Chanakya National Law University Journal

Chanakya National Law University Journal

Vol. 4 **2014**

Cite this volume as CNLU LJ (4) 2014

2014

Price: Rs. 400 (Institutional/Individual) Rs. 320 (Student/Law Teacher)

Registration No. : BIHENG/2010/38114
ISSN 0976-805X

Published by:

The Registrar,
Chanakya National Law University,
Patna-800001.

Distributed exclusively by:

Eastern Book Company
34, Lalbagh, Lucknow - 226 001
U.P., India
Website: www.ebc.co.in Email: sales@ebc-india.com

Chanakya National Law University Journal

Padma Shri Prof. Dr. N. R. Madhav Menon
IBA-CLE
Chair in Continuing Legal education
NLSIU, Bengaluru

Prof. Dr. M.P. Singh
Chancellor
Central University of Haryana

Prof. Dr. R. Venkata Rao
Vice-Chancellor
National Law School of India University, Bengaluru
Visiting Professor
Chanakya National Law University, Patna

Prof. Dr. Ishwara Bhatt
Vice-Chancellor
NUJS, Kolkata

Prof. Dr. Satwinder Juss
Bar-at-law, Senior Lecturer
King's College, London
Visiting Professor
Chanakya National Law University, Patna

Prof. Dr. S. Sivakumar
Research Professor
Indian Law Institute, New Delhi
Visiting Professor
Chanakya National Law University, Patna

Chanakya National Law University Journal

Table of Contents

Articles

Book Review

Case Comment

FROM THE EDITORIAL BOARD

In the words of John Stuart Mill, "There ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it might be considered."

The amplification of the freedom to express is not only the ultimate goal of development of any society but also a principal means to it. A society where a man's perceptions, emotions and creations are dictated by others is anything but a progressive society. Full access to the freedom of expression within the bounds of public order, is the most cherished feature of any democracy.

The CNLU Law Journal, post its inception and the overwhelming success of the last three volume, revisits you with its fourth volume, with a heightened consciousness of surpassing the benchmark that it has created for itself. The Journal, a literary endeavour of Chanakya National Law University, presents to you, a holistic collage of ideas, thoughts and visions with a noted tinge of criticism and ingenuity from amongst the minds of scholars, academicians and students of legal fraternity.

In their article Dr. Ambedkar and The Indian Constitution – Prolegomena- Prof. Dr. A. Lakshminath & Dr. S. P. Singh have analysed the vision of Dr. Ambedkar the father of the Indian Constitution in making the Constitution of India. The authors have put focus on the Constitutional remedies, exercise of legislative and executive powers and the importance of Directive Principles of State Policy and analysed how Dr. Ambedkar contemplated the rights as instruments of empowerment for depressed and isolated sections.

As the title suggests, the article 'An Analysis of Federal Rule of Evidence 412, the Rape Shield Statute, and its Effects' goes into the provisions of the U.S law of evidence with regard to rape cases. Specifically Federal Rule of Evidence 412 has been considered which limits the scope of the defendant to provide the accusers sexual history as evidence, in defence of the crime. The author has traced the meaning of rape from the Hammurabic age to modern times and has debated upon the feasibility of rape shield statutes which though protects the victims, can also work like a double edged sword, by working against the interest of the victims, where it cannot stop the judges from presuming where no evidence is allowed. The

author has stressed for reform in the laws with change in the meaning of rape in the present age and the need for the laws to reflect the needs of the society.

In the article 'The BALCO rationale – a shift to the Territoriality Principle in International Commercial Arbitration', the author has analyzed the judgment of *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc*., better known as the BALCO judgment with regard to the territoriality principle in international commercial arbitration. The article spans the history of the judgment starting with the judgment of *Bhatia International* v. *Bulk Trading S.A.,* which gave too wide an interpretation to Part 1 of the Arbitration and Conciliation Act, 1996, thereby causing unwanted delay in arbitration proceedings. The author has cited various instances, where both the Model Law and State practice have shown inclination towards seat-centric arbitration, hence highlighting the importance of seat of arbitration. In spite of the 1996 Act confirming to the Model law, there has been a negation of this seat-centric arbitration principle through various judgments following *Bhatia International* v. *Bulk Trading S.A*. The BALCO judgment, helped in removing this lacuna caused by the earlier judgment, thus confirming to the territoriality principle by saying that the curial law had to be in consonance with the choice of the seat of arbitration. The ultimate aim is to safeguard party autonomy and intention of parties, of an arbitration.

In the article titled "Treaty Enforcement and the Constitutionally Assigned Role of Domestic Courts: A Comparative Analysis" the author Dr. Manoranjan Kumar has discussed in great detail, the role of State in concluding international treaties along with the effect of such treaties on the municipal laws of the States. Adopting a comparative approach, the author has confabulated of the treaty enforcement mechanisms in the United States of America and Australia along with India. The role of Judiciary in enforcement of treaties in these countries has also been discussed, keeping in light the interpretation of Constitutional provisions pertaining to treaty-making.

We live in a society where tolerance levels have steadily waned and people are increasingly being exposed to western ideas. The article 'Pre-Nuptial Agreements in India: Westernisation Or Modernisation?' explores the idea prenuptial agreements in India and how they are going to shape marriages in the years to come. In an era where courts are overburdened with litigation, prenuptial agreements could offer respite to family courts. This article elucidates the dynamics of modernisation vis-à-vis westernisation in cases of prenuptial agreements and how far it holds good in India.

The article 'Legal acceptability of single colour as a trademark' highlights the importance of protecting colour as a trademark through legal

mechanisms. It refers to several theories propounded in U.S.A, U.K and India with regard to single colour as a subject matter of trademark. With every brand wanting to register a single colour or a combination of colours in their name many lawsuits are being generated. The article aims at proving that colour should be allowed to be registered as a trademark considering the present circumstances. In India especially, this area has not been clearly defined leaving scope for much debate as to the prospects of colour registration as a trademark in India. The author seeks to give a broader dimension to this issue at hand.

In 'Interface between Global Regulatory Regime and the Indian Constitution: Issues and Concerns', the author sheds light on the effects of globalisation, one of which is the global regulatory regime. He explains that the issues that are at the centre of domestic regulatory system become matters of international concern, causing international communities to intervene with the domestic affairs of a nation. He examines Article 51 of the Constitution which embodies the guiding principles for foreign policy and international relations and Article 73 that deals with the extent of Executive Power of the Union. The union executive has an unrestricted treaty making power since there is no law requiring it to be subjected to parliamentary scrutiny. The author stresses on the need to democratise the process of treaty making and their enforcement.

The article titled 'Recognition and Protection of Refugees' 'Right to Nationality' under Indian Legal Regime: A Passage from Refuge to Statelessness?' talks about Recognition and Protection of Refugees' and their 'Right to Nationality'. It is said that situation of stateless persons and refugees are closely related. India has played a vital role in rehabilitating refugees despite the absence of specific refugee legislation or being a party to the UN Refugee or Stateless Convention. The chances of them returning to their own countries mostly due to unstable political conditions are minimal. Many of these refugees are willing to acquire Indian citizenship but laws relating to foreigners have made it practically impossible for them. This leads them being categorized as stateless or often as illegal immigrants. Omission of ad-hoc mechanism, implementing legislations on the lines of international conventions, introducing polices followed in few other countries like Sri Lanka, initiating enabling procedures can bring a better future of refugees in India.

In the contemporary world of today, indigenous people exist under conditions of severe disadvantage relative to others within the states constructed around them. In the article 'Access and Benefit Sharing of Indigenous Peoples from the Convention on Biological Diversity to the Nagoya Protocol', the author discusses the concept of access and benefit sharing from the perspective of Convention on Biological Diversity and Nagoya

Protocol. This article also explores how indigenous communities have been socially and economically crippled. It stresses on the importance of implementation procedures involving international institutions.

The taxation of the agricultural sector is a contentious issue. Tax exemption in this sector causes insufficient public revenue as agriculture is a major contributor in the country's Gross Domestic Product. Discussing related issues in 'Income Tax Act 1961 and Direct Tax Code Bill 2010: Broadening the Tax Exemption Base Provided to the Agricultural Sector', the author opines that tax exemption in the agricultural sector causes insufficient public revenue as agriculture is a major contributor in the country's Gross Domestic Product. He states that it is progressive taxation regime that is needed and not a regressive one as adopted by the Direct Tax Code Bill 2010. He further elucidates that the emergence of certain activities, which are identical to the activities which traditionally would have been classified as manufacturing operations, has further complicated matters. He concludes saying that the taxation of agriculture has to be approached through a presumptive norm based levy on land in proportion to the potential output.

The article '"Corporate Social Responsibility" In the New Companies Act: A Critical Analysis', analyses section 135 of the Companies Act 2013. Section 135 throws light on various guidelines that will regulate CSR activities of a company. All the rules to be followed by a company to fulfil its CSR obligations towards society have been included under it. Companies having net worth of Rs. 500 million or more or turnover of Rs. 1000 crores or net profit of Rs. 5 cr. are required to constitute CSR committee consisting of three or more directors with at least one director acting independently. Such a company is required to spend at least two per cent of its average net profits made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy. Incorporation of guidelines relating CSR has attracted major criticism from corporate fronts but at the same time it has been humbly greeted by the social sector as well NGOs.

BOOK REVIEWS

"*... the line between hunger and anger is a thin line.*"

In pace with the above theme, the author Mr. Debasis Poddar in his book review titled "Agricultural Market: A Long-pending Subject-matter that Requires Prognosis" has analysed the work of Shweta Mohan with great precision. Highlighting the concern for equitable distribution of resources in our country, the author has drawn attention towards the instances from

world history where this issue created an utter state of confusion in the political affairs.

The concept of Intellectual Property Rights continues to evolve with time. The book under review *i.e.* 'Broadcasting Reproduction Right In India: Copyright And Neighbouring Right Issues, 2013' deals with the neighbouring rights particularly re-broadcasting rights of the broadcasting organizations. The term neighbouring rights is used as these rights are inter linked with copyrights. These include rights of performing artists in their performances, the rights of producers of phonograms in their sound records and the rights of broadcasting organizations in their Radio and Television programmes. Broadcasting rights are an aspect of freedom of speech under Article 19(1)(a) of the Indian Constitution.

CASE COMMENTS

Singur was at the helm of international media attention when Tata Motors, decided to pull out of West Bengal and shift the manufacturing unit of Nano to Sanand, Gujarat. The events that preceded and those that followed seem to have permanently handicapped the state of industrialisation in Bengal. The backlash that followed was unprecedented in the political history of West Bengal, toppling the Left Front government. The case comment titled 'Case Notes and Comment: *Tata Motors Ltd.* v. *State of West Bengal*' gives a detailed analysis of the dispute from a constitutional and legal perspective. It puts into motion the idea of inclusive growth balanced with growing importance for individual rights.

The authors Sanjeev Kumar & Jishu Sanyal in their comment "*White Industries Australia Ltd.* v. *Republic of India*" have analysed significant issues raised in the case. The consequences of the award granted in this case on future Bilateral Investment Treaty negotiations are dealt by the authors. The comment also discusses the various recourses available to India to counter problems of the kind created by the case.

ACKNOWLEDGMENT

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

possible by the blessing of the Almighty and the support and co-operation extended by the University administration.

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

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

DR. AMBEDKAR AND THE INDIAN CONSTITUTION - PROLEGOMENA

—Prof. Dr. A. Lakshminath & Dr. S. P. Singh***

Abstract The colonial rule left behind a fragmented and demoralized India. Dr. Ambedkar, a visionary in his own right endeavoured to propel India towards a welfare and egalitarian state. This indefatigable exercise was a commitment to help counter the prevailing discrimination, divisions, exploitation and cultural degeneration rampant in the country. Dr. Ambedkar advocated and championed the cause of the marginalized sections of society. Despite the extent of his contributions, Dr. Ambedkar has been relegated to the background with obligatory remembrances.

The Indian Constitution upholds pious ideals of justice, liberty, equality and fraternity. The Constitution was drafted to duly reflect them. Democracy and liberty are in consonance with economic emancipation, social indiscrimination and collective well-being. Dr. Ambedkar believed that the right to constitutional remedies was the "soul and heart" of the constitution and ensured rightful exercise of legislative and executive power. For Dr. Ambedkar rights are instruments of empowerment for repressed and isolated sections. He advocated parliamentary form of governance with equal participation of subjects. Dr. Ambedkar stressed on importance of Directive Principles as guiding and directing provisions for progressive economic democracy. Separation of powers and a strong centre were his other beliefs relating to governance. He saw the constitution as a means for social engineering. Reality contradicts the intended constitutional goals. The exclusion of the ancient polity and lack of

* Chancellor, D.S. National Law University, Visakhapatnam, Pro-Chancellor & Vice-Chancellor, Chanakya National Law University, Patna.

** Associate Professor & Registrar, Chanakya National Law University, Patna.

participation of village communities in governance, strengthening caste identities and the abuse of Article 356 despite assurances by Ambedkar at the time of its inclusion are some instances. India is seeking a balance between use and misuse of law for the benefit of the elite and betterment of the masses. Fraternity has to become a driving force to combat social evils.

At a time, when the whole Indian sub-continent was in a state of, perhaps, contagious fermentation when antiquity had lost all its relevance and all its effect on the minds of men, at the same time that novelty was attended with the suspicions that always will be attached to whatever is new – the Constituent Assembly, the Drafting Committee and Dr. Ambedkar have been anxiously careful, in a rewarding business and an awe-inspiring venture which would give to us – 'WE THE PEOPLE OF INDIA' – the Constitution, so to conduct themselves that nothing in the progress of this great Parliamentary process and constitutional exercise shall afford a pretext for its future disuse, misuse and abuse.

Other constitutions are satisfied with making good subjects; ours aims at making a good government – a government with the motherly face which would redeem the constitutional pledge and commitment to strengthen and empower some of our children who were the victims of the harrowing humiliation of the "Chaturvarna", which became a "a besetting vice and source of die-hard inhibition, savage exploitation, apartheidisation, vocational discrimination, social suppression and cultural corruption". Such was the vision of the Father of the Constitution, Dr. Ambedkar – to impart to our Constitution and the government a humane and motherly face.

Law, as Prof. Cohen says, is not a closed independent system having nothing to do with economic, political, social or philosophical science. Dr. Ambedkar acknowledged this fact and so to fulfil his commitment to free the ancient unfree, his economics, law and politics were welded into a constitutional militancy and geared to a social emancipation movement. He was always morally, sometimes madly, discontented with social vices practiced with scriptural sanction, highbrow hypocrisy and legal connivance. He was an epitome of the struggle of the depressed for dignity. Through his efforts, the struggle was given a constitutional sanctity which became the sacred duty of the succeeding governments to redeem this constitutional mandate. This microscopic facet of his contribution can be seen in the birth and sustenance of the Indian Polity itself. He toiled laboriously to fulfil the obligation which the country had put on his shoulders- that of drafting the constitution. This he did most adroitly by maintaining a perfect equilibrium between the conflicting pressures, pulls and perceptions prevalent during those turbulent days of democratic infancy. He structured the Constitution in such a way so as to reflect in it a harmonious blend of the ancient and

the modern – by removing the undesirable elements of the old and filling the gap with the new.

This sacred document has stood the test of time and may be seen today as a glowing tribute to the man, his mission, his intellect and his commitment. True, there were dark hours when constitutional morality and propriety were taken to its nadir. For this we have none to blame but ourselves. At most we may say that complete perfection could not be achieved. This is for two reasons. Firstly, the implicit faith which Dr. Ambedkar reposed in his countrymen to zealously pursue the constitutional goals set forth by him for us. And secondly, as John Ruskin says in his 'The Stones of Venice': "No good work whatever can be perfect, and the demand for perfection is always a sign of misunderstanding of the ends of art. This is for two reasons: both based on everlasting laws.

No great man ever stops working till he has reached his point of failure; that is to say, his mind is always far in advance of his power of execution.

> That imperfection is […] the sign of life in a mortal body, that is to say, of a state of progress and change. [Emphasis supplied]

Almost all the members of the Constituent Assembly paid glowing tributes to Dr. Ambedkar for his magnificent work and his outstanding contribution in framing independent India's Constitution. It may not be possible here to quote all those people. In India, there have been four leaders holding four different approaches to the problem of emancipation of depressed classes. They can be classified broadly into two categories. Jyotiba Phule and Dr. Ambedkar held the 'conflict' approach; whereas Gandhiji and Barrister Savarkar can be characterized as holding 'assimilation approach'.

The 'conflict approach' advocated a militant stand against the dominant group in the society, which may or may not be the majority group. It aimed at revolutionizing social relations using drastic methods. What is surprising is that the two leaders advocating the confrontationist path were themselves members of the depressed classes while the one preaching assimilation path were upper caste Hindus.

Contrarily, the 'assimilation approach' advocated initiative by the majority group of a society to change and accept the minority group as its own part, letting it share with it its cultural ethos. It, however, opposed the minority group to establish its distinct identity outside the cultural framework of the dominant majority group.

It ought to be noted that both these approaches were for the purpose of social integration. It was realized by all concerned that integration was certainly not a smooth or easy process. To reach the goal of sharing common values, people belonging to both majority and minority groups have to change their socio-cultural values and their relationship pattern.

Dr. Babasaheb was born a year after Mahatma Phule died. God willed that he should continue the valuable work which was started by Jyotiba Phule. While Mahatma Phule's prolonged fight was against ignorance and illiteracy, with a greater emphasis on removal of social discrimination and social tyranny – Dr. Ambedkar fought a fearless battle against two social evils. Firstly, he wanted the untouchability, social stigma, to go. And, secondly, he wanted to establish a casteless society by destroying all castes and sub-castes which had kept the society vivisected. As a result of his ceaseless and untiring efforts, a way was found and paved to bring about many social reforms leading to the general upliftment of the scheduled castes, scheduled tribes and other backward classes conferring on them constitutional rights and privileges. He continuously pressed for the legal safeguards and increased political participation by the scheduled castes.

Professor Upendra Baxi, in his characteristic way asserts that it is difficult to recall and represent ourselves the image of Ambedkar. He further points out that there is no one but many Ambedkars or there are many kaleidoscopic images. Prof. Upendra Baxi describes 7 images of Dr. Ambedkar as that of 1) an authentic Dalit 2) Exemplar of Scholarship 3) Activist Journalist 4) Pre-Gandhian activist 5) Gandhisation 6) Constitutionalist 7) Renunciation of Hinduism.

Prof. Baxi, described seven Ambedkars merely to represent successive steps in the lived experience of Babasaheb. And there is some danger in presenting an evolutionary sequence of a life-history in terms of different persons. But all of us, in one way or the other, represent a repertoire of many mixed identities. To unravel each distinct identity as a person need not entail a methodological sin. Birthday celebrations are organised political events having distinctive ideologies of recall and distinctive modes of appropriating a historic figure for the purpose of the present.

In India, celebrations simultaneously function as instruments of organising memory and forgetfulness; the Ambedkar that we choose to remember now will entail organised oblivion about other Ambedkars. Dr. Ambedkar played a very significant role in the Constitution making. So pre-eminent was his role that, in a deep irony, the man who made a bonfire of Manusmriti was hailed as a "Modern Manu". But even this Modern Manu was ultimately reduced to a backroom boy when the Constitution he helped

make and moved for adoption was acclaimed (as Eleanor Zelliot reminds us) by the Constituent Assembly, as "Mahatma Gandhi Ki Jai".

The process of cooptation of a radical Dalit leader was historically now complete. He was no longer relevant and useful. For full four years and fifty six days, he remained as the Law Minister in Nehru's Cabinet. In his statement released on October 10, 1951 on the eve of his resignation from the Cabinet Dr. Ambedkar said:

> "I knew the Law Ministry to be administratively of no importance. It gave no opportunity for shaping the policy of the Government of India. We used to call it an empty soap box only good for old lawyers to play with […] I was competent to run any administrative department […] and would like to have some administrative portfolio […] During my time there have been many transfers of portfolios from one minister to another. Though I might be considered for any one of them, but I have always been left out of consideration. Many ministers have been given two or three portfolios so that they have been overburdened. Others like me have been wanting more work. I have not even been considered for holding a portfolio temporarily where a Minister in charge has gone abroad for a few days. It is difficult to understand what is the principle underlying the distribution of Government work among Ministers which the Prime Minister follows. Is it capacity? Is it trust? Is it friendship? […]" [Emphasis supplied]

Dr. Ambedkar revealed his own sense of humiliation in not being treated as an equal. He felt misled and betrayed when Parliamentary deliberations on the Hindu Code Bill were going on. He also articulated his anguish and indignation at the "neglect of the Scheduled Castes by the Government". He complained that he was always left out of consideration. In character with the marginalisation when Ambedkar breathed his last in Delhi, the Prime Minister sent an emissary with a wreath; and was absent at his funeral in Bombay.

Constitutional morality would mean an effective coordination between conflicting interests of different people and the administrative cooperation to resolve them amicably without any confrontation amongst the various groups working for the realization of their ends at any cost. For Ambedkar, moral fabric of the society, governed as well as the governance must be strong. In other words, public conscience, moral order and constitutional morality – ethos of politicians, that constitute the core of policy making,

must be very sound and strong if democracy is to survive for long period of progress and prosperity for the common people.

A Constitution can perform many functions in a modern state. One of these tasks is to serve as a deposit for a cluster of a society's fundamental political values. A Constitution can reflect these values in substantive ways by guaranteeing Fundamental Rights and in procedural ways by providing remedies. It also reflects society's basic values in 'allocative ways'. It mirrors basic values about who shall govern and in what direction. In addition to structuring and 'allocating goals', through its institutional arrangements and commandments, the Constitution reflects a particular vision of a good and achievable community life.

Our Constitution is the precursor of the new Indian renaissance. The basic objectives can be seen in the Preamble, which embodies in a solemn form all the ideals and aspirations for which the country had struggled during the British regime. These basic objectives are:

- JUSTICE, Social, Economic and Political;
- LIBERTY of thought, expression, belief, faith and worship;
- EQUALITY of status and of opportunity; and to promote among them all
- FRATERNITY assuring the dignity of the individual and the Unity and Integrity of the Nation.

National Integration through Fraternity is the Constitutional goal that can be achieved through individual pledge and commitment.

I. JUSTICE, LIBERTY, EQUALITY AND FRATERNITY

Structural equality demands equal opportunity for all sections of society and more so for the depressed ones. Structural inequalities tend to create an identity crisis among minorities and according to an analysis of the "official view" of national integration, identity crisis is the main hurdle.

"Fraternity", the fourth objective in the Preamble, was added because the Drafting committee felt that the need for fraternal concord and goodwill in India was never greater than now and that this particular aim of the Constitution should be emphasized by special reference in the Preamble.

Fraternity as an object is not reflected in any Article of the Constitution – no Constitution and no law can produce brotherly feeling or concord. There are provisions of the Constitution which are designed to promote

fraternity, such as a common citizenship [Art.5] and the right of citizens of India to move freely throughout the territory of India, to reside and settle in any part of India, or to acquire, hold and dispose of property, to practice any profession or to carry on any occupation, trade or calling in any part of India [Arts. 19 (1) (d) to (g)]. There are, however, other provisions which militate against fraternity, such as the division of States on linguistic lines and the provisions relating to language. A fair and even–handed executive administration can do more to promote fraternity than any constitutional or legal provision. The fourth objective refers to a moral and political ideal, and it can throw no light on the interpretation of the Constitution, nor does any provision of the Constitution give a clear content to fraternity.

Democracy and liberty were his ideals of faith. To him both economic emancipation and social indiscrimination were pre-conditions to political equality and civil liberties which were meaningless without them. Although he agreed with the Marxist analysis of economic determinism, he felt that economic forces were not the sole determinants of the course of human history. The role of the individual in shaping the history was equally important. He refused to look upon the individual as a mere automation and an economic being. Economic factors, though important, were not the sole actors in the drama of human life. Spiritualism had an equally, if not more, significant role to play in shaping the mind of man. On the satisfaction of mundane needs man craves for spiritual satisfaction. Divorce of morality and spiritualism from the social affairs was unacceptable to him. Religion which satisfied those yearnings was, according to him, as much necessary for the growth of the individual as his material well-being.

However, he yearned for a truly humanistic religion which not only preached but also practised social equality, love and respect for all fellow beings and creatures, self-sacrifice for the collective well being and peace and non-violence.

For Ambedkar, liberty for the oppressed meant security against oppression and exploitation. Similarly, it was a total programme of social transformation which constituted him conception of Swaraj. Swaraj was not just freedom (from the British) it was freedom which was just. Fraternity creates an inner force which pushes different sections into unity. The term “Maitri” used by him, appropriately encompasses the meaning of fraternity. Love for living beings and empathy/communion with respect to human beings are the hallmarks of fraternity. He emphasized equal sharing on the basis of equal status rather than accommodation. He believed that ‘fraternity’ could be achieved only by the fulfillment of just rights.

II. RIGHT TO CONSTITUTIONAL REMEDIES

A novel right which was described by Dr.Ambedkar as the "soul and heart" of the constitution was meant to deliver the citizen from the whims of the legislature and the executive and make the realization of the other rights enshrined in Part III a reality. It was seen as a "right without which the Constitution would be a nullity"

Although the writs specifically mentioned in the draft Article 25, were not new and had been available through various proceedings, these writs were at the mercy of the legislature. The character and the nature of these writs were sought to be altered by incorporating them in the Constitution so that they were placed outside the purview of the abrogating power of the legislature. "It is not that the Supreme Court is left to be invested with the power to issue these writs by a law to be made by the legislature at its sweet will. The Constitution has invested the Supreme Court with these rights and these writs could not be taken away unless and until the Constitution itself is amended by means left open to the legislature. This in my judgement is one of the greatest safeguards that can be provided for the safety and security of the individual. We need not therefore have much apprehension that the freedoms which this Constitution has provided will be taken away by any legislature merely because it happens to have a majority.

III. DEVELOPMENT THROUGH RIGHTS

Dr. Ambedkar converts rights as instrumentalities of 'negative' liberties (that is the restrictions on State power) into those of 'positive' liberties (that is requiring specific action by the State so that the liberty may be availed by the depressed classes). The majority communities 'rights' to cultural and religious freedom stand fully curtailed, normatively by the enunciation of the right of social equality of the depressed classes. For him rights were the instruments which would empower and emancipate the target groups and would fulfil their basic human needs. The basic human needs of the Ati-shudras were both material and non-material. The latter comprise a variety of needs for dignity and fraternity or respect for the Ati-shudras' right to be human; the former include a whole set of material needs such as access to basic needs.

IV. PARLIAMENTARY FORM OF GOVERNMENT

Having inherited the legacy of Government of India Act, 1935, Ambedkar was a strong advocate of Parliamentary form of government. He considered functional opposition and free and fair elections to be essential pillars of Parliamentary democracy. Realizing the major weakness

of Parliamentary democracy as a model of government, viz., slowness to respond to the demands of socio-economic change and equality, he strongly pleaded for a vigilant public opinion, effective implementation of laws and responsible executive, committed legislature and impartial judiciary.

V. DIRECTIVE PRINCIPLES

Being anxious to usher in an era of not merely political democracy but also socio-economic democracy, the Drafting Committee, under the stewardship of Dr. Ambedkar, sought to introduce the Directive Principles on the model of the Irish Constitution. They did "not want merely to lay down a mechanism to enable people to come and capture power. The Constitution also wishes to lay down an ideal before those who would be forming the government. That ideal is economic democracy. Being conscious of the various ways in which such economic democracy may be brought about, either by a socialist conception of a state or a communist one, the language employed in the Directive Principles is not rigid but quite flexible so as to leave enough room for people of different ways of thinking, with regard to the reaching of the ideal of economic democracy, to strive in their own way, to persuade electorate that it is the best way of reaching economic democracy, the fullest opportunity to act in the way in which they want to act. "It is no use giving a fixed rigid form to something which is not rigid, which is fundamentally changing and must, having to the circumstances and the times, keep on changing". To the criticism that the Directive Principles had no value, his answer was that they have a great value since they categorically lay down that our ideal was economic democracy. The Directive Principles provide the government a direction as to what our economic ideal and social order ought to be. Thus the Directive Principles were envisaged as rudders to the government sailing in the ocean of social inequity, inequality and injustice. This is evident by the answer given by Dr.Ambedkar to a motion that the words 'Fundamental', and 'Directive', are not necessary and may be deleted. He said "if the word 'Directive' is omitted I am afraid the intention of the Constituent Assembly in enacting this part will fail in its purpose […] [I]t is not the intention to introduce in this part these principles as mere pious declarations. It is the intention of the Assembly that in future both the legislature and the executive should not merely pay lip service to these principles enacted in this Part, but that they should be made the basis of all executive and legislative action that may be taken hereafter in the matter of the governance of the country. I, therefore, submit that both the words "fundamental" and "directive" are necessary and should be retained". [Emphasis supplied]

It was also the intention of the Drafting Committee that "even when there are circumstances which prevent the government, or which stand in

the way of the government giving effect to these Directive Principles, they shall, even under hard and unpropitious circumstances, always strive in the fulfillment of these directives. That is why we have used the word 'strive'. Otherwise, it would be open for any government to say that the circumstances are so bad, that the finances are so inadequate that we cannot even make an effort in the direction in which the Constitution asks us to go". "If it is said that the Directive Principles have no legal force behind them, I am prepared to admit it. But I am not prepared to admit that they have no sort of binding force at all. Nor am I prepared to concede that they are useless because they have no binding force in law. The Directive Principles are like the instrument of instructions which were issued to the Governor-General and to the Governors under Government of India Act 1935.

VI. SEPARATION OF POWERS

Dr. Ambedkar was pragmatic enough to resist any move to effect a rigid separation of powers between executive and the legislature on the same lines as in the US Policy, being aware of the difficulties faced in the US and realizing that "Americans themselves have begun to feel a great deal of doubt with regard to the advantage of a complete separation between the executive and the legislature". He said, "There is not the slightest doubt in my mind and in the minds of many students of political science, that the work of Parliament is so complicated, so vast that unless and until the Members of Legislature receive direct guidance and initiative from the members of the executive, sitting in Parliament, it would be very difficult for Members of Parliament to carry on the work of the legislature. The functioning of the Members of the Executive alone with Members of Parliament in a debate on Legislative measures, undoubtedly has this advantage, that the Members of the Legislature can receive the necessary guidance on complicated matters and I personally therefore, do think that there is any great loss that is likely to occur if we do not adopt the American method of separating the executive from the legislature". The above idea of state socialism with parliamentary democracy should silence those critics who doubted his socialistic credentials. For this very reason, he strongly disapproved of the Marxian concept of a totalitarian state.

A. Social Engineering

Dr. Ambedkar looked at the Constitution as a document for socio-economic change or an instrument of social engineering. It was indeed a tough task to strike a balance between the highly egalitarian constitutional aspirations and the extremely hierarchical social organization. To reconcile this contradiction between the ideal and the reality, and to accommodate the demands of both the merit and needs of the people in the society the Indian

constitution has given place both to the meritarian and compensatory principles of equality viz., Articles 16(1) and 16(4), Articles 15(1) and 15(4). The meritarian principles in the Constitution are applied to an individual, as against the traditional social order in which merit was considered to be an attribute of caste. He was quite conscious of the need for proper accommodation as well as balance between the meritarian and compensatory principles within the Indian society. He strongly felt that these claims should not eat up the general rule of equality of opportunity. "Therefore the seats to be reserved [...] must be confined to a minority of seats", he observed, in the context of Art. 16(4). This pragmatic approach of Dr.Ambedkar can well serve as a guide post for our present day politicians.

B. Cautious Pragmatism

While destroying old inequalities we should be careful not to create new inequalities. If the State keeps on extending the duration and scope of protective discrimination we shall be introducing castes and classes over again. Perhaps the time has come when we should be identifying individuals in the group/class who need special assistance, rather than keep on applying the principle of compensatory discrimination to the groups, indiscriminately. The application of compensatory discrimination has to be gradually individualized (and ultimately eliminated) if we really mean to usher in an egalitarian society.

Post-Constitutional developments unfortunately amply bear out that individual members of depressed class do not intend to give up their caste identity at all since it brings them the prospect of advancement. The political processes including the electoral politics and manner of application of protective discrimination provisions seem to have strengthened the caste identities rather than weakened them. Perhaps, the Constitution-makers (including Dr. Ambedkar) had not conceived of such a development.

Dr. Ambedkar's words, when the Hindu Code Bill, which was introduced by him was dropped by Nehru, were extremely forceful - "The Hindu Code Bill was the greatest social reform measure ever undertaken by the Legislature […] to leave inequality between class and class, between sex and sex which is the soul of the Hindu society, untouched and to go on passing legislations relating to economic problem is to make the farce of our Constitution and to build a palace on a dung-heap". [Emphasis supplied]

Supporting the idea of federation with a strong center, Dr. Ambedkar rightly observed: "It is difficult to prevent the center from becoming strong. Constitutions in modern world are such that centralization of powers is inevitable. One only has, to consider the growth of the federal government in USA, which notwithstanding the very limited powers given to it

by the constitution, has outgrown its former self and has overshadowed and eclipsed the state governments. This is due to the modern conditions. The same conditions are sure to operate in the Government of India and nothing that one can do will help to prevent it from being strong. On the other hand we must resist the tendency to make it stronger. It cannot chew more than it can digest. Its strength must be commensurate with its weight. It would be a folly to make it so strong that it may fall by its own weight". The Unique feature of our Constitution is that it is a federal state with a leaning towards central dominance in certain matters. The Constitution envisaged the creation of a dual polity consisting of the Union Government and the States.

Another criticism against the Draft Constitution is that no part of it represents the ancient polity of India. But those who take pride in the village communities do not care to consider that little part they have played in the affairs and the destiny of the country; and why? Their part in the destiny of the country has been well described by Metcalfe himself who says: "Dynasty after dynasty tumbles down, revolution succeeds to revolution. Hindoo, Pathan, Mogul, Maharatha, Sikh, English, are all masters in turn but the village communities remain the same. In times of trouble they arm and fortify themselves. A hostile army passes through the country. The village communities collect their little cattle within their walls and let the enemy pass unprovoked".

Such was the part that the village communities have played in the history of their country. What is a village but a sink of localism, a den of ignorance, narrow mindedness and communalism? Though Dr. Ambedkar was glad that the Draft Constitution has discarded the village and adopted the individual as its unit, 73rd and 74th Constitutional Amendments paved the way for democratic decentralization by making village as a unit through Panchayat Raj. Alternative Dispute Resolution Mechanism is being encouraged through legislation and the courts.

In his answer to apprehensions expressed by some members of the constituent assembly with regard to the use or abuse of Art.356, Dr. Ambedkar replied that such Article will never be called into operation and that it would remain a dead letter. But unfortunately Dr. Ambedkar's prophecy has not come true as can be seen from the observations of Ahmadi, J., as he then was, (1994) 3 SCC 1, 67 in *Bommai* case

> "We are a crisis laden country, crisis situations created by both external and internal forces necessitating drastic State action to preserve the security, unity and integrity of the country. To deal with such extraordinary difficult situations exercise of emergency powers becomes an imperative".

Article 356 of the Constitution which was expected to be a 'dead letter' has in fact become an oft invoked provision during one party rule at the center. However with the emergence of coalitional rule at the center it has become difficult to invoke this provision.

The Constitution is the process by which the governmental action is effectively restrained and is understood as the process of the function of which it is not only to organize but to restrain. Indian experience can be viewed as a conflict resulting from a search for a balance between the use of law by elites for purposes of domination and the use of law to moderate elite domination by providing avenues of participation for the disadvantaged. The existence of this duality is perhaps the result of the failure of the masses to understand their legal rights, the restricted access of the masses to the legal system in terms of time and/or financial constraints. The 'civic revolution' as a model of social transformation would make it a logical necessity that law as an instrument of social change is held under constant review (Prof. Yogendra Singh). The efforts of the three wings of the State, viz., Legislature, Executive and Judiciary and the efforts of the public organisations and enterprises working to advance the movement of democratic law and social change must be linked for more effective implementation.

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

It is now Dr. Ambedkar's vision of "fraternity" as the essence of Buddhism placing faith on the concept of "Maitri" should be the "liet motif" for all Indians to combat against all evil forces.

[Modified version of Lecture delivered at 'Puducherry']

AN ANALYSIS OF FEDERAL RULE OF EVIDENCE 412, THE RAPE SHIELD STATUTE, AND ITS EFFECTS

—*Vandana Murty*[*]

"Rape is the only crime in which the victim becomes the accused."
—Freda Adler[**]

Abstract *Crimes of sexual nature have always been tougher for the victim than the accused due to the inherent prejudice in the minds of the people trying such cases. This prejudice is based upon the victims past sexual history. The federal rule of evidence 412, better known as the rape shield law, rectified this by forbidding the accused from enquiring into the victims past sexual endeavors, to use it as a defence for himself. However, it is questionable whether it has really helped the case of the victims, because even if evidence of their past sexual history isn't allowed to be taken into account as evidence, it doesn't mean that the question won't be hanging at the back of the mind of the judge trying the case and cause prejudice regarding something which can never be known about. To make a lethal combination, rape shield laws are now being combined with rape sword laws which allow the prosecution to go into the accused's sexual history to prove his propensity. In light of all this it would be better to be more straightforward in giving evidence because one cannot help the prejudice which forms due to hidden information.*

[*] J.D. Atlanta, Georgia, USA.

[**] Freda Adler is an American criminologist, Professor Emeritus at Rutgers University and visiting Professor at the University of Pennsylvania. She is the former president of the American Criminological Society. Further information about Ms. Adler http://www .criminology.fsu.edu/crimtheory/Adler.htm. (Accessed on 27/032014).

This paper analyses the origin, history and purpose of rape shield statute focusing on the evolution of the federal rule. The paper highlights the need for reform in these laws taking into consideration the present social needs.

I. INTRODUCTION

The law has always treated sexual crimes differently. It is one of the only class of crimes where the society has blamed the victim for the incident. Although the law has been evolved to recognize a victim's innocence, research indicates that jurors might harbor attitude of blame towards women with socially condemnable sexual histories. Even in modern times, sexual crime prosecution reflects the persistent inequality between men and women. In the late twentieth century, the United States legislature attempted to remedy this inherent bias by enacting a rape shield statute. This paper addresses the origin, history and purposes of the rape shield statute, focusing on the language and evolution of the federal rule. It further examines the benefits, problems, and competing practical and constitutional interests for victims and defendants alike, since the enactment of rape shield statutes.

II. WHAT IS RAPE?

To understand the evolution and purpose of rape shield statutes, one must first understand the evolution and definition of rape as a crime. Each state defines rape differently and categorizes sexual offenses over a number of statutes, but essentially, the modern definition of rape is forced sexual intercourse.[1] However, it was not until the twelfth century, when the law permitted women to file suit against rapists that rape was considered a crime against a person. Rape originally constituted a property offense. To this day, the crime retains the ancient derogatory connotations in the name itself: "The origins of the word rape are found in ancient Greek – to steal. The etymology of the word alone underscores the cultural assumptions locked within. recorded law until very recent history, the rape of women has been constructed as a property crime whose redress was directed to the husband or father of the victim."[2]

---

[1] In some states, like Georgia, only females can be legal victims of rape. O.C.G.A. § 16-6-1: "(a) A person commits the offense of rape when he has carnal knowledge of: (1) A female forcibly and against her will; or (2) A female who is less than ten years of age. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. The fact that the person allegedly raped is the wife of the defendant shall not be a defense to a charge of rape."

[2] Suzanne Brown. *Feminist History of Rape* Connections 6 (Spring/Summer 2003). http://www.safeplaceolympia.org/wp-content/uploads/2011/09/A-Feminist-History-of-Rape.pdf.. (Accessed on 27/03/2014).

Rape was the theft of virginity, and the embezzlement of a father's fair price for his daughter or a future husband's enjoyment of his bride's chastity. Therefore, the punishments were generally severe for the attacker and, most often, the victim as well. According to the Hammurabic Code, if a betrothed virgin was raped, she was considered blameless and her attacker was slain. However, if a married woman was raped, both she and her attacker were thrown into the river to drown. Hebrew law dictated that if an unmarried woman was raped within city walls, she be stoned to death. The reasoning was that if she had not consented to the sex, she would have screamed to be saved. If rape occurred outside city walls, the victim was presumed not-guilty but still faced consequences. If not betrothed, the rapist was ordered to pay the woman's father compensation of what would have been her bride price and the rapist and woman were ordered to marry. If the woman was betrothed, the state voided the offense and the woman's bridal price (usually fifty silver pieces) was marked down. Assyria adopted a more "eye for an eye" philosophy, allowing the father of a raped virgin to violate the rapist's wife.

With the rise of Christianity in 30 AD, rape was redefined as a public offense rather than as a private wrong.[3] Under Roman law, "rape" also referred to cases of abduction or elopement without the head of household's permission. Therefore, Emperor Constantine ordered that if the woman had consented to pre or extra marital sexual relations, she should be punished along with the male "abductor" by being burnt alive. If she had not consented, she was still considered an accomplice, on the Hebrew grounds "that she could have saved herself by screaming for help."[4] Even where the rapist and woman's family consented to a marriage as the result of an elopement, the marriage was legally void.[5] The punishment continued to be compensation to the woman's father.

With spread of civilization in the west, punishment for rapists once again became more severe. Prior to William the Conqueror's invasion of England, the penalty was death and dismemberment, but only if the victim was a woman with high social status who possessed property.[6] However, the most

---

[3] James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe*, University of Chicago Press Books,1990, p.107.

[4] Jane F. Gardner, *Women in Roman Law and Society*, Indiana University Press, 1991, p.120.

[5] Theodosian Code 9.24.1.2–3; *Cod*. 9.13.1; James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe*, University of Chicago Press Books,1990, p.107.

[6] This law was influence by the highly publicized sexual assault in the rape of Lucretia, a Roman queen who was raped and subsequently committed suicide. This catalyzed a re-definition of rape in Roman law. However, the protection did not extend to all woman. The Roman emperor and philosopher, Diocletian (reigned 284–305 AD), held: "The laws punish the foul wickedness of those who prostitute their modesty to the lusts of others, but they do not attach blame to those who are compelled to *stuprum* by force, since it has, moreover, been quite properly decided that their reputations are unharmed and that they

significant change in addressing the crime in the Western world occurred with the reign of Henry II in the twelfth century. England was the first country to afford a victim a trial by jury if she filed a timely civil suit.[7] The victim was required to make a show, through credible witness testimony, that immediately after the attack, she ran through the town making a "hue and cry" by showing her injuries and torn clothing to "Men of Good Repute."[8] If accomplished, the court found that was sufficient corroborating evidence that an attack occurred.[9]

Henry II's initiative triggered a "new world" analysis of rape that eventually led to the criminalization of rape in all cases, not just where the victims were virgins. The thirteenth century gave rise to the concept of statutory rape in the Western world and if a woman failed to bring a private suit within forty days of the attack, the Crown took over the prosecution. Despite the narrow class of individuals who could actually allege rape, the state officially recognized the crime as an issue of public safety and concern.[10]

III. PROVING RAPE IN AMERICA

Post-colonial America retained the British definitions and punishment for rape in large part, including requiring the victim to prove she did everything in her power to physically resist the attack. "Subject to the exception where the power of resistance is overcome by unconsciousness, threats, or exhaustion, in order to constitute the crime of rape not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means and faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated."[11] In fact, "[m]ere

---

are not prohibited from marriage to others." As cited in Jane F. Gardner, *Women in Roman Law and Society*, Indiana University Press, 1991, p.120.

7 Non-virgins were excluded from the ability to file suit; the reasoning being that nothing was "lost." The standard of proof for this type of suit was blood, torn garments, and the evidence of the vocality of the woman's objection after the attack. "It was also during the reign if Henry II that some of the first affirmative defenses were articulated: the woman was a concubine to the rapist, she consented, her accusations rose out of bitterness or jealousy, her family pressured her into making the accusation, or the defendant had an alibi." *As cited in* Suzanne Brown. *Feminist History of Rape* Connections 6 (Spring/Summer 2003). http://www.safeplaceolympia.org/wp-content/uploads/2011/09/A-Feminist-History-of-Rape.pdf. (accessed on 27th March 2014).

8 In common law, a hue and cry is a process by which bystanders are summoned to assist in the apprehension of a criminal who has been witnessed in the act of committing a crime.

9 Susan Brownmiller, *Against our Will: Men, Women, and Rape*, Ballantine books, 1975, p. 24.

10 *Id*. However, the perpetual pendulum of punishment and victim recognition swung in favor of two years maximum imprisonment for convicted rapists. "For 10 years, in 1285 the 2nd Statute of Westminster reestablished the punishment to death."

11 *Brown* v. *State*, 127 Wis. 193 (1906).

general statements of prosecutrix in a prosecution for rape that she did her utmost to resist, etc., without a statement of the acts constituting such resistance, is insufficient to show absence of assent."[12]

As women gained more social prominence, the legislatures took preemptive measures to counter the defense tactic of "putting the accuser on trial." Now rape and other sex crimes are the only crimes in which there are statutory protections designed in favor of the accuser in the United States. Rape shield laws limit a defendant's ability to cross-examine rape complainants about their past sexual behavior. The legislative efforts culminated in the drafting of Federal Rules of Evidence 412 through 415. Rule 412 was added in 1978, four years after Michigan "passed the first rape shield law in the United States."[13] By the early 1980s, every state enacted a version of the rape shield statute into its own Rules of Evidence.

IV. FEDERAL RAPE SHIELD STATUTE

The Rules of Evidence have a strong presumption of admissibility, unless it is in the interest of justice that certain evidence is excluded. Federal Rules of Evidence 412 and 413 specifically narrow the parameters for admissible evidence in sex offenses. This paper focuses on the nature and effects of the substantive portion of Rule 412, which states, in part:

Sex offense Cases; Relevance of Alleged Victim's Past Sexual behavior or Alleged

Sexual Predisposition:

(a) Evidence Generally Inadmissible. the following evidence is NOT ADMISSIBLE in any civil or criminal involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

  (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior; and

  (2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.—

  (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

---

[12] *Id.*

[13] Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and New Rape Shield Law* 70 GEORGE. WASH. L. REV. 51, 52 (2002).

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.[14]

The Advisory Notes to Rule 412 elucidate the reasoning behind the enactment and categorization of the rule. Rule 412 "limits the admissibility in both civil and criminal cases of evidence of the sexual behavior or predisposition of an alleged victim of sexual misconduct." It is a rule that is rooted in relevancy and public policy concerns. Considering the minimal probative value of such evidence and the danger of unfair prejudice, the rule protects sexual offense victims and their privacy interests by guarding "against unwarranted intrusion into the victim's private life."[15] In fact, the rule protects against lawyerly strategy. Typically, evidence that is deemed inadmissible through a "400" rule, is admissible, in part, to prove a witness's credibility. The rule addresses this potential loophole. It expands upon which evidence is generally inadmissible: "[r]ule 412(a) generally bars the admissibility of two categories of evidence, whether offered as substantive evidence or impeachment purposes."[16] Other sexual behavior is also inadmissible, including:

- "All activities that involve actual physical contact such as sexual intercourse and sexual contact.
- All activities that imply sexual intercourse or contact.
- Statements that indicate a desire to engage in sexual activity.
- Fantasies or dreams that imply sexual activity.

---

[14] Fed. R. Evid. 412.
[15] *United States* v. *One Feather*, 702 F 2d 736, 739 (1983).
[16] Fed. R. Evid. 412 *See United States* v. *Azure*, 845 F 2d 1503, 1506 (1988).

- Reputation or opinion evidence about the alleged victim."[17]

Expectedly, this prohibition also extends to disallowing "evidence related to victim's mode of dress, speech and life-style if offered for its sexual connotation."[18]

Rule 412 applies to all cases that involve sexual misconduct, criminal and civil. While the criminal sexual misconduct cases are more obvious, in civil cases, the rule can be triggered even where the defendant is being sued for a nonsexual offense. For example, if the defendant's sexual misconduct is relevant to prove motive or background evidence for the civil charge, rule 412 can take effect.[19] In criminal cases, the rule protects any relevant witness, not just the accuser.[20] In civil cases, the rule applies in any case where a person claims to be the victim of sexual misconduct (including actions for sexual battery and sexual harassment.)[21] Since the enactment of Rule 412, the courts have enumerated five exceptions where evidence of the complainant's history may be ruled admissible. The exceptions are:

1. Rebutting medical evidence that defendant is the cause of pregnancy or disease, or source of semen in the victim, including injuries allegedly caused by defendant.[22]
2. Conduct involving the defendant, including "evidence of specific instances of sexual behavior by the alleged victim with respect to the accused to prove consent."[23] (This rule only includes conduct directly involving the defendant. In *People* v. *Goodwin*, the Court properly precluded any questioning of the complainant about an incident in which she allegedly engaged in oral sex with another person

---

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* "[…] 412 protects pattern witnesses, called to testify to other acts of sexual misconduct by a defendant, from being interrogated about their past sexual behavior."

21 *Id.*

22 *See United States* v. *Begay, 937 F 2d 515, 519-23 (1991). "The prosecution offered evidence that a physical examination of the eight-year old alleged victim revealed an unusually large hymenal opening and vaginal abrasion. The trial court erroneously refused to allow the defendant to prove that the alleged victim had been sexually assaulted three times a few months preceding the charged sexual assault, even though the prosecution's expert conceded (outside the jury's presence) that the injuries could have been caused by such earlier assaults." But see "In United States* v. *Torres, 937 F 2d 1469, 1473-74 (1991), the defense offered evidence that the alleged victim had engaged in sexual intercourse six months after the alleged assault in an effort to prove that someone else was the source of the semen found on her panties. The trial court properly excluded this evidence because the panties were in police custody at the time the other sexual act occurred."* Fed. R. Evid. 412.

23 Fed. R. Evid. 412(b)(1)(B); *People* v. *Badine*, 301 AD 2d 178 (2d Dept 2002); *People* v. *Westfall*, 95 AD 2d 581 (3d Dept 1983).

while defendant was present because he had no relationship with the accused.)[24]

3. Rebutting evidence by the prosecution of the victim's failure to engage in sexual activity during a particular period of time.[25] ("This is designed to allow the prosecution to offer evidence of uncharged sexual activity to the extent permitted under 404(b).")[26]
4. In the interest of justice, "exclusion would violate the accused's constitutional right to confrontation or due process."[27]

These exceptions have been the source of many legal arguments regarding accused and accuser's rights in sexual misconduct cases.

V. BENEFITS AND PROBLEMS

The rape shield laws provide a balance and allow the fact finder to consider only relevant evidence when seeking the truth. A woman's prior pattern of sexual behavior is nearly irrelevant to her willingness to engage in sexual conduct regularly. "A defendant arguing the defense of consent in a rape case, however, is not simply claiming that the complainant consented. Instead, he is claiming that she consented, but then falsely reported to the police that he raped her, pursued the claim through the investigative process, and then lied under oath about the experience at trial. Without a pattern of prior false accusations, a pattern of sexual behavior is irrelevant on this crucial question."[28] Rape shield laws protect the victim against public shaming because even where a prior pattern of sexual conduct would be somewhat relevant, the relevance would be severely outweighed by the substantial, unfair prejudice it would have on jurors. "Psychological and sociological research over the past two decades indicates that a complainant's promiscuity or perceived promiscuity with third parties subverts the truth-seeking process by biasing jurors against the woman who has failed to live to a model of feminine modesty."[29]

"Neither enumerated exception found in Rule 412(b)(1) involves the use of character evidence, and rarely, if ever, will the constitution compel the admission of evidence of an alleged victim's character."[30] The rules also help to promote reports of sexual assault as well. Considering estimates

---

[24] *People* v. *Goodwin*, 179 AD 2d 1046 (4th Dept 1992).
[25] *People* v. *James*, 98 AD 2d 863 (1983).
[26] Fed. R. Evid. 412.
[27] *People* v. *Williams*, 81 NY 2d 303 (1993); Fed. R. Evid. 412(b)(1)(c).
[28] Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and New Rape Shield Law* 70 George. Washi. L.Rev. 55 (2002).
[29] *Id*.
[30] Jane F. Gardner, *Women in Roman Law and Society*, Indiana University Press, 1991, p.121.

that over half of rapes go unreported, it is important for victims to feel safe about reporting sexual crimes.[31]

Despite these protections, legal debates continue on both sides. Victim advocates believe that "since their passage, federal and state rape shield laws have repeatedly failed to protect victims in many real cases."[32] They believe that the exceptions are not clear enough to protect against irrelevant evidence. Despite the general inadmissibility of character evidence" "A complainant's chastity or lack thereof is typically of little relevance with a sex offense charge, thus the complainant's sexual history is normally inadmissible."[33] However, the contention is that "although most rape shield laws appear to bar the admission of a rape complainant's sexual history except under limited and carefully defined circumstances, their exceptions routinely gut the protection they purport to offer."[34]

The concern is that rape shield laws only protect "perfect" victims and, therefore, render the very purpose for which they were enacted, unfulfilled. There is merit to this concern, particularly in cases of spousal sexual assault or sexual crimes against a victim where a previously consenting sexual relationship existed between the accuser and accused. The statistics indicate that the majority of sexual crimes are perpetrated by a non-stranger.[35] Two-thirds of rapes are committed by someone the victim knows. Seventy-three percent of sexual assaults are perpetrated by a non-stranger and nearly thirty percent of sexual crimes are committed by an intimate.[36] Victim's advocates assert therefore that, only evidence that is temporally and substantively probative to the incident in question should be admitted. Otherwise, for the tens of thousands of victims who fall under the umbrella of non-stranger sexual violence or offense, the law provides no protection.

The other hand of the argument is of course, a constitutional one. Every defendant is presumed innocent until found guilty. The Sixth and Fourteenth Amendments allow for an equal protection under the law and due process in litigation after an individual is charged with a crime. Further, the confrontation clause affords the accused the right to "in all criminal prosecutions the right to be confronted with the witnesses against him."[37] While this is not an issue in civil litigation, in criminal cases, the

---

[31] Rape, Abuse and Incest National Network (RAINN) Reporting Statistics, http://www.rainn.org/statistics. (Accessed on 27th March 2014).

[32] *Id.* at 54.

[33] *People* v. *Halter*, 19 NY 3d 1046 (2012).

[34] Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and New Rape Shield Law* 70 George. Washington Law Rev. 51 (2002).

[35] Rape, Abuse and Incest National Network (RAINN) Reporting Statistics. http://www.rainn.org/statistics (Accessed on 27th March 2014).

[36] *Id.*

[37] N.M. CONST. amend.art VI.

rape shield laws effectively curtail this right. Defense proponents argue, that where an allegation is made, the defendant should have the right to a thorough cross-examination of all witnesses giving testimony against him, especially the one accusing him. Even though evidence of previous false accusations are exempt from the rape shield law (discussed below), it is still relevant to inquire further as to the credibility of the complainant in criminal cases, which may involve inquiry into her sexual history.

In the civil arena, the sexual demeanor of a witness or complainant may be even more relevant. For example, while it is distasteful to think about it in more enlightened times, it is conceivable that a person may allege sexual harassment for monetary gain. Since the protections against inquiring about credibility are so broad, the defense may be unjustly harmed.[38] "To make matters worse, many jurisdictions have now coupled rape shield laws with what amounts to rape sword laws—laws that specifically allow the prosecution to introduce evidence of a defendant's sexual history as proof of his character or propensity."[39] This not only tips the scale of guilt and innocence, but may result in a severe miscarriage of justice.

There is also a third, more neutral, group that analyses the laws objectively and suggest that they have exhausted their use in society. I. Bennet Capers, Professor of Law at Brooklyn Law School writes:

> "...My immediate contention is that rape shield laws are bad for women. Although they may appear to benefit all women, in fact they benefit only some—women who because of age and race and class can easily pass as chaste and worthy of the law's protections. But beyond this is another more fundamental problem: When rape shields do work, they do so at extraordinary cost, re inscribing the very chastity requirement that they were intended to abolish. . . . rape shield laws have not equally benefited Black, Hispanic and Asian women and in fact may leave them in a worse position than they would be without rape shield laws. The more I considered the impact of rape shield laws, the more it became obvious that rape shield laws are bad for all rape victims. And they are bad for the rest of us, too."[40]

This call for reform is definitely worth noting. Perhaps the time for rape shield laws has passed. If the law is not effectively protecting and fulfilling its purpose or scope, it becomes counterproductive. As Capers' asserts,

---

[38] I. Bennett Capers, *Real Women, Real Rape* 60 UCLA L. Rev. 826 (2013).
[39] *Id.* at 827.
[40] *Id.* at 832-33.

"by virtue of the rape shield, jurors will learn nothing about her sexual experience. But again, jurors who are told nothing do not assume nothing. Instead, jurors are more apt to conclude that the complainant is sexually active and that she may even be a bad girl (sexually indiscriminate and sexually immoderate). Indeed, because of the continued salience of race in this country, jurors may reach this conclusion even when presented with a black complainant who is solidly middle-class, articulate, and fully presentable to the jury."[41] Juries are not blind, it may very well be in the benefit of both parties to be more straightforward with the evidence and explain how they relate, or do not relate, to the elements of the crime or offence.

VI. THE WOMAN WHO CRIED RAPE: FALSE ACCUSATIONS

Rule 412 does not apply to previously proven false allegations of rape. "Prior false claims are not considered sexual behavior."[42] Although this does not make evidence of false accusations automatically admissible, it certainly leaves the door open wide for the complainant to put her reputation at issue. If that occurs, the shield protection is punctured and the defendant may question the accuser or witness about her sexual reputation.

There are several conflicting reports regarding the incidence and prevalence of false accusations of sexual assault. Because of the nature of the crime, it could very well be impossible to deduce how common, false accusations are. Therefore, in those instances where there seems to be evidence of such allegations, the trial court, as gatekeeper, would have to conduct a case-by-case analysis to decide the balance between probativeness and prejudice, subject to Rules 403 and 412 (b)(2).

VII. PROPOSAL FOR THE FUTURE

Writing about any sexual crime today, in an entirely objective fashion is impossible. After thousands of years of bias, discussing sexual offenses, without leaning heavily towards victims' rights is difficult. After all, even with the caveat of believing chaste women, it is undisputed that inherent biases lean towards believing women in any sexual offense case.

Not considering the exception of the "wrong place at the wrong time, chivalrous prince" who fell into bad company, the default presumption is that men are more capable and likely to commit sexual violence or offenses. While our system shrouds defendants in a cloak of innocence from the

---

41 *Id.* at 868.

42 Fed. R. Evid. 412.

time they enter a courtroom until they receive a verdict, the rape shield is designed to protect the victim from being attacked again, this time in the courtroom. As a society, the intended message to be given through the rape shield laws is "no more." However, that may no longer be an appropriate message.

New information has changed the face of the sexual crime perpetrator and victim. With increased reporting and more accurate fact recording, society is coming to understand sexual offenses better. In order to maintain this progress, it is time to re-evaluate the laws. The notion of women as property is all but extinguished in American society. While the nation still has a long way to go in perfecting gender equality, perhaps Capers' argument for reform is the fastest way to reach that. It is time to make the laws more reflective of society's needs. Whether this means amending the rape shield laws, changing the name of the crime itself, or unifying the definition of sexual assault across states, it is time for a fresh set of eyes to assess the rape shield laws.

THE BALCO RATIONALE – A SHIFT TO THE TERRITORIALITY PRINCIPLE IN INTERNATIONAL COMMERCIAL ARBITRATION

—*Sai Ramani Garimella**

Abstract The seat of the arbitration denotes the legal identity of the arbitral proceedings, apart from stating the curial law that would govern the arbitral proceedings. The territoriality principle has been firmly placed into the UNCITRAL Model Law. Many Member States in the European space have adopted the UNICTRAL Model Law in its entirety while in the Asia-Pacific States have adopted it with modifications and reservations. India has adopted the UNCITRAL Model Law but has made a few changes which have been subjected to much judicial interpretation often in extremes. The recent decision in the BALCO case is a final affirmation of the territoriality principle in International Commercial Arbitration involving Indian parties where the arbitration is seated outside India.

The decision of the Supreme Court in Bharat Aluminium Co. v. *Kaiser Aluminium Technical Services Inc.*[1], *BALCO decision as it has come to be known, delivered on September 6th, 2012, has been subjected to much scrutiny, academic and otherwise. BALCO has been a significant statement on the application of Arbitration and Conciliation Act, 1996, especially the inter-relationship, if any existed, between Parts I and II of the legislation. The legislation itself has been the subject of much revisionary efforts within the precincts of the Law Commission of India and also in the Parliament*

* Assistant Professor of Law, South Asian University, New Delhi.

1 (2012) 9 SCC 552.

of India, and on the lines of its recommendations an amendment to the legislation is under Parliament's consideration. This paper looks at the decision from the perspective of the transition to a seat-centric arbitration in India.

I. INTRODUCTION

The decision of the Supreme Court in *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.*[2] (*BALCO* decision as it has come to be known) delivered on September 6th, 2012, has been subject to much scrutiny, academic and otherwise. *BALCO* has been a significant statement on the application of Arbitration and Conciliation Act, 1996, especially the inter-relationship, (if any) between Parts I and II of the legislation. The legislation itself has been the subject of much revisionary efforts within the precincts of the Law Commission of India and also in the Parliament of India, and on the lines of its recommendations, an amendment to the legislation is under Parliament's consideration. This paper looks at the decision from the perspective of the transition to a seat-centric arbitration in India.

The 176th Report of the Law Commission of India makes a pertinent statement on the process of judicial intervention and the role of the judiciary with regard to the awards derived from International Commercial Arbitration.[3]

The judicial history of BALCO began a decade earlier with the decision in *Bhatia International* v. *Bulk Trading S.A.*[4] where the apex court was called upon to decide the position of judicial intervention with regard to foreign-seated arbitrations. It was specifically asked to opine upon the role of Indian courts with regard to interim relief where the parties or either of them are Indian and the arbitration is seated outside the country. The Supreme Court in *Bhatia* case was faced with a lacuna whereby Indian arbitration law did not appear to provide Indian courts with the power to grant interim relief in support of arbitrations seated outside India. In order to avoid this, the court interpreted the Indian Arbitration and Conciliation Act 1996 in a creative way which unfortunately brought with it undesirable consequences. In *Bhatia* case, the Indian Court considered a request for interim relief under Part I of the Act by a party to an ICC arbitration seated in Paris. A three-judge bench of the Supreme Court held that the provisions of Part I of the Act would also apply to international commercial arbitrations seated outside India, unless the parties had expressly or impliedly excluded its application. The reasoning underlying the Court's

---

2 (2012) 9 SCC 552.

3 <http://lawcommissionofindia.nic.in/arb.pdf> (accessed on 27th March, 2014).

4 (2002) 4 SCC 105.

judgment was that Section 2(2) of the Act did not imply that Part I would "only" apply when the place of arbitration was in India. The court held that the provision enabling the courts to grant interim relief – contained in Part I of the Act, which seemingly dealt only with domestic arbitrations – could equally be applied to foreign seated arbitrations, unless the parties opted out of this arrangement.

In a series of cases following the *Bhatia* judgment, the seemingly innocent intention of the Court to explain a supposed vacuum in the 1996 Act created a structure whereby the courts have seen an expansive role, supervisory or otherwise, to interfere with foreign- seated arbitrations and the foreign awards either by way of interim relief or during the enforcement proceedings by a discussion on the merits of the foreign arbitral award itself. The effect of the *Bhatia* decision could only be gauged by the extent of the expansive decisions that followed as possible implications of this decision, *Venture Global* and *Indtel* cases to name a few. In the case of *Venture Global Engg.* v. *Satyam Computer Services Ltd.*[5] wherein the Court was asked to set aside an award in a foreign-seated arbitration it held that a London Court of International Arbitration (LCIA) award rendered in London could be challenged in India under the expanded "public policy" grounds for reviewing arbitral awards in Part I of the Act (Section 34). In the case of *Indtel Technical Services (P) Ltd.* v. *W.S. Atkins Rail Ltd.*[6] the Supreme Court held that Indian courts can appoint arbitrators in foreign-seated arbitrations. The Supreme Court ruled that it had the power to appoint arbitrators in arbitrations seated outside India in the case of a deadlock between the parties concerning the appointment procedure. – both decisions pursuant to the enabling provisions contained in Part I of the Act, being illustrative of the judicial over-reach the decision in *Bhatia* case made possible.

Bhatia case and its progeny have therefore created significant uncertainty and delay in a number of arbitrations taking place outside India but involving Indian counterparties or laws. Those decisions have also been the subject of intense international attention and criticism for adopting a position inconsistent with the international arbitral practice by which the court of the seat of arbitration will generally have supervisory jurisdiction over an arbitration and exclusive jurisdiction to review and set aside any arbitral awards. As a result of Bhatia case, it has become common for commercial parties to expressly exclude the application of Part I of the Act in arbitration agreements which have any connection with India, in order to prevent the Indian courts from assuming jurisdiction over arbitrations seated outside India.

---

5 (2008) 4 SCC 190: AIR 2008 SC 1061.

6 (2008) 10 SCC 308: AIR 2009 SC 1132.

In 2008, a two-judge bench of the Supreme Court expressed reservations about the principles laid down in the *Bhatia* judgment.[7] Subsequently, in 2011, the matter was referred to a five- judge Constitutional Bench (including the Chief Justice of India) to reconsider the current legal position and, hopefully, settle the controversy.

The observations made by the bench in the hearings, demonstrated its indignation at the international implications of the appeal, particularly the detrimental impact on investments in India if the arbitration regimes to which those investments are subject, suffer from excessive judicial intervention. In the course of considering the application of Part I to foreign seated arbitrations, it was also expected that the Court would clarify Indian "conflict of laws" principles as they apply in an international arbitration having a nexus with India.

In April 2010, the Law Ministry of India introduced a consultation paper, proposing certain important amendments to the Act. One of the key amendments, sought to nullify the impact of the Bhatia line of decisions. However, the proposed legislative reforms have yet to be considered by the Indian parliament and it seems unlikely that statutory clarification will be forthcoming in future. In these circumstances, the Supreme Court's decision to reconsider its own ruling in *Bhatia* case is a welcome development. It is hoped that the Constitutional Bench will adopt a less interventionist approach than the previous decisions, thereby providing greater certainty for parties which chose to invest in India.

The case also found merit in the argument that if Part I was not made applicable to arbitrations conducted outside India it would render "party remediless", as wholly correct. It is not open to a party to file a suit touching on the merits of the arbitration, since such suit would necessarily have to be stayed in view of Section 8 or Section 45 of the Arbitration Act, 1996. The Court opined that the only way a suit can be framed is for a suit "to inter alia restrict the defendant from parting with properties".

II. UNCITRAL MODEL LAW, LOCALIZATION TO THE SEAT AND THE ASIAN PRACTICE OF JUDICIAL INTERVENTION

Article 1(3) states the territoriality nature of the law.[8] It reads as follows—

---

[7] *Venture Global Engg.* v. *Satyam Computer Services Ltd.*, (2008) 4 SCC 190: AIR 2008 SC 1061.

[8] <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> (Accessed on 27/03/2014).

(3) An arbitration is international

if:

(a) the parties to an arbitration agreement, have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(iii) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

The strict territoriality criterion governed most of the Model Law for the sake of certainty and also for the following factual reasons. In most legal systems, the place of arbitration is the exclusive criterion for determining the applicability of the national law and, where the national law allows parties to choose the procedural law of a State other than where the arbitration takes place, experience shows that parties rarely make use of that possibility. Incidentally, enactment of the Model Law reduces any need for the parties to choose a "foreign" law, since the Model Law grants the parties wide freedom in shaping the rules of the arbitral proceedings. In addition to designating the law governing the arbitral procedure, the territorial criterion is of considerable practical importance in respect of Articles 11, 13, 14, 16, 27 and 34, which entrust State courts at the place of arbitration, with functions of supervision and assistance to arbitration. It should be noted that the territorial criterion, legally triggered by the parties' choice regarding the place of arbitration, does not limit the arbitral tribunal's ability to meet at any place it considers appropriate for the conduct of the proceedings, as provided by Article 20 (2). Many arbitration laws have attempted to limit court involvement in international commercial arbitration.[9] The explanatory note of the Model Law opined that it seemed justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and, in particular commercial cases, thereby preferring expediency and finality to protracted battles in court.[10]

---

[9] Section 103 of the English Arbitration Act, 1996.

[10] Pages 26-27 of the Explanatory Note of the UNCITRAL Model Law <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> (Accessed on 27/03/2014).

The Model Law foresaw court involvement only in the limited areas of appointment, challenge and termination of arbitrators (Articles 11,13 and 14), jurisdiction of the arbitral tribunal (Article 16) and setting aside of the arbitral award (Article 34). Beyond these instances, in these Articles, no court shall intervene in matters governed as according to the provisions of the Model Law.

As Kaufmann-Kohler has noted, one of the Model Law's 'main purposes was to free the proceedings from the constraints of local law, so as to avoid the parties' expectations from being frustrated by conflicting provisions of such law'.[11] This is also reflected in UNCITRAL reports leading up to the establishment of the Model Law: Probably the most important principle on which the Model Law should be based is the freedom of the parties, in order to facilitate the proper functioning of international commercial arbitration according to their expectations. This would allow them to freely submit their disputes to arbitration and to tailor the 'rules of the game' to their specific needs. It would also enable them to take full advantage of rules and policies geared to modern international arbitration practice as, for example, embodied in the UNCITRAL Arbitration Rules.

In the Asia-Pacific, State practice, however, has been vacillating between minimalist narrow approach like the European countries and the expansive supervisory role of the judiciary that was traditionally known in this geographic space.

Supposing the seat of arbitration is Singapore, then Article 1(2) prescribes that an Article 34 setting aside application in relation to an award rendered in that arbitration must take place in Singapore and it must be made before the Singapore High Court, the court specified for the purposes of Model Law Article 6. Section 8 of Singapore Arbitration Act makes it clear that seat-centric arbitration is the norm proposed by the Model Law.[12] Further, Asian practice confirms this proposition that courts at the seat of the arbitration have a major role in setting aside a foreign award. For example, in *Karaha Bodas Co. LLC* v. *Peusahaan Pertambangan Minyak Dan Gas Bumi Negara (No. 2)*[13], a Cayman Island company obtained a US$270 million arbitral award against the Indonesian respondents. Notwithstanding that the seat of arbitration was in Geneva, Switzerland, the Indonesian courts set aside the award. Subsequently, enforcement of the Swiss arbitral award was sought in Hong Kong against one of the respondents, *Pertamina*,

---

[11] G Kaufmann-Kohler, 'Identifying and Applying the Law Governing the Arbitration Procedure –The Role of the Law of the Place of Arbitration', (1998) 9 ICCA Congress Series 336, at p. 355.

[12] http://books.google.co.in/books?id=73lEwiY6_9cC&pg=PA417&lpg=PA417&dq. (Accessed on 27th March, 2014).

[13] (2003) 4 HKC 488.

which resisted enforcement inter alia on the ground that the award had been set aside by an Indonesian court. The Hong Kong Court of First Instance held, and correctly so, that the seat of arbitration was in Switzerland and considered 'the fact that the court in Indonesia has now annulled the award under its own law is ... a matter which has no effect on this court's task'.

Japanese district courts have a wider jurisdiction than most. Whilst the leer of the Model Law is clearly set out in Art 4 of the New Law – 'No court shall intervene with respect to any arbitral proceedings except where so provided in this Law' – its spirit is perhaps less faithfully observed by the provisions which follow.[14] On the other hand, domestic courts can decide to restrict the freedom of international arbitration and thereby restrict the delocalised character of Model Law. Examples of this kind of restriction are usually found in those cases where an attempt is made to set aside an award.

Having looked at the above-mentioned capsule on Model Law and State practice, it can be vouched for that delocalization has, in an albeit limited manner, found an entry into the arbitration documents in the UNCITRAL and has also been adopted into many jurisdictions.

In that light, the role of the seat in arbitration proceedings becomes important, a fact that finds place in the Indian Law of 1996, but somehow has not been given the required territoriality interpretation and is seen in a limited statutory role. Section 2(1)(e) provides for the subject- matter jurisdiction of the court where the arbitration is conducted and which would ordinarily have jurisdiction if such subject-matter were to be pleaded in a suit before it, such attribution of the court's jurisdiction is founded on the principle of territoriality.

Despite confirming (through the 1996 Act) to the provisions of the Model Law, the *Venture Global* case that followed *Bhatia* decision raised a significant concern amongst the practitioners and the academic community on the place of the seat of the arbitration vis-à-vis the Indian law of 1996. The decision in this case tried to close the door on the role of the seat in international commercial arbitration, thereby establishing the role of the courts in the arbitral proceedings as irrelevant of the nature of the arbitration. The Supreme Court held that an award made in an LCIA arbitration seated in London between Indian and US parties, though a foreign award, could be set aside under Section 34 of the Arbitration and Conciliation Act 1996, a provision based on Article 34 of the Model Law. This decision applied to Section 34 despite its location in Part I of that Act, which Part applies

[14] D Roughton, *A Brief Review of the Japanese Arbitration Law*, (2005) 1(2) Asian International Arbitration Journal 127, at p. 131.

(pursuant to Section 2(2)) 'where the place of arbitration is in India'. The judgment in *Venture Global* has been criticized for creating a new law not found in the Indian Arbitration and Conciliation Act, 1996. While *Bhatia* and the rest in its wake seemed to have overlooked this principle, the Constitution Bench in *BALCO* case specifically addressed itself to the issue of territoriality and the seat of the arbitration being of primordial importance in explaining the nature of judicial intervention in arbitration.

In *BALCO* the court was presented with an argument in support of the application of Part I to foreign seated arbitration through a concerted interpretation of Sections 2(1)(e), 20 and 26 read with Sections 45 and 48(1)(e) which was pleaded as leading to a subject-matter centric arbitration rather than a seat-centric arbitration. It was further pleaded that Section 2(1)(e) describing the jurisdiction of the civil court jurisdiction with the focus on the subject-matter of the arbitration, Part I should naturally be applicable to foreign seated arbitration irrespective of the seat, the only condition being that the subject-matter of arbitration is related to India. Rejecting the contention, the Supreme Court held that these points should be read with "territoriality" as the focal point in view of Section 2(2). The omission of the word "only" in Section 2(2) of the Act which was subjected to much discussion in *Bhatia* judgment and the decisions that followed *Bhatia* judgment, was not an indication of deviation from the territoriality principle. The fact that the Indian Parliament while adopting the 1996 Act took into consideration the Model Law was indication enough of the fact that the territoriality principle was the fulcrum of the Model Law. The Court held that Section 2(1)(e) which talked about the subject-matter of the arbitration ought not to be confused with the subject-matter of the suit. The phrase 'subject-matter' shall serve the purpose of identifying the court for the supervisory process over the arbitration proceedings. Such identification refers to the court where the seat of the arbitration is located.

Seat-centric arbitration is not unknown in India. There have been examples of Indian courts upholding seat-centric arbitration on a few instances. Post *Bhatia* decision, another significant statement on the subject is the decision in *Yograj Infrastructure*[15] case. The Court opined that even if the agreement is subject to the laws of India, where the parties expressed a choice of seat at Singapore and there is application of the Singapore International Centre(SIAC) Rules, Part I is deemed to have been excluded. The judgment in this case also averred to the non-applicability of Part I of the Arbitration Act, 1996 in situations where the substantive law of the contract was the Indian Law, owing to the fact that parties have agreed to the foreign curial law, as in the law of the seat of arbitration. Thus *Yograj*

[15] *Yograj Infrastructure Ltd.* v. *Ssang Yong Engg. & Construction Co. Ltd.*, (2011) 9 SCC 735: AIR 2011 SC 3517.

judgment effectively meant absence of jurisdiction to the Indian Courts in an international arbitration during the arbitral proceedings for any interim relief. *Yograj* judgment brought the Indian Law on international arbitration on largely similar lines of the UNCITRAL Model Law, 1985. Of significant interest here is the fact that the original text of the Arbitration Act, 1996 did not contain a provision for interim measures in arbitrations held outside India. So the fact that parties have to agree to expressly or implied exclude Part I to keep the arbitral proceedings away from the Indian Courts' jurisdiction for interim relief was only a *Bhatia* case innovation. *Yograj* case despite stating that parties' choice of seat would govern the arbitral proceedings and the applicability of the curial law, did not aver to this innovation of *Bhatia* case that was absent in the text of the legislation. It only brought in the primacy of the territoriality principle by giving priority to the parties' express or implied choice.

In *Paramita Constructions* v. *UE Development India*[16] and again in *Jyothi Turbopower Services (P) Ltd*. v. *Shenzhen Shandong Nuclear Power Construction Co. Ltd*..[17], the Andhra Pradesh High Court held that where parties have agreed to have their arbitration located in a specified seat, court in that local jurisdiction alone would have jurisdiction to hear any proceedings challenging such arbitration. It can thus be vouched for that *BALCO* was only speaking for an often pleaded request on giving primacy to the seat of the arbitration.

BALCO effectively put an end to the question of subject-matter jurisdiction by stating that courtesy Section 2(1)(e) seat of arbitration shall be the basis of the jurisdiction. Upholding the principle of territoriality and giving the courts located at the seat of the arbitration an exclusive supervisory jurisdiction, the court was furthering the idea of party autonomy. This feature would now apply to domestic arbitrations as well, thus further extending the territoriality principle. The Court in *BALCO* felt that if the seat theory is replaced with the cause of action to decide jurisdiction based on cause of action and not on consent, it would render the fundamental principle of arbitration, party autonomy, meaningless.

The Court held that the Arbitration Act, 1996 allowed the parties to decide the place of arbitration. Interpreting Section 20 of the Act related to the seat/place of arbitration the Court clarified that where the seat of arbitration is India, the parties are free to choose any venue for the conduct of the arbitration proceedings. Section 20 has to be read with Section 2(2) to understand the applicability of the principle of territoriality.

---

[16] (2008) 3 An LT 440.
[17] AIR 2011 AP 111.

BALCO thus confirmed the territoriality principle by holding that the choice of curial law now has to be in consonance with the choice of the seat of arbitration. It reiterated this holding by stating that Part I of the Act relating to domestic arbitration would not be applicable to foreign-seated arbitrations. Further, where the arbitration proceedings are seated outside India a party would not be able to file for interim relief in an Indian civil court in relation to the subject-matter of the arbitration agreement. This need not be an issue of concern warranting an amendment to the law for this purpose, as according to the now accepted seat theory, the aggrieved party could still approach the courts of the seat as specified in the curial law of the arbitration proceedings. It needs to be read that the meaning of the UNCITRAL Model Law in Articles 8 and 9 with regard to the access to the courts either to initiate the arbitration proceedings or for any interim relief that might be required for the purpose of the arbitration proceedings alone. Party autonomy being the sine qua non of arbitration proceedings parties can initially or later agree to a curial law that would address their needs during the arbitration process in a best possible manner. Allowing the curial law of the arbitration to address issues exclusively during the arbitration proceedings would expose the parties to the minimum risk of pleading their issues under foreign laws. The territoriality principle-seat theory now finds a place in the Indian Legal system courtesy the BALCO decision.

It is suggested that there could be a separate law for international commercial arbitration without deviation from the UNCITRAL Model Law, as was done in the Singapore International Arbitration Act. Such legislation would ensure that the statutory inadequacies and interpretation differences that might be found with regard to domestic arbitration would not affect international commercial arbitration efforts. Such law could provide for addressing the curial law for any relief that might be required during the pendency of arbitral proceedings. A significant example with regard to interim relief and the powers of the courts could be found in the provisions of the French Arbitration Law. The Decree no. 2011-48 addressed the arbitrators' powers to order interim measures. The Decree codifies the power of the arbitral tribunal to order interim measures, with daily penalties for any failure to comply with the measures ordered. The codification of these principles greatly strengthens the authority and powers of the tribunal and thereby favours arbitration. While an arbitral tribunal has no authority to ensure the enforcement of interim measures when a party refuses to comply voluntarily, the Decree will allow a counterparty to ask courts to order performance of such interim measures. In principle, French courts will enforce an interim measure without examining the merits of the measure which has been decided by the arbitral tribunal.[18] Here the reference to the French

[18] Pierre Heitzmann and Johanna Schwartz Miralles (2011), The 2011 French Arbitration Reforms Comparative Perspective *MEALEY'S International Arbitration Report*, Vol. 26, 4 April 2011.

courts should be seen as courts according to the curial law at the seat of arbitration.

The absence of jurisdiction for interim relief in a foreign-seated arbitration has been the English judicial opinion on many occasions. In *Econet Wireless Ltd.* v. *Vee Networks Ltd*.[19] the Court held that the natural court for the granting of interim injunctive relief will normally be the court of the country of the seat of arbitration. It went on to add that there might be an exception to the situation, on rare occasions. However, limitation was imposed on such exercise. The judge went on to say that "a party may exceptionally be entitled to seek interim relief in some court other than that of the seat, if for practical reasons the application can only sensibly be made there, provided that the proceedings are not a disguised attempt to outflank the arbitration agreement". In *Mobil Cerro Negro Ltd.* v. *Petroleos De Venezuela SA*[20] the English Court held that it is reluctant to grant interim relief in support of foreign arbitration proceedings, save in exceptional circumstances. The territoriality principle gained much support from the judicial statement in *U&M Mining Zambia Ltd.* v. *Konkola Copper Mines Plc*.[21] As a matter of principle, the judge noted in his judgment, the choice of the seat of arbitration determines, inter alia, the choice of courts that will exercise supervisory and supportive jurisdiction in the arbitration proceedings and also the choice of law that will govern any attempt to set aside the arbitral award. The judge quoted Dicey, Morris & Collins, who state that ''the courts of the seat will have the sole supervisory and primary supportive function in relation to the conduct of the arbitration. ...".[22]

In conclusion it is suggested that International Commercial Arbitration would gain significant impetus if the value of this device is recognized as an important practitioner's tool and that the judiciary should play a perfect foil in ensuring that the arbitration proceedings uphold the intention of the parties and the fundamental principle of arbitration, party autonomy.

---

[19] (2006) 2 Lloyd's Rep 428.

[20] (2008) EWHC 532 (Comm).

[21] 2013 EWHC 260 (Comm).

[22] Thomas Yates, CarinneMaisel and Anna Sokolovskaya (2013), English Court Confirms That It Does Not Have Exclusive Jurisdiction To Grant Interim Relief In Support Of An English Arbitration, *MEALEY'S International Arbitration Report,* Vol. 28, 4 April 2013.

TREATY ENFORCEMENT AND THE CONSTITUTIONALLY ASSIGNED ROLE OF DOMESTIC COURTS: A COMPARATIVE ANALYSIS

—Manoranjan Kumar[*]

Abstract Which organ of the State has the authority to conclude binding international treaty on behalf of the State? What are the effects of an international treaty on the municipal law and the citizens of a State? These and many other questions of great import are frequently raised before the domestic courts in different countries and the decisions thereof have a profound impact upon the development of international law. The constitutional validity of treaties along with all the ancillary and incidental issues has quite often been the subject of judicial inquiry. Similarly, the true scope and limits of the treaty-making power have been the subject matter of several disputes raised before the courts. Despite the varied aspects of the role of domestic courts pertaining to treaty enforcement, it appears that there have been fewer acknowledgements that by far, the greater part in the judicial interpretation of international treaties falls to municipal and not international tribunals. In recent years, there has been substantial increase in the number of international treaties. This article seeks to make a comparative and critical study of the approach and attitude of the domestic courts in the Unites States of America, Australia and India towards the enforcement of treaties in order to find the relevant factors which influence the domestic courts in their role of enforcement and interpretation of international treaty obligations.

[*] Assistant Professor of Law, Chanakya National Law University, Patna.

I. INTRODUCTION

The exponential growth in treaty-making in the recent years and the sweeping coverage through these international agreements of all kinds of subject matters including subjects hitherto considered purely domestic in nature, have produced both excitement as well as anxieties. In the recent years, there has been substantial increase in international cooperation on shared concerns due to the growing social and economic interdependence in the highly globalised world order.[1] Today, with chemical weapons to climate change, tobacco to terrorism, deep sea-bed to outer space and human rights to treaties amongst other things becoming the subject matter of treaties, international law is being invoked more frequently than ever, before the municipal courts and tribunals throughout the world. It has come to be widely acknowledged that municipal courts do play a vital role, and furthermore, that they have an immense potential to play much crucial and meaningful role in the enforcement of treaties. Very few institutions have been established so far to create, interpret and apply the law under international law; as a result of which, in the words of one author, international law is a decentralised legal system.[2] Moreover, in the absence of compulsory jurisdiction of any international tribunal, it is the instrumentality of domestic courts and tribunals which people primarily approach for the enforcement of any right conferred, or for seeking remedies for any alleged violation of the rights under international law including multilateral treaties. Quite strange, however, that there appears to be little awareness and fewer acknowledgements that by far the greater part in the judicial interpretation of international treaties falls to municipal courts and not to international tribunals.[3] Normally, due to lack of any effective central enforcement agencies of its own, international law is dependent upon the national enforcement agencies to a great extent. From the perspectives of constitutional and international law jurisprudence, therefore, a comparative analysis of the role and practices of domestic courts in the enforcement of international treaties assumes significance.

The international legal system relies largely on the cooperation of domestic governments. However, the governments are bound and guided by the internal distribution of powers envisaged under their respective Constitution. As a wing of the State, the municipal courts also have certain express and implied constitutional authorities in the realm of external affairs. The aim of this article is to make a comparative analysis of the

---

1 *See* Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 Calif. L. Rev 1263 (2002).

2 Antonios Tzanakopoulos, *Domestic Courts as the 'Natural Judge' of International Law: A Change in Physiognomy*, available at http://www.esilen.law.cam.ac.uk/Media/Draft_Papers/Agora/Tzanakopoulos.pdf (Accessed on December 10, 2013).

3 *See,* C.H. Schreuer, *The Interpretation of Treaties By Domestic Courts*, 45 Brit. Y.B. Int'l L. 255 (1971).

approach and attitude of the municipal courts towards enforcement of treaties concluded by the respective States. The researcher has adopted a doctrinal research methodology and selected United States of America, Australia and India as the countries for the case study. In analysing the approach and attitude of the domestic courts in different countries, it has been endeavoured to understand the constitutional scheme envisaging the internal allocation of power between the coordinate branches, and the respective authorities of the different organs of the State including judiciary in the realm of treaty power, using the expression in its widest terms as including both treaty-making and treaty-implementing power.

The power and jurisdiction of the municipal courts to interpret international treaties is regulated by the domestic legal system of different States. Unlike the international tribunals, the domestic courts have, subject to the constitutional and other municipal regulations, the advantage of accessible jurisdiction and enforceable judgments. There is a growing realisation therefore of the pivotal role that domestic court could play in the enforcement of international law.[4] However, notwithstanding the institutional vacuum at the international plane and despite considerable space for the national courts to play a more conducive and meaningful role, authors have criticised the national courts for having failed to rise up to the expectation.[5] The domestic courts, however, are bound by and subject to their respective constitutional provisions and when it comes to treaty enforcement we find that there exist divergent set-ups in different countries.

II. INTERPLAY OF MUNICIPAL LAW AND TREATY OBLIGATIONS

The domestic courts' practices display mutually divergent approach on the issue of applicability of the international treaties and enforcement thereof into the municipal system. Traditionally, two doctrinal approaches have been applied to analyse the true relationship between municipal and international law, namely the concepts of 'monism' and 'dualism'. According to the monist approach, a treaty made in accordance with the constitution becomes a part of the domestic law without legislation. Further, according to this approach national law is perceived as deriving its validity from international law, which enjoys a higher status in a hierarchy of legal norms and therefore, international law overrides conflicting national law. On the other hand, dualism posits that international law and municipal law operates on two different platforms. In other words, there exist two

---

4 Anthea Roberts, Comparative International Law? The Role of National Courts in Creating and Enforcing International Law 60 ICLQ 57 (2011).

5 Yuval Shany, No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary, 20 EJIL 74 (2009).

divergent approaches. Under the first approach, treaties do not automatically become part of the domestic law upon entry into force and they need to be transformed by being specifically adopted and made part of municipal law by acts of legislature. They become part of the domestic legal order only where the legislature so provides. United Kingdom and a number of Commonwealth countries adhere to this approach. It is a well settled rule of English law that the courts will not accept a treaty as a source of law unless it has been incorporated into the law of England by legislation.[6] Australia and India adhere to the same rule. The other approach holds that international treaties automatically become part of municipal law.[7] Under this approach of automatic treaty incorporation, duly ratified treaties are considered to become part of the domestic legal order upon their entry into force and courts are empowered to enforce them.[8]

Thus, though international law requires a State to carry out its obligations under international treaties, it does not govern the process of incorporating international law into municipal law.[9] Because international law enters domestic legal orders if so allowed by them, the greater presence of international law in the domestic legal orders of states also is the direct consequence of the growing amenability of states towards international law.[10] Indeed, the abiding divide between legal orders has required that international law, to yield any effect in domestic law, be duly incorporated by each state.[11] By pruning the formal domestic requirements of incorporation, the monist states have further facilitated the entry of international law in their domestic legal order.[12] What is most important, however, is that notwithstanding transformation and incorporation, the domestic courts have the power to construe domestic law in a manner that is consistent with the international obligations of the state. If international law is not the law of the land because it has not been incorporated, it may still yield effect in the domestic legal order if domestic judges interpret national law by drawing on international law. By virtue of the principle of consistent interpretation, the domestic courts have the potential to heed international law and give weight to it in the domestic legal order. International law also assumes that national courts can be instrumental in enforcing international obligations

---

6 *Supra* note 3 at 256.

7 *See*, A.K. Ganguli, *Interface between International Law and Municipal Law: Role of the Indian Judiciary*, *in* India and International Law 13 (Bimal N. Patel ed., Volume 2, 2008).

8 Mario Mendez, The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques 21 EJIL 84-85 (2010).

9 Sunil Kumar Agarwal, "Implementation of International Law in India: Role of Judiciary" 1 (Work in Progress).

10 Jean D'Aspremont, "The Systematic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order" 143 *available at* http://ssrn.com/abstract=1401019. (Accessed on 02 March 2014).

11 *See* J d'Aspremont & F Dopagne, Kadi: the ECJ's Reminder of the Abiding Divide between Legal Orders, 5 Int'l Org L Rev 371 (2008).

12 *Supra* note 10.

upon recalcitrant governments.[13] However, the principle of consistent interpretation does not endow any international treaty with the self-executing character.

III. DOMESTIC COURTS AND INTERPRETATION OF CONSTITUTIONAL PROVISIONS PERTAINING TO TREATY-MAKING POWER

Distribution of power amongst the different organs and different levels of government is an internal matter guided exclusively by the Constitution of that particular state. Treaty-making power of the nations and their impact on the municipal law and citizens are no exceptions to this and they too depend upon the constitutional system of the country.[14] As Duncan B. Hollis has said,

> "The treaty lives a double life. By day, it is a creature of international law, which sets forth extensive substantive and procedural rules by which the treaty much operate [….] By night, however, the treaty leads a more domestic life. In its domestic incarnation, the treaty is a creature of national law, deriving its force from the constitutional order of the nation state that concluded it."[15]
> [emphasis added]

In the course of deciding issues raised before them in cases involving the constitutionality of the treaties concluded by the governments, the municipal courts invariably refer to and interpret these constitutional provisions. Thus, to begin with, a perusal of the interpretation of such constitutional provisions by the respective domestic courts gives an insight of the approach of the judiciary towards treaty enforcement.

A. United States of America

Under the U.S Constitution, the Treaty Clause provides:

> "He [The President] shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur[...]"[16]
> [emphasis added]

---

[13] Eyal Benvenisti, Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts, 4 EJIL 159, 160 (1993).

[14] *Supra* note 7 at 15.

[15] Duncan B. Hollis, "Executive Federalism: Forging New Federalist Constraints on the Treaty Power" *Legal Studies Research Paper Series* also *available at* http://ssrn.com/abstract=895623. (Accessed on 02 March 2014).

[16] U.S. Const. art. II, § 2 cl. 2.

Thus, under the U.S. Constitution treaty-making was originally intended by the framers to be a multi-branch affair. The President makes treaties by and with the advice and consent of the Senate.[17] Here, the phrase "advice and consent" implies that the Senate will have an opportunity to shape the content of a treaty.[18] As originally conceived, the Senators were to play a major role in the treaty making process. The framers intended the Senate and the President to share the treaty-making power. In practice, however, the Presidents have not accorded the Senate a substantial advisory role in the making of treaties since early in the U.S. history.[19] Under the current two-step treaty-making process the President first negotiates a treaty and the Senate rejects or approves the treaty.

In *United States* v. *Curtiss-Wright Export Corpn.*[20], Justice Sutherland claimed that the President alone negotiates. Into the field of negotiation the Senate cannot intrude; and the Congress itself is powerless to invade it.[21] Thus, the judicial sanctity to the position of 'negotiation' being a purely executive exercise gives the first impression of pro-executive judicial attitude in interpretation of treaty-making power.

B. Alternative Treaty-Making Procedures in United States

One of the remarkable developments in the U.S. foreign relations has been the emergence and growing significance of alternative procedure of concluding binding international agreements. Interestingly, the U.S. Constitution does not stipulate any procedure other than the Treaty Clause to conclude binding international agreements. The dominating view was that the principal mechanism for entering into international obligations was the treaty-making process as per Article II.[22] From the constitutional law perspective and the municipal legal system, only those international instruments which have received the 'advice and consent' of the Senate, are known as 'treaties' in the constitutional sense. And those international agreements concluded by the United States, which did not require and receive the 'advice and consent' of the Senate are known as 'executive agreements' because they are entered into by the President without the two-third super majority senatorial approval.

---

17 *Id*.

18 Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U. Pa. L. Rev. 1511, 1512 (1989).

19 Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Se*para*tion of Powers*, 126 Harv. L. Rev. 412, 436 (2012).

20 81 L Ed 255 : 299 US 304 (1936).

21 *Id.* at 319.

22 Robert M. Chesney, Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations, 92 Iowa L. Rev. 1723, 1737-38 (2007).

At present the Treaty Clause is utilized much less often than other forms of international agreements. In addition to Article II treaties, internationally binding agreements are made which are known as congressional-executive agreements and sole executive agreements. Thus, the judicial sanctity for the dominance of 'congressional-executive' agreements and 'sole-executive' agreements in the absence of any constitutional text is regarded as a testimony of the pro-executive approach.

C. Australia

One of the remarkable features of the Commonwealth of Australia Constitution Act, 1900, is its relative silence on the issue of treaty-making. In fact, the Australian Constitution makes little reference to international affairs, let alone treaties.[23] The complete absence of a formal provision on treaty-making has its explanation in the constitutional history of Australia. At the time of drafting of Australian Constitution, the framers had not expected and in fact were not desirous of Australia undertaking international obligations in its own right. As a result, at the time of the enforcement of its Constitution, the treaty-making power remained vested with the Crown of England. Subsequently, however due to the developments of First World War and more so due to the increased participation of Australia into global affairs in Post World War II, the treaty making power came to be regarded as vested in Australia in its own right. Australia's Constitution contains very few direct references to the matters that could be considered as relating to international law.[24] As a result, Australia's treaty-making experience has been fraught with uncertainty. The key sections that envisage some form of intersection with the international legal order are Section 51(xxix), which grants the federal Parliament the power to enact legislation with respect to 'external affairs', and Section 75(i) which vests the High Court with original jurisdiction in relation to 'matters arising under a treaty'.[25] There is no direct reference in the Constitution to a formal treaty-making power.

Interestingly whilst there is no explicit provision in the Constitution, conferring the power to conclude a treaty on any specific branch of the government, the High Court of Australia, in *R.* v. *Burgess*[26], has interpreted Section 61 of the Constitution as containing the power to conclude

---

[23] Donald R. Rothwell, (David Sloss ed.) *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study*, [Australia: Academia, 2009] at p. 122.

[24] *Id*. at 124. See Cheryl Saunders, Articles of Faith or Lucky Breaks? The Constitutional Law of International Agreements in Australia, 17 Sydney L. Rev. 150, 154 (1995).

[25] Hilary Charlesworth, Madelaine Chiam ET.AL., *Deep Anxieties: Australia and the International Legal Order* 25 Sydney L. Rev. 428 (2003).

[26] *R.* v. *Burgess*, *ex p Henry*, (1936) 55 CLR 608.

treaties with other countries.[27] The Commonwealth Executive has therefore been held to possess "exclusive power" to take on international obligations. Today, it is a settled position that under the Australian Constitution, the power to enter into treaties is an executive power within Section 61 and accordingly its exercise is the formal responsibility of the Executive.

D. India

Unlike, the U.S. Constitution, there is no provision in the Constitution of India which expressly and categorically vests the treaty-making power with any specific branch or organ of the State. According to one commentator, "Our Constitution does not grant our Executive any external sovereignty through affirmative grants. Under our Constitution it is wrong to think that power over external affairs, in origin and in its essential character, is different from that over internal affairs[....]The executive under our constitution cannot pre-empt law, or go counter to it, not only in the domestic sphere but also at the international plane."[28] However, despite this ambiguity, the approach of the judiciary in India has been consistent in so far as it has held that the power to enter into treaties on behalf of the nation lies with the executive and thereby provided the constitutional legitimacy to the executive prerogative. In *Union of India* v. *Manmull Jain*[29], the validity of the treaty by which the area of Chandernagore, which was formerly under the Sovereignty of the French Republic, had become a part of India was challenged on the ground that the Parliament has not legislated on the treaty by which Chandernagore was ceded to India. The Calcutta High Court declared that making a treaty is an executive act and not a legislative act and held:

> "The power of legislation on this matter of entering into treaties leaves untouched the executive power of entering into treaties [....] The President makes a treaty in exercise of his executive power and no court of law in India can question its validity."[30] [emphasis added]

In *Ram Jawaya* case[31], deliberating upon the scope of the executive power the Supreme Court had observed that it is not necessary that Parliament or the State Legislature has legislated on certain items appertain-

---

27 *Id.* at 644 per Latham C.J.

28 Shiva Kant Jha, "A Summary of the Constitutional Provisions Relevant to Determine the Reach and Ambit of India's Treaty- Power", http://www.shivakantjha Making.org/pdfdocs/parlour /A_Constitutional_Provision_apropos_Treaty_Making_Power.pdf. (Accessed on 02 March 2014).

29 AIR 1954 Cal 615.

30 *Id.* at 616-617.

31 *Ram Jawaya Kapur* v. *State of Punjab*, AIR 1955 SC 549.

ing to their respective lists in order that the Union or the State executive, as the case may be, can proceed to function in respect to them.[32] In *Union of India* v. *Azadi Bachao Andolan*[33], the Supreme Court held that the power of entering into a treaty is an inherent part of the sovereign power of the State. It was held that the Executive is qua the State competent to represent the State in all international matters and may by agreement, convention or treaty incur obligations which in international law are binding upon the State.[34]

Under Article 246, read with Entry 14 of List I *i.e.*, Union List of the Seventh Schedule to the Constitution, Parliament is empowered to regulate the entire treaty-making exercise by making appropriate legislation. However, in the wake of deliberate non-legislation by Parliament, notwithstanding such absence of any comprehensive legislation, the Union executive legitimately continues to enjoy the erstwhile unbridled treaty-making power of the British colonial era. This legislative vacuum has been criticised by many as posing great potential threat *inter alia* to the very ethos of responsible government and a federal democratic republic. Krishna Iyer J. rightly describes: "in the absence of such a law, the executive exercises this power, which may inflict incalculable injury on the citizenry or barter precious national values at the whim of a transient Cabinet".[35]

Thus, the domestic courts in each of the three countries adopt an interpretative approach towards the constitutional provisions pertaining to treaty-making process which gives a *prima facie* impression of the approach of the judiciary being by and large pro executive.

IV. DOMESTIC COURTS AND INTERPRETATION OF CONSTITUTIONAL PROVISIONS PERTAINING TO TREATY-IMPLEMENTING POWER

A. Position in U.S.A

In the federal setup of the United States, the proper place of treaties in the domestic or municipal legal system has always remained a highly contested issue. Under the Constitution of the United States, which is the supreme law of the land, public international law in general has not been incorporated as supreme law binding upon all government actors. This has

---

[32] *Id.* at 554.

[33] (2004) 10 SCC 1.

[34] *Id.* at 23-24.

[35] V.R. Krishna Iyer, *Accords Sans Accountability*, Frontline, March. 30 – April 12, 2000. Also *available at* http://www.hindu.com/fline/fl1907/19070870.htm (Accessed on 22 April 2013).

been done for reasons rooted in the core principles of the U.S. constitutional scheme namely separation of powers and federalism.[36] The question whether the act of transformation is essentially required for every international treaty, or are they directly applicable as norms of domestic law, along with other related aspects of status and place of the international treaties in the municipal system has been debated for long. Anthony Aust writes, the position of the United States is unique and remarkably complex in this context. The way treaties are dealt with under the Constitution of the United States embodies aspects of both dualist and monist approaches and has rightly been described as remarkably complex.[37] In the U.S. Constitution the Supremacy Clause[38] provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

A plain reading of the opening sentence of the Supremacy Clause signifies as if "Treaties" are, *per se* the "Supreme Law of the Land" just like the "Constitution" and "Laws of the United States". But it is not what the Supremacy Clause was intended for. The United States' systems of checks and balances and the separation of power doctrine greatly complicate who may give domestic effect to treaties and exactly what that effect will be.[39] The Supremacy Clause was intended to assure the supremacy of treaties to state law, however, the language of this clause came to be understood also as ensuring that treaties will become law of the land of their own accord without any implementing act on the part of Congress.[40] The reason for this misleading interpretation is obvious as the clause does not expressly say that a "Treaty" requires a statutory law of the United States to be the supreme law of the land, but rather implies equality between "Treaties"

---

[36] John M. Rogers, *International Law and United States Law*, [Aldershoot: Ashgate Publishing Company, 1999] at 74.

[37] Anthony Aust, *Modern Treaty Law and Practice,* 2nd ed., [New York: Cambridge University Press, 2007] at p. 196.

[38] U.S. Const. art. VI, cl. 2.

[39] Penny J. White, Legal, Political, and Ethical Hurdles to Applying International Human Rights Law in the State Courts of the United States (and Arguments for Scaling Them), 71 U. Cin. L. Rev. 937-938 (2003) cited in Mary D. Halleman, MedellÃn v. Texas: The Treaties That Bind, University of Richmond Law Review also available at http://lawreview.richmond.edu/medellin-v-texas/ (Accessed on 25th March 2013).

[40] Louis Henkin, *Foreign Affairs and the US Constitution,* 2nd edition, [New York: Oxford University Press, 1999] at p. 199.

and "Laws of the United States".[41] Thus, the provision is often, and misleadingly, described as making treaties self-executing.[42] In practice, while at times treaties are thought to take direct effect in American domestic law, at other times, however, courts refuse to give them effect in suits brought by individuals. Thus, for a very long time, courts and scholars have distinguished between two types of treaties, namely, 'non-self-executing treaties' which require implementation by a law of the United States, and 'self-executing treaties' which do not require any implementing legislation.[43]

While ruling on a property claim, interpreting the Treaty of Amity, Settlement and Limits between the United States and Spain, in *Foster* v. *Neilson*[44], the U.S. Supreme Court held:

> "Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department: and the legislature must execute the contract before it can become a rule for the Court."

According to this statement therefore, there are two types of treaties namely, self-executing and non-self-executing treaties. A treaty establishing enforceable domestic law without any further action by Congress is known as self-executing treaty. Friendship, Commerce and Navigation Treaties and bilateral investment treaties are the examples of self-executing treaties.[45] A non-self-executing treaty on the other hand is one that requires legislative implementation before its provisions can be of any effect as domestic law. The possibility of judicial enforcement of a treaty in the absence of an implementing legislation turns on the non-self-executing/self-executing character of the treaty. There is significant uncertainty regarding determination of the status of a treaty, whether it is self-executing one or not. Interestingly, there is no settled procedure or sure method for determining the self-executing or non self-executing status of a treaty. It is typically a matter of interpretation based upon the subject matter of the treaty and the nature of the behaviour toward that subject that the treaty enjoins upon the

---

41 *See*, Leonie W. Huang, Which Treaties Reign Supreme? The Dormant Supremacy Clause Effect of Implemented Non-Self-Executing Treaties, 79 Fordham L. Rev. 2211, 2214 (2011).

42 *Supra* note 37 at 197. U.S. Const. art. VI, cl. 2.

43 *Supra* note 41.

44 7 L Ed 415 : 27 US 253, 314 (1829).

45 *See* Robert E. Dalton, (Duncan B. Hollis, Merritt R. Blakeslee et al. eds). *National Treaty Law and Practice*, (2005) at p. 788.

governmental signatories.[46] Another related issue is whether there can be a strong presumption in favour of a treaty having self-executing status rather than non-self-executing. There has been an abiding controversy whether there should be a presumption for or against treaties having the status of being self-executing. It is always a question of interpretation in each case to be decided by the Court as to whether a particular treaty or text of a treaty is a self-executing one or non-self-executing.

In 2008, in *Medellín* v. *Texas*[47], the Supreme Court employed a text-centred approach to self-execution and decided that the intent of the U.S. treaty makers should be determinative of self-execution. The court implicitly rejected the argument that there should be a strong presumption in favour of self-execution of a treaty.[48] In *Medellín* v. *Texas*[49], the Supreme Court held that the ICJ's ruling in *Avena and other Mexican Nationals* case[50] does not have automatic, directly-enforceable effect in domestic courts because none of the treaties at issue were self-executing and because the President of the United States does not have the authority to implement the *Avena* judgment domestically by writing a memorandum to the Attorney General.[51] *Medellín* v. *Texas*[52], significantly exhibited how the unique constitutional set up of United States creates tensions between federalism, separation of powers and international obligations wherein the court held that the United States' constitutional structure trumped its international obligations.[53] The court declared "only if the treaty contains stipulations which are self-executing, that is, they require no legislation to make them operative, and will they have the force and effect of a legislative enactment."[54] Thus, according to *Medellín*, sometimes treaties have the status similar to legislation, but only if the language of the treaty supports such an interpretation.[55]

Accordingly, it has to be ascertained by the Executive in the first instance as to whether the treaty itself be faithfully executed as law or whether implementation by the Congress be sought. Otherwise, if in a particular case the matter pertaining to the self-executing or non-self-executing

---

[46] John F. Murphy, *The United States and the Rule of Law in International Affairs,* [New York: Oxford University Press, 2004] at p. 77.

[47] 128 S Ct 1346 : 552 US 491 (2008).

[48] Curtis A. Bradley, *Intent Presumptions, and Non-Self-Executing Treaties*, 102 Am. J. Int'l L. 540 (2008).

[49] 128 S Ct 1346 : 552 US 491 (2008).

[50] Avena and other Mexican Nationals (*Mexico* v. *United States),* 2004 I.C.J. 12 (Mar. 31).

[51] Taryn Marks, *The Problems of Self-Execution: Medellín* v. *Texas*, 4 Duke J. Const. L. & Pub. Pol'y Sidebar 191 (2009).

[52] 128 S Ct 1346 : 552 US 491 (2008).

[53] Ben Geslison, Treaties, Execution, and Originalism in *Medellín* v. *Texas,* 128 S Ct 1346 : 552 US 491 (2008), 32 Harv. J. L. & Pub. Pol'y 767 (2009).

[54] 128 S Ct 1346, 1357 : 552 US 491 (2008).

[55] John T. Parry, Congress, The Supremacy Clause, and the Implementation of Treaties, 32 Fordham Int'l L.J 1211 (2009).

status of a treaty comes before the court, then the court has to decide whether the treaty has promised certain rights or has it merely promised that the United States would perform a particular act that the Congress would enact a law that would provide the benefits promised.

The issue of self-executing or non-self-executing status of a treaty is directly tied to the constitutional issue of separation of powers doctrine. In this regard, it is settled therefore, that treaties are subject to the separation of powers restrictions to a certain extent. It is generally agreed that a treaty cannot take effect as domestic law without implementation by Congress, if the agreement would achieve what lies within the exclusive lawmaking power of Congress. Notwithstanding the difference between self-executing and non-self-executing treaties, a treaty always remains legally binding on the United States in international law. However, the status, place and effect of a treaty in the domestic law depends *inter alia* upon consideration of several factors such as: the text of the particular treaty, language and purpose, the specific circumstances, the nature of the obligations and the implications of permitting a private right of action without the need for legislation.[56]

B. Position in Australia

In Australia, although the power to conclude treaties as part of the executive prerogative is not subject to legislative approval, treaties have no effect until legislation translates them into municipal law.[57] Treaties ratified or acceded to by the government do not have direct legal effect in the Australian domestic legal system until implemented by legislation, for otherwise the executive, not Parliament, would effectively be making law.[58] It is a settled and generally accepted position that treaties are not directly incorporated into Australian law by the act of ratification or accession. Treaties are not *per se* part of domestic law and they have to be implemented by legislation in order to become binding under the Australian law. The legislative powers of the Commonwealth Parliament are outlined in Sections 51 and 52 of the Constitution. Section 51 (xxix) provides that the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to external affairs.

Thus, Section 51(xxix) of the Commonwealth Constitution gives the Commonwealth Parliament the power to make laws for the peace, order and

---

[56] *Supra* note 37 at 197.

[57] John Ravenhill, (Hans J. Michelmann & Panayotis Soldatos eds.) *Federalism and International Relations: The Role of Subnational Units*, [New York: Oxford University Press, 2001] at p. 84.

[58] George Winterton, (Philip Alston and Madelaine Chiam eds) *Limits to the Use of the "Treaty Power", in Treaty-Making and Australia: Globalisation versus Sovereignty?,* [New York: Greenwood Press, 1999] at p. 34).

good government of the Commonwealth with respect to 'external affairs'. The power with respect to external affairs has however, proved to be one of the most controversial one. The capacity of the Commonwealth Parliament to give effect to treaty obligations has been the subject of extensive debate within Australia and could not be resolved finally until the decision in *Tasmanian Dam* case.[59]

The practice in Australia is influenced by the common law position relating to the status of international treaties in municipal law. In common law, the Crown has the power to enter into treaties on behalf of the United Kingdom, but treaties so concluded by United Kingdom become part of English law only if an enabling Act of the Parliament has been passed. The rule regarding the operation of treaties in the domestic law in common law system has found its best possible formulation in *Attorney General for Canada* v. *Attorney General for Ontario*[60]:

> "Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decides to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes."

The transformation principle which is adhered to in Australia like most of the common law countries is based on the doctrine of separation of executive power from the legislative power.[61] The Commonwealth Parliament's limited powers include a power to legislate in the field of external affairs. The High Court of Australia has held that this allows the Parliament to enact legislation for implementing international treaties to which Australia is a party. Apart from passing specific implementing legislation by Parliament, the domestic implementation of Australia's international obligations can occur, *inter alia*, through reliance on existing Commonwealth or State legislation and depending on the nature of particular treaty where it imposes obligations only on the government, through administrative measures made under the executive order.[62] Accordingly, treaty obligations may

---

[59] *Commonwealth* v. *Tasmania*, (1983) 158 CLR 1.

[60] 1937 AC 326 (PC).

[61] Glen Cranwell, Treaties and Australian Law—Administrative Discretions, Statutes and the Common Law 1 QUTLJJ 51 (2001).

[62] *Supra* note 25 at 435.

be implemented either through Commonwealth Parliament enacting implementing legislation using 'external affairs power' under Section 51 (xxix) or by engaging the states in co-operative implementation. The current practice of the Commonwealth government is to prefer implementation through co-operation with the states over reliance on Section 51 (xxix).[63] The broad ambit of the Commonwealth's legislative power to implement treaties was definitively established only in the *Tasmanian Dam* case.[64]

C. Position in India

India follows the dualist system as far as the relationship between treaties and domestic law is concerned. We have discussed above that the Union executive enjoys somewhat unbridled power in the conclusion of treaties and in deciding the extent to which India should be bound by a treaty. The matter, however, does not end with the conclusion of a treaty. State has the duty to carry out the obligations incurred under the treaty both within and outside the realm of Indian municipal law. It is for the executive to ensure that there is no gap between the assumption of international obligations by India and their implementation. Moreover, there is also the constitutional mandate 'to foster respect for treaty obligations' enshrined under Article 51(c) of the Constitution of India. Implementation of treaties, agreements and conventions with foreign countries has exclusively been reserved for Parliament. Article 253 of the Constitution of India contains express provision pertaining to the implementation of treaties in the municipal legal system.

It is not the case that the government can enforce and implement anything and everything in the name of implementing the international commitments, for the power of Parliament is itself subject to certain restrictions, say for example, fundamental rights of the citizens and various other constitutional provisions apart from the principle of basic structure of the Constitution pronounced by the honourable Supreme Court in *Kesavananda Bharati case*.[65] In other words, the power of the union executive and Parliament are subject to the provisions of the Constitution, *i.e.*, limited by the fundamental rights of the citizens as guaranteed in the Constitution and by the judicially-invented doctrine of "basic structure of the Constitution".[66] Therefore, what cannot be implemented, for constitutional or other reasons, should not be undertaken by the executive as a feat of its prerogative.

Thus, in *Birma* v. *State*[67], dealing with the question whether a treaty concluded between the British Government and the princely State of Dholapur,

---

[63] *Id.* at 436.

[64] *Commonwealth* v. *Tasmania*, (1983) 158 CLR 1 at p. 299 per Dawson J.

[65] *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225 : AIR 1973 SC 1461.

[66] Rekha Saxena, Treaty-Making Powers: A Case for 'Federalisation' and 'Parliamentarisation', 42 Economic And Political Weekly 26 (2007).

[67] AIR 1951 Raj 127.

which was not given effect to by means of a legislative enactment, could be regarded as part of the Municipal law of the then Dholapur State, the division bench of the Rajasthan High Court, observed: "treaties which are part of the international law do not form part of the law of the land unless expressly made so by the legislative authority."[68] In *Xavier* v. *Canara Bank Ltd*.[69], question arose as to whether Article 11 of the International Covenants on Civil and Political Rights adopted by the General Assembly of the United Nations, providing that no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation, became part of the Municipal law of this country and would give rise to a remedial action at the instance of an aggrieved individual of this country, the court observed: "The remedy for breaches of International law in general is not to be found in the law courts of the State because International Law *per se* or *proprio vigour* has not the force or authority of civil law, till under its inspirational impact, actual legislation is undertaken."

Similarly, dealing with the issue of extradition, in *State of W.B.* v. *Jugal Kishore More*[70], the Supreme Court held that the executive may make treaties with foreign State for the extradition of criminals, but those treaties can only be carried into effect by Act of Parliament, for the executive has no power, without statutory authority, to seize an alien here and deliver him to a foreign power.[71] In *State of Gujarat* v. *Vora Fiddali Badruddin Mithibarwala*[72], the Supreme Court has observed that in India, unlike some other countries the stipulations of treaty duly ratified do not by virtue of the treaty alone have the force of law and Article 253 of the Constitution of India recognises this position.[73] In *Shiv Kumar Sharma* v. *Union of India*[74] the Delhi High Court has held that if a treaty either requires alteration of or addition to existing law, or affects the rights of the subjects, or are treaties on the basis of which obligations between the treaty-making State and its subjects have to be made enforceable in municipal courts, or which, involves raising or expending of money or conferring new powers on the Government recognizable by the municipal courts, a legislation will be necessary.[75]

In *Jolly George Varghese* v. *Bank of Cochin*[76], while dealing with the effect of international law and the enforceability of such law at the instance of individuals within the state, the Supreme Court quoted with approval the

---

[68] *Id*. at 129.
[69] 1969 KLT 927.
[70] (1969) 1 SCC 440 : AIR 1969 SC 1171.
[71] *Id*. at 1175.
[72] AIR 1964 SC 1043.
[73] *Id*. at 1059.
[74] AIR 1969 Del 64.
[75] *Id*. at 74.
[76] (1980) 2 SCC 360 : AIR 1980 SC 470.

observations of the Kerala High Court in *Xavier* v. *Canara Bank Ltd*.[77] and enunciated the law on the point as: "The positive commitment of the States parties ignites legislative action at home but does not automatically make the covenant an enforceable part of the *corpus juris* of India."[78] In *Civil Rights Vigilance Committee, SLSRC College of Law* v. *Union of India*[79], the Karnataka High Court has held that India's obligations under an international treaty cannot be enforced, unless such obligations are made part of the law of this country by means of appropriate legislation.[80] However, it was observed in *Union of India* v. *Azadi Bachao Andolan*[81], that if the rights of the citizens or others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty.[82]

While initially the Indian courts had adopted traditional dualist approach that treaties have no effect unless implemented into the domestic law, strict adherence is no more paid to this convention. Unimplemented treaty obligations are not insignificant altogether and they too can have impact on the interpretation of domestic legislations.[83] Endowed with the powers of interpretation of the Constitution and legislations, High Courts and the Supreme Court have from time to time relied upon and read the treaty obligations including the unimplemented ones while interpreting laws and the Constitution. It is appropriate to mention here that this tendency on the part of domestic courts is found particularly, in the enforcement of treaty-based rights. Another significant feature of this emerging trend on the part of the domestic courts is that India is not alone as far as indirect application of treaty-based rights by domestic courts is concerned and scholarly studies suggest that this trend is prevailing in several other Commonwealth countries like Australia, Canada and United Kingdom.

V. ROLE OF JUDICIARY IN ENFORCEMENT OF TREATIES

In the recent years in the backdrop of treaties becoming the most important source of international law, the role of municipal courts has also increased in enunciating the correct propositions about the true nature, scope and status of the vast array of laws incorporated under the treaties. The municipal courts have increasingly been facing the matters wherein they are required to assess the status of treaties in municipal law.

---

77 1969 KLT 927

78 *Supra* 76. at 474.

79 AIR 1983 Kant 85.

80 *Id.* at ¶ 18.

81 (2004) 10 SCC 1.

82 *Id.* at 24.

83 Elisabeth Eid, *Interaction Between International and Domestic Human Rights Law: A Canadian Perspective*, *available at* http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/E-Eid.PDF (Accessed on 17/11/2013).

A. Position in United States of America

Unlike the Commonwealth of Australia and India, treaties in the United States can have a direct and immediate effect of their own force. The Supremacy Clause in Article VI of the U.S. Constitution declares treaties to be the "supreme law of the Land", just like the Constitution and federal statutes, and further instructs the judges to give them effect. Thus, the Supremacy Clause supplements international law mechanisms for enforcing treaties by adding domestic mechanisms.[84] Nevertheless, it is well settled that some treaties ratified by the United States lack domestic legal force. For example, a treaty provision that is in conflict with the Constitution or that has been superseded by a later-in-time statute does not have the force of law in the United States.[85] Similarly, a constitutionally non-self-executing treaty that has not been implemented by legislation lacks domestic legal force. A treaty is "constitutionally non-self-executing" if it obligates the United States to accomplish a goal that, under the U.S. Constitution requires bicameral legislation approved by both houses of Congress.[86] Today's dominant theory of treaty enforcement is the doctrine of "self-execution", which suggests that judicial enforcement of treaties is deduced from the nature of the treaties signed.

Prima facie, the Supremacy Clause has the effect of assimilating treaties to federal statutes and the Constitution. However, one exception that the Supreme Court has recognised to the rule of equivalent treatment comes from its holding in *Foster* v. *Neilson*[87], which provided some treaties are non-self-executing because of what they have to say about the need for legislative implementation. In *Foster* v. *Neilson*[88], Chief Justice John Marshall interpreted Article VI in such a way as to distinguish between "self-executing" and "non-self-executing" treaties. Four years later, in *United States* v. *Percheman*[89], the Court was confronted with the same provision of the same treaty. The Chief Justice Marshall went on to clarify that a treaty is non-self-executing when it stipulates for some future legislative act. Thus, the Supremacy Clause, as properly construed in *United States* v. *Percheman*[90], establishes a presumption of self-execution that can be overridden only through a clear statement that the treaty is subject to legislative implementation. In the initial years the treaty- statute relationship was

---

[84] Carlos Manuel Vázquez, Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties 122 HARV. L. REV. 606 (2008).

[85] *See* David Sloss, *The Role of Domestic Courts in Treaty Enforcement: A* Comparative *Study*, [New York: Cambridge University Press, 2009] at p. 510.

[86] *See* Restatement (Third) Of Foreign Relations Law § 114 (4) (c) (stating that a treaty is not self-executing "if implementing legislation is constitutionally required").

[87] 7 L Ed 415 : 27 US 253, 314 (1829).

[88] *Id*.

[89] 8 L Ed 604 : 32 US (7 Pet) 51, 89 (1833).

[90] *Id*.

unresolved. It was in *Whitney* v. *Robertson*[91], that the Court articulated the later-in-time rule and held that if the two are inconsistent, the one last in date will control the other.

Through the years till *Medellín* v. *Texas*[92], the lower courts continued to look to the text and history of ratification process to determine whether a treaty was meant to be self-executing, to give rise to a private right, or to create a private right of action. *Medellín*[93] has changed the nature of U.S. courts' treaty analysis. There is a remarkable shift in the approach of the courts in so far as there is a growing inclination for presumption that treaties are neither self-executing nor protective of private rights and therefore do not give rise to private rights of action. In *Medellín* v. *Texas*[94], the Court held that when ratified, treaties are not presumed to have the status of binding domestic federal law immediately, but instead require subsequent federal legislation to become law. In *Medellín*[95] the Supreme Court concluded that a treaty was not directly enforceable in court unless the treaty contained explicit textual expression about self-execution. Therefore, as per *Medellín*[96] when a treaty is intended to be directly enforceable in U.S. Courts, the treaty would include explicit language to that effect.

On the development of treaty enforcement in the 20th century, several commentators appear to have consensus in so far as they uniformly agree that judicial enforcement of treaties has declined in the aftermath of World War II.[97] This trend is attributed to different factors like the rise of multilateral treaties, abuse of the doctrine of non-self-execution *etc*. The courts of the United States are today less willing than ever to directly enforce the Article II treaty obligations of the United States through private right of action.

The U.S. Supreme Court's recent decision in *Medellín* v. *Texas*[98], is very significant from the perspectives of analysing the judicial attitude. The majority endorsed the approach that a treaty term is not domestically enforceable without further action unless the language in the treaty clearly indicates that the parties intended the term to be self-executing.[99] In the light of *Medellín* case dicta, recently the President and the Senate

---

91 31 L Ed 386 : 124 US 190, 194 (1888).
92 128 S Ct 1346 : 552 US 491 (2008).
93 *Id*.
94 *Id*.
95 *Id*.
96 *Id*.
97 Tim Wu, "When do American Judges Enforce Treaties?" University of Chicago Public Law Research Paper No. 82 *available at* SSRN: http://ssrn.com/abstract=664701.
98 *Supra* note 91.
99 James A. Turner, *The Post-Medellín Case for Legislative Standing*, 59 Am. U. L. Rev. 733 (2010).

have started the practice of attaching declaration of self-execution to treaties. According to some commentators, this approach to treaty interpretation grants the executive the final say in deciding whether to enforce treaty obligations within the United States, and thereby increases the executive power.[100]

B. Position in Australia

With the decision of High Court of Australia in the *Tasmanian Dam* case,[101] wherein the High Court upheld the validity of the legislation on the basis of the Commonwealth's Section 51 (xxix) "external affairs" power under the Constitution, the scope of the treaty implementation power under Section 51 (xxix) stands widened. In *Minister of State for Immigration and Ethnic Affairs* v. *Teoh*[102], the principle that treaties have no direct effect in domestic law unless implemented by statute was apparently modified when the majority of the High Court held that the Commonwealth decision-makers, when making decisions affecting private rights, may need to take account of international treaties and conventions ratified by Australia but not implemented by legislation. In the High Court, the argument was advanced that consideration should be given to the Convention on the Rights of the Child, 1989, a treaty to which Australia was a party but it had yet to be implemented under the municipal law. The majority was of the view that Australia's ratification of the Convention created a legitimate expectation for individuals whose matters were under review and that administrative decision makers would have some regard to the Convention when making their determinations. The decision of the High Court of Australia in *Minister of State for Immigration and Ethnic Affairs* v. *Teoh*[103], has highlighted the significance of international law within the domestic legal and administrative affairs. This decision has the potential of making international law function without restraint within Australia and therefore, it created considerable anxiety within the political society.[104] Latent beneath the decision in this case there was a risk of shifting the balance between the different branches of the government and granting the executive an unbridled power which is fraught with democratic deficit.

Subsequent governments through formal executive statements have sought to limit the effect of the *Teoh* case. Later, in *Minister for Immigration and Multicultural Affairs, ex p Lam, In re*[105], without actually overruling the decision in *Teoh*, the High Court in *Minister for Immigration*

---

[100] *Id.* at 734.
[101] *Commonwealth* v. *Tasmania*, (1983) 158 CLR 1.
[102] (1995) 128 ALR 353.
[103] *Id*.
[104] *Supra* note 25 at 437.
[105] 2003 HCA 6 at 102.

and Multicultural Affairs, ex p Lam, In re[106], raised doubt on the doctrine of legitimate expectation paving the way for *Teoh* being overruled and discarded by a future High Court. Subsequently, on a number of occasions in a variety of actions litigants have sought to rely on treaties as a possible basis of claim, notwithstanding the absence of a statute giving effect to the treaty. In all such cases, however, the applicants were unable to make out their claim because there was an insufficient legal basis to recognise the claim under Australian law, or because of adherence by the courts to a dualist approach to international and municipal law.[107] Thus, the High Court in the recent cases has followed its previous approach of not enforcing the rights or remedies under treaties to which Australia was a party, unless the treaty obligations had been implemented by an implementing legislation.

Where legislation purports to give effect to a treaty, Australian courts may look at the treaty as an aid to interpretation in order to resolve any legislative ambiguity. It is presumed that Parliament intends to give effect to Australia's international legal obligations. There has been acceptance since long within the High Court that treaties not only have the ability to influence the development of the common law in Australia but also may be legitimately relied on as an aid to statutory interpretation.[108] It is well accepted that if statutory language is susceptible to a construction which is consistent with the terms of a treaty and the obligations imposed upon Australia, then that construction should prevail. The presumption of compliance or compatibility provides that consistency with Australia's international obligations will be assumed in the absence of clear words to the contrary.

In the recent years, there is greater acceptance of the value of referring to the international treaties to which Australia is a party, not only in the case of statutory ambiguity, but also in those cases where the construction of statute would result in an interpretation contrary to international human rights standards. This approach was partly the outcome of Bangalore Principles adopted in 1988 at a judicial colloquium of senior Commonwealth jurists. It appears to be a settled position in the High Court that it is entirely legitimate to refer to a treaty when the language of a statute so permits or where there is statutory ambiguity.

C. Position in India

In India, treaties on being signed or ratified would not automatically become municipal law nor would they become enforceable. However, there are number of instances where the domestic courts in India have applied

---

[106] *Id*.
[107] *Supra* note 23 at p. 151.
[108] *Id.* at p. 153.

unimplemented treaties in the context of statutory interpretation and judicial review of administrative action. It is a celebrated proposition today, not only in India but in other Commonwealth countries as well, that judges should strive to interpret national laws in accordance with relevant international obligations.[109] In the cases litigated before it, the Supreme Court has evolved and applied certain principles in relation to treaties that have not been implemented in the municipal law. In the *Habeas Corpus* case,[110] the Supreme Court observed that if two constructions of the municipal law are possible, the courts should adopt such constructions which would make its provisions in harmony with the international law or treaty obligations.[111]

In *Jolly George Varghese* v. *Bank of Cochin*[112], the validity of Section 51 of the Code of Civil Procedure [C.P.C.] was for consideration before the Supreme Court. Section 51 of the C.P.C. read with Order XXI Rule 37 enabled a court to order execution of the decree by arrest and detention in prison of the judgment-debtor on the application of a decree-holder, if the court was satisfied that judgment-debtor has or had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same. It was argued that this section was inconsistent with Article 11 of the International Covenant on Civil and Political Rights which provides that "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation." Noting that India was a signatory to the Covenant, and that Article 51(c) of the Constitution "obligates the State to foster respect for international law and treaty obligations,' the court held that Section 51 of CPC should be interpreted in accordance with the State's international obligations.

In *People's Union for Civil Liberties* v. *Union of India*[113], the question for consideration before the Supreme Court was related to the interpretation of Section 3(2)(d) of the Protection of Human Rights Act, 1993, as to whether a police officer who had retired as Director of the Central Bureau of Investigation was eligible to be appointed as a member of the National Human Rights Commission. The Court held that a police officer was ineligible to be appointed as a member of the Commission. The Court explained that where the terms of any legislation are not clear or are reasonably capable of more than one meaning then that meaning which is in consonance with the treaties is to be relied upon.[114]

---

[109] *Supra* note 82.
[110] *ADM, Jabalpur* v. *Shivakant Shukla,* (1976) 2 SCC 521 : AIR 1976 SC 1207.
[111] *Id.* at ¶ 169.
[112] (1980) 2 SCC 360 : AIR 1980 SC 470.
[113] (2005) 2 SCC 436.
[114] *Id.* at 453-454 ¶ 41.

It is worth mentioning here that the human rights conventions and treaties stand on a different pedestal as the attitude of Indian judiciary towards them has been by far proactive. By and large they have received the favour and support of the domestic courts, even in the absence of an implementing legislation. Indian judiciary has adopted a remarkable approach to effectuate the objectives enshrined under these conventions by reading them into the various constitutional and statutory provisions. India has ratified various international human rights related treaties and conventions *e.g.* Geneva Conventions, Genocide Convention, International Convention on the Elimination of All Forms of Racial Discrimination (CERD), International Covenant on Civil and Political Rights (ICCPR), Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), International Covenant on Economic, Social and Cultural Rights (ICESCR) *etc*. These and many other international human rights initiatives have been relied upon by the judiciary while interpreting constitutional provisions, particularly, those related to fundamental rights guaranteed under Part III and other social and economic rights guaranteed under Part IV of the Constitution. There are several judgments where the Supreme Court has read the human rights treaties in the domestic law. Some of the relevant cases are discussed below.

In *Nilabati Behera* v. *State of Orissa*[115], the Supreme Court referred to a provision in the ICCPR to support its view that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right, as a public remedy under Article 32.[116] In *Vishaka* v. *State of Rajasthan*[117] , certain social activists and non-governmental organisations had brought a class action by filing writ petition for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India. In the opinion of the court any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.[118] The Supreme Court referred to the Beijing Statement of Principles of the Independence of the Judiciary and the Convention on the Elimination of all Forms of Discrimination against Women and in light of the fact that India had ratified certain resolutions pursuant to the conventions, the court relied upon them for the purpose of construing the nature and ambit of constitutional guarantee of gender equality under Indian Constitution.[119] The Supreme Court observed that the international conventions and norms are to be read into the fundamental rights in the absence of enacted domestic law

[115] (1993) 2 SCC 746 : AIR 1993 SC 1960.
[116] *Id.* at ¶ 20 and 21.
[117] (1997) 6 SCC 241 : AIR 1997 SC 3011.
[118] *Id.* at ¶ 7.
[119] *Id.* at ¶ 13.

occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.[120]

In *Apparel Export Promotion Council* v. *A.K. Chopra*[121], Anand, C.J., referred to international instruments like the ILO Seminar 1993 held at Manila, the Convention on the Elimination of All forms of Discrimination against Women, 1979, the Beijing Declaration and the International Covenant on Economic, Social and Cultural Rights. He observed:[122]

> "This Court has in numerous cases emphasised that while discussing constitutional requirements, Court and counsel must never forget the core principle embodied in the International Conventions and Instruments and as far as possible give effect to the principles contained in those international instruments. The Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law."

Thus, in India in cases pertaining to violation of human rights, the international instruments and conventions even though not transformed into municipal law have commonly been given due regard, provided there is no inconsistency between the international norms and the domestic law occupying the field.

Domestic courts also play significant role in relation to treaties which are transformed into municipal law. Sometimes, the implementing legislation suffers from inherent lacuna or ambiguity or might be at conflict with other laws or may be at conflict with the international treaty provisions which it intends to effectuate. In these cases the role of the domestic courts are of utmost importance. The fundamental guiding principle remains that the courts are bound by the legislation and they must give effect to it. If the terms of the legislative enactment do not suffer from any ambiguity or lack of clarity they must be given effect to even if they do not carry out the treaty obligations, but the treaty or the Protocol or the convention becomes important if the meaning of the expressions used by the Parliament is not clear and can be construed in more than one way.[123]

---

[120] *Id.* at ¶ 14.
[121] (1999) 1 SCC 759 : AIR 1999 SC 625.
[122] *Id.* at ¶ 27.
[123] *V.O. Tractoroexport* v. *Tarapore & Co.*, (1969) 3 SCC 562 : AIR 1971 SC 1.

VI. CONCLUSION

A comparative analysis of the role of domestic courts in treaty enforcement reveals that they are guided by several motivating factors. There is a common tendency on the part of national courts to apply the concepts and methods of their own municipal law which produces divergence instead of bringing uniformity in international law. The judicial sanctity to exclusive and unbridled executive power to negotiate, sign and ratify a treaty on behalf of the country notwithstanding the text of the constitutional provisions as in the case of United States, or despite its relative silence as in the case of Commonwealth of Australia, is the outcome of the historical and other factors. However, the same is also susceptible of being read as pro-executive approach to some extent. Through their power of adjudication, the domestic courts need to harmonize diffused, fragmented and decentralised international legal regime. It is abundantly clear that in the globalised world order the national courts need to be prepared for more rapid, active and serious engagement with the international treaties, and thereby contribute towards a coherent and harmonised international legal order. At the same time, it is equally important that the domestic courts' approach in the interpretation of constitutional provisions, pertaining to treaty-making and treaty-implementing power must maintain and secure the constitutionally envisaged balance between the different wings of the state. At the end, it is submitted that any pro-executive approach in interpretation of constitutional provisions pertaining to treaty power would be detrimental to domestic court's own position vis-à-vis the other organs of the state viz. the executive and legislature.

PRE-NUPTIAL AGREEMENTS IN INDIA: WESTERNISATION OR MODERNISATION?

—*Devanshi Saxena and Surabhi Lal*[*]

Abstract *If the law does not take care of the changing trends in the society, it is likely to harm the interests of persons who are part of it, especially when the change relates to the fundamental unit of the society - family. 'Premarital agreement' is a concept which is new to the traditional nuptial checklist in India. A prenuptial agreement is a signed, registered and notarised document that usually outlines the distribution of assets, liabilities and issues relating to the custody of children if the marriage falls apart in the future.*[1] *There's no doubt that prenuptial agreements have become an essential part of the marriage paraphernalia especially in cities like Bombay and Delhi where the parties want to secure themselves against all future risks in case their bond created on mutual love and affection gives way. Prenuptial agreements is a polemic concept and both sides are left questioning "Where is it all coming from?", as the parties get ready to go beyond marriage ceremonies and vows and sign a document that will supposedly put to rest all their pre wedding blues. Our paper is an attempt to give a place to prenuptial agreements amongst the web of personal laws that govern India citizens. The paper seeks to determine whether the rise of prenuptial agreements is an effect of modernisation or westernisation after taking into account the views of both sides.*

---

[*] 3rd year B.A. LL.B.(Hons.) National Law University, Delhi.

[1] V. Verma, *Parting Shot*, http://www.telegraphindia.com/1120404/jsp/opinion/story_15332562jsp#.UQKeJieZWvc. (Accessed on 29/05/2013).

I. INTRODUCTION

Jayanth Krishnan had an inter-faith wedding. But before the couple got married, they signed a prenuptial agreement stipulating that neither would force the other to change his or her religion in the future. However, two years down the line, Krishnan's wife started putting pressure on him to change his religion. Krishnan promptly sought a divorce. When the lawyer produced the prenuptial agreement to defend his client's decision at the Coimbatore Family Court, it was upheld by the judge.[2]

Anjali Sharma, a middle aged business woman, forbade her husband to remarry post divorce and also claimed custody of all the pets bought during the course of marriage with the help of a document called a pre-nuptial agreement.[3]

A pre-nuptial agreement is a contract entered into by the future bride and groom prior to the marriage attempting to bind various aspects regarding money and property in the event of a divorce.[4] An NGO 'Rakshak' in its Memorandum on NRI marriages and Abandoned Brides submitted to the Ministry of Overseas Indian Affairs, on 25th July 2007, has suggested that in case of NRI marriages there should be a mandatory pre nuptial agreement as it protects both the spouses in case of marital fraud.[5] Attorney Tala Siddique says that the present generation is about ambitious, educated and focused people who do not want a single mistake to pull them down in life. Arranged marriages once gave couples the security of families knowing each other well but in the age of instant marriages, they can't be blamed for being practical.[6]

The need for prenuptial agreements can be further explained with the help of the goals that it seeks to achieve i.e. avoiding the trauma post divorce, reaching a fair division of assets, providing remedies for marital rape, cheating, philandering and adultery and most important of all regarding custody of children. A pre-nuptial can also address issues not hitherto provided for by personal laws of parties in India except under the Special Marriage Act and the Parsi Marriage law i.e. maintenance to husband by the wife. If the party fulfils the pre-nuptial conditions, it promotes mutual trust and makes the marriage stronger.

---

2 *Id*.

3 Ipshita Mishra, *Happily married but conditions apply*, THE TIMES OF INDIA, 13 December 2012.

4 Stephen Rue, *Louisiana Family Law Guide*, 1st ed., [Pelican Publishing, 2004].

5 http://www.498a.org/contents/pressConference/moiaMemorandum_25July07.pdf. [Accessed on 27/10 2013]

6 Jamal Shahid Sheikh, *It's all about money, honey*, THE TIMES OF INDIA, 15 March 2005.

Pre-nuptial agreements are legally binding in various countries including the USA and Australia. However, they are not automatically enforceable in courts in England and Wales. In a landmark ruling in October 2010, in the case of *Radmacher* v. *Granatino*, the US Supreme Court held that courts should give effect to a pre-nuptial agreement that is freely entered into by each party with a full appreciation of its implications, unless in the prevailing circumstances it would not be fair to hold the parties to their agreement.[7] The most basic and probably the most compelling argument given by those against it is that it is an agreement that contemplates the breakdown of the marriage and tends to encourage divorce.[8] The breakdown theory of divorce is now recognised by the Indian Judiciary in cases where the marriage breaks down beyond repair and there is no option of conciliation between the parties and thus pre-nuptials cannot be invalidated on this ground in India.

Under the present law in India, prenuptial agreements come under contract law but courts don't recognise its validity. Indian judiciary has declared such agreements as invalid in *Tekait Mon Mohini Jemadai* v. *Basanta Kumar Singh*[9] and *Krishna Aiyar* v. *Balammal*[10]. Supreme Court lawyer, Pavan Duggal is of the view that pre-nuptials are not tenable or executable in a court of law. However, they can at best be an indication of the intent of the parties.[11] Also under Section 10 of the Indian Contracts Act, prenuptial agreements have as much sanctity as any other contract, oral or written; just because litigation has not begun in this area does not mean that it has to be treated any differently and that it cannot be enforced. Courts do take cognizance of a prenuptial agreement if both parties have mutually agreed, are competent to contract, and the prenuptial agreement clearly states the fair division of property, personal possessions and financial assets of the parties.[12]

The concept of prenuptial agreements is labelled as a western concept, a western idea, which is new to the Indian culture and traditions. It is looked down upon by a generation of elders who have not even met their other halves before their arranged marriage, yet place full trust in their

---

7 Catherine Fairbairn, *Pre-nuptial agreements: Recent developments* www.parliament.uk/briefing-papers/SN03752.pdf. (Accessed on 27.10.2013).

8 Marcia Mobilia Boumil and Stephen C. Hicks, WOMEN AND THE LAW, 1st ed., [1992] at p. 285.

9 ILR (1901) 28 Cal 751.

10 ILR (1911) 34 Mad 398.

11 Ismat Tehseen, *Does Prenuptial agreement hold good in India as well?*(27.10.2013), http://www.dnaindia.com/lifestyle/report_does-the-prenuptial-agreement-hold-good-in-india-as-well_1350300.

12 Rohan, *Prenuptial Agreement is the need of the hour,available at,h*ttp://www.merinews.com/article/prenuptial-contracts-is-the-need-of-the-hour/15711364.shtml. (Accessed on 27/10/2013).

relationships and need no further assurance from a legal document. But in today's India the dynamics of marriage have changed. Divorce rates have gone up in India due to several reasons,[13] and young couples are looking for ways to lessen the post divorce trauma. There is lack of trust in relationships and couples contemplate divorce and want to be fully prepared for any contingencies. Some opine that, 'a pre-nuptial agreement, is a Western practice made famous by Hollywood stars.[14] Another set of opinion is that a prenuptial agreement is a modern concept which has gained importance due to the change in value system of the modern families and the modern ways of living.

It is submitted that premarital agreements that settle questions of property and support rights upon divorce promote and facilitate marriage rather than encourage divorce. It is submitted that the concepts of modernisation and westernisation are intertwined. 'The countries that are economically and technologically advanced and politically and culturally dominant become the models for development for their own citizens as well as for those trying to break away from their dominance. Western countries have become models for modern countries. This means that the present day development, which is a change in the direction of specific modernization and westernization are inevitably entwined.'[15] Thus, the authors are of the view that even the changes in legal arena are a complex mixture wherein both modernization and westernization are entangled. Prenuptial agreements are just another such change.

II. JUSTIFYING THE NEED FOR GRANTING VALIDITY TO PRENUPS

The need for prenuptial agreements can be explained with the help of the goals that it seeks to achieve i.e. avoiding the post divorce trauma, reaching a fair division of assets, providing remedies for marital rape, cheating, philandering and adultery and most important of all regarding custody of children. As the character of familial relationships is intimate and unique to each family, the arrangements that emanate from the spouses themselves will be the most acceptable to them. They are also more likely to honour the terms that they have reached voluntarily.[16] In India, the generation next is more aware of their rights and they do not tolerate any misbehaviour in

---

[13] IBN, *Divorce rates are skyrocketing in Indian cities too, available at*, http://ibnlive.in.com/news/divorce-rates-are-skyrocketing-in-indian-cities-too/297338-60-120.html. (Accessed on 27/10/2013).

[14] New Straits Times, *Pre-nups protect Muslim women*, *at* http://www.nst.com.my/top-news/pre-nups-protect-muslim-women-1.128281 (Accessed on Oct. 27, 2013).

[15] A. Szirmai, The Dynamics of Socio-Economic Development: An Introduction (1st ed., 2005).

[16] D. Ling, *When Spouses Agree,* Singapore Academy Law Journal 96-115 (2006).

relationships. This has led to rising divorce cases- almost 200% a year in Mumbai - especially among youngsters.[17] This is another reason to favour prenuptial agreements as this will allow parties to declare their intentions and expectations from the marriage beforehand and if the terms of such an agreement are not contrary to the law of the land, it will be cherry on the cake, as they are likely to be accepted as valid by the courts in India. A pre-nuptial can also address issues not hitherto provided for by personal laws of parties in India except under the Special Marriage Act and the Parsi Marriage law i.e. maintenance to husband by the wife. If the party fulfils the pre-nuptial conditions, it promotes mutual trust and makes the marriage tie stronger. Mediation and counselling are believed to aid in the harmonious resolution of family disputes. One of the greatest benefits of these processes is the advantage of practical arrangements which are worked out by parties for themselves.[18] In Australia on passing of the Family Law Amendment Act, 2000, which gave validity to prenuptial agreements, the benefits of binding financial agreements were made clear by the Explanatory Memorandum to the Family Law Amendment Act, 2000 and these were, 'Greater control over property for parties to agreements (parties are able to quarantine assets acquired before, during, or after the marriage has ended. This was viewed as being 'of particular benefit to people who are entering subsequent marriages as well as to people on the land and those who own family businesses); Greater choice of parties to agreements to order their own financial affairs (with the court being unable in most circumstances to change or set aside agreements); Reduced conflict (and with it, reduced emotional and financial cost) on marriage breakdown and the need for the Family Law Act to reflect changed community attitudes and needs.'[19] If pre-nuptial agreements are given validity in India through legislation or by the courts by recognizing them as valid contracts, similar benefits can be derived by the contracting couples. More so in case of NRI marriages which bring up the bugs of traditional matchmaking and also create several hardships for the parties when they approach the courts for justice, which turns out to be greatly constrained and complex.

III. NRI MARRIAGES AND THE REMEDY OF PRE-NUPTIAL AGREEMENTS

'NRI marriages, as generally understood, are between an Indian woman from India and an Indian man residing in another country (thus NRI – non-resident Indian), either as Indian citizen (when he would legally be an

---

[17] DNA, *Does the prenuptial agreement hold good in India as well?*, (visited on Oct. 27, 2013), *at* http://www.dnaindia.com/lifestyle/report_does-the-prenuptial-agreement-hold-good-in-india-as-well_1350300.

[18] D. Ling, *When Spouses Agree,* Singapore Academy Law Journal 96-115 (2006).

[19] B. Smyth, *Binding Pre-Nuptial Agreements in Australia: The First Year,* International Journal of Law, Policy and the Family 16 (2002).

'NRI') or as citizen of that other country (when he would legally be a PIO – person of Indian origin).'[20] Indian women harbour dreams of marrying an NRI for the opportunity of living a completely different life, under the shade of the western societal structure. But their dreams end shortly after when they suffer by the desertion and cruelty by their NRI husbands and their families. 'Such brides end up as emotional wreck carrying albatross of marriage around their neck during the golden period of their youth.'[21]

"Any matrimonial column of any newspaper or magazine would carry a column that a NRI seeks Indian bride without any demand. The attraction of getting a groom and that too serving or earning abroad without dowry, lures many especially those from the middle class. Even otherwise parental insistence for Indian bride in the hope that their son is not lost forever is not uncommon. The result, at times, is matrimonial alliance by a reluctant husband to assuage the sentiments of his parents. Victim is the helpless, poor, educated girl, normally, of a middle class family with dreams of a foreign land.[22]

The above lines were observed in the textbook case of NRI marriages-*Neeraja Saraph* v. *Jayant V. Saraph*.[23] The boy employed in US, married a well educated girl from India, celebrated their marriage and left for the US, leaving the girl behind, persuading her to give up her job and join him in US. The girl applied for VISA and left her job hoping to join her husband. But instead she received a petition for annulment of marriage in a USA court and a letter from her father-in-law apologising for unfortunate decision of his son. The wife, having been forsaken by her husband and having lost the job had no alternative except to file a suit for damages against the husband and father-in-law for ruining her life *in forma pauperis*. In this case it was decided that the wife would be entitled to compensation from the respondent. Moreover, in this case a need for legislation in this respect was recognised and the court gave suggestions for its fulfilment.

In cases of NRI marriages, there are various safeguards a family could follow like running a background check on the boy and his family, etc, but what can be better in these cases if not some legal backup, which a prenuptial agreement can provide. The content of a prenuptial agreement can vary widely, but commonly includes provisions for division of property and spousal support in the event of dissolution of marriage,[24] or can include

---

[20] National Commission for Women, *Problems Relating to NRI Marriages http://ncw.nic.in/pdffiles/*nridodont.pdf. (Accessed on 27/10/2013).

[21] *Anubha* v. *Vikas Aggarwal*, (2002) 100 DLT 682.

[22] *Neeraja Saraph* v. *Jayant V. Saraph*, (1994) 6 SCC 461.

[23] (1994) 6 SCC 461.

[24] Daniel Bays Law Firm, *Prenuptial Agreements*, at http://bayslawfirm.com/prenuptial-agreements/(Accessed on 27/10/2013).

provisions in relation to any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.[25] Such an agreement could create a contractual obligation on the NRI husband to respect his wife's rights and fulfil his marital duties. 'Documenting and agreeing upon division of property, child custody, cheating and philandering or negotiating other rights as means of safeguarding individual interests do spare the couple an embittered separation.'[26] A legislation mandating prenuptial agreements in cases of NRI marriages will on the lowest level create awareness about the contingencies of an NRI marriage and will protect parties against defaulting spouses and their families.

In the case of *Sheenam Raheja* v. *Amit Wadhwa,* CS(OS) 990/2010 where the wife, mother of two children aged 9 and 6 years, suffered cruelty inflicted upon her by her husband and his family members, who publicly humiliated her for dowry, whenever she visited India, even though for short spells. When the wife became unwell on account of such cruelty and was admitted to a hospital in Delhi, the mother-in-law took the two children with her and left for USA. The wife later found out that she was also left with no matrimonial home, which was locked by the mother-in-law with malafide intentions and with no bank balance which was withdrawn fraudulently by the defendant and his relatives by forging her signatures. Not only this, the plaintiff came to know that a case for dissolution of marriage of the parties on the ground of irreconcilable differences had been filed by the defendant before the Superior Court of California, County of Santa Clara, San Jose, USA. It was decided by the Delhi High Court in this case that, the plaintiff and the defendant both resided together in India and hence as per Section 19 of the Hindu Marriage Act, 1955, the jurisdiction for the grant of decree of divorce vests with the Courts in India and also that the impugned proceedings and the decree of dissolution are in violation of the principles of natural justice since the plaintiff was not given an opportunity to present her case. It was held that the decree of dissolution of marriage passed by the Superior Court of California in favour of the defendant cannot be said to be conclusive under Section 13 of the Civil Procedure Code and hence not enforceable in India. The aforesaid decree was declared null, void and unenforceable. The court also referred to the case of *Neeraja Saraph* v. *Jayant V. Saraph*[27], and regretfully observed that, '[T]he plight of women and their exploitation by NRI husbands is yet to be ameliorated through legislative measures as suggested in the said case.'

---

[25] State Legislature, *Family Code*, http://www.statutes.legis.state.tx.us/Docs/FA/htm/FA.4.htm (Accessed on 24/10 2013).

[26] I. Mishra, *Happily married but conditions apply*, THE TIMES OF INDIA, 13 December 2012.

[27] (1994) 6 SCC 461.

There is yet another case of *Monica* v. *State of Punjab*, Criminal Misc. No. M 53908 of 2007 (O&M), where a young girl was left in lurch by her NRI husband. The husband left for Italy after 20 days of marriage, leaving the girl at the mercy of his parents who harassed her for dowry day after day. The girl finally lodged a complaint against this treatment but agreed on a compromise to accept 10 lacs as permanent alimony and maintenance and on her part to file a divorce petition on the basis of mutual consent and to withdraw her FIR. However, the plaintiff received only 7 lacs and while 3 lacs were still due to her, the father-in-law instituted a criminal complaint for cheating under S. 420, against the girl for not withdrawing her FIR. The high court duly quashed the FIR and reflected upon the deplorable condition of young brides who are exploited at the hands of their NRI husbands in so many ways.

In *Anubha* v. *Vikas Aggarwal*[28], where the matrimonial alliance of the parties was a result of matrimonial advertisement, the plaintiff, a young girl of 24-25 filed a suit seeking declaration that she is entitled to live separately from her husband, and also for a decree for maintenance for the 1500$ per month besides the pendent lite expenses as she was deserted and abandoned after being subjected to cruelty. She was sent back to her parents hardly after two months of her marriage.[29] The defendant apart from treating her with physical and mental cruelty also disclosed that he had a premarital affair with a woman in Connecticut, USA. After this, the husband, threatened to call off the marriage unless the plaintiff's father paid up Rs 10 lacs. When the wife failed to arrange this, he filed a 'No Fault Divorce' Petition in a US Court. He also called his wife unchaste in his defence in the present case to escape Section 18 of the Hindu Adoptions and Maintenance Act 1956. The court in its decision after deliberating on all the allegations, decided that the defendant was a prisoner of orthodoxy and suspiciousness and no wonder subjected the plaintiff to mental cruelty of extreme nature and therefore he cannot deprive the plaintiff of her right of maintenance on the ground of her living an unchaste life.

IV. LEGAL VALIDITY

We would now examine the legal validity of prenuptial agreements in several countries of the world by isolating the advantages and disadvantages.

---

[28] (2002) 100 DLT 682.

[29] *Anubha* v. *Vikas Aggarwal*, (2002) 100 DLT 682, para 2.

A. USA

In July 1983, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved and recommended for enactment in all states the Uniform Premarital Agreements Act. The Act was passed with the objective of providing uniformity of content and certainty of enforcement throughout the country and to provide the flexibility needed in modern marriages.[30] But the Act provides for certain parameters for the pre-nuptial agreements to be enforceable under the Act. Section 3 of the Act provides that, 'Agreements may govern the use, ownership, and disposition of real and personal property both during and after the marriage whether it terminates by death of a spouse or divorce'. Another interesting provision is Section 3(a)(8) which permits the parties to include, 'any other matter, including their personal rights and obligations, not in violation of public policy or any statute imposing a criminal penalty.'[31] Section 6(a) of the act requires that the party seeking to avoid the agreement prove the following:

1. That [the] party did not execute the agreement voluntarily; or
2. (i) before execution of the agreement, that [the] party was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; and

   (ii) before execution of the agreement, that [the] party did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond that actually provided; and

   (iii) before execution of the agreement, that [the] party did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party; and

   (iv) that the agreement was unconscionable when it was executed.[32]

In a landmark ruling in October 2010, in the case of *Radmacher* v. *Granatino*[33], the US Supreme Court held that courts should give effect to a pre-nuptial agreement that is freely entered into by each party with a full appreciation of its implications, unless in the circumstances prevailing it would not be fair to hold the parties to their agreement.[34] The Florida Supreme Court has rejected the old paradigm that a pre-nuptial agreement in contemplation of divorce is against public policy.[35] However, these

---

30 C. George, *Marching To a Single Beat*, Family Advocate 25-38 (1984).
31 C. George, *Marching To a Single Beat*, Family Advocate 25-38 (1984).
32 Uniform Premarital Agreements Act 1983, § 6.
33 2010 UKSC 42.
34 Catherine Fairbairn, *Pre-nuptial Agreements: Recent Developments* www.parliament.uk/briefing-papers/SN03752.pdf. (Accessed on 27.10.2013).
35 *Posner* v. *Posner*, 233 So. 2d 381 (Fla. 1970).

agreements are to be tested by the rules prescribed in *Del Vecchio* v. *Del Vecchio*[36], for ante-and post-nuptial agreements settling the property rights of the spouses in the estate of the other upon death and also it has to be seen that the divorce is prosecuted in good faith and on proper grounds.[37]

B. ENGLAND

The English courts were traditionally reluctant to enforce pre-nuptial agreements which sought to provide for matters upon a divorce. As pointed out by Christopher Slade QC in 2008, some people opined that, 'they are not worth the paper they are written on.'[38] There was a concern that pre-nuptial agreements which contemplate divorce undermine the institution of marriage, and are contrary to public policy because it undermines the concept of marriage as a life-long union,[39] and it was also contrary to public policy to oust the jurisdiction of the court by agreement in matters over which the state was very much concerned.[40] In *Brodie* v. *Brodie*[41], a man agreed to marry the woman expecting his child on the condition that they would always live apart as if they were not married. It was held that the agreement is against public policy.

However, the more recent cases in England while not formally enforcing such agreements, have given consideration to their provisions while assessing financial provisions under the Matrimonial Causes Act, 1973.[42] Justice Connell made an observation that, "Where other jurisdictions, both in the USA and in the European Union, have been persuaded that there are cases where justice can only be served by confining the parties to their rights under prenuptial agreements, we should be cautious about categorically asserting the contrary."[43] In the same case he went on to hold that, "it would be as unjust to the husband to ignore the existence of the agreement and its terms as it would be to the wife to hold her strictly to those terms".[44] A court may attach some weight to the provisions of a pre-nuptial depending on the circumstances of a case,[45] however the law is still in its evolutionary

---

36 143 So. 2d 17 (Fla. 1962).
37 *Posner* v. *Posner*, 233 So. 2d 381 (Fla. 1970).
38 J. Bray, *Pre-Nuptial Agreements under Scrutiny: Macleod v. Macleod*, Denning Law Journal 21, 131-139 (2009).
39 G. Miller, *Pre-nuptial agreements in English Law*, Private Client Business 415-426 (2003).
40 *Hyman* v. *Hyman*, 1929 AC 601.
41 (1916-17) All ER 237.
42 J. Bray, *Pre-Nuptial Agreements under Scrutiny: Macleod* v. *Macleod*, Denning Law Journal 21, 131-139 (2009).
43 *M* v. *M,* (2002) 1 FLR 654, 661.
44 *M* v. *M,* (2002) 1 FLR 654, 661.
45 *Van den Boogaard* v. *Laumen,* 1997 QB 759.

stage and the courts are very cautious in attaching significance to such an agreement.[46]

'The fact that an agreement was made abroad and at a time when the parties lived abroad may be a relevant factor in assessing the importance to be attached to it.'[47] The court may take into account the effect of the agreement in the country in which it was made.[48] Several other factors are taken into account while dealing with the validity of a pre-nuptial agreement in England such as, 'the length of the marriage,[49] the source of the family wealth,[50] the standard of provision for the wife,[51] the circumstances in which the agreement was signed,[52] and the objectives of the parties.[53][54]

In the case of *MacLeod* v. *MacLeod*[55], the Privy Council having reviewed the position in other jurisdictions which uphold pre-nuptial settlements decided that since in other jurisdictions pre-nuptial settlements had been introduced through legislation rather than through judicial decision, the legislature was better able to build in the necessary safeguard if such settlements were to be upheld. This was considered by the Law Commission which is now preparing a draft bill.[56] The Law Commission has criticised the divorce laws in England as being incomplete, uncertain and uninformative and as a result the courts have no guidelines on deciding issues related to division of assets. It is forecasted that if the Law Commission proposes that the government should validate a properly drafted pre-nuptial, as long as the needs of the couples are met and they have signed it of their own volition, even if the division of assets seemed unfair (as was laid down in the *Radmacher* v. *Granatino* case), it will only fuel an increase in the number of pre-nuptials being taken out by those seeking to protect their wealth and those embarking on second marriages.[57]

---

46 *F* v. *F*, (1995) 2 FLR 45, 66; *S* v. *S*, (1997) 2 FLR 100, 102.

47 G. Miller, *Pre-nuptial agreements in English law*, Private Client Business 415-426 (2003).

48 G. Miller, *Pre-nuptial agreements in English law*, Private Client Business 415-426 (2003).

49 *Haneef* v. *Haneef*, 17-2-1999 (CA) (Unreported); *M* v. *M,* (2002) 1 FLR 654, 661; *K* v. *K*, (2003) 1 FLR 120.

50 *M* v. *M,* (2002) 1 FLR 654, 661; *K* v. *K*, (2003) 1 FLR 120.

51 *F* v. *F*, (1995) 2 FLR 45; *S* v. *S*, (1997) 2 FLR 100; *K* v. *K*, (2003) 1 FLR 120.

52 *F* v. *F*, (1995) 2 FLR 45; *S* v. *S*, (1997) 2 FLR 100; *K* v. *K*, (2003) 1 FLR 120; *M* v. *M,* (2002) 1 FLR 654.

53 *Wyatt-Jones* v. *Goldsmith*, 2000 WL 976036; *K* v. *K*, (2003) 1 FLR 120; *M* v. *M*, (2002) 1 FLR 654, *S* v. *S*, (1997) 2 FLR 100.

54 G. Miller, *Pre-nuptial agreements in English law*, Private Client Business 415-426 (2003).

55 2008 UKPC 64.

56 J. Bray, *Pre-Nuptial Agreements under Scrutiny: Macleod* v. *Macleod*, Denning Law Journal 21, 131-139 (2009).

57 O. Bowcott, *Divorce law criticised as incomplete and uninformative,* THE GUARDIAN 11 September 2012.

C. SINGAPORE

In 1993, a couple made an agreement that after marriage there would be no consummation or cohabitation between them until they had undergone the traditional Chinese customary rites and had set up a matrimonial home.[58] The Singaporean Court of Appeal held that,

> *[N]ot every pre-nuptial agreement regulating or restricting the marital relations of the husband and wife is void and against public policy...the law does not forbid the parties to the marriage to regulate their married lives and also the incidents of the marriage, so long as such agreement does not seek to enable them to negate the marriage or resile from the marriage...the law does not forbid them to agree as to how they should live and conduct themselves as husband and wife, when and where they would commence to live as husband and wife, when they would consummate their marriage, when they would have a child or children and how many children they would have. Such agreements made between husband and wife are not illegal or immoral or against public policy.*[59]

In Singapore there are four areas in which agreement between spouses may not be enforceable- agreements tampering with the fundamental character of marriage, agreements for payment of capital sums in full settlement of future maintenance are not effective until approved by the court, agreements for division of matrimonial assets which are regulated by Section 112 of the Women's Charter,[60] agreements relating to the custody of children which are to be in conformity with Section 129 of the Charter. In the recent case of *TQ* v. *TR*[61], the Court of Appeal explained the extent to which spouses retain the freedom to make their own arrangement on the division of assets upon a divorce.[62] The precedent that *TQ* v. *TR*[63], sets is that, 'the prenuptial agreement cannot be enforced, in and of itself, they ought to comply with the various legal doctrines and requirements that are an integral part of the common law of contract...'.[64] 'In another case of *Wong Kam Fong Anne* v. *Ang Ann Liang*[65], an agreement between spouses to

---

58 D. Ong, *Prenuptial agreements: a Singaporean perspective in TQ v TR,* Child and Family Law Quarterly 21, 536-547 (2009).

59 *Kwong Sin Hwa* v. *Lau Lee Yen*, (1993) 1 SLR 457, [38].

60 Statutes of the Republic of Singapore, 1985, Cap 353.

61 2009 SGCA 6.

62 D. Ong, *Prenuptial agreements: a Singaporean perspective in TQ* v. *TR,* Child and Family Law Quarterly 21, 536-547 (2009).

63 2009 SGCA 6.

64 2009 SGCA 6, [94].

65 (1993) 2 SLR 192.

divide matrimonial assets was upheld. Similarly, if the agreements between spouses are made voluntarily without duress and undue influence but, are not technically valid by contract principles, they should still remain relevant to the court when it endeavours to reach the fairest outcome.[66]

D. AUSTRALIA

In Australia, 'financial agreements' are binding under the Family Law Amendment Act 2000. 'In practice, financial agreements are likely to be pre-nuptial agreements.'[67] A financial agreement may cover property and financial resources (present or future), spousal maintenance and other incidental and ancillary matters.[68] These are enforceable as long as the formal requirements for entry are satisfied, and no other ground for setting aside the agreement is established.[69] Further, such an agreement necessarily, has to be made by consent between the parties formed after receiving independent legal advice and there is no court supervision or registration of such agreements under the law.[70]A financial agreement is binding unless it is terminated by the parties or it comes under the grounds for setting aside under Section 90K of the Act like fraud, material change in circumstances and other conditions that make the agreement void, voidable or unenforceable under the contract law.

E. NEW ZEALAND

Prenuptial agreements are also valid in New Zealand. Under the Property (Relationships) Act 1976 an agreement entered before marriage or cohabitation is not enforceable if the court decides that giving effect to the agreement would cause serious injustice having regard to a number of matters, including whether the agreement has become unfair in the light of any changes in circumstances since it was entered.[71]

F. INDIA

Indian judiciary has declared such agreements as unenforceable under Section 23 of the Indian Contract Act as being in contradiction with the personal laws and therefore being opposed to public policy. In *Tekait Mon*

---

66 D. Ong, *Prenuptial agreements: a Singaporean perspective in TQ* v. *TR,* Child and Family Law Quarterly 21, 536-547 (2009).

67 B. Smyth, *Binding Pre-Nuptial Agreements in Australia: The First Year,* International Journal of Law, Policy and the Family 16 (2002).

68 Family Law Amendment Act 2000, Ss. 90B (3), 90C (3) and 90D (3).

69 B. Smyth, *Binding Pre-Nuptial Agreements in Australia: The First Year,* International Journal of Law, Policy and the Family 16 (2002).

70 Family Law Amendment Act 2000, § 90G.

71 Property (Relationships) Act 1976, § 21J.

Mohini Jemadai v. *Basanta Kumar Singh*[72], where there was an ante-nuptial agreement on the part of the husband that he will never be at liberty to remove his wife from parental abode and in *Krishna Aiyar* v. *Balammal*[73], where there was an agreement between the parties which provided for a future separation. In *CIT* v. *Shanti Meattle*[74], the Allahabad High Court while deciding the validity of an agreement between the parties to live apart was held unenforceable because it brought to an end all marital rights which a husband can exercise in relation to his wife. Supreme Court lawyer, Pavan Duggal is of the view that pre-nuptials are not tenable or executable in a court of law. However, they can at best be an indication of the intent of the parties.[75] Also under Section 10 of the Indian Contract Act, prenuptial agreements have as much sanctity as any other contract, oral or written; just because litigation has not begun in this area does not mean that it has to be treated any differently and that it cannot be enforced. Courts do take cognizance of a prenuptial agreement if both parties have mutually agreed, are competent to contract, and the prenuptial agreement clearly states the fair division of property, personal possessions and financial assets of the parties.[76]

V. CONCLUSION

In all jurisdictions, pre nuptial agreements are not per se invalid though the courts may not be exactly willing to render them enforceable. The legal and social oppositions to prenuptial agreements can be classified as one, being contrary to the law and public policy or two, disregarding the sacred nature of marriage as a sacrament, a divine and lifelong union. In India, courts have been reluctant to grant enforceability to prenuptial agreements in several cases but that was mainly because they were against the contract laws and personal laws of the country. Prenuptial agreements are looked down upon in India by the traditional Indian society as, 'a pre-nup may become a precursor to a negative married life ridden with lack of trust and one full of suspicion.'[77] Though prenuptial agreements are on the rise in India, it cannot be said that they have uniform acceptability across the nation because of the Indian tradition and culture which places trust as the building block of the institution of marriage which, in India, is a union between families and not between individuals. This ideology precludes the

---

[72] ILR (1901) 28 Cal 751.

[73] ILR (1911) 34 Mad 398.

[74] (1973) 90 ITR 385 (All).

[75] DNA, *Does the prenuptial agreement hold good in India as well?*, *at* http://www.dnaindia.com/lifestyle/report_does-the-prenuptial-agreement-hold-good-in-india-as-well_1350300. (Accessed on 27/10/2013).

[76] Rohan, *Prenuptial Agreement is the need of the hour at* http://www.merinews.com/article/prenuptial-contracts-is-the-need-of-the-hour/15711364.shtml. (Accessed on 27/10/2013).

[77] I. Mishra, *Happily married but conditions apply*, THE TIMES OF INDIA, 13 December 2012.

acceptance of such an agreement. In Australia, it has been observed that even though legislation exists that helps to overcome practical obstacles to such agreements, reluctance to undermine or disrupt the personal relationship may mean that the use of pre-nuptial agreements remains a rare form of behaviour in relationships.[78] While bringing up the subject of a prenuptial agreement between newly engaged couples can be uncomfortable but once broached, it brings up many important issues, which are best discussed and agreed upon prior to marriage, bringing couples closer and ultimately strengthening their union.[79] A prenuptial agreement is also eschewed because it, 'achieves an unreasonable status when clauses on paper cross the lines of prudence and enter the path of absurdity.'[80] There have been instances of spouses putting in absurd clauses in a prenuptial agreement, such as barring the husband from remarrying post divorce. It is submitted that these kinds of terms which are motivated by viciousness are not to be supported. But examples like these should not prejudice the interest of couples in genuine cases where a safeguard is necessary against straying spouses. Particularly in cases of NRI marriages, a prenuptial can do wonders by creating a balance in favour of the deserted spouse. Therefore the authors submit that pre nuptial agreements regulated by means of a statute, especially in cases of NRI marriages, should be encouraged to protect the interest of the deserted wives.

---

[78] B. Smyth, *Binding Pre-Nuptial Agreements in Australia: The First Year,* International Journal of Law, Policy and the Family 16 (2002).

[79] India currents, *The Prenuptial Agreement, at http://www.indiacurrents.com/articles/2012/02/13/*prenuptial-agreement. (Accessed on Oct. 27, 2013).

[80] I. Mishra, *Happily married but conditions apply*, THE TIMES OF INDIA, 13 December 2012.

LEGAL ACCEPTABILITY OF SINGLE COLOUR AS A TRADEMARK

—*Sakshi Mahajan & Aastha Tandon*[*]

Abstract *India lacks any mention of colour being eligible for trademark protection. Both statutes and judgments are lacking in this. The United State of America and the European Union have produced various conflicting judgments. There has been a great deal of debate and different stands have been taken by the different courts. The Wal-Mart case has made the position in U.S.A more or less clear. Colours as such are not protectable until they have acquired distinctiveness in combination with any other thing. On the other hand the U.K Court in the Cadbury case has demonstrated that colour can be protected as a trademark after getting distinctiveness.*

Single colour qualifying as a valid trademark, is a concept which is new to India. There being many cases on colour combination and trade dress but not on colour alone, the author seeks to analyse in this paper the prospect of colour registration in India on the basis of judgments and law laid down in U.S.A, U.K and India.

I. INTRODUCTION

The aim of advertising for any product is to create a recall value, and this recall or reminder is set by using different advertising platforms such as television, the print advertisement, the packaging of the product and sometimes just the brand name. Out of these, the most effective one is the packaging style and usage of colours. Nowadays, packaging is one of the most essential tools used by manufacturers to attract customers to their product and this packing is what establishes brand and product recall. Thus it becomes a property right which requires legal protection. This paper shall

[*] Three year LL.B programme, Campus Law Centre, Faculty of Law, Delhi University.

be dealing with recent debates and suits that have emerged in connection to single colour trademark which is one of the types of non-conventional trademarks.

In this paper, we shall discuss the issue of a single colour as a subject matter of trademark on the basis of some popularly referred to theories and doctrines in United States of America, EU (European Union) and India. They are as follows:

- The colour depletion theory,
- Secondary meaning,
- The functionality doctrine and
- Distinctiveness of applicants' goods in commerce (section 32, The Trade Marks Act 1999)

Colour has always acted as a mechanism to attract or draw attention of the human mind and thus, due to sustained use of such colour in an advertisement related to a particular product, it gets associated with a certain product or brand in the human mind. It has been proved that the human mind easily registers colourful and attractive things and as a result the manufacturers try and package their products in a very inviting and attractive manner. They tend to use a combination of colours or a single colour. Certain products can be distinguished and can be easily recognized on seeing the colour of the package irrespective of the language used to write the brand name. For example, specific shade of purple is always associated with Cadbury even if "Cadbury" is written in Chinese, Japanese, English, Arabic or any other language. Similarly Fuji's films come in green colour, Heinz baked beans are packaged in a turquoise box.

Marketing research indicates that over 80% of visual information is related to colour. In other words, colour conveys information and/or provides the user with some other operational benefit.

The use of distinctive colours to identify products can be seen everywhere, from pharmaceutical items to industrial equipment. Some products are packaged in a variety of distinctive colours. For example Kodak's film comes in a yellow and black box and Fuji's, green. Other products tend to be packaged in variations of the same two or three colours in different designs. For example, laundry detergents are typically sold in blue, orange and/or yellow packaging. The actual design of the container or label may be quite different, even though the colours used are the same. On the other hand, a more confusing situation may confront a consumer when right next to your favorite brand of cough syrup, sits another brand in similar colours.

Even the labels are oddly similar, so much that you might even confuse the two and pick up the wrong one by mistake.

Until recently the issue of colour for brand identity was not a legal issue and a topic of much debate. Different countries were open to the question "whether a single distinctive colour associated with a brand could be a subject matter of trademark?" Now, with every brand aspiring to register a single colour or a combination of colours in their name, a colour war is exploding and an unprecedented number of law suits are being generated. With the recent case of *Christian Louboutin* v. *Yves Saint Laurent,* wherein Christian Louboutin's use of Pantone shade of red for its outsole of high heeled shoes was challenged, the debate of single colour distinctive as a trademark has reached an acme.Different countries have legislated (or are in the process of doing so) their respective laws/statues after a lot of debate. The issue of colour as a subject matter of trademark protection is still in flux.

This paper aims at proving that colour should be allowed to be registered as a trademark, taking into account the marketing, advertisement, time period for which a particular product has been in the market, the degree of association of a product with a particular colour in the mind of the customers. The protection of a particular colour or any combination becomes essential in cases where the colour has been associated with a brand for a reasonable period of time. Colour plays a pivotal role in perception of a brand.

The secretariat of the Seoul International Colour Expo 2004, conducted a research, documenting the following relationships between colour and marketing:

- 92.6 percent said that they put most importance on visual factors when purchasing products. Only 5.6 percent said that the physical feel via the sense of touch was most important. Hearing and smell each drew 0.9 percent.
- When asked to approximate the importance of colour while buying products, 84.7 percent of the total respondents think that colour accounts for more than half among the various factors important for choosing products.

The issue of a single colour qualifying as a valid trademark is relatively new in India. In fact there is no single case of single colour registration in India and also not much has been written on the same. There are many cases on colour combination and trade dress, but not on colour alone. The author seeks to explore the prospects of colour registration as a trademark in India and offer a broader dimension to the issue.

II. POSITION IN USA

In the period between 1905 and 1946, federal trademark law was governed by the Trademark Act of 1905[1], which was essentially a codification of the common law and granted only limited protection to trademarks.

Initially single colour was not considered to be a sufficiently distinctive mark to be indicative of the source of the product and hence was not considered a strong feature and eligible to qualify for trademark protection. Under the 1905 Act, descriptive marks could not be registered[2]. The trademark act was not broad enough and it did not have the capacity to grant trademark protection to "descriptive marks."

Prior to the Lanham Act, the courts were of the opinion that trademark protection cannot be granted on the basis of colour alone[3]. Protection was refused as certain industries and products had very limited colours that they could use[4].

The confusion and the doubts were put to rest with the execution of the Lanham Act.

As one commentator observed, "The basic 1905 Trademark Act remained inadequate to cope with the realities of twentieth century commerce and brand names.''[5] Congress responded by enacting the Trademark Act

---

1 Act of Feb 20, 1905, ch. 592, 33 Stat. 724 (repealed 1947).

2 *Standard Paint Co.* v. *Trinidad Asphalt Mfg. Co*., 55 L Ed 536: 220 US 446 (1911).

3 *A. Leschen & Sons Rope Co.* v. *Broderick & Bascom Rope Co.,* 50 L Ed 710: 201 US 166, 171 (1906) Supreme Court of USA stated "[whether mere colour can constitute a valid trademark may admit of doubt. Doubtless it may, if it be impresses in a particular design, as a circle, square, triangle, a cross, or a star. But the authorities do not go farther than this"]; *Diamond Match Co.* v. *Saginaw Match Co*., 6 Cir., 1906, 142 F. 727, 729 ["Sometimes a colour, taken in connection with other characteristics, may serve to distinguish one's goods, and thus be protected by the courts * * *; but, as a rule, a colour cannot be monopolized to distinguish a product * * *.]; *In Re General Petroleum Corpn*.., 49 F 2d 966, 967-68, 9 U.S.P.Q 511, 512 C.C.P.A 1931**.** [The court denied registration of colour violet for use as a gasoline trademark.] Also see, *Samson Cordage Works* v. *Puritan Cordage Mills*, 6 Cir., 1914, 211 F. 603, L.R.A.1915F, 1107; *James Heddon's Sons* v. *Millsite Steel & Wire Works*, 6 Cir., 1942, 128 F 2d 6; 1 *Nims, Unfair Competition and Trade-Marks* § 210b; 2 *Callmann, Unfair Competition and Trade Marks* § 71.5 (1945); *James Heddon's Sons* v. *Millsite Steel & Wire Works*, 6 Cir., 1942, 128 F 2d 6, 9 ["Colour, except in connection with some definite, arbitrary symbol or in association with some characteristics which serve to distinguish the article as made or sold by a particular person is not subject to trade-mark monopoly."]

4 *Pacific Coast Condensed Milk Co.* v. *Frye & Co*., 1915, 85 Wash. 133, 147 P 865, 869 **[**"The primary colours are few, and as the evidence shows those suitable for light products, such as milk, are even more limited. To allow them to be appropriated as distinguishing marks would foster monopoly by foreclosing the use by others of any tasty dress."]

5 McCARTHY, § 5.03.

of 1946[6], which is commonly referred to as the Lanham Act. The Senate committee while reporting the bill indicated that its purpose was to "place all matters relating to trademarks in one statute and to eliminate judicial obscurity, to simplify registration and to make it stronger and more liberal, to dispense with mere technical prohibitions and arbitrary provisions, to make procedure simple, and relief against infringement prompt and effective."[7]

The Lanham Act took effect on July 5, 1947[8]. The Lanham Act significantly expanded the scope of trademark protection in USA by broadening the spectrum of the definition of trademark, incorporating, "any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others."[9]

In the case of *Campbell Soup*[10], United States Court of Appeals Third Circuit refused trademark protection of colours on two grounds- (1) The use of colour labels was an industry norm and (2) the colour depletion theory. The court in this particular case applied the colour depletion theory, as the use of colours was a regular practice followed by traders in the industry and monopolizing a single colour would lead to the depletion of colours for use by others.

The facts of the case were such that the plaintiffs, Campbell Soup company and Carnation company, together sought an injunction to stop the use of red and white labels on food product labels by Armour. The third circuit reasoned that permitting Campbell to monopolize the colour red would hinder competition in a business in which colour labels were an industry norm[11]. The court's central premise was that depletion by trademark registrants of the limited number of colours in the palette would violate public policy[12.]

Hence in this case the court rejected the protection of single colour as a trademark on the grounds that "list of colours will soon run out".[13] Many

---

6 Act of July 5, 1946, ch.540, 60 Stat. 427 [~dified at 15 U.S.C. § 1051 (1994)].

7 S. REP.NO. 1333, 79th Cong., 2d Sess. 5 (1946), reprinted in 1946 U.S.C.C.A.N. 1274, 1277.

8 15 U.S.C. § 1051 (1994).

9 Act of July 5, 1946, oh. 540, § 45, 60 StaL 427 (corrent version at 15 U.S.C. § 1127 (1994)).

10 *Campbell Soup Co.* v. *Armour & Co.,*175 F 2d 795, 81 U.S.P.Q 430 (3rdcir.), cert. denied, 338 US 847, 83 U.S.P.Q 543 (1949).

11 *Id* at 798, 81 U.S.P.Q at 432-33.

12 *Id*.

13 Cert. denied, 338 US 847, 83 U.S.P.Q. 543 (1949).

courts followed the decision of the third circuit in Campbell Soup[14]. Courts have also refused to grant trademark protection to colours alone on the basis of functionality doctrine along with the colour depletion theory[15]. In Deere's case, the court expressed concern that affording Deere trademark protection would reduce the already limited number of colours and shades of colours available to Deere's competitors'[16]. The court, however, concluded by saying that Deere's colour was functional and hence could be imitated by his competitors'[17].

Although many of the earlier cases raised the argument of colour depletion theory, the Federal Circuit's decision properly recognized that the risk of tying up all available colours is, but one of several factors that courts should consider in determining registrability of colours[18]. This reasoning is in sync with certain decisions which dissent with the colour depletion theory as an inherent bar to registration of colours alone[19].

The law today says that a mark categorized as "descriptive" cannot be protected unless the secondary meaning is proven. A descriptive mark is any mark descriptive of: the intended purpose, function or use of the goods; the size of the goods; the class of users of the goods; a desirable characteristic of the goods or the end effect upon the user.

Therefore, for colour alone to qualify as a trademark, it has to acquire distinctiveness as it lacks a sufficient degree of the same.

---

[14] *Tas-T-Nut Co.* v. *Variety Nut & Date Co*., 245 F 2d 3, 6, 113 U.S.P.Q. 493, 495-96 (6th Cir. 1957) (Finding no proprietary right in colour for use on packages); *Norwich Pharmacal Co*. v. *Sterling Drug Inc*., 71 F 2d 569, 572, 123 U.S.P.Q. 372, 375 (2d Cir. 1959) (Holding that colour pink could not be monopolized in connection with remedy for an upset stomach).

[15] *Deere & Co.* v. *Farmhand Co.*, 560 F Supp 85, 217 U.S.P.Q. 252 (S.D. Iowa 1982), aft'd, 721 F 2d 253 (8th Cir. 1983) (per curiam); *Life Savers Corpn.* v. *Curtiss Candy Co***.** [the court took the stand that the use of coloured labels on the wrapper of candies is a common trade practice as the coloured stripes were an indicator of the flavours inside the packet.]

[16] *Id* at 96-97, 217 U.S.P.Q. at 261.

[17] *Id* at 98, 217 U.S.P.Q. at 262.

[18] *See* Id at 1120,-227 U.S.P.Q. at 419 (stating that courts should consider particular mark and circumstances of its use, as well as colour depletion doctrine).

[19] *Ives Laboratories Inc.* v. *Darby Drug Co.,* 601 F 2d 631, 643, 202 U.S.P.Q. 548, 558 (2nd Cir. 1979) [Noting viability of "endless number of colour combinations"]; Cooper, Trademark Aspects of Pharmaceutical Product design, 70 TRADE-MARK REP. 1, 22-28(1980) [(stating that although 86 colour names currently are tabulated, each colour name embraces numerous distinguishable unnamed tints). Colours are differentiated on the basis of hue, brightness, and saturation and, consequently, such subtle differentiation creates vast colour possibilities]; *Ideal Toy Corpn.* v. *Plawner Toy Mfg. Corpn*., 215 U.S.P.Q. 610, 612 (D.N.J. 1981) (Finding wide variety of possible patterns and colour on toy cube), aff'd as modified, 685 F 2d 78, 216 U.S.P.Q. 102 (3d Cir. 1982); *Ideal Toy Corpn.* v. *Chinese Arts & Crafts Inc*., 530 F Supp 375, 378, 217 U.S.P.Q. 959, 962 (S.D.N.Y. 1981) (noting great number of colours, shades, and combinations).; *Inwood Laboratories Inc.* v. *Ives Laboratories Inc.*, 72 L Ed 2d 606, 456 US 844, 214 U.S.P.Q 1 (1982).

As the U.S. Supreme court has observed:

> "Marks which are merely descriptive of a product are not inherently distinctive. When used to describe a product, they do not inherently identify a particular source, and hence cannot be protected. However, descriptive marks may acquire the distinctiveness which will allow them to be protected under the [Lanham] Act. . . . .this acquired distinctiveness is generally called "secondary meaning"[20].

In 1985 the United States Court of Appeals for the Federal Circuit deviated from the traditional common law and untangled the issue of colour alone to be able to qualify as a trademark in the case of *Owens-Corning Fiberglas Corpn., In re*[21]. The court took the stand that in limited cases, when a colour has been associated with a particular manufacturer, then it can qualify as a registrable mark. The facts of the case were such that Owens-Corning Fiberglas Corp (OCF). applied for registration of the colour "pink", used in fibrous glass residential insulation, under section 2(f) of the Lanham Act, alleging its use in commerce since 1956[22]. The United States Patent and Trademark Office's Trademark Trial and Appeal Board (Board) was of the opinion that the overall colour was capable of functioning as a trademark. The Board, however, denied registration on the ground that OCF had failed to bring out the distinctiveness of the colour pink[23]. On appeal,

---

[20] *Two Pesos Inc*. v. *Taco cabana Inc*., 120 L Ed 2d 615, 112 S Ct 2753, 505 US 763, 23 USPQ 2d 1081, 1083 (1992). [McCarthy on trademark and unfair competition vol. 1 1994-pg §11.05[1].

[21] 774 F 2d 1116, 227 U.S.P.Q. 417 (Fed. Cir. 1985).

[22] *Owens-Corning Fiberglas Corpn*., *In re,* 221 U.S.P.Q. 1195, 1196 (TTAB 1984), rezid on other grounds, 774 F 2d 1116, 227 U.S.P.Q. 417 (Fed. Cir. 1985). To qualify for registration on the principal register, a mark must have been "used in commerce" prior to the submission of an application for trademark. 15 U.S.C. § 1051 (1982). This term requires that the goods must have been sold in interstate commerce or the services rendered in interstate commerce.

[23] *Id* at 1198-99. The Trademark Trial and Appeal Board (Board) found that the colour was merely a type of product ornamentation and was not inherently distinctive. *Id*. at 1199. Thus, the Board held that OCF needed to show that its pink colour had acquired a secondary meaning sufficient to identify its goods. *Id*. For a discussion of the doctrine of secondary meaning, *see* supra note 20. OCF produced evidence indicating that it had spent over $42 million in advertising its pink insulation. *Owens-Corning Fiberglas Corpn*., *In re*, 221 U.S.P.Q 1195, 1196 (ITAB 1984), rev'd on other grounds, 774 F 2d 1116, 227 U.S.P.Q. 417 (Fed. Cir. 1985). The Board rejected this evidence as insufficient for failing to indicate the degree to which OCF's advertising emphasized the colour pink as a mark or the actual extent of the use of the advertising materials. *Id*. at 1199. It is this finding that the Federal Circuit reversed. *Owens-Corning Fiberglas Corpn*., *In re,* 774 F 2d 1116, 1128, 227 U.S.P.Q. 417, 425 (Fed. Cir. 1985). OCF submitted "extensive affidavit and documentary evidence" detailing television, radio, and magazine advertising that featured the "Pink Panther" cartoon character. *Id*. at 1125-27, 227 U.S.P.Q. at 422-24. During one seven-month period, OCF purchased almost two hundred separate blocks of network broadcast time during such high exposure programming as the Super Bowl and the World

the Federal Circuit assented with the conclusion of the Board that, under the modern trademark law, the overall colour of the goods, instead of mere colour in the form of a design, is capable of registration as a trademark. The court in the above mentioned case, referred to the case of *Park 'N Fly Inc.* v. *Dollar Park and Fly Inc*.[24] where the United States Supreme Court reasoned that the Lanham Act liberalized the trademark laws and gave it a broader spectrum[25].

In the case of *Master Distributors Inc.* v. *Pako Corpn. (MOT)*[26], the eighth circuit observed that, "We are not persuaded by the three traditional arguments against protection--the colour depletion theory, shade confusion, and the functionality doctrine. Nor are we impressed by the argument that "consistency and predictability" require a per se prohibition against trademark protection for colour alone. We believe that not allowing manufacturers to protect colour marks when all the traditional requirements have been met will actually promote inconsistency and confusion". Also, the court found that: there was a competitive need to use the colour blue in the leader splicing tape industry, and allowing MDI to appropriate the colour blue or a specific shade of blue would deter future competitors from entering the market "merely because existing manufacturers hold trademarks in the available colours."[27]

The confusion revolving around the protection of a mere colour was put to rest by the United Supreme Court in the *Qualitex* case[28]. The facts of the case were such that Qualitex, the plaintiff, was using a shade of green-gold on its press pads since 1950. The defendant, a rival manufacturer, started to use the same shade on its press pads. The plaintiff sued for infringement of its colour which was protected under its trademark. The defendant, counterclaimed to cancel the plaintiff's registration on the ground that colour alone was not protectable. The California trial court held that the plaintiff's trademark was valid and infringed by the defendant. On appeal, the Ninth Circuit reversed as to the claim for trademark infringement, holding that the colour alone of the pad was not protectable. The Supreme Court reversed the Ninth Circuit and, resolving a split of authority among the

---

Series. *Id*. at 1126, 227 U.S.P.Q. at 423. This extensive advertising campaign utilized such slogans as "Put your House in the Pink," "Pink Power," and "Think Pink." *Id*. at 1126-27, 227 U.S.P.Q. at 423-24. In reviewing the evidence, the Federal Circuit concluded that OCF's advertising had created a"syndetic relationship between the colour 'pink' and Owens-Coming Fiberglas in the minds of a significant part of the purchasing public." *Id*. at 1127, 227 U.S.P.Q. at 424.

[24] 83 L Ed 2d 582: 105 S Ct 658: 469 US 189, 224 U.S.P.Q. 327 (1985).

[25] Congress' mandate that "sound public policy" requires that trademarks should receive nationally the greatest protection that can be given to them.

[26] 61 USLW 2529, 25 U.S.P.Q. 2d 1794.

[27] *Id* at 749-50.

[28] *Qualitex Co.* v. *Jacobson Products Co*., 34 U.S.P.Q. 2d (BNA) 1161.

circuit courts, held that the plaintiff's colour qualified for trademark protection. The Court focused upon Section 45 of the Lanham Act ("the Act"), which defines a "Trademark" to include "any word, name, symbol or device, or any combination thereof." According to the Court, colour may be considered a "symbol" or "device" much in the same way as shapes, sounds and scents have been granted protection as trademarks under similar authority. The Court observed broadly that a person can use colour "to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown" and, as such, meet the statutory definition, under Section 45 of what constitutes a "Trademark". In resolving the split, Qualitex case sends a message to all the manufacturers that they can seek trademark protection for colour alone.

Even after the judgment in the Qualitex case, there was some doubt regarding whether colour can be granted protection without proving "secondary meaning", i.e. whether a colour alone can be "inherently distinctive". All the lingering doubts left after the Qualitex judgement were put to an end with the decision of the Supreme Court of United States of America in the *Wal-Mart* case[29]. The court took the stand that colour per se cannot be protected as a trademark. For a colour to qualify as a trademark, it had to combined with some other thing to acquire distinctive design.

The stands taken by the courts in USA have waivered over the years. Starting from *Leschen* case[30] where the protecting ability solely on the basis of colour was denied, followed by the *Campbell soup* case[31], where granting single colour as a registered trademark status was declined by the court on the basis of the colour depletion theory and the *Deere's* case[32], where functionality doctrine was first taken as a ground for refusal to granting protection to single colour. With the court in *Owens, In re* case[33] refuting the colour depletion theory and observing that single colour can serve as a trademark, the question of mere colour being eligible to be a valid registered trademark entered a new phase. The Supreme Court of USA adopted this position in the *Qualitex* case[34] and held that colour sometimes will meet the ordinary legal requirements to qualify as a trademark. Recently in the *Wal-Mart* case[35], the Supreme Court, by observing that for a single colour to qualify as a trademark it has to be in combination with something to acquire distinctiveness, has put an end to ambiguities. Also, how a colour

---

[29] *Wal-Mart Stores Inc.* v. *Samara Bros. Inc.*, 146 L Ed 2d 182: 529 US 205, 211-212,54, USPQ 2d 1065, 1068 (2000).

[30] *See* supra note 3.

[31] *See* supra note 10.

[32] *See* supra note 15.

[33] *See* supra note 21.

[34] *See* supra note 28.

[35] *See* supra note 29.

mark is distinct from other types of marks is illustrated in the case *Thrifty Inc., In re*[36], where it was held that, a word mark retains its same appearance when used on different objects but colour is not immediately distinguishable as a service mark when used in similar circumstances.

III. POSITION IN THE EUROPEAN UNION

In 1964 a draft of a "Convention on European Trademark Law" was prepared, in which the concept of CTM i.e. Community Trade Mark emerged. However, it was only in 1980, that for the first time a proposal for CTM materialized. In the European Union (EU) countries a proprietor can register trademarks via the CTM system which allows them to attain a uniform right applicable in all Member States of the European Union. The CTM system is administered by the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), which is located in Alicante, Spain.

In the European Union, Article 4 of Council Regulation (EC) No. 40-94 of December 20, 1993 ("signs of which a Community Trade Mark may consist") clearly states that any CTM may consist of "any signs capable of being represented graphically...provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings". The European Court of Justice (ECJ) in the case of *Libertel Groep BV* v. *Benelux Merkenbureau*[37] repeats the criteria from *Sieckmann* v. *German Patent Office*[38] that graphical representation, preferably means by images, lines or characters, and that the representation must be clear, precise, self-contained, easily accessible, intelligible, durable and objective.

In 1995 the case relating to colour trademark at the ECJ was the *Heidelberger*[39]. The court in this case considered the registrability of combination of colours. An important statement was given by the ECJ in its guidance to the German Federal Court of Justice, it said:

> *"Accordingly, a graphic representation consisting of two or more colours, designated in the abstract and without contours, must be systematically arranged by associating the colours concerned in a predetermined and uniform way."*

---

[36] 274 F 3d 1349, 1353, 61 USPQ2d 1121,1124 (Fed. Cir. 2001).

[37] Case C-104/01.

[38] Case C-273/00, The case involved a "methyl cinnamate" scent, which the applicant had described "as balsamically fruity with a slight hint of cinnamon". The ECJ ruled that (a) a chemical formula depicting this scent did not represent the odour of a substance, was not sufficiently intelligible, nor sufficiently clear and precise; (b) a written description was not sufficiently clear, precise and objective; and (c) a physical deposit of a sample of the scent did not constitute a graphic representation, and was not sufficiently stable or durable.

[39] Case C49-02.

The applicant Heidelberger filed an application showing the mark in a rectangle, which had the upper part of the rectangle in blue and the lower half in yellow, combined with a written description stating that the mark was used "in every conceivable form". But the court thought that it was not descriptive enough and thus justified that the graphic representation of a mark had to be precise and durable. In the case of a combination of colours, the graphic representation had to be *"systematically arranged by associating the colours concerned in a pre-determined and uniform way."*

The most important case that explains the law in this was the decision given by the ECJ in *Libertel Groep BV*[40]. In this case the colour orange was in dispute. Libertel had applied to register the colour orange at the Benelux Trade Marks Office for various goods and services relating to telecommunications. The Benelux Office refused the application of the appellant on the grounds that the mark was devoid of any distinctive character and they were unable to prove that the colour orange had acquired a distinct nature through use.

The Libertel case made it clear that in order to be registered as a trade mark in the European Union, a mark must overcome some hurdles:

- It should be a sign,
- It should be capable of being represented graphically,
- It should be capable of distinguishing the goods and services of one organization from the other and ultimately it should distinguish the goods and services of one undertaking from those of others whether inherently or via use.
- The goods or services should be explained with detailed specification and narrowly defined. The definition must clearly be justifiable and based in all respects on past used made.
- The representation of the colour is to be proved by establishing a specimen and a reference to a widely available and internationally recognised colour standard such as Pantone shades.
- It must be made clear as to the manner in which the colour constitutes to be a mark.

This case in 2003 established that a single colour is capable of acting as a trademark and can be registered if the specifications laid down in the case are met. If it can be proved that the purchasing public would inherently, or over a period of time, take the colour as distinguishing the goods and

[40] *Supra* see note 37.

services of one particular trader from those of another, then the colour can be registered as a trademark.

However, Libertel failed in one test, it was unable to sufficiently give a clear definition to the colour "orange" which if done would have enabled the mark to be represented graphically. The definition was too simple and lacked clarity. The definition used by Libertel did not fulfill the requirement established in the earlier *Sieckmann*[41] decision. The most recent case which put the debate on single colour to rest was the Cadbury v. Nestlé case. It is a landmark judgment and established that single colour can be a trademark. Cadbury is one of the well known chocolate brands across the world and in 2008, Cadbury had applied to trademark the colour purple, Pantone 2865C, in a number of categories, but Nestlé challenged the registration claiming that it "lacked distinctive character".

It was held that Cadbury would be allowed the trademark for purple colour because it is and has been associated with the brand since a long time and people associate the chocolates of this company with the purple packaging.

The chocolate company's use of the particular purple shade, Pantone 2685C, in the sale of chocolate bars, chocolate in tablet form and eating and drinking chocolate products showed sufficient "distinctive character" to merit trade mark protection.

In England many people associate service stations that are coloured green (Pantone 348C) as being a British Petroleum service station. But, is it possible to attain a trademark for the green colour? Technically UK under its current law does recognise and register a colour as a trademark, but in practice it could be very difficult to persuade the trademark examiner that the mark has the capacity to distinguish the goods and services of the applicant from those of other organizations. The UK Intellectual Property Office (UKIPO) believes that "consumers are not in the habit of making assumptions about the origin of goods and services based solely on their colour or the colour of their packaging" since colours are commonly used in advertising and marketing without any specific message or meaning would make it difficult to grant exclusive right over a colour.

BP (British Petroleum) has not been able to succeed in all the cases it fought across the world. In Poland the discussed trade mark was registered under No. R-115856. When the case was brought before the Supreme Court by BP against a Polish entrepreneur, owner of several petrol stations

[41] *See*, supra note 38, a trade mark definition has to be clear, precise, self-contained, easily accessible, intelligible, durable and objective.

in Poland, who used the same colours for his petrol stations, the court held that the green colour was from the very beginning linked to the yellow colour. There was therefore no reason why the defendant could not have used the green colour in combination with other colours. The Court rejected BP's claim, as the green and yellow trade mark did not enjoy a well-known reputation due to the attractiveness of the form of its graphic representation and its highly distinctive character. However, the Court held that the similarity between the appearance and colours of the defendant's petrol stations and the appearance and colours registered for BP and embodied in BP's petrol stations caused a likelihood of confusion between the two companies' petrol stations.

The Supreme Court[42] thus ruled that only a combination of colours made in an appropriate way and with colours and shades in appropriate proportions may constitute a trade mark. This would not prevent other entrepreneurs from using any of the individual colours used in the combination in question in combination with other colours.

In another case of British Petroleum that is *BP Amoco Plc.* v. *John Kelly Ltd.*[43], when the matter was brought to the UK Court of Appeal, it rejected BP's claim for passing off. The court reasoned that the normally observant customer would be able to differentiate between the respective parties' petrol stations due to the defendant's prominent use of the word TOP. However, the court did agree that there has been an infringement, thus the claim succeeded. It was for these purposes that the comparison was made between the uses of the respective colours without reference to use of the defendant's word mark.

---

[42] The Court also stated that "a single colour can be a trade mark only if it has acquired a distinctive character. There is a public interest in not restricting the availability of colours for other traders. In the case of businesses operating in a certain industry sector, such as petrol stations, there are only a small number of available colours which can be used to distinguish goods and services and also be considered aesthetic and useful in marketing. If only one undertaking has the exclusive right to use a specific colour by preventing the use of it by any other undertakings operating in the same business, this would in effect be a limitation on the freedom of others to pursue a business activity. It would also violate the principle of fair competition, especially in a situation where the market is interested in just a few colours which are particularly associated with that given industry sector."

[43] 2001 NICA 3 (2nd February 2001), BP had attained a UK trade mark registrations covering, inter alia, fuels and vehicle station services, which consisted of line drawings marking the surface of an exterior to one of their typical petrol stations combined with a written description indicating that the mark consisted of the colour green as applied to the exterior surface of the premises. It had operated in the UK for several years as petrol stations, whose livery was in the colour green. John Kelly Ltd., was the Irish owner of a series of petrol stations again in a green livery, when the defendant extended its activities to Northern Ireland, BP sued them.

In the case of *KWS Saat AG* v. *OHIM*[44], the ECJ had to consider a CTM application for the colour "orange" in relation to seeds in class 31 and associated machinery in classes 7 and 11 and business consultancy services for plant cultivation in class 42. The earlier decision of the Court at First Instance[45] (CFI) rejected the application in relation to classes 7, 11 and 31 as a colour, in itself, was not distinctive in principle unless it had acquired such distinctive character through use; the same was upheld by the ECJ. Although, the CFI had previously accepted the application for business consultancy services in class 42. The registrability of services was not appealed to the ECJ, thus it did not form part of the ECJ's decision. It is therefore an open question as to whether the ECJ would have followed the same reasoning as followed in case of goods to determine a single colour to be a trademark for a service.

Since the above decision, the CTM Rules[46] have been amended with effect from July 25, 2005. The new Rules took into account partly the reasoning applied in the above case. By Rule 3(5) in the case of a CTM application for colour, an applicant is required now to file a colour sample with a written description explaining the link of the colour with the service being provided. This rule has made the use of a designation under an international colour coding system optional, however in office practice it is still recommended.

The colour of turquoise has closely been associated with the famous brand Heinz for the packaging of Heinz baked beans. Being the most dominant single colour which is applied to the visible exterior of the packaging of this product the company has attained protection under the UK trademark law and has been registered.

There are a number of companies and organizations who are registering a colour with respect to a particular good or service, which gives them a trademark right to industry specific single colour or combination of colours. One such example is T-mobiles. It can only trademark in the industry sector that they are registered in. Thus, T-Mobile has trademarked the colour magenta in telecommunications.

---

44 Case C-447/02 P.

45 According to CFI, there was a difference between the use of colours in respect to goods and services. The court believed that a colour clearly could not be attached to the service itself as the relevant public would easily be able to distinguish between use of a colour as mere decoration and use as a trade mark. Moreover, the colour by itself was unable to fulfil other immediate functions, such as description of a characteristic of the service, and a colour must easily and instantly create a memorable and distinct sign or mark for the service in question.

46 (Commission Regulation No.2868/95).

The growing combination of colours is giving rise to formation of new colours thus giving an opportunity to increase in the availability of colours and the customization of a specific product or service. The European Union has a gamut of single colour trademarks registered, some of which have national recognition and registration only. Some have attained recognition and registration across the European Union. The EU countries have shown numerous judgments over the years approving or disapproving single colour as a trademark, whether it be ECJ's decision in the *Libertel Groep BV* v. *Benelux Merkenbureau*[47] case or the *BP Amoco Plc.* v. *John Kelly Ltd.*[48] case. The European courts have also dealt with service industry related single colour trademark such as *KWS Saat AG* v. *OHIM*[49] case. The Cadbury case was the most recent judgment that leaves no ambiguity regarding the essentials required for proving single colour as a trademark. Thus, the trademark law in the EU highlights some major points. Firstly, trademarks can be provided industry specific, secondly, the single colour being registered should be through the pantone system and thirdly, the colour in question must define, justify and clearly establish the character it explains or conveys to the public of the product or service it is linked with.

IV. POSITION IN INDIA

In India there is no mention of colour as being eligible for trademark protection, both in statues as well as in judgments. However, there has been a great deal of debate in the United States of America and in the European Union. Over the years, there have been many conflicting views and different courts have taken various stands. With the recent Wal-Mart case, the position of law in USA has become clearer that colours per se are not protectable until they have acquired distinctiveness upon combination with any other thing. The recent judgment of the UK court in the Cadbury case has demonstrated that colour can be protected as a trademark after acquiring distinctiveness.

This topic has not been discussed much in India, it being relatively virgin. With certain precedents in India and with the help of the persuasive value of the judgments of the Hon'ble courts of UK and USA, our endeavor is to analyze the position in India.

According to the Trademark Act, 1999,

A 'trademark':

- means a mark, which is capable of being represented graphically[50];

---

47 *Supra* note 37.
48 *Supra* note 43.
49 *Supra* note 44.
50 S. 2(1)(zb) Trade Marks Act, 1999: This complies with TRIPs Agreement 1994 art 1(1).

- means a mark which is capable of distinguishing the goods or services of one person from others[51];
- may include shape of goods, their packaging and combination of colours[52];
- in relation to other provisions of the Act, means a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so to indicate a connection in the course of trade between the goods or services, and some person having the right, either as proprietor or by way of permitted user, to use the mark whether with or without any indication of the identity of that person[53];

A trade mark is a source indicator and may take range by definitions anywhere from a word, numerals, graphic, device, shape, colour combination and even a sound. It performs various roles, including distinguishing the goods from those of others[54].

Manner of acquiring trade mark rights:

The three sources for the creation of trade mark rights in any country are:

(1) Registration;

(2) Prior and continuous user; and

(3) Widespread reputation and goodwill of the mark,

irrespective of the fact whether or not goods are sold in that particular country. An aggrieved party has a right to protect its reputation and goodwill wherever it is sought to be encashed or traded upon unauthorisedly[55].

A 'mark' includes a device, brand, heading, label, ticket, name, signature, word letter, numeral, shape of goods, packaging or combination of colours or any combination thereof[56].

The definition of a "mark" in the Trade Mark Act, 1999 is an inclusive definition where 'Includes' is generally used as a word of extension but the meaning of a word or phrase is extended when it is said to include things

---

[51] *See supra* note 50.
[52] *See supra* note 50.
[53] S. 2(1)(zb)(ii), Trade Marks Act, 1999.
[54] Halsbury's laws of India, Vol. 20(1), [185.558] functions of a trade mark.
[55] *Jolen Inc.* v. *Doctor & Co*., (2002) 25 PTC 29 (Del).
[56] S 2(1)(m), Trade Marks Act, 1999.

that would not properly fall within its ordinary connotation[57]. Therefore under the interpretation of statues, an inclusive definition is open ended and is broad enough to encompass other things apart from those mentioned. As a single colour is not mentioned in the section, still, it being an inclusive definition does not rule out its inclusion.

Section 27(2) of the Trade Mark Act, 1999 states that, "Nothing in this Act shall be deemed to affect rights of action against any person for passing off goods or services as the goods of another person or as services provided by another person, or the remedies in respect thereof[58]."

The courts abide by this section of the statute as can be seen that, it was reported by the Hon'ble Supreme Court in the case of *Laxmikant V. Patel* v. *Chetanbhai Shah*[59] "It is common in trade and business for a trader or a businessman to adopt a name and/or mark under which he would carry on his trade or business. The name under which a business trades will almost always be a trade mark (or if the business or any other) will normally have attached to it a goodwill that the courts will protect……..[60]

Also, the fact that section 27(2) has an over-ridding effect over the entire act is made clear by the hon'ble High Court of Delhi in the case of *Goenka Institute of Education & Research* v. *Anjani Kumar Goenka*[61] Where it held:

> "…In other words registration of a trade mark does not provide a defence to the proceedings for passing off as under Section 27(2) of the Act. A prior user of trade mark can maintain an action for passing off against any subsequent user of an identical trade mark including a registered user thereof……Besides Section 31 is not immune to the over-riding effect of Section 27(2)."

Therefore, section 2(1)(m) when read with section 27(2) of the act[62], suggests that a mark has a very broad spectrum and protection will be granted by the court to those users of a mark who have been consistently using their mark, irrespective of it being a registered trademark.

For a colour to be able to qualify as a trademark its strength has to be assessed. The strength of a mark is a factual determination of the mark's

---

57 Vepa P. Sarathi, *Interpretation of Statutes*, 4th ed, Eastern Book Co, 1975, p.372.
58 S. 27(2),Trade Mark Act, 1999.
59 (2002) 3 SCC 65: AIR 2002 SC 275.
60 David Keeling et al, *Kerly's Law of Trade and Trade Names*, 12th ed, Sweet and Maxwell, 2011,para 16.49.
61 ILR (2009) 6 Del 415.
62 Trade Mark Act, 1999.

distinctiveness or popularity. The more distinct a mark, the more likely it is for confusion to result from its infringing use, and therefore more protection is necessary. A mark is strong and distinctive when the public readily accepts it as the hallmark of a particular source; such acceptance can occur when the mark is inherently unique, when it has received intensive advertisement, or both. To assess the strength of a trade mark the court generally places it in any of the following four categories: generic, descriptive, suggestive and fanciful or arbitrary. However, such classification is not determinative, for the strength of a mark depends ultimately on its distinctiveness or its origin indicating quality in the eyes of the purchasing public[63].

In the case of a mark which is not prima facie distinctive, right can only be acquired when it has become distinctive and accordingly, the question, who gets into the market first is not relevant, but whose trade mark has become distinctive[64].

Though not in colour alone, but many Indian courts have given judgments on passing-off. The test for infringement and passing off being the same on the issue of deceptive similarity when the two competing trademarks are not identical has been reiterated by the Hon'ble Supreme Court in the case of *Ramdev Food Products (P) Ltd.* v. *Arvindbhai Rambhai Patel*[65], page 765 of the judgment states: "……..In an action for infringement where the defendant's trade mark is identical with the plaintiff's mark, the court will not enquire whether the infringement is such as is likely to deceive or cause confusion. The test, therefore, is as to likelihood of confusion or deception arising from similarity of marks, and is the same both in infringement and passing-off actions."

Law is not static; it evolves and grows with the changing society. Therefore, keeping in mind, the technical advancement, the pace at which things grow and expand and the cut throat competition in the 21th century, the law should keep evolving to keep pace with the changing times. With so many brands and products flooding the market everyday it is very easy for the buyer to get confused. Even a simple thing like mere colour can cause a lot of confusion, especially when it has been associated with a particular brand since a long time and consumers link the colour to that brand or manufacturer.

Hence, to prevent newbie's from taking advantage of the brand value of well established, popular and frequently used brands protection of even a single colour is important after it has acquired distinctiveness.

---

[63] *American Express Co.* v. *Vibra Approved Laboratories Corpn.,* (1989) 10 USPQ 2d 2006; *Plus Products* v. *Plus Discount Foods Inc.,* (1983) 222 USPQ 373/377.

[64] *General Motors Holden's Ltd.* v. *Premier Automobiles Ltd.,* 1983 PTC 350 (Reg Del).

[65] (2006) 8 SCC 726: AIR 2006 SC 3304.

V. CONCLUSION

The authors would like to conclude by quoting Justice Black in the Sears case, where it was recognized that unfair competition can impose liability for confusing similar use of any trademark in packaging:

> *"Doubtless a State may, in appropriate circumstances, require that goods, whether patented or unpatented, be labeled or that other precautionary steps be taken to prevent customers from being misled as to the source, just as it may protect business in the use of their trademarks, labels, or distinctive dress in the packaging of goods so as to prevent others, by imitating such markings, from misleading purchasers as to the source of the goods."*

In some cases the colour is an essential part of the article as an article, whilst in others it is something, which is not essential and has been added for some other reason. If evidence shows that the colour has been added so as to denote the origin of the goods, then it is being used as a mark in the trademark sense[66].

After digging into the case laws and provisions in the statues' of USA and UK, we have observed that in USA's Lanham act nowhere is it mentioned that a single colour can be protected as a trademark, but still as seen, courts have granted protection to single colour in many cases, based on different criteria. If USA and UK both being developed countries, and having a literacy rate of 99%[67] can accord trademark status to colour alone then India having a far more lower literacy rate should allow a mere colour to qualify as a trademark after acquiring distinctiveness as illiterate people being unable to read, often recognize goods based on their colour. India has the largest illiterate population in the world. The literacy rate of India as per 2001 census is 65.38%, hence the illiteracy rate is 34.62% and therefore the consumers should be protected from being misled by colour confusion or for that matter any confusion. This can be substantiated by citing the case, *V.K. Industries* v. *H. Mehta, Registrar of Trade Marks*[68]. In this case it was observed by the Delhi High Court that:

---

[66] *Smith, Kline & French laboratories Ltd's Trade Mark Applications* (1974) RPC 91 h, 1973 FSR 333: coloured pellets in capsules need not be treated as representations in practice of the use of marks rather than as marks themselves. Registration ought to be allowed for the particular drug for which the evidence shows that the particular colour combinations here have been used.

[67] According to the CIA World Factbook website, based on the definition "over 15 and can read and write.

[68] 1997 LawSuit (Del) 462.

> The need for a duel protection, i.e. protection both to the manufacturer and the customer, is essential in a developing country like India and other under-developed countries in the world because the mass of the people in such countries belong to illiterate, uneducated or the semi-educated class who would not be able to distinguish the product of a manufacturer by the name of the manufacture and would have to depend on some sort of a mark whether consisting of a name, a word, a device or a representation with a view to distinguish the goods of a particular manufacturer, in which they may be interested, from those of the others, and the chances of deception, particular of ordinary man with average and imperfect recollection, are almost proverbial in such societies.

If shape, sound and fragrance can act as symbols, so can a colour. Over time, customers may come to treat a particular colour on a product or its packaging, like an unusual colour, as signifying a brand, that colour would identify and distinguish the goods, that is, indicate their source, much in the same way as a descriptive word on a product. There is no theoretical objection to the use of colour alone as a trade mark, where that colour has attained a secondary meaning and therefore identifies and distinguishes a particular brand and thus, indicates its source. It is the source distinguishing ability of a mark and not its ontological status as colour, shape, fragrance, word, or a sign that permits it to serve a trademark function[69].

Depending upon the context, the word "trademark" can denote the whole field of trademarks, service marks, trade names, certification and collective marks, and trade dress, or, less frequently, can mean more precisely only trade symbols used to identify goods, as opposed to services or companies[70].

Many businesses have taken steps to protect their colour identity because of the impact of colours on sales. The principle that a single colour may receive trademark protection is now the law of the land. This development manifests itself not only in national statutes, but also in the international Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods of the TRIPS Agreement. On the other hand, the courts recognize that colours are in limited supply and that allowing companies to appropriate colours will soon lead to the "depletion"

---

[69] *Qualitex Co.* v. *Jacobson Products Co.,* 34 USPQ 2d 1161, (1995) US SC.

[70] Or, alternatively, "trademark" may denote only trademarks and service marks, not trade names, verification marks, collective marks and trade dress. Restatement (Third) of Unfair Competition, § 9, comment f (Tentative Draft No. 2 1990) ("The term trademark' is generally understood to include marks used in connection with either goods or services. The definitions in this Section adopt this convenient usage.")

of all of the attractive colours in each product line. Although the courts tend to view that preventing the use of a colour would put a competitor at a significant disadvantage, the colour must pass the functionality test.

Although functionality can be defined by multiple criteria, here is a simplified list:

- Psychological Effects (symbolism, associations) - When a colour's associations relate to the product in a literal or abstract way, this is considered to be functional. For example, green is frequently used in packaging of organic, healthy and natural products because if the association with trees, grass and nature. Another example is blue fertilizer (indicating the presence of nitrogen).
- Aesthetic Effects (attractive and effective design) - Many colour combinations can be considered to be harmonious and "pleasing to the eye." For example, green and yellow are harmonious since they are closely related to each other (analogous). Functional design effects may also include perception of size and weight. For example a black outboard motor appears smaller than motors in other colours.
- Visual Effects (eye catching, text legibility) - The human eye reacts to colour in many different ways. Some colours are advancing (and grab attention), others receding. Some colour combinations render text legible; others are problematic.

Hence, to prevent neophytes from taking advantage of the brand value of well established and frequently used products, granting trademark protection to even a single colour is important after it has acquired distinctiveness or a secondary meaning with the consumers.

This, we believe should be the future of granting trademark protection to a single colour, in India and in other parts of the world.

INTERFACE BETWEEN GLOBAL REGULATORY REGIME AND THE INDIAN CONSTITUTION: ISSUES AND CONCERNS

—*P. Puneeth*[*]

I. **INTRODUCTION**

International Law was considered, not so long ago, as the "vanishing point of jurisprudence".[1] Today, in the era of globalization, it is occupying a central position even with respect to issues that, otherwise, appears to be of domestic concern of sovereign independent states. It is growing by leaps and bounds to cover various areas of human activity. New developments in the field of international law have given it the characteristics of transnational law. International law, today, is not confined to the regulation of the relationship between the states. Matters of domestic concern such as health, education, environment and economics apart from guarantee of human rights within the domestic jurisdiction fall within the ambit of international regulations.[2] Sovereign independent states are increasingly constrained to incorporate these global regulatory standards within the domestic regulatory framework. But the method and manner of their incorporation depends on the constitutional framework of each country since it lays down the bases for it. It is in this context that the constitutional framework for incorporation of global regulatory regime into the domestic legal system in India has been studied in this paper.

The paper explains briefly, in the following part, how global regulatory regime is emerging in the era of globalization in the form of treaties, covenants and conventions to increasingly deal with issues of domestic concern. Parts III and IV deal with the cardinal aspect of interface between global regulatory regime and the Indian Constitution touching upon key issues

---

[*] Assistant Research Professor, the Indian Law Institute, New Delhi.

[1] Thomas E. Holland, Lectures on International Law (Clarendon Press, Oxford 1933).

[2] People's Union for Civil Liberties v. Union of India, (1997) 3 SCC 433.

such as union legislature and treaty making; union executive and treaty making; constitutional limits on treaty making power and constitutional framework relating to enforcement of transnational law. Part V highlights the issues of serious concern to India's constitutional democracy in the present era of globalization. The paper concludes with emphasis on the need to revisit constitutional and legal framework relating to treaty making and enforcement in view of the long-term implications on India's polity.

II. GLOBAL REGULATORY REGIME: AN OVERVIEW

The emergence of global regulatory regime is a necessary consequence of globalization. The term 'globalization' is relatively a new term used to describe a very old process. Broadly speaking, it refers to "integration of economies and societies through cross country flows of information, ideas, technologies, goods, services, capital, finance and people."[3] Though, the process of globalization began long ago, undoubtedly, it is in the recent time that it has gained more significance. Post Second World War developments such as industrialization, technological advancement, expansion of transportation and communication have been largely responsible for acceleration of the process of globalization. Globalization has led to the growth of interconnectedness and interdependence of sovereign independent states on one another. Although globalization was often seen, at initial stages, as an economic phenomenon, it is noticeably all pervasive today. The increasing global connectivity, integration and interdependence are not confined only to the economic field. They have their implications on the cultural, social and political aspects as well. Definition of globalization by Held D highlights, very succinctly, these aspects. He defines globalization as:[4]

> *"[t]he widening, deepening and speeding up of worldwide interconnectedness in all aspects of contemporary social life, from cultural to the criminal, the financial to the spiritual".*

Globalization has brought in its wake profound transition in various fields of human activity. It may not be incorrect to state that the globalization is impacting, directly or indirectly, almost all aspects of human life. Relationships that exist across the borders are not just between and among different countries but there exists people to people relationships across the borders. It is a result of trans-border movement of people mainly for education and employment.

---

[3] C. Rangarajan, "Responding to Globalization: India's Answer", 4thRamanbhai Patel Memorial Lecture on Excellence in Education, at: http://eac.gov.in/aboutus /chspe/55GLOBALIZATION%20 AND%20CHALLENGES%20BEFORE%20INDIA-Gen%20(single%20space).doc.(accessed on 29 Nov 2013).

[4] Held D., et al., Global Transformations 2 (Stanford: Stanford University Press, 1999).

As there is a rapid integration of countries and people across the border, interdependence on one another is also growing rapidly and spreading over to many fields such as trade in products and services, security, protection of human rights, environment and intellectual property etc., Today no state can insulate itself from the rest of the world and offered to miss the opportunities that globalization can offer.

However, it is important to note that globalization, apart from creating new vistas and opportunities, has also thrown up new issues and challenges to the legal systems of sovereign independent countries. Issues that are at the centre of domestic regulatory system have increasingly become matters of international concern, thereby, compelling international communities to intervene with the domestic affairs in some way or the other. Highly integrated economies and societies naturally require uniformity in the legal framework and thus, necessitate some transnational norms and standards, which the different national legal systems can adopt within their respective jurisdictions as well. Further, domestic regulatory regimes have become ineffective to address some (rather, many) of the issues and challenges and the consequences arising out of the global integration and interdependence.[5] "As a result", as Kingsbury *et al*., points out, "various transnational systems of regulation or regulatory cooperation have been established through international treaties and more informal intergovernmental networks of cooperation, shifting many regulatory decisions from the national to the global level."[6] Many scholars in their academic writings have also described these transnational regimes as "global regulatory regime".[7]

With the integration of economies and ways of life across the world, there has been a steady increase in the global regulatory regime as well. What has been formally within the exclusive competence of states are now being addressed, either directly or indirectly, by emerging transnational law. Issues such as health, education, security, labour standards, protection of environment, human rights of citizens and non-citizens within the domestic jurisdiction, protection of intellectual property rights etc., have all become matters of transnational concern and, thus, have become subject matter of transnational regime.

It is important to note that much of the global regulatory regime is emerging in the form of international treaties, covenants, conventions etc., and, thus, they are under the garb of international law. They have changed the nature and characteristics of international law in a way wholly

---

5 *See* Benedict Kingsbury, Nico Krish et al., "The Emergence of Global Administrative Law" 68:15 Law and Contemporary Problems 16 (2005).

6 *Id*.

7 *See* P. Puneeth, "Changing Facets of International Law: Understanding the Concept of Global Regulatory Regime" 3 (4) Bangalore Law Journal 426 - 430 (2011).

unanticipated by scholars like Holland, who described international law as "vanishing point of jurisprudence". Owing to the increase in transnational regulations, international law has become all pervasive compelling the state parties to international treaties, covenants and conventions to discharge the regulatory obligations undertaken by them. As a result, state sovereignty is increasingly limited as the important regulatory policies are now being formulated at the global level and independent states are required to only implement them. This will have implications on the domestic governance, which needs to be carried on in accordance with the Constitution – the founding document for the governance of the country.

III. CONSTITUTION OF INDIA AND GRR

In view of the fact that global regulatory regime is emerging under the garb of international law, it is important to understand, in the first place, the place of international law under the Indian Constitution. The Constitution of India obligates the State to respect international law. It lays down the bases on which India's foreign policy should be formulated and its international obligations respected.[8] In the first place the constitutional commitment to promote international peace and security has been stated in Article 51 of the Constitution. It is pertinent to note that Article 51 of the Constitution is a part of non-enforceable directive principles of state policy. Though, in the scheme of the Indian Constitution, the directive principles have been made non-enforceable, it has been stated expressly and in unequivocal terms in the Constitution that they are fundamental in the governance of the country. Directive Principles of State Policy, envisaged in Part IV of the Constitution of India, are, in fact, mandates to the 'state'[9] to take positive steps to implement them.

Article 51 of the Constitution of India imposes an obligation on the Government and the Parliament of India to make an effort to – (a) promote

---

[8] P. Chandrasekhar Rao, The Indian Constitution and International Law 3 (1993).

[9] The term 'state', even for the purpose of part IV of the Constitution of India, has the same meaning, unless the context otherwise requires, as in article 12 in part III dealing with fundamental rights. According to article 12, the term 'state' – unless the context otherwise requires – includes: (i) the Government and the Parliament of India; (ii) the Government and the Legislature of each of the States; (iii) all local and other authorities within the territory of India, and (iv) all local and other authorities under the control of government of India. It is an inclusive definition and it is further qualified by the expressions "unless the context otherwise requires", which are of great significance in the context of article 51 of the Constitution. The objectives of the provision were to provide bases for framing India's foreign policy, conducting foreign affairs and maintaining international relations, which are, in the scheme of Indian Constitution, fall within the exclusive domain of Union of India and not her constituent units. The constituent units i.e., states in India do not have any international standing in the scheme envisaged in the Indian Constitution [*See* P. Chandrasekhar Rao, The Indian Constitution and International Law 5 (1993)]. Thus, the mandate of article 51 refers only to the "Government and Parliament of India".

international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another, and (d) to encourage settlement of international disputes by arbitration. These provisions reflect India's ancient cultural and spiritual heritage and her centuries old tradition of non-aggression. It is in keeping with what has been the policy and practice of India since ancient times, *viz*., peaceful coexistence. The mandate here is to make an endeavour to ensure that peace prevails in the world.

Clauses (a) to (c) of Article 51 also reflect some of the purposes and aims of the United Nations as enshrined in the Charter of United Nations.[10] Clause (d) of Article 51 of the Constitution accords primacy to arbitration for settlement of international disputes as against other modes of settlement. The Charter of United Nations does not accord any such primacy to any mode of settlement but it only requires that Members shall settle their international disputes by peaceful means in such manner that international peace and security, and justice are not endangered.[11] It may be of some interest to note that the provision for settlement of international disputes by arbitration was not there in the draft Constitution. It was initially suggested by B.M. Gupte in the Constituent Assembly as an alternative to war for settlement of international disputes[12]and the formal amendment was moved to that effect by M. Ananthasayanam Ayyangar,[13] which came to be finally accepted in the Constituent Assembly.

One of the very important mandates to the state under Article 51 of the Constitution, which is of great significance in the contemporary era, is to "foster respect for international law and treaty obligations in the dealings of organized people with one another." It may be apt to state in this context that, as some of the commentators pointed out, the distinction drawn between "international law" and "treaty obligations" in Article 51 (c) was uncalled for and somewhat misleading.[14] Treaties constitute one of the formal sources of international law, thus, they are not to be treated as something distinct from international law. However, it may be said that the distinction that seems to exist is only an error of drafting and the intention of the framers was to convey what was envisaged in the preamble of the Charter of United Nations i.e., "respect for obligations arising from treaties and other sources of international law."[15] Thus, in order to avoid ambiguity, Article 51 should be construed to mean, "to foster respect for international

---

[10] *See* P. Chandrasekhar Rao, *Supra* note 8 at 6.
[11] Art. 2 (3). *See* P. Chandrasekhar Rao, *Id*. at 6-7.
[12] VII CAD 603.
[13] *Id*. at 604.
[14] P. Chandrasekhar Rao, *Supra* note 8 at 7.
[15] *Id*.

law including treaty obligations." It may be noted that the 'treaty obligations' might have been specifically included in view of the ever-increasing importance of treaties as a source of international law.

In mandating that state should respect international law, it seems the framers of the Constitution wanted to ensure that international obligations are not undertaken as mere formality but serious efforts shall be made to implement them. Obligations imposed under Article 51 (c) supplements and compliments obligations imposed under Articles 51 (a) and (b) of the Constitution. In other words, respecting international law including treaty obligations undertaken by the country goes a long way in promoting international peace and security and also in maintaining just and honourable relations between nations. The framers of the Constitution never wanted the country to treat international treaties, conventions, covenants and agreements as mere scraps of paper or to provide only lip service to the international cause or concerns. Thus, the Constitution accords due recognition for international law and provides bases for discharging international obligations.

In order to understand the scope and ambit of Article 51 (c) of the Constitution, it is also important to ascertain the true implications of the words "in the dealings of organized people with one another" occurring in the said provision of the Constitution. The question that would arise is whether the use of those words to qualify "to foster respect for international law and treaty obligations" would indicate that the Government and Parliament of India is obligated to respect/implement only that part of the international law having bearing on the "dealings of organized people with one another" (i.e., dealing of the states with one another since state is understood, in one sense, as politically organized society)? Or does it refer to international law in general?

The above question is of great significance owing to the changing dimensions of international law, which is not confined to regulating relations between states. Today matters of domestic concerns such as health, education, economics, protection of human rights and environment fall within the ambit of international regulations. There are several international treaties, covenants and conventions dealing with these aspects. There is nothing in the Constituent Assembly Debates or in any other known sources to indicate whether the words "to foster respect for international law and treaty obligations in the dealings of organized peoples with one another" mandate respect for such international treaties, covenants and conventions as well even though they do not directly deal with regulation of relations between states.

However, in view of the several decisions of the Supreme court giving effect to provisions of such treaties, covenants and conventions relying on the mandate of Article 51 (c) of the Constitution, it may well be argued that, in the opinion of the Supreme Court, the mandate of Article 51 (c) is wide enough to include respect for even those treaties, covenants and conventions, which contain provisions that address issues of domestic concern. Such an interpretation may further be supported by an argument that even though such treaties etc., primarily deal with issues of domestic concern, they do have some bearing on the "dealings of organized people with one another". It is more so in the era of globalization.

In order to understand the place of international/transnational law under the scheme of Indian Constitution, it is not sufficient to understand only the mandate of Article 51 (c) of the Constitution. Article 51, in general, embodies the guiding principles for foreign policy and international relations. Clause (c) thereof speaks, in particular, about post treaty obligations and respect for other sources of international law. It is completely silent about pre-treaty[16] steps. The provision does not throw any light on source of power and procedure for entering into any treaty or for signing or ratifying any covenants and conventions. No doubt, every state, as an international person, has the capacity to enter into treaties with other states under international law,[17] but within the state system, as between different branches of the government, the question as to which organ of the state has the constitutional competence *qua* the state to enter into an international agreement, is one which depends on the provisions of the domestic Constitution and their interpretation.[18]

There is no provision in the Constitution of India, which expressly deals with the source of power and the procedure for entering into treaty or for signing or ratification of any covenants and conventions. There is no authority expressly designated for the purpose. It does not, however, mean that there is no provision in the Constitution, which throw light upon these aspects. The intention of the framers of the Constitution on treaty making has been sufficiently expressed in some of the provisions.

It is to be noted, at the outset, that though India is a federal country, the general approach of the Indian Constitution is to give exclusive power to the centre in the matter of international relations and foreign affairs. A general perusal of certain provisions of the Constitution such as Articles 73, 246 read with Entries 10, 11, 12 13, 14 etc., of the Schedule VII and Article 253

---

[16] The term 'treaty' has been used in general sense so as to include other forms of international understandings as well viz., covenants, conventions, agreements etc.,

[17] Art. 6, the Vienna Convention on Law of Treaties.

[18] C.G. Raghavan, "Treaty Making Power Under the Constitution of India" in S.K. Agrawala (ed.), Essays on the Law of Treaties 217 – 250 (1972).

makes this position clear. As stated earlier, the constituent units i.e., states in India do not have any international standing.

The important question then arises is that which instrumentality of the Union has the constitutional competence to enter into treaty or for signing or ratifying covenants and conventions undertaking international obligations on behalf of the country. Though, the Constitution, by itself, has not made a clear choice of the instrumentality of the government for the purpose, it has conferred a plenary power on the union legislature i.e., Parliament to legislate on the subject.[19]

IV. UNION LEGISLATURE AND TREATY MAKING[20]

By virtue of Article 246(1), "Parliament has exclusive power to make laws with respect to any of the matters enumerated in List - I in the Seventh Schedule". Under the scheme of distribution of legislative power between the union and the states envisaged in the Constitution, the whole range of legislative entries covering the entire legislative field - dealing with international relations and foreign affairs - are found in the List I, which has been referred to as the "Union List" in the Constitution. In particular, Entries 13 and 14 specifically deal with "[P]articipation in international conferences, associations and other bodies and implementing of decisions made thereat", and "[E]ntering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries", respectively. Thus, by virtue of Article 246(1) read with Entry 14 of list - I of Schedule - VII, union legislature has the competence to legislate on the field - "Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries." This specific provision makes it clear that under the scheme of Indian Constitution, treaty-making is not within the exclusive competence of the union executive. It squarely falls within the legislative competence of the Parliament.[21] Thus, the argument advanced by some scholars that under the Constitution of India, it is the prerogative of the union executive to make treaties is wholly misconceived. It is only in the absence of a law

---

[19] *See* Id. at 219.

[20] The discussion on 'treaty making' in this context does not only refer to what are specifically described as 'treaties'. It includes other forms of international instruments having different nomenclatures such as conventions, agreements, arrangements, covenants, protocols, declarations, statutes, etc. It is because, though there exists some differences among them, the internal procedures, followed in India, leading to the decision to be bound by such treaties and agreements, by and large, are uniformly applicable to all kinds of agreements irrespective of the nomenclature used. *See* K. Thakore, "National Treaty Law and Practice: India" 27 Stud. Transnat'l Legal Pol'y 79 (1995).

[21] *See* NCRWC, "A Consultation Paper on Treaty – Making Power under Our Constitution at http://lawmin.nic.in/ncrwc/finalreport/v2b2-3.htm." (Accessed on Jan. 31, 2012).

enacted by the Parliament as contemplated in the Constitution, the union executive can claim such a prerogative.

The Parliament's power to lay down, by law, a comprehensive framework to regulate treaty making, signing or ratification of other international covenants and conventions is very wide. In addition to the specific entries including the Entry 14 in the Union List, even the residuary legislative power also vests in the Parliament.[22] By virtue of these provisions, it is open to the Parliament to impose limitations subject to which and to regulate the manner in which treaties can be entered into, and international conventions or covenants can be signed or ratified. Comprehensive procedure can also be laid down by the Parliament for the purpose. There is no impediment in the Constitution to provide for Parliamentary approval or for involving the constituent states in the process. The Parliament can even specify, by law, the instrumentalities of the union executive for the purpose of taking part in the negotiation, formation and conclusion of treaties or other international instruments. However, the fact of the matter is that no law has been enacted by the Parliament till date. It is quite strange that the Parliament has not yet thought it expedient to enact such law in spite of the fundamental significance of treaties, covenants, conventions and international agreements in the era of globalization. International bilateral and multilateral treaties, agreements, covenants and conventions are occupying a central place not only in regulating inter-state relations but also in the domestic governance of the country.

However, ever since the Constitution of India has been brought into force, though no law has been enacted as contemplated in the Constitution, the Government of India has been entering into several treaties, agreements and has also been a signatory to many international covenants and conventions in the exercise of its executive power. It has been estimated that on an average 150 agreements are concluded by India every year including amendments, extensions of existing agreements, etc.[23]It has been the consistent stand of the Government of India that the union executive has an unfettered treaty making power since there is no law requiring the same to be subjected to parliamentary scrutiny.[24] Reference to the practice statement of the Government of India made in response to a circular letter addressed

---

[22] *See* Arts. 248 and 246 read with entry 97 of List I in the Schedule VII of the Constitution of India.

[23] K. Thakore, *Supra* note 20 at 103.

[24] However, there have been few instances where the Union Executive, though there was no legal requirement, has laid on the table of both Houses of Parliament some treaties and agreements for their consideration. For example, Tashkent Declaration signed by the Prime Minister of India and the President of Pakistan at Tashkent on January 10, 1966; The Treaty of Peace, Friendship and Cooperation between India and USSR signed by the foreign ministers of the two countries at New Delhi on August 11, 1971; The Agreement on Bilateral Relations between the Government of India and the Government of Pakistan,

by the Secretary – General of the United Nations to governments in January 1951 is very instructive in this regard. It is as follows:[25]

1. Under Article 73 of the Constitution of India, "the Executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws", and under Article 53 the executive power of the Union "is vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution." Under Article 246 (1), "Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List"). List I, Clause 14, contains the item: "entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries."

2. Parliament has not made any laws so far on the subject, and, until it does so, the President's power to enter into treaties remains unfettered by any "internal constitutional restrictions."

3. In Practice, the President does not negotiate and conclude a treaty or agreement himself. Plenipotentiaries are appointed for this purpose and they act under full powers issued by the President. It is, however, the President who ratifies a treaty.

4. Apart from treaties made between heads of States, agreements of a technical or administrative character are also made by the Government of India with other governments. Such agreements are made in the name of the signatory governments, and are signed by the representatives of these governments. Full powers are granted and ratification is effected on behalf of the Government.

The position stated above remains unchanged even today, as Parliament till date has not enacted any such law. Attempts made earlier to provide for Parliamentary scrutiny of the treaty-making power of the Union executive have not been successful.[26] The Union Executive continues to exercise

---

signed by the Prime Minister of India and the President of Pakistan at Simla on July 2, 1972. *See* K. Thakore, *Id*. at 96-98.

[25] U.N. Doc. ST/LEG/SER.B/3, at 63 – 64 (Dec. 1952) (Memorandum of April 19, 1951) as cited in K. Thakore, "National Treaty Law and Practice: India" 27 Stud. Transnat'l Legal Pol'y 87 - 88 (1995). *Also see* Swan Sik, Ko Swan Siket al (ed.) Asian Yearbook of International Law 161 (1997).

[26] In February 1992, M.A. Baby Member of Parliament gave a notice of his intention to introduce, in the Rajya Sabha, the Constitution (Amendment) Bill, 1992 to amend article 77 of the Constitution of India providing that "every agreement, treaty, memorandum of understanding, contract or deal entered into by the Government of India including borrowing under article 292 of the Constitution with any foreign country or international organization of social, economic, political, financial or cultural nature and settlements relating to trade, tariff and patents shall be laid before each House of Parliament prior to

treaty-making power as its prerogative and there is no condition precedent, either under the Constitution or under any law for the time being in force, requiring approval by the legislature for the purpose of entering into treaties or agreements. Thus, there is a need to understand the scope and extent of union executive power in the scheme of Indian Constitution particularly with reference to treaty making power.

V. UNION EXECUTIVE AND TREATY MAKING

In the scheme of Indian Constitution, "[T]he executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him".[27] The executive power of the Union is co-extensive with that of its legislative power.[28] It is important to note, in this context, the wordings of Article 73 of the Constitution, which reads as follows:

> Article 73. Extent of Executive Power of the Union.—(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—
>
> (a) to the matters with respect to which, Parliament has power to make laws; and
>
> (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:
>
> Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in

---

the implementation of such agreements, treaty, memorandum of understanding, contract or deal and shall operate only after it has been approved by resolutions of both Houses of Parliament." The same was taken up for discussion only in March 1997 but it did not materialize. Meanwhile on March 5, 1993, George Fernandes gave notice of intention to introduce, in the Lok Sabha, the Constitution (Amendment) Bill, 1993 for amending article 253 to provide for ratification of treaties and conventions by each House of Parliament by not less than one half of the membership of each House and by a majority of the legislatures of not less than half the States. The Bill was not listed for consideration during the life of that Lok Sabha. Subsequently a question was tabled, in the Rajya Sabha, by Satyaprakash Malviya enquiring whether the government proposes to introduce any legislation to amend the Constitution to provide for parliamentary approval of international treaties. The said question was answered negatively on May 12, 1994. Again on July 17, 1994, Chitta Basu, Member of Parliament, Lok Sabha gave notice of intention to introduce a Constitution (Amendment) Bill, 1994 on the same lines as suggested by M.A. Baby and the same was not taken up for discussion during the life of that Lok Sabha. *See* NCRWC, "A Consultation Paper on Treaty – Making Power under Our Constitution", *supra* note 21.

[27] Art. 53.

[28] Art. 73.

> any State to matters with respect to which the Legislature of the State has also power to make laws.
>
> (2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

Similar provision with respect to the executive power of the State has been made in Article 162 of the Constitution.[29] On a plain reading of these provisions, it is clear that the Union Executive power is not confined to the matters upon which the Parliament has already enacted the law but it is coextensive with that of the law making power of the Parliament itself. Enactment of law is not a pre-requisite for exercising executive power. By virtue of this provision, the grant of power to Parliament operates as grant of power to the Union Executive also. Similarly, the power of the State executive extends to matters enumerated in List II upon which the State Legislature is competent to legislate and are not confined to matters over which legislation has already been enacted. Under the scheme of distribution of executive power as envisaged in the said provisions, the executive power of the state ordinarily extends to the matters enumerated in the Concurrent List also except as provided in the Constitution itself or in any law passed by the Parliament. It would be open to the Parliament to provide that in exceptional cases the executive power of the Union shall extend to any of the matters enumerated in the Concurrent List as well. This aspect has been clarified by the Supreme Court of India in *Ram Jawaya Kapur* v. *State of Punjab*[30] and the same was reiterated in *Jayantilal Amratlal Shodhan* v. *F.N. Rana*[31] and several other cases. By virtue of this constitutional position, Article 73 has been relied upon as the bastion for the argument that the Union Executive has the competence to make treaties even in the absence of law providing for it[32] since the Union Legislature i.e., Parliament has the legislative competence to enact law under Entry 14

---

[29] Art. 162. The Extent of Executive Power of the State: Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws: Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

[30] AIR 1955 SC 549, para 7.

[31] AIR 1964 SC 648.

[32] C.G. Raghavan, *supra* note 18 at 221.

List I on the subject-matter. In *Nirmal Bose* v. *Union of India*[33], Sinha J of the Calcutta High Court categorically held that "regard being had to item No. 14 of List I read with Article 73, there can be no doubt that the Union Government has the right by executive action to enter into treaties and agreements with foreign countries." The apex court reinforced this view in *Maganbhai Ishwarbhai Patel* v. *Union of India*[34]. In this case, Shah J, in his separate but concurrent decision, has observed:[35]

> *"By Article 73, subject to the provisions of the Constitution, the executive power of the Union extends to the matters with respect to which the Parliament has power to make laws. Our Constitution makes no provision making legislation a condition of the entry into an international treaty in times of either war or peace. The executive power of the Union is vested in the President and is exercisable in accordance with the Constitution. The executive is qua the state is competent to represent the state in all matters of international and may by agreement, convention or treaties incur obligations which in international law are binding upon the State".*

Thus, it is long been the settled position that the union executive is competent to enter into international treaties and agreements by virtue of Article 73 of the Constitution. However, in *P.B. Samant* v. *Union of India*[36], the High Court of Bombay was asked to consider a unique question as to whether the Union of India can exercise its executive power to enter into treaties, which are likely to affect the matters in the State List? It was contended before the court that it is not open for the Union to enter into any treaty or agreement, in exercise of the executive powers under Article 73 of the Constitution, with foreign countries in respect of matters, which are covered by the State List since the executive power of Union does not extend in any State to matters with regard to which the Legislature of the State has power to make laws. While rejecting the argument and relying on the observation made by Shah J in *Maganbhai Ishwarbhai Patel*[37], the court observed:[38]

> *"[T]he executive power conferred under Article 73 is to be read along with the power conferred under Article 253 of the Constitution of India. The observations leave no*

---

[33] AIR 1959 Cal 506.
[34] (1970) 3 SCC 400: AIR 1969 SC 783.
[35] *Id.* at Para 81.
[36] AIR 1994 Bom 323.
[37] *Supra* note 34 at para 81.
[38] *Id.* Para 4.

> *manner of doubt that in case the Government enters into treaty or agreement, then in respect of implementation thereof, it is open for the Parliament to pass a law which deals with the matters which are in the State list. In case the Parliament is entitled to pass laws in respect of matter in the State list in pursuance of the treaty or the agreement, then it is difficult to appreciate how it can be held that the Central Government is not entitled to enter into treaty or agreement which affects the matters included in the State list".*

Judicial decisions referred to above make it amply clear that the union government, in exercise of its executive power, can enter into international treaties or agreements notwithstanding their implications on the distribution of legislative powers under Article 246 read with different Lists in the seventh schedule. Even after more than 60 years since the commencement of the Constitution, the Union executive is continuing to exercise treaty making power as its prerogative. There is no law to regulate the exercise of the said power and the Parliament is reluctant to enact such law even though it is fully competent to do so. It was evident from the speech delivered by Pranab Mukherjee in the Parliament, when the private member Bill to amend the Constitution came up for discussion nearly after five years since its introduction in the *Rajya Sabha* by M.A. Baby, Member of Parliament. Pranab Mukherjee, in his speech, stated that there are two sides of the picture. He pointed out that where Parliamentary approval is required, it has led to certain complications. He substantiated the same with the example of the United State's Senate refusing to ratify the treaty of Versailles concluded at the end of the World War in spite of the fact that President Wilson had played a crucial role in bringing about the said treaty. Reference was also made to the two treaties signed between India and Nepal on harnessing water resources of *Mahakali* and other rivers and the other with Bangladesh on sharing of the *Ganga* waters. He said that had these agreements been submitted to Parliament for ratification – particularly the treaty with Bangladesh – it would have been extremely difficult to obtain such approval or ratification in the prevailing circumstances. At the same time, he added that his intention was not to say that the Parliament should be kept in dark or that the authority of the Parliament in this behalf should be denied. He pointed out that any General Agreement on Tariffs and Trade (GATT)/World Trade Organization (WTO) Agreements, signed and ratified by the Government of India, can be implemented only by Parliament by making a law in terms of the agreement acting under Entry 14 of List - I of the seventh schedule read with Article 253 of the Constitution. He further opined that the Parliament is not so constituted as to discuss the international treaties and agreements in an effective manner. He pointed out that even votes on account and budget demands involving thousands of crores

of rupees are being passed without any discussion. In such a situation, he further stated, entrusting the Parliament with the power to oversee any and every treaty and agreement and convention being entered into or signed by the Government of India would not be practicable and would also not lead to desirable consequences. He also submitted that one of the reasons for the success of European Union and ASEAN as 'economic blocs' is that the decision makers of the constituent Countries, i.e. their executive, are by and large free to take decisions in matters of common interest. Ultimately, he suggested that there should be informed debate and discussion on the issue and that one should not rush with such measures. However, he emphasised on the point that there is no need to enact such legislation since under the present system of parliamentary government, envisaged in the Constitution, the executive has to render continuous accountability to Parliament and that the Parliament can always question the acts and steps taken by the Government.[39]

It is submitted that the system of collective responsibility of the executive to the Parliament is not an effective substitute for the specific legislation to regulate the exercise of treaty making power. In the parliamentary form of government, which the Indian Constitution has set-up, the concept of collective responsibility remains sound only in theory and inefficacious in practice. Though, in India, as in England, the executive has to act subject to the control of the legislature, in practice it is actually the opposite that is true. The executive, which enjoys the support of the majority in the legislature, concentrates in itself the virtual control over the legislature as well. The law that disqualifies the Members of the Parliament for disobeying the direction issued by the political party to which he belongs has rendered the principle of collective responsibility virtually meaningless.

Further, under the scheme of Indian Constitution, the grant of power to the legislature also operates as grant of power to the executive as well. However, the executive power that is coincidental with the legislative power is only transitory in nature. Though there is nothing explicit in the Constitution to suggest the same, a clear inference can be drawn from the provisions made in Chapter I, Part XI read with seventh schedule of the Constitution. Had that not been the intention of the framers, they would not have made such elaborate provisions conferring legislative power on both the Union and the State legislature and made the executive power co-incidental to the legislative power. In addition, there are several other provisions in the Constitution, which establishes the 'rule of law' as one of the essential principles. The practice of exercising executive power without enacting a law affects principle of rule of law. If the rule of law is to be

[39] *See* NCRWC, "A Consultation Paper on Treaty – Making Power under Our Constitution", *Supra* note 21.

a living reality in every walks of nation's life, enactment of a law to regulate treaty-making power is important. The National Commission to Review the Working of the Constitution has also recommended "the Parliament may consider enacting suitable legislation to control and regulate the treaty power of the Union Government wherever appropriate and necessary after consulting the State Governments".[40] Similar recommendation was made by the Commission on Centre-State Relations.[41]

VI. CONSTITUTIONAL LIMITS ON TREATY MAKING POWER

Treaty making power of the executive, whether regulated by a legislation or not, has its roots in the Constitution. Constitution being the supreme law of the land, state power – be it in the nature of legislative, executive and judicial, is derived from it and, therefore, should be exercised in conformity with it. In a country where the principle of rule of law is pervading in its constitutional scheme, the executive power must be exercised not only in conformity with the Constitution but also in conformity with other legislations.

Thus, the treaty making power, which is one of the facets of executive power, is also to be exercised in conformity with the Constitution and the laws. However, since the Parliament, which has the legislative competence to enact the law on the subject, has not enacted any legislation to regulate the exercise of treaty making power, the only limitations on the treaty making power of the executive in India are the ones found in the Constitution. It has to be exercised in a manner contemplated by the Constitution and subject to the limitations imposed by it.[42]

It is in this context that the effect of constitutional limitations on treaty making power on the validity of treaties is to be considered. It is worth noting that it is one of the most relentlessly debated subjects in International Law. Almost every aspect of it is clouded by controversy. Discussions here range from determination of primacy between international law and municipal to the analysis of specific limitations on treaty making power.[43]

---

[40] NCRWC, I Report of the National Commission to Review the Working of the Constitution 224 (Universal Law Pub. Com. Pvt. Ltd., 2002).

[41] Commission on Centre-State Relations, II Report on Constitutional Governance and the Management of Centre-state Relations 219 – 220 (2010).

[42] Berubari Union (I), In re, AIR 1960 SC 845.

[43] Upendra Baxi, "Law of Treaties in the Contemporary Practices of India", XIV The Indian Year Book of International Affairs 141 (1965).

The Vienna Convention on the Law of Treaties[44] has dealt with this aspect of effect of constitutional limitations on treaty making power on the internal validity and binding nature of treaties.

Article 26 of the Vienna Convention provides that "[E]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Article 27 further provides that "[A] party may not invoke the provisions of its internal law as justifications for its failure to perform a treaty." However, it has been made subject to Article 46 of the said Convention.[45] As per the said provision, the treaty is invalid if it was made in manifest violation of *internal law of fundamental importance*. It can be clearly inferred from the said provision that the Constitution being the fundamental law of the land, if any treaty or agreement violates any of the provisions of the Constitution, it would be totally incompetent and ineffective even under the international law.

Thus, it is important to understand the constitutional limitations on the treaty making power of the executive. However, an attempt to prepare an exhaustive list of limitations on treaty making power can only yield limited result because a federal Constitution, so elaborately written as the Indian constitution, might be judicially construed as implying an inherent limitation on the executive treaty making power.[46] What can be stated is that the treaty making power being a part of the union executive power, which is co-extensive with that of union legislative power, it is also subjected to same limitations as that of the legislative power of the union under the constitutional scheme. As the Parliament cannot pass any law in contravention of the existing provisions of the Constitution, the executive cannot also exercise, *inter alia*, its treaty making power in contravention of the provisions of the Constitution. It cannot, however, be construed to mean that the union executive can be prohibited from entering into any treaty or agreements, which contain provisions not in conformity with the provisions of the Constitution particularly in view of the fact that the provisions of the Constitution can be amended in the manner prescribed in the Constitution itself. In a *Westminster* form of government, since executive enjoys the majority in the Parliament, it can seek to amend the constitution to make

---

[44] U.N. Doc. A/CONF.39/27, May 23, 1969. Though India is not a party to it, broadly we follow the principles laid down in it.

[45] Article 46 of section 2 of the treaty that deals with "Invalidity of Treaties". It reads as follows: 46. Provisions of internal law regarding competence to conclude treaties. – (1) A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
(2) A violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith.

[46] Upendra Baxi, *supra* note 43 at 151.

such treaties and agreements enforceable. But there is no bar to enter into such treaties and agreements, it is only their enforcement that require constitutional amendments.[47]

VII. ENFORCEMENT OF TRANSNATIONAL LAW AND INDIAN CONSTITUTION

The question of implementation of a treaty in any domestic jurisdiction would be governed by the provisions of the Constitution of that country. Whether a treaty made can be implemented by ordinary legislation or by constitutional amendment or otherwise will naturally depend on the provisions of the Constitution itself.[48] Sometimes, Constitutions make textual disposition of the issue relating to the enforcement of international or transnational law and the relationship between internal law and international law. Different countries have adopted different approaches in their Constitutions towards this issue. Broadly, there are two important approaches based on the two corresponding theories. They are: (i) Monist theory, and (ii) Dualist theory.

The monist theory proceeds on the postulate of the unity of law and the hierarchical order of legal norms. The essence of this theory is that a treaty may, without legislation, become part of the domestic law once it has been concluded in accordance with the provisions of the Constitution and entered into force. It asserts the supremacy of international law in both international sphere and national sphere. The dualist theory proclaims that the international law and municipal law are separate and distinct and self-contained legal systems that operate at different levels. The international law has primacy over municipal law in the international sphere and municipal law has primacy over international law within the municipal sphere and the application of international law within the municipal sphere requires an adoption or transformation of the principles of international law into municipal law.[49]

As far the Constitution of India, there is no express provision dealing with this aspect. It does not render treaties to which India is a party the law of the land as in the United States, where they have been made supreme law of the land.[50] Though, Article 51 (c) of the Constitution of India, the only substantive provision that speaks about international law, mandates that the "[S]tate shall endeavour… to foster respect for international law and treaty obligations in the dealings of organized people with one another", no

---

47 *See* Maganbhai, *Supra* note 34 at para 25 (Per M Hidayatullah C.J.).
48 *See* Berubari Union (I), In re, *supra* note 42.
49 *See* P. Chandrasekhar Rao, *supra* note at 51.
50 Art. 6, S. 2 of the U.S. Constitution.

inference as to the method and manner of enforcement of international law in the domestic sphere in India can be drawn from it.

Further, as stated elsewhere in this paper, the implications of the words "…in the dealings of organized people with one another" in the aforesaid provision are not clear.[51] By virtue of these words, Article 51 (c) can be construed to restrict the obligation to foster respect for only that part of international law that has bearing on the dealings of states with one another. If construed so, further inference can be drawn that framers have contemplated dualist approach to be adopted towards international law.

Having laid down the bases for respecting international law, framers of the Constitution have left it to the wisdom of the Union legislature to evolve norms for enforcement of international treaties…etc., In order to allow the Union legislature a clear sway in the matter, provision has also been made under Article 253 of the Constitution, which reads as follows:

> 253. Legislation for giving effect to international agreements. – Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

The general scheme of the legislative distribution of power envisaged in Article 246 read with Schedule VII of the Constitution has been subjected to this provision. Power of the state legislature to legislate on the subjects in the state list has been restricted to give Parliament the power to enact any law for the purpose of implementation of any international treaties, agreements etc. However, Article 253 of the Constitution is only an enabling provision. It enables the Parliament to enact law on any field, notwithstanding the general scheme of distribution of legislative power envisaged in Article 246 read with Schedule VII, for implementing any international treaty, agreement, etc. The said provision cannot be construed to mean that the Constitution presupposes a legislative enactment for implementation of any treaty, agreement, etc.[52] Article 253 does not even throw any light on the question as to which treaty requires legislative incorporation for its enforcement in India. By virtue of this provision, Parliament has enacted several laws to give effect to specific international treaties and agreements.

---

[51] C.H. Alexandrowicz points out that the expression 'organized people' comprises also self-governing communities, which have not yet secured recognition by family of nations. *See* "International Law in India" in Intl. and Comp. Law Quartly 294 (1952).

[52] *See* Per J.C. Shah J. in Maganbhai Ishwarbhai Patel v. Union of India, *supra* note 34 at para 82.

However, no law has been enacted by the Parliament to comprehensively deal with the issue of enforcement of international law in domestic sphere in India, though Parliament is competent to enact such law under Entry 14 of List–I of Schedule–VII of the Constitution of India. Thus, there are no explicit legislative provisions laying down the method and manner of enforcement of international treaties within the domestic jurisdiction in India.

In the absence of any such legislation, pre-constitutional practice is even now followed in India. Article 372 of the Constitution permits such a practice to be adopted even after bringing into force the Constitution of India. The object of Article 372 (1) is to maintain the continuity of the 'law in force', which not only includes the law passed or made by a legislature but also the common law that was in force in India during the British period. The legal position relating to the enforcement of international law and its relationship with the domestic law under the common law regime has been succinctly stated by the Privy Council in *Attorney General for Canada* v. *Attorney General for Ontario*.[53] Speaking for the judicial committee of the Privy Council, Lord Atkin observed:[54]

> *"It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, and requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes".*

It is evident from the decision of the Supreme Court in *Maganbhai*[55] that even after the advent of the Constitution of India, the above quoted legal position so succinctly states by the Privy Council appears to hold good in India substantially even today. J.S. Shah J observed, in his separate but concurrent judgment, thus:[56]

---

[53] 1937 AC 326 (PC).

[54] *Id*. at 347.

[55] Maganbhai Ishwarbhai Patel v. Union of India, *supra* note 34 at 793, 807.

[56] *Id*. at para 81.

> *"...The executive is qua the State competent to represent the State in all matters internationally and may by agreement, convention and treaties incur obligations, which in the international law are binding upon the State. But the obligations arising under the agreements are treaties are not by their own force binding upon Indian Nationals. The power to legislate in respect of treaties lies with the Parliament under Entry 10 and 14 of List I of the Seventh Schedule. But making of law under that authority is necessary when the treaty or agreement operates to restrict the rights of citizens or other or modifies the laws of the State. If the rights of the citizens or others, which are justiciable, are not affected, no legislative measure is needed to give effect to the agreement or treaty".*

Thus, legislative enactment for enforcement of international treaties, agreements, covenants etc., is not a constitutional pre-condition in every case. By virtue of Article 73 of the Constitution of India, the union executive is competent to implement treaties at its level even without legislative endorsement in certain cases.[57] The scope of executive power under Article 73, which is coextensive with that of the union legislative power, is not restricted in any manner by Article 253 of the Constitution. This aspect has been clarified by J.C. Shah J in *Maganbhai*:[58]

> *"The effect of Article 253 is that if a treaty, agreement or convention with a foreign state deals with subject within the competence of the State legislature, the Parliament alone has, notwithstanding Article 246 (3), the power to make laws to implement the treaty, agreement or convention or any decision made at the international conference, association or other body... thereby the power is conferred upon the Parliament which it may not otherwise possess. But it does not seek to circumscribe the extent of power conferred by Article 73. If, in consequences of the exercise of executive power, rights of the citizens or others are restricted or infringed, or laws are modified, the exercise of power must be supported by legislation; where there is no restriction, infringement of the right or modification of the laws, the executive is competent to exercise the power".*

---

[57] *See* P. Chandrasekhar Rao, *Supra* note 8 at 133.
[58] *Supra* note 55 at para 82.

The issue of enforcement of international law and its relationship with the domestic law has been considered by the Supreme Court in several other cases.[59] Though, it has been the consistent stand of the Supreme Court that only in certain cases the enactment of legislation is a pre-condition for implementation of international treaties, agreements or covenants etc. it is difficult to prepare an exhaustive list of treaties, agreements which require legislation for their implementation. However, the legal position that can be obtained from development of case law in India on the subject can be succinctly stated as follows:

1. There is a distinction between formation of treaties, agreements, covenants etc. and performance of obligations undertaken by entering into such treaties, agreements or covenants.
2. The formation of treaty, agreement etc., is in the exclusive domain of the union executive, which it can exercise subject only to the Provisions of the Constitution and there is no parliamentary legislations to regulate the exercise of this power by union executive.
3. Performance of obligations undertaken or, in other words, implementation of international treaties, agreements, etc., in not in the exclusive domain of the union executive.
4. By virtue of Article 73 of the Constitution of India, the union executive has the competence to implement treaties, agreements without implementing municipal legislation in certain cases. This power is not restricted by Article 253 of the Constitution of India.
5. Enactment of a municipal law (including constitutional amendments in certain cases) is a pre-requisite for implementation in certain cases, *viz*., (i) Implementation of treaties involving cessession of territory; (ii) Where implementation of treaties etc., results in restricting or infringing any justiciable rights of citizens or others; (iii) Treaties where implementation requires addition to, or alteration of, the existing law.

This legal position has been reiterated in several recent decisions of the Supreme Court. Though on the basis of the discussion above, it can very well be concluded that dualist theory broadly holds the field in India such a conclusion is not without any exceptions. Judiciary in India, which is considered to be the strongest in the world, has wide power of judicial review and the authority to interpret the Constitution; it has gradually asserted a significant role even in the matter of enforcement of obligations undertaken

[59] ADM, Jabalpur v. Shivakant Shukla, (1976) 2 SCC 521: AIR 1976 SC 1207; Vellore Citizens' Welfare Forum v. Union of India, (1996) 5 SCC 647: AIR 1996 SC 2715; Vishaka v. State of Rajasthan, (1997) 6 SCC 241: AIR 1997 SC 3011, etc.

by international treaties or covenants. This aspect has been dealt with under the following heading.

VIII. ROLE OF JUDICIARY IN IMPLEMENTATION/ENFORCEMENT OF INTERNATIONAL TREATIES ETC.

It is clear from the above discussion that there is no need to incorporate a treaty into a law in cases where its enforcement is permissible even without legislative endorsement. In such cases, the union executive, by virtue of Article 73 of the Constitution, can enforce them on its own. However, the original position was that since the Constitution does not render the treaties to which India is a party the law of the land,[60] obligations arising from such treaties would not be judicially enforceable in India unless backed by municipal legislation.[61] If the Parliament does not enact legislation for implementing the obligations under a treaty, courts cannot compel Parliament to make such a law, and that, in the absence of such law, they cannot also enforce obedience of the executive authority to the treaty obligations.[62]

Though, the apex court repeatedly reiterated this position, it had shown inclination, as early as in 1969, to read the provisions of the municipal statutes, provided that their language permits, so as not to be inconsistent with the comity of nations or with established principles of international law. Such an approach was backed by the presumption that Parliament doesn't assert or assume jurisdiction, which goes beyond the limits established by the common consent of nations.[63] However, the court also recognized the limits for application of such a principle of interpretation. It clearly stated that the said principle applies "only where there is an ambiguity and must give way before clearly expressed intention. If statutory enactments are clear in meaning, they must be construed according to their meaning even though they are contrary to the comity of nations or international law."[64] Thus, the court has carved out, for itself, some scope, through interpretive process, for enforcement of international law. This balanced approach was

---

[60] It is important to note that since the treaties are not made the supreme law of the land by the Constitution of India as in the United States, the distinction between self-executing and non-self executing treaties would not be relevant in India. *See* T.S. Rama Rao, "Some Problems of International Law in India", VI The Indian Year Book of International Affairs 37 (1987).

[61] *See* State of W.B. v. Jugal Kishore More, (1969) 1 SCC 440: AIR 1969 SC 1171, 1175; State of Gujarat v. Vora Fiddali Badruddin Mithibarwala, AIR 1964 SC 1043, 1059.

[62] CRV Committee, SLSRCCL v. Union of India, AIR 1983 Kant 85, 87.

[63] V.O. Tractoroexport v. Tarapore & Co., (1969) 3 SCC 562.

[64] *Id*. at 571, Para 15.

adopted by Krishna Iyer J in *Jolly George Varghese* v. *Bank of Cochin*[65], where he observed:[66]

> "…Article 51 (c) of the Constitution obligates the states to "foster respect for international law and treaty obligations in the dealings of organized peoples with one another". Even so, until the municipal law is changed to accommodate the Government what binds the court is the farmer, not the latter. A.H. Robertson in "Human Rights – in National and International Law" rightly points out that international conventional law must go through the process of transformation into the municipal law before the international treaty can become an internal law. From the national point of view the municipal rules alone count … with regard to interpretation, however, *it is a principle generally recognized in national legal systems that, in the event of doubt, the national rule is to be interpreted in accordance with the State's international obligations".*
> (Emphasis supplied)

Relying on the above observation it may be possible to say that the apex court has paved the way for deviating from the doctrine of transformation and moving towards doctrine of incorporation.[67] However, having regard to the constitutional scheme, no further progress was made in this direction. Under the scheme envisaged in the Indian Constitution, it is not permissible to fully adopt the doctrine of incorporation and give primacy to international law in case it conflicts with the national law. The decision of the Supreme Court in *Gramophone Co. of India Ltd.* v. *Birendra Bahadur Pandey*[68] is very instructive in this regard. The court specifically considered, in this case, two important questions: (i) whether international law is, of its own force, drawn into the law of the land without the aid of municipal statutes? (ii) Whether, so drawn, it overrides municipal law in case of conflict? While considering the questions, the court observed:[69]

> *"There can be no question that nations must march with the international community and the municipal law must respect rules of international law even as nations respect international opinion. The comity of nations requires that rules of international law may be accommodated in*

---

[65] (1980) 2 SCC 360.
[66] *Id.* at Para 6.
[67] *See* V.G. Hegde, "Indian Courts and International Law", 23 Leiden Journal of International Law 53 – 77 at 60 (2010).
[68] (1984) 2 SCC 534.
[69] *Id.* at para 5.

> *the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and integrity of the Republic and the supremacy of the constituted legislatures in making the law may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves... National courts cannot say yes if Parliament has said no to a principle of international law... National courts being organs of the national state and not organs of international law must perforce apply national law if international law conflicts with it. But the courts are under an obligation, within legitimate limits, to so interpret the municipal statute as to avoid confrontation with the comity of nations or the well established principles of international law. But if conflict is inevitable, the latter must yield".*

It seems that the principle of interpretation that allows the municipal courts to read the provisions of international law into the domestic statutes has gained more acceptance over the years. It is in this background that the Supreme Court of India was asked, in *People's Union for Civil Liberties* v. *Union of India*[70], to specifically consider the question as to what extent the covenants and conventions signed by the Government of India can be enforced through court of law in India. After considering the observation of Mason CJ[71]

---

[70] (1997) 3 SCC 433.

[71] Mason C.J. (speaking for himself and Dean J) observed: It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless these provisions have been validly incorporated into our municipal law by statute [Chow Hung Ching v. R., (1948) 77 CLR 449; Bradley v. Commonwealth, (1973) 128 CLR 557; Simsek v. Macphee, (1982) 148 CLR 636; Koowarta v. Bjelke-Petersen, 1982 CLR 168; Kioa v. West, (1985) 159 CLR 550; Dietrich v. R., (1992) 177 CLR 292; Rayner (J.H.) (Mincing Lane) Ltd. v. Deptt. of Trade and Industry, (1990) 2 AC 418]. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of Parliament, not the executive [Simsek v. Macphee, (1982) 148 CLR 636]. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law…

But the fact that the convention has not been incorporated into Australian law doesn't mean that its ratification holds no significance for Australian law. Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party [Chu Kheng Lim v. Minister for Immigration, (1992) 176 CLR 1], at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facia, intends to give effect to Australia's obligation under international law [Polites v. Commonwealth, (1945) 70 CLR 60].

in *Minister for Immigration and Ethnic Affairs* v. *Toeh*[72], where similar question had been considered by the Australian High Court, the Supreme Court of India observed:[73]

> *"The main criticism against reading such conventions and covenants into national law is one pointed out by Mason C.J. himself, viz., the ratification of these conventions and covenants is done, in most of the countries by the Executive acting alone and that the prerogative of making of law is that of Parliament alone; unless Parliament legislates, no law can come into existence. It is not clear whether our Parliament has approved the action of the Government of India ratifying the said 1966 Covenant... Assuming that it has, the question may yet arise whether such approval can be equated to legislation and invests the covenants with the sanctity of a law made by Parliament. As pointed out by this Court in S.R. Bommai* v. *Union of India*[74]*, every action of the Parliament cannot be equated to legislation. Legislation is no doubt the main function of Parliament but it also performs many other functions all of which do not amount to legislation. In our opinion, this aspect requires deeper scrutiny than has been possible in this case. For the present, it would suffice to state that the provisions of the covenants, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon*

Apart from influencing the construction of a statute or subordinate legislation, an international convention may play a part in the development by the courts of the common law. The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law [Mabo v. Queensland (No. 2), (1991) 175 CLR 1; Dietrich v. R., (1992) 177 CLR 292; Jago v. District Court of New South Wales, (1988) 12 NSW LR 558; Derbyshire County Council v. Times Newspapers Ltd., 1992 QB 770]. But the courts should act in this fashion which due circumspection when Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law. Judicial development of the common law must not be seen as a backdoor means of importing an unincorporated convention into Australian law. A cautious approach to the development of the common law by reference to international conventions would be consistent with the approach which the courts have hither to adopted to the development of the common law by reference to statutory policy and statutory materials [Lamb v. Cotogno, (1987) 164 CLR 1]. Much will depend upon the nature of relevant provisions, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law.

Toohey J and Gaudron J broadly concurred with the above view whereas MacHugh J dissented.

72 (1995) 69 Aus LJ 423.

73 *Supra* note 70 at para 13.

74 (1994) 3 SCC 1.

by courts as facets of these fundamental rights and hence, enforceable as such".

In *Vishaka* v. *State of Rajasthan*[75] the Supreme Court stated the legal position in unequivocal words thus:[76]"it is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law where there is no inconsistency between them and there is a void in the domestic law."

Above discussions clearly suggest that non-transformation or non-incorporation of international law into domestic law does not make the international law insignificant or totally irrelevant in India. The judiciary in India has carved out a space for itself to play a significant role, without prejudice to the power of the legislature and the executive in this regard, in the matter of enforcement of international obligations under taken by India. However, in some cases, the judiciary has gone beyond this line and relied upon a provision of the International Covenant on Civil and Political Rights, 1966 for its support to devise an enforceable right to compensation for violation of fundamental rights notwithstanding the specific reservation made by the Government of India at the time of ratification of the said covenant.[77] No doubt, such an approach of the judiciary has been a bone of contention even today. Subject to this exception, the general legal position that almost stands crystallized in India is that the international law not inconsistent with the provisions of the domestic law and in harmony with its spirit can be read into those provisions by the judiciary and, thus, become enforceable in India even without going through the process of transformation.

IX. ISSUES AND CONCERNS

International treaties, agreements, covenants and conventions are increasingly entered into or formulated to deal with issues that are of domestic concern as well. India has been a signatory to many such treaties. Since, in India there is no law enacted, as contemplated in the Constitution, to regulate the exercise of treaty making power, the union executive is exercising the said power as its prerogative. There is no scope for meaningful

---

[75] (1997) 6 SCC 241.

[76] *Id*. Para 14.

[77] D.K. Basu v. State of W.B., (1997) 1 SCC 416. Anand J observed: "Article 9 (5) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) provides that 'anyone who has been the victim of unlawful arrest and detention shall have enforceable right to compensation". Of course, the Government of India at the time of its ratification (of ICCPR) in 1979 had made a specific reservation to the effect that Indian legal system does not recognize a right to compensation for the victims of unlawful arrest and detention and thus did not become a party to the covenant. That reservation, however, has now lost its relevance in view of the law laid down by this court in number of cases awarding compensation for the infringement of the fundamental right to life of a citizen."[Para 42].

participation of either the states or union Parliament in the process of their formation. Government at the centre having transitory majority can freely enter into any treaty or agreement etc., even without the approval of the Parliament, incurring international obligations that are binding on the nation. Even when the provisions of the treaty or agreement etc., deal with issues that are of intimate concern for the whole nation, there is no constitutional or legal requirement for taking the Parliament into confidence. Though such a practice could have been developed and adopted even in the absence of any legal requirement, it is evident from the practice statement of the Government of India[78] that no such practice is in vogue in the country. It seems the executive in India is not keen on subjecting, what it considers to be its prerogative to Parliament's scrutiny. It is also interesting to note that there is no constitutional inhibition for the union executive to enter into treaties that contain provisions, which are contrary to the provisions of the Constitution itself. It is only at the time of implementation of such treaties that the executive needs to go before the Parliament for constitutional amendment.

Further, the union executive is competent to enter into any treaty or agreement, which is likely to affect the matters included in the state list of the seventh schedule of the Constitution without taking the states into confidence. Once the union executive enters into any such treaty, agreement or convention, by virtue of Article 253 of the Constitution of India, the union legislature is entitled to make any law for the whole or any part of the territory of India for implementing such treaty, agreement or convention notwithstanding the general scheme of distribution of legislative power envisaged under Article 246 read with seventh schedule of the Constitution. It is a matter of serious concern. In the present day context, one can perceive a clear threat to India's unique federal structure, which is specially devised by the framers of the Constitution to suit the countries diverse needs without compromising on unity and integrity of the nation. The Constitution has envisaged federation with strong centre. However, it made the states autonomous within their respective spheres subject to certain exceptions. States have exclusive legislative competence over entries in the state list of the seventh schedule of the Constitution. On a general overview, it appears that all matters of local concern have been left to the states. Now, owing to the rapid growth of transnational law in the form of treaties, agreements, covenants and conventions, which are likely to affect the issues, which are within the legislative competence of the state legislatures, it is possible for the union executive, by ratifying more and more such treaties, agreements etc., to divest the state legislature of its exclusive legislative competence to enact laws on several matters, which are otherwise, within their competence. Recent controversy over legislative proposal to include

[78] *Supra* note 25.

provisions relating to establishment of *lokayuktas* in the states in the central legislation is a clear indication to understand the magnitude of the threat perception. During the discussions in the *Rajya Sabha* over the Lokpal and Lokayuktas Bill, 2011, almost all the regional political parties and the main opposition party in the centre vehemently opposed the proposal to enact such a legislation under Article 253 of the Constitution of India though union legislature is fully competent to do so by virtue of the fact that India has ratified United Nations Convention Against Corruption[79] in May 2011.[80]

Another important development that is noticeable in the recent days is that in framing policies for dealing with issues that are of domestic concern, policy makers are increasingly guided by global regulatory norms and standards notwithstanding their compatibility with the provisions of the Constitution and in particular the directive principles of state policy, which are fundamental for the governance of the country. It is another area of serious concern. Further, judicial implementation of treaties, covenants etc., under the guise of interpretation of laws and provisions of the Constitution, make them enforceable in India without leaving any scope for meaningful participation of legislature in the process. Sometimes, new rights and remedies are created and new obligations are imposed on the state. Particularly instances such as creating right to compensation for established breach of fundamental right by relying on Article 9 (5) of the International Covenant on Civil and Political Rights, 1966 notwithstanding India's reservation to it show how Indian judiciary is keen to bring transnational norms into domestic regulatory structure on its own.

X. CONCLUSION

The rapid growth of global regulatory regime in the form of international treaties, agreements, covenants and conventions, etc., will have far-reaching consequences to the people and to our polity.[81]There are areas

---

[79] It was adopted by the General Assembly vide its resolution 58/4 of October 31, 2003.

[80] In this regard it may be instructive to note the submissions made by J.S. Verma and Rajeev Dhavan. J.S. Verma opined that "for 'combating corruption' in a more effective manner a uniform legislation enacted by the Union Parliament by invoking Article 253 can provide for the Lokpal and the Lokayuktas...The Parliamentary central enactment made by invoking Article 253 would be constitutionally valid, such legislative competence in the Union Parliament being expressly provided as a part of the constitutional scheme, consistent with the nature of federalism created by the Constitution...." whereas Rajeev Dhavan was of the view that ".....Bringing Lokayuktas under the Bill may be unconstitutional. It is certainly antifederal. Let the states decided what they want and how their chief Ministers should be toppled....." *See* Department Related Parliamentary Standing Committee On Personnel Public Grievances, Law and Justice, "Forty Eighth Report on Lokpal Bill, 2011"available at: http://www.prsindia.org/uploads/media/Lokpal/SCR%20Lokpa l%20Bill%202011.pdf (accessed on January 26, 2012).

[81] *See* NCRWC, "A Consultation Paper on Treaty – Making Power under Our Constitution", *Supra* note 21.

of convergence and divergence between global regulatory regime and the Indian Constitution. On the one hand, they may contribute for furthering our constitutional objectives as in the case of fundamental rights, which are expanded through judicial interpretations by relying on international standards and, on the other, their growth has the potential to significantly affect some of the other core principles of our Constitution. Foremost of that is that it poses serious threat to India's federal polity.

In the present era of globalization, international treaties, covenants, conventions have acquired greater significance in formulating rules, regulations and policies for the domestic governance. Thus, there is a greater and real need to democratise the process of treaty making and their enforcement. The union executive should not be allowed to freely exercise treaty-making power in an unfettered and unguided fashion, which will deprive constructive role of the larger representative bodies like Parliament and state legislatures in formulating essential policies for the governance of the country.

RECOGNITION AND PROTECTION OF REFUGEES' 'RIGHT TO NATIONALITY' UNDER INDIAN LEGAL REGIME: A PASSAGE FROM REFUGE TO STATELESSNESS?

—*Subhradipta Sarkar*[*]

Abstract While the situation of stateless persons and refugees is closely related, the former are more vulnerable as they do not have any effective State protection. Historically, India has shown magnanimity to shelter thousands of refugees from neighbouring countries, even without having any specific refugee legislation or being a party to the UN Refugee or Stateless Convention. Due to sustained, unstable political conditions in their home countries, a large number of these refugees have found their temporary stays drawn out and become protracted either because of prolonged stay or repeated re-arrival. As the possibility of repatriation diminishes, many refugees have been willing to become citizens of India. Yet a series of amendments to Indian nationality law, when read in conjunction with the legal regime relating to foreigners, have made it almost impossible for those refugees to acquire Indian citizenship. Refugees in India are often treated arbitrarily through ad-hoc mechanisms and even declared to be illegal migrants. Attempts by the higher judiciary to remedy this situation have failed to bring about desired changes on the ground. Consequently, many persons who came as refugees have fallen into a condition of statelessness. Chakmas from Bangladesh have failed to get recognition, Bengalis have been disowned by both the countries, Afghans and Tibetans have found the process a

[*] Assistant Professor, ITM University Law School.

difficult ball-game, and Tamils were left in limbo until the end of the Elam War brought some respite. Shedding off ad-hoc mechanism, legislating on the lines on the international conventions, introducing policies akin to somewhat implemented in Sri Lanka, establishing enabling procedures, sustained advocacy campaigns, can only usher better future for the refugees in India. Or else, thousands of those unfortunate souls would continue to live in oblivion.

Keywords: refugee, statelessness, nationality, citizenship, foreigner

I. INTRODUCTION

Around 12 million people in this world today do not have a country of their own – deprived of minimal legal protection; basic rights to education, health, travel, work, and even an official recognition of death![1] This is because they are not nationals or citizens[2] of any country and have to bear the ignominy to be referred to as 'stateless'. Such groups of people are closely linked with the refugees, but it must be noted that there lies a subtle difference between the two. Statelessness *per se* does not give rise to the refugee status. To qualify as a refugee, a stateless person must stand in a relationship to a state which is broadly comparable to the relation between a citizen and his/her country of nationality.[3] However, unlike the refugees, the stateless persons are not properly documented. A 2003 global survey by the United Nations High Commissioner for Refugees (UNHCR) confirmed that no region of the world is free of the problems that lead to statelessness. Because the issue is politically delicate and many governments have not made accurate counts of these populations, an overall figure is therefore difficult to conclude.[4] According to the U.S. State Department, data on

---

1 *See* UNHCR, *Stateless People*, http://www.unhcr.org/pages/49c3646c155.html (Accessed on Jul. 2, 2013)

2 Neither the Constitution of India nor the citizenship law regime defines 'citizen' or 'national'. The Supreme Court of India, in the case of *State Trading Corpn. of India Ltd.* v. *CTO,* AIR 1963 SC 1811, held that 'nationality' and 'citizenship' are not interchangeable terms. Nationality has reference to the jural relationship which may arise for consideration under international law. On the other hand, citizenship has reference to the jural relationship under municipal law. In other words, citizens are those persons who have full political rights as distinguished from nationals, who may not enjoy full political rights and are still domiciled in that country. However, the matter in this case was about the determination of status of a corporation. It further held that citizenship provisions under Part II of the Constitution are only confined to natural persons. As the author in this article deals only natural persons; hence, for convenience, both the terms are used interchangeably. Furthermore, Sec. 2(f) of the Citizenship Act, 1955 excludes 'company or association or body of individuals, whether incorporated or not' from the definition of 'person'.

3 *See generally* James C. Hathaway, *The Law of Refugee Status*, 59 – 63 (Butterworths 1991).

4 *See* IPU & UNHCR, *Nationality and Statelessness: A Handbook for Parliamentarians* 3 (2005).

statelessness is so limited that the international community does not even know if the numbers are growing or shrinking.[5]

India has received a large number of refugees over the years due to her unique geographical position coupled with unstable political climate of the neighbouring countries. The World Refugee Survey 2009 of the U.S. Committee for Refugees and Immigrants (USCRI) reveals that India houses 411,000 refugees.[6] India owes its refugee problems to the partition following the independence in 1947.[7] Subsequently, there has been a continuous flow of Tibetans, Chakma, Nepalese, Bhutanese, Afghans and Myanmarese refugees into North and Tamil refugees from Sri Lanka into South.

It is pertinent to mention that statelessness problem in India is particularly associated with many of those refugees. Therefore, the key issue to the problem in India is neither stateless people displaced from other countries sought asylum in India and has been denied; nor people in India have been rendered stateless due to displacement, state succession etc., and have no place to go. It is all about the laws, policies and the actions of the authorities which affect the refugees residing in the country and threaten to leave them stateless, yet nobody cares. In spite of safeguards available in the international law and India housing a large number of refugees, thousands of such refugees in the country are glaring at the barrel to become stateless over a period of time. As a matter of fact, gulf between the international law and the Indian legal regime has allowed the phenomenon not only to exist, but to continue unfettered. This article intends to analyze the impact of laws and policies, both national and international, on the matter of right to nationality of the refugees with reference to the practical instances from the ground. Eventually, it attempts to lay down a prescription for the prevention of statelessness of refugees in India.

II. STATELESSNESS AND RIGHT TO NATIONALITY IN INTERNATIONAL LAW

A. Right to Nationality

The notion of citizenship as a human right subject to the domestic choices of nations is admittedly problematic, and it has been the subject of much recent debate. Nationality is often considered as a fundamental human

---

5 Jay Milbrandt, *Stateless*, 20 Cardozo J. Int'l & Comp. L. 75, 80 – 81 (2011).

6 USCRI, *World Refugee Survey 2009: India*, *at* http://www.refugees.org/resources/refugee-warehousing/archived-world-refugee-surveys/2009-wrs-country-updates/india.html. (Accessed on Jan. 8, 2013).

7 Richard Robbins, *The Refugee Status: Challenge and Response*, 21(2) L. Cont'ry Probs. 311, 325 (1956).

right and a foundation of identity, dignity, justice, peace, and security.[8] The link between the ability to possess rights and one's nationality was set out in the Universal Declaration of Human Rights 1948 for the first time in the international arena to be universally protected, as a reaction to the upheaval of World War II.[9] It states that everyone has a right to a nationality, as well as the right not to be arbitrarily deprived of a nationality.[10] The substantive scope of prohibited arbitrariness includes prohibition against statelessness.[11] Yet the choice of whom to admit within national borders, and whether to confer citizenship on those persons, remains a prerogative of the State through its domestic law.[12] The right to nationality is founded on the existence of a genuine and effective link between an individual and a State. Such link, manifested by birth, residency, and/or descent, is reflected in the provisions of many States' nationality legislation.[13]

B. Protection from Statelessness under the UN Refugee Convention

Historically, refugees and stateless persons both received protection and assistance from the international refugee organizations that preceded UNHCR. Though a Convention was proposed to be drafted to cover both the groups, unprecedented flow of refugees in the post-World War II compelled the newly created United Nations to give priority to the refugee problem and defer the issue for time being.[14] Thus, UN Convention Relating to the Status of Refugees (hereinafter 'Refugee Convention') was adopted in 1951.[15] Under the Refugee Convention, a stateless refugee may also receive protection as a refugee, if there is an arbitrary denial of citizenship because of a person's race, religion, nationality, membership in a particular social group, or political opinion.[16] Art. 34 of the Refugee Convention also states that a State shall as far as possible facilitate assimilation and naturalization of refugees.[17]

---

8 Polly J. Price, *Stateless In the United States: Current Reality and a Future Prediction*, 46 Vand. J. Transnat'l L. 443, 454 (2013).

9 *Id.* at 455.

10 *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 15, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

11 *See generally* Mirna Adjami & Julia Harrington, *The Scope and Content of Article 15 of the Universal Declaration of Human Rights*, 20(7) Refugee Surv. Q. 93, 100 – 04 (2008).

12 *Nottebohm* (*Liechtenstein* v. *Guatemala*), Judgment, 1955 I.C.J. 4, at 20 (Apr. 6, 1955).

13 *See* Price, *supra* note 8, at 89 – 91.

14 *See generally* Milbrandt, *supra* note 5, 83 – 88.

15 Convention Relating to the Status of Refugees, Jul. 28, 1951, 189 U.N.T.S. 137. The Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 was adopted in 1967.

16 *See* IPU & UNHCR, *supra* note 4, at 9 – 10.

17 Refugee Convention, Art. 34. Naturalization. – The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular

C. UN Stateless Conventions

The UN Convention Relating to the Status of Stateless Persons 1954 (hereinafter '1954 Stateless Convention') is the primary international instrument that aims to regulate and improve the status of stateless persons and to ensure that stateless persons are accorded their fundamental rights and freedoms without discrimination.[18] The provisions of the 1954 Stateless Convention are, in many respects, very similar to those of the Refugee Convention. It defines a stateless person as "a person who is not considered as a national by any State under the operation of its law".[19] This is known as *de jure* stateless persons.[20] There may also be a situation where a person may have a genuine link with a State but is unable to establish such a link and hence, does not has an effective nationality and does not enjoy national protection. Such person is considered to be *de facto* stateless.[21] Art. 34 of 1954 Stateless Convention also states that a State shall as far as possible facilitate assimilation and naturalization of refugees.

Another important legal instrument regarding statelessness is the UN Convention on the Reduction of Statelessness 1961 (hereinafter '1961 Stateless Convention') which aims to avoid statelessness at birth.[22] The Convention obligates a contracting State to grant its nationality to a person born in its territory who would otherwise be stateless. Such nationality shall be granted either at birth or upon an application being lodged with the appropriate authority, in the manner prescribed by the national law.[23] Again, Art.8 of the 1961 Stateless Convention emphasizes that a State shall not deprive a person of his nationality if such deprivation would render him stateless.

D. India's Obligations towards International Law

India is neither a party to the statelessness or refugee instruments. Nevertheless because of having vast experience in dealing with refugee problems, India is a member of the Executive Committee (ExCom) of the Office of the UNHCR since 1995.[24] It was the ExCom which has urged

---

make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

18 Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117.

19 *See* 1954 Stateless Convention, Art. 1.

20 *See* Alec Paxton, *Finding a Country to Call Home: A Framework for Evaluating Legislation to Reduce Statelessness in Southeast Asia*, 21 Pac. Rim L. Pol'y J. 623, 626 (2012).

21 *See generally id*. 626 – 27.

22 Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175.

23 *See* 1961 Stateless Convention, Art. 1.

24 *See generally* Ipshita Sengupta, *UNHCR's Role in Refugee Protection in India*, INFOCHANGE, Jul. 2008 *at* http://infochangeindia.org/agenda/migration-a-displacement/

the UNHCR to work with the Government as well as civil society actors to identify and build up a database of such persons; the States to consider examining their nationality laws consistent with fundamental principles of international law to prevent arbitrary denial or deprivation of nationality; the States to abide by the human rights law regime to reduce and protect such vulnerable group.[25]

Subsequent to UDHR, several UN international human rights instruments have enumerated the right to nationality. E.g. Art.7 of the Convention on the Rights of the Child (CRC) 1989, Art. 24 of the International Covenant on Civil and Political Rights (ICCPR) 1966, Art. 9 of the Convention on the Elimination of Discrimination Against Women (CEDAW) 1979, Arts. 1 and 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) 1965 seek to ensure, at the minimum, that persons will be granted nationality under certain circumstances in which they might be otherwise be rendered stateless. Interestingly, India is a party to UDHR; signed and ratified ICCPR, CRC, CEDAW and CERD.

The importance of the international law has been highlighted in a number of cases by the activist Indian judiciary. While international treaties are not self-executing in case of India; nevertheless, the Supreme Court, in the case of *Vishaka* v. *State of Rajasthan*[26], observed that if they are not inconsistent with the Fundamental Rights enshrined in the Constitution of India (hereinafter 'Constitution'), must be read into those provisions to enlarge the meaning and content, to promote the object of the constitutional guarantee. This is implicit in Art. 51(c)[27] and the enabling power of Parliament to enact laws for implementing the international conventions under Art. 253[28] read with Entry 14[29] of the Union List in the Seventh Schedule of the Constitution.

---

unhcrs-role-in-refugee-protection-in-india.html. (Accessed Jul. 7, 2013).

25 ExCom Conclusions, UNHCR, *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons*, 106 (LVII) - 2006, (Oct. 6, 2006), *at* http://www.unhcr.org/excom/EXCOM/453497302.html. (Accessed on Jul. 7, 2013).

26 (1997) 6 SCC 241: AIR 1997 SC 3011.

27 India Const. Art. 51. Promotion of international peace and security.— The State shall endeavour to . . . (*c*) foster respect for international law and treaty obligations in the dealings of organized peoples with one another […].

28 India Const. Art. 253. Legislation for giving effect to international agreements — Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

29 India Const. Sch. VII, List I, E. 14. Entering into treaties and agreements and implementation of treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

The Court further observed:[30]

> *". . . The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. . . ."*

Prominent human rights lawyer, Colin Gonsalves has pushed the jurisprudence further arguing that even if a convention is not ratified by the Government of India, courts are still at liberty, provided that there is no Indian law to the contrary, to incorporate such conventions into Indian law and thereby enforce them.[31]

Moreover, Art. 22 of the CRC deals with refugee children and India has no reservation in this regard.[32] As the problem of statelessness possesses the gravest threat to those children in this country, India is directly responsible for their welfare. In absence of a domestic law concerning stateless persons, the judiciary is required to read the above-mentioned international human rights instruments into the Indian jurisprudence and the sanction lies in the aspirational language of Art. 51(c) of the Constitution. Incidentally, Randall Hansen has rightly indicated that the most significant decisions impacting the rights of migrants have been taken at the national level by domestic courts. Hence, he concludes that international human rights are most forceful when they are put into effect by national courts.[33]

E. Inter-American Court of Human Rights on Statelessness

Debate about the nature and scope of the right in international law would remain unaccomplished without mentioning of the jurisprudence developed

---

[30] *Vishaka* v. *State of Rajasthan*, (1997) 6 SCC 241: AIR 1997 SC 3011, ¶ 14.

[31] Colin Gonsalves, *The Somewhat Automatic Integration of International Refugee Conventions in Indian Law*, 3(2) Bulletin On IHL & Refugee Law 248, 250 (Jul. – Dec., 1998).

[32] CRC, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (Nov. 20, 1989), art. 22, ¶ 1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and *in other international human rights or humanitarian instruments to which the said States are Parties*. (*Emphasis* added).

[33] *See* Anna Dolidze, *Lampedusa and Beyond: Recognition, Implementation, and Justiciability of Stateless Persons' Rights under International Law*, 6 Interdisc. J. Hum. Rts. L. 123, 127 (2011-12).

by the Inter-American Court of Human Rights in this regard. In the case of the *Yean and Bosico Children* v. *Dominican Republic*[34], the Court acknowledged that that the determination of the right of nationality of an individual continues to fall within a State's domestic jurisdiction, yet the discretional authority has gradually being restricted with the evolution of international human right law. It is for the States to "have the obligation not to adopt practices or laws concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons. . . . Statelessness deprives an individual of the possibility of enjoying civil and political rights and places him in a condition of extreme vulnerability."[35]

III. INDIAN LAW AND PRACTICE – A RECIPE FOR STATELESSNESS

A. Citizenship Law Regime

To understand the phenomenon of statelessness, it is necessary to take a more realistic view of the concept of citizenship and its bearing on the subject. Expansive citizenship or immigration or refugee law is likely to afford greater protection for the unprotected refugee or stateless person. Statelessness occurs when a person do not automatically obtain either *jus soli* or *jus sanguinis* citizenship.[36,37] Narrower the law and policy in this regard, more the chances to generate and perpetuate statelessness.[38] The citizenship regime in India has its impact on the status of the refugees and consequently the stateless persons in India. The Constitution confers citizenship by birth, decent, domicile, migration or registration.[39] The provision of migration was specifically included, keeping in mind about the large scale migration of people from Pakistan following the independence. Thus, the Constitution took the partition refugees within its fold and actually

---

[34] Judgment of Sept. 8, 2005, Inter-Am Ct. H.R., (Ser. C) No. 130 (2005), *at* http://www1.umn.edu/humanrts/iachr/C/130-ing.html. (Accessed on 7 July 2013).

[35] Inter-Am Ct. H.R., (Ser. C) No. 130 (2005), ¶ 142.

[36] *Jus soli* literally means right of the soil. It is a right by which nationality or citizenship can be recognized to any individual born in the territory of the related state. The other principle followed by the State to grant citizenship is *jus sanguinis* which means right of blood. It is the principle by which citizenship is not determined by place of birth but by having one or both parents who are citizens of the nation. *See generally* Adjami & Harrington, *supra* note 11, at 104.

[37] Morgan G. Miranda, *A (Stateless) Stranger in A Strange Land: Flores-Villar and the Potential for Statelessness under U.S. Law*, 15 J. Gender Race & Just. 379, 385 (2012).

[38] Raghu Amay Karnad, Rajeev Dhavan & Bhairav Acharya, *Protecting the Forgotten and Excluded: Statelessness in South Asia*, *at* http://www.mcrg.ac.in/AddReading%5C2012%5CStatelessness.pdf.

[39] The provisions relating to 'Citizenship' are enshrined in Articles 5 to 11 in Part II of the Constitution of India.

saved millions who would otherwise be rendered stateless.[40] However, the crisis at the time of partition was not resolved completely by the Constitution and soon there arose a need of a new legislation in the form of the Citizenship Act, 1955.[41] According to sec. 3 of the Act, 'every person born in India on or after the 26th of February 1950' would be citizen of India by birth irrespective of the nationality of his parents. The law was based purely on the concept of *jus soli* and appeared less problematic for the refugees. However, the amendment of 1986[42] brought a change by adding *jus sanguinis* clause; whereby a person born after July 1, 1987 has to show that one of his parents is an Indian before his claim is accepted. The 'person of Indian origin' was restricted to consider only to those whose parents and not grandparents were born in undivided India.[43] Furthermore, a stringent residential requirement was also added in cases of such persons in acquiring citizenship by registration.[44] All these amendments caused greater hardship for determining the status of the refugees in this country.

More restrictive changes in *jus sanguinis* clause followed with the Citizenship (Amendment) Act, 2003, whereby a person born in India can only become a citizen of the country only if both his parents are Indians or one of them is an Indian and the other is not an 'illegal migrant'.[45] It does not give any reference to the refugees but defined 'illegal migrant' as a foreigner who has entered into India either without valid passport/travel document or has over stayed.[46] Grant of citizenship by registration or naturalization is restricted to a person who is not an illegal migrant.[47] This amendment severely jolted the prospect of the refugees to become Indian citizens and thus rendering them stateless. The qualification added to the birth clause has proved to be fatal for thousands of children born to the refugees in India. The marriage clause, regarding acquisition of citizenship by registration, though gender neutral, has become gradually stricter. While Amendment Act of 1986 added five years of residential requirement, the Amendment Act of 2003 increased it to seven years.[48]

---

40 *See generally* M.P. Jain, *Indian Constitutional Law*, at 862 – 63 (LexisNexis Butterworths Wadwa Nagpur 2010) (1962).

41 Act No. 75 of 1955. The Act provides five ways for acquiring citizenship: birth, decent, registration, naturalization and incorporation of some territory into India. However, the migration clause was removed. On a broad understanding, citizenship by birth (sec. 3) applies to a person born in India, while decent (sec. 4) applies to one born outside the country to acquire citizenship. Citizenship by registration (sec. 5) applies to those who are considered to an 'ordinarily resident' of India. There are certain qualifications laid down in the Act in this regard. The naturalization clause (sec. 6) applies to any foreigner, upon the discretion of the Central Government.

42 Citizenship (Amendment) Act, 1986, Act No. 51 of 1986.

43 *See* Citizenship Act, sec. 5, Expl. 2.

44 *See* Citizenship Act, sec. 5(1)(a).

45 Act 6 of 2004.

46 *See* Citizenship Act, sec. 2(b).

47 *See* Citizenship Act, 1955, secs. 5 & 6.

48 *See* Citizenship (Amendment) Act, 2003, sec. 5(1)(c).

B. Foreigners' Law Regime

To understand the actual implications of illegal migrant, it is useful to take a note of the basic legal regime governing foreigners in India, which primarily comprises of two legislations: the Foreigners Act, 1946 and the Registration of the Foreigners Act, 1939.[49] Both the Acts define[50] 'foreigner' as a 'person who is not the citizen of India' thus covering the refugees within its ambit as well. The Foreigners Act gives a lot of power in the hands of the Central Government including the determination of the nationality of the person concerned and such decision cannot be questioned in the court of law.[51] Under this Act, the burden of proof is on the person concerned to show that he is not a foreigner.[52] Further, the Foreigners (Amendment) Act, 2004 has prescribed enhanced punishment in case of entry, travel or stay in the country without proper documents.[53] In fact, after any foreigner including a refugee registers himself with the concerned Foreigners Registration Office,[54] he is issued a residential permit.[55] Since, there is no refugee-specific legislation or policy, the authorities often follow an ad-hoc policy. While some groups are issued such permits, others are turned away without explanation.[56]

In addition the Passport (Entry into India) Act, 1920[57] mandates every foreigner to enter India with valid travel documents. As the refugees fleeing their country in unfavourable situation often fail to do so, becomes an illegal migrant upon his entry to India. In practice, however, the administrative policy of the Indian Government has operated to let certain groups of refugees enter the country without required documentation.[58] Under such a legal framework, acquiring citizenship in India is almost a Utopian idea for the refugees. In case they get stuck in India for a longer period of time and the political situation in their homeland deters them from return – statelessness can be the only consequence. For the children, the impact of the laws is horrendous; as they would be rendered stateless since birth. Thus, we witness intertwining of legal procedures and requirements with an increasingly exclusionary vision of what would meant be an 'Indian'.

---

49 Act 31 of 1946; Act 16 of 1939.
50 Sec. 2(a) of both the legislation.
51 *See* Foreigners Act, sec. 8.
52 *See* Foreigners Act, sec. 9.
53 *See generally* Foreigners Act, sec. 14 – 14C.
54 *See* Registration of the Foreigners Rules, 1939, rr. 5 & 6.
55 *See* Foreigners Order, 1948, or. 7.
56 Ragini Trakroo et. al, *Refugees and the Law*, at 98 (Socio-Legal Information Centre 2005).
57 Act No. 34 of 1920.
58 Trakroo, *supra* note 56, at 57 – 66.

C. Chakma Refugees and *NHRC* Judgment

As already being stated, there are several groups of refugees staying in India; their situations are unique when compared among themselves but all of them have anyhow faced the brunt of arbitrary law and practices. Instances of few major refugee groups may be considered to demonstrate the ground reality. In the initial stages, citizens of India needed no travel documents to visit East Pakistan, and vice versa. In 1952, however, the two governments agreed to introduce passport and visa controls.[59] Approximately 35,000 of the Chakmas and 1,000 Hajongs were given valid migration certificates and settled in what was then the North East Frontier Agency (now known as the State of Arunachal Pradesh). Since their resettlement, they have become integrated into the social fabric of the state. Subsequently many of such Chakmas and Hajongs are actually born in India and know no other home. They have voted in state elections and paid state taxes on their land. It is against this background that their claims for Indian citizenship are to be considered. It may also be noted that under the Indira-Mujib Agreement of 1972, it was determined that India and not Bangladesh would be responsible for all migrants who entered India before March 25, 1971.[60]

While the laws have come down heavily on the refugees, the Supreme Court has shown some ray of hope. Granting citizenship to the Chakma refugees was highlighted in its judgment in the case of *National Human Rights Commission* v. *State of Arunachal Pradesh*.[61] The NHRC (petitioner) approached the Court on behalf of the Chakmas stating that their representations for the grant of citizenship before their local Deputy Commissioners had yielded no results. The Union of India (second respondent) replied that the issue of conferring citizenship on the Chakmas was considered from time to time but was not possible primarily due to the lackadaisical attitude of the State of Arunachal Pradesh (first respondent).

The Court held that the State Government is under constitutional and statutory duty to protect threatened group and "*by refusing to forward their applications, the Chakmas are denied rights, Constitutional and statutory, to be considered for being registered as citizens of India*".[62] The Court directed the Government of Arunachal Pradesh to forward the application for registration for citizenship by the Chakmas to the Central Government

---

[59] Willem Van Schendel, *Stateless in South Asia: The Making of the India-Bangladesh Enclaves*, 61(1) J. Asian Stud's. 115, 124 (Feb. 2002).

[60] *The Stateless Chakmas and Hajongs of the Indian State of Arunachal Pradesh: A study of systematic repression*, *at* http://www.hrdc.net/sahrdc/resources/stateless_chakmas.htm. {Accessed on Jul. 5, 2013].

[61] (1996) 1 SCC 742: AIR 1996 SC 1234.

[62] *National Human Rights Commission* v. *State of Arunachal Pradesh*, (1996) 1 SCC 742: AIR 1996 SC 1234, ¶ 20. (emphasis added).

for its consideration in accordance with law; even returned applications should be called back for consideration. Moreover, while an application of any individual Chakmas is pending consideration, the State Government shall not evict or remove the concerned person from his occupation on the ground that he is not a citizen of India until the competent authority has taken a decision in that behalf. This is arguably the only judgment of the highest court of the land reflecting on right to nationality of the refugees in India.

Despite the Supreme Court direction, situation on ground is rather discouraging. There are several reports of persistent ill-treatment of the Chakmas, blatant human rights violations and forced eviction from the State. The Government of India has failed miserably to implement the judgment due to the non-cooperation of the Government of Arunachal Pradesh. Applications for citizenship are still not entertained in a friendly manner. People need to be fortunate and muster enough courage to push their application amidst administrative obstacles. No wonder that about 4,627 applications were submitted by the Chakmas and Hajongs pursuant to the judgment but not a single applicant was conferred citizenship till December, 2005.[63]

D. Afghan Refugees

There have been periodical flow of the Afghan refugees in India; and after 1992, the majority of those refugees were Sikhs and Hindus of Indian origin. They also came after American attack on Afghanistan in 2001.[64] The UNHCR office in New Delhi mainly deals with these Afghans besides others. Even though the Government of India issues residential permits to those refugees, they are often treated as illegal migrants under Indian laws. There are numerous cases of ill-treatment of those refugees.[65] Importantly, many of the Afghan refugees are reluctant to return home because the future there is bleak. Afghanistan is essentially an agrarian economy, but the prolonged fighting had destroyed much of its irrigation capability, prevented a generation of children born in refugee camps from learning agricultural skills, and killed or injured hundreds of thousands of farmers.[66]

---

[63] *See* Suhas Chakma ed., *SAARC Human Rights Report 2006*, 112 (Asian Centre for Human Rights, 2006).

[64] *See generally* Human Rights Law Network (HRLN), *Report of Refugee Populations in India* 20 (2007).

[65] *See generally* Maina Sharma, 'Refugees in Delhi', Working Paper No. 229, 11 – 15 (Centre for Civil Society, 2009), *at* http://www.ccsindia.org/ccsindia/downloads/intern-papers-09/refugees-in-delhi-229.pdf; Also *see generally* Evaluation and Policy Analysis Unit, UNHCR, *Evaluation of UNHCR's policy on refugees in urban areas: A case study review of New Delhi* (2000), *at* http://www.supportunhcr.org/3ae6bd464.pdf.

[66] Mahendra P. Lama, *The Afghan refugees*, THE HINDU, Feb. 5, 2002, *at* http://www.hindu.com/thehindu/2002/02/05/stories/2002020500040800.htm. (Accessed on Jul. 10, 2013).

According to the Constitution or Citizenship Act, a person is considered to be of Indian origin if he/she, or either of his/her parents or grandparents (pre-1986), was born in undivided India. And if a person is proved to be of Indian origin, the possibility of acquiring citizenship increases as he not only gets the benefit of the registration clause but also through decent. Unfortunately, the Afghans of Indian origin are not able to benefit from those provisions as they are not having any proof that either of their parents or grandparents was born in undivided India though many claim that their parents or grandparents had moved to Afghanistan from Pakistan at the time of partition.[67] Thus, they are left with no other alternative but to opt for naturalization clause which serves no better deal. Many of the Afghan refugees who have entered India legally and living here for more than 10 years are yet to be either naturalized or registered as an Indian citizen. Out of 2,724 such eligible refugees, only one-fifth of them actually applied for naturalization. The reason for such low response is the absence of appropriate enabling procedure.[68] Moreover, research data establishes UNHCR has been inconsistent in recognizing refugees, while it recognized about 10,400 of the Afghan refugees under its mandate in New Delhi, but left out at least 20,000 similarly situated Afghans.[69] Considering the volatile political situation in Afghanistan, there is high possibility that the next generations of those unrecognized Afghans will neither have identity nor state protection.

E. Tamil Refugees

Time and again, the escalation of ethnic conflict has led to the re-arrival of the same Tamil refugees from Sri Lanka. E.g. in June/July 1990 when Eelam War II broke out, half of the 48,000 refugees who were sent back in 1987 returned to the state of Tamil Nadu.[70] Similar situation happened when war broke out in 2006 as well.[71] According to the Sri Lankan Citizenship Act, children born to Sri Lankan nationals outside the island are required to apply for Sri Lankan citizenship by registration through the nearest Embassy/Consulate/High Commission. However, the Sri Lankan Deputy High Commission in Chennai claimed that the number of applications received from Sri Lankan nationals for citizenship by registration is very low. Nothing but procedural complexities always remained as a hurdle.[72]

---

67 *See generally* K.C. Saha, 'Naturalisation of Afghan Refugees of Indian origin', Paper Presentation, 7th Informal Regional Consultation on Refugee and Migratory Movements, New Delhi, Dec. 15 – 16, 2002, (visited Mar. 31, 2009), *at* http://eminentpersonsgroup.org.

68 UNHCR, *UNHCR Global Appeal 2005* 240 (2005).

69 USCRI, *Country Report 2006: India*, http://www.refugees.org/countryreports.asp x?submm=&ssm=&cid=15 88 (Accessed on 1/05/2013).

70 *See generally* T.S. Subramanian, *Camps of Neglect*, Frontline, July 14, 2006 at 22.

71 *See generally* T.S. Subramanian, *Fleeing to Safety*, Frontline, July 14, 2006 at 18.

72 *See* V. Suryanarayan, *Between Fear and Hope*, Frontline, May 23, 2003 at 131 – 33.

The state of affairs remained the same even after the fall of the Liberation Tigers of Tamil Eelam (LTTE) in 2009 until recently.[73]

F. (Perceived) Bangladeshi Migrants

If any poor in Delhi is a Muslim and speak Bengali, the Delhi police need no other proof to brand him as an 'illegal migrant' from Bangladesh and summarily be deported. This all started with 'Action Plan' and 'Operation Push Back' in 1992 - 1993, when thousands of Bengali-speaking Muslims have been picked up from various working class settlements all over Delhi and forcibly pushed inside Bangladesh. It has never been established whether those people were actually from Bangladesh.[74] Ironically, a great majority of them had been issued ration-cards for obtaining subsidized food rations under the government's public distribution scheme, given identification tokens for their individual squatters, and their names had been recorded in the voting registers. Actually, many of those people are refugees who had come in 1970s onwards and served as vote-banks for the Government. Therefore, such actions exemplified a hasty yet haphazard attempt by then ruling Congress at salvaging its own authority in the face of the rising tide of Hindu nationalism. To make things worse, the Bangladeshi authorities detained many of those deportees as Indians as they did not have proof of being citizens of Bangladesh; on the contrary they had Indian documents.[75] With no lawful procedure ever been followed, such people are virtually left *in limbo*.

G. Tibetan Refugees and *Namgyal Dolkar* judgment

Beginning in 1959, Tibetans followed the Dalai Lama to India and have enjoyed the patronage of the Government of India, owing to their conflict with the Chinese government.[76] Although the Government provided identity documents automatically only to children of Tibetans who arrived before 1979, newly arrived Tibetans had difficulty obtaining them. According to both the US Commission on Civil Rights (UCCR) and the International Campaign of Tibet, while India admitted Tibetan refugees into the country after 1980, the Government has often refused those Tibetans with both Residential and Identity Certificates.[77] These documents are indispensible

---

[73] *Sri Lankan Tamils want to Take a Journey Back Home*, The Times of India, Oct. 21, 2012, *at* http://articles.timesofindia.indiatimes.com/2012-10-21/chennai/34626985_1_lankan-refugees-high-commission-sri-lankan-tamils. (Accessed on Jan. 10, 2013).

[74] Ranabir Samaddar, *Flags and Rights, Policies and Practices: 11* 36 (Mahanirban Calcutta Research Group 2006).

[75] *See* Sujata Ramachandran, *'Operation Pushback' – Sangh Parivar, State, Slums, and Surreptitious Bangladeshis in New Delhi*, 38(7) Econ. & Pol. Weekly 637 – 44 (2003).

[76] *See* William Peterson, *International Migration*, 4 Ann. Rev. Sociol. 533, 552 (1978).

[77] *See* C.S. Madhu, A Legal Status of Tibetan Refugees in India – Issues and Trends 63 – 64 (Jul. 18, 2005) (unpublished LL.M. dissertation, NLSIU) (on file with NLSIU Library).

for consideration for citizenship. With no realistic hope of returning to their homeland and citizenship claims being refused by Indian authorities, their status is in jeopardy too.

Possession of the identity certificates did not help their cause either until the Delhi High Court delivered a significant judgment in the case of *Namgyal Dolkar* v. *Govt. of India, Ministry of External Affairs*.[78] The Court upheld the right of the petitioner for the conferment of Indian citizenship by birth clause under sec. 3(1) of the Citizenship Act, 1955. Thus, the petitioner became the first Tibetan (born to Tibetan parents) to be conferred with Indian citizenship status. The court judgment was sufficient to declare her as an Indian citizen without separately applying for the same because unlike sec. 5 or sec. 6, sec. 3 does not envisages such application.[79] Although international conventions were not referred to in the judgment, certainly it was in the spirit of Art. 15 of UDHR; and Arts. 7 & 22 of the CRC.[80]

However, it may be recalled that the petitioner was born before the Amendment Act of 1986 had come into force and hence, the Court refused to attract the additional qualifications brought about by the amendment subsequently. While the judgment paved the way in upholding the nationality right of the refugee children born in India before July 1, 1987; the challenge for the refugee children born after the aforementioned amendment looms large. The judgment merits more publicity, albeit this stumbling block.

IV. QUEST FOR DURABLE SOLUTION CONTINUES

It was amply clear from the discussion to this point that uncertainty regarding the legal status of the refugees in India has actually attributed to such problems. The general law on foreigners in India is silent on treating the refugees as a distinct class of foreigners needing protection. Enacting a regional instrument dealing with refugees has been a long call for the South Asian region including India as the region is plagued with the problem of refugees. Concern had been voiced by the noted international law expert, Professor B.S. Chimni. He argued from the opposite angle and opined:[81]

> "Governments must be more concerned about the protection of people facing persecution, rather than thinking

---

78 (2010) 120 DRJ 749.

79 *Namgyal Dolkar* v. *Govt. of India, Ministry of External Affairs*, (2010) 120 DRJ 749, ¶ 25.

80 CRC, art. 7, ¶ 1. The child . . . shall have the right to acquire a nationality. . . ¶ 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

81 Oishik Sircar, *Refugees are not Illegal Migrants*, Infochange, May, 2006, *at* http://www.infocha ngeindia.org/human-rights/analysis/refugees-are-not-illegal-migrants.html. (Accessed on Jul. 5, 2013).

> about how a refugee regime might open the floodgates to illegal immigrants. It is a substantive law that would facilitate states to identify illegal immigrants from refugees."

Under no legal regime, nationality is not granted indiscriminately.[82] International law stipulates that it is for each State to determine, through the operation of national law, who are the citizens.[83] Even the 1961 Stateless Convention does not also require a contracting State unconditionally to grant nationality to any stateless person rather it seeks to balance factors of birth, decent or residence in an effort to avoid the creation of statelessness. As the phenomenon of statelessness in India has its roots in trans-migration, even being the major power in the sub-continent India has not taken any substantive and sustained measure in the direction to bring any solution to the problem.

The UNHCR took the lead in setting up an Eminent Persons Group (EPG) to look into various problems relating to the refugees in the region. In this process, EPG came up with the Model Refugees Law for the South Asian Nations meant for the refugee protection in the region.[84] The India-specific version of the Model Law has been approved and presented before the Government of India in 2000. This is titled as 'Refugees and Asylum Seekers Protection Act, 2000' (commonly known as 'Model National Law'). Attempts were made by the NHRC as a follow-up procedure. An Expert Committee on Refugees constituted in November 2003 by the Commission which met for the first time on March 9, 2004, to give its opinion to the Commission, on the Model Law.[85] Regrettably, apart from periodical intellectual deliberation, nothing has taken place till date worthy to be mentioned. It is noteworthy that though the Model National Law speaks about voluntary repatriation,[86] unlike the Refugee Convention, there is no mention of naturalization. Thus, along with the law on refugees, various consequential problems including the issue of statelessness have been put to rest.

---

[82] *See generally* Matthew F. Ferraro, *Stateless in Shangri-La: Minority Rights, Citizenship, and Belonging in Bhutan*, 48 Stan. J. Int'l L. 405, 421 – 23 (2012).

[83] *See generally* Malcolm N. Shaw, *International Law*, at 584 – 89 (Cambridge University Press 2003).

[84] *See generally* Refugee and Migratory Movements Research Unit, *The South Asia Declaration On Refugees*, 27 UDBASTU (The Uprooted) 1 – 5 (Jan. – Mar., 2004), *at* http://www.uscrirefug ees.org/2010Website/5_Resources/5_5_Refugee_ Warehousing/5_5_2_International_Standards/South_Asia_Declaration_on_Refugees.pdf (Accessed on Jul. 4, 2013).

[85] *See Meeting of Expert Committee on Refugees*, NHRC, *at* http://nhrc.nic.in/disparchive.asp?fno= 753 (Accessed on Jul. 6, 2013).

[86] *See* sec. 16.

Indeed, for India there is already a replicable model available in the sub-continent – tackling the problem of stateless Tamils in Sri Lanka.[87] In Sri Lanka, 190,000 heads of household persons acquired citizenship by the end 2003 on the basis of the Grant of Citizenship to Persons of Indian Origin Act, unanimously approved by Parliament in October 2003.[88] In July and August 2004, a second campaign was organized in the northeast of the country where more than 2,000 stateless persons were granted, citizenship. Those benefited persons were brought from India during British colonial rule to work on Sri Lanka's tea and coffee plantations. Following the enactment, the UNHCR and the Sri Lankan authorities designed an information campaign to ensure that stateless persons could apply for citizenship in a fair and transparent manner, and without long or complicated administrative procedures.[89] From 1948, when Sri Lanka won its independence, until 1988, various Indo-Sri Lankan agreements including the Grant of Citizenship to Stateless Persons (Special Provisions) Act, 1988, determined the legal status of these labourers.[90] While some were fortunate to be granted citizenship by either country, many had no nationality. Adding to the woes, in 1982, the Government of India informed the Government of Sri Lanka that it considered previous agreements concerning those people were no longer binding because the implementation period of those agreements had expired.[91] It must also be noted that the entire success story took place in the backdrop of the persistent LTTE problem which involved Tamil separatist conflict.[92]

An even more impressive breakthrough subsequently took place in Nepal where, as a welcome by-product of the peace process, a remarkable 2.6 million previously stateless individuals were issued with citizenship certificates in just four months in early 2007.[93] Similarly, the Russian Federation simplified naturalization procedures with fee exemption enabling former citizens of the Soviet Union who were stateless to acquire citizenship if they resided permanently on Russian territory on July 1, 2002. By the time the procedure was discontinued in 2009, more than 600,000 people had received Russian citizenship.[94]

---

87 *See generally* Bernard Tilakaratna, 'The Problem of Statelessness in Sri Lanka', Sri Lanka Country Paper presentation, Third Informal Regional Consultation on Refugee and Migratory Movements, New Delhi, Nov. 14 – 15, 1996, (visited Mar. 31, 2009), *at* http://eminentpersonsgroup.org.

88 *Stateless Tamils' Long Struggle Bears Fruit*, Tamilnet, Oct. 7, 2003, (last visited Jul. 5, 2013), *at* http://www.tamilnet.com/art.html?catid=79&artid=10064.

89 *See* IPU & UNHCR, *supra* note 4, at 46 – 47.

90 P. Krishnaswamy, *Sigh of Relief for the Stateless*, Sunday Observer, Jun. 29, 2003, (visited Jul. 5, 2013), *at* http://www.sundayobserver.lk/2003/06/29/new15.html.

91 *See* IPU & UNHCR, *supra* note 4, at 46.

92 *See generally* V.S. Sambandan, *Sri Lanka's Troubled East*, Frontline, Nov. 7, 2003, at 53 – 56.

93 UNHCR, *The Excluded*, 147(3) Refugees 7 (2007).

94 *See* UNHCR, *The State of the World's Refugees: In Search of Solidarity*, at 17 (2012).

India could have taken a cue from other countries' benevolence and arrangements in devising ways to confer citizenship to huge number of people through a simplified procedure. More importantly, at this juncture, it may be recalled that like India, neither Sri Lanka nor Nepal is a party to either the refugee or the statelessness convention. Even Russian Federation is not a party to the stateless conventions. But the actions of those States are consistent with the letter and spirit of the conventions. Such state practices herald high respect for the international law. In contrast, India's efforts are rather pitiful. Besides, the Chakma experience of handling applications as stated earlier, the statistics regarding acquiring citizenship either by registration or naturalization is very discouraging. In a year about 1000 persons get citizenship by registration including the cases of marriage to the Indian spouses while about 20 to 30 persons are granted citizenship by naturalization.[95] Even with all noble intentions, at this pace of progress, it will take ages to grant citizenship to the desirables.

Finally, the interplay between birth registration systems and statelessness is hard to understate.[96] Every year an estimated 40 million births go unregistered worldwide.[97] It is likely to impact the refugee children significantly. Therefore, utmost care should be taken to register the births of the refugee children through combined effort of Government, NGOs and UN organizations, in an accessible and simplified manner, e.g. awareness campaigns, greater publicity, mobile registration centres. Cambodia is an excellent example at hand where the Government in conjunction with local communities and NGOs succeeded in enhancing the birth registration rate from 5% to 91% of Cambodia's population between 2000 and 2005.[98]

V. CONCLUSION

It is often argued that human rights are universal and inalienable; indivisible; interdependent and interrelated.[99] The indivisibility thesis was affirmed in the Vienna Declaration 1993.[100] Therefore, even if India is not a party to the refugee or statelessness instruments, it is still bound by international human rights law commitments. The language of Art. 22(1) of the CRC is significant in this regard. However, acceding to 1961 Statelessness Convention would be desirable.

---

[95] *See* Saha, *supra* note 67.

[96] CRC, art. 7, ¶ 1. The child shall be registered immediately after birth[…].

[97] UNICEF, *UNICEF on Deficient Birth Registration in Developing Countries*, 24 Population & Dev. Rev. 659, 662 (1998).

[98] *See generally* Paxton, *supra* note 20, at 629.

[99] *What are Human Rights?* OCHCR, (visited Jan. 16, 2013), *at* http://www.o hchr.org/en/issues/Pages/WhatareHumanRights.aspx (Accessed on 05 July 2013).

[100] Vienna Declaration and Programme of Action, U.N. GAOR, World Conf. on Hum. Rts., 48th Sess., 22d plen. mtg., part I, ¶ 5, U.N. Doc. A/CONF.157/24 (1993).

Couple of judgments of the higher courts of India endorses their concern for those defenceless persons against arbitrary state practice. Yet the higher judiciary is expected to demonstrate more activism and embark on enunciating important legal principles on statelessness similar to that of the Inter-American Court of Human Rights reminding the State about its obligations towards such a vulnerable group. It is disturbing to note that the Governments have not even taken the Supreme Court directions seriously. In fact, the *NHRC* judgment could have gone a long way in devising methods for granting citizenship to the genuine claimants. *Namgyal Dolkar* judgment may be considered momentous in safeguarding the most vulnerable group – the refugee children. Hence, implementation of such judgments holds the key.

While the NHRC's role in *Chakma* case and its efforts in the realm of refugee rights are commendable, yet they are on an ad hoc basis without being consistent. It is required to approach the Supreme Court reminding the Court of non-implementation of the Court's own judgment. It's a fact that the problem of statelessness of the refugees has received scant attention in the mainstream human rights or refugee law discourse in India. Legal scholars, media, the NHRC, NGOs and advocacy groups are urged to amplify the awareness regarding the issue among policy makers in the country.

Embracing international human rights law and excluding a large population from enjoying the benefits of citizenship is a high-minded rhetoric which sounds hypocritical. And this hypocrisy may be resolved by amending the restrictive citizenship law regime. Its desirable giving preponderance to *jus soli* over *jus sanguinis* clause in the law as it would save thousands of refugees from being rendered stateless. Utmost attention shall be given to birth registration of the refugee children. It is a paradoxical proposition for India to be a part of ExCom endorsing policies for the welfare of the refugees worldwide and amending its own domestic laws to their detriment. Indian legal regime must exclude refugees without necessary travel documents from being considered as 'illegal migrant' which in turn will help those stateless refugees. There is an enormous scope for arbitrariness among the authorities under the foreigners' law regime which frowns at every migrant as an illegal one; such an administrative process is a great hindrance to a stateless refugee in representing his case. In this respect, we may adopt good practices of other countries to ensure better results.

Finally, India is required to enact a refugee law at the national level and also play a pivotal role in adopting a regional instrument at the South Asian level, which are long standing demands and they should include the issue of their statelessness into their fold. Sooner it happens; tyrannical practices which eventually lead to their statelessness would come to an end.

ACCESS AND BENEFIT SHARING OF INDIGENOUS PEOPLES FROM THE CONVENTION ON BIOLOGICAL DIVERSITY TO THE NAGOYA PROTOCOL

—Rahul Tanwani & Malcolm Katrak[*]

Abstract The Convention on Biological Diversity is the most important convention on the sustainable use of Biological Diversity, which also deals with the fair and equitable sharing of benefits and access to resources and traditional knowledge. The indigenous people, being the majority holders of this traditional knowledge and resources have also been given rights under the Convention on Biological Diversity and its guidelines and protocols. The indigenous people have put itself to the peril of the Convention to make an internationally accepted law on the aspects of sustainable use, access and benefit sharing. The indigenous people have long been crippled and their economic rights being taken away from them. This in turn leads to biopiracy which has far reaching consequences on the rights of the indigenous people. This article deals with the rights of self determination of the Indigenous peoples along with their right to proper benefits arising from the utilization of their resources. It also deals with the consequences of the Convention on Biological Diversity and the Nagoya Protocol on the Rights of the Indigenous peoples. The recognition of the indigenous peoples' rights and the betterment of the access and benefit sharing system with regard to benefits which are 'prompt', 'adequate' and 'effective' to indigenous people. The article mainly goes on to enumerate the laws laid down for the system of access and benefit sharing and the implications of these laws on a practical ground. The enhancement of these laws is necessary and

[*] Fifth and second year of BLS/LLB.

obtainment of an individual law on the access and benefit sharing system thereby making it on par with the other two objectives of the Convention on Biological Diversity.

I. INTRODUCTION

Development had emerged in the biological sector with the growth of commercial sector and with this, it was essential to safeguard the biological resources with the development of a global international law. To protect and preserve the biological diversity, The Convention on Biological Diversity (CBD) was adopted 22nd May 1992, and on 29th December 1993 the Convention on Biological Diversity entered into force. Having 193 contracting parties makes it a universally accepted international agreement. Access and Benefit Sharing is one of the main objectives of this Convention on the Biological Diversity enshrined under Article 1 of this Convention. Access and Benefit Sharing refers to the questions arising in the context of (a) access of genetic resources (b) the fair and equitable sharing of benefits arising from the utilization of these resources and equitable sharing of benefits arising from the utilization of the relevant traditional Knowledge.[1] Traditional Knowledge and the components of Biological Diversity are not only monetarily beneficial but also are the starting points for research activities and hence preservation and protection of these resources as well as their traditional knowledge have been given utmost importance. The protectors of these resources are the indigenous people who have not only retained their distinct characteristic but also protected these precious components and traditional knowledge associated thereto. Indigenous people have a population of more than 370 million living in 70 different countries.[2] The Convention on Biological Diversity being the first global legal instrument has not only taken the biological aspect into consideration but also the socio-economic aspect, thereby including several provisions relating to the indigenous people. The Convention on Biological Diversity has been the balance between the provider country and the user country. Article 15 of the Convention on Biological Diversity tries to balance the interests of the users of genetic resources, who want to have continued access to those resources, with the interests of the providers of such resources, who want to receive an equitable share of the benefits that may be derived from the use of such resources. In effect, with the entry into force of the Convention on Biological Diversity, there was a paradigm shift, as the conservation

---

1 Perrez, F.X. (2009) 'The protection of indigenous peoples traditional knowledge through an international regime on access and benefit-sharing', *'University of Bern',* http://www.iew.unibe.ch/unibe/rechtswissenschaft/dwr/iew/content/e3911/e4043/e6182/poschung_anna_ger.pdf (Accessed on 22nd October 2013).

2 UNIPP (2009), United Nations Indigenous peoples partnership (UNIPP), Adopted On 20th July 2009, http://www.ohchr.org/EN/Issues/IPeoples/Pages/UNIPPartnership.aspx (Accessed on October 13, 2013).

community moved from considering genetic resources as a common heritage to recognizing the sovereign rights of States to those resources and to regulating their use.[3]However the number of issues which are dealt with by the Convention on Biological Diversity are from the general point of view and hence the national pointers have not been well defined within the provisions. The language creates a double standard between the Indigenous and Local communities (ILC) Rights and those of the state parties by using words and texts as "*in accordance with the National Legislation*", "*as appropriate*", "*as applicable*" whenever it is dealt with the rights of indigenous and local communities.[4] The issues of growing importance as to the rights of indigenous people on the aspect of Access and Benefit sharing have not been dealt with in a simplified manner. The tangible participatory mechanisms to facilitate full and effective participation of these communities have not been taken into consideration. Access legislation and complementary laws to regulate the use of traditional knowledge, innovations and practices of indigenous communities have to consider the human rights of these communities.[5] The aspects of sovereignty over natural resources of developing countries are being taken into account. The Convention on Biological Diversity is silent about the Patents and the Intellectual Property Rights (IPR) of the indigenous people. The question that is of paramount importance is whether the indigenous people are regarded as forerunners or are they considered as a mere third party amidst the provisions of the Convention on Biological Diversity.

II. CONVENTION ON BIOLOGICAL DIVERSITY, THE BONN GUIDELINES WITH REGARDS TO THE INDIGENOUS PEOPLE

There is no specific definition of indigenous people which has been globally accepted, instead, the nearest definition is enshrined in the Convention No. 169 of the International Labour Organization[6] that applies to:

---

[3] Greiber, T., Moreno, S., Åhrén, M., Carrasco, J., Kamau, E., Medaglia, J., Julia, M., Perron-Welch, O., Perron-Welch, F., Ali, N. and Williams, C. (2012) 'An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing', *'IUCN Environmental Law'* 83.

[4] Native Women of Quebec (2010) *'Joint Statement of North American Indigenous Organizations on the Nagoya ABS Protocol of the Convention on Biological Diversity', at* http://www.faq-qnw.org/ol d/documents/pressrelease-14dec.pdf (Accessed on Oct. 26, 2013).

[5] BIOTRADE Initiative TED, DITC, UNCTAD (2000), 'UNCTAD BIOTRADE: Some considerations on Access, Benefit Sharing and Traditional Knowledge',*'UNCTAD',* http://www.biotrade.org/ResourcesPublications/Some%20considerations%20on%20ABS%20and%20TK.pdf (Accessed on 26th October 2013).

[6] ILO Convention No.: 169 (1989), Convention Concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27th June 1989, Geneva, http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm (Accessed on 26th October 2013).

> *"(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;*
>
> *(b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions."*[7]

The best way of identifying the indigenous people is to take into consideration the criterion of self determination which has been underlined in number of human rights documents, such as the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, United Nations Charter and eloquently highlighted by the International Court of Justice in case of Kosovo[8] and by the International Community in the case of South Sudan. The aspect of self determination has certain core values, rights, including non-discrimination, protection of cultural integrity, rights over lands and natural resources, social welfare for economic well-being, and self-government.[9] These aspects were realized by the Convention on Biological Diversity however to a limited use, Article 8(j) and Article 15(1) of the Convention provided the sovereignty over natural resources under the Convention on Biological Diversity which was subject to national legislation which provided the Advantage of Access and Benefit Sharing in the hands of the particular national governments and the Convention on Biological Diversity was unable to provide with a particular law in regard to the volatile relationship of the indigenous people with their respective national governments. The provisions under Article 15 which is considered to be the essence of the Convention lays down the terms *'Prior Informed Consent'* and *'Mutually Agreed terms'* which were essential to be taken from the holders of Traditional Knowledge and Resource holders. Comparatively Article 8(j) of the Convention which reads as follows:

---

7 Article 1, ILO Convention No.: 169 (1989), Convention Concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27th June 1989, Geneva, http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm (Accessed on 26th October 2013).

8 Cirkovic, E. (2010) 'An analysis of the ICJ Advisory Opinion on Kosovo's Unilateral Declaration of Independence, *'German Law Journal'* (11).

9 Anaya, S.J. *'Indigenous Peoples in International Law'* 2nd Edition. [Oxford University Press, 2004].

> *'Each contracting party shall, as far as possible and as appropriate:*
>
> *Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of benefits arising from the utilization of such resources.'*[10]

However, it has no such terms mentioned in it. Article 8(j) which relates to the application of the Access and Benefit sharing of the Traditional Knowledge is silent about the *'Prior Informed Consent'* and *'Mutually Agreed Terms'* and hence it is inferred that Article 8 does not require the Prior Informed Consent of the indigenous people for the use of Traditional Knowledge. To clarify this point the *Bonn Guidelines on access to genetic resources and the fair and equitable sharing of the benefits arising from their utilization* were adopted in 2002.[11] These guidelines were legally not binding. The Bonn Guidelines aimed at assisting parties, governments and other stakeholders in developing legislative, administrative or policy measures or in negotiating contractual arrangements under mutually agreed terms on access and benefit-sharing. These guidelines also focused on the aspect of prior informed consent.[12] The guidelines proved fruitful on the aspect of prior informed consent and the mutually agreed terms as it laid down the proper guidance and necessary requirements but the guidelines do not take into account the basis of Indigenous and Local Communities Rights as the guidelines are silent on the role Indigenous and Local Communities and the stakeholders.[13] The guidelines are particularly silent about the rights of the same Indigenous Communities located in different parts. Though the guidelines provide for necessary requirements and has

---

[10] Article 8(j) United Nations Conference on Environment and Development: Convention On Biological Diversity (1992), Entered into force on 29th December 1993, http://www.cbd.int/doc/legal/cbd-en.pdf (Accessed on 22nd October, 2013).

[11] CBD-COP 6, Convention on Biological Diversity- Conference of Parties, Access and benefit-sharing as related to genetic resources, 2002, http://www.cbd.int/doc/decisions/cop-06/full/cop-06-dec-en.pdf (Accessed on 23rd October 2013).

[12] Paragraph 24-40' Bonn Guidelines' (2002) Secretariat of the Convention on Biological Diversity. Bonn Guidelines on Access to genetic resources and fair and equitable sharing of benefits arising out of their utilization. 6th Meeting, U.N. Doc. UNEP/CBD/6/24, *at* http://www.cbd.int/d oc/publications/cbd-bonn-gdls-en.pdf (Accessed on Oct. 19, 2013),

[13] Dross., Wolff, M. and Wolff, F. (2005) New Elements of the International Regime on Access and Benefit- Sharing of Genetic Resources - the Role of Certificates of Origin, Germany, http://www.bfn.eu/fileadmin/ABS/documents/BfN_Skript_127.pdf (Accessed on 20th October 2013).

aimed at removing the difficulties and better reviewing of the provisions of the Convention on Biological Diversity, it lacks to give a full view point and answer to all the questions and removing the ambiguity on the Access and Benefit sharing system. As it is limited in providing a complete scope and answer to all questions, thereby not removing the ambiguity on the access and benefit sharing system. In consequence to this, the developing countries and the like minded mega diverse groups joined hands and pushed for the protocol on the access and benefit sharing.[14]

III. THE SOUTH- AFRICAN SAN PEOPLE AND THE MEDICINAL HOODIA PLANT

Access and Benefit Sharing system after the Convention on Biological Resources had a lot of complexities. Though it seemed a viable option on paper, the practical application was indeed a different story, the ground reality and working painted a different picture. The regulation was limited in its scope and not up to the mark to deal with the ground working, as difficulties arose during the actual exercise of the access and benefit sharing system. This can be seen in the case of Hoodia plant, a succulent plant indigenous to Southern Africa and long used to stave off hunger and thirst by the indigenous San people, the oldest human inhabitants in Africa.[15] The San people settled in the southern African region some 150,000 years ago. The San currently number about 100,000 and live in the Kalahari region of South Africa, Botswana and Namibia. The Hoodia plant having medicinal quality was a means for attracting the government institutions and the pharmaceutical companies for its commercial exploitation. The medicinal qualities of the Hoodia plant were first brought in front of the Council for Scientific and Industrial Research (CSIR) which is the largest research organization in Africa. The CSIR has a broad mandate for research and development in South Africa. Unknown to the San community the CSIR had started its research on the Hoodia plant and obtained significant results for the same. In 1995, the CSIR obtained the main ingredient P57 which was the reason for suppressing the appetite, without the prior informed consent of the San Community.[16]

After obtaining P57, CSIR, licensed it to a British Biotech Company, Phytopharm. Phytopharm in turn sub-licensed it to Pfizer, the American Biotech Company. The San people later got to know about the entire process. CSIR along with Phytopharm were criticized for not taking the prior

---

[14] ICTSD, *Megadiverse Countries Call for Legally Binding ABS Regime*, (2005), '*Bridges Trade BioRes'* (5), http://ictsd.org/i/news/biores/63359/(Accessed on 23rd October 2013).

[15] White, A., Sloane, B.L. (1937) '*The Stapelieae'*, Haselton.

[16] Wynberg, R., and Chennells, R., (2008) *'Green Diamonds of the South: A Review of the San-Hoodia Case',* In: Wynberg, R., and Chennells, R. (2008) *'Indigenous peoples consent and benefit sharing. Learning from San-Hoodia Case,* Springer: Berlin, at pp. 127-141.

permission of the San community and also for not providing them with the benefits of the Hoodia plant. The Hoodia plant case made the 100,000 San people join hands and form the San Hoodia Benefit Sharing Trust. The main objective of this particular trust was to maintain and use the Hoodia funds for the betterment and development of the San population. The trust was composed of three representatives appointed by the San Council, a CSIR representative, a non-voting observer from the South African Department of Science and Technology, three representatives appointed by the Working Group for Indigenous Minorities in Southern Africa (WIMSA), a member of WIMSA, and a professional appointed by the San Council. The immediate objective which was entrusted on the trust was to make buildings and educate the San population. However with this change of events, in 2003, the American Company Pfizer pulled out as the sub-licensee.

A number of lapses were seen in the exercise of the Access and Benefit sharing system with regard to the use of Hoodia plant by CSIR without the prior permission of the San people. The Hoodia plant which is an economically beneficial plant and has various other medicinal qualities and which can be commercially exploited, the rewards given to the San community in relation to that was less. Above all, the question still remains that on what terms the mutual agreement has been decided upon. The patent obtained by CSIR of the Hoodia plant which was without the permission of the San people is still in the hands of the CSIR. The organization or the council which has been formed does not have any legitimacy. Moreover the entire knowledge of Hoodia plant has reached the San people in Botswana, Namibia and other African places which pose a severe threat on the Benefit Sharing Agreement.

The policies and minimum regulations have not been imposed by the Convention on Biological Diversity; the regulation is according to the national legislation which may lead to a severe mishap in the near future and an unaccountable loss to biodiversity. The unity obtained by the San people against the pharmaceutical giants was a particular instance but the indigenous people who cannot obtain such unity have been ravaged of their resources and traditional knowledge without the proper benefits provided to these indigenous people.

It is essential to recognize the urgent need to develop, respect and promote the traditional rights of the indigenous people. The CBD and the relevant laws and guidelines should take into consideration Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR) that includes, "*measures to ensure the effective participation of members of minority communities in decisions which affect them*." At *Conference of Parties*

(COP-8)[17] the indigenous peoples' opening statement explained the entire interpretation and an urgent want for clarification were needed.

> *With regards to sovereignty over genetic resources, we continue to be concerned that states are misinterpreting their rights over natural resources. State sovereignty does not amount to absolute political or legal freedom. Sovereignty of states is limited by the Charter of the United Nations and by International Human Rights Law and standards. Within the national and international context, state sovereignty and ownership over resources is not exclusive because indigenous people retain rights to our territories and the lands and waters that we have traditionally used and occupied. (emphasis added)*

The industries as well as the research institutes have a lack of understanding regarding their obligations under the Convention on Biological Diversity or do not respect certain provisions of the Convention and with the need of every country to grow and develop, they do not take adequate measures in this regard. For example, the Netherlands and USA biotechnology company, Genencor International, have been in discussions with the Kenyan government about claims that it developed enzymes from samples collected in the 1990s from alkaline lakes, which were subsequently licensed to Proctor and Gamble and used in Tide laundry detergent. This case was brought to public attention after a feature in Genencor's 2000 annual report suggested that the lakes served as a source of a useful enzyme—a powerful image in an annual report, perhaps, but bound to raise concerns on the part of provider countries.[18]

IV. THE WORKING GROUP ON ARTICLE 8(J) OF THE CONVENTION ON BIOLOGICAL DIVERSITY AND THE WORKING GROUP ON ACCESS AND BENEFIT SHARING

A. Working group on Article 8(j)

The existence of the Convention on Biological Resources as an internationally recognized law made it essential to come up with the alternatives

---

[17] COP-8, Conference of Parties to the Convention on Biological Diversity. (2006) Eighth ordinary meeting of the Conference of Parties to the Convention on Biological Diversity, Brazil, http://www.cbd.int/decisions/cop/?m=cop-08 (Accessed on 23rd October 2013).

[18] Mbaria, J. (2004) ' KWS Wants Millions for 'Extreme Bugs': Proctor and Gamble Used the Organisms in its Detergents', *'The East African'* August 23-29 2004.

and enhancement of certain provisions of the Convention on Biological Resources and hence the *Working Group on Article 8(j)* (WG 8J) was established in 1998 by the fourth Conference of parties meeting in order to provide the conference of parties with advice relating to the implementation of Article 8(j) of the Convention. The working group on Article 8(j) is considered as a boon to the Indigenous and Local communities as one of the main objectives of this group is to facilitate *"full and effective participation of indigenous and local communities in all stages of the identification and implementation of the elements of the programme of work."* The Working Group consisted of parties and observers, including, in particular, representatives of indigenous people. The working group has been in the forefront and is currently working for the benefit of indigenous people to make them the forerunner and also to provide them with the necessary recognition on the international platform with regard to the biological aspect. The inclusion of a legally non-binding *'Akwé: Kon Guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place or which are likely to impact on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities'*[19] was due to the exhilarating effort of the Working Group of Article 8(j).

B. Working group on Access and Benefit sharing

The *Working group on Access and Benefit sharing* (WG ABS) was established in the fifth Conference of parties in May 2000 with an objective to establish guidelines on the access and benefit sharing system. Its fundamental goal was to *"develop guidelines and other approaches for submission to the Conference of the Parties and to assist parties and stakeholders in addressing the following elements as relevant to access to genetic resources and benefit-sharing, inter alia: terms for prior informed consent and mutually agreed terms; roles, responsibilities and participation of stakeholders; relevant aspects relating to in situ and ex situ conservation and sustainable use; mechanisms for benefit-sharing, for example through technology transfer and joint research and development; and means to ensure the respect, preservation and maintenance of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity, taking into account, inter alia, work by the World Intellectual Property Organization on intellectual property rights issues."* It was due to the specific work of

[19] Akwé: Kon Guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place or which are likely to impact on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities, in Article 8(j) and related provisions (2004) (CBD Decision VII/16F), http://www.cbd.int/doc/decisions/cop-07/full/cop-07-dec-en.pdf (Accessed on 23rd October 2013).

the Working group on access and benefit sharing that the formation of *'Bonn Guidelines on access to genetic resources and the fair and equitable sharing of the benefits arising from their utilization took place, a legally non-binding document.'* was possible.

V. THE NAGOYA PROTOCOL ON ACCESS AND BENEFIT SHARING

The adoption of the Convention on Biological Diversity opened up new dimensions in the Biotechnology aspect and also the protection of the Biological Diversity however certain provisions were lacking which made the basic structure of the Convention brittle. Even after the Bonn guidelines coming into picture, for clarification on certain grave aspects such as Mutually Agreed Terms and Prior Informed Consent there were ambiguities which were of a severe nature.

To curb these and to create a change in this paradigm, the *Nagoya Protocol on Access and Benefit Sharing* was created. The Nagoya Protocol is a legally binding, supplementary agreement to the Convention on Biological Diversity. The Nagoya Protocol aims to further develop the framework and provisions of the Convention on Biological Diversity. The Nagoya Protocol has 27 Preambulatory clauses, Operative clauses comprising of 36 articles, and 1 annexure containing a non-exhaustive list of monetary and non-monetary benefits. It establishes a framework for regulating how users of genetic resources and/or traditional knowledge associated with obtainment of genetic resources can deal upon the benefit sharing terms. The issue of Access and Benefit Sharing is one of the important clauses of the Nagoya Protocol. Article 6(1) reiterates the sovereign rights of States over their natural resources. It clarifies once more that access to genetic resources is subject to Prior Informed Consent granted by the provider country, unless otherwise determined. Article 6(2) aims at regulating the access to genetic resources, however it is pertinent to note that this provision applies to those situations where Indigenous and Local Communities have established their rights over genetic resources. Thus saving the abovementioned situation, it does not seek to address any other situation.

Article 3 includes the scope of this protocol which reads as follows:—

> *"This Protocol shall apply to genetic resources within the scope of Article 15 of the Convention and to the benefits arising from the utilization of such resources. This Protocol shall also apply to traditional knowledge associated with genetic resources within the scope of the*

Convention and to the benefits arising from the utilization of such knowledge."[20]

This article specifies the relation and importance of the benefit sharing and also the scope of Article 15 of the Convention on Biological Diversity; however it fails to remove the ambiguity of Article 15 of the Convention. The first sentence limits the Nagoya Protocol on the genetic resources aspect mentioned in the Article 15 of the Convention on Biological Diversity.

The content of Article 5 makes it by far the most important provision of the Nagoya Protocol. It states that, the benefits arising out of the utilization of traditional knowledge and resources shall have to be shared in a fair and equitable manner with the country providing the particular resources. Article 5(2) recognizes the rights of the Indigenous and Local Communities and a forward step was taken as compared to the Convention on Biological Diversity by stating that the mutually agreed terms with the Indigenous and Local Communities and the use of these resources and knowledge will be according to the *'domestic legislation'* as compared to the *'national legislation'* in the Convention on biological diversity.

To strive for a better access and benefit sharing system, the Nagoya protocol urges the parties to take legislative, administrative and policy measures to safeguard the rights of the Indigenous and Local Communities and also to strive for the betterment of these communities. However the Nagoya Protocol is unable to define the concept of fair and equitable sharing of benefits in Article 5. The Protocol has taken into account and inferred Paragraph 45 of the Bonn guidelines on Access and Benefit sharing that the definition of fair and equitable sharing would be in the particular circumstances however it was essential that after the formulation of the Convention and the Bonn Guidelines on Access and Benefit Sharing in 1992 and 2002 respectively, that the Nagoya Protocol gave a perfect internationally accepted definition in this matter. Article 5(2) in the respect of Indigenous and Local Communities Rights has recognized the right of these communities however it has not provided the force which was needed after the recognition of these rights in the Bonn guidelines as well. Article 5(2) falls flat and has not been descriptive as compared to Article 5(1) of the Nagoya Protocol. The Convention on Biological Diversity/=-merely speculated the permission and prior informed consent of the Indigenous communities. However the Nagoya Protocol has taken the inherit rights of the Indigenous Peoples as mentioned in the *United Nations Declaration on the Rights of*

[20] 'Nagoya Protocol' (2011) Nagoya protocol on Access to genetic resources and the fair and equitable sharing of benefits arising from their utilization to the Convention on Biological diversity, opened for signature 2nd February 2011, *available at,* http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf (Accessed on 20th October 2013).

Indigenous People (UNDRIP) including in relation to their land territory, natural resources and traditional knowledge.[21] The question, however, arises whether in this context the reference to "in accordance with domestic legislation" suggests a focus on the facilitative role of the State in implementing rights of Indigenous and Local Communities Rights over genetic resources rather than on its determination of these rights.[22]

Article 5(5) of the Nagoya Protocol reads as follows:—

> *"Each Party shall take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge. Such sharing shall be upon mutually agreed terms."*

Article 5(5) deals with the States obligation to ensure that the benefits arising from the utilization of the genetic resources and traditional knowledge should be construed with mutually agreed terms with the Indigenous and Local communities. Nagoya protocol as compared to the Convention on Biological Diversity has a broader aspect in relation to recognizing Indigenous and Local Communities rights and taking further steps to provide for a betterment in that aspect alone but the Nagoya protocol lacks the temporal scope and thereby limits itself and cannot apply to cases of access and benefit sharing which was prior to its formulation.

Article 6(2) of the Nagoya protocol deals with the Prior informed consent of the indigenous and local communities where the communities have the established rights and control over these resources. This provision was absent in the Convention on Biological Diversity. Article 6 is the linkage and a broader aspect of Article 15 of the Convention on Biological Diversity. The rights provided in the Nagoya protocol are on the basis of domestic legislation and not national legislation. Domestic legislation in general sense would imply that each party can take its own steps and policies and also that each party can take certain measures depending on their own laws (i.e. domestic laws).[23] The Nagoya protocol by introduc-

---

[21] 'UNDRIP' (2007), United Nations Declaration on Rights of Indigenous peoples, adopted 13th September 2007. http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (Accessed on 21st October 2013).

[22] Buck, M. and Hamilton, C. (2011) 'The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity', *'Review of European Community & International Environmental Law'* (20).

[23] 'UNIPP' (2009), United Nations Indigenous peoples partnership (UNIPP), Adopted On 20th July 2009, http://www.ohchr.org/EN/Issues/IPeoples/Pages/UNIPPartnership.aspx

ing the domestic legislation regarded and gave the top priority to the self determination aspect of the Indigenous and Local Communities. The legislation includes the community protocols, customary laws, procedures etc.

> *"A bio-cultural community protocol (BCP) is a protocol that is developed after a community undertakes a consultative process to outline their core ecological, cultural, and spiritual values and customary laws relating to their traditional knowledge and resources, based on which they provide clear terms and conditions to regulate access to their knowledge and natural resources. The process of developing a BCP involves reflection about the interconnectedness of various aspects of ILCs' ways of life (such as between culture, customary laws, practices relating to natural resources management, and traditional knowledge) and may involve resource mapping, evaluating governance systems, and reviewing community development plans. It also involves legal empowerment so that community members can better understand the international and national legal regimes that regulate various aspects of their lives, such as those linked to access and benefit-sharing (ABS). Within the ABS framework, for example, a community may want to evaluate what the community's research priorities are, on what terms it would engage with potential commercial and non-commercial researchers wanting access to their traditional knowledge, what the procedures relating to prior informed consent (PIC) must be, and what types of benefits the community may want to secure."*[24]

The mere application of domestic legislation may be with regard to a trans-boundary dispute of the same local communities thereby making the situation worse than a single governed law on access and benefit sharing system.

Though the Nagoya Protocol takes into account the necessity to build up trans-boundary cooperation but it still has its limitations. The utility or preservation of a particular resource and/or traditional knowledge may have been possibly done by two or more indigenous and local communities and hence the implementation of the benefit sharing agreement becomes rather crippled. A cooperation necessity being formulated in this protocol

---

(Accessed on 26th October 2013.

[24] Bavikatte. K. and Jonas. H. (2009) 'BIO-CULTURAL COMMUNITY PROTOCOLS:A Community Approach to Ensuring the Integrity of Environmental Law and Policy', '*United Nations Environment Programme'*,http://www.unep.org/communityprotocols/PDF/communityprotocols.pdf (Accessed on 19th October 2013).

is a futile exercise as there have been no explicit maintained or governed guidelines provided on this. There is a need for the cultivation of regulatory mechanisms and a mere provision with regards to the promotion affects the parties itself.

The objective of fair and equitable sharing of benefits is in possible ways treated as the orphan child compared to the other two objectives. The Convention on biological diversity and its guidelines and protocols have always aimed at getting this objective on equal footing and to achieve this there has been the formulation of the Bonn guidelines and the Nagoya protocol.[25] The Nagoya protocol has brought a lot of changes as compared to the Convention on Biological Diversity, the change of the national legislation to domestic legislation, recognizing of the Indigenous and local communities rights, getting the trans-boundary picture into consideration and formulating ways and necessitates the formulation of a national focal point. It also provides for the necessary monetary and non-monetary measures for facilitation on the access and benefit sharing system. Even though the Nagoya protocol goes on to reaffirm the sovereign rights of states over their resources and certain other provisions of the Convention on Biological Diversity, it fails to deliver a concrete platform on the access and benefit sharing system especially for the indigenous and local communities. It is indeed sad that a blueprint mechanism of the access and benefit sharing agreement has not been provided till date. Two years have passed since the formation of the Convention on the Biological Diversity and ambiguity in the understanding the terms still remains. There has been a default in defining the terms such as fair and equitable sharing, which on defining would provide a greater clarity as to the scope and ambit. The Nagoya Protocol was envisioned to be the platform for removing the vagueness and making the access and benefit sharing system the backbone of the Convention on Biological Diversity. After the United Nations Declaration on Indigenous Peoples in 2007 it was essential that their rights be recognized which was done by the Nagoya Protocol however not entirely. The trans-boundary cooperation movement is just a starting point in a particular direction and has not been entirely defined or completed. The cultivated ideas have been expanded after the Convention of 1992 however the access and benefit sharing system which has been proliferated in recent years has not been given its due importance in the subsequent Nagoya Protocol and hence is still considered as the orphan child as compared to the other objectives.

---

[25] 'UNIPP' (2009), United Nations Indigenous peoples partnership (UNIPP), Adopted On 20th July 2009, http://www.ohchr.org/EN/Issues/IPeoples/Pages/UNIPPartnership.aspx (Accessed on 26th October 2013).

VI. THE ESSENTIALITY OF LAWS RELATING TO HUMAN RIGHTS AND OTHER INTERNATIONALLY RECOGNIZED LAWS FOR THE IMPLEMENTATION AND PROGRESS OF ACCESS AND BENEFIT SHARING LAWS WITH REGARDS TO THE INDIGENOUS AND LOCAL COMMUNITIES

Indigenous peoples' rights form a category of separate protection in international human rights law. The two main instruments for the protection of the rights of indigenous peoples are the legally binding International Labour Organization Convention 169 concerning the rights of Indigenous and Local Communities and the legally nonbinding United Nations Declaration on Indigenous Peoples. They both take into account the collective nature of indigenous peoples' cultures and enunciate individual as well as collective rights. The most important objective of the International Labour Organization Convention 169 is to protect and preserve the identity of Indigenous people, recognize their rights to their traditionally occupied territory,[26] the right to exercise control over their economic,[27] social and cultural development and the right to retain their own customs and traditions.[28]ILO Convention 169 though formed on a large scale has not provided the impetus on the particular objectives this can be seen through a very poor number of ratifications by the parties thereby making it a mere paper agreement.

On the other hand, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has been a savior of the Indigenous Communities rights. The UNDRIP being a legally non-binding agreement has achieved an enormous amount of recognition. The basis for the recognition of Indigenous and Local communities rights in the Nagoya Protocol can be traced to the UNDRIP. The UNDRIP includes the right of Indigenous and local communities to freely determine their political status and freely pursue their economic, social and cultural development,[29] the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous

---

[26] Article 1, ILO Convention No.: 169 (1989), Convention Concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27th June 1989.

[27] Article 7, ILO Convention No.: 169 (1989), Convention Concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27th June 1989.

[28] Article 1, ILO Convention No.: 169 (1989), Convention Concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27th June 1989.

[29] Article 3, UNDRIP (2007), United Nations Declaration on Rights of Indigenous peoples, adopted 13th September 2007.

functions[30] and the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.[31] The UNDRIP together achieves the aspect of self-determination of these communities. The ramification include that the UNDRIP is a legally non-binding agreement and yet has not created a stir in the International Community. The UNDRIP maintains the respect of International laws with regard to the Intellectual property scenario but fails to give any particular view on the same.

The International laws relating to the rights of Indigenous and Local Communities are still not equipped as compared to the general human rights laws which may include among others the *Universal Declaration of Human Rights* (UDHR) and *International Covenant on Civil and Political Rights* (ICCPR).

VII. CONCLUSION

> "*I guess you could say that we indigenous peoples are on the verge of turning it all upside down*."
>
> —Pauline Tangiora
>
> *Maori Elder, Indigenous Rights, Nuclear Disarmament Movement*

Indigenous peoples being in the forefront on the biological aspect are the people who control the biodiversity. Indigenous people have been made mere third parties to the conventions and guidelines laid down. The use of traditional knowledge and resources was free of cost before an international regime on this particular aspect was brought into picture; however the international regime bringing new concepts was backlogged from the starting point of its implementation. After the Rio declaration of 1992 the rights and aspect on sustainable development grew enormously and with a Convention on Biological Diversity specifically being made for the biological diversity, the Indigenous peoples and the user provider countries had to be the forerunners, however major flaws had been seen and the gaps in certain provisions lead to the decay in implementation of the Convention on Biological Diversity. Although the Convention on Biological Diversity sets out a framework for benefit-sharing of genetic resources, and although it recognizes some of the rights of indigenous and local communities, the fact remains that the Convention on Biological Diversity was not designed

[30] Article 4, UNDRIP (2007), United Nations Declaration on Rights of Indigenous peoples, adopted 13th September 2007.

[31] Article 5, UNDRIP (2007), United Nations Declaration on Rights of Indigenous peoples, adopted 13th September 2007.

to be a forum for the elaboration of rights of indigenous peoples. The formation of the process of self determination of Indigenous peoples and to achieve the same the Convention on Biological Diversity was the forum, but this did not happen. Eventually the Indigenous peoples' group formation and pressurizing the International community was one of the reasons for the formation of the Bonn Guidelines on Access and Benefit Sharing. These guidelines were legally non-binding and it did achieve to remove the ambiguity of certain words and a process on the entire access and benefit sharing was laid down, but the minimum view on the process of this system with the aspect of Indigenous peoples was absent. Indigenous peoples are significantly concerned about the rapid pace at which the Convention on Biological Diversity's proposed international regime on Access and Benefit Sharing (ABS) is developing.

The formation of the Nagoya Protocol was probably the most important legally binding agreement on the International Level taken into account the access and benefit sharing view. The recognition of the Indigenous peoples rights on the Biological Diversity aspect was first taken into consideration by the Nagoya Protocol however certain negative points had also to be taken into account which was not touched upon in this Protocol.

The world is developing at a fast pace and soon the Biological market will be the top priority for every country in the world. The protectors have done their job and now it's our turn to give something in return. The possible ways to move forward on the access and benefit sharing aspect is to strengthen the system.

To curb ambiguities and lack of procedural laws on access and benefit sharing of Indigenous peoples the *Indigenous Peoples Council on Biocolonolism* (IPCB) was organized to assist Indigenous peoples in the protection of their genetic resources, Indigenous knowledge, and cultural and human rights from the negative effects of biotechnology. The IPCB strives to empower Indigenous peoples with educational information, including primers, resource guides, briefing papers and documentary films, to strengthen their own voices locally, nationally and globally to protect their rights in their genetic material, Indigenous knowledge, and cultural property.

There should be more informed decision making and above all an independent law in this matter. Even after ratifying the protocols and Conventions by the parties the broader aspect has to be taken into consideration. Indigenous peoples' community should also have a proactive unity in this matter with the help of their particular national government. A blueprint of the entire process of access and benefit sharing has to be made and the essential words have to be clearly defined.

A vision and an overall goal should be set down.

The legislation on the Indigenous peoples right and the access and benefit sharing system should be based on the Measures to ensure compliance with prior informed consent of indigenous and local communities holding traditional knowledge associated with genetic resources in accordance with Article 8(j) of the Convention on Biological Diversity, Disclosure of origin/source/legal provenance of genetic resources and associated traditional knowledge in applications for intellectual property rights, Recognition and protection of the rights of indigenous and local communities over their traditional knowledge associated to genetic resources subject to the national legislation of the countries where these communities are located, Customary law and traditional cultural practices of indigenous and local communities, Code of ethics/code of conduct/models of prior informed consent or other instruments in order to ensure fair and equitable sharing of benefits with indigenous and local communities.

The lands and resources which we think are all similar and should be only used to satisfy our own needs are the birthplace of Gods for the Indigenous people. We blindly go on conquering lands and taking these resources for our own commercial needs without thinking of the future consequences not only on the Indigenous peoples but also on the process of Intergenerational Equity.

> *"We know our lands have now become more valuable. The white people think we do not know their value but we know that land is everlasting. The few goods we receive for it are soon worn out and gone."*
>
> —Canasatego
>
> *Leader of the Onondaga nation and spokesman of the Iroquois*

INCOME TAX ACT 1961 AND DIRECT TAX CODE BILL 2010: BROADENING THE TAX EXEMPTION BASE PROVIDED TO THE AGRICULTURAL SECTOR

—*Shivam Bhardwaj*[*]

Abstract The Indian Agricultural sector post-independence has been exempted from taxation. The idea for such exemption emanates from the historic over taxation on the agricultural produce but the placement of agricultural sector in an umbrella tax exemption bracket has led to years of inadequate revenue generation from the aforementioned sector which is at complete loggerheads with the Taxation Policy so adopted by the Indian government. The massive influx of corporate giants in the traditionally humble agricultural domain has opened the sector to immense profits and has provided the landowners with a safe and stable output which ought to be taxed. While the judiciary has aided in toning down the absolute terminology used by the Income Tax Act 1961 by adopting a forward approach and labeling new inventions and capital gains in the agricultural sector as worthy of being taxed, the Direct Tax Code Bill 2010, that aims to replace the statutory enactment, has adopted a regressive approach on the agricultural domain and has further widened the exemption base existing in the sector. Thus there is not only a complete neglect shown by the legislative limb of the nation but the executives too have been incapable of providing a platform for prompt follow-up and thus the central as well as the state governments have been unable to collect tax revenue from the rich landowners. This paper thus pitches to create a regime for land based levy rooted in the productivity of the crop which shall be payable to the state

[*] 3rd year B.A.LLB. (Hons.) West Bengal National University of Juridical Sciences.

governments thence solving the dearth of revenue available with the government for developmental purposes.

I. INTRODUCTION: TAXING REGIME IN THE INDIAN AGRICULTURAL SECTOR, AN UNTAPPED REVENUE SOLUTION

Agriculture has often been pitched as the hardest to tax of all the hard-to-tax sectors,[1] this being a universal concern, owing to the *small scale* and *spatial spread* of the activity. The exogenous shock to which the sector is often exposed makes its taxation even more contentious.[2] In the Indian context, where agriculture accounts for a sizable share in the Gross Development Product (GDP),[3] an under-taxation of the agriculture sector leads to insufficiency of public revenues in the very region or sector where it is chronically required. Statutory recognition to such an exemption in the Indian legal regime has a historic base which has primarily shaped the contemporary understanding of the sector, even when the state exchequer stands to gain potential revenue to the tune of 50,000 crores,[4] miniscule efforts are being taken by the state instrumentalities to remedy the situation. Exemptions create incentives to underreport taxable incomes which ultimately undermine the revenue collection from genuinely taxable sources.

On the need for an effective taxation policy on agriculture there has been an overwhelming agreement among economists, the uniform approval has been close on the heels of the pressure emanating from the governmental expenditure and the corresponding need to generate additional revenues. The present paper aims to stir up the debate surrounding the need for agricultural taxation in India, the paper argues for a more comprehensive taxation policy at a pan India level which shall include a *progressive* taxation regime for agriculture, additionally the paper pitches for keeping the exemption base provided to agricultural dwellers to as low as possible so that the revenue so generated can be utilized for in-sector development of the rural primary activities.

---

1 The three hard-to-tax sectors are conventionally taken to be small business, services and agriculture as cited by Richard M. Bird, *Income Tax Reform in Developing Countries: The Administrative Dimension*, Bulletin for International Fiscal Documentation 37:1, 3-4 (1983).

2 Indira Rajaraman, *Taxing Agriculture In A Developing Country: A Possible Approach*,245-275 (1st ed., 2005).

3 12.3% of gross domestic product (GDP) in 2009-10, as cited in D.P. Sengupta, R. Kavita Rao, *Direct Taxes Code and Taxation of Agricultural Income*, 47 EPW 15, 51 (2012).

4 About 1.2% of GDP or about 9% of the GDP of agriculture, *see* Appendix at p. 59 cited by Sengupta, Rao, *Id*.

The first part of the paper brings to the fore the contemporary advancements in the agricultural sector and analysis whether they have altered the traditional understanding of the sector as a marginal production unit marred by the unequal distribution of land across the nation. The second part of the paper expounds the contemporary legislative enactments and the judicial interpretations of the same, whether the judiciary and legislative enactments have taken a progressive view and even with a forward understanding has the state government been able to tap the revenue from agricultural sector. The third part of the paper elaborates upon the provisions under the yet to be tabled, Direct Tax Code Bill '10 (DTC) dealing with agricultural taxation, analyzing thus the efficiency of such provisions in achieving the goals of the Indian taxing regime which are aimed at *horizontal equity* that involves transferring of private savings to public investments. The fourth part of the paper suggests a simple norm based land levy which shall be under the domain of respective state governments. The design, so elaborated upon, will be rooted in the *potential* earnings of the cultivable land. Finally the fifth part of the paper shall conclude the debate by stressing upon the need for a proactive role of the union and the state governments in the afore-stated sector which will limit the instances of under taxation of the sector.

II. CHANGING STRUCTURE OF THE INDIAN AGRICULTURE: ADJUSTING TO THE MARKET STIMULUS

The debate on agricultural taxation in the Indian scenario is not new and has been making rounds ever since the nation got independence, in the early 1950's the field was considered in detail by the Taxation Enquiry Commission,[5] the commission though was unable to recommend any *radical* alteration in the land revenue system. No exemptions were made for small farmers and neither was gradual surcharge levied on big agriculturists, thence negating the possibility of a taxing regime based on *reasonable* classification. The traditional understanding of agriculture has severely been attenuated since the sector now boasts of players who do not fall squarely in the domain of small farmers struggling to meet the minimum food security levels of India.[6] The conventional target of agricultural sector, in India, was primarily to produce *food grains* for self-consumption and exchange. What has evolved over a period of more than five decades is a mammoth change in the composition of the crops being sown and the organizations functional in the sector. A marked change in the sources of livelihood for agricultural dwellers has emanated from a robust increase in the mechanization process

---

[5] Ministry of Finance, Government of India, *Report of the Taxation Enquiry Commission* Vol. III, (New Delhi, India, 1953-54), 181-330.

[6] *See* Supra note 3.

of the sector. It is interesting to note that although the total cropped area has increased from 185 to 195 million hectares post the liberalized era of 1990-91, even then the share of food grains has remained static around 122 to 125 million hectares.[7] The trend is indicative of the fact that there has been a gradual increase in the area earmarked for non-food grain crops, which may include the likes of cash crops, fiber-yielding crops, horticulture and floriculture produce. The noted incline towards non-food grain production hinges on the significant high rate of returns as compared to the returns made for food grain cultivation.[8]

The figures presented in the preceding text corroborates the stance that agriculture has been diversified to a great extent and the concerned functionaries are responding to the market demand in a well-informed fashion.

A. Corporate Presence: Dismantling The Traditional Hierarchy Of The Sector

The organizational hierarchy in agricultural sector has been usurped by the presence of *corporate* sector in varied activities. There has been a sharp hike in the number of corporations/companies who have been reporting agricultural gains from direct or indirect involvement in the sector.[9] Numerically the numbers are not significant but the incomes being generated by the aforementioned corporations cannot be ignored. It is important to note that the companies being mentioned do not deal solely with agricultural produce; it is often the case that the agricultural produce being cultivated is consumed by the corporation itself thence underscoring the level of taxable income.

Equally intriguing is the interaction of agriculture with corporate officials in the form of *contract farming*. The initiative, which shall be elucidated in the subsequent few paragraphs, has led to reduction in price uncertainties, if not completely *stabilizing* the prices. The two essential components of the niche field being, technological assistance thereby increasing the production capabilities and providing a fall back option to the farmers in case of unexpected change of events. The uncertainty has been regulated by either pre-deciding the price of sale or by providing ready markets to the agricultural dwellers. The PepsiCo initiative in assisting the

---

[7] Computed from Handbook of Statistics on Indian Economy 2011, Tables 19 and 24 at p. 52, *See* supra note 3.

[8] Sushil Kumar, *Higher Yields and Profits from New Crop Rotations Permitting Integration of Mediculture with Agriculture in the Indo-Gangetic Plains*80 Current Science 4,563-66 (2001). *See also* Surabhi Mittal, *Can Horticulture Be a Success Story for India?*. ICRIER Working Paper No 197 (2007).

[9] Directorate of Marketing & Inspection (DMI), *Private Sector Companies involved in Contract Farming in India* (accessed on Feb. 22, 2013),*at* http://agmarknet.nic.in/ConFarm.htm.

potato producing farmers from strong fluctuations in the local market has helped them cope up with negative externalities.[10] Tata Group with its company Rallis India has provided useful insights in marketing of the goods, all these gumptions have, arguably, been beneficial for the farmers thereby enlarging the returns several folds without exposing the dwellers to significant risks which were traditionally associated with agriculture.

B. Unequal Landholdings And Access To Technology: Still A Major Concern In The Indian Agricultural Regime

Having discussed the increasing presence of corporate entities in the agricultural sector, it is crucial to consider the underlying logic behind the argument being raised here. The researcher suggests a progressive taxation regime where the rich *agriculturists* are to be taxed because of the factors discussed in the preceding few paragraphs while the small farmers who till date depend upon the *conventional* modes of cultivation should be wholly exempted. The idea emerges from the principle that people in equal income positions are to be treated equally, independent of their sources of income.[11] The inequality is apparent in not only the sphere of accessibility to technology but also the availability of net *cultivable* land; some regions like Punjab & Haryana are at environ-geographical advantage while the states like West Bengal face a dearth of land capable of producing agricultural output. The inefficiency in certain states is also the direct result of the cautious refrain from defining who precisely constitutes the small or midsized farmer.[12] The regressive nature of Indian taxation as inherited by the British system of tax application is unexceptionally present in the sphere of agricultural taxation; with no major land re-allocation on the cards in the near future a minimal development for the farmers at the far end of the agricultural hierarchy can be safely forecasted.[13] The objectives of developmental process which includes the element of *inclusive growth* stands defeated if an umbrella taxation policy is devised to tax all without identifying glaring differences in the placement of individuals in the societal positioning. Thence when the distribution of land is unequal, the forces of taxation so proposed shall run counter to one of the major social goals of development unless a significant degree of *progression* is introduced in the taxation of agriculture. The author has presented a viable model for agricultural taxation, based on previous research, for the Indian economy in the latter part of the paper.

---

[10] RomitaDatta, *Problems of Plenty for West Bengal's Potato Farmers*, Live Mint (Kolkata, 25 March 2010), *at* http://www.livemint.com/Politics/zKj1tqkosN9SCUlrTgvPAO/Problems-of-plenty-for-West-Bengal8 217s-potato-farmers.html. (Accessed on Feb. 22, 2013).

[11] Bichard A Musgrave, *The Theory of Public Finance*, 173 (1st ed., 1959).

[12] K.N. Raj*, Direct Taxation of Agriculture,* (1973) Centre for Development Studies Ulloor, Trivandrum Working Paper No. 12/1973, *at* http://www.esocialsciences.org/Download/repecDownl &AId=2802&fref=repec. (Accessed on Feb. 22, 2013).

[13] *Id*.

III. CONTEMPORARY LAWS REGULATING TAXATION OF THE AGRICULTURAL SECTOR IN INDIA, ITS JUDICIAL INTERPRETATION AND THE FOLLOW UP BY THE STATE GOVERNMENTS: AN APPARENT PARADOX

A. Definition Of Agricultural Income And The Exemption Granted Thereof

Article 246 (3) read in harmony with Entry 46 in List II of the seventh schedule enables the state instrumentalities to make laws governing the ambit of agricultural taxation. While the centre or the Union is wholly excluded from making laws in the aforestated arena owing to the provisions laid down in Article 246 read with Entry 82 of the Union List of the seventh schedule.[14] To make things further more lucid, an exemption has been granted to Agricultural Income, defined in section 2 (1)(A) of the Income Tax Act 1961 (ITA'61), under section 10 (1) of the ITA'61.[15] In the case of *CIT* v. *Benoy Kumar Sahas Roy*[16] the essentials of agricultural income were discussed where the stress was laid on the basic operations like tilling the land, sowing, planting and the like, subsequent actions which includes weeding, digging, preserving et al do not by itself constitute agricultural operations.[17]

(a) Amendments: Altering The Tax Base Of Agricultural Income

1970 Amendment: By the Taxation Laws (Amendment) (TLA) Act, 1970, the pre-condition related to the categorization of agricultural income on the basis of assessment to the land revenue was dropped. It was duly noted in the case of *Anand Bala Bhushan* v. *CIT*[18] that in the recent times the agricultural operations have been extended to the *Terai* or the cantonment regions which are not assessed to land revenue, but the income arising out of such operations cannot be excluded out of the ambit of Agricultural Income.

---

[14] Dr. Justice A.R. Lakshmanan, D.D. Basu, *Shorter Constitution of India*, 1683 (14th ed. 2009).

[15] The constitutional validity of the same has been upheld in the case of *Singhai Rakesh Kumar* v. *Union of India,* (2001) 1 SCC 364: (2001) 247 ITR 150/115 Taxman 101 (SC).

[16] AIR 1957 SC 768: (1957) 32 ITR 466 (SC).

[17] Gist of selected Judgments of Supreme Court/High Courts (1922- March 2005), s. 2(1A), *Agricultural Income*, (accessed Feb. 22, 2013), *at* http://law.incometaxindia.gov.in/dittaxmann/incometaxacts/2005itact/casesec2(1A).htm.

[18] (1996) 217 ITR 144 (All).

The Amendment also brought a momentous alteration in accessing the incomes generated from the use of *farmhouses*, while the assessment to land revenue was eliminated in case of cultivable land, the same was considered a *prerequisite* for forwarding the exemption from taxation to the income generated from farmhouses. Though there were exemptions made for the farmhouses situated outside the urban centers, thence exempting the income derived out of it irrespective of the fact that the said piece of land was not accessed to land revenue.[19]

Another liberalist mutation was brought in the definition of the term *capital assets*, by the 1970 amending act it was made adequately clear that the agricultural land in *any urban area* shall be considered as capital asset hence any gain arising out of the transfer of such agricultural land was brought within the purview of capital gains taxation.[20]

1973 Amendment: The Committee on Taxation of Agricultural Wealth and Income (*Raj Committee*) suggested aggregation of the agricultural and non-agricultural components of a taxpayer's income and the tax to be levied on the non-agricultural half as if it was placed in the top table. It was further made explicit that the said integration should be carried out exclusively in the cases where a taxpayer has taxable non-agricultural income which exceeds the minimum exemption limit laid down for making the tax applicable. The Finance Act 1973 gave its accent to the recommendations and adopted the same, although the validity has been challenged in a number of judicial decisions, including the likes of *K.J. Joseph* v. *ITO*[21] where the Kerala High Court decided that the said classification is *reasonable* and based on the *intelligible differentia* also in *K.V. Abdulla* v. *ITO.*[22], the Karnataka High Court in essence followed the same reasoning as followed in the Kerala High Court case.[23]

1989 Amendment: Although the Amending Act of 1970 made explicit the intention of the legislature to tax the capital gains arising out of the exchange of capital assets, there were certain conflicting decisions being passed by a number of High Courts all across the country. To remedy the situation an explanation was inserted by the Finance Act, 1989 to clarify the position related to revenue which would exclude any income arising from

[19] *Rural Area* is defined as any area which is outside the jurisdiction of any municipality or cantonment board having a population of not less than 10,000 persons and also beyond the notified distance outside the limits of any such municipality or cantonment board.

[20] Area comprised within the jurisdiction of a municipality or a cantonment board (having a population of not less than 10,000) or in any area outside the limits of any municipality or any cantonment board (having a population of not less than 10,000) up to a maximum distance of eight k.m. from such limits as notified by the central government.

[21] (1980) 121 ITR 178 (Ker).

[22] (1986) 161 ITR 589 (Kant).

[23] The Karnataka High Court held that making the burden of tax on the net income heavier in proportion to the increase in the agricultural income cannot be said to be unreasonable.

the transfer of such land, in the process narrowing down the exemption base of agricultural taxation.[24]

2000 Amendment: It is interesting to note here that the parliament, in order to widen the scope of agricultural taxation, brought in an explanation in the Finance Act and categorically stated that inclusion of any income derived out of a building owned and/or occupied by the cultivator shall be made only if the building is being used for *agricultural* purposes. Needless to say that gains stemming out of any other undertaking shall not be entitled to the exemption provided to agricultural incomes.

(b) Scheme Of The Amendments: Narrowing The Base Of Exemption So Provided To The Agricultural Income

After a detailed analysis of the amendments that have been brought forth by the legislature, it can be inferred that the base of agricultural taxation was gradually increasing. If one considers the changes like disentitling farmhouses in urban areas from any exemption, including capital gains as taxable part of the income or integration of agricultural and non-agricultural parts of the total income earned by an individual, a progressive trajectory can be drawn in the way judiciary and the legislature have together tried to curb the instances of under taxation at least in the contemporary scenario.

This apparent forward approach when contrasted with the way in which some emerging scientific technological activities are governed presents an ambiguity. With the emergence of certain activities which are identical to the activities which traditionally would have been classified as manufacturing operations, certain tensions have cropped up between the tax department and the entities, where the former has tried denying the exemption to the involved parties. The conflict has been described in the subsequent paragraphs.

B. Changes In Composition Of The Sector: Controversies Arising Due To An Unclear Approach Of The Legislature And The Judiciary

The treatment of *nurseries and pot cultivation*[25] by the judiciary has been allied with the affirmative taxation ideology wherein the court has taken the view that since in the aforementioned conditions the involved party is primarily concerned with procurement and sale of plants and saplings rather than tiling, sowing and planting the exemption should not be made available

[24] *Singhai Rakesh Kumar* v. *Union of India*, (2001) 1 SCC 364: (2001) 247 ITR 150, the Supreme Court again upholding the validity of the aforementioned amendment in the case.

[25] *Jugal Kishore Arora* v. *CIT*, (2004) 269 ITR 133 (All).

to the income so generated in the process. While an amendment was added to the Finance Act, 2008 which made all incomes arising out of sale of saplings or seedlings grown in nursery as agricultural incomes. The judiciary, though again, adopted a pro-taxation approach in a case involving *tissue culture*[26] where it was laid that when a taxpayer is in business of growing and exporting ornamental plants by means of tissue culture which is not carried out on land, no exemption can be granted by claiming the income so derived as agricultural gains.

Further the treatment of *seed companies* employing sophisticated methods to generate and propagate seeds has been perplexing. Mumbai Tribunal in the important case of *Mosanto* held that income from such activities was entitled to the exemption provided to agricultural income while the Delhi Tribunal in another case of *Pioneer Overseas and Proagro Seeds* held the same to be non-agricultural in nature.[27] What is interesting to note here is that the judiciary has denied the exemption privileges to the taxpayers involved in *contract farming*[28] because, according to the court, the basic functions of agriculture[29] are not carried out by the assessee company, rather only inputs and scientific advice is given by the company to the farmer employed by it to produce crops or seeds of a *certain* standard.

(a) Forward Approach By The Legislature And The Judiciary Yet A Downward Trend In Agricultural Tax Collection By The State: An Analysis Of The Paradox

What emanates from the discussion in the preceding few paragraphs is a clear paradox, where although the legislation initially stipulated a broad taxation base entitling almost all incomes so generated by indulging into agricultural activities for an exemption,[30] the subsequent amendments have tried to limit the effect to the activities which *primarily* deal with agricultural activities and not the *secondary* activities which are only *remotely* related to the sector. The 1970, 1989 and 2000 amendments have been instrumental in altering the initial standing of the Indian taxation regime yet the *ambiguity* arises when in spite of a legislation in place and a catena of case studies, showing that a particular field can be taxed, the concerned state governments ignore its duty to levy taxes.

---

[26] *Invitro International* v. *CIT*, [2011 TIOL 445 ITAT Bang].

[27] *Monsanto India* v. *CIT*, [2011 TIOL 169 ITAT Mum], *Proagro Seeds Company Ltd.* v. *CIT*, [2003 TIOL 50 ITAT Del], *Pioneer Overseas Corpn.* v. *Director of Income Tax*, [2010 TIOL 54 ITAT Del].

[28] *CIT* v. *Namdhari Seeds (P) Ltd.*, [Manu/KA/1614/2011].

[29] Which includes the likes of planting, tiling, sowing as discussed in the case of *CIT* v. *Benoy Kumar Sahas Roy*, See *Supra* note 3.

[30] The fact in particular can be corroborated by laying emphasis on sec. 10 (1) of the ITA'61.

Although taxation of agricultural income is placed in the State list, yet only a handful of states have tried to venture into the territory. Even when the tax is placed it is mostly on plantation crops. The Indian state of Assam has a comprehensive levy mechanism yet the revenue it generates is mostly out of tea cultivation leaving the rest of the agricultural sector immune. It has been empirically observed that none of the states have been able to mobilize even 0.5% of their gross state domestic product (GSDP) from taxing the agricultural produce. *In nominal terms, the revenue collections of the states have varied between Rs 8 crores for Karnataka and West Bengal and Rs. 78 crores in the case of Assam for the year 2009-10.*[31]

Thence there exists clear gap between the follow up of the legislations so passed by the competent authority which results in under-taxation of the agricultural sector, while as apparent from the judicial decisions, contemporary advances in the field of agricultural produce and the amendments so passed, the sector is eligible for heavier taxation.[32]

IV. THE DIRECT TAX CODE BILL: PROPOSED CHANGES FOR AGRICULTURAL TAXATION AND ITS IMPLICATIONS ON THE CURRENT REVENUE GENERATION TREND OF THE INDIAN TAXATION REGIME

Agricultural Income shall continue to be exempted under the Direct Tax Code Bill, 2010. Section 10 read with Entry in Sl. No. 1 of the Sixth Schedule in the Direct Tax Code Bill, 2010(DTC), makes clear the intention of the legislature in this regard. Rationale behind the exemption is the assignment of the taxing powers under the Constitution to the State, thence giving no scope for this code to address the issue.[33]Direct Tax Code Bill makes certain that the expansion base be broadened to the effect that the income from Urban Agricultural land also would fall squarely under the ambit of Clause (12) of Section 284 of the Code. The new provision wholly negates the exclusionary clauses as mentioned in the Income Tax Act, 1961 which exempted the *urban agricultural land*, unless it was assessed to land revenue in India. As has been noted in the previous parts of the paper, the courts have been skeptical in giving a *wider* meaning to the term *agricultural income* and the same has been restricted in a material manner by the

---

[31] *See* Supra note 3, 55.

[32] Raj Krishna, *Intersectoral Equity and Agricultural Taxation in India* (1972) 31/33 (7) EPW, 1589,1591-1593, 1595-1599 *at* http://www.jstor.org/stable/4361667. (Accessed on Feb. 22, 2013).

[33] Nirmal Ghorawat, *Tag Archives: Taxation of Agricultural Income under DTC* (2 November, 2009), *at* http://canirmalg.wordpress.com/tag/taxation-of-agricultural-income-under-dtc/. (Accessed on Feb. 22, 2013).

judiciary. While the proposed code could have been used in a manner to incorporate the leeway given by judiciary in a statue but as seen by a bare skeletal analysis of the provisions, the same has not been done.

A. Alterations In The Componential Part Of The Agricultural Income: Widening The Ambit Of Exemption

The definition of agricultural income includes, primarily, three components, namely, rent from agricultural land, income derived from such land by agricultural operations and income obtained by farmhouses. Shifting our analysis to rent derived from agricultural land, the current statute limits the scope of exemption to the produce which has been obtained by employing an ordinary process adopted by a cultivator, and furthermore the sale of the produce should not be subject to any process other than necessary for making the output *fit* to be carried to the market. Following such statutory dictates the court has been very selective in offering any exemption to modern day agricultural activities.[34] The provisions under Direct Tax Code Bill are at complete loggerheads with the current legislation since it states, "any profits and gains derived from cultivation of agricultural land" shall be entitled to the exemption. The second component which deals with income derived from agricultural operations has also been made wider by the proposed bill which gives specific exemption to the income being derived from saplings or seedlings in a nursery, as seen in the preceding part of the paper, the judiciary, following the restrictive phraseology of the contemporary statutes, has put the income from such operations out of the ambit of any exemption.[35]

Putting the focus to the third component of agricultural income it can be seen that where the Finance Act, 2000 explicitly excluded the tax exemption to any income derived from *farmhouses* for any purposes other than the direct agricultural undertaking, such a precise explanation finds no place in the proposed Code, putting a glaring loophole out in the open which can be abused by the taxpayers, resulting in evasion from taxation on the income which are being earned by unrelated operations, having a remote or negligible nexus with agriculture per se.

---

[34] Which includes the areas like hybrid seeds, where the market is immense and the scope of profits large.

[35] *See* Supra note 27.

B. Provisions In The Direct Tax Code Bill For Taxing The Agriculture Produce: An Inadvertent Clash With The Ideals Of Indian Taxation Policy

As is clear from the discussion, in the few paragraphs above, Direct Tax Code Bill has expanded the base of exemption so provided to the agricultural incomes in the Indian scenario for all practical purposes, making the agricultural sector a "non taxpaying" entity. The taxation policy in India has focused on a broader base of taxable income so as to generate a given amount of revenue[36] but in the case of agriculture, what stands to be compromised is the *overall productivity of the tax system,*[37] which emphasizes on horizontal equity whereby similar incomes in similar grades are accessed at an equal footing. In particular the Indian tax policy has been a principal instrument for transferring private savings to public consumption and investment,[38] but the provisions related to agricultural taxation in the Direct Tax Code Bill stands to inhibit the pace of development by providing opportunities for concentration of income with opulent agricultural dwellers. The evolution of tax policy in the restrained Indian scenario has necessitated steeply progressive tax structure in both direct and indirect taxes which brings back the debate to *vertical equity* wherein, if the difference between the tax-income ratios of different income-brackets reflects the socially desired degree of progression, it becomes immaterial whether the taxpayers in each bracket are farmers, workers, technicians or entrepreneurs.[39]

The Tax Reforms Committee (TRC)[40] while recommending a structural reform process outlined the necessity to broaden the tax base and to undertake measures to make the administration and enforcement of the tax system more effective. In principle, thus, the small or marginal farmers being exempted the major burden of taxation ought to be borne by rich famers who have been the major beneficiaries of *green revolution*. Direct Tax Code Bill by ignoring the intended progressive element of the Indian taxation regime goes contrary to a comprehensive taxation policy on a pan India level which gives due prominence to a broader tax base, uniformity and equity while taxing the income earned by the *targeted* tax payers.

---

[36] M. Govinda Rao & R. Kavita Rao, *Trends and Issues in Tax Policy and Reform in India*, India Policy Forum, Global Economy and Development Program, The Brookings Institution 2(1), 55-122 (2005).

[37] Indira Rajaraman, *Fiscal Developments and Outlook in India*, National Institute of Public Finance and Policy Working Paper No. 15 (2004).

[38] Amaresh Bagchi & Nicholas Stern, *Tax Policy And Planning In Developing Countries*, (1st ed. 1994).

[39] *See* Supra note 33, 1589.

[40] Richard M. Bird, *Interim Report of the Tax Reforms Committee by Raja J. Chelliah*, 28 EPW 50, 2723 (1993).

V. A LAND BASED LEVY ROOTED IN THE PRODUCTIVITY OF THE CROP, PAYABLE AT THE STATE LEVEL: AN EFFICIENT TAX MODEL FOR INDIAN AGRICULTURE

The basic ideology behind the insistence for an agricultural tax is to ensure within-sector retention of resources raised from agriculture for infrastructure development and productivity enhancement.[41] Having proved the fact empirically that there is a clear link between growth and poverty reduction,[42] there should be no case for any compliance resistance to agricultural taxation. There is a *mainstream consensus* in the elaborate literature on the necessity of approaching taxation of agriculture through a *presumptive norm based* levy on land in *proportion* to the potential output.[43]

A norm based presumptive approach to taxation involves assessment of *taxability* independent of self-declaration. Identification of objectively measurable indicators specific to an economic activity is the first step towards levying a norm based presumptive tax, for agriculture the indicators will include land sown, using which not only will the taxability be established but also the taxable income generated per unit of the chosen indicators be fixed. The second step includes establishing a robust survey based norm linking taxable income to the *observed* indicators. Justifiability for presumptive approach comes from the fact that the whole of income corresponding to incremental effort above the norm accrues to the agent,[44] in case of agriculture the essential productive asset, land, being fixed and unequally distributed a fair tax rooted in potential returns to land leads to both efficiency and equity. Further a levy evidently related to the income stream generation is by default related to the ability to pay.[45]

---

41 D.M. Newbery, *TheRole of Public Enterprises in the National Economy*, Cambridge Working Papers in Economics 9209/1992 (1992).

42 Gaurav Datt & Martin Ravallion, *Macroeconomic Crisis and Poverty Monitoring: A Case Study for India*, Policy Research Working Paper, World Bank 1685/1996 (1996).

43 Ahmad, Ehtisham, and Nicholas Stern, *Effective Taxes and Tax Reform in India*, Discussion Paper, Development Economics Research Centre, University of Warwick 25/1991 (1983).

44 Efraim Sadka & Vito Tanzi, *A Tax on the Gross Assets of Enterprises as a Form of Presumptive Taxation,* Bulletin for International Fiscal Documentation 47.2, 66-73 (1993).

45 *See* K.J. Davey, *Land taxation in the New Millennium*,(Cambridge, MA: Lincoln Institute of Land Policy 1999), who advances that as a reason for the rise in income and transaction taxes as sources of revenue in the OECD world.

A. Design For The Proposed Model: A Simple Norm Based Tax Emanating From The Stability In The Sector

A land based levy has, indispensably, to be crop specific. Moreover there needs to be *stability* in the yield being observed, this stability cannot be reasonably expected at very low levels of the observed yield and neither at very high levels. If there is no stability over any range of the observed cross sectional yield then that crop is not liable to a norm based tax. The said stability will only come into operation if there is a reasonable conformity between targeted and observed yield. The stability so observed will necessarily lead to surplus which shall be the major portion to be taxed by the state. For accessing this taxable surplus the state instrumentality can conduct region-specific field surveys, the cross sectional data so collected can then be used to identify a threshold which defines the lower limit of the stable cost-revenue domain which in turn can then serve as a catastrophe exemption yield, which would be the cutoff point below which the cultivator shall be exempted to pay any tax. As has been amply stated, this paper explains a feasible design for a simple norm-based crop-specific tax on agricultural land leviable at *local* level. The paper, in so far as the authoritative position of the state is concerned for taxing agriculture, concurs with the contemporary and the proposed legislative enactments. The major advantage of vesting rights of levy with local government is flexibility which becomes an implicit part of the tax regime since the local sentiments are taken into consideration.

The levy being recommended here is allied with the *potential* income stream that shall be generated, which is more acceptable than a property tax which is wholly unrelated to the income being earned. As has been discussed in the preceding paragraph, the assessing of this potential income shall vary according to the crops, taxing being selectively confined to those crops for which returns lie above the specified floor. The specified floor emanates from the taxable surplus parameter which links the levy rate per hectare to income being generated; the same can be deciphered from either field surveys or by using the secondary sources on cost of cultivation averaged by area. The said approach is progressive in nature since the flat levy per acre shall vary across crops in accordance with the returns to the land. Finally it is obvious that a land tax exempts landless agricultural workers from its ambit, since the agricultural land is the core asset, unequal distribution of which has led to inequality in rural India, a taxing regime which is based on the area sown to high-returns crops can definitely not be labeled as regressive. The only information required in the regime being mentioned here is the list of cultivators who are producing above the *anchor* yield. As

a natural corollary the information about the producers not in the aforestated bracket also becomes important.[46]

(a) Potential Income And Future Income: Two Distinct Concepts

The *potential* income should not be confused with *future* income since the potential level of productivity is being considered only to differentiate the crops having higher returns from the ones which will fall below the level of anchored yield. Such classification shall be helpful to then levy taxes on the crops which fall in the former category and to exempt the latter variety. The amount of tax being collected would be in conformity with the level of yield but shall not be graded to yield levels above the anchor yield and hence it shall be a simple single-rate structure. The concept is thus *ex-post* and is not based on unintelligible presumptions.

VI. SUMMING UP: PITCHING FOR A PROACTIVE ROLE OF THE STATE GOVERNMENTS TO PREVENT UNDER-TAXATION OF THE AGRICULTURAL GAINS

To sum up the discussion it can logically be stated that a pro-active role on the part of the state governments is mandatory, where in the state-level reforms would require a consensus on some agreed norms on taxation or entering into a tax rental arrangement with the union government, whereby the union will collect taxes and the proportional benefit will accrue on each state government. Moreover the union should make it explicit that the right not to levy a tax on the agricultural dwellers at the state level shall be accompanied with the responsibility to bear the cost of the resultant shortfall so experienced by the exchequer.[47] It is extremely important to spill out the clear exclusion of secondary activities related only marginally to agriculture but are highly remunerative in nature, the example being production of genetically modified seeds, tissue culture, miscellaneous renting of farmhouses et al.

The design so suggested draws a road map that can be employed to achieve a standardized mechanism of taxation, inclusive of an inbuilt exemption criterion, of agricultural produce. Direct Tax Code Bill has only made things murkier by using vague terminology, as shown in the third part of the paper, which has widened the exemption base.[48] Thence not only is there a need to restructure the provisions related to agricultural taxation in the Direct Tax Code Bill, on account of it being regressive, but also a sagacious approach by the state government, in realizing the importance of

[46] *See* Supra note 2, 269.
[47] *See* Supra note 3, 59.
[48] *See* part 3.1 of the paper.

progressive taxation of agricultural sector to ensure productivity in the primary sector of the economy is essential to prevent the cases of under taxation which are rampant in the agricultural domain.

The long run result of efficient taxation of agricultural produce shall be instrumental in commercialization of agriculture which in turn would help the sector to gain a competitive edge by responding to the prices and other market forces quickly. The tax would have an indirect effect of increasing the labour capacity functional in the sector since the farmers then would be able to improve upon the technology being utilized.[49] Thence in the broader perspective taxation in agricultural sector is not only possible, required and efficient but is mandatory given the revenue requirement of the government and the investments that are yet to be made in the field of public welfare and development.

[49] Mona Chawhan, *A Study of Agricultural Taxation of India,* International Research Journal 1/2010, 50 *at* http://www.ssmrae.com/admin/imag es/359a03ac01640c81bcbc8358a9f39c4e.pdf? (Accessed on 13 July 2013).

"CORPORATE SOCIAL RESPONSIBILITY" IN THE NEW COMPANIES ACT: A CRITICAL ANALYSIS

—*Sidharth Kaushik & Stuti Bhatnagar*[*]

Abstract *The aspect of Corporate Social Responsibility has assumed an undisputed importance after its incorporation into the new Companies Act 2013. Though the practice had been undertaken voluntarily by different companies and firms since time immemorial, the practice has now been made mandatory for all the companies. This has attracted backlash and harsh criticism from corporate front but is being greeted with applause from myriad nonprofit organizations and various other NGO's. It is integral to understand that corporate social responsibility does not have an independent existence. There are multiple threads attached to its viability. Section 135 of the Companies Act 2013 lays down something much more than mere guidelines to be followed mandatorily by the corporations. Through the course of this essay we shall attempt to elucidate the concept of mandatory corporate social responsibility that has been introduced by the legislature and will discuss its repercussions and advantages. We shall investigate the provision in its entirety and evaluate how beneficial and fruitful it can turn out for the Indian economy. This paper will present an overview of the corporate social responsibility regime in India. After the enactment of the Companies Act 2013, there is hope that this activity will be taken seriously by the giant corporations for the betterment of the corporate social structure of the country.*

[*] 3rd year B.A.LLB. (Hons.) West Bengal National University of Juridical Sciences.

Keywords: Corporate Social Responsibility, The new Companies Act 2013, Indian Economy, Philanthropy based model, Stakeholder participation

I. INTRODUCTION

Social welfare and wellbeing of others have always held a pronounced position in the history of India, a land where people venerate those lords and kings who had bequeathed their material possessions for the welfare of people; where homage is paid to those scriptures that advice to part with one's possessions for enrichment of life of others. Such extreme beliefs may not seem pragmatic in today's era of scams, but the core belief of welfare and social wellbeing is still present in different forms. The green signal given by the new Companies Act 2013 which has mandated compulsory expenditure by the corporate and business houses on Corporate Social Responsibility (*hereinafter*, CSR) is one such form based on similar principles. Corporate Social Responsibility (CSR), as the beyond business initiatives of companies have come to be globally known, is a complex evolving subject.[1] CSR does not entail any rigid definition but it can be described as the continuous commitment by corporations towards the economic and social development of communities in which they operate.[2] It includes those tasks which are done for the betterment of the society in consonance with the economic development of the country. In the past few decades India has witnessed a spur in establishment of giant multinationals which has initiated a new realm of change in the manner in which economy has been regulated and operated in the country. However, this shift in the focus of the economy towards an 'all profit' frame of mind was considered as a warning signal by many. But the incorporation of mandatory CSR in the Act would change the way in which the Indian corporations do their business in the country. With the onset of commercialized environment and of large business houses there has been a rise in the importance placed on CSR by both the government and such firms. Even though the concept of CSR has developed from philanthropy based to community based, many firms still believe that mere donations or services provided to employees suffice as CSR. The Companies Act 2013 has been introduced to channel the focus of the companies to a broader vision and scope of CSR. But there is still a long distance to cover before this provision renders any definite success.

---

1 N. Ravi Kumar, *From Charity to Responsibility*, September 10, 2013, http://www.thehindu.com/books/books-reviews/from-charity-to-responsibility/article5110251.ece. (Accessed on 30th October 2013).

2 Sudip Mahapatra and Kumar Visalaksh, *Emerging Trends In Corporate Social Responsibility: Perspectives And Experiences from Post-Liberalized India,*http://www.csr-weltweit.de/uploads/tx_jpdownloads/SudipEmerging_Trends_in_Corporate_Social_Responsibility1.pdf.(Accessed on 17th May 2013).

II. CORPORATE SOCIAL RESPONSIBILITY: COMPANIES ACT 2013

Section 135 of the new Companies Act encapsulates various guidelines that will regulate the CSR spectrum of a corporation. It includes all the rules which need to be followed by a company to fulfill its CSR obligation towards the society. Few of the most common queries related to this provision have been answered as under:

A. Who are covered under Section 135

Three types of companies are included within the ambit of Section 135. These companies are the ones having worth of Rs. 500 million or more, or turnover of Rs. 1000 crore or more or a net profit of Rs. 5 crore or more. They are required to constitute a *CSR committee* consisting of three or more directors with at least one director acting independently.[3] Such a company is required to spend at least two per cent of its average net profits made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy.

B. Activities of CSR committee

According to Section 135(5) of the Act, CSR committee shall formulate and monitor the CSR policy of the company and also discharge the responsibility of recommending the amount of expenditure to be incurred in such activities. This comprehensive clause also include that the CSR Committee so formed shall indicate the activities to be undertaken by the companies as specified in Schedule VII of the Act[4] that includes ten activities including promotion of education, eradication of extreme hunger and poverty, promotion of gender equity etc.[5]

C. Punishment for defaulters

Board of Directors will be responsible for seeing that the company spends money for CSR. Any company that fails to comply with these provisions has to give in its report the reasons for the same.[6]

---

3 The Companies Act, 2013; Section 135(1).
4 *Id.* Section 135(3) (a).
5 *Id.* Schedule VII.
6 *Id.* Section 135, Proviso.

Such an explicit statutory provision has made India the first country to mandate obligatory CSR.[7] The Act, which is set to replace the existing Companies Act 1956, also seeks to make independent directors more accountable and has brought in steps to improve corporate governance practices.[8] This Act has provided a brand new set of norms defining social responsibilities of corporate.

III. MANDATORY CSR: AN URGENT NEED OF THE HOUR?

The statistics and the data reveal startling facts regarding the growth of CSR sector, which will occur after the implementation of this Act. Taken together, registered companies in India will likely spend Rs. 18,000 crore on CSR activities per year, which would mean that there will be a be scope for the CSR consulting.[9] But the importation of strict and compulsory CSR related provisions in the Act has ignited a series of discussions pertaining to its viability in the economic environment of India. There have been two different segments of CSR; Philanthropy model and the Stakeholder model. In India, after 1991 with the transformation of the economic environment of the country, the concept of CSR also changed shape and grew more diversified. There was a fundamental shift from ancient *philanthropy based model* of CSR to the *stakeholder-participation model*.[10] The philanthropic approach adopted by the firms earlier basically included mere charity and excluded any sort of community participation.[11] In the stakeholder model on the other hand the community in which the corporation is present is seen as a stakeholder in the company and therefore, the company has certain obligation and duties towards it like it has towards its other stakeholders (customers, employees, shareholders).[12] The Apex Court has time-and-again reemphasized the importance placed on obligations of a company towards the community in which it operates.[13]

---

7 The Hindu, *New Companies Bill mandates CSR spending,* December 19, 2012, http://www.thehindu.com/business/companies/new-companies-bill-mandates-csr spending/article4217872.ece. (Accessed on 17th September 2013).

8 Business Line, *New Companies Bill makes 2% spend on social causes a must,*, http://www.thehindubusinessline.com/industry-and-economy/new-companies-bill-makes-2-spend-on-social-causes-a-must/article4218234.ece. (accessed on 17th September 2013).

9 Aman Malik, *Company Law to change CSR landscape,* August 12, 2013, (visited September 24, 2013), *at* http://www.livemint.com/Companies/tOGwGAPjhQs1QautjL4GEI/New-company-law-to-change-CSR-landscape.html.

10 Seema G. Sharma, *Corporate Social Responsibility in India: An overview,* 43 Int'l Law. 1515 (2009), at 1519.

11 *Id.*

12 *Id.*

13 *National Textile Workers' Union* v. *P.R. Ramakrishnan*, (1983) 1 SCC 228 : AIR 1983 SC 75.

Though the CSR related activities will be boosted in the country, the economy might face some difficulties and the mixed output may finally be rendered. One of the most pertinent doubts that need consideration is whether the country is in a dire need for a strict stipulation like this or not. Hence, it becomes extremely essential to delve into the reasons which have initiated the process of such change.

Indian Public Sector Undertakings (hereinafter, PSU's) have had a long tradition of CSR, and their contribution to the development of undeveloped or underdeveloped regions cannot be ignored.[14] Companies like TATA and Birla have been practicing CSR for decades, long before CSR became a popular name.[15] In 1991 due to abolition of License Raj, more and more global Multinational Corporations (hereinafter, MNCs) were, and still continue to be attracted to India for production, manufacturing and provision of services.[16] The process of liberalization in India in 1991 was accompanied by many environment and human rights related hazards.[17]

A. Need for CSR in light of environment disasters

The need for CSR has increased due to recent rapid increase in the operation of MNCs on the soil of India. Such corporations have often perturbed the lives of the locals. *Bhopal Gas Disaster*[18], POSCO plant in Odisha, Unilever case of Kodaikanal and many other such instances depict the negative intrusion of the corporations into the lives of the people. This is a strong factor that has made Government turn its head towards CSR. The tribal, villagers and other socially disadvantaged groups of the population often find themselves at the mercy of government.[19] It has carved out a realization that without a mandatory provision many corporations will continue to operate focusing on their own economic interests by violating all the ethical norms. With this obligatory provision, there is a hope that the negative effects of globalization and excessive industrialization can be countered and balanced.

---

[14] Seema G. Sharma, *Supra* note 11, at 1521.

[15] Prachi Arora, *Incorporate Corporate Social Responsibility Strategy into Business*, The SIJ Transactions on Industrial, Financial & Business Management (IFBM), Vol. 1, No. 2, 78 (May-June 2013), (visited September 20, 2013), *at* http://www.thesij.com/papers/IFBM/2013/May-June/IFBM-0102590102.pdf.

[16] Seema G. Sharma, *Supra* note 11, at 1522.

[17] Caroline Van Zile, *India's Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market,* Asian Pacific Law & Policy journal, Vol. 13, No. 2, at 288.

[18] *Union Carbide Corpn.* v. *Union of India*, (1991) 4 SCC 584.

[19] Dr. Sunitha Kanipakam, *Reflections of Indian judiciary on Corporate Social Responsibility,* International Journal of Applied Research and Studies, Review paper, ISSN: 2278-9480 Volume 2, Issue 4 (April 2013).

In India most of the companies still do not have any structured systems for approaching or deploying CSR activities.[20] The activities related to CSR can be executed in an ordered and controlled manner if there are strict guidelines present for its compliance and the defaulters are punished. This acts aims to bring the much needed reform.

Schedule VII of the Act that lists activities to be undertaken by the corporations such as promotion of education and eradication of poverty shows the inclination of the Act around this approach. The government aims at resolving these issues with the assistance of giant corporations that derive benefits out of the support of community they operate in.

This community development has been regarded as a key element of India's CSR agenda, which should be seen in business terms too, i.e. companies enhance their reputation and improve relations with communities[21], which is directly related to increased goodwill and trust of the people in the activities of the corporation. Such confidence of the stakeholders in the company is necessary for the company, if it desires to remain in a profitable long term business and it will therefore work towards development of 'reputation capital'[22]. In essence CSR benefits not only the society but also the firm which is engaged in such activities.

B. Mandatory CSR-Essential for harnessing development

Another major argument for mandatory CSR spending is that it will help harness the rate of development in India. Hampered by a liberal and competitive global economy, it is difficult for the Indian government to impose steep taxes or comprehensive regulation[23] creating gaps in social development thereby requiring private sector to step in and fill in such lacunae. Mandatory 2% CSR will ensure regular investment in the activities which will assist government in its welfare schemes. Also, the companies will now be accountable for its perilous acts; such as environmental degradation or employment of child labour. It is a well established fact that in India for a long time CSR meant pure philanthropy or charity.[24] It changed its form post liberalization. Mandatory CSR reinforces the same concept that

---

[20] Dean Roy Nash, *CSR Indian Perspective: A review*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2018754. (Accessed on 29th Seotember 2013).

[21] Tatjana Chahoud et al., *Corporate Social and Environmental Responsibility in India - Assessing the UN Global Compact's Role*, German Development Institute, Research Report, 33 (2007), *at* http://www.globalcompact.de/sites/default/files/jahr/publikation/studies_26.pdf.

[22] PXV Law Partners, *Examining CSR Aspects of the Companies Bill, 2012,* http://pxvlaw.wordpress.com/2013/02/25/examining-csr-aspects-of-the-companies-bill-2012/. (Accessed on 29/09/2013).

[23] Caroline Van Zile, *Supra* note18 at 301.

[24] Sudip Mahapatra and Kumar Visalaksh, *Supra* note 3.

complete development of the social structure of the country will be possible only with the participation of all the sectors of the country. This provision will also lead to about 30% increase in CSR linked jobs.[25]

C. Other advantages

There are several other long term positive implications that arise out of this provision. Mandatory CSR will facilitate government to create awareness regarding corporate responsibility in the private sector. This legally binding provision will instigate a sense of serious focus in them regarding protection of interests of all the stakeholders that are indirectly affected by its activities. According to a report by SMC Global securities, there are about 1227 listed Indian companies who had made total aggregate profits amounting to Rs. 4,37,167 crores in the last financial year and if the mandatory spending proposal becomes a guideline, nearly Rs. 8700 crores has to be spent by Indian corporate yearly on CSR.[26] If this amount is spend on CSR related activities, the social spectrum of India will definitely experience a brand new change. Some even contend that mandatory CSR will make its monitoring easier by the government.[27]

IV. REPERCUSSIONS OF SECTION 135

Though the core motive of the Section 135 and the reason behind its induction remains undisputed the provision however has received a severe backlash from the corporate front. While the Minister of Corporate Affairs indicated that some executives were supportive of the two percent mandate, most of India Inc. was immediately up in arms.[28] On further analysis of this clause there are many long-term irregularities that seem to arise. Also, there are many who contend that that new regulations would have only little impact on the charitable and philanthropic activities that are undertaken in the country. Amidst this debate certain inherent flaws in the provision are overlooked and not paid due consideration at. This may give rise to hurdles in the smooth path of philanthropic activities that this provision intends to achieve.

---

[25] *Corporate Social Responsibility: Meaning, Provision in Companies Bill 2012*, http://mrunal.org/2012/12/economy-corporate-social-responsibility-csr-meaning-provision-companies-bill-2012.html. (Accessed on 27th September 2013).

[26] Dean Roy Nash, *Supra* note 21.

[27] Akhila Vijayraghvan, *Making CSR mandatory in India,* http://www.triplepundit.com/2011/07/making-csr-mandatory-india/. (Accessed on 27th September 2013).

[28] The Indian Express, *2% CSR Spend on Cards for India Inc*, Feb. 9, 2011, http://www.indianexpress.com/news/2--csr-spend-on-cards-for-india-inc/747860/1. (Accessed 23rd September 2013).

A. Involuntary nature of CSR

One of the major critiques of Section 135 has been that it has changed the core essence of CSR by making it mandatory and subjecting it to a law. When the proposal for mandatory CSR was in the pipeline the Confederation of Indian Industry asserted, "the law should not specify any amount to be spent on CSR activities. It should be left to the decision of the board."[29] Other companies echoed the same sentiment, claiming that "what companies spend on community welfare, education, health, development and environmental activism is for them to decide."[30] It is not CSR that is being objected to; it is the 'compulsory' nature of it that is being contested by the companies. It cannot be denied that the decision to spend profits on the welfare schemes should be a sole prerogative of the company. There is a complex labyrinth of regulations and frameworks that a business major is already succumbed to. A mandatory provision like this will certainly not make life easier for companies.[31] Many corporate houses spoke unabashedly against this clause of the Act. Lalit Kumar, Partner, J Sagar Associates, for example said that provision relating to CSR should have been ideally left to the company's discretion.[32] Rahul Bajaj, chairman of Bajaj Group reiterated the same thought by saying philanthropy, CSR activities and generosity should not be made mandatory.[33]

This mandatory provision has rendered the concept, nature and essence of community service and CSR vulnerable to contradiction. If CSR is forced upon and is done under any sort of legal pressure, it is very hard to believe that there will be any difference left between the regular contracts entered into by a company and its CSR related acts since both will now be regulated by law.

B. Crouched Profits, Unbalanced Economy

If CSR activities are undertaken regularly, one of its obvious long term effects might include lesser profits for the companies which will in turn damage current growth rate of the economy. It is a well established fact that Indian economy is one of the fastest growing economies of the world. The development of corporate sector has been one of the major factors for the growth of the country and improvement of the condition of people. One of

---

29 Van Zile, *Supra* note at 295.

30 *Id*.

31 Equity master, *Is mandatory CSR good?,* 21st December 2012, http://www.equitymaster.com/tm/tm.asp?date=12/21/2012&title=Is-mandatory-CSR-good. (Accessed on 23rd September 2013).

32 Business Line, *Supra* note 9.

33 The Indian Express, *Indian Inc questions mandatory CSR*, 20th December 2012, http://www.indianexpress.com/news/indian-inc-questions-mandatory-csr/1047785/1. (Accessed on 23rd September 2013).

the most salient arguments against mandatory spending that it might put India at a competitive disadvantage in the global marketplace and might slow or reverse the country's near miraculous growth.[34] The mandatory CSR will put an extra burden on a firm and will also affect its production in many ways and there will be no more foreign direct investments or MNC's if there is an extra burden placed on them.[35] Hence, CSR must proof the business case, i.e. the financial benefits must outweigh the costs – in the long run at least – to ensure that CSR engagement is financially sustainable.[36] Social engagement shall not be blended with the economic activities which are done for the sole purpose of generating profit. And if blended, it is essential that benefits supersede the losses.

C. Section 135- A Challenge to Economic freedom

By making social welfare mandatory, the government has blurred the line between economic freedom and social development. Ignorance or negligence of companies is not the only reasons due to which there contribution towards CSR related activities remain somber. The pressures of the market may prevent them too, because after all, CSR does not necessarily make companies *less* profitable, nor is it particularly likely to make most companies *more* profitable.[37] Spending the money on CSR related activities or restraining from doing it because of reasonable apprehension that market would shrink in the following months, should be entirely the decision of the companies. Since a company has complete knowledge regarding the uncertainties of the market, it will be able to take a decision accurately regarding its profits and income. Mandating a certain part of their profits towards CSR activities through creating legal pressure is contradictory with their freedom of decision-making. A scenario like this will not paint a very good picture of Indian economic environment and will make companies apprehensive regarding their functioning here.

D. Other Ambiguities in the provision

There are several other ambiguities that have surfaced regarding this clause. Foremost being, absence of any clause that measures the impact of spending or investment of the companies on CSR related activates. If the Act mandates social spending, it should rightly formulate a plan to evaluate its impact also so that viability of such plan can be gauged.

---

[34] *Id.*

[35] Sandeep Rajpurohit, *Corporate Social Responsibility towards Poor,* (visited September 25, 2013), *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1892086.

[36] Tatjana Chahoud et al., *Supra* note 24 at 63.

[37] Van Zile, *Supra* note 16 at 301.

Another issue that crops up is that the Act is silent about several CSR activities not touched upon by Schedule VII that need consideration. If only prescribed activities under Schedule VII of Section 135 are considered as CSR, and if the investment made by firms in other activities of community development is withdrawn, the NGOs and communities could find themselves stranded.[38] There is no mention of social issues like eradication of child labor, sexual harassment, dowry death.

Many scholars are of an opinion that Section 135 has made CSR just another 'tick the box' compliance detracting the firms from its broader vision which was to make business socially responsible towards its stakeholders.[39] Companies can also adopt age old method of "cooking up balance sheets" via legal methods, i.e. companies can spend the 2% on CSR and comply and yet find ways to discount those in their accounting techniques.[40]

V. CONCLUSION

Corporate governance does not necessarily dictate the prospects that would regulate the economic environment of the country but it surely plays an integral role in shaping as well as regulating the country's economic scenario. In light of various economic developments that are taking place in the country, there has been a diversion from a socialistic welfare approach of development to all profit-all economic approach. This calls for serious contemplation on the manner the business functions in the country. Mandatory CSR inducted in the Companies Act is a firm step taken by the legislature to reinforce the significance and value of socially relevant activities. This has increased the likelihood to counter negative externalities arising out of economic operations of corporations in the country more smoothly. However, many view this piece of legislation as a means by the government to increase its vote bank. The political insecurities of the government would not affect the scenario much if the provision renders positive results. Many believe that ploughing back each penny of profit into expanding and building the business was their biggest *dharma* and the most powerful way to make an impact.[41] This might ring a bell in many but can be said to be far from reality. As already discussed no assurance of positive results has been

---

[38] Forbes India, *Challenges of the 2% paradigm*, March 21 2013, http://forbesindia.com/blog/business-strategy/challenges-of-the-2-csr-paradigm/. (Accessed on 25th September, 2013).

[39] Saahil Kaul, *Corporate governance and Corporate Social Responsibility Post Companies Bill 2012: An analysis,* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243319. (Accessed on 25 /09/2013).

[40] Pankaj Arora, *Why Pavan Sukhdev thinks the mandatory 2% CSR spend is short-sighted,* http://linkingsustainability.com/2013/01/08/why-pavan-sukhdev-thinks-the-mandatory-2-csr-spend-is-short-sighted/. (Accessed on 25th September 2013).

[41] Shreyasi Singh, *India's Companies Act: Legally Enforced Corporate Social Responsibility,* http://thediplomat.com/the-pulse/2013/08/27/indias-companies-act-legally-enforced-corporate-social-responsibility/. (Accessed on 29/10/2013).

yet contemplated by anyone, even if there is strict compliance to this legislation. The law has ignited a wide range of debate and discussions ranging from its feasibility to infringement of economic freedom of the firms. Economics and business today has a wider domain than it had previously.

There are many challenges that the government and the corporate front might face while overseeing the execution of this law.

One of the other backdrops of the legislation is that at present the provision does not take into account many integral social issues. It is duty of the government to make or rather interpret the clause as comprehensively as possible since CSR cannot be restricted to chosen few activities. It should enumerate clearer guidelines as to the manner in which other important activities can also be undertaken by the firms. If CSR has played an integral role in the Act, the government has to make sure that there are no discrepancies and companies do fulfil the target of CSR. A monitoring body of independent nature set up by government can accomplish this task. This body shall also measure the impact of 2% spend or investment in CSR by the companies on the social structure of the country. This impact will help in assessing the viability of this clause.

Companies will have to pursue the 2% target to safeguard them from government scrutiny. Sound business strategies will go a long way in achieving this target with minimal hindrance. Collaboration of private parties is needed for the development of the society and the companies cannot shy away from this responsibility. If the benefits of this clause supersede any loss that occurs, the firms will gain from this development. It is a vicious cycle that is formed and the corporations will accrue the benefits of this development in the form of committed workforce, increased sales etc. Hence, in an era of competitive globalization this state driven CSR policy can be seen as a beginning of a new wave of progress in the realm of CSR which breaks the ancient norm of its voluntary practice.

AGRICULTURAL MARKET: A LONG-PENDING SUBJECT-MATTER THAT REQUIRES PROGNOSIS

—Debasis Poddar[*]

"*... the line between hunger and anger is a thin line.*"
—John Steibeck.[1]

In greater perspective, agriculture is the most fundamental industry that no civilized state may afford to do away with. Every sundry system of governance is under an obligation not to keep the stomach of its people empty, if not full, for the sake of its stability. There is precedent in world history, like that of the French Revolution, that anger generated out of hunger was the cause of topsy-turvy in the then system of governance. There is reason to believe that history may repeat itself in an overpopulated country like India since a substantial part of its population lacks two square meals a(ny) day. Thus, equitable distribution of resources remains a matter of concern for statesmen in India. In this line of thought, agricultural procurement on the part of "the State" is a long-pending matter- a headache in exact sense of the term- for "the State" that requires introspection. So, the book named, 'Legal Regulation of Agricultural Procurement and Processing in India' authored by *Shweta Mohan*- deserves appreciation for review of the given legal regime vis-à-vis agricultural procurement from socio-economic point of view in general and macro-economic point of view in particular. Besides, an interdisciplinary approach adds value to her book.

After entering into the depth of her work in its nitty-gritty, her approach deserves understanding of a series of interfaces, for e.g. between (i) law and economics, (ii) law and public policy administration, (iii) law and human rights, (iv) law and governance, etc. The main aspect of her book lies in this interdisciplinarity that helps cut across disciplinary decadence among these otherwise compartmentalized areas of study. The way she interpreted diverse branches of law-constitutional law, human rights law and

[*] Assistant Professor of Law, National University of Study and Research in Law, Ranchi, Jharkhand.

[1] John Steinbech, *The Grapes of Wrath*, Chapter Twenty-One, available at: http://nbu.bg/webs/amb/american/4/steinbeck/grapes21.htm [Accessed on June 26, 2013].

the like- despite hailing from non-law academic background seems rare, if at all, in the recent interdisciplinary literature produced in India. Her research being dedicated to Prof. *Lakshminath*, one of the finest legal minds in the area of public law, whose inspiration may have left sublime imprint on her work to tend the same transcend in the trajectory of her discipline (Economics) and attain the terrain of legal economics through her research on agricultural procurement.

The book is divided into seven chapters. Chapter one deals with theoretical framework of right to food in specific context of the text of the Constitution of India along with major international human rights instruments. Chapter two is instrumental to identify major concerns vis-à-vis agriculture in India and its performance in last few decades since independence. Chapter three offers detailed analysis of major legal regulations vis-à-vis agricultural procurement. Chapter four offers a detailed analysis of major legal regulations vis-à-vis food processing to complement and supplement increasing agricultural production. Chapter five explores the marketing and determination of prices for agricultural products and major socio-economic problems involved therein, that substantially affect food management of the country. Chapter six is a region-specific study for the State of Bihar (after reorganization of states and exclusion of Jharkhand from its jurisdiction) in terms of its poor agricultural marketing system that requires immediate reforms to create opportunities in the region. Last but not the least in Chapter 7, the author derives a set of concluding observations to protect the farming community of India, which is imperative for "the State" in order to recover from the setbacks suffered by it in time ahead. Together, these chapters provide a comprehensive study of the issue- agricultural procurement regime in India with special reference to the State of Bihar. Within its given space of one hundred fifty odd pages, the book has covered plenty of issues on such a contentious subject matter in a very lucid language.

The beginning seems to be the most interesting part of her book. With the use of appropriate provisions, she has contextualized her subject in terms of the text of the Constitution of India with respect to (human) right to food and legal obligation of "the State" vis-à-vis food management to which agricultural procurement and food processing is instrumental enough to put food security as priority in its public policy. The author has established the same as an agendum of "the State" in light of Part III and Part IV of the Constitution including. Articles 14, 19, 21, 38, 39, 48, *etc*. Besides, with the use of major international instruments like Universal Declaration of Human Rights and International Covenant on Economic, Social and Cultural Rights, she has identified the technical hyperlinks between national (read constitutional) regime and international human rights regime in terms of her research foci. Inbuilt dichotomy between Fabian socialism in theory and hybrid capitalism in practice is clear in this chapter.

In the second chapter, through systematic description and analysis, the author established the futility of pre-(green)revolution enactments, to contain clandestine activities and put forth a suggestion that after green revolution followed by globalization, all these enactments require replacement by newer ones to keep pace with the changing times. She has also raised emerging issues including a set of commitments vis-à-vis agriculture which India is under a legal obligation to follow under the Agreement on Agriculture- a major instrument of international trade regime under the auspices of World Trade Organization. Thus, she has identified the obscurity of archaic laws on one side and the want of newer laws in terms of contemporary agricultural market on the other. Also, she has advocated for a jurisprudent position for India before the WTO to club subsidies in place of the given system of compartmentalization of subsidies in coloured boxes thereby defeating the object and purpose of the regime. Through statistical records, she established that total agricultural subsidies in India is well below the *de minimis* of ten percent (10%), the WTO permitted upper ceiling to this end.

Besides, she has identified some other issues in agricultural procurement of India, such as (i) green revolution falsified an otherwise proven apprehension of *Malthus* that, after reaching its threshold point, population would take a toll on its own through famine or war, (ii) politics rather than economics takes the driving seat to determine the pricing policy for agricultural procurement and the same is more so in recent age of coalition government, (iii) effects of failure of erroneous price policy like breaking of historical pattern, absence of incentive for private investment in grain storage, ignoring other (non-grain) food crops, shifting concern from consumer to producer, encouraging rice and wheat crops at random to gross detriment of fertility of soil and groundwater depletion, *etc*. In the context of emerging globalization, the author suggests a combination of market-driven and consumer-centric policy measures to minimize these shortcomings of agricultural market (distortion).

In chapter four, while dealing with legal regulation vis-à-vis food processing, she has emphasised on two factors for recent rise in food processing economy, one is foreign direct investment and another is role of technology. Indeed, both played decisive role to this end. The role of patronage on the part of "the State" is identified by her as an accelerator. Thus, "the State" has encouraged a paradigm shift by reducing itself from regulator to facilitator of the agricultural market. In course of her discussion, she has dealt with a whole lot of enactments related to agriculture, such as procurement, processing, marketing, *etc*. which is in any way related to foodstuff, and the range is wide enough from the Agricultural Produce (Grading and Marketing) Act, 1937 to the Food Safety and Standards Act, 2006 to prove her contention beyond doubt.

Agricultural marketing and pricing policy is dealt with in chapter five. Here the author offers an argument that while virtual absence of state intervention and consequent market failure was the causality of famine in Bengal during 1943, state intervention despite plenty of production seems the cause of market failure in contemporary India, hence putting agricultural economy to jeopardy. After stocktaking of the regulatory regime and its evolution with the passage of time, she has established by a set of illustrations that, despite reforms in last few decades, there is space for further reforms vis-à-vis agricultural marketing and pricing in India to contextualize its liberalized economy compliant with globalization in general and international trade regime in particular. The public policy in India seems still deficient to this end. Rather than blanket policy to safeguard economic interest of the producer, she puts stress on food management and organization of systematic investment in agricultural market.

Like a case study, though not in technical sense of the term, she presented the agricultural marketing system for the State of Bihar to illustrate her observations in chapter six. Her study being based on the northern part of India, selection of Bihar as the region for such kind of a study seems correct. Even in the southern part of India, reality is not so far from her study. In the concluding chapter (chapter seven), besides her concluding observations, a set of emerging issues and challenges are highlighted that the agricultural industry in India is likely to face in the time ahead. Albeit the insignia of these observations, it is apparent that it deserves attention of policymakers without further delay. These concerns need immediate intervention to get rid of systemic troubles in time ahead. Specific steps towards economic engineering are suggested by the author to address these troubles. She has also suggested jurisprudent steps toward social engineering of diverse issues like agricultural procurement, processing, pricing and, last but not the least, marketing of agricultural products in India and abroad. Together these features offer illustration of strong interdisciplinarity between law and economics.

At the end of her work, she is back to right to food- the starting point of her study- and thereby establishes the discursive hyperlinks between two issues involved herein: right to food and access to food. While the former is a concern of law, the latter is but a concern of economics and access to food is instrumental for the realization of a right to the same. Appreciation is due to the author for her prognosis on such avant-garde area of study. The same is due to the publisher as well for encouraging her work despite this being not a textbook and therefore involves relatively less market viability. However, for social science library in any seat of higher learning (for agricultural law, politics, history, sociology and economics in particular), this book is indeed a valuable addition for further research in relevant academic disciplines.

Last but not the least, rising concern for food- both from rights and access perspective- becomes increasingly critical with the passage of time and this trend is likely to continue in time ahead. Of late, after the Food Safety and Standards Act of 2006, another Bill is on its way to carry forward this concern- the National Food Security Bill of 2013. Already, under the Act mentioned above, there is one institutional mechanism named Food Safety and Standards Authority of India to look after normative order. While the legislative process seems sensitive enough,- albeit arguably,- the economic process is yet to cope with the pace of time. This work, being accomplished before the Bill mentioned above was introduced in the Parliament, has initiated constructive critique, followed by polemics, of the economic process in the light of this legislative process. In its essence, this work is set to address the gap between these two systemic orders, legal and economic, so that institutions of governance may walk hand-in-hand despite disciplinary decadence between law and economics. Also, this work is instrumental in understanding hitherto void existing in the cleavage of law and economics that is yet to get addressed by academicians in either discipline. This work is set to address a long pending vacuum in terms of its subject matter that requires prognosis.

There are few flip sides of this discourse as well. Whether or how far food security may facilitate industrial (including agro-industrial) entrepreneurship that requires workforce (read manpower) in building modern India seems a million-dollar question. In this work, she did not address this question. Neither the answer is required since the same raises different discourse altogether and may at ease be dealt with elsewhere. The question, however, seems appurtenant (if not integral) to this matter.

The output of an(y) academic research cannot be (mis)taken as panacea to cure one and all diseases. It is more so, while the same is related to one of a complex society like that of modern India. In its given trajectory, this work seems a timely contribution to add value to limited literature on interface between law and economics.

Details of publication under review:

Shweta Mohan, Legal Regulation of Agricultural Procurement and Processing in India, Satyam Law International, New Delhi, 2012. Price: Rs. 695. ISBN 978-81921204-0-0

BROADCASTING REPRODUCTION RIGHT IN INDIA: COPYRIGHT AND NEIGHBOURING RIGHT ISSUES, 2013 EDITION

—Prof. (Dr.) B.C. Nirmal[*]

The rapid development of information and communication technologies over the past decades has served as a catalyst for replacement of the material-based society by a knowledge-based society in which generating, protecting and preserving new knowledge has acquired enormous importance as an integral part of the national economy.[1] That the knowledge is power is not a new revelation. What is new is the commodification of the knowledge and its recognition as a private right to be protected by law. The recognition of intellectual property rights as an integral part of the international trading system under the World Trade Organization (WTO) regime[2] and the actual or potential contribution that these rights are capable to make to the world economy have made the protection of these rights a legitimate concern of the international community.[3] For this reason, members of the intellectual property rights community, never miss any opportunity to exaggerate the importance of intellectual property as a valuable and costly asset that must be created, protected and controlled as other assets like people, man,

---

[*] Vice-Chancellor, National University of Study and Research in Law, Ranchi, Jharkhand.

[1] B.C. Nirmal, "Intellectual Property Rights Protection of Software: The Indian Perspective", 2013 *Malayan Law Journal*, pp xxxviii-lxiii at p. xxviii.

[2] The Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994), *at* http://www.wto.org/english/tratop_e/trips_e/trips_e.htm. For a critique of the copyright regime under TRIPs, see, B.C. Nirmal, "International Copyright Law and Developing Countries", in S.N. Saxena *et al* (eds.), *Spotlight on Intellectual Copyrights*, 2005, pp. 98-113. For a critique of the Global Patent Regime especially from the perspective of the human right to health, see; "Human Right to Health, Access to Drugs and Global Patents Regime", 49 IJIL (2009), 377-407, Nirmal, "Indian Pharmaceutical Industry and the New Patent Regime, *The Pharma Review*, (April-May, 2007), pp. 36 et seq. The TRIPs regime is bolstered by a very strong dispute settlement regime for a critique of the dispute settlement mechanism. See. Nirmal, "WTO Dispute Settlement and Developing Countries", 34 *Banaras Law Journal* (2005), pp. 33-62.

[3] B.C. Nirmal, "Copyright in Cinematograph Films", in N.C. Patnaik (ed.), *Introduction to Copyright Law in India*, 2007, pp. 1-39 at 1.

material, machine etc. Intellectual property is a social good and its creation and further development may increase a nation's prosperity and wealth.[4]

What are intellectual property rights? They are legal and institutional derives to protect the creation of human intelligence such as inventions, works of art and literature, and designs. Yet, the concept of intellectual property continues to be misleading,[5] it is elastic and over the years, has been unduly stretched to move beyond its traditional pillars, namely, patents, copyrights and trademarks to include other human creations such as industrial design, trade secrets, plant breeders rights geographical indications and rights to layout designs of integrated circuits.[6] This dramatic radical expansion of the intellectual property rights concept has occurred not only as a response to scientific and technological advances and business needs of the oligopolistic multinational corporations of the industrialized world but also out of an abominable and abhorrent tendency of powerful and greedy to grab and appropriate what is possible in today's materialistic and consumerist world. Aptly described as 'proprietarianism' by Peter Drahos this tendency means, "a creed which says that the possessor should take all, that ownership privileges should trump community interest and that the world and its contents are open to ownership."[7] The recent trend to expand patent protection to plants, animals, genes and gene fragments, which was not only unthinkable in the past, but is still considered by many as immoral and even sacrilegious, is a prime example of 'proprietarianism'.

Since 1960's intellectual property rights regimes are in the constant process of evolution leading to radical changes there under, while the first such change is the widening of protectable subject matter, and the second one relates to the progressive standardization of the basic features of intellectual property rights, the third major change is the creation of new rights such as plant breeders' rights and right to layout designs of integrated circuits[8].

The book under review[9] makes a modest attempt to present a coherent picture of neighboring rights, especially re-broadcasting rights of the broadcasting organizations as recognized and protected in India in the

---

4 *See*, generally Christopher Arup and William van Caenegem (eds.) *Intellectual Property Policy Reform*, Edward Elgal Publishing Limited, UK, 2009. See also Ruth Taplin and Alojzy Z. Nowak (eds.), *Intellectual Property, Innovation and Management in Emerging Economics*, Routled, New York, 2010.

5 World Intellectual Property Organisation (2002), "Elements of a *sui generis* system for the protection of Traditional Knowledge", Document prepared by the Secretariat. (WIPO/GRTKF/IC/3/8), pg. 9.

6 Graham Dutfield, *Intellectual Property Rights and the Life Science Industries*, (2nd ed. 2009) p.1.

7 Peter Drohos, *A Philosophy of Intellectual Property,* (1996), at pg. 202.

8 Dutfield, *Supra* note 6, at pg.19.

9 S. Sivakumar and Lisa P. Lukose, *Broadcasting Reproduction Right in India: Copyright and Neighbouring Right Issues*, Indian Law Institute (2003).

background of relevant international treaties and conventions. Considering that neighboring rights constitute a recent but valuable addition to copyright law at the national and international level authors' efforts to discuss and analyze the issues that arise in the context of protection of these rights purport to fulfill a long felt need of a slim but compact book on the subject. 'Neighboring rights', which needs to be recognized, is an umbrella concept which engulfs within its ambit the rights of performing artists in their performances, the rights of producers of phonograms in their sound records and the rights of broadcasting organizations in their Radio and Television programmes. These are called neighboring rights because they neighbor on copyrights in the sense that they have developed in parallel with copyrights and their exercise is very often linked with the exercise of copyrights.[10] The protection of the rights of various intermediaries who help in the dissemination of intellectual works is no less important than the copyright protection of intellectual works. The purpose of neighboring rights is to protect the interests of certain persons or entities that either contribute in making creative works available to the public or produce subject matter worthy of a copyright – like protection, through such work not original yet it is creative enough to qualify as a work worth of protection under a national copyright system.[11]

The book under review consists of six chapters. While Chapter 1 deals with different kinds of intellectual property and Chapter 2 gives a bird's eye view of different aspects of copyright, Chapter 3 highlights the salient features of the Copyright (Amendment) Act, 2012 under the following sub-heads: commercial rental, the right to store, extension of copyright duration for photographs, first owner in respect of a work incorporated in a cinematograph, assignment, relinquishment, licence, extension of fair dealing provisions, copyright society, special rights of authors, rights of performers. Although India is yet to ratify the Internet treaties – WIPO Copyright Treaty (WCT)[12] and WIPO Performances and Phonograms Treaty (WPPT),[13] the Copyright (Amendment Act), 2012 strives to harmonise the Indian Copyright law with the internet treaties. With the introduction of certain unique features to the Copyright Act, 1957 by the amending Act of 2012, particularly those which are designed to strengthen enforcement

---

[10] B.C. Nirmal and P.C. Shukla, *Rights of Performers and Broadcasters Organisations*, 3 *Gopeshwar Law Journals* (2005-2006), pp. 38-64 at p. 42.

[11] Viviana Munoz and Andrew Chege, "The Proposed WIPO Treaty on the Protection of Broadcasting Organisation: are the New Rights Warranted and will Developing Countries Benefit" South Centre, September, 2006.

[12] The WIPO Copyright Treaty (WCT), 1996, available at : http://www.wipo.int/treaties/en/ip/wct.

[13] The WIPO Performances and Phonograms Treaty (WPPT), 1996, *at* http://www.wipo.int/treaties/en/ip/wppt/trtdocs-wo034.html. For details, *see*, B.C. Nirmal, Neighboring Rights in International Law with Special Reference to the WCT and WPPT, in B.N. Pandey (ed.), *Intellectual Property Rights Law*, (2003, BHU), pp. 232-242.

of the copyright legislation and protection from internet piracy, the Indian Copyright Act has become one of the best copyright legislations in the world.[14]

Chapter 4 explores and analyses a wide range of issues pertaining to neighbouring rights in the light of the relevant international treaties and conventions and adumbrates the rights of performers and phonogram producers as recognized and protected under the Indian Copyright Act, 1957.

In India freedom of broadcasting is recognized as an aspect of freedom of speech and expression guaranteed under Article 19(1)(a) of the Indian Constitution.[15] While being a facet of a fundamental right, it is available against the State, broadcasting-reproduction right is a statutorily recognized private right under Section 37 of the Copyright Act. The broadcasting-reproducing right is available to all broadcasting organizations, wherever they are situated, so long as the broadcast is available in India for viewing. So far broadcasting freedom is concerned it has following main components: freedom of broadcasts, listeners'/viewers' right and access to broadcasting.[16] Chapter 5 deals with broadcasting and re-broadcasting rights and explains them with the help of decided cases, statutory provisions and provisions of the relevant international treaties and conventions.

This sixth and last chapter consists of various important judicial decisions concerning broadcasting reproduction rights. Important cases like *Zee Entertainment Ltd.* v. *Gajendra Singh*[17]*, Super Cassette Industries Ltd.* v. *Entertainment Network (India) Ltd.*[18], etc., are analysed and explained in a very easy to understand manner. To facilitate easy understanding and accessibility, various case laws on the subject are segregated under different sub heads like broadcast reproduction right, Infringement of copyright by broadcast etc. The book contains an appendix consisting of the Copyright Act, 1957, The Communication Convergence Bill, 2011, The Cable Television Networks (Regulation) Act, 1995, The Rome Convention, 1961, Brussels Satellites Convention, 1974, WIPO Copyright Treaty, 1996, The WIPO Performances and Phonograms Treaty (WPPT), 1996, Beijing Treaty on Audiovisual Performances, 2012. It may serve as a ready reference practitioners and scholars.

---

[14] Sivakumar *et al*., *Supra* note 9, Ch. 3, *See also* Sivakumar and Lisa P. Lukose, "Copyright Amendment Act, 2012: A Revisit, 55 *Journal of Indian Law Institute* (2013), 149-174.

[15] *Ministry of Information and Broadcasting*, *Govt. of India* v. *Cricket Assn. of Bengal*, (1995) 2 SCC 161.

[16] Sivakumar *et al, Supra* note 9, Ch. V.

[17] (2008) 36 PTC 53 (Bom).

[18] AIR 2004 Del 326, *ESPN Stars Sports* v. *Global Broadcasts News Ltd*., (2008) 36 PTC 492 (Del).

Given the dearth of Indian publications on Broadcasting Reproduction Right, the present book is a useful addition to the existing literature on the subject. The book shall be useful to law professionals, academics media houses, government bodies, subject consultants and students.

TATA MOTORS LTD. v. THE STATE OF WEST BENGAL (SINGUR LAND DISPUTE): CASE NOTES AND COMMENT

—*Prashant Agase*[*]

Abstract The modern India of the 21st century is in a constant struggle for successful and sustained growth learning society, while retaining its core values of being an open, inclusive democracy. The economic reforms of 1991 captured liberalization and privatization agendas, and the sovereign power of eminent domain was often used to facilitate industrialization. The rationale of "public good over private interests" often hid the real benefits of lower transaction costs (no holdouts, litigation over title etc.), lower opportunity costs to the eventual users of land and lower acquisition costs, due to underpayment to land owners.[1] The Singur land controversy, over acquisition of land for the Tata Nano car is painted by the same brush. On one hand was the promise of an affordable four-wheeler, so that no family of four had to risk their lives on a two-wheeler again. On the other hand, was the land and interest of hundreds of farmers, who perhaps themselves would never purchase a Nano. This project examines the divergent positions while analysing the decision of the High Court[2] on the Singur Land Rehabilitation and Development Act, 2011, which took back the land from the company, Tata Motors.

---

[*] 2nd year B.A LLB (Hons) at Nalsar University of Law, Hyderabad.

[1] Sanjoy Chakravorty, From Wipeouts to Windfalls: Cautions about Current Thinking on Land Acquisition, presented at IGC Conference on Economic Growth in West Bengal: Challenges and Priorities, 2012, at www.theigc.org/sites/default/files/ses sions/2_ SANJAY%20CHAKROBARTY%20From%20Wipeouts%20to20Windfalls.pdf (Accessed on Sep. 20, 2013).

[2] Tata Motors Ltd. v. State of W.B., (2012) 3 Cal LT 1 (HC).

I. THE CASE IN COURT[3]

A. Background to the Dispute

Singur, a small town located around 32 km from Kolkata, in the Hoogly district, came to the fore in 2006 when Tata Motors chose this relatively unknown location to produce the 'Nano', which would be the world's cheapest car. Several governments sought to have the Tata Nano factory setup in their state, which made the project a prized catch for then West Bengal Chief Minister Budhadeb Bhattacharjee of the Communist Party of India - Marxist. At the time, the state was desperately trying to erase its anti-industry image. In a bid to do so, the Government had on several occasions, attempted hasty land acquisitions, and this would prove to be the Sword of Damocles.

As regards Singur, on 6th July, 2006, the Joint Secretary to the Government wrote to the West Bengal Industrial Development Corporation (WBIDC), the District Magistrate, and the Land Revenue Department to initiate acquisition proceedings. The Government totally acquired 1200 acres of land, including 997.11 acres from 13,000 "unwilling" farmers in 2007. It then leased it to Tata Motors to set up the Nano plant. As with Nandigram[4], the Government hastily acquired fertile and multi-crop agricultural land, leading to protests, though the government did give bigger compensation and included bargadars (sharecroppers) under its ambit. Nevertheless, 2000 of the 13,000 "unwilling" farmers refused to accept compensation for their 400-odd acres of land. Moreover, protests and scattered incidents of violence began against the acquisition as a large number of dependants (artisans, landless labourers, etc) could not be compensated nor were they promised employment in the upcoming factory. The main opposition party, Trinamool Congress (TMC), promptly capitalized on the agitation and took to the streets in protest. In the face of a deteriorating law and order situation, Tata Motors took an unprecedented decision, on 7 October, 2008, to relocate the factory to Sanand, in Gujarat. The company stated that it had lost approximately Rs. 1500cr in the whole fiasco. The subsequent West Bengal Elections brought the opposition, TMC, to power, and in 2011, the Government passed a legislation seeking to take back the land at Singur from Tata Motors. This legislation is the subject of this dispute before the High Court at Calcutta.

---

[3] The entire case summary is the original work of the Researcher.

[4] Janak Raj Jai, SEZs: Massacre of Human Rights with Special Reference to Singur & Nandigram, 1st ed., [Kolkata: Daya Books, 2007) at page 19-37.

B. Arguments of the Petitioners – Tata Motors Ltd. and its Vendors

On the first issue, it submitted that the Act was a law relating to 'acquisition'. This meant that the Act related wholly to Entry 42, List III, Seventh Schedule[5] r/w Article 300A[6], and not to Entry 18, List II, Seventh Schedule[7], as the State had sought to portray. His reasons were broadly as follows:

a) The name or title to the Act is not conclusive and cannot be a device to take a matter covered by Entry 42 List III to Entry 18 of List II.

b) The Advocate General had submitted before the Single Judge that the principles enshrined in Sections 23 and 24 of the Land Acquisition Act (LA), 1894, may be applied to determine the compensation payable in this case, implying that the State admitted that it had 'acquired' the land.8

The consequence of this would be that the Act would be void under Article 254, being repugnant to the Central law i.e. L.A. Act, and having failed to obtain the assent of the President, as is required for such a State law to prevail over a Central law.[9]

C. Arguments of the Respondents – State of West Bengal and WBIDC

On the first issue, the State countered the company's contention by arguing that the Act provides for vesting by way of legislation whereas LA Act provides for acquisition through executive action. The Act thus basically provided for resumption of possession. Furthermore, the State argued that the company had essentially surrendered the lease. An extinction of lease was different from acquisition, insofar as the leasehold does not return to the landlord. The lease document showed that it was for manufacturing of the Nano car only. As the purpose was fixed and no other purpose was possible, the lease was not transferable.[10]

---

5 This entry specifies: "Acquisition and requisitioning of property".

6 This provision concerns the Right to Property. It lays down the rule that persons are not to be deprived of property, save by authority of law, as well as the rule of compensation.

7 This entry specifies: "Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization."

8 *Supra* note 2, ¶¶78-80.

9 *Id*, ¶123-124.

10 *Id*, ¶¶317-325, ¶¶340-344.

D. The Decision of the Single Judge

(a) Issue 1 – The scope of the Act

The Single Judge noted that the exercise of the power of eminent domain by the State had to satisfy the twin test of being for public purpose and providing an amount of compensation to the deprived leaseholder. He found that the Act disclosed public purpose in its body as well as in the statement of objects quite sufficiently.[11] He noted also that the Company had admitted that it had no activity in contemplation to be undertaken at the site. He would not accept that the Act was targeted at a particular person or corporate body to victimize it, and found that single person legislations were held valid, including that by the Supreme Court in Charanjit Lal Chowdhury v. Union of India[12] and in Dharam Dutt v. Union of India.[13]

As to the nature of the action by the State, the Judge felt that where a ninety year lease was ostensibly sought to be "extinguished" by the State, and the consequences of such "extinguishment" was that the lessor got the property back, it was difficult to think of such an exercise as being anything but an 'acquisition'. Therefore, the Act was not wholly an exercise of the power of the State Legislature under Entry 18, List II, but was also an exercise of its power under Entry 42 of List III. But the incidental encroachment on Entry 42, List III, did not invalidate the exercise of power under Entry 18, List II; hence the Act was valid.

E. The Decision of the Division Bench

The Division Bench, P.C. Ghose and M.K. Chaudhuri, J.J., hearing the appeal against the order of the Single Judge found the Act to be unconstitutional, and decided in favour of the Company. The judgment is a lengthy one and 499 paragraphs are devoted to the arguments of the parties and the authorities cited by them, besides the facts of the case.

(a) Issue 1 – The scope of the Act

The Court characterized this issue as being whether the Act was for 'acquisition' and made under Entry 42, List III, Seventh Schedule or whether it was enacted under Entry 18, List II. In order to arrive at this conclusion, the Court considered the intent of the Legislature in passing the Act. It referred to the Preamble of the Act which stated that it had been enacted to provide for taking over the land covered by the lease granted to

---

[11] *Id*, ¶¶30-31.
[12] AIR 1951 SC 41.
[13] (2004) 1 SCC 712.

the Company on the ground of "non-commissioning and abandoning small car project and ancillary factories with a view to return such portion of the land to the unwilling owners who have not accepted compensation." The further motive was to utilize the balance portion of the land in public interest and for the benefit of the State. Based upon this, the Court found that the "primary and dominant intention" of the Act was to return the land to the unwilling owners. The Company had already abandoned the land, and the Government had now moved to take it back, to the extent that even the leasehold interest was sought to be acquired. Moreover, there was an intention to pay compensation under the Act, thus establishing that the Act was meant solely for "acquisition" of the land from the Company.[14]

The Court then referred to Article 246(2) of the Constitution, wherein concurrent power was conferred upon both the Union and State Legislature to legislate with respect to the entries included in List III. When both bodies made a law on the same entry, there was a possibility of conflict. The Court would apply the "rule of pith and substance" to determine which entry the legislation related to, though incidental trenching on another entry would be of no consequence. The Court noted that Entry 18 of List II gave the State the prerogative over land reform and alteration of land tenures, but not "acquisition of land", which was included in Entry 42 of List III, as was held in State of Bihar v.Kameshwar Singh [15]. It also considered the Supreme Court's view in Jilubhai Nanbhai Khachar v. State of Gujarat[16], where it was observed that the words "rights in" or "over land", in Entry 18, List II, conferred very wide power, which was not limited by rights between the landholders inter se or the landholder or the State or the landholder or the tenant. The Court found that the State's contention that the Act was meant for "resumption of land" under Entry 18, List II and not for "acquisition" under Entry 42, List III was untenable in law. Though Entry 18 was wide enough to cover to land reform and alteration of land tenures and also for agrarian reforms, it could not cover land acquisition. Referring to the Supreme Court's decision in Inder Parshad v. Union of India[17], the Court held that where the Government leases its land, it cannot unilaterally determine the lease and take back possession, unless it exercises its power of eminent domain for public purpose. Thus, it concluded that both the LA Act and Singur Act were in the same field – Entry 42, List III.[18]

The Court then considered the consequent issue of repugnancy of the Act, referring to Article 254 and to the "triple test"[19] put forward by the Constitutional Bench of the Supreme Court in M. Karunanidhi v.

[14] *Supra*, note 2, ¶¶501-502, 512-513.
[15] AIR 1952 SC 252: 1952 SCR 889.
[16] 1995 Supp (1) SCC 596, ¶10.
[17] (1994) 5 SCC 239.
[18] *Supra*, note 2, ¶¶527, 529, 546.
[19] This shall be dealt with in detail in the next section: *Infra*, 3.4.

Union of India.[20] Repugnancy would follow if the two Acts could not be applied together, due to irreconcilable conflict, or because one lays down an exhaustive code on that subject-matter. Having considered the provisions of the two Acts in question, the Court concluded that "there is clear and direct inconsistency" which is "absolutely irreconcilable", in terms of Sections 3, 4(3), 5 and 6 of the Act.[21] As the acquisition was not for agrarian reforms, the Act could not be saved by bringing it under Entry 18 of List II either. Now applying Article 254(1), in a case of repugnancy, the law made by the Parliament was to prevail and the State law was to be void to the extent of such repugnancy, unless the law had received the assent of the President allowing it to prevail in that State. In this case, no such assent had been obtained, and hence the Act was void. Moreover, the Court also stated that the Act had no 'public purpose' when the intention is to return the land to the unwilling land owners/farmers.[22]

(b) Issue 2 – Compensation due to the Company

The Court considered this issue quite briefly, given its conclusion on the earlier issue. It disagreed with the Single Judge who had tried to interpret the law by reading in the principles to compute compensation from the LA Act in order to remove the vagueness and uncertainty from the impugned Act. It felt that the Court could not re-write, recast, or reframe legislation. Therefore, while it did accept that there was vagueness and uncertainty in the Act as to compensation, it would not indulge in any interpretation of the provisions, in order to give them validity. Moreover, as regards Section 5(1) of the Act, concerning compensation to the vendors, it held that as the proposed compensation was only refund of the amount so paid by the vendors, such amount was 'no compensation' at all, and was hence illusory and liable to be struck down.[23]

II. CRITIQUE

The Higher Courts in India have been repeatedly called upon to examine legislations. They have borne in mind the presumption of constitutionality of a statute, and good faith and knowledge of the existing conditions on the part of a legislature.[24] Bearing this in mind, an analysis of the Court's judgment in the present case may be undertaken:

---

[20] (1979) 3 SCC 431, ¶24.
[21] *Supra*, note 2, ¶¶547-551, 579.
[22] *Id*, ¶¶581, 587, 588.
[23] *Id*, ¶¶584, 589.
[24] Deepak Sibal v. Punjab University, (1989) 2 SCC 145, ¶15.

A. The Impugned Act

It is worthwhile to briefly set out the provisions of the Act, before proceeding to a detailed analysis of the Court's decision. A detailed Statement of Objects and Reasons notes the background to the legislation – that the Government, in public interest, considered it necessary to take back the ownership and possession of the land due to "total frustration of the object and purpose of allotment/lease of land" and for "ameliorating ascending public dissatisfaction and agitation". It goes on to state that steps had to be taken urgently for return of the land to the unwilling erstwhile owners, who had not accepted compensation and to utilize the remaining portion in public interest.

The Act contains nine sections. Section 2(b) defines "land" as the land leased out to the Company and its vendors by WBIDC. Section 3 states that on the appointed date, the land and all right, title or interest in respect of it shall stand transferred to and vest in the State Government "free of any lease or allotment". Section 4 deals with the general effect of vesting and in sub-section (3), requires the Company to restore vacant possession of the land in favour of the District Magistrate, Hooghly. Section 5 concerns compensation. Sub-section (1) states that the vendors shall receive the amounts of premium paid by them after deducting the amount of arrears of rent left unpaid by them, if any. Sub-section (2) states that the amount of compensation to be paid to the Company would be determined by the District Judge, Hooghly on an application being made by the Company "in due compliance with the principles of natural justice and by reasoned order". Section 6 discusses transfer of land back to the erstwhile owners and utilization of the remaining portion. Section 9 gives the Government rule-making power and accordingly it framed certain rules, which contain the machinery for redistribution of land, based on decisions of a High Powered Committee. It is pertinent to note that the Singur Bill was introduced in the Assembly on June 14, 2011 and cleared the same day even without a perfunctory discussion, lending credence to the criticism that it was a hurriedly drafted legislation.[25]

B. Eminent Domain and Public Purpose – Who's purpose is it anyway?

Essentially, eminent domain is the power of the state to take over private land for a public purpose. The principal issue has centred on what constitutes "public purpose", and a great divergence of opinion has emerged,

[25] Niranjan Sahoo, Will Singur verdict brighten the prospect of Land Bill?, Observer Research Foundation, 13 July, 2012 at http://www.orfonline.org/cms/sites/orfonline/modules/analysis/AnalysisDetailhtml?cmaid=39488&mmacmaid=39489.

including relatively sweeping propositions such as those of the United States Supreme Court in Kelo v. City of New London[26], where even broad economic development, in terms of setting up of a pharmaceutical company, was considered sufficient justification to exercise eminent domain validly. The arguments oscillate from the need for the State to act for the welfare of the people as a whole i.e. salus populii suprema lex, to the restrictions on the State to intrude into the private lives of its people, or act as a "super land-lord" upon its whims.[27] Recently, the Supreme Court has emphasized that individual right of ownership over land must yield place to the larger public good, though the acquisition must be in accordance with the procedure sanctioned by law.[28]

(a) The judicial view of the issue in India

The right to property has been watered down over the decades since independence, in order to facilitate the exercise of eminent domain by the State.[29] Nevertheless, "public purpose" is a precondition for deprivation of a person from his property under Article 300A. In Jilubhai case[30], it was also held that in the context of Article 300-A, law means an Act of Parliament or State Legislature, or a rule, or a statutory order, having the force of law.

The Supreme Court has made it clear that any declaration of the Government for land acquisition must be relatable to a public purpose as distinct from a purely private purpose. It acknowledges that the Government is prima facie the best judge as to whether an acquisition is for a public purpose; however, it is not the sole judge. Furthermore, there must be "...a fixity of purpose in the mind of the Government".[31] In this respect, several cases have identified what would amount to 'vagueness' of purpose. In Munshi Singh v. Union of India[32], it was held that "planned development of area" lacked particularization of public purpose. Again in M.P. Housing Board v. Mohd. Shafi[33], the stated purpose of "for residential purpose" and "housing scheme" was found hopelessly vague.

---

[26] 545 US 469 (2005) (US Supreme Court). (Accessed on Oct. 7, 2013).

[27] Usha Ramnathan, On Eminent Domain and Sovereignty, in Lyla Mehta ed., Displaced by Development – Confronting Marginalisation and Gender Injustice (New Delhi: Sage, 2009), at page 71-72, 74.

[28] Amarjit Singh v. State of Punjab, (2010) 10 SCC 43.

[29] Note the transition of the right from a Fundamental Right under Article 19(1)(f) and Article 31, to being only a constitutional right under Article 300A, following the 44th Amendment Act, 1978.

[30] *Supra*, note 25, ¶24.

[31] Somawanti v. State of Punjab, AIR 1963 SC 151, ¶40; State of Bombay v. R.S. Nanji, AIR 1956 SC 294, ¶25.

[32] (1973) 2 SCC 337, ¶¶2, 4-6.

[33] (1992) 2 SCC 168.

In the Singur context, the Act stated the return of the land to the unwilling erstwhile owners, who had not accepted compensation and utilizing the remaining portion in public interest as the 'public purpose'. The return of land to certain unwilling farmers appears to be 'private' purpose as distinct from 'public' purpose, as noted by the Division Bench.[34] The latter portion of the statement, concerning utilizing "the remaining portion in public interest", on its part, appears vague. Thus, the Act falls foul of the public purpose element.

(b) The political context of 'public purpose'

The question of 'public purpose' in the case should be seen in light of the political context in which the Act was passed by the Assembly. The TMC led Government dislodged the incumbent Left Front Government from power in West Bengal after a 30 year period largely by piggybacking on the Singur controversy, having promised to return the land to the farmers and portraying itself as a champion of peasant's rights. To that extent, the judgment is a huge setback for the Government. At the same time, the state is in deep financial crisis and is struggling to meet even routine expenses, like paying its massive public workforce, the largest in the country. It is yet to secure a bailout package from the Centre.[35] The entire controversy has led to the State being branded as anti-industry, which is precarious given the fragile condition of its economy. In this context, whether the use of land for industrial development or agriculture amounts to 'public purpose' is itself a matter of debate, particularly when both are being done by private individuals. It leads one to question whether a more viable alternative would be to consider 'public use' as the sole element of 'public purpose' given how India's political class interprets the term 'public purpose' based on the convenience of the day.

C. Compensation – Money does Matter!

Compensation changes the nature of the take-over of private land by the State from "appropriation" to "acquisition", thus clothing it with legitimacy and a degree of fairness.[36] The position on compensation has seen a sea of change since the requirement of "just compensation" in the Bela Banerjee[37] case sparked off a tussle between the Parliament and the Court, and spurred a number of Constitutional amendments. In Jilubhai[38], it was held that the law may fix an amount or lay out principles by which it may be determined, which cannot be irrelevant. The law cannot be questioned on the grounds that the amount is not adequate or "just", or less than market value, but at

---

[34] *Supra*, note 2, ¶588.
[35] *Supra*, note 36, Sahoo.
[36] *Supra*, note 38, Ramnathan, 71.
[37] State of W.B. v. Bela Banerjee, AIR 1954 SC 170.
[38] *Supra*, note 25, ¶52.

the same time, it must not be illusory. In a recent decision, Rajiv Sarin v. State of Uttarakhand[39], it was reiterated that the Constitution did not require payment of market value or indemnification to the owner of the property expropriated. The acquisition of property was in furtherance of Directive Principles of State policy to distribute the material resources of the community for public purpose.

On applying these principles to the Singur Act, it is seen that Section 5 of the Act, discussed above[40], is evidently a hurriedly drafted provision. The Legislature has not applied its mind to the question of compensation at all, leaving it to the discretion of the District Magistrate, without indicating how he is to do so. The decision in Jilubhai case is clear on the point that the law itself must specify the principles by which compensation is to be determined, and in that respect the decision of the Single Judge[41] to read in the mechanism under the L.A. Act appears tenuous. The legislation does not purport the intention for such principles to be applied, and doing so would amount to 'judicial law-making'. As regards the compensation payable to the vendors, Section 5(1) intends to compensate by simply returning the amounts of premium paid by them after deducting the arrears of unpaid rent. It is submitted that this is simply a "refund" and not "compensation", and hence wholly illusory.

D. A Word on Doctrine of Repugnancy and Presidential Assent

The doctrine of repugnancy, as under Article 254, requires the fulfilment of a "triple test", as was laid down by the Supreme Court in the M. Karunanidhi[42] case. This comprises (i) that there is a clear and direct inconsistency between the Central Act and the State Act; (ii) the inconsistency is absolutely irreconcilable; and (iii) the inconsistency is of such a nature as to bring the two Acts into direct collision with each other such that it is impossible to obey one without disobeying the other. The key element to determine repugnancy is to ascertain the intention of the legislature, and in particular, whether the Central Act was meant to cover the whole field. In doing so, the Court applies the doctrine of pith and substance to trace the entry in the Seventh Schedule to which it is relatable, excluding incidental encroachments.[43]

The question on repugnancy raised in this case is a fairly settled point, and the Division Bench has correctly applied the law laid down by the Supreme Court on earlier occasions, where it has asserted that laws relating

---

39 (2011) 8 SCC 708, ¶78.
40 *Supra*, 3.1.
41 *Supra*, 2.6.
42 *Supra*, note 29, ¶24.
43 K.T. Plantation (P) Ltd. v. State of Karnataka, (2011) 9 SCC 1, ¶187.

to acquisitions fall under Entry 42, List III.[44] The only manner in which land can be returned to the erstwhile unwilling owners and unencumbered title can be conferred in them overnight is by a law that relates to acquisition of land from the current owner. To that extent, the Singur Act becomes repugnant to the L.A. Act, and would require Presidential assent to be valid.

III. CONCLUSION AND SUGGESTIONS

The country has witnessed several conflicts over land acquisition, particularly after the SEZ Act, 2005, and over infrastructure projects for power, roads, dams etc. Land acquisition is known to place a disproportionate burden on the socially marginalized, with non-owners and common property users not even being considered for compensation or rehabilitation. The Singur case has shown once again the need for the Government to consider the structure of the economy and mould its policies accordingly. At the same time, knee-jerk reactions, such as hurriedly passing a targeted and arbitrary Act, are unwise methods of undoing perceived injustice, and will not pass muster with the Courts. The State must find delicate balance between individual rights and development for inclusive growth.

ANNEXURE – SELECTED STATISTICS

I. Status of major industrial projects undertaken since 2008 based on success, failure or stalling of Land Acquisition process[45]:

Table 17.1: List of Industrial Projects of Private Business Studied along with the status of the Project

Project brief	***Sponsor name***	***Place***	***Status (2008)***
Alumina Refinery	Vedanta (Sterlite)	Lanjigarh (Orissa)	Tending towards Failure
Aluminium Smelter	Vedanta (Sterlite)	Jharsuguda (Orissa)	Tending towards Failure
Car Plant	Tata Motors	Singur (West Bengal)	Abandoned
Car Plant	Hyundai Motors	Irungattukottai (Tamil Nadu)	Successful
Port and Special Economic Zone	Adani Group	Mundra (Gujarat)	Successful
Power Plant	Navin Jindal Group	Raigarh (Chhattisgarh)	Successful

[44] Rajiv Sarin v. State of Uttarakhand, (2011) 8 SCC 708; Jilubhai Nanbhai Khachar v. State of Gujarat, 1995 Supp (1) SCC 596; Ishwari Khetan Sugar Mills (P) Ltd. v. State of U.P., (1980) 4 SCC 136.

[45] Ram Kumar Kakani, Tata L. Raghu Ram, Insights into Land Acquisition Experiences of Private Businesses in India, in India Infrastructure Report 2009: Land—A Critical Resource for Infrastructure, 136, at http://www.iitk.ac.in/3inetwork/html/rep orts/IIR2009/IIR_2009_Final_July %2009.pdf (Accessed on Oct. 5, 2013).

Project brief	*Sponsor name*	*Place*	*Status (2008)*
Power Plant	Sajjan Jindal Group	Barmer (Rajasthan)	Tending towards Success
Power Plant	Moser Baer	Chandil (Jharkhand)	Tending towards Success
Power Plant, Fertilizer, and Steel	Tata Group	Barapukuria (Bangladesh)	Ahandoned
Special Economic Zone	Mahindra Group	Bagru (Rajasthan)	Successful
Special Economic Zone	Mahindra Group	Maraimalainagar (Tamil Nadu)	Successful
Steel Plant	Bhusan Steel	Potka (Jharkhand)	Tending towards Failure
Steel Plant	Tata Steel	Bastar (Chhattisgarh)	Tending towards Failure
Steel Plant	Tata Steel	Gopalpur (Orissa)	Abandoned
Steel Plant	Essar Group	Paradip (Orissa)	Tending towards Failure
Steel Plant	POSCO, Korea	Paradip (Orissa)	Tending towards Failure
Steel Plant	L.N. Mittal Group	Torpa (Jharkhand)	Tending towards Failure
Steel Plant	L.N. Mittal Group	Kasaphal (Orissa)	Tending towards Failure
Steel Plant	Tata Steel	Saraikela (Jharkhand)	Temporarily Stalled
Steel Plant	Sajjan Jindal Group	Salboni (West Bengal)	Tending towards Failure
Steel Plant	Tata Steel	Kalinganagar (Orissa)	Tending towards Failure
Titanium Dioxide	Tata Steel	Turicorin (Tamil Nadu)	Abandoned

II. *Land Acquisition for SEZs*[46]:

Parameters	Area in sq. km	% to total land mass
A Total landmass in India	29,73,190	
B Arable agriculture land	16,20,388	54.5
C Land in possession of the 260 SEZs notified	299	0.01
D SEZs in pipeline for which approvals have been granted	677	0.02
Total approved and possessed land under SEZs (C+D)	976	0.03

Source: Ministry of Commerce, SEZ section, Government of India, 2008.

[46] Ministry of Commerce, Government of India SEZ Section, (visited on Oct. 6, 2013), at http://commerce.nic.in/resourcecenter/sez.asp?id=5.

WHITE INDUSTRIES AUSTRALIA LIMITED V. REPUBLIC OF INDIA – CASE COMMENT

—*Sanjeev Kumar & Jishnu Sanyal*[*]

Abstract *Backlog of cases has been a persistent problem for quite some time in our country, but the same has crossed the national frontiers after the award in the White Industries Case. An ad hoc arbitral tribunal constituted under the UNCITRAL Arbitration Rules upheld the claim of White Industry Australia and charged India with the aforesaid amount due to its inability to enforce the award passed by the ICC Tribunal in May, 2002. Hence, the issue of pendency of cases has gone on to hurt India to a hefty sum of A$ 4.08 million also not to mention tainting India's reputation in the eyes of investors. This paper is a comment on the case and analyses the significant issues raised in the case delving into the definition of Investment within the Bilateral Treaty. The case comment describes how an MFN clause and the 'Effective Means' standard was adeptly invoked by White Industries to put India on the back foot. The comment apart from scrutinizing the award provides the reader with the available recourses to India to counter such problems in the future.*

I. INTRODUCTION

This comment analyses the Australian White Industries Arbitration case, wherein India was asked to pay compensation for not providing 'effective means' for asserting the claims during the nine-year pendency of the case. The paper focuses on analysing the significant points of law that arose in the case law wherein India has been asked to pay a compensation of A$

[*] 4th Year B.A.LL.B (Hons), National Law University, Delhi.

4.08 million and also the consequences this award is likely to have on future Bilateral Investment Treaty negotiations.

II. BACKGROUND OF THE CASE

The origin of the dispute can be traced back to 1989 when White Industries Australia Ltd. entered into a contract with Coal India Ltd. and a dispute arose between the contracting parties on the execution of the contract and the matter was submitted for arbitration in 1999. ICC arbitration favoured the White Industries (WI) and found the Indian counterparts in breach of its contractual obligation. The WI tried to enforce the arbitral award under the Arbitration and Conciliation Act, 1996 (the Act) in the Delhi High Court and a subsequent suit was filed by the Indian counterpart in the High Court of Calcutta. The matter thus reached the Apex Court during the pendency of which WI invoked the arbitration clause in the Indo-Australian BIT (the Treaty) and challenged the Indians, alleging the Indian Government to be in breach of the obligations of providing with 'effective means' of asserting their claims.

This case comment deals primarily with two aspects, firstly with respect to the scope of the word 'investment' which was one of the contended areas and secondly the aftermath of the present decision in terms of what Republic of India must do to prevent award of such magnitude being awarded against it.

III. WIDE DEFINITION OF INVESTMENT: THE ACHILLES HEEL

The Australia-India Bilateral Treaty provided for a wide definition of the expression 'investment', similar to that of the US- Lanka Treaty[1]. The definition had been interpreted so as to include the award. The argument in counter given by the Indian counterparts was the *Salini* test[2], which was rejected by the Tribunal. The *Salini* test was rightly rejected as the same applies to States that are signatories to the conventions and the 'investment' criterion laid down can be dispensed with the need.[3] Apart from relying on the Salini test, India also relied on the writings of Douglas[4] an authority

---

1 *Mihaly International Corpn.* v. *Republic of Sri Lanka,* 17 ICSID Rep 142 (2002).

2 *Salini Construttori* v. *Morocco*, ICSID Case No. ARB/00/4, (July 23, 2001), 42 ILM 609, (2003); *Phoenix Action, Ltd.* v. *The Czech Republic* (ICSID Case No. ARB/06/5, (15 April 2009); *Jan de Nul N.V. and Dredging International N.V.* v. *Arab Republic of Egypt,* ICSID Case No. ARB/04/l3, Decision on Jurisdiction, (16 June 2006).

3 *Petrobart* v. *Kyrgyz Republic*, VIII.7 Stockholm INT. ARB. REV., 3 (2005), (March 29 2005).

4 E Douglas, *Nothing if not Critical for Investment Treat Methanex: Occidental, Eureko and Methanex,* 22 Arbitration International 27, 28 (2006).

on this point of law, but the same were rejected on the ground that Indians acknowledged the *right in personam* contractual rights to be within the ambit of 'investment' in the treaty. The broad wording of the treaty and the disregard to definitional nuances seemed to be the problem. The definition is so wide that award was considered to be an investment within the Bilateral Investment Treaty.[5]

The problem that India is faced with is manifold as India hasn't had a tendency of restricting the definition of the term 'investment' as is evident from the Indo-France BIT[6], which allows for indirect investment without defining the same. Not being a signatory to the International Centre for Settlement of Investment Dispute (ICSID) is another disadvantage as the characteristics specific to Article 25(1) and the corresponding tests do not apply.

The immediate remedy available to India is to take a cautionary stand with respect to the definition of 'investment' in the BITs or become a signatory to ICSID convention, the failure of which would go against the interests of the country considering there were reasonable chances to have the award turned down on the basis of the characteristics of 'investment' under Article 25(1) of ICSID.

IV. AFTERMATH OF THE AWARD

In the backdrop of the very first published investment award against India[7] it is pertinent to analyze the ripple effect that it might have on future investors and moreover, it is appurtenant to consider if India needs to review its policy with respect to bilateral investment treaties. As already mentioned earlier the three member ad hoc arbitral tribunal unanimously held India responsible for inordinate delays in enforcing the arbitral award

---

5 *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* UNCITRAL, PCA Case No. 34877, Interim Award, (December 1, 2008) 185, referring to *Mondev Intemational Ltd.* v. *United States of America, Saipem S.P.A.* v. *The People's Republic of Bangladesh,* ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, (21 March 2007) 127. See also *ATA Construction, Industrial and Trading Company* v. *The Hashemite Kingdom of Jordan* ICSID Case No. ARB/08/2, Award, (18 May 2010) 115 where the tribunal observed that: 'measured by the standards in Saipem, the Final Award at issue in the present arbitration would be part of an 'entire operation' that qualifies as an investment' ICSID Case No. ARB (A)/99/2, Award, (11 October 2002), 81.

6 Biswajit Dhar, Reji Joseph, T.C. James, *India's Bilateral Investment Agreement Time To Review*, Economic & Political Weekly Vol. XLVII, 114, http://www.bilaterals.org/IMG/pdf/BIT-India-France.pdf. (Accessed on 04 March 2014).

7 Sandra Friedrich, *White Industries v. India: Investment Arbitration as Last resort to overcome Hurdles in enforcing Arbitral Awards*, Latham and Watkins, http://www.lw.com/white Industries v. India: Investment Arbitration as Last resort to overcome Hurdles in enforcing Arbitral Awards. (Accessed on 2 March 2014).

and awarded White Industries Australia Limited A$ 4.08 million, the amount due under original award and interest.

This award sets an extremely worrying precedent from India's point of view.[8] Given the inevitable delays which are part and parcel of India's civil judicial process, it simply emboldens the claim of any foreign company which would take similar recourse to filing International Arbitration under Bilateral Investment Treaties. This award may also be looked at as an attack on the sovereignty of the Indian state. The Indian judiciary functions independently of the executive government of the state. Such independence is a basic feature of the Constitution of India. No person or authority can be allowed to sit in appeal against the functions of the judiciary except in accordance with the provisions of the Constitution of India.

V. GLOBAL BACKLASH

India's Bilateral Investment Promotion and Protection Agreement (BIPA) regime was initiated in 1994 with the signing of such agreement with the United Kingdom. Since then India has gone on to sign 82 BIPAs with various countries.[9] But with the very first dispute regarding the provisions of BIPA and consequently the award rendered, India has landed itself into a conundrum.

India is currently in a situation where a global backlash by foreign investors seems not only plausible but also imminent. Since the White Industries case, Vodafone Plc has issued a notice under the India-Netherlands BIT against India for its proposed retrospective amendment to the tax code.[10] This is by no means is an isolated instance as other companies such as the Russian conglomerate Sistema, Norwegian company Telenor, and the British hedge fund Children's Investment Fund, have reportedly initiated arbitration proceedings against India for various regulatory actions.[11]

VI. THE WAY FORTH

In the light of the claims against the government, the Department for Industrial Policy and Promotion has called for a review of all 82 BITs

---

[8] Jayati Ghosh, *India's Bilateral Investment Treaties: Worst fear Realised*, Frontline, Volume 29 - Issue 5: March 10-23, 2012.

[9] Biswajit Dhar, Reji Joseph, T.C. James, *India Bilateral Investment Agreement Time to Review,* Economic & Political Weekly Vol. XLVII, 114, http://www.epw.in/system/files/pdf/2012_47/52/Indias_Bilateral_Investment_Agreements.pdf (Accessed on 2 March 2014).

[10] *Id*.

[11] S. Bhusan & Puneeth Nagaraj, *Need to align bilateral investment treaty regime with global reality*, The Hindu, (January 7, 2013), http://www.thehindu.com/todays-paper/tp-business/need-to-align-bilateral-investment-treaty-regime-with-global-reality/article4281263.ece (Accessed on 2 March 2014).

signed by India. Host countries in the developing world has time and again locked horns with investors and quite naturally so, as evident from ambiguous and broad definition of investment, generic Most Favoured Nation (MFN) clauses and delimited exception clauses in the agreements. Capital exporting countries have been prudent and therefore have avoided the same by subjecting their BIPAs to periodic reviews. The forerunner in this regard has been the US. After initiating its BIT programme in 1981 it has gone on to review its model BIT twice (2004 and 2012) in order to keep abreast of the needs of the changing times. The definition of investment in model BIT was amended comprehensibly in the reviews undertaken.[12]

Examples can be sited of countries which have taken a skeptical attitude towards BITs. Prime example is ironically Australia which has stopped signing BITs having arbitration provisions. South Africa has decided it would be apt to review its existing BITs and engage in termination and possible renegotiation on the basis of a new Model BIT. Further, Latin American countries Venezuela, along with Ecuador and Bolivia have denounced the ICSID Convention (which establishes the International Centre for the Settlement of Investor Disputes to arbitrate investor state disputes) to stem the investment arbitration cases against it.[13]

VII. CLOSER VIEW OF MFN CLAUSE

Now venturing more into the specific situation that India is facing – it is important to note that on the protection and promotion of investment, different BIPAs of India provide for different provisions and use different terms. White Industries' main contention in this case was that India had failed to provide "effective means" of enforcing rights and asserting claims. But it is pertinent to note that an 'effective means' standard or any other obligation relating to delays in court has not been incorporated in the 1999 India – Australia BIT. But the MFN clause comes to the rescue of White Industries and enables it to import more favourable provisions from other treaties signed by India. Specifically, White Industries drew upon a beneficial provision under Article 4 (5) of the India-Kuwait BIT which obliges India to provide 'effective means of asserting claims and enforcing rights with respect to investment.' By relying on the MFN clause, White Industries sought similar level of protection which Kuwaiti investors are given in India.

---

[12] Biswajit Dhar, Reji Joseph, T C James, *India Bilateral Investment Agreement Time to Review,* Economic & Political Weekly Vol. XLVII, 114, http://www.bilaterals.org/IMG/pdf/BIT-India-France.pdf. (Accessed on 2 March 2014).

[13] S. Bhusan & Puneeth Nagaraj, *Need to align bilateral investment treaty regime with global reality*, The Hindu, (January 7, 2013) http://www.thehindu.com/todays-paper/tp-business/need-to-align-bilateral-investment-treaty-regime-with-global-reality/article4281263.ece (Accessed on 2 March 2014).

Without delving into the debate whether an investor has to take the host countries' judicial system 'as is' under the Fair and Equitable Treatment (FET) standards and whether India's act amounts to the violation of this clause, we go straight into the question of ironing out the flaws in the present model of BITs signed by India.[14]

VIII. PRACTICAL CONSIDERATIONS FOR INDIA

An investor's chances of success in an arbitration proceeding would be proportional to how adroitly India frames its future BITs and reviews the existing ones. Since there are conflicts between the treaty's obligations and legitimate policy objectives, a carefully and well-worded investment treaty could avoid potential disputes and leave less discretion at the hands of the Tribunal when one such dispute arises.

Firstly, as emphasized a number of times, India should initiate a comprehensive review of its existing investment treaties since the present case has exposed the vulnerabilities of the same. The review would serve as a base for amending the existing treaties through bilateral negotiations. Secondly, investor-state dispute settlement mechanisms under which a foreign investor can initiate an international arbitration against India should be done away with.[15] In 2011, Australia announced its decision to not include investor-state dispute mechanisms under its trade agreements with the developing countries. Third and the most important one, is to prevent 'treaty shopping' by investors. Carefully worded MFN clauses in future treaties can prohibit the possibility of importing such clauses from earlier treaties signed by India. Vague and controversial provisions such as national treatment, FET clauses, free transfer of capital, umbrella clauses should preferably be avoided or incorporated with explicit qualifications in the treaty.[16]

Also, these treaties essentially contain some exception clauses (for example national security clauses) which are exempt from the treaty's obligations.[17] Expanding the list of exceptions by incorporating other policy priorities such as taxation and financial stability in the treaty also seems a plausible solution. Investor sentiments and attitude may be of paramount importance to a developing nation but should not be given priority at the

---

[14] Sandra Friedrich, *White Industries v. India: Investment Arbitration as Last resort to overcome Hurdles in enforcing Arbitral Awards*, Latham and Watkins http://www.lw.com/white Industries v. India: Investment Arbitration as Last resort to overcome Hurdles in enforcing Arbitral Awards. (Accessed on 2 March 2014).

[15] Ben Olbourne, *White Industries Australia Limited* v. *The Republic Of India Uncitral Arbitration Award – 30 November 2011*, http://www.ciarb.org.sg/blast/issue4/WhiteIndustries.pdf (Accessed on 2 March 2014).

[16] Kavaljit Singh, *Treaties that Gave Away The Store*, The Hindu (April 27, 2012) http://www.thehindu.com/opinion/lead/article3357429.ece (Accessed on 2 March 2014).

[17] *Id.*

cost of the nation's sovereignty. Hence, the main objective of treaties should not be investment protection alone. There are legitimate policy objectives such as sustainable development and financial stability which should also find place in the treaties. The state's power to regulate business activities in the public interest should be explicitly mentioned in the treaties' preambles and other sections. All the aforementioned measures along with exclusion of clauses which could bar the state from pursuing regulatory and other measures to pursue legitimate policy goals would go a long way in barricading the effect of the present award and prevent an onslaught from foreign investors in the days to come.

FORM IV

STATEMENT ABOUT OWNERSHIP AND OTHER PARTICULARS

(See Rule 8)

1.	Place of Publication :	:	Chanakya National Law University, Nyaya Nagar, Mithapur, Patna-800001
2.	Periodicity of Publication	:	Yearly
3.	Printer's Name	:	Registrar, Chanakya National Law University
	Nationality	:	Indian
	Address	:	Nyaya Nagar, Mithapur, Patna-800001
4.	Publisher's Name	:	Registrar, Chanakya National Law University
	Nationality	:	Indian
	Address	:	Nyaya Nagar, Mithapur, Patna-800001
5.	Editor's Name	:	Prof. Dr. A. Lakshminath
	Nationality	:	Indian
	Address	:	Chanakya National Law University, Nyaya Nagar, Mithapur, Patna-800001
6.	Ownership	:	Chanakya National Law University, Nyaya Nagar, Mithapur, Patna-800001

I, A. Lakshminath, hereby declare that the particulars given above are true to the best of my knowledge and belief.

Sd/-
A. Lakshminath

ABOUT THE JOURNAL

The CNLU Law Journal, an endeavour of Chanakya National Law University, Patna aims to encourage critical writings that cut across disciplines like Sociology, Political Science, Public policy and Economics in the context of Law.

CLJ invites contributions under the following categories—

Articles—The article should be a comprehensive review of current/ contemporary relevant legal issue(s)/question(s) that need to be analysed and presented. It must be clear on the topic dwelt upon and lucidly presented without any ambiguity. The author's stand on the issue(s) should be expressed with clarity. The article should aim at understanding the issue(s) of current/contemporary legal importance. The word limit for the submission is 4000 – 7000 words, exclusive of footnotes and abstract.

Notes and Comments—Notes and Comments may include a brief analysis of a recent judicial pronouncement, legislation, book or any legal issue of relevance. The word limit for the submission is 2000 – 4000 words, exclusive of footnotes and abstract.

Submission Guidelines

Covering Letter—All submissions must be accompanied by a covering letter stating the title, author's full name, university and year of study and the author's contact details. Only the covering letter should contain the above mentioned details and not the manuscript.

Submissions must be in MS Word doc. 2007

Main text—Times New Roman, font size 12, double spacing, justified, with a margin of an inch on all sides.

Foot notes—Times New Roman, font size 10. Substantive foot notes are accepted.

Both single-authored and co-authored (a maximum of two authors) entries will be accepted.

Abstract—All the entries should be accompanied by an abstract which should be of 300 words for both articles and notes and comments.

Citation—The Bluebook: A Uniform Method of Citation, 18th Edition should be strictly adhered to.

Contact Details

Submissions should be mailed at **editorial.clr@gmail.com**.

For any further queries, please contact:

The Editorial Board,
CNLU Law Journal,
Chanakya National Law University,
Nyaya Nagar, Mithapur,
Patna-800001.

Publication Policy

All the submissions should be original, neither previously published nor in consideration for any other publication.

The Editorial Board will follow the Anonymous Peer-Review policy for judging the submissions.

The Editorial Board reserves the right to reject or edit any article whose content is offensive or defamatory, explicitly unethical or if it supports racism, sexual or religious discrimination, illegal activities or terrorism; similarly an article may be refused if the Board deems that it might harm the political or religious sensitivity of interested readers in any manner.

The Editorial Board reserves the right to disqualify entries on account of plagiarism. The submissions should not infringe the copyright or any other right of a third party, if so, the journal disclaims any responsibility for copyright violation or any other liability.

By submitting their work, the authors grant to CNLU Law Journal, an exclusive right to publish and reproduce their work in all media. Such right is to be given with the view of observing the doctrine of fair use under intellectual property rights subject to attribution of the author.

Chanakya National Law University, Patna

Subscription Form

Please enter/renew my subscription for the items circled below:

Type of Subscription	One year (1 issue)
Hard Copy for 2014	
Institutional/ Individual	Rs. 400
Law Students & Teachers	Rs. 320

Mailing Details:

Name _____

Organisation _____

Draft No. _____

drawn on _____

for Rs. _____ (in favour of Eastern Book Company)

Address _____

_____

Tel: _____

Email: _____

Attach attested photocopy of Photo ID of institution to avail Law Student/Teacher subscription.