricting settlements to not more than one settlement in 2 years. The new model thus prescribes a cooling off period for all violations so that the mechanism is not misused or treated, as Judge Rakoff termed it, as a modest cost of doing business.

Perhaps one of the most significant changes is the radical increase in transparency of the procedure; certain orders before the amendment had been criticized as being difficult to reconcile with the stated guidelines. The High Powered Advisory Committee and the panel of two Whole Time

[79]Attorney General's Reference No.1 of 1988 (1988) BCC 765, affirmed by the House of Lords at (1989) BCC 625.
[80]Circular No. EFD/1/2012 (May 25, 2012), http://www.sebi.gov.in/cms/sebi_data/attachdocs/1337946507938.pdf.

Members are now required to elaborate on the provisions of law being violated, the alleged misconduct, and facts and circumstances.

B Constitutional and Administrative Law Perspectives on the Amendments

These changes touch upon the power of judicial review of administrative and executive actions, which have been interpreted in the celebrated case of *Minerva Mills:*[81]

> *The power of the judicial review is an integral part of our constitutional system and without it, there will be no Government of Laws and the rule of law would become a teasing illusion and a promise of unreality.*

Further, it was held that "if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review; it is unquestionably a part of the basic structure of the Constitution".

While the scales of reference in the *Miverva Millscase* and the present scenario are indubitably different, the underlying theme of Constitutionalism is common: it is the submission of the authors that it abrogates from the power of judicial review and rule of law is massive violations affecting the entire market and the rights is several private individuals are settled not once but several times in a manner that is opaque and flawed.

The changes brought about by the amendment are also in keeping with the theme of Indian administrative law, which has been established by a series of judicial pronouncements starting from the *In Re Delhi Laws Act case*[82]: prohibition of unchecked administrative discretion[83] which does not adhere to the guiding principles.[84] Before these amendments, Consent Orders were granted freely contravening the guiding principles given in Para 11 of the 2007 Circular: it was impossible to reconcile such exercise of discretion with the principles of natural justice and administrative law.

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[81]Minerva Mills Ltd. & Ors vs Union Of India & Ors., 1980 A.I.R. 1789.
[82]In Re Delhi Laws Act case, 1951 A.vI.R. 332.
[83]Bangalore Medical trust v. B S Mundappa, 1991A.I.R. 1902.
[84]Magganlal Chagganlal Ltd. v. Municpal Corporation of Greater Bombay, 1974A.I.R. 2009.

Furthermore, the authors submit that the granting of consent orders in manners as questionable as 8 times to a single offender, and without a recording of reasons, clearly is not made by application of mind: these factors establish it as mechanical exercise of discretion[85] and bad in law.[86] The strict restrictions placed upon such practise by the amendments are thus a very necessary measure.

C UBS Securities under the New Regime: An Analysis

Revisiting *UBS Securities*, it is useful to hypothesize the result if the case had occurred after the 2012 amendment. The case arose from theStock Market Crash, after which SEBI investigated into several persons and institutions to determine the causes of the crash. Out of the violations it unearthed, the ones by UBS Securities Asia had been some of the gravest- insider trader, front running, other unfair trade practises had been carried out. Before the case could be disposed off finally by the judiciary, the 2007 circular was passed and a consent order was granted to UBS for a sum of 50 lacs, which drew immense criticisms for the relatively low monetary settlement and the fact that such offenses had been settled at all.

Supposing the consent settlement application for a similar incident had been made today, it would not be eligible for the settlement procedure at all. Offenses of such gravity and negative ramifications have been excluded from the scope of the circular. However, a provision still exists in the amendment to grant SEBI discretion to consider a consent application.[87]

This discretion clause, while it may seem a self-defeating inclusion in an amendment which aims to eradicate settlement of grave violations, is only as controversial as its application. While the question does arise: what "facts and circumstances of the case" could arise that would make settlement of insider trading an act in public interest or in keeping with SEBI's goals relating to investor protection? The escape clause also seems at odds with the special emphasis provided by italicizing the words "shall not", in "SEBI *shall not* settle the disputes listed below".

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[85]Anil Kumar v. Union of India,[2007] 2SLJ63CAT.
[86]Ram Lal Sharma v. Union of India, [2007] 1SLJ59CAT.
[87]*"Notwithstanding anything contained in this circular, based on the facts and circumstances of the case, the HPAC/Panel of WTMs may settle any of the defaults listed above"; supra* note 80, at ¶ 1.

The decisive question thus is: *will* the HPAC or a panel of Whole Time Members exercise this discretion? Perhaps the most suitable authority on this question would be Sandeep Parekh, the Executive Director of SEBI at the time of the passing on the 2007 circular and by whose signature it had been passed, who states: *"the prohibition of cases like insider trading cases which are usually barred from being settled is likely to be the rule. Few will exercise discretion where the broad rule is to not allow it",*[88] further adding that he expects the exercise of this discretion to not be more often than "once or twice a year".

Administrative law today does not embrace Dicey's strongly negative view of administrative discretion, yet it cannot be denied that this clause is dubious at best. If the general themes of the amendments are abided by though, a *UBS Securities* settlement would be impossible today.

D Critical Analysis of the Amended Consent Order Mechanism

Over the course of the paper, the history of consent orders in India has been traced from pre 2007 and post 2007 times, analyzing the various issues with the system at that point to 2012 and the amendments.

The lack of transparency, repeated violations being settled, settlement of grave offenses, absence of a clear and consistent standard for denial or acceptance of consent applications, and the non-abeyance of the guidelines encapsulated in the circular led to discontent with the working of the system. The note of dissent reverberating between industry experts and the Securities Appellate Tribunal grew into a crescendo as a Public Interest Litigation was filed by entrepreneur Deepak Khosla challenging the capacity to pass such a circular.

The amendments have indubitably been very thorough in their attempt to dispel industry concerns and plug the loopholes in the system. The increased levels of transparency, limitations on the number of consent order obtainable in a set period of time and measures at expediting the speediness of the system are effective, comprehensive, and welcome.

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[88] Sandeep Parekh, *Amendments to SEBI Consent Order Provisions are welcome*, ECONOMIC TIMES, May 29, 2012.

However, what might be the most crucial change of all is marred by the presence of a discretion clause oddly incongruous with the objective and tone of the amendments. The exclusion of more serious offences is a step worded in strong emphasis, as in needed in a change so crucial. Yet there has been provided discretion to SEBI to entertain them anyhow, without any very specific guidance being provided to this discretion beyond the need to "consider" the "facts and circumstances". It is difficult to imagine any situation in which the public interest would be served or the securities market be better regulated by settling grave offenses which threaten investor rights and the health of the market.

Poorly guided discretion might crack the otherwise appreciable new circular, though securities regulation experts believe that a general rule has been established firmly enough to dissuade the exercise of this discretion very often.

IV. CONCLUSION

SEBI has acted at a time when the securities regulation system that inspired the consent mechanism in the first place is still unable to resolve the issues, despite Judge Rakoff's refusal of the Citigroup settlement.

Constitutional differences place the American judiciary in a radically different position as concerns the matters of judicial review, public interest and executive policy. However, the authors assert that the seeds of change having been sown, the American system is very likely to change to a significant degree; the overruling of Judge Rakoff's order does not spell the end of the dissent against the consent mechanism.

The new amendments have increased the scope of judicial review of the administrative acts of granting settlements and consequently made the misuse of administrative discretion less likely. This is a laudable development and an achievement for our constitutionality, judiciary, law-makers and the executive.

The authors conclude by observing: the amendment is sure to increase investor confidence, make the securities market more robust and do away with the growing trend of manipulative trade practises by big players; yet it

cannot be called self-sufficient in its role as change-bringer due to the windows still open for discretion. It will take a proactive judiciary and wise exercise of discretion by SEBI's officials to ensure that the note of triumph in our resolution of the consent order problem sustains and is an exemplar to securities markets worldwide.

COMPARATIVE ADVERTISEMENT: A COMPREHENSIVE OVERVIEW

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ABSTRACT

"Frivolity has become a serious business these days. Television commercials which are meant to portray a stylization of the good life are crafted with great care, using all the skills that the arts and psychology have produced."[1] *It is explicable that considering the various market forces and the fierce competition coupled with the ability of the common man to purchase a product, which he deems to be good for himself, comparative advertising has become inevitable. The concept of comparative advertisement has created quite an amount of uproar lately. Since, the liberalizing reforms were introduced in the 1990s every product category has seen a boom in the number of brands. This has led to extensive use of comparative advertising by the companies to promote their product over the others. In India comparative advertisement has taken off in a big way. There has been a paradigm shift from hesitant indirect comparisons to bold and direct*

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[1]Pepsi Co. Inc and Anr. v. Hindustan Coco Cola and Ors., [2003] 27 PTC 305 Del.

comparisons. At present comparative advertisement is not dealt by any specific law in India. Section 29 of Trademarks Act and section 36A of the repealed MRTP Act have been applied in cases where the companies were alleged to have overstepped their liberties in advertising their products. The authors of this article have scrutinized regulations governing comparative advertisement in India and analyzed case laws laying down the protocol to be followed while simultaneously assessing the common law and statute governing comparative advertisement in the US."

I. INTRODUCTION

In a liberalised economy, there are thousands of entrepreneurs or businessmen who manufacture the same or similar products for the consumers. Their main aim is to maximise the profits and advertising has proved to be a medium of inestimable value for the entrepreneurs to achieve this goal. Commercial advertisers strive to attract the attention of consumers to their products by branding. Incidentally, branding involves a repetition of an image which is generally associated with the product. Advertising, in general, may be a tool to make consumers aware of a certain product, in addition to establishing a product in certain segment of a market.[2] In common parlance, comparative advertisement means advertisement of a particular product, or service, which specifically mentions a competitor by name for the express purpose of showing why the

[2]Francesca Barigozzi &Martin Peitz, *Comparative Advertising and Competition Policy* (Sept. 5, 2012), http://amsacta.unibo.it/1563/1/524.pdf.

competitor is inferior to the product naming it.[3] It is a practice primarily used as a promotion technique by naming, directly or indirectly, the product of the competitor to compare one or more attributes or characteristics.

Here, the question arises as to whether comparative advertisement is something which is legal, and whether such comparison is equivalent to trademark infringement. The answer to such questions is obvious, yet complex. Advertisement of one's product is in no way barred. In fact, the Constitution does recognise the right of "commercial speech" under Article 19(1) (a) which deals with freedom of speech and expression. But the underlining point being that such a right is not to be misused. There is a thin line of distinction between puffery and disparagement, the two elements of comparative advertisement. Puffing, in general, is a superlative claim made about one's product; and is typically understood as being so superlative that an average consumer would not believe the claim.[4] Disparagement, on the other hand, is 'to dishonour by comparison with what is inferior.'[5] Traditionally, puffing of one's products is allowed. Whereas when such puffing up denigrates the product of another, resulting in disparagement, it has leverage to attract an immediate injunction. Another factor, which needs to be kept in mind to determine whether in a case injunction should be granted or not, is the interest of the consumers. Careful consideration needs to be given to the fact as to whether an average man would be confused, deceived or lured by the advertisement in question. This is where there is an interface between consumer interest and the interest of the competitor.

[3]Karan Gandhi & Anurag, *Competition and Comparative Advertising*, 4 INDIAN LEGAL IMPETUS, 10 (2011).
[4]Sharad Vadehra et al., *Puffing-Commercial Disparagement* (Sept. 9, 2012), http://www.galamarketlaw.com/joomla4/index.php?option=com_content&view=article&id=250&Itemid=123.
[5]THE CHAMBERS ENGLISH DICTIONARY 409 (1992).

Therefore, in conclusion, comparative advertisement can be allowed only to the extent that it does not in any way disparage the product of the rival, and at the same time it should not have the element of confusing the average man, which would lead to luring or deceiving him into buying the particular brand product. This is very subjective and depends on the facts of different cases. However, over a period of time the courts have tried to lay down the guidelines for comparative advertisement which will be discussed in the article.

II. STATUTORY PROVISIONS

The Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as the MRTP Act) which is now repealed, was the first step towards regulation of competition in the market. Section 36A of the act defined 'unfair trade practice' (hereinafter to be referred as UTP). The same has also been elucidated under Section 2(1)(r) of Consumer Protection Act, 1986. If any firm/company/person for the purpose of promoting its sale, supply of goods and services, adopts any unfair method so as to mislead people on quantity, quality, standard, need, usefulness, performance, efficacy, or gives false guarantee of goods or services, or falsely mislead people on goods, services or trade of another person, it amounts to 'unfair trade practice'. Comparative advertising has UTP as a component. When an advertisement provides misleading facts in order to disparage the goods of the competitor, it falls under section 36A of the MRTP Act. This provision of UTP limited comparative advertising by recognising that the publishing of any misleading or disparaging facts about a competitor's goods or services amounted to 'unfair trade practice'.[6]

[6]Ameet Datta, *Comparative Advertising in India – Puff under scrutiny* (Dec. 2, 2009), http://www.iam-magazine.com/reports/Detail.aspx?g=5509d118-a8d7-4d57-84b5-4a917bf824d2.

The angle of trademarks was introduced in the Indian scenario when the Trademarks Act, 1999 was implemented. Section 29(8) of the act lays down the conditions under which a trademark is infringed in advertising. They are:

1. When the advertisement takes unfair advantage of and is contrary to honest practices in industrial or commercial matters.
2. Is detrimental to its distinctive character.
3. Is against the reputation of the trademark.

The MRTP Act and the Trademark Act together provided a base for the regulation of comparative advertising in India. The UTP provisions under the MRTP Act have not been included in the Competition Act of 2002 which was enacted in place of MRTP. Therefore, comparative advertising has now become a subject of only the Trademarks Act and the Consumer Protection Act. Also, the law laid down by courts and tribunals in various cases now plays an imperative part in the regulation of comparative advertisements.

In *Reckitt Benckiser* v. *Hindustan Lever*[7], the court noted that sections 29(8) and 30(1) of the Trademarks act dealt with disparagement and comparative advertisement with regard to trademarks. Disparagement occurs when an advertisement denigrates or disseminates the products of others so that the product it represents gains more popularity than the other products, amongst the masses. A trader is entitled to boast about his product for the purpose of its promotion only, however untrue the boast may be, and for that purpose can even compare the advantages of his goods over the goods of another. However, the competitor's goods cannot be mentioned in a disparaging manner.[8] Disparagement in India has been identified mostly through judgments. One of the earliest examples of disparagement that can be

[7]Reckitt Benckiser v. Hindustan Lever, [2008] 38 PTC 139.
[8]Safir Anand &Shivli Katyayan, *Legal Issues in Advertising: Major Implications for IP Rights*, 28 INTELLECTUAL ASSET MANAGEMENT, 176,179 (2008).

mentioned is the case *Chloride Industries Ltd.* v. *The Standard Batteries Ltd.*[9] The Calcutta HC held that if the goods are disparaged maliciously or with some other such intent to injure and not by way of fair trade rivalry, the same would be actionable.

Under the Competition Act, 2002 provisions have been made for the transfer of cases on dissolution of MRTPC. As per sub-section (3) and sub-section (5) of section 66 of the Competition Act, 2002, the following cases shall be referred to the Competition Appellate tribunal:

1. All cases pertaining to Monopolies and Trade Practices or Restricted Trade Practices including such cases in which Unfair Trade Practice has also been alleged. These cases would have arisen under sections 31 and 37 of the MRTP Act.
2. All cases pertaining to Unfair Trade Practices referred to in clause (X) of sub section (1) of section 36A of MRTP Act. These cases relate to giving false or misleading facts disparaging the goods, services or trade of another person.

However, there is no provision for Unfair Trade practices under the new Act. In order to move away from the rigid structure of the MRTP Act, the UTP definition has not been incorporated anywhere in the new legislation. Therefore it can be concluded that it is not possible for an aggrieved party to approach the CCI for effective legal remedy for any grievances arising out of comparative advertising. Nevertheless, it does find mention in the Consumer Protection Act, 1986. Since it was included in the consumer protection act, it can be construed that the legislators were of the view that the appropriate forums to deal with misleading facts relating to goods and services were the consumer protection forums. The UTP provision under the Consumer Protection Act has limited application. The Consumer Protection Act allows a consumer or a consumer association, the central government or a state government to take up the case of unfair

[9]Decided on September 13, 1994.

trade practice before a consumer forum. This, however, does not provide effective relief to the aggrieved parties, since they cannot approach the consumer protection forum for addressing the issue in question as the act excludes the manufacturers, sellers and service providers from its ambit.[10] This way the parties are forced to seek alternate remedies such as injunctive measures to stop the alleged infringement of their intellectual property rights.

In addition to the abovementioned provisions, there are the guidelines[11] laid down by the Advertising Standards Council of India, a voluntary, non-profit, self-regulatory company having its members as advertisers of considerable repute from the Indian advertising industry. In conclusion, it is clear that currently there is neither specific law nor any specific provision in any law which directly lays down the guidelines for comparative advertisement.

III. THE SCENARIO IN UK AND US

Comparative advertisement has been a point of debate not only in India but around the world. In the UK it was prohibited till the 90s, whereas in the US it has been encouraged since the 70s.

Initially, common law was unreceptive towards comparative advertising with regard to the legal parameters to which an entity can indulge in comparative advertisement. It was something which was abhorred by the society. It was considered to be an unfair trade practice under which even honest practices did not fall as an exception. However, things changed when the Trademarks Act of 1994 was introduced, which provided certain degree of flexibility to the regime of comparative advertisement. The UK courts operate in a

[10]Colgate Pamolive (India) Ltd. v. Anchor Health and Beauty Care Pvt. Ltd., [2009] 40 PTC 653.
[11]*The Code For Self-regulation In Advertsing*, 1985, http://www.ascionline.org/index.php/asci-codes.

manner whereby the regulation of comparative advertisement is such that the interest of the consumers is not completely eclipsed.[12] The Comparative Advertising Directorate has put down the following conditions to be observed in such advertising:

1. Must not be misleading.
2. Must compare goods or services meeting the same needs or intended for the same purpose.
3. Must objectively compare one or more material, relevant, verifiable and representative features.
4. Must not create confusion, discredit or denigrate the competitor or its trademark.
5. Must not take unfair advantage of the reputation of the competitor's mark.
6. Must not present goods and services as imitations or replicas of goods or services of the competitor trademark owner.[13]

There is also the Advertising Standards Authority which was established with the object of ensuring that the advertisements were "legal, decent, honest and truthful".[14] The basis is an agreement between newspapers and journals not to carry any advertisement that seems to have breached the code set out by it. Also, it can refer disputes to the Director General of Fair Trading. The European Union Directive has played an important part in developing the mechanism by permitting comparative advertisement in the interests of competition and public awareness. The only condition imposed is that

[12]Swaraj Paul Barooah & Shivaji Bhattacharya, *Comparative Advertisements: Balancing Consumer Interest Vis-à-vis IPR Infringement*, 2 IJIPL 116 (2009).
[13]Council Directive 84/450/EEC of 10 September 1984(OJ 1984 L 250 at 17).
[14]TOM CRONE, LAW AND THE MEDIA 204-207 (3rd ed., 1996).

the promotion should not be misleading and should genuinely compare like with like.[15]

The USA first addressed Comparative Advertisement as a tort of unfair trade practices and so no specific legislation regarding it was considered.[16] However, by the 1970s, comparative advertisement in US became widespread as the Federal Trade Commission sanctioned the use of it. The FTC had issued its "Statement of Policy Regarding Comparative Advertising", noting that, although some industry codes and trade association standards may be interpreted as discouraging comparative advertising, it is the "Commission's position that industry self-regulation should not restrain the use of truthful Comparative Advertisement".[17] In addition to providing a green light for comparative advertising, the FTC has further stated that disparaging advertisements, that is, advertisements attacking, discrediting, or otherwise criticizing another product, are permissible so long as they are truthful and non-deceptive.[18] Comparative advertisement is subject to regulation through a combination of federal, state and local laws, as well as self-regulatory codes of conduct in US.[19] These include:

1. The Federal Trade Commission Act (FTC Act)
2. Section 43(a) of the Lanham Act

[15]Directive 97/55/EC on Comparative Advertising Control of Misleading Advertisements (Amendment) Regulations, 2000 (SI 2000/94).

[16]Shyam Kapoor, *Comparative advertisement – an eye for eye*, 13 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 19.

[17]FTC statement of policy regarding comparative advertising, (Aug. 13, 1979) http://www.ftc.gov/bcp/policystmt/ad-compare.htm.

[18]FTC Comparative Advertising Statement § (c)(1) (citing Carter Prods., 60 F.T.C. 782, modified [1963 Trade Cas. (CCH) 70,902], 323 F.2d 523 (5th Cir. 1963) (narrowing the order of a hearing examiner to allow respondents to make "truthful and non-deceptive statements that a product has certain desirable properties or qualities which a competing product or products do not possess").

[19]John.E.Villafranco et al., *Comparative Advertising Law in the US*, (Sept. 05, 2012), http://us.practicallaw.com/3-503-3503.

Hence it is apparent that the US laws encourage comparative advertising, including naming the competitors blatantly for the benefit of consumers, provided that the information is absolutely correct and legitimate and not misleading or denigrating. Petty and Spink[20] observed,

The tenor and language of the European (proposal) Directive contrast sharply with the permissiveness of US policy towards comparative advertisement. Although legal violations of such a trademark infringement, disparagement and passing off are recognised in both the United States and Europe, they are more broadly construed in Europe.

In the contemporary sense, comparative advertising is now a commonly accepted marketing technique worldwide. It is highly controversial in nature and to reduce the number of cases the countries have allowed it to be used only to a certain extent. Comparative advertisement, if used in a healthy way, is a source for consumer awareness and helps the producer stay vigilant.

IV. ASPECTS OF COMPARATIVE ADVERTISEMENT

A Puffing Up

To puff up is to praise extravagantly. It is primarily a flattering commendation. Puffing is an exaggerated advertising, blustering and boasting upon which no reasonable buyer will rely on.[21] The courts have held that 'publicity and advertisement of one's product with a view to boost sales is a legitimate market strategy'.[22] Puffing may also consist of a general claim of superiority over a comparative product that is supposed to be vague, it will be understood as a mere

[20]Paul Spink is Lecturer in Law, University of Stirling and Ross Petty is Professor in Marketing Law, Babson College, Boston.
[21]J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, (4th ed. 2010).
[22]M. Balasundram v. Jyothi Laboratories and Anr., [1995] 82 CC 830.

expression of opinion.[23] Puffing up has definitely been accepted in India but only up to a certain extent as has been established in various case laws in the past ten years. In the case of *Reckitt & Colman of India Ltd.* v. *Kiwi TTK Ltd*[24], the court laid down five principles to determine whether a party is entitled to an injunction or not. They are:

1. A tradesman is entitled to declare his goods to be the best in the world, even though the declaration is untrue.
2. He can also say his goods are better than his competitors', even though such statements are untrue.
3. For the purpose of saying that his goods are the best in the world or his goods are better than his competitors' he can even compare the advantages of his goods over the goods of others.
4. He, however, cannot while saying his product is better than his competitors', say that his competitors' goods are bad. If he says so, he slanders the goods of his competitors'. In other words, he defames his competitors' and their goods which is not permissible.
5. If there is no defamation of the goods or the manufacturer of such goods, no action lies and if an action lies for recovery of damages for defamation, then the Court is also competent to grant an order of injunction restraining repetition of such defamation.

The same has been reiterated and confirmed by the court in *Reckitt & Colman of India Ltd.* v. *M.P. Ramachandran & Anr.*[25] The first and the second rule regarding comparative advertising of a product constitute the rule of puffery which was also later endorsed in *Pepsi Co. Inc and Anr*. v. *Hindustan Coco Cola and Ors.*[26] The court had further stated in Para 8 that the respondents were puffing to promote

[23]*Id.*
[24]Reckitt & Colman of India Ltd. v. Kiwi TTK Ltd., [1996] 63DLT 29.
[25]Reckitt & Colman of India Ltd. v. M.P. Ramachandran & Anr., [1999] PTC (19) 741.
[26]Pepsi Co. Inc and Anr. v. Hindustan Coco Cola and Ors, [2003] 27 PTC 305 Del.

their goods, which is healthy competition. Moreover, advertisements are nothing but probity and are aimed at poking fun at the advertisements of others, which is permissible by law. Para 16 of the same judgment says,

After analysing the submissions made by the counsel for the parties, the picture which emerges can be summed up thus; it is now a settled law that mere puffing of goods is not actionable. Tradesman can say his goods are best or better. But by comparison the tradesman cannot slander nor defame the goods of the competitor nor can call it bad or inferior....

The rule of puffery is a popular defence taken up by a party when accused of denigration. As long as it is not disparaging the other competitors, it is allowed. This gives a manufacturer great leverage to endorse his product using clever advertising techniques thereby leaving a mark on consumers and still not be actionable for disparagement. The puffing rule amounts to a seller's privilege to lie, as long as he says nothing specific, on the theory that no reasonable man will believe him, or that no reasonable man will be influenced by such talk.[27]

Another aspect which needs to be touched upon is that of commercial speech. The Supreme Court ,in the *Tata Press Ltd.* v. *MTNL*[28], had held that advertisement does fall under the expression of a 'commercial speech' as given under article 19(1) (a) of the Indian Constitution. The apex court in the case *Colgate Palmolive India ltd. v. Hindustan Lever Ltd.*[29] had said that,

In any event, a distinction shall always have to be made and latitude is allowed in the event of there being an advertisement to

[27]P T Hayden, *A Goodly Apple Rotten At The Heart: Commercial Disparagement in Comparative Advertising as Common-Law Tortious Unfair Competition*, 76 IOWA L. REV. 67 (1990).
[28]Tata Press Ltd. v. MTNL, [1995] 5 SCC 139.
[29]Colgate Palmolive India ltd. v. Hindustan Lever Ltd., [1999] 7 SCC 1.

gain a purchaser or two. The latitude spoken of, however, cannot and does not mean any misrepresentation but by a description of permissible assertion.

Discussing a paragraph from Anson's Law of Contract (27th Edition), the court was of the opinion that 'commendatory expressions' in advertisements such as certain brand of beer refreshes the parts that other beers cannot are not dealt with as serious representations of fact. Applying a rule of civil law, 'simplex commendatio non-obligat'- simple commendation can only be regarded as a mere invitation to the customer without any obligation as regards the quality of goods: Every seller will naturally try and affirm that his wares are otherwise good to be purchased unless of course the same appears to be on evidence that the commendation was intended to be a warranty.

In all of the above cases, it can be seen that the court does not come down hard on the practice of puffing up. The court has even pointed out that it is but natural for a seller to persuade the consumers to choose his goods over that of a competitor. The court is of the view that puffing up is allowed as long as

1. It is overt.
2. It can be easily understood as being spurious by the consumers.
3. It does not cause any real harm to the products of the other competitors.

However, the court has to consider the fact that the perception of consumers in their living rooms is different from that of a Judge's in his dissection of an advertisement

In conclusion, the law permits a seller to puff up his goods for the purpose of selling his products. But he is allowed to do so only to a limited extent, so long as the puffing does not in any way denigrate the goods of the other. But what constitutes denigration, i.e., what is the limit after which the puffing will be considered to be disparagement of the other's product is a matter to be looked into, which is dealt with in the next segment of the article.

B Disparagement

Comparative advertisement when accompanied by disparagement causes infringement of trademark. Commercial advertisement should not be misleading or disparaging as visual media has immense impact on the mind of the viewers and that of possible purchasers.[30] According to Black's Law Dictionary disparage means to connect unequally; or to dishonour (something or someone) by comparison; or to unjustly discredit or detract from the reputation of another's product, property or business.[31] The basic foundation of disparagement in comparative advertisement is that it is one thing to say that your product is superior and another thing to say that the other product is inferior, even though while asserting the latter the hidden message is the former, but that is inevitable in case of comparison.[32]

Lord Watson, a member of the House of Lords, stated the pre-requisites required for maintaining an action for disparagement, in the following words,

Every extravagant phrase used by a tradesman in commendation of his own goods may be implied disparagement of the goods of all others in the same trade; it may attract customers to him and diminish the business of others who sell as good and even better articles at the same price; but that is a disparagement of which the law takes no cognizance. In order to constitute disparagement which is, in the sense of law, injurious, it must be shown that the defendant's representations were made of and concerning the plaintiff's goods; that they were in disparagement of his goods and untrue; and that they have occasioned special damage to the plaintiff.[33]

[30] Priya Bansal, *Use of Trademark in Comparative Advertising- Situation in India* (Sept. 8, 2012), http://www.legalserviceindia.com/articles/tadv.htm.
[31] BLACK'S LAW DICTIONARY, (7th ed. 1999).
[32] Dabur India Ltd v. Wipro Limited, Bangalore, [2006] 36PTC 677 (Del).
[33] Timothy White v. Gustav Mellin, [1895] AC 154.

The court in *Pepsi Co. Inc. and Anr* v. *Hindustan Coco Cola Ltd and Ors*.[34] laid down the factors to be kept in mind to decide the question of disparagement:

1. Intent of Commercial: what the advertisers seek to establish in order to promote their product.
2. Manner of Commercial, which is the most important factor. If the manner is ridiculing and condemning, then it amounts to disparagement but if the manner is just to show that one's product is better or best without degrading other's product then it is not actionable.
3. Storyline of commercial and the message sought to be conveyed.

One of the other questions which usually arises with regard to disparagement is whether the product should be specifically pointed out or a general assertion can amount to denigrating the product of the competitor. In *Reckitt Colman* v. *M.P. Ramachandran*[35] it was held that,

> *It was sought to be contended that insinuations against all are permissible, though the same may not be permissible against one particular individual. I do not accept the same for the simple reason that while saying all are bad, it was being said all and everyone is bad and anyone fitting the description of "everyone" is affected thereby.*

In *Dabur India Ltd.* v. *Colgate Pamolive India Ltd.*[36] the learned single judge stated, in Para 19, that generic disparagement of a rival product without specifically pinpointing the product is equally objectionable. In *Dabur India Ltd.* v. *Emami Ltd.*[37] the honourable Delhi HC said that what is sought to be done by the defendant is to

[34]P T Hayden, *supra* note 27.
[35]Reckitt Colman v. M.P. Ramachandran., [1999] PTC (19) 741.
[36]Dabur India Ltd. v. Colgate Pamolive India Ltd., [2004] 115 DLT 667.
[37]Dabur India Ltd. v. Emami Ltd., [2004] 29 PTC 1.

forbid and exclude user of Chayawanprash during the summer months so that it can exclusively capture the Indian market during the summer months, which is sought to be done by sending a message that consumption of Chayawanprash during the summer season serves no purpose and Amritprash is more effective substitute thereof, and thereby attempting to induce an unwary consumer into believing that Chayawanprash should not be taken in summer months at all and Amritprash is the substitute for it. The aforesaid effort on the part of the defendant would be definitely a disparagement of the product Chayawanprash and even in generic term the same would adversely affect the product of the plaintiff. According to the judge,

In my considered opinion, even if there be no direct reference to the product of the plaintiff and only a reference is made to the entire class of Chayawanprash in its generic sense, even in those circumstances disparagement is possible. There is insinuation against user of Chayawanprash during the summer months, in the advertisement in question, for Dabur Chayawanprash is also a Chayawanprash as against which disparagement is made.

However, it is the view of some that precedents like the one laid down by the Dabur case are like treading a dangerous path as it would disallow a competitor to even make comparisons on a general basis.[38]

A very intriguing point to be noted is the position defamation occupies in disparagement. In *Dabur India Ltd.* v. *Wipro Ltd*.[39] the court had come to a conclusion that the degree of disparagement must be such that it is tantamount to, or almost tantamount to defamation. It emphasised the fact that there was no need for a manufacturer of a product to be hyper-sensitive in such matters as market forces are much stronger than the best advertisement. If the product is good, it stands no matter whatsoever.

[38] *Supra* note 13.
[39] *Supra* note 33.

Any advertisement which is in conformity with 'honest practices' as provided under section 29(8) of the Trademarks Act will not be actionable disparagement. This has been upheld in the case of *Godrej Sara Lee Ltd.* v. *Reckitt Benckiser India Ltd.*[40] where the defendants advertised their product 'Mortein' which was meant to kill both cockroaches and mosquitoes and the commercial highlighted this aspect. The plaintiff claimed that this disparaged their product 'Hit', which had two separate versions for killing cockroaches and mosquitoes. The court in its judgment stated that the advertiser has a right to boast of its technological superiority in comparison with product of the competitor. Telling the consumer that he could use one single product to kill two different species of insects without undermining the plaintiff's products, by no stretch of imagination amounted to disparaging the product of the plaintiff.

Therefore, a complete analysis of the above mentioned case laws will lead to the conclusion of the following:

1. The term disparagement has neither been defined by the courts nor does it find mention under any Act. This not only fails to deter the manufacturers from adopting unlawful means such as giving false information but also makes it difficult for an aggrieved party to prove disparagement.
2. The concept of generic disparagement has decreased the scope of comparative advertising. Now the advertisers are not allowed to make disparaging claims against any faction of products which a consumer might associate with any specific brand.
3. The plaintiff should prove that the said advertisement is fallacious or misleading and has caused him damage.
4. The disparagement should amount to or almost amount to defamation. However the courts have failed to identify the degree of disparagement that would amount to defamation.

[40]Dabur India Ltd. v. Wipro Ltd., [2006] 32 PTC 307 Del.

5. Disparagement if it is true and is backed by substantial proof is allowed.

The courts have attempted to differentiate puffing up from disparagement. However there is only a thin line of difference and it depends on the facts and circumstances of each case.

C Consumer Interest to be kept in Mind to Determine Disparagement

Advertising is the most appropriate way or an inevitable medium for a manufacturer to reach out to the consumers, and through the true or false perception lures them into purchasing his product. Comparison lies at the root of advertising.[41] Comparative advertising primarily affects 3 parties- the advertising company, the rival company and then the consumers. It is important not to forget the interest of the consumers as at the end of the day advertising is for them. In 1997, the EU released a directive which allowed comparative advertising provided it is not misleading. The rationale for such a favourable attitude towards 'comparative advertising' on part of the competition authorities is that it improves the consumers' information about available products and prices.[42] Comparative advertising may be a useful strategy to transit information to consumers.[43] If the consumers are left confused and technically speaking there is no disparagement by the advertising company of the rival product, the purpose of law will be defeated. There needs to be a balance between the interests of a consumer and competitor.

The Consumer Protection Act 1986 defines 'unfair trade practices'. This act protects the two most important rights of a consumer:

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[41]W.R. CORNISH & DAVID LLEWELYN, INTELLECTUAL PROPERTY 656 (4th ed., Sweet & Maxwell 1999).

[42]Simon P Anderson & Regis Renault, *Comparative Advertising: Disclosing Horizontal Match Information*, 40 RAND Journal of Economics 558 (2009).

[43]Francesca Barigozzi &Martin Peitz, *supra* note 3.

1. The right of the consumer to be informed about the quantity, potency, purity, standards and price of goods to guard against unfair trade practices;
2. The right to consumer education.[44]

In *Peoples Union for Civil Liberties (PUCL)* v. *Union of India*[45], the apex court observed that disinformation, misinformation and non-information, all equally create a uniformed citizenry which would finally make democracy a monocracy and a farce. Hence, it is very important that the consumers should not be misinformed or misled. The whole point of comparative advertisement should be for the benefit of the consumers. Therefore, in a suit for disparagement, the advertisement should be viewed from the standpoint of such consumers.[46]

The rule of puffery in advertisement has been substantially dealt with. It had been asserted in case after case that all that is required to be determined is whether the advertisement has just been puffed up or it actually denigrates the rival product. However, this position was reconsidered to a limited extent in the case of *Glaxo Smith Kline Consumer Health Care Ltd.* v. *Heinz India Private Limited and Ors.*[47] where the court sought to regulate the representations of opinion by introducing a broad element of tenability. Adding to this, the court in the case *Colgate* v. *Anchor* introduced the principle of 'consumer of average intelligence'. It introduced the element of consumer protection. However, the law in India has mostly ignored the consumer's rights up until recently where the Madras HC held the even puffery was not allowed and would amount to disparagement.[48]

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[44]Consumer Protection Act, 1986,Section 6.
[45]Peoples Union for Civil Liberties (PUCL) v. Union of India., [2003] 4 SCC 399.
[46]Reckitt Benckiser (India) & Anr. v. Hindustan Lever Ltd., [2008] 38 PTC 139 (Del).
[47]Glaxo Smith Kline Consumer Health Care Ltd. v. Heinz India Private Limited and Ors., [2007] 2 CHN 44.
[48]Colgate Palmolive (India) Limited v. Anchor Health and Beauty Care Private Ltd., [2009] 40 PTC 653.

The Court was called upon to decide whether certain claims by Anchor (that its toothpaste was the "only" and "first" toothpaste to offer all-round dental protection) amounted to disparagement. Colgate, obviously, did not take this claim too kindly; and asked for an injunction. On these facts, it may well be possible to hold that the advertisement was not a puff, but was in fact a misleading objective claim. The decision would not have been as significant had it rested solely on this aspect. Nonetheless, the Court went further to observe that all puffing was illegal. The reasoning of the court being that the question of the legality of puffing needed to be decided by balancing the right to freedom under Article 19 along with reasonable restrictions on that right in the form of consumer laws. The Court noted that the contrary decisions of other Courts were based on old English cases decided before consumer protection laws were put in place. Therefore, any proper determination of the legality of puffing must necessarily take into account consumer protection laws in India. The Court went on to hold that *any puff* must amount to an "unfair trade practice" under the Consumer Protection Act. It was held that allowing competitors to puff their products was not in the public interest, and could not be permitted.

Ending with what was stated in *Colgate* v. *Anchor*[49], in a free market economy, the products will find their place, as water would finds its level, provided the consumers are well informed. Consumer education, in a country with limited resources and a low literacy level, is possible only by allowing a free play for trade rivals in the advertising arena, so that each exposes the other and the consumers thereby derives a fringe benefit. It is with the touchstone of public interest that such advertisements are to be tested.

[49] *Id.*

V. DRAWBACKS

In this rapidly evolving economy, the need for product advertisement is only going to increase. This, in turn, would lead to increase in comparisons between brands. Consequently, there will be need for more vigilant laws to deal with the challenges posed by comparative advertising. Known as 'Knocking Copy'[50], it is a tool which is used by a manufacturer to establish the superiority of his product. Law in India on comparative advertisement has not been codified. It is in fact not been dealt with specifically in any statute. The only provisions under which a grievance, in case of comparative advertising, can be entertained are the sections 29 and 30 of Trademarks Act, 1999 and the Consumer Protection Act, 1986 under which the term 'unfair trade practices' has been dealt with. In fact, the law regarding comparative advertising was further liquidated when the MRTP Act was repealed and nothing was provided for in the Competition Act, 2002. Now this field is regulated mainly through precedents laid down by the courts which are handful in number. This makes the entire set-up of this field of advertising vague and uncertain. This is because the guidelines set in various cases are of inconsistent standards as the court is always allowed to dissent from previously expressed opinions. For example, the recent judgment of the Madras HC in the case *Colgate* v. *Anchor* has taken a different stand with regards to the rule of puffery i.e., till now all the judgments had upheld that puffery not amounting to disparagement was allowed, however, going by the reasoning of the court in the case in question even puffery is not permitted as it confuses the customers. This point is highly debatable, as it a view taken by many that when advertising, comparisons are inevitable and puffery is usually a superlative claim which a customer is unlikely to believe. It is this blurred situation of the law that necessitates the immediate implementation of a statute which would

[50]Petty R and Spink P, *Comparative advertising in the EU*, 47 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 855 (1998).

lay down in clear cut ways as to what is allowed and what are the consequences, in case the set rules are not followed. The law is insufficient as far as the subject of damages is concerned. In fact, the only remedy available to a competitor is injunction on the advertisement in question. It in no way provides for any pecuniary compensation in case of disparagement, even though there is loss to the business of the innocent manufacturer. Another one of the loopholes that needs to be covered is the issue of tenability. The court in Glaxo Smith Kline case did recognise the fact that the claims of advertisers need to be substantiated by tenable sources however, it didn't deal with the matter further and hence there is no mechanism or standard of regulation regarding this. The law is also unsettled with regard to honest practices. There is wide ambiguity in the law regarding a competitor's right to injunction when the offending advertisement involves not only disparagement but is also pursuant to honest practices.

The above mentioned issues form the crux of comparative advertisements. It is important to straighten out the disconcerted law regarding the issues. And the first and the most important step in this direction would be introduction of a statute, without which the law is bound to remain ambiguous.

VI. CONCLUSION

The Courts or the legislators should formulate comprehensive and unambiguous regulation which would curb false and misleading advertisements and conversely promote healthy completion which would benefit the consumers, keeping in mind the following:

1. Comparison should be made on verifiable facts and should have credible source which can be substantiated.

2. Comparison should be made only with products that are adequate alternates for the product in question.
3. Direct comparisons with other like products should be encouraged if it is backed by significant evidence.
4. Principal intent of the commercial should be informing the consumers about the virtues of the product in question and not to unfairly attack, condemn, or disrepute the mark of another.
5. No exploitation of goodwill of any trademark.
6. Honest practices pursuant to consumers' welfare should be allowed even though they might border on disparagement as relaying information should be the foremost goal.
7. Consumer interest needs to be kept in mind while granting injunction. Therefore, technically speaking even if there is no disparagement, but there is a good chance of the consumer getting confused there needs to be some action. However, while doing so the rights of the competitor on the other hand should not be ignored.
8. The advertising industry should be allowed to suggest a broad structure for a comprehensive scheme of regulation as their point of view would be invaluable.
9. Provisions have to be made under the Competition Act, 2002 to enable various competitors to approach the CCI for effective remedy against misleading advertisements

It is of utmost importance that both corporate bodies and judiciary work in tandem with each other to maintain a particular market order which would encourage a better corporate environment for increased investment. Comparative advertisement is a worldwide trend and cannot be done away with, even though it comes with its own disadvantages. It is up to the legislators and competitors to use it to their benefit. Also, the courts should not be used as instruments for settlement of market disputes; its intervention should be required only

in the case of express violation of law. To conclude, regulation of comparative advertisement is of utmost importance, keeping in mind the interests of both the consumers and the traders.

NOMINEE – BARE COLLECTOR OR EXCLUSIVE OWNER?

Anuja Saxena[*] *& Nikita Hemmige*[**]

ABSTRACT

They say when loving hearts are separated; it is not he who is exiled to heaven, but the survivor, who tastes the sting of death. A man's dying hence becomes more his survivors' affair that his own. Money is important; for it is a link between the present and the future. We do not exist in a utopia where sharing one's possessions is an earnest virtue. When the breadwinner dies, his family faces both personal grief and a plethora of legal troubles.

A very common practice is to appoint a nominee to one's properties. Nominee means a person appointed in the prescribed manner by a member of the fund to receive the amount which may be due to the member from the fund in the event of his death before the amount is paid to him'.[1] *The word 'receive' has many connotations in different legislations where a nominee is concerned. Is he a mere holder or trustee, or is he vested*

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[1]P. RAMANATHAN AIYAR, ADVANCED LAW LEXICON (3rd ed., Wadhwa, 2005).

with rights exclusive to the other heirs? Is this differential treatment justified?

Therefore, we will discuss in detail the legal status, rights and duties of a nominee with reference to legal framework in India and in other countries. Essentially we will address the conflicting rights of nominee as under the Insurance Act, 1938 and what the family goes through when the person dies interstate, fails to update his will, when the will is not congruous with the testamentary disposition or, most importantly, whether different rights granted violates the essence of equality are all questions pertaining to such hassles. The paper shall enumerate the legal nuances relating to the subject matter.

I. NOMINEE UNDER SECTION 39 OF THE INSURANCE ACT, 1938

A Object of the Act

Insurance is a contract wherein one party agrees to pay a sum to another upon happening of a contingency in the duration of human life. The primary function of insurance is to ensure equitable distribution of financial losses of insured through which the insurer and insured are benefited.[2] In a recent judgment, the Rajasthan High Court held:

The very purpose and object of the assured in taking policies from the LIC is with a view to safeguard interest of his dependants, viz.,

[2] M.N.SRINIVASAN, PRINCIPLES OF INSURANCE LAW 4 (2006).

wife and children, as the case may be, in the event of premature death of the assured as a result of the happening of any contingency. Thus, in that event, the nominees and the dependants may not be deprived of the dues payable under the policies to them, otherwise very legislative and beneficial object for taking such policies would stand lost and defeated.[3]

This clarifies the object of the legislation and the impact it has after a person's death on the family and explains the reasoning behind Section 39 of the Insurance Act. It can be construed that a nominee's right is subject to all the liabilities to which the insured party is subject, and is not transferable or heritable. His position is that of a receiver and he has a bare right to collect the policy money.[4]

B Factual Situations

The aforesaid is analogous to the present legal framework which affirms that Section 39 merely provides for a limited and not an absolute right in exclusion to all other persons. Hence, reading of this section establishes that nomination *"only indicates the hand which is authorized to receive the amount"* can be explained with reference to factual situations which illustrate how other elements also aim at curbing the residual rights of nominee.

a) *Where the Wife is the Nominee but there are Pending Claims of the Creditors* – In a case before the Calcutta High Court, wife claimed her rights along with the creditors counter claim. The honourable Court held that the insurance was part of the estate and that the creditors were entitled to such policy money.

b) *Where there is a Repayment of Loan/Mortgage/Security* – Though assignment automatically cancels nomination, sub-section (4) of Section 39 indicates that when the insurer bears some risk at the time of assignment in consideration for a loan granted as security within its

[3]Santhosh Kumar Gupta v. LIC, A.I.R. 2000 Raj 327.
[4]Ram Ballav v. Gangadhar, A.I.R. 1957 Mad 115.

surrender value or reassignment on repayment, it shall not cancel the nomination.

c) *Where the Nominee and Assured Die at the Same Time* – In a situation where the assured and his brother died around the same time, the wife of the assured and nominee were left behind fighting for such money. The judge preferred the claim of the nominee's widow because it formed a part of the nominee's estate.

d) *Whether the Nominee can Assign the Policy against Bank Debt* –It was held by the Supreme Court that the assignment by nominee of his title, right and interest in favour of a debt or any such assignment is invalid. This is because he is a custodian of the money and nothing more than that. In other words, he holds the money for the benefit of the estate of the deceased assured.

e) *Whether a Portion of the Debt can be Assigned* – The assignment is always held to be good in equity and passes property in that portion of the debt. In enforcing such a claim, it would be necessary to implead the owner of the other portion but apart from that there is no other objection in equity.

f) *Assured of a Life Insurance Policy Dies Intestate Leaving Behind him his Mother, his Widow, and a Son, but for the Purpose of Section 39 has Nominated his Widow alone* –

   i. *Sarabati Devi Case*[5] *– A Judicial Landmark*: The respondent, Usha Devi, the widow of one Jagmohan Swaroop, contested the suit claiming that she has the absolute right to the amounts to the exclusion of her son and her mother-in-law. The argument put forth in this case was whether the nominee gets an absolute right to the amount due under the life insurance policy on death of the assured. The Supreme Court asserted in the negative. It was held, "*The money remains property of the assured during his lifetime and forms part of his estate subject to the personal laws of*

[5] Sarabati Devi v. UshaDevi, [1984] A.I.R. 346.

succession."[6] There have been few judgments in which the High Courts have taken a dissenting view but the Supreme Court has been expeditious in pronouncing a landmark judgment to this effect. In *Karuppa Gounder* v. *Palaniamma*[7], the Court held that the mother was not entitled to any portion of the insurance amount and the same was held in *Matin* v. *Mahomed Matin.*[8] The latter has been overruled because it was a judgment prior to the amendment and the former has been overruled by the *Sarabati Devi case* itself. Reference has also been made to the observance of the Madras High Court suggesting that in case of a joint family it cannot be construed that the money will be divided among all the coparceners if the assured has expressly named his wife or children as his nominees irrespective of the fact that the premium paid was out of the funds of the entire family fund.

II. CORPORATE LAWS IN INDIA

In comparison to the insurance provisions, one line of thought that the Corporate laws hold shows a striking difference. Corporate laws which have reference to 'nominee' are – the Depositories Act, Government Securities Act, Security Exchange Board of India Actand most importantly the Companies Act. These Acts confer an exclusive right to the nominee of a share holder and make him the sole owner of the property after the death of the share-holder.

The status of the nominee even in the Companies Act was very contentious prior to 1999 when the amendment to this provision came into force. There have been a number of cases pointing out the

[6]Similar views have been held by both Madras High Court in D.Mohanavelu Mudaliar v. Indian Insurance and Banking Corp. Ltd., [1957] 27 CompCas. 47 and Andhra Pradesh High Court in M.Brahmamma v. Venkataramana Rao, [1958] CompCas 57.

[7]Karuppa Gounder v. Palaniamma, A.I.R. 1963Mad 245.

[8]Matin v. Mahomed Matin, A.I.R. 1922 Lah145(Z14).

lacunae in section 39 of Insurance Act. One of the many issues pertaining to the same has been addressed in the following case laws:

1. In a matter before the Company Law Board it was observed that the deceased owned 33% of the company's shares and that had to be divided among 8 claimants of the family. It took months of litigation for the family to come to a settlement despite there being a Will. As of today, the company has also offered to consider the transmission of shares in case all the eight legal heirs agree for the suitable distribution of shares. By this amendment, the company aims its duties with regard to the nominee.

2. In a matter before the Company Law Board case[9] it was held, "*The legal representative shall not have the status of member unless his name is entered in the register of members, as already stated*". This hampers the interest of the representative because it does not give him exclusive rights and is contrary to what is mentioned in Section 109. The view that the representative is not entitled to the rights merely because he is not an existing member is not a sound judicial proposition. Hence, the amendment aims at conveying certain rights to the nominee which he is otherwise being deprived of.

Post the amendment, SEBI came out with a report[10] stating the causes for the amendment and clearly analysed the scope of Section 109A of the Companies Act, 1956 and such other provisions relating to the nominee. It refers to the problems faced by the investors, like, producing the probate of the will, obtaining surety or a NOC (No-Objection Certificate) from all the legal heirs, issuance of advertisement in the newspaper and in case the investor dies intestate, the applicant has to follow a cumbersome procedure and this process may sometimes exceed the value of shares. To quote the report in respect of this particular amendment, it says:

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[9]Hemendra Prasad Barooah and Anr v. Bahadur Tea Company Co. P. Ltd., [1991] 70 CompCas 792(Gau).

[10]SEBI, *Report and Recommendations of the Group on Transmission of Shares* (Aug. 4, 2011), http://www.sebi.gov.in/commreport/rep140807.pdf.

Nomination is a very effective remedy to the situation. Once a share holder appoints a nominee, then as per the law, the company's liability towards the event stands discharged and that is the intention behind inserting such provisions. The facility of nomination is intended to make the company law in tune with the present day economic policies of liberalization and deregulation. This is also intended to promote investors confidence in capital market and to promote the climate for inter corporate investment in the country.

This reflects the object of the legislation or in this case, objective to amend this section.

The High Courts in various cases suggesting status of nominee vis-a-vis the legal heir have taken Sarbatti Devi as a precedent relying on the ratio that *"nomination doesn't have the effect of conferring beneficial interest"* even in non-insurance contexts. But the Bombay High Court[11] in *Harsha Nitin Kokate case* has brought about a revelation by holding a view that:

Nomination under Section 109A of the Act does not entail mere payment of the amount of shares. It specifically vests the property in the shares in the nominee, in the event of the death of the holder of the shares. The analogy drawn from the judgment in the case of Sarbatti Devi is completely misplaced on the basis of difference in the language used in both the statutes and also the object of both the Acts.

III. GLOBAL SCENARIO

The rights bequeathed on a nominee by an insurance policy under the Indian legislations are restrictive in nature. However a strikingly different standpoint can be witnessed in many other countries as far as

[11]Harsha Nitin Kokate v. Saraswat Co-op Bank Ltd. and Ors., [2010] SCC OnLine Bom 615.

the status of a nominee is concerned. Further the paper shall entail the statutory provisions of insurance nomination law and the rights conferred on a nominee on a comprehensive level along with that we shall also draw a divergence to our existing law.

A Singapore

Under the Singaporean law there are two types of nominations: Trust nomination and revocable nomination, which accordingly confer different rights on the nominee which is at the discretion of the policy holder/insured unlike the Indian insurance where nominee is given a very insignificant role as far as the policy proceeds are concerned.

In a trust nomination the policy holder relinquishes all his policy rights and all the policy proceeds including both the death and living benefits belong to the nominee however the policy holder can reclaim the benefits with the consent of all the nominees. And only the spouse or a child of the policyholder is eligible to become a nominee.

In a revocable nomination, the policy holder retains full rights and ownership over the policy which includes changing or revoking a nomination at any point of time with or without the consent of the nominees. Only the death benefits can be accrued to nominee while the living benefits shall be accredited to the policy holder himself.

B Common Law of England

The law in force has summarized this litigious issue on nomination in the Halsbury's Laws of England. There have been periodical changes in the position of nominee from making him a mere agent to an absolute beneficiary and then again an agent.

Firstly, nominee in this context becomes a third party because he is not privy to the contract which is in fact between the insurer and the insured. The policy money payable on the death of the assured may be expressed to be payable to a third party and the third party is then prima facie merely the agent for the time being of the legal owner and has his authority to receive the policy money and to give a good

discharge; but he generally has no right to sue the insurers in his own name. However, unless and until they are otherwise directed by the assured's personal representatives the insurers may pay the money to the third party and get a good discharge from him.[12]

In the later stages of development of the insurance industry, the attitude towards this issue has changed, and the nominee whose name is included in the proposal form would be regarded as an absolute beneficiary under the policy.[13]

Notwithstanding these developments, there was a paradigm shift from the aforementioned position wherein it was stated that "nomination does not, however, by itself, constitute the assured a trustee, nor, since the person nominated is a stranger to the contract, has he any remedy at law. The property in such a policy will therefore, pass notwithstanding the nomination, to the personal representatives of the assured on his death and the nominee has no rights whatsoever."[14] Besides the Common law of England and India, there are a substantial number of countries following a similar legal approach like United States of America and Australia.

C Islamic Law

The nominee is a trustee and the governing principles of nominee under Islamic lawcould be derived from the doctrine of *al-amanah* which means reliability, trustworthiness, good faith, faithfulness, honesty, and fidelity.[15] There are differences of opinion among the practitioners as well as Islamic scholars. Some claim that a nominee in an insurance policy should be regarded as the owner of the policy

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[12] HALSBURY'S LAWS OF ENGLAND, Vol. 25, ¶579 (4th ed.).

[13] B.N.BANERJEE, LAW OF INSURANCE, Volume 1, 393 (4th ed., The Law Book Company Pvt. Ltd.) (1994),.

[14] D.Mohanavelu Mudaliar Alias D. v. The Indian Insurance and Banking, [1956] 2 MLJ 476.

[15] COWEN, J. MILTON, A DICTIONARY OF MODERN WRITTEN ARABIC, 278 (Hanossowitz, Wiesbadean, 1961).

who must have absolute right to be the beneficiary over the policy.[16] The reasoning behind this is that policy holder pays the premiums and owing to principles of fair distribution i.e. *al-mirath* and *al-wasiyah*, the legal heirs are entitled to the policy benefits and not the nominee. The contrary view though existent but not accepted is that an insurance policy is *al-hibah* which is a gift given to the nominee by the assured which makes him an absolute beneficiary so as to enjoy perpetual ownership.

IV. CRITICAL ANALYSIS BASED ON DIFFERENTIAL TREATMENT

Let's consider a situation. A father dies intestate leaving behind immovable property, life insurance policy worth Rs 5 lakhs payable to A (nominee), and B as the nominee for shares valued at Rs 10 lakhs. In the given instance, A and B are brothers. The grievance that arises is that why A should pay a part of the insurance policy upon receipt of the nomination money on the death of the father to B as it is liable for partition but B can enjoy the entire value of shares individually as shares are not liable for partition? Is there a violation of Article 14 of the Indian Constitution? Why two legislations provide for different scope of the term nominee? How differently are they worded and how different are they as a matter of principle?

An in-depth analysis of the language used in the statutes discussed above and others will lead to following conclusions. Welfare legislations like The Payment of Gratuity Act, 1972 and The Employees Provident Fund and Miscellaneous Provisions Act, 1952 specifically require that a family member should be appointed as the nominee and no outsider is entitled to the money even if there is an

[16]Prof. Dr. Mohd. Ma'sum Billah, *Effect of 'Nomination in Life Policy' Insurance vs. Takaful Practices* (Aug. 4, 2011), http://www.panoramassicurativo.ania.it/get_file.php?id=14516.

outstanding credit. The member also has the discretion to decide before hand, the distribution of money between the survivors. The purpose of these enactments is to gratify the survivors of the deceased and hence this differentiates it from the Insurance Act, 1938 where one can even hold the policy as a security against debt. This makes it clear that Insurance Act is not just welfare legislation though it has almost the same objective.

The Public Debt Act, 1944 which is in consonance with the Companies Act, 1956 on this point confers on the nominee a vested right in exclusion to all other persons. The object of these enactments, as already mentioned, is to discharge the company/government, of its duties in order to expedite its work in the other respects. The same goes with The Co operative Societies Act, 1912 which by default registers the nominee as a member on death of the actual member conferring upon him rights as if he is the member himself. Comparatively, they are materially distinct from the Insurance Act because this act came into force with a purpose to protect the survivors of the deceased and it is to note that inspite of being introduced in 1938 there haven't been any amendments to this effect.

V. CONSTITUTIONAL VALIDITY

Article 14 quotes equality before law but that doesn't mean that un-equals ought to be treated equally. All persons are not equal by nature and circumstances and this leads to classification among different groups of persons and differentiation between these classes.[17] The question is whether the classification is reasonable or not. Here, the conflict is between the differential positions of a nominee. It is well established that in the absence of definition in the statute the words occurring will have to be understood with reference to objects of the

[17] PROF. M.P. JAIN, INDIAN CONSTITUTION LAW (5th ed., Lexis Nexus Butterworths, 2005).

Act and in the context in which they occur.[18] Sometimes one finds two or more enactments operating in the same field and each containing a non-obstante clause. The conflict in such cases is resolved on consideration of purpose and policy underlying the enactments and the languages used in them.[19]

The object of the Insurance act is to assure that the survivors of the assured are being benefited by the insurance amount and the reason behind the amendment in the Companies Act or the other Acts mentioned is to get discharged of the duties. This affirms that there is a rational nexus with the object of the statute and hence this cannot be held arbitrary under Article 14 of the Constitution.

It is settled law that differentiation is not always discriminatory.[20] And if the purpose of the statute is achieved, then it does not violate the principles of Article 14 of the Constitution. Therefore, mere differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause.[21]

In conclusion to the above it is safe to say that Insurance Act and Companies Act are two enactments independent of each other and hence generalising the provisions of both on a level playing field will be unjust to the intention of the legislation.

VI. RECOMMENDATIONS

Having explained the various facets of a nominee, it is however not expected of a layman to understand the intricacies of law and the depth of such provisions. These are a few recommendations not only for the unwary investors but also for the property holders who leave

[18] D.P. MITTAL, INTERPRETATION OF STATUTES (2nd ed.).
[19] JUSTICE G.P. SINGH, PRINCIPLES OF STATUTORY INTERPRETATION (8th ed., Wadhwa and Company, 2001).
[20] Union of India v. M.V.Valliappan, [1999] 6 SCC 259,269.
[21] K.Thimmappa v.Chairman, Central Board Of Directors, A.I.R. 2001 SC 467.

behind a lot many mouths to be fed after their death. Keeping in mind the need of the hour, we would find it apt to make certain recommendations.

A Make a Will

When a person is well aware that his property can be a bone of contention among his children, however happy a family it is, by not making a will he shall only make relations sour amongst the legal heirs. A standing example in the Indian Commerce Industry will be the feud between the Ambani brothers which caused a lot of imbalance in the family, reliance industry, the share markets and the impact it had on the government cannot be overlooked. Hence it is submitted that differences which can at a later stage cause a menace should be nipped in the bud by making a proper testamentary disposition.

B Update the Will

It is not only enough to make the will but keep it updated with the recurring changes in law and personal life. This measure of family welfare becomes an instrument of social strife and tears off the family fabric. One family member receives the money as a nominee and the other brothers and sisters want to share it. The mother of the deceased receives the money and the wife and the children are deprived of it. The wife receives the claim and the dependant mother does not get a share in it. The widow after getting of the claim money gets remarried leaving the children with the husband's family. These hard facts of life must be faced and hence one should write a solution to them during one's lifetime rather than leaving them unsettled and causing greater trauma and agony to the family subsequently. All these conditions are clearly avoidable through proper nomination on policies.[22]

[22]*Nominate Your Policy Correctly* (Aug. 6, 2011), http://www.insuremagic.com/CONTENT/Articles/Life/nomination.asp.

C Appointment of a Nominee

If the nominee is a minor, a person who is a major should be appointed as an appointee and also a person who has an insurable interest in you should be nominated. Nominees should preferably be the legal heirs or a person in who trust is reposed to ensure the fair distribution to the real heirs.

D Inputs from the Singaporean Laws of Insurance

As already stated, Singaporean laws of insurance ensure that the discretion lies with the policy holder to confer the rights and its extent. By giving an option to the policy holder it gives him the opportunity to make his own decision of whether he wants the nominee to be a mere agent or beneficiary and also bars the statute from providing a general clause.

E Law Commission Report

The authors second the recommendations put forth by the Law Commission in its 190th Report[23] as regard the suggested amendment of Section 39 of the Insurance Act which is as follows. Recommendations of the Law Commission may be summarized as:

1. A clear distinction be made in the provision itself between a beneficial nominee and a collector nominee.
2. It is not possible to agree to the suggestion made by some of the insurers that in all cases the payment to the nominee would tantamount to a full discharge of the insurer's liability under the policy and that unless the contrary is expressed, the nominee would be the beneficial nominee.
3. An option be given to the policyholder to clearly express whether the nominee will collect the money on behalf of the legal representatives

[23]Law Commission of India, *The Revision of the Insurance Act, 1938 and The Insurance Regulatory and Development Authority Act, 1999* (Aug. 4, 2011), http://lawcommissionofindia.nic.in/reports/InsuranceReport-2nddraft1.pdf.

(in other words such nominee will be the collector nominee) or whether the nominee will be the absolute owner of the monies in which case such nominee will be the beneficial nominee.

4. A proviso be added to make the nomination effectual for the nominee to receive the policy money in case the policyholder dies after the maturity of the policy but before it can be encashed.

F Must Do's for Shareholders

Shareholders should regularly update their nomination of shares pro rata to the percentage mentioned in the will as nomination under Section 109A of the Companies Act, 1956 has an over ridding effect on any kind of testamentary disposition. Every investor or policy holder should compulsorily propose a nominee as it ebbs the burden of producing thousands of documents after the death of the policy holder relating to the certification of succession, letters of administration, probate of will which are cumbersome, costly and time consuming which otherwise has to be borne by the survivors of the deceased.

VII. CONCLUSION

The position of the nominee is one that has different legal status under various legislations. This does not imply unequal treatment to people who come under such legislations or create special benefits for them. It is to be noted that the essence of these provisions are its very objective and amending them will hamper the intent of the legislation in making such provisions. Enhancing the status of nominees under the respective enactments would help comprehensively than just mere introducing amendments to bring everyone under the same footing.

RESERVATIONS FOR MIGRANT SCHEDULED CASTES AND SCHEDULED TRIBES

Ankita Gupta[*]

ABSTRACT

The issue dealt with in the present article is whether the migrant Scheduled Caste (SC) and Scheduled Tribe (ST) members are entitled to benefits of the reservation policy in the State of their migration. This question has come up in the recent case of State of Uttaranchal v. Sandeep Kumar Singh. It is submitted that the migrant SC and ST candidates should be able to avail the benefits of the reservation policy of the states to which they have migrated. Any reservation policy framed by the state which seeks to exclude the migrant candidates would be invalid because it would be based solely on the criteria of place of birth and hence would be violative of Article 16. Moreover, Articles 341-342 are only for the purpose of specifying the list of SCs and STs in each State and should not be interpreted to mean that the lists would be considered to be valid only for that State alone. Any reservation policy which seeks to exclude the migrant SC and ST from its purview would also be violative of the Basic Structure of the Constitution. This is a multi

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layered argument since three principles of the Basic Structure Doctrine would be violated: the overarching Principle of Equality, which would be violated due to the treatment of migrant SC and ST in the same category as the general category members of the State and hence resulting in the treatment of unequals as equals; the Golden Triangle of Articles 14, 19 and 21 would be violated since the right to freely reside and the right to development will be hampered due to lack of reservation benefits in the State of migration; the principle of Harmonious Construction of Fundamental Rights and Directive Principles which requires that Article 46 and Article 16 be read to mean that the reservation benefits be given regardless of the State.

I. INTRODUCTION

Whether the migrant Scheduled Caste (SC) and Scheduled Tribe (ST) members are entitled to benefits of the reservation policy in the State of their migration?- is the question that has come up once again in the recent case of *State of Uttaranchal* v. *Sandeep Kumar Singh.*[1] The fact scenario of the case is as follows:

G.B. Pant University of Agriculture & Technology, Pant Nagar, Uttaranchal issued an employment notice inviting applications from candidates all over the country for various posts mentioned therein. As per the notification, the vacancies were advertised under the reservation roster supplied by the Uttaranchal government. The

[1]State of Uttaranchal v. Sandeep Kumar Singh, [2010] 12 SCC 794.

respondents therein applied for the posts as SC reserved category candidates. In support of their caste, certificates issued by the states of Uttar Pradesh, Bihar and Tripura were produced. They were successful in the selection conducted by the University. Thereafter, a letter was sent to the Vice-Chancellor of the University by the government of Uttaranchal, stating that the appointment had been made in violation of reservation policy of the state and the appointments made by the University were cancelled. The appointment letters of the respondents were withdrawn by the University under the instructions of the state government on the ground that the candidates did not belong to SC category of the state of Uttaranchal. The respondents filed writ petitions in the High Court challenging the termination letter. The High Court allowed the writ petitions and quashed the termination orders. The present case has been filed by way of an appeal by the state of Uttaranchal. Since a very important question of law as to interpretation of Articles 16(4), 341 and 342 arose for consideration in the case[2], it has been referred to a larger bench.[3]

The author seeks to submit that the migrant SC and ST candidates should be able to avail the benefits of the reservation policy of the states to which they have migrated. Any reservation policy framed by the state which seeks to exclude the migrant candidates would be invalid because:

1. The Reservation Policy would be violative of Article 16 (2) of the Constitution of India since it would be discriminating only on the ground of place of birth.
2. Articles 341-342 and Article 16 (4) needs to be harmoniously construed in furtherance of the objective of Article 16 (4). The purpose of Articles 341-342 is to prepare a list classifying persons into SCs and STs with respect to the State. Once the list is prepared,

[2]*Id.*
[3]*Id.*

they would be considered to be either SC or ST for the entire geography of the country and for all purposes of the Constitution. This argument will be dealt with in two limbs:

a) Articles 341-342 should be interpreted in furtherance of the object of Article 16(4).

b) Article 16 (4) and Articles 341-342 need to be harmoniously construed.

3. The Reservation Policy would be violative of the Basic Structure of the Constitution

a) It would be violative of the overarching Principle of Equality. This is because by refusing reservation benefits to the migrant SC and ST, in effect they would be treated in the same manner as the general category members and thus, unequals would be treated as equals.

b) It would be violative of the Golden Triangle of Article 14, 19 and 21:

i. Violation of Article 14:

- Violation of the test of reasonable classification since there is no intelligible differentia for the classification of migrant SC and ST in a category separate from the resident SC and ST of the state.
- Violation of the test of non arbitrariness since the separate categorization of resident SC, ST and the migrant SC, ST is arbitrary.
- Violation of the strict scrutiny test due to the failure to provide reservation to the migrant SC and ST which results in the hampering of their personal autonomy.

ii. Violation of Article 19 because by excluding the migrant SC and ST members from reservation, in effect, would prevent

them from residing in any other part of the country other than the State where they are recognized as SCs or STs.

iii. Violation of Article 21 because the right to development of the migrant SC and ST is being hampered by the lack of reservation benefits in the states to which they migrate.

c) It would be violative of the principle of harmonious construction of Directive Principles and Fundamental Rights which, when applied to Article 16 (4) and Article 46, would require the State to further the interests of SCs and STs regardless of the fact that they belong to another State.

II. ARGUMENTS

A The Reservation Policy would be Violative of Article 16 (2) of the Constitution of India

Article 16 (1) provides for equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. In respect of any employment or office under the State, discrimination against a citizen on grounds only of religion, race, caste, sex, place of birth, residence or any of them, is prohibited.[4] However, *nothing in the Article* will prevent the Parliament from making any reservation in appointments or posts, in favor of any backward class of citizens.[5]

If the reservation policy does not provide reservation to the migrant candidates, it is based solely on the criteria of the place of birth of the individual. Article 16 (2) will invalidate a law, rule or an order if it authorizes discrimination, in matters of employment under the state, on any of the grounds specified therein even if it professes to make a

[4]Constitution of India, 1950, art. 16(2).
[5]Constitution of India, 1950, art. 16(4).

reservation in the interests of the backward classes.[6] The principle of equality would be violated if a citizen, by reason of his residence in a state, which ordinarily would be the result of his birth in a place situated within that state, should have opportunity for education or advancement which is denied to another citizen because he happens to be resident in another state.[7]

The aim of the *non obstante* clause in Article 16 (4) was to take out the *absolutism* of Article 16 (1) and not to *stultify*[8] or *destroy* the *negativism* of Article 16 (2).[9] A *non obstante* clause is used to preclude any interpretation contrary to the stated purpose and objects.[10] It is thus necessary to refer to the objects and the purpose of the laws under consideration.[11] Affirmative action, in terms of Article 16 (4), is meant to provide for representation of citizens who are socially or economically backward.[12] Their rights need to be judged on the basis of the interest and well-being of the SC and ST in the country as a whole.[13]

Article 16 (4) has been said to be a facet of Article 14 and Article 16 (1)[14] and therefore, anything destructive of equality for Article 16 (1) would be destructive of Article 16 (4) also.[15] Limiting the reservation policy to the residents of the State would amount to discrimination on the basis of only place of birth and hence would be violative of Article 16 (2).

[6]Venkataraman B. v. State of Madras, A.I.R. 1951 SC 229; Narsimha Rao A.V.S v. State of A.P., [1969] 1 SCC 839.
[7]Dr. Pradeep Jain and Others v. Union of India and Others, [1984] 3 SCC 654.
[8]State of Uttar Pradesh and Others v. Pradip Tandon and Others, [1975] 1 SCC 267.
[9]Indra Sawhney and Others v. Union of India, A.I.R. 1970 SC 422.
[10]BLACK'S LAW DICTIONARY 1079 (Bryan A. Garner ed., 7th ed., 1999).
[11]VEPA P. SARATHI, INTERPRETATION OF STATUTES 581 (Eastern Book Company 4th ed., 2005).
[12]Bimlesh Tanwar v. State of Haryana, [2003] 5 SCC 604.
[13]Marri Chandra Shekhar Rao v. Dean, Medical College, [1990] 3 SCC 130.
[14]Chattar Singh and Others v. State of Rajasthan and Others, [1996] 11 SCC 742.
[15]Indra Sawhney and Others v. Union of India, A.I.R. 1970 SC 422.

B Articles 341-342 and Article 16 (4) should be Harmoniously Construed in furtherance of the Objective of Article 16 (4)

a) *Articles 341-342 should be Interpreted in furtherance of the Objective of Article 16 (4)*– The object of Articles 341 is to prevent any disputes regarding the fact of a caste being an SC or not,[16] and the object should not be interpreted to mean that SC so specified are considered to be so for that state alone.[17] Similar is the case with Article 342 which is to remove any confusion as to whether a particular tribe is an ST or not. If the reservation policy excludes the migrants, the SC and ST members who may be forced to migrate to other states for livelihood and to escape their tormentors would not be able to benefit from the reservation policy.[18] This will defeat the objective of Articles 341-342 and Article 16 (4), which is to provide additional protection to the members of the SC and ST[19] and to bring them into the mainstream national life.[20]

b) *Articles 341-342 and Article 16 (4) should be Harmoniously Construed*– The Court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure.[21] Articles 341 (1) and 342 (1) clearly show that the power of the President is *limited* to *specifying* the castes or tribes which shall, *for the purposes of the Constitution*, be deemed to be Scheduled Castes or Scheduled Tribes *in respect to a State or a Union*

[16]Bhaiya Lal v. Harikishan Singh, A.I.R. 1965 SC 1557.

[17]Manju Singh v. The Dean, B.N. Medical College and Others, A.I.R. 1986 Guj 175.

[18]Action Committee on Issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in the State of Maharashtra and Anr v. Union of India, [1994] 5 SCC 244.

[19]2 D. D. BASU, SHORTER CONSTITUTION OF INDIA 2128 (A.R. Lakshmanan et. al. rev., Lexis Nexis Butterworths Wadhwa 14th ed., 2009).

[20]*Supra* note 14.

[21]I.R. Coelho v. State of Tamil Nadu and Others, [2007] 2 SCC 1.

Territory, as the case may be.[22] SC and ST are entitled to derive benefits of the all-India Services or admissions in the educational institutions controlled or administered by the Central Government, irrespective of the state to which they belong.[23] If a person is to be treated as SC in terms of Article 341, all the benefits attached must be conferred on him because there will be an anomaly if a person is treated as a member of SC for one purpose and not for another purpose.[24] The same would apply to ST under Article 342.

The terms *'in respect to the State'* and *'for the purposes of the Constitution'* need to be interpreted in a manner to achieve the objective of equality promised to all citizens by the Preamble of the Constitution.[25] The phrase *'In respect to'* means 'in connection with' or 'in regard to' that state,[26] and cannot mean that the SC or ST so specified is deemed to be an SC or ST for that state alone.[27] *'For the purposes of the Constitution'* means that the SC and ST necessarily need to be identified on a state to state basis because of the varying social conditions of a caste and a tribe across the states,[28] and once so identified, they should be regarded as SC or ST *'for the purposes of the Constitution'* i.e. for the purposes of all and not only some of the provisions.[29] Such an interpretation would ensure that the SC and ST would be able to avail of the reservations throughout the country.

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[22]*Supra* note 18.
[23]S. Pushpa v. Sivachanmugavelu and Ors., [2005] 3 SCC 1; Marri Chandra Shekhar Rao v. Dean, Medical College, [1990] 3 SCC 130.
[24]Subhash Chandra and Anr. v. Delhi Subordinate Services, [2009] 15 SCC 458.
[25]*Supra* note 18.
[26]*Supra* note 17.
[27]*Id.*; See also, ADVANCED LAW LEXICON 2256 (Y. V. Chandrachud ed., 2005).
[28]*Supra* note 18.
[29]M.K. Kochu Devassy v. State of Kerala, [1979] 2 SCC 117.

C The Reservation Policy would be Violative of the Basic Structure Doctrine

The concept of basic structure has been resorted to even where there is no Constitutional Amendment in question.[30] The primary reason seems to be that if Parliament, while exercising its Constituent Power, cannot enact an amendment destroying some character of the Constitution, the same cannot be done by permitting the framing of laws which violate the same character and then protecting them.[31] A two fold test would be used wherein the law would first be tested to see if it violative of Part III of the Constitution and if the answer is positive, the law would be tested on the touchstone of basic structure.[32] The actual effect and impact of any Constitutional or statutory provision on the rights guaranteed under Part III of the Constitution has to be taken into account in determining whether or not it destroys the basic structure.[33]

a) *The Reservation Policy would be Violative of the Overarching Principle of Equality*– Right to equality before law, right to equality of opportunity in matters of public employment are fundamental rights guaranteed under the Constitution and have a *'common identity'*[34]committed to the *overarching principle*[35] of equality which is the basic structure of the Constitution.[36] The concept of egalitarian equality exists in Article 14 read with Article 16(4).[37] The violation of the principle of equality has been elaborated upon in point 2.1 of this paper.

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[30]State of West Bengal v. The Committee for Protection of Democratic Rights, [2010] 3 SCC 571; S.R. Bommai v. Union of India[1994] 3 SCC 1.
[31]*Supra* note 21.
[32]*Id.*
[33]*Supra* note 30.
[34]Glanrock Estate (P) Ltd. v. State of Tamil Nadu, [2010] 10 SCC 96; His Holiness Kesavanada Bharti v. State of Kerala, [1973] 4 SCC 225.
[35]M. Nagaraj and Others v. Union of India and Others, [2006] 8 SCC 212.
[36]*Supra* note 34.
[37]*Supra* note 35.

b) *The Reservation Policy would be Violative of the Golden Triangle of Article 14, Article 19 and Article 21* – When Article 21, read with Articles 14 and Article 19, is sought to be eliminated, not only the "essence of right" test but also the "rights test" has to be applied, because they form the core values of the Constitution,[38] and are a part of the basic structure.[39] Articles 14, 19 and 21 pervade all enacted laws and they stand at the '*pinnacle of the hierarchy of constitutional values'*.[40] Their exclusion would result in nullification of the basic structure doctrine.[41]

i. *The Reservation Policy would be Violative of Article 14:* Equal protection requires affirmative action by the state towards unequals by providing facilities and opportunities.[42] Article 14 prohibits class legislation but not reasonable classification[43] which means that the classification (i) should be based on intelligible differentia which distinguishes persons or things grouped together from others left out of the group and (ii) the differentia must have a rational relation to the object sought to be achieved.[44] The classification will be violative of Article 14 if the basis has no rational nexus with the object sought to be achieved.[45]

1) The Reservation Policy would be Violative of the Test of Reasonable Classification

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[38]*Supra* note 34.
[39]Minerva Mills Ltd. and Others v. Union of India and Others, [1980] 3 SCC 625.
[40]*Supra* note 35.
[41]*Supra* note 34.
[42]Panchayat Varga Aharmajivi Samudik Sahakari Khedut Cooperative Society v. Haribhai Mevabhai, [1996] 10 SCC 320.
[43]Dharam Dutt v. Union of India, [2004] 1 SCC 712; Budhan Chowdhry v. State of Bihar, [1955] 1SCR 1045.
[44]Municipal Committee, Patiala v. Model Town Residents Association, [2007] 8 SCC 669; Saraswat Cooperative Bank Limited v. State of Maharshtra, [2006] 8 SCC 520; K. Prabhakaran v. P. Jyaranjan, [2005] 1 SCC 754; Naresh Kumar v. Union of India, [2004] 4 SCC 540.
[45]State of West Bengal v. Anwar Ali Sarkar, A.I.R. 1952 SC 75.

Firstly, Unequals would be treated as Equals in the Reservation Policy– Equality of opportunity is the hallmark of the Constitution and provisions for affirmative action have been provided to ensure that unequals are not treated as equals.[46] By not providing reservation for the migrant SC and ST members, they would, in effect, be treated in the same category as the general category candidates of the state and such a scheme would be violative of Article 14 because unequals are being treated equally.

Secondly, there would be no Rational Nexus in the classification made in the Reservation Policy – Protective discrimination in favour of the SC and ST is a mandate[47] of the Constitution and is a part of Constitutional scheme of social and economic justice.[48] The aim is to integrate them into the national mainstream and establish an integrated social order.[49] Article 16 is an incident of guarantee of equality contained in Art. 14[50] and hence Article 16 does not debar a reasonable classification which is made with reference to the object to be achieved.[51] Preferential treatment of Backward Classes and SC and ST is a rational classification and is necessary to ensure equality of opportunity for all citizens.[52]

The basis of classification may be geographical provided there is a nexus between the territorial basis of classification and the object sought to be achieved.[53] However, mere migration does

[46]Secretary, State of Karnataka v. Uma Devi (2006) 4 SCC 1; State of Gujarat v. Karshanbhai K. Rabari, [2006] 6 SCC 21; Atyant Pichhara Barg Chhatra v. Jharkand State Vaishya Federation, [2006] 6 SCC 718.
[47]*Supra* note 28.
[48]Ashok Kumar Gupta v. State of U.P., [1997] 5 SCC 201; Jagdish Lal v. State of Haryana (1997) 6 SCC 538; State of U.P. v. Dina Nath Shukla, [1997] 9 SCC 662.
[49]P.G.I. of Medical Education and Research v. K.L. Narsimhan, [1997] 6 SCC 283.
[50]State of Kerala and Another v. N.M. Thomas and Others, [1976] 2 SCC 310.
[51]Union of India v. Kohli, [1973] 3 SCC 592.
[52]State of Kerala and Another v. N.M. Thomas, [1976] 2 SCC 310.
[53]D.P. Joshi v. State of M.P., [1955] 1SCR 1215.

not mean that that the person ceases to be a SC or ST and becomes a member of forward caste.[54] Therefore, in the present case, the classification being made between the migrant and the non migrant SC and ST members has no nexus with the object, which is to provide additional protection to the members of the SC and ST as a class of persons who have been suffering since a considerable length of time due to social and educational backwardness.[55]

In fact, the Hon'ble Supreme Court has opined that it is necessary for the legislatures or the Parliament to consider appropriate legislations to ensure that the SC and ST are given the benefits of reservation even after migration to ensure that proper effect is given to the rights given to them.[56]

2) The Reservation Policy would be Violative of the Test of Non Arbitrariness in Article 14

An unreasonable classification would make the impugned legislative or executive action arbitrary and violative of Article 14.[57] Any administrative or policy decision can be considered arbitrary[58] if it is irrational and not based on any sound reasoning.[59] The courts claim that Article 14 aims to prevent arbitrariness, and reasonable classification is merely a test to determine whether the legislative or the executive action is arbitrary.[60] The right to equality also means protection against any arbitrary or irrational act of the state.[61] The reservation policy which excludes the migrant SC and ST makes an unreasonable classification and is arbitrary.

[54] S. Pushpa v. Sivachanmugavelu and Ors., [2005] 3 SCC 1.
[55] E.V. Chinnaiah v. State of A.P. [2005] 1 SCC 394.
[56] *Supra* note 28.
[57] Ramana Dayaram Shetty v. I.A.A.I., [1979] 3 SCC 489.
[58] Union of India v. Dinesh Engineering Corporation, [2001] 8 SCC 491.
[59] Om Kumar v. Union of India, [2001] 2 SCC 386.
[60] Ajay Hasia v. Khalid Mujib, [1981] 1 SCC 722.
[61] E.P. Royappa v. State of Tamil Nadu, [1974] 4 SCC 3.

3) The Reservation Policy would be Violative of the Strict Scrutiny Test

If people who are entitled to get benefit of protective discrimination under Article 16 (4) are deprived of their Constitutional right, the test of strict scrutiny will be applicable.[62] Any classification based on suspect criteria that is rooted in "*a characteristic that relates to personal autonomy*", except in cases of affirmative action, may be subject to strict scrutiny.[63] However only laws that enhance the personal autonomy of the members of a vulnerable group can be said to be an affirmative action measure and those that hamper the personal autonomy should be regarded as discriminatory.[64] The test of strict scrutiny will be applicable when state action is directed against a minority group, thereby creating a classification based on criteria that is rooted in either 'immutable status' or 'fundamental choice'.[65]

Assessment should not only be based on its proposed aims but rather on the implications and the effects.[66] Since the migrant SC and ST members cannot derive any benefit from the reservation policy of the state to which they have migrated, this in effect hampers the personal autonomy regarding the fundamental choice of their place of residence.[67]

While applying the strict scrutiny test, it needs to be ensured that the ends sought to be achieved are compelling and the law is a narrowly tailored means of furthering the compelling

[62]Subhash Chandra and Anr. v. Delhi Subordinate Services, [2009] 15 SCC 458.
[63]Naz Foundation v. Government of NCT, [2009] 160DLT 277.
[64]Tarunabh Khaitan, *Beyond Reasonableness – A Rigorous Standard of Review for Article 15 Infringement,* 50 (II) JILI 177, 205 (2008).
[65]Religion and place of residence are fundamental choices protected by the Constitution. See, *id.*
[66]Anuj Garg and Others v. Hotel Association and Others, [2008] 3 SCC 1.
[67]*Supra* note 64.

means.[68] Article 16 (4) enables a State to provide reservation in cases where there exists backwardness of a class and inadequacy of representation in employment and this qualifies as compelling reasons.[69] However, the test of narrow tailoring will not be satisfied if there is failure to regulate activities that pose substantially the same threats to the government's compelling interest as the conduct that the government prohibits.[70] This is so because any under inclusiveness diminishes the credibility of the government's rationale for infringing the Constitutional rights.[71]

If there is no reservation for the migrant SC and ST members, this would mean that even where the migration from one state to other is involuntary, by force of circumstances either of employment or of profession, the migrants will not benefit from the reservation[72] and since such a consequence shows the under inclusiveness, the policy would not satisfy the strict scrutiny test.

ii. The Reservation Policy would be Violative of Article 19*:* All citizens have the right to reside and settle in any part of the territory of India[73] and the right to practice any profession, or to carry on any occupation, trade or business.[74] The SC and ST members face systematic and widespread denial of opportunities because of existing societal discrimination,[75] and the concept of

[68]Subhash Chandra v. Delhi Subordinate Service Selection Board, [2009] 15 SCC 458.
[69]*Supra* note 9.
[70]Richard H. Fallon, *Strict Judicial Scrutiny,* 54 UCLA LAW REV. 1267, 1327 (2007).
[71]*Id.*
[72]*Supra* note 28.
[73]Constitution of India, 1950, art. 19(1)(e).
[74]Constitution of India, 1950, art. 19(1)(g).
[75]Tarunabh Khaitan*, supra* note 64.

egalitarian equality requires the state to take affirmative action in favour of disadvantaged sections of society.[76]

A proclamation of a right is not a fulfillment of a right and a right will be considered to be guaranteed only when arrangements have been made for people to enjoy it.[77] Presence of abilities and not just absence of disabilities is required to ensure equality of opportunity.[78] By excluding the migrant SC and ST members from the reservation, in effect, this would prevent them from residing in any other part of the country other than the state where they are recognized as members of the SC and ST. In case they decide to migrate, their freedom to practice any profession will be hampered because they cannot avail of the reservation benefits which are very necessary to get rid of their social handicaps which prevent them from coming into the mainstream of national life.[79]

iii. *The Reservation Policy would be Violative of Article 21:* The right to life guaranteed under Article 21 includes not only the physical existence but also the quality of life,[80] and includes the opportunity[81] to develop and be free from all restrictions which inhibit the growth.[82] Right to development is considered to be a basic human right[83] and is a component of Article 21.[84] It includes the entire social, civil, cultural, economic and political process which will enable the person to make full use of their potential.[85]

[76] *Supra* note 35.
[77] HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND US FOREIGN POLICY 16 (Princeton University Press, 1980).
[78] *Supra* note 28.
[79] *Supra* note 14.
[80] D. D. BASU, SHORTER CONSTITUTION OF INDIA, VOL. 1 366 (A.R. Lakshmanan et. al. (rev.), Lexis Nexis Butterworths Wadhwa Nagpur 14th ed., 2009).
[81] Reliance Enery Limited v. Maharashtra State Road Development Corporation Ltd, [2007] 8 SCC 1.
[82] Chameli Singh and Others v. State of Uttar Pradesh and Others, [1996] 2 SCC 549.
[83] Election Commission of India v. St. Mary's School, [2008] 2 SCC 390.
[84] D. D. BASU, *supra* note 80, at 402.
[85] N.D. Jayal v. Union of India, [2004] 9 SCC 362.

By excluding the migrant SC and ST from the benefits of the reservation policy, in effect, their right to development is being hampered and hence there is a violation of Article 21.

c) *The Reservation Policy would be Violative of the Principle of Harmonious Construction between Fundamental Rights and Directive Principles* – Maintaining a balance between the Fundamental Rights and Directive Principles is an essential feature of the basic structure of the Constitution[86] and the object is to create an egalitarian society.[87] The Directive Principles should serve as a code of interpretation for the Fundamental Rights and the former need to be read into the latter[88] and all the attempts should be made at harmonizing and reconciling them[89] so that the true objects of the provisions can be promoted.[90] The Constitution should be interpreted in a manner to make the right to life meaningful and to provide the right to social justice and economic empowerment to the weaker sections of the society.[91] The state is under an obligation to provide facilities and opportunities of economic empowerment to the SC and ST.[92] Harmonious construction of Article 16 (4) and Article 46 would require the state to further the interests of the SC and ST regardless of the fact that they belong to another state.

Therefore, if the reservation policy excludes the migrant SC and ST, it would be violative of the basic structure of the Constitution because it would violate the principle of overarching equality, the principle of Golden Triangle of Article 14, Article 19 and Article 21 and the principle of harmonious construction of the Fundamental

[86] *Supra* note 39.
[87] *Supra* note 21.
[88] Akhil Bharatiya Soshit Karamchari Sangh v. Union of India, [1981] 1 SCC 246.
[89] State of Tamil Nadu v. L. Abu Kavur Bai, [1984] 1 SCC 515.
[90] Moti Ram Deka v. G.M., N.E. Frontier Railway, [1964] 5 SCR 683.
[91] *Supra* note 48.
[92] Constitution of India, 1950, art. 46; Panchayat Varga Sharmajivi Samudik Sahakari Khedut Cooperative Society v. Haribhai Mevabhai, [1996] 10 SCC 320.

Rights and the Directive principles which is considered to be a feature of the Basic Structure.

III. CONCLUSION

The above discussion makes it clear that to make the reservation policy constitutionally valid, it is necessary to extend the benefits to even the migrant SC and ST candidates. Arguing in favour of not granting reservation to the migrant SC and ST, it has been pointed out by the National Commission of Scheduled Tribes that unless stratified reservation is mandated, it will be difficult to prevent marginalization of indigenous tribals and monopolization of reservation benefits by more advanced tribal communities. Thus, a common Reservation Order, e.g. for Delhi & Andaman and Nicobar Islands, may well lead to a farce.[93] Such a problem would arise only if a single list under Article 341 and Article 342 was to be prepared for the entire country. This would cause the overlooking of the deifering levels of development of the various castes in tribes in different states and in such a case would there have been the problem of the facilities being monopolized by the more advanced communities.

To avoid this problem and to ensure that the benefits are given to all who need them, once the statewise list of SC and ST has been prepared under Article 341 and Article 342 respectively, the list should be held valid throughout the country. Candidates who have been recognized as SC or ST in one state should be able to make use of the reservation policies of the state to which they migrate. Such a measure would also be in furtherance of the recommendation of the National Commission for Scheduled Tribes to have a constitutionally valid scheme of reservation may be evolved to extend benefits of

[93]National Commission for Scheduled Tribes, *Agenda Note for Agenda Item No.3, For the Meeting of the Commission on 22/02/2010*, (Apr. 13, 2012) http://ncst.nic.in/writereaddata/linkimages/Agenda22022010-III420942710.pdf.

reservation to migratory SCs & STs living outside their original place of nativity.[94]

[94] *Id.*

CONTRASTING THE INDIAN GARMENT AND HANDLOOM INDUSTRIES – A CRITIQUE OF LEGISLATIVE AND EXECUTIVE INACTION

Kanika Gauba[*]

ABSTRACT

The textiles and garments industry contributes 16.63 per cent of India's export earnings; around 45 per cent of this comes from garment exports alone. The garments industry provides employment to around 3.5 million people across the country and is one of the success stories of neoliberal India, but its success is on account of the thousands of garment workers – those working in big and small factories, as well as from their shanty homes. On the other hand, handloom weaving is a part of India's cultural ethos, and employs the second largest workforce in India, next only to agriculture. However, in terms of State treatment, the two sectors constitute extreme ends of the legal spectrum. Through a presentation of the features, working conditions and politico-economic (in)significance and resultant policy initiatives, it is hoped to place these two sectors in stark contrast against each other – the former, the child of the policy makers, while the latter, the albatross around their

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neck, while adopting a labour and human rights perspective. In the light of the recent crises of capitalism that have afflicted the world economy, as also the spate of weavers' suicides, the author appeals to the Government to awake to the consequences of following an export-oriented policy of textile promotion and instead safeguard the right to be human of millions of handloom weavers.

I. INTRODUCTION

The textile industry in India, one of the oldest[1] and the largest of Indian manufacturing industries, employs 35 million people at present. The Indian textiles industry is extremely varied, with the hand-spun and hand-woven sector at one end of the spectrum, and the capital intensive, sophisticated mill sector at the other.[2] India's rich cultural textile tradition attracted traders from all over the world in ancient times; evidence of textile manufacturing has been found from the Harappan valley civilization.[3]

It is considered that among manufacturing sectors, the single largest employment potential is in textiles, which was slated to generate 7 million jobs from 2002-2020. More than 40 per cent of these jobs were predicted to be in garment production units in the small scale

[1]"The spinning wheel was invented in India between 500 – 1000 A.D." C. WAYNE SMITH & JOE TOM COTHREN, COTTON: ORIGIN, HISTORY, TECHNOLOGY, AND PRODUCTION 8 (John Wiley and Sons Ltd., 1999).
[2]"At current prices the Indian textiles industry is pegged at US$ 55 billion, 64% of which services domestic demand. The textiles industry accounts for 14% of industrial production, which is 4% of GDP; employs 35 million people and accounts for nearly 12% share of the country's total exports basket." Annual Report 2009-2010, MINISTRY OF TEXTILES, GOVERNMENT OF INDIA, at 3 (2010).
[3]*Indian Textile History: Textile Images,* HISTORY OF TEXTILE (Dec. 7, 2011), http://www.textileasart.com/weaving.htm#indian.

industry (SSI) sector.[4] India is the second largest manufacturer of textiles and garments after China. The textile industry accounts for 14 per cent of industrial production and 12 per cent share of the country's total exports basket.

According to the Ministry of Textiles, the Indian textile industry may be subdivided into seven important segments:[5]

1. Organized Cotton/Man-made Fibre textile industry
2. Man-made fibre/Filament Yarn industry
3. Wool and Woollen Textiles industry
4. Sericulture and Silk industries industry
5. Handlooms
6. Handicrafts
7. Jute and Jute Textiles industry.

After 2005, when the quota system on global textile trade lifted, India expected a dramatic increase in exports.[6] The predictions came true as India emerged the prime sourcing destination for textiles: from 2004-05 to 2009-10, India's exports of textile and clothing increased by 60.14%.[7]

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[4]Report of the Committee on India Vision 2020, PLANNING COMMISSION, GOVERNMENT OF INDIA, at 39 (2002).

[5]*Supra* note 2, at 4.

[6]*Id.*

[7]"India's textiles & clothing (T&C) export registered robust growth of 25% in 2005-06, recording a growth of US$ 3.5 billion in value terms thereby reaching a level of US$ 17.52 billion. The growth continued in 2006-07 as T&C exports were US$19.15 billion recording an increase of 9.28% over previous year. Though India's T&C exports in 2007-08 at US$ 22.13 billion were adversely affected by strong appreciation of the Indian rupee against the US dollar, it still managed to record a healthy growth of 15.59% in US dollar terms (in rupee terms, the growth was about 2.76%. India's textiles exports at US$ 20.94 billion showed a decline of 5.45% in 2008-09 over 2007-08 as the recessionary trends were observed in India's major markets i.e. the US and the EU. As per the latest available provisional figures of the Directorate General of Commercial Intelligence and Statistics (DGCI&S), Kolkata, during 2009-10, the exports of T&C increased by over 5.60% and reached the level of USD 22.42 billion." Outcome Budget 2011-2012, Ministry of Textiles, Government of India, at 1 (2011).

Post-liberalization, India has chosen to integrate her domestic economy with the global economy of goods and services, thus subjecting herself to what has been termed the 'international division of labour', where "industrial capital (as a consequence of globalization, improvement in technology and communication) has been increasingly able to internationally relocate the different parts of the industrial labour processes where the relative price and productive attributes of the different national labour forces best satisfies its requirements, thus giving birth to the New International Division of Labour (NIDL)".[8] In simple terms, this means that in order for it to engage with the global market, it must fulfil specific demands of such market, in this case, provide cheap labour for the global production process. Thus we see that the problems of labour, which were already substantial, have only become aggravated in the neoliberal era.

Precisely twenty years have elapsed since the introduction of neoliberal elements into Indian economy, and the past few years have been particularly eventful. Empirically, there is no better time than now to critically examine the true effect of neoliberal policy and legislation in the textile sector, especially in context of the fissures that appeared in the neo-capitalist system of production in 2008 and 2011 in the world markets. This being the perfect time to take stock, India must reflect on the symptoms manifested by its textile law, and decide whether to blindly move forward, or pause and reconsider the course dictated by the Washington Consensus.

This paper looks at the unorganized labour employed by two of the most important sectors in the Indian textile industry: the garment sector and the handloom sector, and analyses the effect of neoliberal legislation on the workers in these two sectors. The garment sector represents the modern, export-driven and revenue-earning focal point

[8]Nicolas Grinberg, *The New International Division of Labour and the Differentiated Evolution of Poverty at World Scale* (Jan. 21, 2012) http://www.sed.manchester.ac.uk/research/events/conferences/povertyandcapital/grinberg.pdf.

of Government policy, while the handloom sector presents the picture of historical and cultural significance, the employment-source of millions of Indian citizens, many of whom have resorted to committing suicide in the face of inhuman deprivation and poverty. The difficulties of balancing economic and social objectives of the State through the instrument of Law are highlighted through a comparison of Government legislation, policy and political will in these two sectors.

For the purpose of this paper, the author will follow the definition of 'unorganized sector workers' as provided by the National Commission on Enterprises in the Unorganized Sector (NCEUS), viz.:

Unorganized/Informal workers consist of those working in the informal sector or households, excluding regular workers with social security benefits provided by the employers, and the workers in the formal sector without any employment and social security benefits provided by the employers.[9]

As per the definition, the unorganized/informal workers would include (i) all casual contributing family workers; (ii) self-employed persons in informal sector and private households; and (iii) all other employees not eligible for advance notice of dismissal or paid sick or annual leave or for any social security benefits provided by the employees.[10]

The first part of the paper looks at the garment sector, discussing its peculiar features, conditions of work, trends at the workplace, along with important developments in the international and national spheres that have affected the prospects of the sector or its workforce. The second part of the paper analyses the handloom industry in India in a

[9]Report on Financing of Enterprises in the Unorganised Sector and Creation of a National Fund for Unorganised Sector, National Commission on Enterprises in the Unorganized Sector at 3 (2007) [hereinafter NCEUS 2007b].
[10]NCEUS, 2008a, at 45 (2008).

similar fashion. The last part provides a brief comparison between the two sectors so as to highlight the variance in labour policies, with suggestions for the future.

II. THE INDIAN GARMENT INDUSTRY

A Introduction

The readymade garment sector constitutes 45 per cent of the total textiles exports.[11] The Indian textile value chain operates independently, manufacturing raw material (fibres) to finished products (garments and apparel), with spinning, weaving, knitting and processing in between as intermediate processes. The structural pyramid of Indian textile industry is inverse in terms of strength: fibre manufacturing and spinning processes are strong while weaving and processing are relatively weak.[12] The clothing sector is the final stage of the textile value chain and the maximum value addition takes place at this stage.[13]

The pattern of production in the Indian garment industry is highly fragmented, testimony to which fact is borne by the co-existence of varying structures of production, viz. large units, small enterprises and home-based work,[14] albeit on varying conditions of survival. In

[11]Annual Report 2010-2011, MINISTRY OF TEXTILES, GOVERNMENT OF INDIA, at 45 (2011).

[12]T.S. Devaraja, *Indian Textile and Garment Industry-An Overview*, INDIAN COUNCIL FOR SOCIAL SCIENCE RESEARCH (Dec. 28, 2011), http://sibresearch.org/uploads/2/7/9/9/2799227/working_paper_-_dr_devaraja.pdf.

[13]Report of the Working Group on Jute and Textiles for the Eleventh Plan (2007-2012), Planning Commission of India, Government of India, at 35 (2006).

[14]There is a tendency to treat home-based workers as self-employed persons; however, 'home-based worker' here includes: i) independent employers or own-account workers (purely self-employed), and ii) dependent sub-contract workers or 'homeworkers'. ILO Home Work Convention, Article 1 (1996) (C177) defines 'home-worker' as a person who carries out work for remuneration in premises of

this paper, in tandem with the adopted definition of 'unorganized worker', the workers in the regulated[15] large factories are also considered as unorganized workers.[16]

The garment industry in India operates within subcontracting supply chains. These supply chains are sometimes small and at the local level, while some operate for export houses who supply to international retail brands.[17] The growth of numerous small-scale units around the larger units has led to a splitting up of the production process;[18] rampant contracting and sub-contracting often lends

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his/her choice, other than the work place of the employer, resulting in a product or service as specified by the employer, irrespective of who provided the equipment, material or inputs used.

[15]The Factories Act, 1948, No. 63, Act of Parliament 1948 (India).

[16]"The work in numerous garment-manufacturing units, many of which employ a large number of workers, is organised in nature, but is entirely informal," Report of the SNCL, ¶7.19. "The (big) factories are usually subsidiaries of big textile mills in the country. These registered factory outlets are in the 'organized sector' in name only; the rampant flouting of labour laws by such units, except on paper, leads to withholding of social security to their workforce, much of which is temporary or casual, there being no employment contract affording them the benefits accruing to permanent labour." Maithreyi Krishna Raj, *New Opportunities on Old Terms: The Garment Industry in India*, 15 SOCIAL SCIENTIST 45 (1987).

[17]NCEUS, 2007b, at 82, ¶5.21. Many of the activities undertaken by homeworkers are conducted within a value chain, which is sometimes connected globally. The value chain contains a number of intermediaries between the homeworker/producer and the final consumer. An example of a global value chain is in the garment industry. At the upper extreme are the international retailers such as GAP or Wal-Mart. These retailers mainly operate through export houses or large exporters themselves. The export houses contract out the orders to contractors who in turn may sub-contract it to sub-contractors. The actual production may be done in large factories, small factories or by homeworkers. The production process may be broken up and some part of this work, sometimes the more intricate hand work such as embroidery work, is done by the home-workers, NCEUS, 2007b, at 71, ¶4.89.

[18]*See* Report of the National Commission on Self Employed Women and Women in the Informal Sector, "The encouragement given to small sector, although welcome, is reported to have led to splitting of large units into smaller ones, contracting and sub-contracting systems and growth of home-based industry. These forms of production are used as tools of avoiding labour laws and as means of exploiting workers, women workers being the greater sufferers."

credence to the illusion that the industry is composed primarily of small and medium enterprises.

Post-liberalization, home-based work is more often found in the form of homeworkers, who form the base of the pyramid of manufacturers, and are engaged in production of items such as frocks for children, petticoats and gowns, to be sold through small retail outlets mainly to the local market. Such workers, mostly women,[19] operate through a chain of contractors and sub-contractors. These contractors take the material from the large merchants or shops and supply it to home based workers. They then collect the finished product and return it to the supplier for final sale in the market.[20]

Though homework offers several advantages to the workers,[21] these are far outweighed by the disadvantages: in a labour market characterized by surplus labour, homeworkers are often paid extremely low piece rates, with little or no access to the final market or consumer and increased vulnerability due to the lack of unionization. The distance between the final consumer and the homeworker also makes it difficult to identify the principal employer, the one who is responsible for providing higher wages and social security.[22] Child labour constitutes an integral part of homework.[23]

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[19]In the apparel manufacturing sector, women are present to the tune of 28.2 per cent, while men are 20.4 per cent: NSS 55th Round 1999-2000, quoted from NCEUS, 2007b, at 59.

[20]*Supra* note 12.

[21]The advantages are in the form of being time-conserving, offering flexible work hours and an additional source of income for the family, while sometimes resulting in the birth of individual enterprise. Women find it easier to fulfill domestic responsibilities while augmenting the household income: NCEUS, 2007b, at 71, ¶4.86.

[22]ILO 2002b. *Decent Work and the Informal Economy*, Report VI, International Labour Conference, 90th Session (2002).

[23]There has been a visible decline in the incidence of child labour in factory settings, in reaction to growing public and political pressure within India and beyond. Yet this decline represents merely a displacement of the problem: child labour has shifted out of factory-based production into the arena of household activity, as the restructuring of garments production to reduce costs and

Often, the exploitation of the home-worker by local employers can be a mere first step in the exploitation through the global value chain.[24]

Thus, the garment sector in India engages three types of workers – factory workers (in both big and small enterprises), homeworkers and own account workers.

B Conditions of Work

a) *"Workers are Cheaper than Machines"* – The minimum working hours in the Garment Industry range from 10-12 hours,[25] against a Factories Act, 1948 mandate of nine working hours per day;[26] workers are often forced to work overtime, and in case of refusal, are perfunctorily dismissed. One finds workers working for 20 to 30 years without any week-long holidays and at times, on 12-14 hour shifts.[27]

Minimum wage stipulations are relentlessly flouted, thus lowering the average wages as a whole. For instance, tailors, who are among the highest paid employees in Bangalore factories, are paid Rs 140 per day, when the minimum wages for such work in Karnataka has been notified as Rs. 158 per day.[28]

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evade regulation has dramatically increased the importance of home-based work and the numbers of (particularly women) workers in the burgeoning household sector: Nicola Phillips et.al., "Child labour in global production networks: poverty, vulnerability and 'adverse incorporation' in the Delhi garments sector", Chronic Poverty Research Centre, *Working Paper* (Jun., 2011), http://www.chronicpoverty.org/uploads/publication_files/WP177%20Phillips%20et%20al.pdf.

[24]NCEUS, 2007b, at 71, ¶4.87.

[25]Jatinder S. Bedi & Radheyshyam Verma, *State of Fabric Producing Units in India* EPW, Vol. XLVI No. 4, 66 (2011). *See infra,* note 28.

[26]The Factories Act (1948) mandates vide S. 51 that no adult workers shall be required or allowed to work in a factory for more than forty-eight hours in any week, or, vide S. 54, more than nine hours in any day.

[27]Long work hours are often a strategy on the part of the employer to minimize possibilities of unionization. Workers in many factories have been threatened if they make attempts to unionize themselves.

[28]In conversation with Ms. Suhasini Singh, CIVIDEP India. In another case, the Government of Karnataka revised minimum wages in 2009 and later repealed its

Where payment is on a piece-rate basis, as is invariably the case, especially where women are employed in majority, unrealistic targets of 100-120 pieces per day, against an industrial average of 60-70 pieces per day, are imposed on the workers, who have no choice but to skip their pithy (usually 30-minutes long), supervised lunch-breaks in order to achieve daily targets.[29]

Garment workers face physical and sexual abuse by the employers who often use hurtful, derogatory and gender-insensitive language in their communication with these workers, most of whom are women.[30]

Within the factory, basic facilities like toilets, ventilation and even drinking water are a luxury:[31] employers impose restrictions on the use of toilets and the workers are usually not permitted to sit while working. Safety standards of work are abysmal; injuries are frequently caused by old machinery, and occupational diseases are rampant among the workers. The only social security these workers get is a 'maternity-benefit' in the form of a single nursing break.[32]

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own notification. *See*, *Garment workers seek better working conditions*, THE HINDU (Mar. 9, 2011), http://www.hindu.com/2011/03/09/stories/2011030967570400.htm.; Nilanjana Biswas, *A Tailor-made Catastrophe*, TEHELKA, Vol. 4, Issue 45, (2007).

[29]Suhasini Singh, *Fashionable and Famous – At the Garment Worker's Cost*, (Apr., 2009), http://cividep.org/wp-content/uploads/Fashionable-and-famous.pdf.

[30]Nirmala Krishna, *Garment Factories – A Hell on Earth* (Nov. 21, 2011), http://www.socialistworld.net/doc/2695. The recent case of 25-year old Ammu is an instance of the increased spate of 'suicides' by garment workers: Ammu was found hanged in suspicious circumstances on the day she was harassed by supervisors for more production; she was abused, violently pushed and objects were also thrown at her. The factory employing her until her death is 'Triangle Apparels', a part of the Gokuldas Corporation which employs around 40,000 workers and produces garments under brand names such as Mexx, Puma and O'Neil for export to foreign countries.

[31]The Royal Commission on Labour (RCL), 1929, Report of the Labour Investigation Committee, at 130 (1946).

[32]*Supra* note 30.

Obsolete and faulty machinery causes constant puncture wounds on the fingertips and the nails, as the cloth is passed through heavy vibrating machines; at times the worker loses entire fingers in the process. Textile dust enters the lungs of the workers due to improper ventilation and causes lung cancer. A Cividep study in 2008 showed that 80 per cent of the patients registered with the Employee State

Supervisors are predominantly male, leading to abuses of a greater degree.[33]

The 1988 National Commission on Self Employed Women and Women in the Informal Sector (NCSEW) highlighted in the case of home-based workers, the issue of visibility (with respect to the planning process); it recommended their recognition as workers along with ensured access to raw materials and credit facilities.[34]

Perhaps a reason for the extremely poor working conditions of the garment sector workers is the lack of unionization.[35].

C Discrimination at Work

Discrimination at the workplace manifests itself in three forms – against women, child and migrant labour.

a) *Discrimination against Women Workers* – Women labour has been increasing in the garment sector; although precise data on this is not available, several national-level reports have brought this incidence to light.[36] Occupational segregation between men and women is

Insurance Corporation (ESIC) were suffering from tuberculosis caused due to inhalation of cotton fluff. Apart from these, cases of anaemia, sleeplessness, miscarriages and leg and back pain (as work is repetitive and monotonous) are common.

[33]Deepa Girish, *Bangalore garment workers woes and challenges ahead* (Dec. 2, 2011), http://www.socialistworld.net/doc/5231.

[34]Report of the National Commission on Self Employed Women and Women in the Informal Sector, at 149-152 (1988).

[35]Less than 5% of the workforce is union members: Mohan Mani "The minimum wage in the sector was first fixed at Rs.7 per day in 1979. At that stage, the minimum wage was not linked to inflation, and there was no DA (dearness allowance) component to the wage. In 1984, the state government took up the matter with the judiciary, and DA was included as a component of wage in 1986, with the minimum wage fixed at Rs.18 per day. It should be noted that even the 1984 intervention was not done by workers' organisations, but was taken up by the state." *Id.*, at 14.

[36]The National Commission for Self Employed Women and Women in the Informal Sector identified that certain non-traditional industries like garments had recorded sizeable increase in women population, Report of the National Commission for Self Employed Women and Women in the Informal Sector, (1988) also identified in the Report of the Study Group on Women and Child Labour, Second National

perceived as an important and effective instrument of discrimination against women. Because of narrow options, women get crowded into certain sectors with an inevitable lowering of wages. Alternatively their concentration in some sectors which eliminates competition between men and women also permits the bypassing of the legal requirement of equality of wages. If men and women are doing different things, obviously there is no need to apply the same standard.[37] Moreover, for women workers in the informal economy, the 'double burden' of combining the tasks of production and reproduction is even more arduous because they are already engaged in activities that require long hours to obtain a subsistence wage.[38]

The sexual division of labour is often used as a justification for dubbing women's work as low-skilled; a division that is visible in the garment making process and also in the type and quality of the garments contracted. In most industry groups, women are placed at the bottom of the hierarchy of jobs, which is then used to (de)value the job as low-skilled even if it involves exceptional talent and years of informal training.[39] Such a division of work results in lower piece-rate wages and lower overall monthly incomes for women, thus relegating them to the lowest categories of work.[40] Men are engaged in the more specialized activities, such as cutting the garments (most

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Commission on Labour (SNCL), at 576 (2001). "Women are employed in large numbers in the unorganised textile sector, in hosiery, handlooms, textile handicrafts like embroidery, patchwork and block printing, and in the manufacture of readymade garments." The SNCL identifies garments as one of the areas employing a high percentage of women, SNCL, ¶9.30, 9.38. In countries such as Bangladesh and Cambodia, where the garment sector is equally strong, women comprise 80 and 85-90 per cent respectively of the workforce: Ratnakar Adhikari & Yumiko Yamamoto, *Flying Colours, Broken Threads: One Year of Evidence from Asia after the Phase-out of Textiles and Clothing Quotas* (January, 2005), http://asia-pacific.undp.org/practices/poverty_reduction/publications/P1069.pdf.

[37]Maithreyi Krishna Raj, *New Opportunities on Old Terms: The Garment Industry in India*, 15 SOCIAL SCIENTIST 45 (1987).

[38]NCEUS, 2007b, ¶5.1.

[39]NCEUS, 2007b, ¶5.26.

[40]NCEUS, 2007b, ¶5.22.

specialized), supervision, procuring orders and marketing. Women were engaged in minor activities like cutting the loose threads, stitching the buttons and other finishing and ornamentation work.[41]

Further, there is also the incidence of discrimination within a category of vulnerable workers: studies show that rural women workers occupy a lower position compared to their urban counterparts, but the lowermost layer is constituted by those belonging to the bottom strata of the society i.e. SCs and STs.[42]

b) *Discrimination against Child Workers* – Child labour is highly fragmented, prevalent within complex structures where much of the work is done through a system of sub-contracting to small, unorganised sector enterprises (home-based and otherwise), which are paid on piece rates. The system of sub-contracting permits the employer to escape application of labour law regulations which ban child labour in such industries.[43] The violation is, therefore, not just of labour law, but also human rights.

Within the class of women workers, and related to the issue of gender discrimination, there is the subset of girl child workers. Although the latter is only 2.6 per cent of the total women workers, the problem of out of school girl children is a larger one.[44] The main issue about the girl child is that the characteristics of their work participation and engagement in domestic duties reflect those of the adult women. The same double burden of work operating on her ensures reduced capabilities to enter the labour law market in the

[41]*Supra* note 33, at 50. *See* NCEUS, 2007b, ¶5.27. *See also* Report of the Study Group on Women and Child Labour, Second National Commission on Labour (SNCL), at 581 (2001).
[42]NCEUS, 2007b, ¶5.51.
[43]NCEUS, 2007b, ¶6.42. "Independent researchers have found child workers in large numbers in home-based industries such as beedi making, match industry, carpet production, lock making, glass bangle making, *hosiery* and so on, all identified as 'hazardous industries' under the Child Labour Act of 1986."
[44]NCEUS, 2007b, ¶5.50.

future.[45] Child labour is also prevalent wherever home-based work is performed.

c) <u>*Discrimination against Migrant Labour*</u> – Migrant labourers comprise the petty self-employed and the unskilled casual wage workers who are highly disadvantaged and vulnerable and are subject to extremely adverse working conditions and economic exploitation. Migration from nearby villages to the garment factory is seen. Over 90% of garment workers in Tirupur are migrants and they are all contractual labourers. Bonded labour has been found in handlooms, sericulture and silk weaving and woollen carpets.[46]

d) <u>*New Forms of Discrimination*</u> – Apart from the traditional conceptualization of 'discrimination', studies reflect a newer understanding of discrimination in cases of home-based work; discrimination due to *invisibility*. Amongst the home-based women producers, apart from those doing their own account work, there is a large section of women doing piece-rate work. In the case of the latter the employer is in advantageous position to exploit the workers. He saves on over-head costs, the women are at mercy of such employers as it is imperative for them to get work on any terms. The wages therefore, are very low. A sad corollary of this system is that all the children assist their mothers in such work. The prevalence of child labour in this category is very high.[47]

The workers do not enjoy the protection of legislation as they remain invisible to the Plan-makers, thus suffering the evils of invisibility. The only solution to their plight is for these workers to unionize themselves, but remains a distant dream. Women operating own

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[45]NCEUS, 2007b, ¶6.48.

[46]NCEUS, 2007b, ¶6.52.

[47]Report of the National Commission on Self Employed Women and Women in the Informal Sector, (1988). For home-based women workers, despite receiving training, wages are low and there are no tie ups with markets. Working capital is scarce, and the workers are dependent on someone else to do the cutting work, due to lack of training.

account enterprises in the garment sector, usually manufacturing for the local market, also remain unseen by the policy-makers: such women are not recognized as workers and therefore do not enjoy any protection whatsoever.

D Legislative and Policy Framework

a) Evolution of Indian Policy on the Garment Sector – India developed a modern textile industry soon after Britain, using her indigenous cotton, cheap labour, access to British machinery, and a well-developed mercantile tradition. By the 1950s, India was among the leading nations in textile production. From the 1950s, however, Indian textiles receded steadily from the world market, while the industry receded in importance in the industrialization process at home.[48] This change in the 1950s adhered to the policy of protectionism. In 1985, the National Textile Policy was announced, with far-reaching impacts on the textile industry and trade. First, the macro-economic regime encouraged export of textiles, import of equipment, and import of generic intermediates. Costs of resources and costs of acquiring new capability came down from what they were in a protected market. Second, deregulation removed barriers to expansion and restructuring of mills and powerlooms.[49]

After liberalization of the economy in 1991-1992, textiles became a significant issue for the plan-makers, especially as its exports of readymade garments in that year are estimated to have reached Rs 6,282 crore which is almost double the value obtained in 1989-90 when garment exports amounted only to Rs 3,472 crore.[50] Henceforth, (as is clear from an understanding of the handloom sector) Indian policy has consistently favoured growth – through modernisation – of

[48]Tirthankar Roy, *Economic Reforms and Textile Industry in India*, 33 EPW No. 32 2173(Aug. 8-14 1998).
[49]*Id*.
[50]Somnath Chatterjee & Rakesh Mohan, *India's Garment Exports*, 28 EPW No. 35 M-95 (Aug. 28, 1993).

the garment industry, apparent from the evolution of policy in its favour.

The Technology Upgradation Fund Scheme (TUFS), commissioned on April 1, 1999 for an initial period of 5 years, with a view to facilitate the modernization and upgradation of the textiles industry by providing credit at reduced rates to the entrepreneurs both in the organized and the unorganized sector, was mainly directed towards the export-oriented garment manufacturing units. This scheme has helped in the transition from a quantitatively restricted textiles trade to market driven global merchandise, thus infusing an investment climate in the textile industry.[51] However, the Scheme is driven solely to meet the requirements of export-led growth and not the demand for domestic markets.

This was followed by a new National Textile Policy (NTP) in 2000, and sustained the orientation towards export-led growth and investment-wooing. It aimed at making India a global player in textile production and exports, especially in the sphere of garments, by dereserving the garment sector from the small-scale sector, allowing foreign investment to the tune of 100 per cent (subject to the guidelines of the Foreign Investment Promotion Board), in order to compete with neighbouring countries such as Sri Lanka, Pakistan and Bangladesh. The garment sector was earlier under SSI reservation with an investment ceiling of Rs 3 crore and a cap of 24 per cent FDI equity.[52] Pursuant to such policies, there was a rise of the garment-manufacturing with both branded and unbranded garments manufactured primarily in the small-scale and unorganised sector.[53]

[51]Annual Report, MINISTRY OF TEXTILES, GOVERNMENT OF INDIA, at 4. It aimed at raising the export target for textile and apparel from then $11 billion to $50 billion by 2010, out of which the share of garments would be $25 billion.

[52]*See also* Ruddar Datt, *New Textile Policy -- Blow to the employment objective*, THE BUSINESS LINE (Nov. 27, 2000), http://www.thehindubusinessline.in/businessline/2000/11/27/stories/042769tx.htm.

[53]Study Group on Women and Child Labour, Report No. 2, National Commission on Labour, at 590 (2011).

b) <u>*Indian Policy post Neo-liberalization*</u> – With the lifting of the quota system in 2005, India faces ruthless competition from neighbouring Asian countries. Accordingly, the Working Group on Textile and Jute Industry for the Eleventh Plan highlighted the potential for exponential growth in the garment sector and the strategies that would help attain this growth; *inter alia*, labour law reforms to attract investment in large size units, and the liberalisation of procedures to attract Foreign Direct Investment (FDI) in specific areas of textile industry[54] needing FDI to *bridge the gap* between domestic investment and required investment.[55] It assailed the existing labour laws declaring that they "retain the potential for last minute disruption of export orders fulfilment".[56]

A reading of this Report is vital to glean the true focus of India's policy on the garment industry: it advocates astonishing relaxations in labour laws applicable to the garment and apparel sector by suggesting the inclusion of Export-Oriented Textile Units (EOUs)[57] within s. 10 of the Contract Labour (Regulation and Abolition) Act, 1970 so as to allow employers in EOUs to hire contract workers, or unrestricted outsourcing of the work;[58] easing the application of Industrial Disputes Act, 1956 by increasing the limit on workers from

[54]Such area also includes FDI in textile machinery, an aim which must be 'aggressively' pursued as was in China.
[55]Report of the Working Group on Textile and Jute Industry for the Eleventh Five Year Plan (2007-2012), MINISTRY OF TEXTILES, Preface (2006).The vision statement consists only of references to increasing the 'competitiveness' and 'market-shares' of the textile industry, with an ambiguous 'development of human resource' added, almost as an afterthought.
[56]*Id.*
[57]These are textile units engaged in export related activities, with exports or deemed exports comprising 50 per cent of the sales.
[58]Report, ¶1.40.1.This is to be done so as to offshoot the financial 'risk' inherent in employing excess workers during lean periods or the initial stages of developing an export market, when the uncertainty of the order is high.

100 to 500;[59] and extending the work hours from nine to twelve hours per day and forty-eight to sixty hours per week, so as to compensate for peak seasons and low labour productivity.[60] These recommendations were incorporated in the Eleventh Plan with commendable sagacity.

More recently, in September 2011, the Textile Ministry has asked the Planning Commission to allocate Rs 35,000 crore funds (a 60 per cent leap) during the Twelfth Plan period, 2012-2017. In the Eleventh Plan period, the Ministry was allocated the budgeted Rs 14,000 crore plus additional fund of Rs 22,000 crore.[61]

The Approach Paper to the Twelfth Plan indicates a return to the theory of manufacturing as the sole fount of employment-creation.[62] The Commission continues to hold labour regulations "long pending review, such as the Factories Act" responsible for the increased cost to employers in the form of routine inspections and forms, but allows that new institutional arrangements are required to provide security for employees before existing legal safe-guards for them

[59]This must be done so as to remove the hindrance, particularly to medium enterprises, of obtaining necessary approvals for lay-offs etc., by keeping units employing more than 500 persons outside the purview of the Act. Report, ¶1.40.2.

[60]Report, ¶1.40.3.

[61]*Textile Ministry seeks 60% jump in 12th Plan funds*, BUSINESS STANDARD (Sept. 19, 2011), http://www.business-standard.com/india/news/textile-ministry-seeks-60-jump-in-12th-plan-funds/147077/on.

[62]The Commission notes the Eleventh Plan had targeted growth in manufacturing at 10.0-11.0 per cent but predicts actual performance to be only about 7.7 per cent. "It is a matter of concern that the manufacturing sector has not shared in the dynamism of the economy not just in the Eleventh Plan, but even in preceding Plan periods. As a result, the share of the manufacturing sector in GDP is only 15.0 per cent in India, compared with 34.0 per cent in China and 40.0 per cent in Thailand. The slow pace of growth in the manufacturing sector at this stage of India's development is not an acceptable outcome. Manufacturing must provide a large portion of the additional employment opportunities as opposed to agriculture for India's increasing number of youth. On the contrary it should be releasing labour which has very low productivity in agriculture to be absorbed in other sectors." : *Approach Paper to the Twelfth Plan (2012-2017),* PLANNING COMMISSION OF INDIA, GOVERNMENT OF INDIA (Dec. 2, 2011), http://planningcommission.gov.in/plans/planrel/app11_16jan.pdf.

can be reduced or altered. Thus, a "solution to the fairness-flexibility conundrum is not only in changes in laws but also in building and strengthening institutions".[63]

In November 2011, the Cabinet, amidst political furore, opened doors for foreign direct investment (FDI) up to 51 per cent in multi-brand retail and simultaneously increased the FDI limit in single-brand retail ventures to 100 per cent, much beyond its February 2006 decision to permit 51 per cent FDI in single-brand retail.[64] The decision to allow FDI in multi-brand retail, though on hold as of now, would create conditions of imbalanced competition, with the large foreign retail investors exploiting their vast resources and sourcing capacities to outmanoeuvre the small manufacturers and retailers, an immediate consequence of which will be the loss of employment for millions in the formal and informal sector, contrary to the Government's allegations of job-creation.[65] This could create an unlevel playing field between international brands, such as Wal-Mart, and established local garment brands, where one concern is the inability of the latter to match the economies of scale enjoyed by the former. Unable to compete with the prices, variety and quality afforded by the global brands, domestic garment manufacturers and retailers would be gradually weeded out from the indigent market for garments. Moreover, there is also the threat that such large multi-brand retailers source their products from other (cheaper) Asian countries into India, a situation which would spell doom for the local manufacturers keen to tie in production processes with these firms.

[63] *Id*, at 82-83, ¶8.10-8.11.

[64] *Cabinet opens doors for 51% FDI in multi-brand retail*, THE BUSINESS LINE (Nov. 24, 2011), http://www.thehindubusinessline.com/industry-and-economy/marketing/article2656952.ece.

[65] *Misplaced obsession*, THE HINDU (Nov. 28, 2011), http://www.thehindu.com/opinion/editorial/article2665876.ece#.;C.P. Chandrasekhar, *The retail counter-revolution*, THE HINDU (Nov. 30, 2011), http://www.thehindu.com/opinion/columns/Chandrasekhar/article2672067.ece.

In the midst of increasing competition from other countries, particularly Bangladesh and Cambodia,[66] it appears that garment exports have ceased to hold as much importance as they once did. The Government, while extending TUFS (that provides Plan support for textiles through interest reimbursement and capital subsidy) during the 12th Five-Year Plan period, did not mention garment exports as core areas. Instead, the Textile Minister seems to suggest that the new focus area is *technical textiles,*[67] an industry expected to grow to Rs 1.4 trillion ($31.4 billion) by 2016-17, with the healthcare and construction industries as its prime consumers.[68] Whether this reflects a change in policy with respect to the Indian garment industry remains to be seen.

c) *International Policy on Trade in Garments* – International trade in textiles and garments has been an exception to the principles[69] of the General Agreement on Tariff and Trade (GATT), 1947 as amended in 1994.The Short Term Cotton Arrangement (STA) was concluded at the behest of US, in 1961, for a year. Textiles came to be acknowledged by GATT as a "special case". The STA was followed by Long Term Arrangement (LTA) which was in force from 1962 to 1973.

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[66]The textiles and clothing share in total exports exceeds 70 per cent in these two economies: Ratnakar Adhikari & Yumiko Yamamoto, *Flying Colours, Broken Threads: One Year of Evidence from Asia after the Phase-out of Textiles and Clothing Quotas*, (January, 2006), http://asia-pacific.undp.org/practices/poverty_reduction/publications/P1069.pdf.

[67]Technical textiles include textiles for automotive applications, medical textiles, geo-textiles, agro-textiles used for crop protection and protective clothing for fire fighters, bullet-proof jackets and space suits. *Infra.*

[68]*Technical textile sector to get capital subsidy in 12th Plan*, THE BUSINESS LINE (Aug. 25, 2011), http://www.thehindubusinessline.com/industry-and-economy/article2396848.ece.

[69]The GATT, 1947 proclaimed its main object to be the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce, by entering into reciprocal and mutually advantageous arrangements directed towards the same, GATT, Preamble (1947).

The Arrangement Regarding International Trade in Textiles, better known as the Multi Fibre Agreement (MFA) governed world textile and garment trade from December 1, 1974 until its expiry on January 1, 2005. It allowed developed countries to adjust to imports from the developing countries, which enjoyed the benefits of low labour cost and labour intensive manufacture, by imposing trade quotas on such imports. Post-MFA, textiles and clothing are integrated within GATT rules, having lost their 'special' status. The immediate effect of the expiry of quotas in the textile industry was a gain for developing countries and a loss for developed and semi-developed economies in Asia and EU.[70] However, there still exist substantial tariff barriers constructed by developed countries, to ostensibly protect their domestic market, as well as non-tariff trade barriers.[71]

The MFA era greatly benefitted Indian trade in textile and clothing; post-MFA, India is looking at ruthless competition from its low-cost Asian neighbours. Looking to opportunities in the vast Indian market, both EU and USA have offered India zero-for-zero tariffs. The new economic order requires, therefore, a combination of national as well as company strategy, where each (local) firm tries to outdo the other in order to emerge as the best *global competitor*.[72] With the threat of competition, India enjoys no assured market for its textile trade. This raises the rhetoric of the need for "timely action to relax various

[70]Ratnakar Adhikari & Yumiko Yamamoto, *The textile and clothing industry: Adjusting to the post-quota world* (Dec. 4, 2011) http://www.un.org/esa/sustdev/publications/industrial_development/2_2.pdf.

[71]*Id.*, at 198-200. Examples of these are regulatory measures, also called 'frictional barriers', through stringent regulatory or standard-based norms that make compliance either expensive or impossible (providing no revenue to the importing country but) adding to the cost of the exporter; and allegations of dumping, resulting in anti-dumping investigations.

[72]Samar Verma, *WTO Agreement on Textiles and Clothing: Impact on Indian Textile & Clothing Industry*, WTO AND THE INDIAN ECONOMY (G.K Chadha, Deep & Deep Publications ed., 2011). *See also* Eckart Naumann, *The Multifibre Agreement – WTO Agreement on Textiles and Clothing*, *in* WORLD TRADE ORGANIZATION: AN AFRICAN PERSPECTIVE MORE THAN A DECADE LATER 37, 39 (Trade Law Centre for Southern Africa, 2009).

policy constraints to increase the competitiveness of the domestic industries”.[73]

III. THE INDIAN HANDLOOM SECTOR

A Introduction

The handloom sector forms a precious part of the generational legacy and exemplifies the richness and diversity of our country and the artistry of the weavers. Tradition of weaving by hand is a part of the country's cultural ethos. As an economic activity, handloom is the second largest employment provider in the unorganized sector,[74] next only to agriculture.[75] There are 43.31 lakh handloom workers in India as of 2010.[76]

Indian handloom products range from coarse cloth to very fine fabrics from a variety of fibres such as cotton, silk, *tasar*, jute, wool, and synthetic blends. Each region has handcrafted textiles that are unique in design and style. What is woven is, however, inseparable from where and how it is woven, that is from the structure of production. There are independent weavers, weavers organized into co-operatives, and those working under master weavers.[77]

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[73]Rajesh Chadha et.al., *Phasing out the Multi Fibre Agreement: Implications for India* (Dec. 4, 2011), https://www.gtap.agecon.purdue.edu/resources/download/3505.pdf.

[74]NCRL, ¶7.22 (1991).

[75]Annual Report (2010-2011), MINISTRY OF TEXTILES, GOVERNMENT OF INDIA, at 135 (2011). 69 per cent of the handloom households undertake commercial production: Third Handloom Census of India. The Census also reflects a decline in the total number of weavers and weaver households, but an increase in the full-time weavers and also average person work-days; this, on the eve of the Twelfth Plan. *See also* Rajeev Shukla, *Census weaves rich handloom data*, THE ECONOMIC TIMES, February 7, 2011.

[76]Third National Census of Handloom Weavers and Issue of Photo Identity Cards to Weavers and Allied Workers (2009-10), at xxii (2010).

[77]Eleventh Five Year Plan, Vol. III, PLANNING COMMISSION, GOVERNMENT OF INDIA, ¶5.18 (2007-2012).

A large proportion of workers in these enterprises is self-employed and works out of his/her home. As a result, the entire family becomes integrated in the spinning or weaving work, thus making handloom weaving or spinning the occupation of the entire household. Working conditions and safety provisions are far from satisfactory. The wage rates are also considerably low.[78] However, there are also the wage-workers in this sector, primarily those who do not own looms of their own. These households are either engaged in hired weaving activities, and their members have to go to other locations with looms (like master weaver's premises, cooperative society work sheds or factories) to do the weaving activity; or these households undertake handloom allied work.[79]

A third of the total number of hand-looms in the country is concentrated in Andhra Pradesh and Tamil Nadu. Within the textile industry, the incidence of mechanisation is the lowest in the handloom sector; not much is required by way of capital for owning a loom and other incidentals; nor long training for operating a loom either.[80]

Handloom weaving is the mainstay of the artisan community, most of which is poor; 87 per cent of the handloom weavers/workers live in rural and semi-urban areas.[81] Nearly 39 per cent of the rural households engaged in handloom industry comprise the most vulnerable sections of the society.[82] It represents a classic case of an industry uprooted by technological change.[83]

[78]Report of the National Commission on Labour, ¶29.36 (1967).

[79]*Supra* note 76. "Nearly 33 per cent of the handloom worker households do not have looms."

[80]*Id.*, ¶29.37.

[81]Third National Census of Handloom Weavers and Issue of Photo Identity Cards to Weavers and Allied Workers (2009-10), at xxi (2010). Nearly 27.83 lakh handloom households are engaged in weaving and allied activities.

[82]Report of the National Commission on Rural Labour, ¶7.22 (1991).

[83]NCEUS, 2007b, ¶4.38.

However, the strength of the handloom sector lies in its regional diversity, community skills and the demand in the local markets.[84] The strength of the handloom sector, its tenacity in the face of unpredictable economic conditions, is the sole fount of its sustenance, and not pithy Government dole, as has been touted by various Centre-funded Committees.[85] This sector produces, however, the modern artefacts of a vanishing art, and is confronted with various problems, such as, obsolete technology, unorganized production system, low productivity, inadequate working capital, conventional product range, weak marketing links leading to accumulation of stocks at various levels etc.[86] It has, after decades of deterioration, been relegated to the base of the hierarchy of textile manufacturing.[87] Owing to the self-employed nature of work, there is not much scope for unionisation of weavers.

While the total production of cloth has increased by about 30 per cent between 1996–97 and 2004–05, the production of handloom sector has declined by about 23 per cent.[88] Recent reports of frightening starvation deaths in what were once economically prosperous weaving districts in Andhra Pradesh bring to the fore increasingly problematic issues of regulating the conditions of work and wage structures of these weavers, as well as theories on what caused them to take such drastic measures in the first place.[89]

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[84]K. Srinivasulu, *A Death Blow to Weavers?*, THE HINDU, March 28, 2000.
[85]*Id.*, quoting the Satyam Committee Report, "Generally the handloom weavers remain tradition- bound and are averse to change ... For more than five decades, the poor handloom weavers remained spoon-fed through Government schemes and they continue to look up to the Government for anything and everything."
[86]*Id.*, at 13.
[87]The NCSEW notes that "policy changes and technological developments in the organized sector affect the unorganized sector, often drastically." Report of the NCSEW, ¶42 (1988).
[88]Eleventh Five Year Plan ¶5.19 (2007-2012).
[89]*See also, Starvation deaths in Andhra Pradesh*, FRONTLINE (Jan. 02-15, 2010), http://www.frontlineonnet.com/fl2701/stories/19911206030.htm. K. Srinivasulu, *Handloom Weavers' Struggle for Survival*, EPW 2331-33 (1994). "The major crisis in 1991, which surfaced within months after the presentation of the 1991-92 budget,

B Conditions of Work

a) *“Ours is not the Loom Pit, it is our Grave Pit.”* – The condition inside the loom-shed (in many cases it is a residential place) is far from satisfactory. The sudden growth of the industry had its ill-effects not only on housing for men who ran the looms, but also on the space available for the looms. Handloom weavers face acute problems with regard to housing. Most of the handloom households live in *kutcha* (54 per cent) or semi-*pucca* (31 per cent) houses, and these are mostly in the rural areas.[90] In many places the walls are dilapidated, the lighting and ventilation inadequate, and the temperature oppressive, exposing the workmen to unhealthy and dangerous consequences. Some centres of powerlooms present the picture of industrial slums, with industrial waste littered on the streets.[91] Regulation of work hours is near impossible, and the workers end up putting in inhuman hours of work.

About 89 per cent of the weaver households earn a monthly income of less than Rs. 500 per month from weaving activity and only 11 per cent earn more than Rs. 500. However, more than one-third of households have reported monthly earning of even less than Rs. 100 per month. This includes 7 lakh households in Assam who do not make any earning from weaving activity.[92]

Outdated technology, low productivity and high cost are the characteristics of handloom sector.[93] Handloom sector has to face stiff competition from the mills and powerlooms, besides the problem of

was a direct consequence of the increase in the prices of 40-60-80 counts yarn from Rs 45 to Rs 115 per bundle of 4.5 kgs. Finding it unprofitable to continue production due to the price increase, many master-weavers discontinued production and as a result worker s were thrown out of employment and pushed into starvation, disease and death. Within a span of three months between September and November 1991, there were around 110 starvation deaths and suicides.”

[90]Third Handloom Census, at xxii.

[91]Report of the National Commission on Labour, ¶29.43 (1967). *See also* NCEUS 2007b, ¶4.52.

[92]*Id.*, ¶7.24.

[93]*Id.*, ¶7.40.

declining demand due to shift in consumer preferences in favour of blended and non-cotton fabrics.[94]

Access to raw materials is also a huge problem for this sector. Handlooms are dependent on the mill sector for yam supplies. The weavers generally have to pay prices which are about 30 per cent higher than that of yam produced by the composite mills for self consumption.[95] The disadvantage that the handloom sector suffers from in the textile market, given the stiff competition from powerlooms, is such that the prices of handloom cloth cannot be raised corresponding to the increase in the raw material prices.[96]

Access to credit amidst conditions of increasing debt, plunging demand and escalating raw material costs is another insurmountable problem for the handloom worker. NABARD provides refinance facilities to the State co-operative banks and Regional Rural Banks (RRBs) for financing requirements of primary and apex weavers' co-operative societies; however, the service charges levied by these institutions result in the doubling of interest rates for the artisans and societies. Further, most State handloom co-operative societies lift stock and reimburse weavers only on sale of products. This blocks the working capital for the weavers.[97] In some cases, like that of the Andhra Pradesh State Handloom Weavers Cooperative Society Ltd. (APCO), the society itself owed crores of rupees to weavers, which it was unable to repay on its collapse in 2000.[98]

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[94]*Id.*, ¶7.25.

[95]Report of the National Commission on Rural Labour, ¶7.38 (1991).

[96]The usual response of the master-weavers to such a situation (especially when the price rise is within the range of manageability) is to transfer the burden of the increase in the cost of production on to the weaver through a corresponding cut in the '*majdoori*' (wages). When the price rise is extraordinarily high, the master-weavers find it unprofitable to continue production: K. Srinivasulu, *Handloom Weavers' Struggle for Survival*, XXIX EPW No. 36 2333 (Sept. 3, 1994).

[97]Eleventh Five Year Plan, ¶5.23 (2007-2012).

[98]Asha Krishnakumar, *The Collapse of APCO*, 18 FRONTLINE, Issue 08 (Apr. 14 - 27, 2001), http://www.flonnet.com/fl1808/18080180.htm. APCO, who had been defaulting on its loans since 1998, since January 1999 APCO owed the primary

Deprivation of the weaver community has been deepened by the textiles policies of the Centre, which seek to liberalize, modernize[99] and privatize the industry, successfully marginalizing over 40 lakh handloom weavers who used to produce over 400 crore metres of cloth every year.[100] Modernisation brings with it powerlooms, that displace up to 12 handlooms, and jet and auto looms, that displace 40 powerlooms. The weavers, already facing a decline in product demand, thus also face the prospects of irreversible unemployment, what with alternative employment options limited in such (usually drought-prone) areas. The workers also grapple with extremely low levels of nutrition, and diseases and starvation. Such deprivation has also led to severe degradation of working and living conditions.

In most states, the weaver castes are listed among backward classes. They are socially and economically underprivileged and a high proportion of them live below the poverty line. As weaving does not provide continuous employment and adequate income throughout the year, most of the families seek employment in agriculture and allied activities or migrate to cities in search of employment.[101]

C Legislative and Policy Framework

a) *<u>"The weavers are not new to crises."</u>* – The Indian handloom sector has been the recipient of unsympathetic and technology-driven policy ever since Independence. Adverse Government policies, all aimed at modernisation of the handloom, begun as early as the Nehruvian era, when the Kanungo Committee, 1952 stated: "For the ordinary cloth,

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cooperative societies Rs.36.26 crores for the purchase of cloth and Rs.10.32 crores for procuring yarn. As a result of these dues, and the interest of 8.5 per cent on the loans taken from the district cooperative banks, most primary societies have collapsed. More recently, NABARD has granted a loan of Rs 10 crore to APCO. *See also APCO gets Rs 10 cr for revival of handloom sector*, THE BUSINESS LINE (Mar. 29, 2012), http://articles.timesofindia.indiatimes.com/2012-03-17/hyderabad/31204303_1_handloom-cluster-handloom-hub-handloom-industry.

[99]The TUFS does not cover cottage industries, and so more traditional weavers cannot modernize their looms.

[100]*Supra* note 96.

[101]Report of the National Commission on Rural Labour, ¶7.27 (1991).

the pure and simple handloom is and must be a relatively inefficient tool of production. With the exception of those items which required an intricate body pattern, there seemed to be no variety of fabric which the handloom industry could produce in a better quality or at a lower price. A *progressive conversion* of handlooms into powerlooms through organised effort over a period of 15 to 20 years is, therefore, recommended." (emphasis added)

The extreme undesirability of such an attitude towards the traditional pit loom systems of weaving is reflected in the fact that the 'conversion' of a *handloom*, made of wood, into a *powerloom,* made of cast iron, is not possible; the true import of the Committee's recommendation was 'replacement' of one by the other.[102]

The Government's 'protective' measures to save the handloom sector from the unequal competition from powerloom & mill sector include:

i. Reservation of certain products for handlooms.

ii. Restriction in expansion of the capacity of the mill sector.

iii. Imposition of a cess on the production in the large Industry.[103]

The first product reservation order under Essential Commodities Act for traditionally produced handloom products was made in April, 1950. The loopholes in the Act and half-hearted enforcement defeated its purpose. The power looms poached even on those exclusive products like coloured sarees, checked shirting, *lungies* and bed sheets.[104] Thus, we see that in an attempt to protect the handloom weavers from the mills, the Government in its haste did not spare thought to check the powerloom sector, which quickly rose to prominence.

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[102]Vijaya Ramaswamy, *Silencing the singing looms*, THE BUSINESS LINE (January 29, 2001), http://www.thehindubusinessline.in/2001/01/29/stories/102969a6.htm.
[103]Report of the National Commission on Rural Labour, at ¶7.36 (1991).
[104]*Id.*, ¶7.37.

The Santanam Committee, 1974, on the inter-sectoral changes in the textile industry had estimated that the installation of one powerloom displaces 12 handloom weavers, and that, therefore, the growth of powerlooms had been disastrous for the handlooms.[105] The 'Janata Cloth Scheme' was started during 1976 with the twin objectives of providing sustained employment to the under-employed/unemployed handloom weavers and making available cloth (cotton dhoties, lungies, sarees. shirting and long cloth) at affordable prices to the poorer section of society.[106]

In 1985, the National Textile Policy (NTP), 1985, was introduced. Though this policy intervention was intended to protect handlooms, its unintended consequence was the expansion of the powerlooms (the more "commercially viable" sector). The NTP proclaimed as its main object, 'the production of cloth of acceptable quality at reasonable prices to meet the clothing requirements of a growing population' and promised the following measures to the handloom sector:

i. modernisation of looms to improve handloom productivity and quality;
ii. necessary measures to encourage and increase spinning in *khadi* sector, given its large employment potential;
iii. ensuring the availability of yarn and other raw materials at reasonable prices; and
iv. encouragement to the production of mixed and blended fabrics on handlooms by making man-made fibre adequately.

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[105]The Santanam Committee was more sympathetic to the woes of the handloom weavers. It proposed several changes to better their conditions, *inter alia*, bringing the excise duty on powerlooms at par with that on handlooms, strengthening weavers' co-operatives so as to make them a vital force in textile production and sales; and reservation of items for exclusive manufacture by the handloom sector. *Supra* note 102.

[106]The Central Government also introduced 'Susman Cloth' Scheme similar to that of 'Sulabh Cloth' Scheme to increase production of mixed and blended fabrics as well as the earnings of handloom weavers.

Soon after, the Handloom (Reservation of Articles for Production) Act, 1985 was enacted by the Legislature. Although it provided protection to handlooms in the form of reservation of 22 items and the hank yarn obligation by the spinning mills to supply 50 per cent of the yarn produced by them to this sector, these safeguards were grossly violated in practice.[107] Challenged by the powerloom and mill lobbies, this Act remained *sub judice* for eight long years[108] till the Supreme Court upheld it as constitutionally valid in a historic judgment in 1993.[109] Instead of creating the necessary mechanism for its successful implementation, the Central Government constituted a review committee to go into the question once again. On the basis of its recommendation, the number of items was reduced by half. During this period, the mills and powerlooms did all the damage they could to this sector, by producing the varieties reserved for this sector and also duplicating the designs that define the identity of the sector.[110]

[107]"Though mills are required to produce 50% of the yarn output meant for market delivery in the form of yarns, this obligation is not faithfully carried out. Thus, physical availability, prices and also the quality of yarn are pitted against the handloom sector." Report of the National Commission on Rural Labour, at ¶7.39 (1991).

[108]The Abid Hussain Committee (1985) recommended that the reservation for handlooms be placed in the Ninth Schedule of the Constitution in order to avoid the legal challenge to this legislation. *See*, for instance, G.T.N. Textiles Ltd. & Anr. v. Assistant Directors, R.O.T. Commr. & Anr., AIR 1993 SC 1596.

[109]Parvej Aktar & Ors. v. Union of India & Ors., 1993 SCR (1) 803.

[110]Report of the National Commission on Rural Labour, at ¶7.35 (1991). "The textile mills who were under obligation to supply fixed percent of controlled cloth resented and pleaded that it was not viable and was resulting in sickness of industry. Its imposition on handloom sector has turned out to be counterproductive. Hence, the scheme should be modified so that handlooms can also produce value added fabrics." The hank yarn obligation was never fulfilled entirely; delivery though required at 50 per cent of production, ranged from 22-24 per cent in the wake of the policy. Reasons for this failure were identified by the Abid Hussain Committee as two: first, diversion of the yarn to the powerloom sector, and second, mismatch between the yarn supplied and the yarn required by the weavers. The yarn supplied, more often than not, did not meet the requirements of the handlooms (i.e., of specific count and quantity).

The Mira Seth Committee, which surveyed the state of the industry in the 1990s, pointed out that however hard the Government tried to stem the tide against handlooms, powerlooms had corroded into the traditional sector and also dominated the co-operatives.[111]

The 1991 shift to liberalization and devaluation of the Indian Rupee led to a desperate attempt by the Centre to boost exports, irrespective of yarn production and domestic requirement.[112] Post-liberalization, the Satyam Committee divided weavers on the basis of the 'quality' of cloth produced into three tiers. In the first tier are grouped the weavers 'producing unique, exclusive, high value-added items', in the second tier producers of 'medium- priced fabrics and articles from not-so-fine counts of yarn' and in the third tier those producing 'plain and low cost textile items'. There was no attempt to estimate the proportion of each tier either in terms of production of fabric or the volume of employment: it is simply assumed that the third tier comprises the bulk of weavers producing coarse fabric and by implication the less skilled lot of the handloom weavers. The items produced by this last category of weavers, it is presumed, enjoy no market demand and have survived only due to Government support.[113]

As a result of trade liberalization, there was a quantum jump in the exports of cotton and yarn in the early 1990s, leading to steep rise in the hank yarn prices in the local market without corresponding increase in product prices. Therefore, a number of master handloom weavers refused to take the risk and suspended production. Thus, thrown out of employment and into serious indebtedness, malnutrition and disease, around 200 weavers either died of starvation or resorted

[111] *Supra* note102.
[112] Yarn export rose from 94.68 mn kgs in 1990-91 to 110.99 mn kgs in 1991-92 when yarn production as a matter of fact decreased from 1,510 mn kgs to 1,450 mn kgs. A matter of serious concern is that in these exports the proportion of hank yarn, most of it being in low counts, as 86.8 per cent. K. Srinivasulu, NTP, quoting from *The Economic Times*, 11 April 1994.
[113] *Supra* note 96.

to suicide.[114] A study in Karimnagar district, Karnataka, where over 43 powerloom deaths took place in 1999-2000, showed that average annual household income among the weavers was Rs. 3,687 as compared with the poverty line limit of Rs. 4,819.[115]

The Textile Policy, 2000 put in place far-reaching changes as proposed by the Satyam Committee, 1998, thus phasing out even the limited protection available to the handlooms.[116] It promises a global market for textiles; a rapid technological revolution in the production sector, especially in loom upgradation; and more employment and better living conditions for weavers. However, the extremely vital issue of energizing latent handloom cooperatives finds scant mention in this 'growth-oriented' policy.[117] Customs on modern powerlooms were reduced from 15 to 5 per cent and a TUFS subsidy of 50 per cent on machinery was also provided. Big and modern powerlooms have set up composite looms and adopted an integrated production system, incorporating all allied activities such as warping, spinning, weaving and dyeing.[118]

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[114]K.Srinvasulu, *Weavers' woes in AP*, THE HINDU, April 26, 2001, https://frontline.thehindu.com/other/article30218687.ece.

[115]Asha Krishnakumar, *Weavers in distress*, 18 FRONTLINE, Issue 08 2 (April 2001). The Minister for Handlooms and Textiles, Karnataka, where over 400 starvation deaths and suicides occurred between 1998-2000, was even quoted as saying, *The powerloom owners must be discouraged from committing suicide as they do it only after getting into a financial mess.*

[116]The official response to the Handloom crisis has usually been: i) The problem is localised; ii) The handloom weaver community lacks skills and their products lack quality; and iii) In order to make them competitive, technology Upgradation and skills-training are imperative. This misdiagnosis leads to spurious solutions: *Supra* note 114.

[117]*See, Garment sector dereserved: Textile policy focus on FDI flows, modernisation*, THE BUSINESS LINE (Nov. 3, 2000), http://www.thehindubusinessline.in/businessline/2000/11/03/stories/14036901.htm. The NTP was heralded as a "death blow to the millions of weavers across the length and breadth of the country": *Supra* note 84. *See*, *Powerloom sector hails textile policy*, THE BUSINESS LINE (Nov. 6, 2000), http://www.thehindubusinessline.in/businessline/2000/11/06/stories/140669uy.htm.

[118]*Supra* note 96.

The policy of treating powerlooms on par with handlooms (both being decentralised) in the matter of fiscal and excise concession and exemption from factory laws encouraged the mills to set up powerlooms in a phenomenal way. Since 1961, the number of powerlooms multiplied tenfold—from 1 lakh to 10 lakhs. The policy of ban on the weaving capacity of the mill sector was lifted in 1985 (the Textile Policy of 1985) causing an adverse effect on the handloom sector.[119]

Other smaller policies also contributed their share in worsening the weavers' lot: sharp increase in yarn prices, steep increase in power tariff, Technology Upgradation Fund Schemes' concessions bypassing the small and traditional powerlooms, let alone weavers, as also dumping by China and Thailand countries, all led to a fall in the market for these textiles.

The unkindest cut of all for the handloom sector is the pronouncement by policy-makers that they wish to develop the 'exclusiveness' of handlooms for the global market. The varieties that made Indian textiles so 'exclusive' – *jamdani*, *jamewar*, *mashroo* or *telia* – can be woven only on the handloom. All these varieties demand manual intervention to the extent of change of shuttle in every pick. Loom conversion, technology upgradation and computer designs render any statement on the *exclusiveness* of Indian loom products, farcical.

In 2006, the Prime Minister of India launched the 'Handloom Mark' as a part of its brand promotion campaign for handloom products. The Mark serves as a guarantee to the buyer the handloom product being purchased is a genuine hand-woven product and not a powerloom or mill made product. This marketing strategy is to be supported by the Geographical Indicators (GI) protection to avoid imitation of these designs.

[119] *Supra* note 95.

Thus, the Government's policy towards the handloom sector has been to synchronize it with its own neoliberal aspirations, with grave omission to comprehend its true nature. The projected creation of a `globalised weaver' is an oxymoron rooted in the inherent contradictions of the textile industry – between powerlooms and handlooms, between fast-paced technology and the slow-paced excellence of the handloom weaver.[120] The handloom industry in India survived with remarkable tenacity all the troughs and crests of manufacturing policy because it serviced the demands of local consumers. In fact, the great diversity in handloom products of one region from another's is due to variations in local demand that caused the product to be modelled in highly unique fashions. Some have even gone so far as to say that the market for handloom products cannot be understood or determined by mere forces of demand and supply.[121]

The song of the loom has been reverberating in Indian craft-culture for 2,000 years; however, technology and globalisation, in tandem with governmental policies, threaten to silence these looms forever. Indian policy toward the handloom sector has always claimed to be protectionist, when in fact, it has consistently advocated technological upgradation of the traditional wooden handloom into an electricity-powered mini-machine. Sixty years of Independence have yet not taught the simplest lesson: mechanization, or 'technological advancement' of the old looms, displaces the weaver. The difference between the method of work of a handloom worker and powerloom worker is as much a comparison between a tailor who sews by hand and one who stitches clothes on the factory-machine. By treating the handloom sector as tantamount to the powerloom and jetloom sectors,

[120]Vijaya Ramaswamy, *Silencing the singing looms,* THE BUSINESS LINE (Jan. 29, 2001), http://www.thehindubusinessline.in/2001/01/29/stories/102969a6.htm. *See also* Asha Krishnakumar, *Perilous policies*, FRONTLINE, Vol. 18 (April 2002), http://www.frontlineonnet.com/fl1808/18080170.htm.
[121]K. Srinivasulu et.al., *Proceedings of the Workshop on Crisis in Handloom Sector in Andhra Pradesh: The Ways Forward*, GAPS – CENTRE FOR ECONOMIC AND SOCIAL STUDIES, 11 (Sept. 2004).

the Government only vitiated the effect of its stated protectionist stance. Suggestions for a new form of protection to this sector are discussed later.

IV. CONCLUSION

The dominant trend in the textiles and garments industry in the last two decades has been the decline of the organised mill sub-sector and the rise of the 'unorganised' powerlooms, hosieries and garment manufacturing units.[122] The problems of the weaving industry have often been seen as an issue of handlooms versus powerlooms. This is no longer valid. With liberalization, globalization and structural adjustment of the economy, the issue is now one of the *small and vulnerable* versus the *big and strong*.

The step-motherly treatment of handlooms, one of the oldest and most unique occupations in the country, is evident when one looks at the *sheer amounts of taxpayers' funds* that have been invested to modernize *growth-oriented* industries.[123] This, compared to the handloom policy: *reliance on a meremark* and *geographical indications* to create effective demand for these products, with some concessions here and there.

In the Budget 2011-12, the Government had announced a loan waiver package of Rs. 3,000 crores, which was expected to benefit 15,000 handloom weavers' cooperative societies and 3 lakh handloom weavers, who had been unable to repay their loan on account of

[122]Study Group on Women and Child Labour, SNCL (2001).

[123]"As a result of a mixture of initiatives taken by the government, there has been new investment of Rs.500 billion in the textile industry in the last five years. Nine textile majors invested Rs. 26 billion and plan to invest another Rs. 64 billion. The industry expects investment of Rs.1,400 billion in this sector in the post-MFA phase." N. Senthil Kumar & P. Subburethina Bharathi, *Indian Textile Industry: Sea of Potential Opportunities*, II INDIAN JOURNAL OF COMMERCE AND MANAGEMENT STUDIES, No. II 2 (Mar. 1, 2011).

economic difficulties.[124] However, a large number of weavers operate as self-employed persons, and this fund would not do much to benefit them.

Instead of developing elaborate "handloom packages" and restructuring "technology upgradation schemes", the Government should act upon the knowledge that the real solution is in assured supply of yarn and dyes at reasonable prices, accessibility to institutional finance so that they can escape the debt trap, and proper marketing facilities, rather than disastrous schemes such as loom modernisation.[125]

It is strange to note the Ministry hailing technical textiles as the new saviour of the export-oriented textile industry in India. The Eleventh Plan seems to be the last refuge of the ailing garment industry; with the Eleventh Commandment of *export-oriented growth* declaring the garment industry diseased and non-competitive, India's policy seems to be shifting towards other, more lucrative avenues. Perhaps this tilt was imminent, seeing that India's biggest trade competitor, China, boasts of a 13.75 per cent percent share in global exports, while India's share is a measly 3 per cent.

With the rise and fall of these industries, one can reasonably expect the unorganized workforce operating these to feel the blows of unfriendly trade policy. Any suggestion to better the conditions of these workers rests on Executive will. Legislation will only serve to add to the bulk of disregarded statute books. In the absence of these, one can only seek the Judiciary as its harbinger of hitherto elusive Justice. Resort to such elevated, disagreeable institutions is not possible without the *collectivization of the workers*. Which brings one

[124]P. Sunderarajan, *Rs.3,000-crore package for handloom units*, THE HINDU (Feb. 28, 2011),
http://www.thehindu.com/business/Industry/article1498385.ece.
[125]*Supra* note 114.

back to the oft-repeated[126] conclusion: unorganized workers must unionize themselves into a collective if they are to better their conditions of work. In the absence of such an effort, they remain isolated and more vulnerable to the whims of a ruthless global village.

Handloom workers today appear to be the most vulnerable class of workers; their vulnerability is compounded because, on account of being self-employed, no employer can be identified, and thus, minimum working conditions and social security remain an impossible, dream. From wages to ventilation, their plight is sadder than that of bonded labour, seeing that they have (through ancestry or will) bound themselves to their decrepit occupation. Their condition cannot be ameliorated by enforcing labour laws against any one employer; rather, it is the cruel hand of successive Governments that have allowed the principles of socialism to rust beyond salvage. In a sense, the ruthlessly fierce policies of neo-liberalization have corrupted Indian economic foresight to the extent that the twenty-first century is gearing to witness the annihilation of the traditional weaver-artisan class: the third assassination of Gandhi.[127]

In 1991, when the first spate of handloom weavers' suicides occurred in Andhra Pradesh, the late Pragada Kotiah, Member of Parliament from Chirala in Andhra Pradesh, stressed the need for the revival of ancient designs.[128] The *revival of ancient designs*, backed by

[126]"The Commission feels unless the workers in these sectors whose need for unionization and protection is the greatest, are brought into the mainstream of the labour movement, the latter has very little relevance for them. It is high time the major labour unions took the labour of the unorganized sector in their fold and extend their trade union knowhow in bringing better income and social security to them." Report of the National Commission on Self Employed Women and Women in the Informal Sector, at ¶8.21 (1988).

[127]The first being a historical fact, while the second being the policy and legislation of 1985.

[128]Reports suggest that numerous ancient designs are to be found at London's Victoria and Albert (V&A) Museum, the world's largest repository of the oldest and most varied designs and textile pieces: *India must revive designs and textures*, 19 FRONTLINE Issue 14 (Jul. 06 - 19, 2002), http://www.flonnet.com/fl1914/19140780.htm.

aggressive marketing in both the Indian and international markets would greatly aid the cause of millions of starving weavers in India. Judging the impact of Indian fashion designers in international fashion shows, the policy-makers must devise new strategies of *using home-bred art to create and channel global demand in the fashion retail sector* as also save the weavers and their centuries' old craft from extinction.

Since the organs of the State are incapable of rectifying the situation as it stands, suffering from a variety of ill affections, as a solution, the author suggests the *introduction of a national-level, distinct statute* protecting the *human* rights of the handloom workers, promoting their occupation and integrating the same within the Plan framework. Such a measure is essential in the light of decades of executive and legislative thrusting of the handloom industry towards technology modernization and skill upgradation. However, legislation such as this must be enacted at a national level, so as to holistically and uniformly improve the lot of the 4.3 million strong workforce, across regional disparities and local governments' political inclinations. It must be underscored that the case of the handloom workers is not merely one of poor working conditions or even inadequate wages; it is the systematic, 'Planned' annihilation of one of the oldest and most widespread occupation of the country. It is important to internalize and distinguish this eradication from a mere deterioration of the mainstay of millions of Indian workers.

Moreover, the work done by the weaver is almost the persistence of intense manual labour in a world of increased mechanisation. It may, therefore, be an over-simplification to treat her wages, working conditions, skills, etc. at par with those of ordinary factory workers. The author proposes that the wage-fixing mechanism take into account the detailed and intricate nature of the weaver's work before stipulating minimum wage.

The handloom workers of India have been deprived of their right to development, "... an inalienable human right by virtue of which every human person and all peoples are entitled to participate in and contribute to and enjoy *economic*, social, cultural, and political development in which all human rights and fundamental freedoms can be fully realized"[129], that a group of persons (as opposed to individuals) are entitled to. In a similar context, Upendra Baxi says that 'development' must at least mean that people will be given the right to be and remain human. Total and continuing destitution and impoverishment exposes people to a loss of their humanity. In no society that takes its human rights seriously should there be allowed a state of affairs where human beings become sub-human – that is, when they perforce have to surrender even those sonorously recited "inalienable" rights of man.[130]

It is in this context that we must understand the entitlements of the millions of handloom workers, facing starvation, indebtedness and obsolescence in today's mechanised production system. A system of 'perfect obligations' would impose a duty on the State to ensure regular access to credit (and not debt-/interest-waivers), raw materials, and aggressive marketing strategies, not in *technology upgradation*. However, herein lies the problem: who will bell the cat?

It must be noted, to conclude, that a system of perfect obligations for the handloom sector workers, while theoretically appeasing and long overdue, remains practically unfeasible due to political disinterest. Such disinterest can, perhaps, be traced to the lack of contribution from this sector to the State exchequer, unlike the garment sector.

[129]Declaration on the Right to Development, art.1 (1986), United Nations General Assembly, Resolution No. 41/128, as affirmed by the 1993 Vienna Declaration and Programme of Action. *See also*, Arjun Sengupta, *The Right to Development as a Human Right*, 13 HUM. RTS. Q. 322-38 (1991) 322, 322–38; Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 HARV. HUM. RTS. J. 137-168 (2004).

[130]Upendra Baxi, *From Human Rights to the Right to be Human: Some Heresies,* RETHINKING HUMAN RIGHTS 187 (S Kothari and H Sethi ed., 1989).

However, the needs of the handloom workers are far more basic to their right to be and remain human than the needs of the garment workers. This is not to say that the conditions of work in the garment sector are satisfactory, but instead, to focus on the intense and perennial deprivation of the weaver community that needs a set of entitlements far more integral to their *survival* than mere regulation of working conditions.

OPTIONS OR NO OPTIONS – AMBIGUITY IN FDI POLICY

Jitendra Soni[*] *& Kanad Bagchi*[**]

ABSTRACT

Foreign Direct Investment is essential for any developing economy for two reasons. First, it brings much needed capital to the target country, on a long term basis to finance various big ticket projects, which is suitable for swift economic development. Secondly, Foreign Direct Investment by big Multinational Corporations is an important channel for the access to the most advance technologies by developing countries. Given this importance, a country to attract foreign investors should have incentives as well as safeguards in place to protect the investments. Incentives could be in the nature of high and consistent returns and a stable framework on economic and industrial policies. Safeguards are usually provided in terms of exit mechanisms including the most commonly used put/call options. This article is written in the backdrop of the recent decision by RBI to allow build-in options in FDI instruments subject to certain conditions. Mindful of the importance of FDI in the growth and

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development of any economy, the authors in the present article critically analyze the proposed policy framework as suggested by the RBI and the Government. In this process, the article also addresses some of the ambiguities and uncertainties in the proposed framework. It is submitted by the authors that certain clarifications are imperative so as to make the policy comprehensible and coherent.

I. INTRODUCTION

Over the years, offshore financial and strategic investors have executed investment agreements with Indian entities, containing a secured exit arrangement. Typically, the exit mechanism includes an initial public offer (IPO), buy back of shares by the investee company, Offer for Sale, Put/ Call Option or tag along /drag along rights.[1] However, given the fact that IPO is not a commercially viable exit mechanism in a volatile market like India, the investors have relied upon put option for their exit. It is interesting to note that eight out of ten Private Equity Investments and Foreign Direct Investments contain a put option[2] wherein the investor has a right/option but not an obligation to sell the shares to the promoter of the investee

[1]Soma Bagaria, *Exit Options in Equity Investments in India: Recent Issues on Legality*, VINOD KOTHARI CONSULTANTS PRIVATE LTD PUBLICATIONS (May 12, 2012), http://india-financing.com/EXIT_OPTIONS_IN_EQUITY_INVESTMENTS_IN_INDIA_RECENT_ISSUES_ON_LEGALI TY.pdf.

[2]Sugata Ghosh, *Stake in local companies: RBI refuses special rights to foreign investors through FDI*, THE ECONOMIC TIMES (May 15, 2012), http://articles.economictimes.indiatimes.com/2012-01-09/news/30607349_1_fdi-deals-inflows-department-of-industrial-policy.

company in case of happening of certain triggering events.[3] This standard international practice has been followed in India for several years until the recent changes in the stance by the Indian regulatory authorities infused ambiguity in the policy framework.

With this background, this note seeks to address the issues arising out of changed regulatory positions and critically review the proposed regulatory framework for put options on FDI Instruments. Before navigating the terrain, it is imperative for us to have its clear map in our minds. For this purpose, this note has been structurized into three parts. First part will acquaint the reader with the background to the issue in hand. Thereafter the note would proceed to critically analyze the policy framework suggested by the Government in consultation with the Reserve Bank of India to address the investors' grievances. The last part would conclude suggesting the shift in the approach of the regulators for the effective regulation of these genres of instruments.

Given the breadth of this topic, it is rather imperative on the part of the authors to clearly define the scope and extent of their discussion. It should be understood that in India, the validity of put and call options is not a matter distinct only to FDI regulations, add to it, it remains an enthusiastically debated topic in the realm of corporate and securities legislation as well. From the perspective of capital market regulator SEBI, the pre-agreed buyback of shares through put/call option is a *'contract in derivative'* and not a spot-delivery contract.[4] Under Securities Contract Regulation Act, 1956, such

[3] Norman Menachem Feder, *Deconstructing Over-The-Counter Derivatives*, 3 COLUM. BUS. L. REV. 677, 692 (2002); PHILIP WOOD, LAW AND PRACTICE OF INTERNATIONAL FINANCE 431 (University Edition); D. Gordon Smith, *The Exit Structure of Venture Capital*, 53 UCLA L. REV. 315, 349 (2005).

[4] SEBI Letter No. CD/DCR/TO/BV/OW/9093/2011 dated Mar. 18, 2011 to Cairns India Limited; Informal Guidance Letter No. CFD/DCR/16403/11, dated May 23, 2011 issued to Vulcan Engineers Limited under the Interpretative Letter under SEBI (Informal Guidance) Scheme, 2003.

contracts would be thus valid only if traded on stock exchange.[5] These views of the regulator sparked a spirited debate between the proponents and critics of the put/call options in the securities of Indian companies.[6] The issues involved therein are much complex and deserves an in-depth analysis that runs beyond the contours of this note. Moreover, the enforceability of contractual restrictions on the transfer of shares[7] is yet again an interrelated aspect which requires a comprehensive review of the judicial pronouncements, and thereby makes such discussion beyond the scope of this note. As a matter of caution, it is not the view of the authors that the developments in the aforementioned areas are insignificant to the current discussion. Instead, the authors are of firm opinion that at times when investors are hunting for stability and uniformity in the investment environment, a coherent understanding of the investors' privileged options and its operation in the interdependent spheres of corporate law, securities law and FDI Policy is much needed. A uniform stance of the regulators and the judiciary will likely make India a preferred destination for foreign direct investment. Having said that, the present note confines itself to the issues pertaining to enforceability of put/call options under the extant FDI Policy of India and an attempt has been made by the authors to bring on forefront the issues worthy of most anxious consideration.

II. GENESIS OF THE DEBATE

The spark, which ignited the debate, was the issue of notification by RBI wherein it placed an explicit bar on any kind of built in

[5]Securities Contract Regulation Act, § 18A (1956); SEBI Notification No. S.O. 184(E) §16 dated March 1, 2000 issued under SCRA.
[6]Umakanth Varottil, *Investment Agreements In India: Is There An "Option"?*, 4 NUJS L. REV. 472 (2011).
[7]V. Niranjan & Umakanth Varottil, *Enforceability of Contractual Restrictions on the Transfer of Shares*, 5 SCC J-1 (2012).

optionality in FDI instruments.[8] In the opinion of the regulator, routing of such intrinsically debt-like instruments through FDI was circumventing the regulatory framework for debt flows in the country.[9] Guided by such approach, till the mid of the year 2011, RBI had been raising objections against the issue of securities which were debt or quasi debt in nature, like convertible debentures, optionally convertible bonds, compulsorily convertible papers and preference shares.[10] Of lately, there was a sudden shift in the approach of RBI and consequently, a whole range of deals, including even plain equity investments, containing put option came into RBI's scanner and several notices were issued by the regulator against such investments.[11]

A RBI's Stance on Options in FDI Instruments

RBI's approach has been rather on a case to case basis with respect to put options forming part of investment agreements. In essence, the objections of RBI were based on two grounds. *First*, the put option accords safe exist to foreign investors. To the extent it takes away the risk factor attached to an equity investment and assures their exit at a guaranteed price, it qualifies to a debt instrument and therefore it needs to comply with ECB Guidelines.[12] *Secondly*, it was asserted that sellback rights in the form of a put option amounts to one-to-one derivate deal.[13] Under extant laws, since equity derivatives can be

[8]A.P. (DIR Series) Circular No. 73 and 74, dated June 8, 2007.
[9]*Id,* at 1 ¶2.
[10]Sugata Ghosh, *Foreign investors, PEs may not be able to exit easily,* THE ECONOMIC TIMES (May 15, 2012), http://articles.economictimes.indiatimes.com/2011-05-30/news/29598753_1_indian-firms-foreign-equity-private-equity.
[11]*Id;* Shraddha Nair & Khushboo Narayan, *Regulators frown at put option mode of exit,* LIVE MINT (May 17, 2012), http://www.livemint.com/2011/08/14230735/Regulators-frown-at-put-option.html.
[12]Anup P. Shah, *Are Options an Option?,* BOMBAY CHARTERED ACCOUNTANTS' SOCIETY – THE KNOWLEDGE PORTAL (May 10, 2012), http://bcasonline.org/articles/artin.asp?1026.
[13]Priti Suri & Ankush Goyal, *Regulatory conundrum over put and call options*, INTERNATIONAL LAW OFFICE'S CORPORATE FINANCE/M&A-INDIA SEGMENT, Issue

traded only on stock exchanges by investors registered with SEBI[14], such over-the-counter (OTC) contracts are illegal under law.[15]

B Industry's Stance on Options in FDI Instruments

On the other hand, the industry circles adversely reacted to such views of the RBI and categorically remarked their displeasure on two fronts. *First,* as far as the exercise of option is dependent on meeting of pricing guidelines, as applicable at the relevant time, and triggering event, these instruments cease to qualify as debt. Additionally, it was pointed out that the option was exercisable on the controlling shareholders and not on the company;[16] therefore it was not reasonable to infer borrower-lender relationship between the company and the investor. *Secondly*, it was asserted that put option in an FDI instrument cannot be treated at par with a stock option traded on exchanges for the reason that option and shares form the part of the same instrument in case of FDI unlike exchange-traded options, where options can be traded separately.[17]

C The Present Policy Framework

While the debate between the regulator and the investors was raging, the Department of Industrial Policy and Promotion (DIPP) issued the Consolidated FDI Policy 2011,[18] wherein it was reiterated that all instruments with in-built option of any type would not qualify as an eligible instrument of FDI.[19] This Clause received sharp responses from the industry and consequently, a Corrigendum was issued by the

IX (May 1, 2012), http://www.psalegal.com/upload/publication/assocFile/Regulatoryconundrumoverputandcalloptions.pdf.

[14]FMD.MSRG.No.39/02.04.003/2009-10 dated August 28, 2008; RESERVE BANK OF INDIA, Master Circular No. 15/2011-12 dated Jul. 1, 2011.

[15]*Supra* note 5.

[16]*Supra* note 6.

[17]Ruchir Sinha and Surya Binoy, *FDI Policy on Options in Equity Instruments Amended*, INDIA LAW JOURNAL 4 (2011).

[18]Vide Circular 2/2011 (September 2011).

[19]*Id,* clause 3.3.2.1.

DIPP deleting the above Clause.[20] Recently, the RBI and the Government decided to concur with the industry's sentiment and they agreed to mellow down the regulations to allow such in-built option, subject to certain compliances.[21] Since this policy framework will have a significant bearing on FDI in India, it is imperative to critically review the framework proposed by DIPP.

D The Proposed Policy Framework

In line with the policy mandate to attract long-term equity investments, a consensus was reached between the Government and the RBI to come with prudential norms to regulate this alleged misuse. As reported, the regulators are considering one formulation which will allow instruments with built-in options under FDI route, subject to certain conditions.[22] Apart from meeting terms and conditions under extant laws, the investment shall be made subject to a lock-in period of 3 years, separate disclosure requirement, and separate accounting treatment.[23] A plain perusal of these policy recommendations will illustrate that this framework, if given the force of law, will add more confusion rather than presenting an apt solution to the present policy imbroglio.

[20]F.No.5(19)/2011-FC-1 dated Oct. 31, 2011; V. Umakanth, *Reversal of FDI Policy on Options*, INDIAN CORPORATE LAW BLOG (Mar. 25, 2012) http://indiacorplaw.blogspot.in/2011/10/reversal-of-fdi-policy-on-options.html.

[21]Timsy Jaipuria & Rajat Guha, *RBI to be lenient on debt-like FDI,* INDIAN EXPRESS (May 10, 2012), http://www.indianexpress.com/news/rbi-to-be-lenient-on-debtlike-fdi/929388/0.

[22]*Id.*

[23]*Id.*

III. CRITICAL ANALYSIS OF PROPOSED FDI POLICY FRAMEWORK ON OPTIONS

A Ambiguity as to the Operation of Lock-In Period

It is understood that a lock-in period will ensure stability of investments in the economy and prevent quick exits. However, the fundamental question still remains unanswered as to the scope, extent and nature of such kind of restriction. It is unclear as to whether the said lock-in period will be applicable on the *'options'* and *'shares'* separately or the *'investment'* as a whole. This distinction becomes particularly important in the present case where it has been a constant opinion of the RBI that put options in FDI instruments are illegal as they are akin to derivative contracts under securities law.[24] Given the fact that the policy makers have not even remotely touched this aspect, it is submitted that there is no nexus whatsoever between the restrictions sought to be imposed and the object intended to be achieved.

Moreover, it is apprehended that in absence of a concrete definition of the term *'options'* clearly indicating the types of options to be covered under the proposed restriction, there are strong chances that the investors will remain suspicious as regards the enforceability of agreements containing an *'exit'* clause and this would ultimately hamper foreign direct investments in India.

As mentioned above, typically the exercise of such option is based on happening of certain triggering event. This event could be a default of the shareholders agreement, failure to meet certain obligation, provisions relating to deadlock resolution mechanisms, material breach of obligations of parties, failure to initiate an IPO, etc. It is asserted that the lock-in period will prejudice the rights of the other party to exit the arrangement on its default. In essence, such

[24] *Supra* note 9.

restriction hits the core of the concept of the freedom of contract wherein the party other than defaulting party will be left remediless on default. Alternatively, it is argued that the extant laws already ensure that any transfer of security from a non-resident to a resident, the pricing guidelines needs to be adhered to. It is our view that as long as pricing guidelines of FEMA are adhered at the time of sale, there is no reason whatsoever for the regulators to interfere in such transaction.

B The Proposed Policy Framework – Retrospective or Prospective?

If the policy reform is to be read in its present form, the language used therein, in no manner clarifies the prospective or retrospective operation of such change. In essence, the regulators have not clarified that whether the said proposals are in the nature of a new policy change or a mere clarification. If former is the case, then it is a step in the right direction, however, if it is the latter, regulators need to draw their attention on the possible effect of such policy on overseas investments made during past years, particularly in real estate sector.

It needs to be appreciated that in its retrospective application, such change will put investors in a position where their investments will be adjudged on the grounds of new policy. In event of non-compliance with these technical requirements, their Indian counterparts could claim to have no obligation to honour existing clauses, leaving investors with no option to exit. It is submitted that if an investor cannot exercise his legitimate right which he has under a private arrangement like this, capital inflows through foreign direct investment may dry up.

At this stage, it is important to note that as per the extant securities laws; *'put'* and *'call'* options in a JV Contract are valid. Authorization to use such options stems from Section 28 of the Securities Contracts Regulation Act, 1956 and the June 1961 Notification of the

Government of India.[25] Therefore, in this context, it is submitted that the present policy changes need to be appreciated in light of these laws. It is submitted that a unified approach would result in an investment friendly environment.

C Separate Disclosure for Options and Shares?

Other policy recommendation which draws our attention is the requirement of a separate reporting and monitoring mechanism of such instruments in the FDI reporting formats. This proposal again reflects the confusion as regards the policy intended to be brought in force. The contentious point here is whether the regulators seek to classify option itself as a separate instrument, distinct from the shares. If this is not the case, then there are no grounds available for the regulator to demand separate disclosure as regards the instruments which fall under the same class.

IV. CONCLUDING REMARKS

Over the years, it has been an unsaid custom to include *"options"* at the time of executing investment agreements. In *form*, inclusion of an option may look like a mere exit mechanism which is normally exercised to reduce risk attached with an investment, but in *substance* such clause ensures successful discharge of respective rights and obligations of the parties. It is asserted that it is the substance which needs to be appreciated and not its form. In this background, it is submitted that it is the exercise of option which needs to be regulated rather than prohibiting options *per se*. Consequently, unless and until industry receives clarification as to the precise, the net result of the policy recently proposed could have an unnerving effect on the number as well as the size of the foreign investments.

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[25]Notification S.O. 1490, dated June 27, 1961.

'WITHOUT PREJUDICE'AFTER OCEANBULK SHIPPING: A COMPARISON BETWEEN THE ENGLISH AND INDIAN POSITIONS OF LAW

Ramyaa Veerabathran[*]

ABSTRACT

The scope of the "without prejudice" rule has expanded prodigiously over the years, but so have the exceptions, permitted to the enforcement of the rule. Oceanbulk Shipping & Trading v. TMT Asia Ltd. &Ors introduces an unprecedented and seemingly drastic exception which shall facilitate the admission of "without prejudice" communications to aid the interpretation of contractual terms that they gave rise to. This paper critically analyzes the Oceanbulk ruling in the context of the evolutionary trend of the rule and submits that when the "without prejudice" rule is stripped down to the essentiality of its original purpose, the reasoning and effect of the judgment are not inconsistent with the objective of the rule. The latter part of this paper is a comparative exercise which asks the question - how would Occeanbulk be decided under Indian law? It is suggested that Section 23 of the Indian Evidence Act 1872, which is the embodiment of this rule in India,

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is framed in a manner that permits no exceptions and therefore, the case would be decided contrary to the United Kingdom Supreme Court's decision. Thus, the Indian "without prejudice" principle remains frozen in its original form, cast in 1872 form whereas in England the rule has evolved greatly.

I. INTRODUCTION

The law of evidence, an adjectival discipline, is intended to facilitate the goals of substantive law. This is why, the underlying objectives of substantive law such as the law of contract, give rise to certain rules of evidence tailored to fit them. The 'without prejudice' rule is one such. By barring the admissibility of evidence given up on the express or implicit condition of non-disclosure in a court of law, it aims to advance the objective of promoting settlement of disputes without litigation. Over the years, however, the expansion of the scope of protection given by the rule was accompanied by the carving out of numerous exceptions to the rule. *Oceanbulk Shipping & Trading* v. *TMT Asia Ltd. & Ors*.[1] tests the limits of such exceptions by introducing an unprecedented and seemingly drastic one; to allow the introduction of "without prejudice" communications to aid the interpretation of contractual terms that they gave rise to.

This paper critically analyzes the ruling in this case, in the context of the evolutionary trend of the 'without prejudice' rule and makes the case that when the 'without prejudice' rule is stripped down to its bare minimum (and original) purpose, the reasoning and effect of the judgment are not as surprising as it might appear to be at first blush. The latter part of this paper is a comparative exercise which asks the

[1]Oceanbulk Shipping & Trading SA v. TMT Asia Ltd. & Ors., [2011] 1 All ER (Comm) 1.

question - how would *Oceanbulk* be decided under Indian law? It is suggested that Section 23 of the Indian Evidence Act 1872 which is the embodiment of this rule in India, is framed in a manner that permits no exceptions and therefore, the case would be decided contrary to the United Kingdom Supreme Court's decision. Thus, the Indian 'without prejudice' principle remains frozen in its original form, cast in 1872 form whereas in United Kingdom the rule has evolved greatly.

The parties to this case, Oceanbulk Shipping and TMT Asia had entered into a series of forward freight arrangements ('**FFA**'), which were a type of contractual arrangement that facilitated hedging against market fluctuation, by enabling the parties to bet on the daily fluctuating rate for time charter of capsize bulk carriers, as per the Baltic Exchange Index. The seller bet that market rates would be lower than the contractual rate and the buyer bet vice versa. The FFAs involved in this case were contracted over May to December 2008 on a monthly basis. At the end of this period, due to unusually high volatility in the market in 2008, TMT Asia had incurred substantial liability under the FFAs. When TMT Asia failed to pay one installment due to Oceanbulk, they sought extra time in order to stave off the huge liquidated damages that were provided for in the agreement. Subsequently, both parties entered into "without prejudice" negotiations in order to amicably resolve the matter. The negotiations were partly in writing and partly oral, in the course of two meetings in June 2008. On 20th June 2008 the parties entered into a written settlement contract in which they agreed:

1. To crystallize 50 per cent of each FFA for 2008 based on the difference between the contracted rate and the average of the ten day closing prices for the Baltic market indices from 26th June 2008;
2. To co-operate to close out the 50 per cent balance of the open 2008 FFAs against the market on the best terms achievable by 15 August 2008.

The dispute in this case arose out of a disagreement between the parties as to the meaning of the second part. Both parties agreed as to the existence of the agreement, its terms and that all terms of the agreement are accurately recorded in the written settlement contract.

The issue that arose pertained to construction of the clause which stated that *"(the parties) will co-operate to close out"*.[2] Oceanbulk's contention was that the defendant had breached the second part of the settlement agreement because it failed to 'co-operate to close out' the balance of 50 per cent of the open FFAs for 2008 as agreed upon. In counter, TMT Asia's contention was that by co-operation, the parties had meant that TMT Asia would, upon Oceanbulk's request, assist Oceanbulk to contract with third parties to close out its opposite market positions, then Oceanbulk would close out those positions and the FFAs between Oceanbulk and Asia TMT would be crystallized at the rates agreed upon between Oceanbulk and the third party. Depending on whose contention is accepted, the closing-out process would be either a bilateral or trilateral process. TMT Asia's contention rested on the usage of the term 'sleeved' in the course of the negotiations, the meaning of which is not contested.

TMT Asia pleaded permission to adduce evidence in the form of two documentary and two oral representations made by Oceanbulk, of which one email and one oral statement were found to be "without prejudice" by the trial court.[3] Oceanbulk pleaded that reliance upon the communications is barred by the legal principle underlying "without prejudice" negotiations. TMT Asia pleaded estoppel against Oceanbulk, stating that the appellants were estopped from denying the *fact* that in the negotiations and the culminating contract, the parties were proceeding on the common assumption that the transactions were to be 'sleeved' by Oceanbulk. Hence, the question of law before

[2]Erich Suter, *The Devil's in the Detail: Interpreting Compromise Agreements After Oceanbulk*, ARBITRATION, 77(2), 274-279, 275 (2011).
[3]*Supra* note 1, ¶12.

the courts was: whether the evidence sought to be adduced by TMT Asia was admissible as an exception to the “without prejudice” rule?

The trial court held for TMT Asia but the Court of Appeal allowed Oceanbulk’s appeal, holding the evidence inadmissible on account of the “without prejudice” rule. Hence the appeal to the UK Supreme Court.

II. THE “WITHOUT PREJUDICE” RULE

The “without prejudice” rule is a rule governing the admissibility of evidence which bars the use of communications during the course of negotiations to settle disputes, against the party making them, in circumstances where the parties have either expressly or implicitly agreed that communications in the course of negotiation should be inadmissible in evidence. In *Universal Plc.* v. *The Proctor & Gamble Co.*,[4] the House of Lords held that the rule operates to rule out proof of any admissions made with a genuine intention to reach a settlement in any litigation subsequent to the negotiations pertaining to the same subject matter. There are two principal justifications for the exclusion of admissions made “without prejudice” in evidence:[5]

1. Public policy requires that parties be encouraged to reach an out-of-court settlement through negotiation without fear of their admissions,during the process, later being used against them, for instance on the question of fault, negligence or liability.
2. Out of respect for the parties’ implicit or express agreement to keep communications exchanged during negotiations outside the purview of evidentiary use.

[4]Unilever Plc. v.The Procter & Gamble Co., [2000] 1 WLR 2436.

[5]CROSS & TAPPER ON EVIDENCE 503 (Colin Tapper ed.) (2010).

Although the rule initially applied only to admissions, over time, the scope of the rule was greatly enlarged, as was evidenced by the House of Lords' refusal to restrict its application to identifiable admissions and reinforcing the protection of all communications under the rule, in *Ofulue* v. *Bossert.*[6] As a consequence of the judicial expansion of its scope, once privilege is established, the boundaries between what is protected and what is not, is rather hazy.[7]

III. EXCEPTIONS TO THE "WITHOUT PREJUDICE" RULE

The "without prejudice' rule has been repeatedly stressed for its importance in promoting out-of-court settlement.[8] However, numerous exceptions have been carved out to the rule judicially. In *Universal Plc.* v. *The Proctor & Gamble Co.,*[9] a non-exhaustive list of eight exceptions was given, the relevant one being the first – to decide whether a settlement was reached between the parties. Pursuant to this, the court decides to allow the exception on the basis of a three pronged justification:

A Analogy with the Rectification Exception

In *Oceanbulk*, the Supreme Court relied upon (and extrapolates from) an unmentioned exception to the without prejudice rule – the exception for the purposes of rectification. Rectification is a process for amending the terms of the contract on the grounds that the terms as they were finally documented, do not reflect the true common intention of the parties. The Supreme Court relied upon two cases, *Pearlman* v. *National Life Assurance Company of Canada*[10] and *Butler* v. *Countrywide Finance Ltd.,*[11] which held that a party to

[6]Ofulue v. Bossert, [2009] WLR (D) 91.
[7]*Supra* note 3, at 505.
[8]*Supra* note 4.
[9]*Supra* note 4.
[10]Pearlman v. National Life Assurance Company of Canada, (1917) 39 OLR 141.
[11]Butler v. Countrywide Finance Ltd., (1992) 5 PRNZ 447.

without prejudice proceedings can use those communications to show that the agreement should be rectified. Imparting rationale to these two decisions, the court stated that the first exception in *Unilever*[12] cannot but mean that rectification is a ground for exception, because no real boundary could be drawn between admitting "without prejudice" communications in order to resolve the issue of whether an agreement was reached and admitting it to prove what the agreement was (for the purpose of rectification). Building on this assertion, Lord Clarke opines that no meaningful distinction can be made between admissibility of the impugned evidence for rectification and in order to interpret the terms of the contract. This cannot be discounted, for the purpose of both the exercise is the same – to give effect to the parties' real intentions. It is when the language of the contract cannot support a construction amenable to the true intention of the parties that rectification is sought. In this light, rectification subsumes the process of identifying the parties' true intentions.

B Rule of Contractual Interpretation

The general rule for the construction of contracts is that the language of the contract should be construed as it would be by a reasonable person having all the background knowledge that is available to the parties.[13] Although pre-contractual negotiations were not admissible in evidence to interpret contracts even in non "without prejudice" transactions, they were admissible to prove estoppel or rectification. The condition for admissibility in such cases is that the facts must be part of the "factual matrix". The phrase refers to the set of objective facts surrounding the contract which provide the context within which it was entered into. Classifying facts as such is deeply subjective to each particular case and can sometimes be a labored distinction. This is acknowledged in the judgment itself, but the Court nevertheless ruled that the rule for admissibility of negotiation-communications to

[12]*Supra* note 4.
[13]Chartbrook Ltd. v. Persimmon Homes Ltd., [2009] A.C. 1101.

interpret the contract should be the same irrespective of whether the negotiations were without prejudice or not, because the fundamental objective was to enable the court to form an objective opinion of the intention of the parties.[14] The implicit rationale was that using 'without prejudice' communications to give effect to the true intention of the parties cannot count as using them *against* either of the parties, and when this condition is satisfied there is no reason why the modern principles of contractual interpretation should not be applied to without prejudice negotiations.

C The Furtherance of Policy Objective

Addressing the policy angle, the court underscores the importance of the rule, in enabling free communication bereft of fear of legal backlash later. The importance of this fundamental premise of the rule is effectively portrayed in *Ofulue* v. *Bossert*, where it was stated, *"It is the ability to speak freely that indicates where the limits of the rule should be."*[15] The court in this case reasons that the evidence of objective facts would make parties confident that their true intentions as evidenced by objective factsduring negotiations would be given effect to; settlement through negotiation would only be encouraged. The Court's assertion seems to be that if parties can be confident that the fruits of negotiation would be given effect as truly intended by them, they will be more willing to negotiate a settlement. Considering the net effect of allowing the exception facilitates further clarity on what the decision holds:

1. Statements made in the course of negotiation will not be used againstthe party making them.
2. Objective facts(such as knowledge, contemplation of both parties etc.) can be used to contextualize the text of the contract.

Given that the first, fundamental protection is still available, the admissibility of negotiation-communications does not seem to

[14] *Supra* note 1, ¶40.
[15] *Supra* note 6, ¶12.

infringe upon the crux of the rule and may even encourage genuine attempts to settle through negotiations culminating in a contract.

Therefore, Lord Clarke decided for TMT Asia and the six other Justices concurred with him in reasoning and conclusion.

IV. CRITICAL APPRECIATION OF OCEANBULK

Several gnawing issues arise when this ruling is given full import. *Oceanbulk* has opened up a judicial maze of questions that will arise in future, of which there would be no easy answer. However, this author would respectfully agree with the conclusion reached by the bench.

A The Factual Matrix Question

The judgment itself recognizes the difficulties in identifying what is included within the ambit of "factual matrix". What constitutes an "objective fact" in the context of 'without prejudice' negotiations is fraught with ambiguity.[16] For instance, a party stating that goods were damaged at the destination port and not at sea is a fact, however the fact that one disputant asserts the fact to another undermines its 'objectivity'. The judgment contemplates that 'objective facts communicated by one party to another' may fall within the factual matrix or background knowledge required to construe the contract.[17] However, this fails to take into account that what is relevant is not either party's subjective intention but shared intention. An instinctively convincing argument is that only the written contract can signify common intent.[18] However, the facts in *Oceanbulk* demonstrate that even where parties agree that the contract reflects

[16]Adrian Zuckerman, *Without prejudice interpretation - with prejudice negotiations: Oceanbulk Shipping and Trading SA v. TMT Asia Ltd,* E. & P., 15(3), 232-244, 234 (2011).
[17]*Supra* note 1, ¶40.
[18]Adrian Zuckerman, *supra* note 16, at 232-244, 236.

common intention, the content of that intention may be ambiguous and the only way to fairly construe the contract is in line with the factual context of the contract, determined as objectively as possible.

But the process of determination of objective facts is fraught with difficulty. Despite the judgment's reliance on *Chartbrook,*[19] which matter-of-factly differentiates between objective facts and subjective statements, in practice, the line between admissible fact and inadmissible statements is fickle and blurry as the judgment itself acknowledges.[20] But to rule out the use of pre-contractual negotiations for interpretation of contract absolutely,[21] might be too drastic. It is implausible, at least to this author that limiting the burden of the court in having to sift through evidence over-rides the objective of giving effect to the true intention of contracting parties. The latter is what underlies rectification as well as interpretation. Would the solution be to rule out all rectification and interpretation that rely upon pre-contractual negotiation? In my humble opinion, no. The objectivity of the fact referred to in the judgment may mean not so much 'fact evident independent of subjective interpretation or representation' but may be closer to 'fact as would seem to a reasonable observer, going by parties' conduct or words'. If the expansive interpretation of the protection that 'without prejudice' proceedings give has led to uneasiness with the proposition that parties should be held to what they represent in the negotiations, we must remind ourselves that the purpose of the rule is *not* to give immunity to parties to say or represent anything in without prejudice negotiations without any consequences attaching thereto, for instance by way of estoppels. That would defeat both purposes of the without prejudice rule – public policy and private agreement.

[19]*Supra* note 6.
[20]*Supra* note 17.
[21]Paul S. Davies, *Negotiating the Boundaries of Admissibility,* C.L.J. 70(1), 24-27, 27 (2011).

B Disregarding Parties' Covenant to Negotiate 'Without Prejudice': The Whittling Down of the Rule

As the Court itself pointed out, one of the bases for the 'without prejudice' rule of exclusion is the implicit or explicit agreement between parties to exclude the negotiation communications from evidence. However, the Supreme Court failed to consider this covenant, justifying its decision on the basis of public policy instead.[22] It is important to remember that the fundamental purpose of the 'without prejudice' exclusionary rule is not to 'exclude admission of negotiations as evidence' but more fundamental – to 'exclude the use of statements made in the course of negotiation from being used against the party'. The latter does not always necessarily require the former.

C Harming the Underlying Public Policy Goal?

It has been suggested that this decision harms the public policy objective of encouraging negotiated settlement rather than encouraging it, for now parties will have to be guarded in what they say during negotiations.[23] In my view, this is not entirely correct. While this judgment does mean parties will have to be more careful about what they say in negotiations, this is only to the extent that they do encapsulate in the contract exactly what was settled by negotiation. The how's and why's of negotiation will ordinarily have no place in an enquiry as to what parties meant by a certain clause of the contract. Why a party might have agreed to pay half the amount of liquidated damages claimed by the other party is unnecessary to the determination of whether this would include interest calculated from the date of the cause of action or not. This becomes relevant in light of the fact that the 'without prejudice' rule was originally designed to protect a party against disclosure as to the former kind, which might

[22]*Supra* note 16, at 235.
[23]*Supra* note 16, at 237.

disadvantage them in legal proceedings and not the latter, which is merely a means to hold the party to what they agreed as a result of the negotiations. This is not to simplify the difficult process of sifting facts essential and relevant to interpretation of the contract. Indeed, the court itself has recognized the inherent problems with this exercise in practice.[24] But within the factual context of each case, it is not impossible.

There is no gainsaying that the Supreme Court of UK has widened the admissibility of "without prejudice" statements greatly. However, whether this widening negates the very purpose of the "without prejudice" rule ought to be answered only after a re-evaluation of the original goal of the rule and the enormous expansion in scope of the rule. In my view, the final result of this decision does not negate the original premise of the rule. The rule was conceived in order to encourage parties to agree; what was agreed upon is still an interpretive exercise that must be carried out in the context of the entire process of agreement. The public policy based reasoning of the court seems to have worked at least in the instant case, where the parties settled all differences even before the Supreme Court's decision was published.[25]

In any case, the argument that *Oceanbulk*will change the way parties negotiate is feeble, because in practice, even before this case, parties knew that their statements could be used to prove the existence of the contract, for rectification, for estoppel etc.[26] The assertion that the kind of enquiry contemplated by this case is not analogous but completely different from the kind undertaken in rectification or in estoppel does not seem to be tenable.

Oceanbulk is one step in a long series of changes that the 'without prejudice' rule has undergone in the UK, in response to new situations

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[24]*Supra* note 1, ¶39.
[25]*Supra* note 2, at 279.
[26]*Supra* note 21.

brought before courts of law. The final part of this paper examines how *Oceanbulk* would have been decided in India.

V. OCEANBULK AND THE INDIAN POSITION OF LAW

The respondent in this case had sought to adduce two statements, one contained in an email and another orally made at a meeting, which were made without prejudice. In order to determine where such a quest would stand in light of the Indian law of evidence, the effect of two provisions of the Indian Evidence Act,1872 becomes crucial – Section 92 and Section 23. The latter embodies 'without prejudice' protection in the Indian statute.

A Admissibility, Outside the Ambit of the "Without Prejudice" Rule

It is first considered whether there is anything to bar the admission or relevancy of the evidence sought to be produced outside the ambit of the "without prejudice" rule. Since there are two kinds of evidence sought to be adduced, oral and documentary, a question arises, as to whether the oral evidence is made inadmissible by Section 91 or 92 of the Act. Section 91 applies where the content of certain types of documents are sought to be proved, which is not the case here. The object is only to clarify the scope of a clause of the document. It is clearly on record that the terms and content of the contract are not contested by either party and there is consensus that the document fully records all terms agreed upon.[27] Hence neither the email nor the oral statement is excluded by the action of Section 91. Section 92 follows the logical sequence of Section 91, which bars the admission of any extrinsic evidence to prove the terms of a transaction which

[27]*Supra* note 1, ¶6.

has been reduced to documentary form.[28] Section 92 bars the admission of oral evidence to contradict, vary, add to or subtract from the terms of a contract. It does not matter whether the oral evidence was spoken before, during or after the transaction.**[29]** However, does the use of oral statements to prove that 'cooperate' necessarily included the 'sleeving' of transactions by Oceanbulk amount to 'contradict, vary, add to or subtract from'? Arguably, it does not. What is attempted is only to give the court the meaning of 'cooperate' in the context of the parties' negotiation. Therefore this does not fall within the ambit of the prohibition under Section 92. The Supreme Court has also held that "the construction of a document so as to ascertain the intention of the parties is in no way controlled by the provisions of Sections 91 or 92 of the Evidence Act. The document has to be interpreted applying the known principles of construction and/ or canons."[30] Therefore, the oral statement sought to be produced is not barred by the action of Section 92. The email falls under documentary evidence, as per the definition of "Evidence" given in Section 3 in the second clause and is not barred by any provision of the Act.

Alternatively, the action of section 92 can be explained through proviso (6) to the section, which states, "Any fact may be proved which shows in what manner the language of a document is related to existing facts." In the opinion of the author, the proviso's wording coupled with illustration (c), suggests that it cannot be used to prove facts which are not strictly in existence, but were, at some earlier point. However, the proviso is worded very generally and is often used by the court when extrinsic evidence is required to ascertain the real meaning.[31] It has also been used to admit evidence to show the

[28]SIR JOHN WOODROFFE & AMEER ALI, LAW OF EVIDENCE, 2408 (S.V. JogaRao ed., 17th ed.) (2001).
[29]SARKAR, SARKAR ON EVIDENCE 1720 (16th ed., 2009).
[30]Hindustan Fasteners Private Limited v. Nashik Workers Union, (2007) 11 SCC 660, 667.
[31]*Supra* note 29, at 1804.

circumstances in which a document was executed, in order to arrive at the true effect of the transaction is embodied, at the Bombay High Court.[32] The true meaning was held to comprise of the enquiry into what the words meant, or how they were to be applied to the circumstances of the writer or the facts existing at the time of making of the document.[33] It has repeatedly been held that the effect of Section 92 and its provisos must be construed with respect to Sections 93 to 98.[34] Due to the action of Section 93, only latent ambiguities may be resolved by extrinsic oral evidence. In this case, the ambiguity arises not because of a patently ambiguous construction of the document but because of latent ambiguity arising as to the scope of 'cooperation'. Hence arguably, proviso (6) to Section 92 allows the production of the oral evidence.

B The "Without Prejudice" Rule in the Indian Evidence Act

Since the above section prompts the conclusion that neither the oral nor documentary evidence would be barred from admission by Sections 91 or 92 in the absence of the without prejudice rule, the effect of the without prejudice rule now comes into question.

Section 23states that an admission which was made upon the express condition that evidence of it is not to be given, or in circumstances from which it is inferable that the parties agreed as such, is not relevant. This Section corresponds to Article 20 under the head "Admissions Made Without Prejudice" in Sir James Fitzjames Stephen's "A Digest of the Law of Evidence", which includes an

[32]John Claro Fernandes v. Luizinha Azavedo and Anr., (2005)107 BOM. L.R. 711; *See also* P.B. Bhatt v. R.Thakker, AIR 1972 Bom 365.
[33]*Id.,* ¶3.
[34]Belapur Co. Ltd. v. Maharashtra State Farming Corporation, AIR 1969 Bom 231, distils this from the preceding body of Section 92 jurisprudence. Followed in John Claro Fernandes v. Luizinha Azavedo and Anr., (2005)107 BOM. L.R. 711.

additional ground of duress.[35] Section 23 therefore, embodies the without prejudice rule in India and its basic contours greatly draw from English law.

The section ought to be read in the context of Section 17 of the Act, which defines admissions as:

An admission is a statement, oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances, hereinafter mentioned.

The definition of admissions itself is so broad that potentially, all statements made in the course of compromise negotiations can be brought within the "without prejudice" protection.

Both the statements made by Oceanbulk's representative which were sought to be admitted would fall within the protectionof Section 23 because they were made in pursuit of a compromise to resolve a dispute and pertained to a relevant fact, i.e., what the terms of the contract meant in the context of the negotiations.

Therefore, they shall be protected by Section 23. What remains is the question of exceptions to the bar of Section 23 and whether they would apply in this case. The wording of the section is such that no exceptions are conceivable. The section states, *"In civil cases no admission is admissible..."* Hence within the meaning of the statute, there is no space for exceptions. This is perhaps why, despite extensive use of English cases to lay down the scope of the protection under Section 23, there has been extremely limited importation of the exceptions permitted under English law into Indian jurisprudence.[36]

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[35] SIR JAMES FITZJAMES STEPHEN, A DIGEST OF THE LAW OF EVIDENCE 52 (G.Chase ed., 1887).

[36] For instance, the presumption of without prejudice protection to negotiations of compromise is not mentioned in the statute, but has been incorporated into Indian jurisprudence. *See,* Bauribandhu Mohanty v. Suresh Chandra Mohanty, AIR 1992 Ori 136.

Another pointer to the absolute nature of section 23 bar, is the 185th report of the Law Commission on the Evidence Act,[37] which recommends the addition of a proviso creating the presumption that compromise negotiations are without prejudice in general and in respect of exceptions, that a proviso be added to this effect- "evidence as to the admission becomes necessary to ascertain if there was at all a settlement or to explain delay where a question of delay is in issue". The recommendation to except the bar of Section 23 to prove fact of settlement was based on the now well entrenched exception carved out in *Tomlin* v. *Standard Telephone.*[38] The recommendations of the Law Commission clearly establish that the section does not admit any exceptions in its current form. And even amendments were to be in the form of very limited, specific grounds which stop far short of any point from where it might be possible for the judiciary to extrapolate and decide along the lines of the *Oceanbulk* decision. Even these recommendations of the Law Commission have not been given effect to.

Therefore, the inevitable conclusion is that as the Indian law of evidence currently stands, TMT Asia will not be allowed to adduce the "without prejudice" communications as evidence because such use is barred by section 23 of the Indian Evidence Act 1872.

VI. CONCLUSION

Oceanbulk Shipping & Trading v. *TMT Asia Ltd. &Ors*. represents perhaps the final frontier of exceptions allowable to the "without prejudice" rule. Any further expansion would undermine the bare essentials of the rule – inadmissibility of statements which attach liability or adversely affect the interests of parties in compromise

[37] 185th Report of the Law Commission of India, Indian Evidence Act 1872, (March 13, 2003) Part II, 118 (2003).

[38] Tomlin v. Standard Telephone, [1969] 1 WLR 1378(CA).

negotiations. The nature of the exercise of contractual interpretation is necessarily contingent on the facts and circumstances of each case. The ambiguity that is inherent in the practical application of the *Oceanbulk* ruling is inevitable but necessary to preempt parties who manipulate negotiations to obtain an advantageous compromise and then seek to fulfill less than their full obligation using ambiguous drafting of the contract. The Indian position on "without prejudice" evidence permits absolutely no exceptions, one-off judicial decisions[39] softening the application of Section 23 notwithstanding. It is therefore submitted that on the question of whether Indian law should be changed to reflect the English position in light of the jurisprudence on Section 23 in India so far, retention of the absolute nature of the rule is a plausible option, even though a strong one. In the absence of uncertain judicially created exceptions, unlike in the United Kingdom, the best option would be to retain the simplicity of the rule and not open up a conceptual Pandora's box.

[39] *Supra* note 36.

THE BALDEV SINGH CASE: A FLAGRANT VIOLATION OF LAW AND OF CONSTITUTIONAL MORALITY

Aditi Sheth[*]

ABSTRACT

A speech that must have impressed one and all, the Hon'ble Chief Justice of India emphasized in the strongest words possible that constitutional morality and ethical morality cannot be separated and that ethical morality is equally important for Judges. In the very same year, in an order of the highest court of the land, two Judges upheld a compromise in a gang-rape case after the accused were held guilty. Where then, was the constitutional morality that Hon'ble Chief Justice Kapadia talked of? Clearly, the judgment lost sight of the age old mandate of the Penal Law and the philosophy behind it. The Hon'ble Chief Justice Kapadia also reemphasized that the Judges ought not question a legislation except on the grounds of a violation of fundamental rights, excessive delegation, repugnancy and ultra vires. Thus, in any other situation a Judge is bound to follow the Law in both letter and spirit. Would not then, disregarding a statute be a gross disregard for constitutional morality? Also,

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were the principles of reasonability and objectivity kept in mind while pronouncing the judgment? The objective of this paper is to identify what exactly 'constitutional morality' is, and then whether the judgment of Baldev Singh was right in law. This paper will also discuss whether such a situation would be acceptable in the United Kingdom. Finally, we come to the question of judicial accountability, whether it will be possible to uphold the spirit of the Constitution and help fulfil Ambedkar's dream of 'the diffusion of constitutional morality.' Is it the only way to ensure that the India envisaged in the Preamble does not remain just a dream? The judiciary is independent and rightly so, but whether this should be at the cost of constitutional morality also needs to be answered. The day constitutional morality is compromised, and that becomes a norm, we have nothing to fall back upon.

I. INTRODUCTION

Constitutional Morality, among other aspects, lies in upholding the Rule of Law and in following completely the spirit of the Constitution. The Constitution clearly mandates that the Parliament is the law-making body while the Judiciary is the protector of the law. Any violation of this demarcation would also go against constitutional morality.

This paper discusses how the judgment in Baldev Singh's case[1] was a gross disregard of this demarcation and on what grounds the judgment was passed. In this case, compounding of a non-compoundable offence was allowed, that too in an offence as grave as gang-rape. Rape itself being a very serious offence, and gang-rape falling in the 'aggravated category' under rape, the judgment comes as a shock to the collective conscience. A sentence of merely three-and-a-half years was given, which is terribly lower than the statutory minimum of ten years. The guilty were to pay Rs. 50,000 to the victim by way of compensation. Moreover, since the period of three-and-a-half years was already served by the guilty, the effect was that the judgment released the guilty upon payment of Rs. 50,000 to the victim. Apart from clearly not following the mandate of the law, the factors taken into account were such that it raised doubts as to whether there was any extraneous consideration that played a part in delivering such a judgment.

Constitutional morality is not just about following the provisions of the Constitution or a statute, but it lies in following the spirit of the Constitution, in not losing sight of the vision of its makers.

The principle of constitutional morality being well formed in England since many years, and being similar to that in India, it provides guidance for India as well.

The question of judicial accountability is also pertinent to this whole discussion as it arose after the tainted verdict was given.

II. THE BALDEV SINGH CASE

This is one case that provided easy prey for the media, but not without reason. On 22nd February, 2011, a division bench of the Supreme

[1]Baldev Singh & Ors. v. State of Punjab, Criminal Appeal No. 749 of 20072, (Decided February 22, 2011).

Court pronounced a judgment allowing compromise in a *proven* case of gang rape to reduce the sentence of the culprits to the period already served, i.e., three-and-a-half years. While delivering the judgment, the bench, which included a female Judge, felt that there were 'adequate and special reasons' to reduce the sentence to less than the minimum prescribed.

The offence of gang rape falls under clause (g) of section 376 of the Indian Penal Code, i.e., it has been classified as an aggravated form of the offence, for which the minimum punishment is 10 years rigorous imprisonment, while the maximum is life. This category was added by the 1983 Amendment which was a result of the shocking *Mathura Rape Case*[2] which involved the rape of a sixteen-year old tribal girl by two policemen in the premises of the police station. The Supreme Court in that case had held the accused not guilty on the ground that Mathura had not raised an alarm and that there were no struggle marks.

In the past, this very court has refused to recognize agreements which involved withdrawal of a case involving a non-compoundable offence in return for consideration.[3] It was rightly observed in *V. Narasimha Raju*[4],

Once the machinery of the Criminal Law is set into motion on the allegation that a non-compoundable offence has been committed, it is for the criminal courts and criminal courts alone to deal with that allegation and to decide whether the offence alleged has in fact been committed or not. The decision of this question cannot either directly or indirectly be taken out of the hands of criminal courts and dealt with by private individuals. When as a consideration for not proceeding with a criminal complaint, an agreement is made, in substance it really means that the complainant has taken upon himself

[2]Tuka Ram and Anr. v. State of Maharashtra, AIR 1979 SC 185.
[3]V. Narasimha Raju v. V. Gurumurthy Raju and Ors, AIR 1963 SC 107.
[4]*Id.*

to deal with his complaint and on the bargaining counter he has used his non-prosecution of the complaint as a consideration for the agreement which his opponent has been induced or coerced to enter into.

In the same case, the judgment of Hon'ble Mukherjea, J in *Sudhindra Kumar* v. *Ganesh Chandra*[5] was also quoted, *"No Court of law can countenance or give effect an agreement which attempts to take the administration of law out of the hands of the Judges and put in the hands of private individuals."* The court also emphasized on Lord Atkin's observation[6] that to insist on reparation as a consideration for promise to abandon criminal proceedings is a serious abuse of the right of private prosecution.

In a recent case,[7] while denying compounding based on section 320 of the Criminal Procedure Code, the *same* bench observed that in the decisions of *B.S.Joshi* v. *State of Haryana;*[8] *Nikhil Merchant* v. *Central Bureau of Investigation and Another;*[9] and *Manoj Sharma* v. *State and Others*[10] the Supreme Court indirectly permitted compounding of non-compoundable offences. It this connection, it observed,

One of us, Hon'ble Mr. Justice Markandey Katju, was a member to the last two decisions. We are of the opinion that the above three decisions require to be re-considered as, in our opinion, something which cannot be done directly cannot be done indirectly. In our, prima facie, opinion, non-compoundable offences cannot be permitted to be compounded by the Court, whether directly or indirectly. Hence, the above three decisions do not appear to us to be correctly decided.

[5]Sudhindra Kumar v. Ganesh Chandra, [1939] I Cal. 241, 250.
[6]Bhowanipur Banking Corporation Ltd. v. Sreemati Durgesh Nandini Dasi, AIR 1941 P.C. 95. 694.
[7]Gian Singh v. State Of Punjab & Anr, SLP No(s).8989/2010, (Decided Nov. 23, 2010).
[8]B.S.Joshi v. State of Haryana, (2003) 4 SCC 675.
[9]Nikhil Merchant v. Central Bureau of Investigation and Anr., (2008) 9 SCC 677.
[10]Manoj Sharma v. State and Others, (2008) 16 SCC 1.

It is true that in the last two decisions, one of us, Hon'ble Mr. Justice Markandey Katju, was a member but a Judge should always be open to correct his mistakes. We feel that these decisions require re-consideration and hence we direct that this matter be placed before a larger Bench to reconsider the correctness of the aforesaid three decisions.

The Court held that it cannot amend the statute and also that it must maintain judicial restraint in this connection. It also observed that the Courts should not try to take over the function of the Parliament or executive and that it is the legislature alone which can amend section 320 of the Code of Criminal Procedure.

Despite having accepted, on the record, that a mistake had been made by the Honourable Justice Katju, it is quite surprising that the very same bench allows compounding, that too in a gang rape case. This is a gross contradiction that in merely 3 months' time, the same bench has taken an entirely opposite view.

The order rests on the proviso to section 376(2)(g) of the Indian Penal Code, which allows reduction of sentence below the minimum based on 'adequate and special' reasons. But, the reasons given by the Supreme Court are that:

1. The parties have entered into a compromise, application an affidavit for the same have been submitted;
2. It is a fourteen year old case; and
3. The prosecutrix is married (not to one of the rapists) and has two children.

The main flaw in the judgment is in this reasoning cited by the Hon'ble Court . This is because it is well beyond the powers of the any court to allow such a compromise. Rape is a non-compoundable offence, and such a case cannot be settled by compromise. Consequently, the court cannot cite compromise as the reason for reducing the sentence below the statutory minimum. 'Adequate and

special reasons' cannot possibly mean to take into account something that is prohibited by the law and is thus beyond the power of the court to grant. The court has also not gone into the factors which prompted the complainant-victim to enter into a compromise with her violators.

The fact that it is an old case also does not amount to adequate and special reasons as the Indian judiciary is prone to delays and this case is no exception. Thus, with all due respect, the decision in unreasonable and the judgment is a dangerous precedent to set for hard core criminals to use to their advantage. It will only encourage a flagrant violation of the law. And setting a precedent which is binding on all of the other courts of the country with respect to such a grave offence is all the more dangerous. It will become very easy for defence advocates to cite this judgment for less grave offences and get a compromise arranged. The courts will have no choice but to grant the same because where a Supreme Court precedent on an offence like gang rape is in place, how can the same treatment be denied to a lesser offence?

Many a times, the Supreme Court has reversed High Court decisions on the ground that the sentence was reduced without giving suitable reasons. In *State of Karnataka* v. *Raju*[11] the Supreme Court struck down a decision of the Karnataka High Court reducing the sentence of a convicted rapist to three-and-a-half-years. The reason cited by the High Court to reduce the sentence was the background of the accused- *"a young boy of 18 years belonging to Vaddara Community and Illiterate"*. The Supreme Court stated that exceptional circumstances were necessary, and it reversed the decision saying that there was an absence of "special and adequate reason".

The basis of the entire penal procedure is that a crime is an offence against the whole society, the offender being a potential threat to society, and it is the duty of the State to bring the accused to book. In such a scenario, it is natural to not have space for any agreement

[11]State of Karnataka v. Raju, AIR 2007 SC 3225.

between the victim and the perpetrator of the crime, especially when grave crimes are involved. Hence, the need for a provision to differentiate between compoundable and non-compoundable offences arose. By not respecting this provision, the Supreme Court has attacked the very basis of the whole criminal prosecution system.

In *State of Andhra Pradesh* v. *Bodem Sundara Rao,*[12] a case involving the rape of a 13-14 year old girl, the Supreme Court reversed the judgment of the High Court and held that a sentence lower than the prescribed minimum under section 376(1) of the Indian Penal Code could not be imposed in any event. It also held that the term "adequate and special reasons" ought to be strictly interpreted. Recently, the Supreme Court opined, on the topic of rape, in *State of U.P.* v. *Chhotey Lal,*[13] *"The important thing that the court has to bear in mind is that what is lost by a rape victim is face. The victim loses value as a person."*

It is quite appalling that two eminent Judges of the same court have gone on to deliver a judgment disregarding the above stated aspect of crime as grave as rape.

It is submitted that, it is unacceptable for Judges to cross the line, travel beyond the realm of the legislation and also question the wisdom of the legislature in such a situation.

This is not the sort of precedent that the apex court of the country should be setting. Rather than moving forward, we have moved a big step backward by not giving the heinous offence of rape the seriousness that is due to it. And since most victims are not very well off, this method of compromise might as well be followed all over the country. It will be like giving affording people a license to rape. Have money, commit a crime. Such a judgment completely takes away the deterrent effect of the law, which is very important in preventing future crimes of the same genre. But it works only when

[12]State of Andhra Pradesh v. Bodem Sundara Rao, AIR 1996 SC 530.
[13]State of U.P. v. Chhotey Lal, (2011) 2 SCC 550.

the courts have come down with a heavy hand upon those found guilty. For crime to be controlled effectively, there should be fear of the consequences of committing it. Such a judgment allays these fears.

Moreover, at a time when even marital rape should be made a punishable offence, such a judgment comes as a real dampener for any such movement.

Hon'ble Chief Justice Kapadia once said, while quoting from the book of a British Judge, that, *"Judicial activism beyond a point is against the rule of law…"* and *"that is why I always tell my brother Judges, 'please see to it we also should continue to learn' ".*[14]

By disobeying the law for reasons which are clearly not 'special and adequate', they are flouting the rule of law and the fundamental principle that no one is above the law.

It is submitted that such a judgment is not just against societal morality, but also against constitutional morality. A compromise in a rape judgment is a horrendous concept.

According to Kalpana Kannabiran,[15] three judgments by the Supreme Court in the month of July mark a sharp departure from pedantic legalism and point to the possibilities of a transformative constitutionalism that sustains and elaborates the idea of constitutional morality developed in the *Naz Foundation* judgment of the Delhi High Court in 2009,

Moral indignation, howsoever strong, is not a valid basis for overriding individual's fundamental rights of dignity and privacy. In

[14]Special Correspondent, *Kapadia Cautions Judges Against Judicial Activism,* THE HINDU, May 3, 2010.
[15]Kalpana Kannabiran, *Development, Justice and the Constitution,* THE HINDU (Jul. 27, 2011), http://www.thehindu.com/opinion/op-ed/article2296451.ece.

our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view.[16]

The three cases are also very different pieces that speak to different realities in similar fashion: *Ram Jethmalani* v. *Union of India;*[17] *Nandini Sundar and Others* v. *State of Chhattisgarh;*[18] and *Delhi Jal Board* v. *National Campaign for Dignity and Rights of Sewerage and Allied Workers.*[19]

According to her, these Supreme Court decisions demonstrate the significance of social action. They draw important connections between courts, social sciences and social movements; connections that are often forgotten or negated in courts. The framework of justice by this token stretches illimitably beyond the narrow confines of constitutional law and decided cases to the letter and spirit of the constitution. Thus, they address constitutional morality which involves not straying from the spirit or core of the Constitution rather than just sticking to bare words for the sake of formality.

This is precisely what the case in question does not do. It is quite an irresponsible judgment, as far as constitutional morality is concerned. That brings us to the question of what exactly constitutional morality is.

III. CONSTITUTIONAL MORALITY

To Dr. Ambedkar, constitutional morality would mean an effective coordination between conflicting interests of different people and the

[16]Naz Foundation v. Government of NCT of Delhi and Ors, WP (C) No. 7455/ 2001 (Decided July 2, 2009).
[17]Ram Jethmalani v. Union of India, WP (C) No. 176 of 2009 (Decided July 4, 2011).
[18]Nandini Sundar and Others v. State of Chhattisgarh, WP (C) No. 250 of 2007 (Decided July 5, 2011).
[19]Delhi Jal Board v. National Campaign for Dignity and Rights of Sewerage and Allied Workers, Civil Appeal No.5322 of 2011 (Decided July 12, 2011).

administrative cooperation to resolve them amicably without any confrontation amongst the various groups working for the realization of their ends at any cost.[20]

While moving the Draft Constitution in the Assembly on November 4, 1948, Dr. Ambedkar quoted the Greek historian Grote, who had said,

The constitutional morality, not merely among the majority of any community but throughout the whole, is an indispensable condition of government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable without being strong enough to conquer the ascendancy for themselves.

After quoting Grote, Dr. Ambedkar added,

While everybody recognised the necessity of diffusion of constitutional morality for the peaceful working of the democratic constitution, there are two things interconnected with it which are not, unfortunately, generally recognised. One is that the form of administration must be appropriate to the end in the same sense as the form of the Constitution. The other, that it is perfectly possible to pervert the Constitution, without changing its form by merely changing its form of administration and to make it inconsistent and opposed to the spirit of the Constitution.

Dr. Ambedkar paused to ponder over the possible cultivation of constitutional morality in India. He observed,

The question is, can we presume such a diffusion of constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it.

[20]Minu Elizabeth Scaria, *Constitutional Morality and Judicial Values,* (Mar. 5, 2008), http://www.legalserviceindia.com/article/l186-Constitutional-Morality-And-Judicial-Values.html.

Democracy in India is only a top dressing on an Indian soil which is essentially undemocratic.

Thus, the Father of the Indian Constitution had a premonition that in the absence of constitutional morality, democracy would flounder in India.

In *D.C. Wadhwa* v. *State of Bihar,*[21] it was observed by the Constitution Bench headed by the then Chief Justice P.N. Bhagwati,

The power to promulgate an Ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be 'perverted to serve political ends'. It is contrary to all democratic norms that the Executive should have the power to make a law.

The court also strongly said while concluding,

It is a settled law that a constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. This would clearly be a fraud on the constitutional provision.

In Re-promulgation of Ordinances, Prof. Wadhwa gives a quotation from the Roman legalist Julius Paulus (B.C. 204), *"One who does what a statute forbids transgresses the Statute; one who contravenes the intention of a Statute without disobeying its actual words, commits a fraud on it."*

The Vajpayee Government, in issuing the proclamation of the Prevention of Terrorism Ordinance, relied on the words of Article 123 without following the spirit and morality of the Constitution. In this context, it has been opined that unless the moral values of a

[21]D.C. Wadhwa v. State of Bihar, AIR 1987 SC 579.

Constitution are upheld at every stage, mere written words in it will not protect the freedom and democratic values of the people.[22]

Dr Ambedkar thought constitutional morality to be of utmost importance in the working of the Constitution. He again endorsed the view of Grote, that constitutional morality required *"a paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within these forms"*. He stressed that diffusion of constitutional morality should be *"not merely among the majority of any community but throughout the whole — since even any powerful and obstinate minority may render the working of a free institution impracticable without being strong enough to conquer ascendancy"*. Dr Ambedkar then posed the question: "*Can we presume such a diffusion of constitutional morality?''* His frank answer was, "*Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it.''*[23]

In the words of William D. Guthrie,

> *It is the duty of lawyers worthy of the profession, not merely to defend constitutional guaranties before the courts for individual clients, but to teach the people in season and out of season to value and respect the constitutional rights of others, to value and respect the moral principles embodied in our constitutions, to value and respect the rights of person and property, to respect and cherish the institutions we have inherited. What higher duty could engage us than to teach its sacredness and its permanence, in the lofty phase of the Roman advocate, its eternity, and to preach to all classes the virtue of*

[22]Era Sezhiyan, *Perverting the Constitution,* Vol. 18 - Issue 25, Dec. 08 -21 (2001).
[23]Soli J Sorabjee, *Dr Ambedkar and the Constitution,* INDIAN EXPRESS (Jan 30, 2005), http://www.indianexpress.com/oldStory/63681/.

self-restraint and respect for rights of others without which there can be no true constitutional morality![24]

Andre Beteille[25] is of the opinion that

> *The strength or weakness of constitutional morality in contemporary India has to be understood in the light of a cycle of escalating demands from the people and the callous response of successive governments to those demands. In a parliamentary democracy, the obligations of constitutional morality are expected to be equally binding on the government and the opposition. In India, the same political party treats these obligations very differently when it is in office and when it is out of it. This has contributed greatly to the popular perception of our political system as being amoral.*

Constitutional democracy acts through a prescribed division of functions between legislature, executive and judiciary. Populist democracy regards such division of functions as cumbersome and arbitrary impediments that act overtly or covertly against the will of the people. Populism sets great store by achieving political objectives swiftly and directly through mass mobilisation in the form of rallies, demonstrations and other spectacular displays of mass support. Constitutionalism, on the other hand, seeks to achieve its objectives methodically through the established institutions of governance.

According to Beteille, populist movements drew on 'the Gandhian tradition of civil disobedience used with great effect during the nationalist movement'. However, 'one has to make a distinction between Gandhi and those who have acted in his name after his passing... No one has shown - or can be expected to show - the restraint and moral discipline of which he was the great exemplar.'[26]

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[24]William D. Guthrie, *Constitutional Morality,* THE NORTH AMERICAN REVIEW , Vol. 196, No. 681, 154-173 (August, 1912).
[25]Andre Beteille, *Constitutional Morality*, ECONOMIC AND POLITICAL WEEKLY, Vol. 43 No. 40 (October 04 - October 10, 2008).
[26]*Supra* note 20.

At the same time, Beteille had some sharp things to say about the deficiencies in the practice, as opposed to the theory, of constitutional democracy in India today. 'In a parliamentary democracy', he remarked, 'the obligations of constitutional morality are expected to be equally binding on the government and the opposition. In India, the same political party treats these obligations very differently when it is in office and when it is out of it. This has contributed greatly to the popular perception of our political system as being amoral.'

Owing to the hypocrisy and arrogance of politicians in power, continued Beteille, 'the people of India have gradually learnt that their own elected leaders can be as deaf to their pleas as the ones who came from outside.' He also said that our elected politicians had sometimes 'shown themselves to be even more venal and self-serving than the British who ruled India.'Our politicians may devise ingenious ways of getting round the Constitution and violating its rules from time to time, but they do not like to see the open defiance of it by others. In that sense the Constitution has come to acquire a significant symbolic value among Indians. But the currents of populism run deep in the country's political life, and they too have their own moral compulsions. It would appear therefore that the people of India are destined to oscillate endlessly between the two poles of constitutionalism and populism without ever discarding the one or the other.'[27]

The highest court of our country, with utter disregard to this concept has granted a relief which is against the spirit of the constitution. Such a relief cannot be given even if it satisfies the majority. Here, the law has not been given any regard. It is a different thing to overrule a law and different altogether to disobey an existing valid law without questioning its validity at any stage.

[27]Ramachandra Guha, *Let Us Live In Hope*, HINDUSTAN TIMES (Jan. 09, 2012), http://www.hindustantimes.com/News-Feed/TopStories/Let-us-live-in-hope/Article1-793826.aspx.

IV. CONSTITUTIONAL MORALITY IN ENGLAND

Constitutional Law in the United Kingdom has been discussed extensively in Dicey's lectures.[28] He explains constitutional morality as follows- The one set of rules are in the strictest sense laws, since they are rules which (whether written or unwritten, whether enacted by statute or derived from the mass of custom, tradition, or Judge-made maxims know as the Common Law) are enforced by the Courts; these rules constitute "constitutional law" in the proper sense of that term, and may for the sake of distinction, be called collectively, "the law of the constitution. The other set of rules consist of conventions, understandings, habits, or practices which, though they may regulate the conduct of several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all since they are not enforced by the Courts. This portion of constitutional law may, for the sake of distinction, be termed the "conventions of the constitution," or constitutional morality.[29]

From the fact that the judicial Bench supports under federal institutions the whole stress of the constitution, a special danger arises lest the judiciary should be unequal to the burden laid upon them. But the moment that this bias becomes obvious a Court loses its moral authority, and decisions which might be justified on grounds of policy excite natural indignation and suspicion when they are seen not to be fully justified on grounds of law.[30]

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[28]A. V. DICEY, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION (2nd ed. 1886).
[29]*Supra* note 23, at 24-25.
[30]*Supra* note 23, at 163.

The fact that all offenses great and small are dealt with on the same principles and by the same Courts is the most important feature in the legal system to maintain the authority of law.[31]

In such a scenario, there is no place for such a judgment in which the same Judges keep changing their stand over and over again without a valid reason as done by the Supreme Court.

V. JUDICIAL ACCOUNTABILITY

Justice S.H. Kapadia famously said, "For a Judge, ethics, not only constitutional morality but even ethical morality, should be the base."

The legal maxim *"Fiat justitia, ruat caelum"* translates into "let justice be done though the heavens fall." Thus, the first duty of a Judge is to administer justice according to law, the law which is established by the legislative authority or the binding authority of precedent. Where there is no anomaly in the law, the Judge has to apply it and has no choice.

The Judicial Standards and Accountability Bill, 2010 replaces the Judges (Inquiry) Act, 1968. It seeks to create enforceable standards for the conduct of Judges of High Courts and the Supreme Court, change the existing mechanism for investigation into allegations of "misbehaviour" or incapacity of Judges of High Courts and the Supreme Court, change the process of removal of Judges, enable minor disciplinary measures to be taken against Judges, and require the declaration of assets of Judges.

The issues of Judicial Standards must be seen in the context of Article 124(4) of the Constitution which provides for the process of impeachment of a Judge on the grounds of proved "mis-behaviour" or incapacity."

[31] *Supra* note 23, at 227.

A report by Transparency International (TI) called the "Global Corruption Report 2007," based on a 2005 countrywide survey of "public perceptions and experiences of corruption in the lower judiciary," conducted by the Centre for Media Studies, found that a very high 77 percent of respondents believe the Indian judiciary is corrupt. It says that *"bribes seem to be solicited as the price of getting things done"*. The estimated amount paid in bribes in a 12-month period it found was around 580 million dollars. Money was paid to the officials in the following proportions: 61 percent to lawyers; 29 percent to court officials; 5 percent to middlemen.[32]

We cannot afford to have the public lose faith in the judiciary. It is the only body we currently lean upon when all other efforts have failed. Such trust that is reposed in it should not be broken.

As per Justice Cardozo[33]

The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at Will in pursuit of his own ideal of beauty or of goodness..; He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence... He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life. Wide enough in all conscience is the field of discretion that remains".

Coming back to the case in question, even during the hearing, the case seemed to lean towards what would have been the righteous decision. When the defense Counsel Rajat Sharma said that an agreement had been reached, and also remarked *"We want to live peacefully",* the bench was quick to retaliate: "*after having committed a gang rape now you want to live a peaceful life?"* Justice Gyan Sudha Mishra

[32]Suman Meena, *Judicial Accountability* (Nov. 20, 2011), LEGAL INDIA http://www.legalindia.in/%E2%80%9Cjudicial-accountability%E2%80%9D.
[33]BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921).

said that since the penal provision does not provide for compounding the offence as under the statute, the court, apart from awarding a minimum of 10 years, can also impose a fine or extend the punishment to life imprisonment. She added *"how can we let you all go scot-free for such an offence like rape? There is no provision under the law to compound the offence. Punishment has to be awarded so that it acts as a deterrent."*[34] But letting them go scot-free is what was ultimately done.

This raises serious doubts. Even if the Hon'ble Judges actually disagreed, a split verdict is always an option. Such a judgment where a u-turn is taken from previous judgments and even from the apparent sentiment during the hearing will inevitably lead to deep dissatisfaction.. Rs. 50,000 is hardly any sum to pay on the part of the rapists, *after* having committed the crime, *and* in lieu of six-and-a-half years' imprisonment.

VI. CONCLUSION AND RECOMMENDATIONS

The Baldev Singh judgment does not do Justice to long established tradition of Indian Judiciary. Such a decision could also lead to situations where victims are coerced into agreeing to a compromise. It is for the Legislature to amend the law. Does it intend to do so? When plea bargaining was introduced in India a few years ago, the Legislature expressly exempted crimes against women from being subject to a plea bargain, because of the often unequal bargaining power of the parties involved, as well as the expressive importance of prosecuting such crimes. Thus, the Legislature did not want to permit "compromises" where victims of crime are women. Despite this clear intention, the court in a gang-rape case granted a compromise!

[34]PTI, *Court Frees Rapists, Agrees They Can Pay Victim* (Feb. 23, 2011), http://www.ndtv.com/article/india/court-frees-rapists-agrees-they-can-pay-victim-87242.

Unfortunately, this now constitutes precedent and before it leads to trading in sentences, one hopes that the Court corrects this anomaly at the earliest.

This is one precedent which criminals can surely do with. Due to the doctrine of precedent, this judgment is binding on all the other courts of the *entire* country! This means that any criminal can easily cite this judgment and he merely has to show similar circumstances. After that, it is simply a matter of time till the verdict is passed and the guilty are free to walk. All that they have to do is pay some money to the hapless victim, who, obviously has been wronged.

It also strikes at the very root of the criminal justice system of India, where it is the duty of the State to bring the accused to book and save the society from future threats by that person. Today he has committed the crime against one person, tomorrow it might be someone else. If the judiciary itself takes such a lenient approach, it will wreck the criminal system. The system is already weak, with overburdened courts. Now, if the cases which reach the higher judiciary and are decided are harmful to our system, there is no hope left.

Moreover, when the legislation mandates that a certain *minimum* punishment is necessary, there are reasons behind the same. It is a well thought decision. The Parliament believes that the punishment imposed is necessary to act as a deterrent and reform for the guilty and other potential offenders. It is not up to the judiciary to decide in the contrary.

In all this, the basic constitutional tenet of the rule of law is violated. Also, the Constitution clearly demarcates the Parliament as the law making body and the judiciary as the protector of those laws. It is not upon to judiciary to disobey the law (the validity of which has also not been challenged) while pronouncing a judgment. That is beyond the powers given to it by the Constitution. Thus, such a judgment violates not just the written provisions of the Constitution, but also its

spirit, and consequently, constitutional morality. Such a situation would have been unacceptable, even in England.

It is important that not only should the Rule of Law and principle of Parliamentary Law be followed, it is important that Judges also be made accountable for their actions. All of these lessons are to be learnt from just one judgment of the Apex court: a judgment which has the power to change the face of criminal prosecution in India if it is not remedied soon.

It will surely do well to the country if this judgment is reversed or overruled soon. That will also be a step towards realizing Dr. Ambedkar’s dream and towards a safer society where hard-core criminals do not abound and move scot-free.

Such a decision cannot even be justified under the guise of judicial activism. It is rather against the interests of society.