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ARTICLES

DOCTRINE OF REPUGNANCY: EVOLUTION, APPLICATION AND EMERGING TRENDS

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I. INTRODUCTION

English law knows what may be called two doctrines of repugnancy, the genuine and the spurious; the one bases upon true logic and other upon false. The genuine doctrine is easy to understand, because it is largely a matter of logical necessity. If a document contains mutually inconsistent provisions, it is said to be repugnant. Repugnancy in this sense presents a problem that is faced by every legal system howsoever mature it may be.

The doctrine of repugnancy in the Indian context generally refers to Article 254 of the constitution which gives supremacy to the laws made by the center. However, the scope of Article 254 has been controversial due to its judicial interpretation which is textually incongruent with the plain language of the Article. Over the period judicial interpretation of Article 254 has considerably whittled down the supremacy of central laws over the State laws which the said Article seeks to establish. In this article, we shall try to ascertain the true scope of Article 254 comparing it with the relevant provisions of the American constitutional law. First, we shall refer to the relevant statutory text i.e., Article 254 including the corresponding provisions of Government of India Act, 1935 which will highlight two things: (a) how much of the current language of the former has been borrowed from the later, (b) what changes the doctrine has undergone since its adoption in our constitutional scheme of things. After considering the scope of Article 254 this paper shall discuss the controversy surrounding it. This controversy mostly relates to the narrow interpretation of Article 254 by the judiciary which has the potential to limit the law-making power of the union. Thereafter, we shall seek to answer the question as how to identify the instances of repugnancy. The identification of the instances of repugnancy is important because the method adopted to identify such repugnancy may increase or decrease the instances of repugnancy which in turn will affect the application of Article 254. Here an analysis of the relevance of the doctrine of pith and substance regarding Article 254 will also be made. Few illustrative cases of the application of the doctrine of repugnancy will give us insight into the issues that arise while resolving actual problems. After this the effects of repugnancy will be spelled out. The exception to the doctrine of repugnancy which is given under Article 254 (2) and the proviso to the said clause have been analyzed keeping in mind their practical implications. This paper also refers corresponding provisions of American law which pertains to the supremacy clause and the principle of preemption.

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II. ARTICLE 254: THE SCOPEOF DOCTRINE OF REPUGNANCY

Article 254 was on the same lines as section 107 of the Government of India Act, 1935.[1]The first problem in the application of Article 254 is to identify the cases to which its provision applies.[2] The problem is compounded due to the wide language used in the Article 254. It refers to a law made by Parliament, which Parliament is competent to enact.[3]

Article 246, as it appears, is sufficient to deal with inconsistencies between a law in List I and List II, List I and List III and List II and List III as the Article contains self-serving provisions. Article 251provides principle to resolve inconsistency between a Union law made under Articles 249,250 and a State law. Now, if constructionof the expression *"a law made by Parliament, which Parliament is competent to enact"*proposed to include the laws made by Parliament under Articles 246, 249 and 250 then a large part of Article 246 and 251 would be rendered impractical and without any meaning. Naturally we need to narrow down the above expression to the laws made by the Parliament under Articles 252,253, 262 and the like provisions put together in one category and the laws made by Parliament under List III i.e., the Concurrent List in the other category. Surprisingly, the Supreme Court construes that the above expression refers only to the competence of the Parliament to legislate under List III.[4] This is atremendously narrow interpretation of the said expression. As if it was not enough, the scope of Article 254 (1) was further constricted down by the court when it held that the existing law or a law made by the parliament and the law made by the state legislature must necessarily be on the same entry of the Concurrent List. Article 254(1) will not be applicable if laws are on different entries of the concurrent list.[5] Likewise, phrase *"law made by the Legislature of a State"* used in Article 254(1) was curbed only to the laws passed by State legislature on matters enumerated in the Concurrent List.

III. JUDICIAL APPRECIATION OF DOCTRINE

Let us try to appreciate the reasoning advanced by the Supreme Court for the above interpretation and to examine how far it is justified in the light of pertinent legal literature. The courts reasoning was best explained in *HoechstPharmaceuticals Ltd.*v. *State of Bihar*[6] in following words:

> "*The question of repugnancy under Article 254(1) between a law made by Parliament and a law made by the State Legislature*

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[1] D. D. Basu, II *Shorter Constitution of India*1700 (Lexis Nexis, Nagpur, 14th edn., 2009).

[2] Tony Blackshield, "Working the Metaphor: The Contrasting Use of Pith & Substance in Indian & Australian Laws" 50(4) *Journal of the Indian Law Institute*518-568 (Oct.–Dec., 2008).

[3] The Parliament draws its competence to enact laws from Article 246(1) i.e., List I of the Seventh Schedule, Article 246(2) i.e., List III of the Seventh Schedule, Articles 248, 249, 250, 252, 253, 262 and many other provisions of the Constitution.

[4]See*Premnath*v. *State of J & K*, AIR 1959 SC 749.

[5]See *Vijay Kumar Sharma* v. *State of Karnataka* (1990) 2 SCC 562.

[6] (1983) 4 SCC45; AIR 1983 SC 1019.

arises only in case both the legislations occupy the same field with respect to the matter enumerated in the Concurrent List, and there is direct conflict between the two laws…. Article 254 has no application to cases of repugnancy due to overlapping found between List II on the one hand and List I and List III on the other. If such overlapping exists in any case, the State law will be ultra-virus because of the non-obstante clause of Article 246(1) read with opening words "subject to" in Article 246(3). In such a case, the State law will fail not because of repugnancy with the Union law but due to want of legislative competence. It is no doubt true that the expression "a law made by Parliament, which Parliament is competent to enact", in Article 254(1) is susceptible of a construction that repugnancy between a State law and a law made by Parliament may take place outside the concurrent sphere because Parliament is competent to enact law with respect to subjects included in List III as well as List I. But if Article 254(1) is read as a whole, it will be seen that it is expressly made subject to clause (2) which makes reference to repugnancy in the field of Concurrent List only. In other words, if clause (2) is to be the guide in determiningthe scope of clause (2), the repugnancy between Union and State law must be taken to refer only to the concurrent field."

The reasoning of the Court appears to rationalize the narrow interpretation of Article 254(1) on two grounds:

Firstly, by reference to clause (2) of Article 254 the court argued that it is an exception to clause (1) and since clause (2) refers only to laws in the Concurrent List, this should control the scope of clause (1) also. This to Prof. P. K. Tripathi is hardly convincing. He rightly points out that the scope of an exception is invariably narrower than that of the main provision, because the function and object of an exception is to retrieve a part of the subject matter from the operation of the main provision. There is nothing unusual, much less objectionable, therefore, in the subject matter of clause (1) having a larger content than that of clause (2) of Article 254.[7]

Secondly, the Court treats the words *"with respect to one of the matters enumerated in the Concurrent List"* as qualifying not only the expression *"existing law"* but also the expressions *"a law made by Parliament, which Parliament is competent to enact"* and *"law made by the Legislature of a State"*.However, in the opinion of Prof. P. K. Tripathi words *"a law made by Parliament, which Parliament is competent to enact"* which the court finds embarrassing are not to be treated as an instance of remiss draftsmanship to be loftily forgiven. They are purposely chosen to include not only laws enacted by the Parliament on the Union and the Concurrent List, but also those which Parliament may make on subjectsitemized in the List II as envisaged, for example, by

[7] Prof. P. K. Tripathi, "The Text is Explicit",AIR 1986 Vol. 33(J) p.no. 17.

Articles 249, 250, 252, or 253. What other language could have covered these Articles better?

Again, the words *"law made by the Legislature of State"* constituting, in grammar, the subject of the sentence cannot be saddled with the words qualifying a phrase in the predicate. To clarify this grammatical point and bring home the fallacy of Supreme Court's argument Prof. Tripathi gives a very fascinating illustration: *"If a short man is in love with a tall woman in an advanced stage of pregnancy"*, it would be ironical to insist that the sentence will apply only when both, the man as well as the woman is in advanced stage of pregnancy.[8] With due respect, our supreme court seems to be so techno imaginative that it took note of a technology in 1983 which would make it possible for both man and woman to be in advanced stage of pregnancy only in the 21st century.

Here it is submitted that if the intention of framers of the constitution was to limit the scope of Article 254 to concurrent list only then it would have been put right after Article 246. The fact that Article 254 have been put after Articles 252 and 253 and that it incorporates wide language goes on to show the clear intention of the drafters of the Constitution to cover these Articles and similar other provisions of the Constitution.

The matter may also be looked at from a different perspective. The *existing laws* referred in Article 254 are not laws made either by state legislature nor by parliament instead they are laws made by legislatures not known to the constitution, which cease to exist as soon as the constitution came into force. But for the saving provision of Article 372, the existing laws would have ceased to exist; they have been saved only to give the legislatures created under the constitution time and opportunity to decide which of them are to be retained and which to be repealed or amended. Now, the legislature of a state could not repeal or amend a law on a matter enumerated in List I, because it is not the competent legislature referred to in Article 372 for these matters. Therefore, there could be no need to make provision for limiting or taking away the power of the states to repeal or amend a law on a matter enumerated in List I. Also, for obvious reasons, there was no question of limiting or taking away the power of the States to repeal or amend existing laws on subjects enumerated in Concurrent List. But the position was different regarding existing laws on subjects in the List III. Here the State Legislatures being the competent legislature under Article 372 would be able to repeal or amend say the Indian Contract Act, 1872 or the Indian Evidence Act, 1872 which fall under List III like the Parliament itself. A policy decision, therefore, had to be taken as to whether the States were to be permitted to go ahead with programs of their own about these existing laws. The policy decision taken in this regard was incorporated in the text of Article 254. Broadly speaking, the policy was not to let the States tamper with these laws except when and to the extent, approved by the Center by giving the Presidential assent; and there too, subject to Parliament's corrective authority deemed in the proviso to clause (2) of Article 254. In this sense Article 254 (1) is an exception to Article 372, restricting the power of the State to repeal or amend existing laws in the Concurrent List.[9]

[8] *Id*. at 19.
[9] *Id*. at 22.

The problem which may arise by embracing the narrow interpretation of Article 254 (1) can be understood with respect to power of the Parliament to legislate on a State matter to effectuate an international treaty.[10] It might happen that when Parliament enacts such a law under Article 253, it may contradict an existing State law on that subject. Beyond any doubt, in such a situation the law made by the Union would prevail over the State law but this can be attained only if we invoke the broader interpretation of Article 254(1). Moreover, Article 254 can also be pressed into service when, law made by the Parliament and State Legislature in their exclusive jurisdiction incidentally encroach upon each other but in pith and substance lies within their exclusive domain.[11]

IV.HOW TO DETERMINE REPUGNANCY?

Repugnancy between a Unionlaw and a State law within the meaning of Article 254 may arise in the following ways:

A. Direct Conflict

It means that there is a tangible and real inconsistency in both the Acts i.e.,one Act says "do" and the other says "don't" in the same set of facts.[12] In other words,when it is unmanageable to follow the one without defying the other. This is known as direct conflict test.[13] In ITC case[14] the Apex Court found direct conflict between the Union lawi.e.,*the Tobacco Board Act* and a State lawi.e.,*the Agricultural Produce Markets Act*and ruled that the "question of allowing both to operate would not arise." In such a condition, the Union law would prevail over the State Law. The court observed:

> "*…we hold that the Tobacco Board Act and the Agricultural Produce Markets Actcollide with each other and cannot be operated simultaneously. Necessarily, therefore, the Tobacco Board Act would prevail and the Agricultural Produce Markets Act, so far as it relates to levy of fee for sale and purchase of tobacco within the market area must be held to go out of the purview of the said Act.*"[15]

B. Occupied Field

There may be repugnancy because both Union and State law cover the same field regardless of the fact that, there is no apparent conflict between two provisions of Union and State Law.[16] Repugnancy will not arise when provision of one law does not exist in

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[10]SeeThe Constitution of India, art. 253.
[11] Prof. M. P. Jain, *Indian Constitutional Law*540 (LexisNexis Butterworths Wadhwa Nagpur, 5th edn., 2009).
[12] See *Deep Chand* v. *State of Uttar Pradesh*, AIR 1959 SC 648.
[13]*Supra* note 1.
[14]See *I.T.C. Ltd.* v. *Agricultural Produce Market Committee*, AIR 2002 SC 852.
[15]*Supra*note 9.
[16]See*Zaverbhai*v. *State of Bombay*, AIR 1954 SC 752.

other, where provisions of both the laws are mutually exclusive and does not overlap. As a general rule, when a Union law and State law can exist together because their operational area are different, there would not be any repugnancy. The Legislature of Uttar Pradesh enacted a law in 1955 empowering the State Government to frame nationalization scheme for motor transport. Later, in the year 1956, the Parliament in order to bring uniformity in law, amended the Motor Vehicles Act. The Supreme Court in *Deep Chand* v. *State of U.P.*,[17] found that both State law and Union law are made on same subject and have same operational field. They diverge on many vital particulars, e.g., *power to initiate the scheme, method of doing it, power to hear objections, principles concerning payment of compensation* etc., and therefore, the State law would have to clear the way for the Union law to the extent of repugnancy.

C. Intended Occupation

If a competent legislature, in this case the Parliament, explicitly or discreetly displays its intention of occupying the entire field, it would be a conclusive proof of repugnancy, when state legislature chooses to enter in the same field.[18] When two enactments pertain the same subject matter and Parliament decides to make its law a complete code on the subject and exhibits its intention to occupy the complete field, the repugnancy will be applicable and the State law whether passed before or after the Union law, to the extent of repugnancy be void.[19]The Supreme Court has observed in a case:

> "*It cannot, therefore, be said that the test of two legislations containing contradictory provisions is the only criterion of repugnance. Repugnancy may arise between two enactments even though obedience to each of them is possible without disobeying the other if a competent legislature with a superior efficacy expressly or implied evinces its intention to cover the whole field.*"[20]

D. Relevance of Pith and Substance

The Supreme Court in *Vijay Kumar Sharma* v. *State of Karnataka*[21] held that the test rule of pith and substance can be applied to determine whether the State law has substantially transgressed on the field occupied by the law of Parliament. Thus, the doctrine of pith and substance can be invoked at the threshold stage for the limited purpose of finding out whether Article 254 is relevant to resolve the dispute. Its corollary is that the doctrine of repugnancy cannot be applied in case of Union and State laws under different entries of List III.

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[17]*Supra* note 12.
[18]Mahendra P. Singh, *V.N. Shukla's Constitution of India*677 (Eastern Book Co., Lucknow, 10th edn., 2004).
[19]See*State of Orissa* v. *M.A. Tulloch & Co.*,AIR 1964 SC 104.See *also Kulwant Kaur* v. *Gurdial Singh Mann*, AIR 2001 SC 1273.
[20]See*ThirumurgaKirupananda Variyar Thavathiru Sundara Swamigal Medical Education & Charitable Trust* v. *State of Tamil Nadu*, AIR 1996 SC 2384 at 2391.
[21] AIR 1990 SC 2072.

V. EFFECT OF REPUGNANCY

Where a State law is repugnant to a Central law within the meaning of Article 254(1), what becomes void is not the entire Act but only insofar as it is repugnant to the Central law subject to the doctrine of severability.[22] Thus those parts of impugned Act which can be severed from the repugnant parts will remain valid and enforceable. Only the repugnant part of the impugned legislation will be held void.

VI. EXCEPTION TO THE DOCTRINE OF REPUGNANCY

Article 254(1) lays down the general rule while Article 254(2) creates an exception to the general rule.Clause (2) crafts a mechanism by which a State law repugnant to a Union law on anysubject of the Concurrent List can be saved and, thereforeeases the rigor of doctrine of repugnancy incorporated in Clause (1) of Article 254. Article254 (1),while accepts the supremacy ofthe Center, Clause (2) recognizes the peculiar local circumstances prevailing in a State and providesacomponent of elasticity to make it possible to have a State law suitable to the local circumstances kept alive in the face of a Central law to the contrary on a matter in the Concurrent List.Article 254(2) provides that where a State law with respect to a subject of the Concurrent List is repugnant to any of the existing Union law with respect to same matter, the State law would prevail over the Union law in the state concerned, if it has received the assent of the President.The Supreme Court has explained the effect of Article 254(2) in the following words:

> "*In short, the result of obtaining the assent of the President to a State Act which is inconsistent with previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override the provisions of the Central Act in their applicability to that State only*".[23]

Regarding the federal character, Article 254(2) provides space to the provincial legislature and the State law if assented to by the Center would prevail in the State to the extent of inconsistency with the Central law; though, the State law would not override the whole of the Central law. However, the final authority rests with the Center to decidewhether the State law should be given antecedence over central law in that state or not. In Article 254(2), the words *"with respect to that matter"* are very relevant. As the Supreme Court, has observed in *Zaverbhai*v. *Amaidas v. State of Bombay*[24]:

> "*The important thing to consider with reference to this provision is whether the legislation is "in respect of the same matter". If the later legislation deals not with the same matter which formed the subject of the earlier legislation but with other and distinct matters*

[22]*Supra* note 1 at 1706.
[23]See*supra* note 6.
[24]*Supra* note 16.

> *though of a cognate and allied character, then Article 254(2) will have no application.*"

The State of Punjab passed the Punjab Village Common Lands (Regulation) Act, 1953. Some of its provisions were found inconsistent with the Administration of Evacuee Property Act, 1950, an earlier Union law. The State law was reserved for the Presidential assent but it was obtained under then Article 31(3) and the first proviso to Article 31-A (1) to protect the law from challenge for violation of fundamental rights. The Court in *Gram Panchayat* v. *Malwinder Singh*[25], held that the Presidential assent obtained for that purpose could not be pleaded in defence when an attack is made on ground of repugnancy between the Union and State laws. In the words of Chief Justice Y. V. Chandrachud[26]:

> "*The assent of the President under Article 254(2) of the Constitution is not a matter of idle formality. The President has, at least, to be appraised of the reason why his assent is sought, if there is any special reason for doing so. If the assent is sought and given in general terms so as to be effective for all purposes, different considerations may legitimately arise. But if, as in the instant case, the assent of the President is sought to the law for a specific purpose, the efficacy of the assent would be limited to that purpose and cannot be extended beyond it.*"

However, Presidential assent is required only for the parent Act and not for the notifications issued under it.[27]

VII. THE PROVISO TO CLAUSE (2): LAST INTENTION OF LEGISLATURE

Article 254(2) proviso, once again empowers the Parliament to supersede State law passed under Clause (2) by making a law on the same matter. This was a departure from Section 107 of the Government of India Act, 1935. While proviso to Article 254(2) has expanded the powers of the Parliament, the Dominion Parliament had no authority to enact a statute repealing directly any provincial act concerning the matters mentioned of Concurrent List. The present proviso to Article 254(2) empowers Parliament to enact a law adding to, varying or repealing a State law when; it relates to a matter mentioned in the Concurrent List. But where it does not expressly do so, even then the State law will be void under that proviso if it conflicts with a later law with respect to the same matter that may be enacted by Parliament. However, it is pertinent here to mention that the later enactment must deal with subjects which form the subject of the previous law. The proviso will not be applicable, if the later Union law deals with a distinct matter, though of alike and connected nature.[28]

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[25]*Supra* note 18 at 673.
[26]See*Gram Panchayat* v.*Malwinder Singh,*AIR 1985 SC 1394.
[27]See *Kerala State Electricity Board* v. *Indian Aluminum Co.*, AIR 1976 SC 1031.
[28]See i*nfra*note.

*Zaverbhai*v. *State of Bombay*[29], is another landmark verdict which expounds on the application of the Article 254(2) proviso. The Union Legislature passed Essential Supplies (Temporary Powers) Act, 1946. Section 7 of Act provided that if any person violates any order made under Section 3, he shall be punished with imprisonment for a term which may extend to three years or with fine or with both. Considering the maximum punishment inadequate, the State of Bombay passed Act 36 of 1947 and enhanced the maximum punishment i.e., imprisonment for a term which may extend to seven years but shall not, except for reasons to be recorded in writing, be less than six months. The law also made it mandatory to impose fine. As the subject matter lies within the Concurrent List, the State of Bombay attained the assent of the Governor–General and hence the Act came into operation in the province.

Later, Essential Supplies (Temporary Powers) Act was amended in the years 1948, 1949 and 1950. The amendment replaced section 7 of the Act and a new scheme of punishment was incorporated for offences under the Act which were grouped under three categories. The new provision was thus a comprehensive code jacketing the entire field of punishment for offences categorised according to the commodity and nature of the offence. The Supreme Court held that the Bombay Act was obliquely repealed by amended section 7 of the Essential Supplies (Temporary Powers) Act, 1950.[30]

Whether the power to repeal a law passed by the State legislature is incidental to enacting a law concerning same subject as is dealt within the State legislature without enacting substantive provisions on the subject would be within the purview of proviso? The question was raised in *Tika Ramji* v. *State of U.P.*,[31] but not decided. Bhagwati, J. conceded that:

> "*…there is considerable force in this contention, and there is much to be said for the view that a repeal simpliciter is not within the proviso. But it is unnecessary to base our decision on this point, as the petitioners must, in our opinion, fail on another ground.*"

It was further clarified by the Supreme Court that power to repeal an earlier law is conferred on the Parliament under the proviso and the same cannot be delegated to executive. *Tikaramji* case is animportantverdictonIndian federal system because it confiscated the opinion that Parliament can explicitly repeal any State law on the subject of Concurrentlist even if it is not repugnant to the Union law. The Supreme Court using literal rule of interpretationclarified that the Parliament can repeal a State law only when the above mentioned conditions are satisfied.[32]

VIII. REFLECTION OF SARKARIA COMMISSION

[29] *Supra* note 16.
[30] *Supra* note 18 at 674.
[31] AIR 1956 SC 676.
[32] *Supra* note 11 at 574.

In response to demands of some States to dilute the principle of Union Supremacy as incorporated under Articles 246 and 254 being anti-federal, the Sarkaria Commission[33] has made following observations:

> "*The rule of Federal Supremacy is a technique to avoid the absurdity of simultaneous operation of two inconsistent laws, each of equal validity. If the principle of Union Supremacy is excluded from Article 246 and 254, it is not difficult to imagine its deleterious consequences. There will be every possibility of our two-tier political system being stultified by internecine strife of legal chaos and confusion caused by a host of conflicting laws, much to the bewilderment of the common citizens. Integrated legislative policy and uniformity on basic issues of common Union –State concern will be stymied. The very object of putting certain matters in the Concurrent List is to enable the Union Legislature to ensure uniformity in laws on their main aspects throughout the country. Therefore, the principle of Union Supremacy is indispensable. It is indeed the kingpin of the federal system. Draw it out the entire system falls to pieces.*"[34]

IX. AMERICAN EXPERIENCE

It is well established[35] in the United States that the Congress has the power to avert state law in a givenfield.[36]The provision analogous to Article 254 is known as the principle of Preemption in the American Constitutional law.It is generallypresumed that the Congress derives thepower of preemption from the Supremacy Clause[37] of the Federal Constitution which reads as under[38]:

> "*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, anything in the Constitution Laws of any State to the contrary notwithstanding.*"[39]

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[33] A Commission under the chairmanship of Justice Sarkaria was set up by the Union Government toexaminethe Centre-state relationship and to make recommendations within the constitutional framework. The Commission submitted its extensive 1600 pages Report in January 1988.

[34]*Ibid.*

[35]See*Pacific Gas & Elec. Co.* v. *State Energy Comm'n*, 461 U.S. 190, 203 (1983).

[36]See Stephen A. Gardbaunt, "The Nature of Preemption" 79 *Cornell Law Review* 767 (1994).

[37]See,The Constitution of the United States of America, art. VI.

[38]Critics however, raises two straightforward problems with this view. Firstly; it does not explicate as how the Federal Supremacy Clause which is a kind of dispute resolution mechanism, can grant any powers at all. Secondly; supremacy and pre-emption are two separate legal concepts instituting two distinct means of regulating the concurrent federal and state relationship.

[39]The Constitution of the United States of America, 1789.

This clearly explains that federal law in the United States can outdo any incompatible state law. Preemption may be explicit or implicit. When Congress selects to explicitly preempt a State law, the only question for Courts to examine is whether the challenged State law is one that the federal law is intended to preempt. In implied preemption, the courts have to look beyond the express language of federal statutes to determine whether Congress has "occupied the field" in which the State is attempting to regulate or whether a State law directly conflicts with federal law, or whether enforcement of the State law might frustrate federal purposes.[40]

The Supreme Court of United States visibly and unambiguously recognized the congressional power of preemption in the beginning of the 20th Century. *Gibbons* v. *Ogden*[41]is considered as the first case in which the Supreme Court avowed the power of preemption.[42] However, the period from 1912-1920 is marked for the clear and explicit statements of candid preemption rules. Under this rule, it was not just incompatible state laws that are superseded by federal law on the same subject, but any state laws even those that are consistent with and supplement federal law. The impact of congressional assertion was possibly to terminate the concurrent power of the states and to create exclusive federal power. This phase perceived supersession of many state laws by the Court overtly on the newly created preemption power.[43] By the 1930s, another movement to extend federal powers was under way. In this new context the automatic element of preemption power was qualified with a prerequisite that a federal law would be considered to have taken over a given field only if Congress clearly manifested its intent to do so.[44] This was a logical result of the rearrangement of American federalism that commenced with the New Deal in 1933[45] and that was judicially affirmed in 1937.[46]

The Court in *Pennsylvania* v. *Nelson*[47]held that federal "occupation of the field occurs, when there is no room" left for State regulation. Courts must look to the pervasiveness of the federal scheme of regulation, the federal interests at stake, and the

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[40] The Supremacy Clause and Federal Preemption. See http://law2.umkc.edu/faculty/projects/ftrials/conlaw/preemption.htm (last visited on Sep. 30, 2019).
[41]22 U.S. 1 (1824).
[42]William Cohen, "Congressional Power to Define State Power to Regulate Commerce: Consent and Preemption", in Terrance Sandalowand Eric Stein (eds.),*Courts and Free Markets: Perspectives from the United States and Europe*523, 537 (Clarendon Press, 1982).
[43]See Alexander Bickel and Benno Schmidt, *The Judiciary and Responsible Government1910-1921*, 264-76 (Macmillan Publishing Company, 1984).
[44]*Supra* note 36.
[45]During 1933 and 1938, U.S. President Franklin D. Roosevelt started a more aggressive series of federal programs carrying immediate economic relief as well as reforms in industry, agriculture, finance, waterpower, labour, and housing etc. It immensely amplified the scope of the federal government's activities. The expression "New Deal" as it was named, was borrowed from Roosevelt's speech on July 2, 1931 generally embraced the concept of a government-regulated economy designed at attaining a balance between conflicting economic interests. Seehttps://www.britannica.com/event/New-Deal (last visited on Sep. 30, 2019).
[46]See Bruce Ackerman, "Constitutional Politics/Constitutional Law" 99(3)*Yale Law Journal*510-15 (1989).
[47]350 U.S. 497 (1956).

danger of federal goals being defeated in making the determination as whether a challenged State law can stand.[48]

Thus, we find that the principle of Preemption in American constitutional law is much more forceful than the doctrine of repugnancy as understood by Indian Constitutional law. The language of the Supremacy Clause further corroborates the approach of academicians like Prof. P.K. Tripathi who seek to extend the scope of Article 254. Moreover, unlike Indian Law, American law does not recognize any exception to the principle of preemption. Federal supremacy is at the core of the principle of preemption and it is guided only by the protection of federal interests.

It has however been argued, in the American context, the most common and consequential error is the belief that Congress's power of preemption is closely and essentially connected to the Supremacy clause of the Constitution. Statements of preemption law almost routinely *"start from the top"* with a reference to the Supremacy clause, although the exact connection that is claimed to exist between the two often varies.[49] In fact, in order of descending frequency and significance, three different theories are constructed: *First*, Congress's constitutional power to preempt state law derives from Supremacy Clause.[50]*Second*, regardless of the source of preemption power, the Supremacy Clause operates to preempt state law where it conflicts with federal law.[51]*Third*, each case of preemption involves a conflict between Congress's intent to displace state regulation in a given area. According to this view, the supremacy Clause operates to resolve this conflict in fovour of Congress.[52]

In India on the other hand, it is only in the concurrent sphere the doctrine of repugnancy operates. In our country Union supremacy in legislative field is established by Article 246 read with Article 254. However, this supremacy is cautiously established by certain Constitutional principles guided by the elaborate provisions for division of powers between the Center and the States. This ensures that States are not kept in dark about their respective domains of legislation.

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[48] Vincent Ostrom, *The meaning of American federalism: Constituting a Self-Governing Society* 206 (ICS Press, California, 1st edn., 1994).

[49]However, there are contrary arguments that these two are separate and distinct legal conceptsand provides two alternative methods of managing the centre-state relation. For instance, when Congress has exclusive power,preemption cannot arise because there is no state legislative power to be pre-empted. Similarly, in such areas, the Supremacy Clause is redundant as there can in principle be no conflict between a valid state and federal laws where the states have no power to act and vice-versa. Federal supremacy does not deprive states of their pre-existing, concurrent law-making powers in a given area; rather it means that a particular law in conflict with a particular federal law will be trumped in cases where both apply. State legislation has full effect as along as it is not in conflict with federal law, and state legislative competence in a given area fully survives. Preemption, by contrast means (a) that states are deprived of their power to act at all in a given area, and (b) that this is so whether or not state law is in conflict with federal law. Preemption is thus jurisdiction-stripping or jurispathic. See*supra* note 36.

[50]*Supra* note 37, para. 2. Commonly referred to as the Supremacy Clause.

[51] The exposition of preemption doctrine in virtually every modern preemption case includes a statement to this effect. See, e.g., Cipollone, 112 S.Ct. at 2617 (State law is preempted if that law actually conflicts with federal law).

[52]*Supra* note 36.

X. CONCLUSION

The doctrine of repugnancy as incorporated in Articles 254 has not received liberal interpretation that it deserved. It is indeed necessary to give liberal interpretation to this Article. The attack on Article 254 as being anti-federal has been beautifully repelled by Sarkaria Commission. In fact, we see more stringent corresponding provisions in American Constitutional law which is a role model of federal polity. It is sometimes extremely important to preserve the uniformity of laws in certain areas of common concern in a federal structure. The principle of supremacy of federal laws serves this purpose very well.

No doubt the rights of States to take care of their local needs requires due consideration. However, we cannot stretch it so far as to create confusion and chaos. We should draw some lessons from the greatest Federation of the world and borrow its best practices which America has mastered over a long period. Therefore, there is no need to be unduly alarmed by the liberal interpretation of Article 254.The analysis of scholars like Prof. P.K. Tripathi also merits due consideration as it would help to resolve certain outstanding issues pertaining to Article 254. Most importantly if we accept the submission of Prof. P.K. Tripathi that Article 254 should be treated as a residuary provision for the resolution of any conflict between Union and State laws we can get a uniform principle for addressing such conflicts.

NEGOTIATIONS WITH ONESELF:LOCATING TIBETAN YOUTH IN THE IDENTITY DISCOURSE

Prof. (Dr.) Nuzhat Parveen Khan[*]
Manjesh Rana[**]

I. INTRODUCTION

Tsering Namgyal, who was born in India in 1971, on being asked by someone where is he from, while he was studying in Taiwan, struggled to answer this question what might appears to be a quite simple question for others. He was born in India to Tibetan parents, so, does this make him a Tibetan refugee from India? That might not be right, as it was his parents who were refugees, not him. Could he simply introduce himself as a Tibetan in exile? That would also not have been correct entirely. Since he was born in India, would that make him an Indian? Or since Tibet has been taken over by China, and is being represented as China in the world-map, would that make him a Chinese? On being told he was a Chinese, he replied in anger, "So then I am a Chinese-refugee, born in Himachal Pradesh, India? That doesn't make sense at all!"[1]

The present research paper attempts to locate Tibetan youth amidst this state of disarray and discombobulation. It looks at the political and legal connotation of citizenship, and struggle of Tibetans with respect to the same. Further, it discusses how boundaries play an important role in preserving the collective identities of groups and communities, and how absence of them can leave them vulnerable. Furthermore, it delves deeper into the phenomenon of identity and highlights how it should be treated to have been evolved through changing dynamic relations between the people, rather than looking at it only through an individual perspective. Finally, it attempts to shed light on the different generations of Tibetans living in India, and the struggle of the youth to identify with their roots.

Tibetansthroughout the world, especially Tibetan youth, appears to be struggling with their identity. It is perhaps hard for them to identify with their 'Tibetan-ness'.Consequentially, theyfind it hard to focus on their struggle for independence or 'autonomy'. On being asked who a Tibetan is, majority of them say that a Tibetan is the one who follows Buddhism. They are slowly losing the track of their identity and the idea of Tibet as a nation is gradually being lost in the minds of young Tibetans.What is Tibet for the ones who migrated to Nepal and India following the invasion of their lands by the Chinese in 1950's? And what is the idea of Tibet for the next generations of those Tibetans? The first generation comprises of the older Tibetans who were born in free Tibet and fled to India due to Chinese invasion in 1950's. The second generation comprises of those who were born in India to the first generation and has never seen the Tibet they know from the stories they are told about. The third generation of Tibetans are those who are born to the second generation (i.e., to the people who have never seen the Tibet they belong to) but have lived their lives under the guidance of those who belong to the first generation (i.e. the ones who are the storytellers.) At the time when there is a continuous threat to their identity and continuous

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[1] Rajiv Mehrotra (ed.), *Voices in Exile*54 (Rupa Publications, New Delhi, 2013).

fear of dilution of their culture in majority cultures, how do the new generation identify with themselves?

II. IDENTITY, CITIZENSHIP AND BOUNDARIES

Citizenship is as old as settled human community. It defines those who are, and who are not, members of a common society.[2] Citizenship is manifestly political enterprise, yet two general issues or questions arise out of its practice: The first question concerns the issue of who can practice citizenship and on what terms it can be practiced.[3] It is not limited to the legal scope of citizenship and the formal nature of rights enshrined in it. Non-political capacities of citizens which derive from the social resources they command and which is also accessible to them. A political system of citizenship based on the equality is in reality unequal if there is a division in the society because of unequal conditions.[4]The second question concerns the consequences of advances in citizenship rights, especially for the social relationships of citizens (and non-citizens) and for the social and economic institutions in which they live and work.[5] In particular, disadvantaged groups in society might struggle for citizenship rights in order to improve their conditions.[6]For Aristotle, the idea of citizenship was the privileged status of the ruling group of the city-state, but in the modern democratic states of today, the basis of citizenship is the capacity to participate in the exercise of political power through the electoral process.

Today, in India, when the citizenship was offered to the Tibetans in exile some of the Tibetans opted for the same, while others, perhaps in the fear of dilution of their Tibetan identity and struggle for freedom, are reluctant to do the same. In the past, earlier generations believed in not adopting citizenships of the places they were residing in, under the fear of their identities being diminished. Today, the situation is a little different, as some of the Tibetans have started opting for citizenship and do not believe this to have an effect of devaluation upon their identity. Some of them are starting to recognise the positives of dual identities.

Boundaries play very important role in determining identities of different groups of people in the world. Boundaries are not just restricted to physical or territorial sense, but also includes various other elements, like language, clothing, food etc. Apart from these, political, social, cultural, and economic subordination also help in determining who belongs to a particular group and who does not. Another unifying feature of these groups is their collective memories. There shared memories make them feel and believe they belong to each other. Leaders, religious and others, make the people of their respective groups strictly obey certain norms demanding conformity. Believers are understandably hesitant to depart from the strictures of their leaders.[7] This leads to cultural pluralism between the people and groups who share common citizenship within a particular State, which is determined by a fixed physical territory or boundary.Therefore, where the mainstream society meets, such as schools, colleges, movies and other public places or media, newspapers, books etc., fights

[2]J.M. Barbalet, *Citizenship: Rights, Struggle and Class Inequality*1 (Open University Press,England, 1988).
[3]*Ibid*.
[4]*Ibid*.
[5]*Id.* at 2.
[6]*Ibid*.
[7]Jeff Spinner, *The Boundaries of Citizenship*168(The John Hopkins University Press,Baltimore & London, 1994).

erupt between such groups because of the varied ideas of identity, collective memories, and citizenship.

It is easier for a nation, which is tied to a defined territory, to maintain its identity. It is harder for those groups who are in minority, to construct their own public spaces. These public spaces, and the memories created within them, have a very important role to play in defining and preserving identities by such groups in a State. Collective memories belong to them, and strengthen the sense of belongingness between the members of a group.For refugees, it is hardest to preserve their identities in the spaces which are alien to them, and publicly dominated by the nationals of a particular State. In such spaces, they become outsiders or strangers struggling to claim their own public space, and protect their distinct identities. They are always at the mercy of the host nations. Failing to create a public space for themselves, they try to create a private space to safeguard their unique ethnic identity. By doing this, they try to establish the boundaries between themselves and the others. Survival of their identity depends upon such boundaries.

For the minority groups who are the citizens of a particular state, maintaining these boundaries means to perform a delicate balancing act between their two identities: ethnic identity in private spaces, and identity of a citizen in public. For a refugee, in absence of any say in public matters of the host states and control of the public spaces, it is much more challenging to establish and maintain these boundaries.Political boundaries allow groups that feel their identity is threatened to gain recognition from others in the world.[8] The demand for recognition is much harder to realise for those ethnic and racial groups who lack a claim to land. For self-determination and to preserve their identity, they desire to have their own State. Therefore, in modern times, survival for all cultural and linguistic communities is a big challenge.

Tenzin Tsundue, one of the most popular Tibetan poets and activists, who resides in Dharamshala, says that, "tomorrow, even if autonomy is granted, our fight for independence will continue"[9], and certainly demands much more than what His Holiness the Dalai Lama asks through his Middle-Way Approach. He, like many other young Tibetans, fails to be satisfied with the demand of autonomy compromising with the bigger demand for complete freedod. Many young Tibetans sit on hunger strikes, organise protest march and raise slogans for 'Free Tibet' inspite of being repeatedly stopped by His Holiness the Dalai Lama. Tsundue feels they are misunderstood to be violent and writes that, "…even though Tibetan Youngsters take aggressive and confrontational actions, our common credo remains non-violence."[10]

Many social groups, in absence of resistance (i.e., when they do not resist when denied rights) could find them outside of their territories and could be totally excluded or displaced. For survival, resistance is sometimes necessary to continue being a member of the State where they have formal rights or right to have a claim for the same. Such 'resistance' is important to save them from 'exclusion'. In some situations, resistance is not possible without violent protests, which can end up being counter-productive, and might reinforce the feeling of 'not belonging' within the members of a group, and can have a negative result of further 'excluding' them. It affects the image of the community to the world outside and the young immigrants could be seen as potential domestic enemy by the other members of the

[8] *Id.* at 176.
[9] *Supra* note 1 at 72-73.
[10] *Id.* at 73.

same community, threatening their cultural or religious identity. Also, the dominant system of the State can easily exploit such community justifying its safety and security policies.

In order to move freely in all the spaces, it is important for the people to be aware of their surroundings. Also, they should be fully aware of their placement and positioning in relation to other agents around them in a given situation. They are always in this 'given' but 'changing' situation which is 'socially constructed'. The identity, in the course of discourse, is constantly changing. The world, for a group, can be described by the things they perceive, how they perceive them, and the values they attach to them. This is their identity in a given situation. Such discourses can empower them and can also trap them.Since it is socially constructed, 'individuality' should be understood as 'social individuality', which has a form peculiar to the form of our surroundings within which our individuality is nurtured and developed. Therefore, instead of treating the phenomenon of identity to be central to an individual, it should be treated to have been evolved through changing dynamic relations between the people. All the powers attributed to an individual are only by virtue of his embedding within a particular region of social activity.

John Shotter while analysing the nature of human beings in psychological context writes, "…human beings are born 'naturally' as already individuals, possessing (also 'naturally') within themselves the 'potential' for an authentic inner self, a potential which in itself owes nothing to society. And that if only our nasty, inhuman environment was changed, that potential would flower out into an authentic self of its own accord. Thus, our task then was to discover the universal nature of 'atomic' human beings (individuals), and the general 'laws' governing their motions. The motifs governing our thinking at the time were: talk of things rather than activities; science not politics; facts rather than moralities; similarities rather than differences; harmony and agreement rather than conflict and discord; homogeneity rather than heterogeneity; order rather than chaos; structures and products rather than activities and processes; unity and stability rather than plurality and instability; already existing form rather than formative (form producing) processes; finding and discovering rather than inventing and making; shared foundations (initial conditions) rather than shared reflexive awareness, that is, shared 'methods' for negotiating understandings- in short, shared meanings rather than shared means; and so on. All the first terms played a privileged part in our discourses, while all the second terms were left unvoiced."[11]

A free individual is the one who acts freely, and takes responsibility for his or her actions. For self-respect, it is important to act freely, i.e., to be able to execute one's own actions, and live a life of their own. If one's actions are dominated by others, and if one is dependent upon other people, especially for the things which provide self-respect, it will be hard to respect oneself. Therefore, people's identity is shaped by their actions, and they help them identify themselves in the society at large, and differentiate themselves from 'others'. It provides them with a sense of what they are and who they are in the identity discourse. The capacity to act freely, i.e., without any support from 'others' and without any intervention, help them own their individuality, and nurture, maintain and regulate the shape of their community.

Tenzin Lhadup, who studied in Tibetan Cultural Village School (TCV), Dharamshala, considers it to be the most effective institution which provided him with an education comprising the traditional learning of Tibetan culture and modernity. Many Tibetans today

[11]Bryan S. Turner, ed., *Citizenship and Social Theory* 117 (Sage Publications, London, 1993).

are trying hard to adapt to alien cultures of the groups of people they struggle to even communicate with. For Tenzin, TCV helped finding him his true Tibetan identity as a 'red-cheeked, Tsampa-eating Tibetan'.[12]

III. THREE GENERATIONS AND THE TIBETAN-NESS

The combined experiences of the three generations of Tibetans in India in exile since last six-decades have impacted the identity of a Tibetan and have presented new set of challenges for the times ahead. Of these three generations, the first were affected in 1950's, when the Chinese invaded Tibet. In 1950's, this generation comprised the youth of Tibet and were in their 20's and early 30's at that time. the generation next to them grew up in the years following the upheaval, i.e., during 1960's and 1970's. the third generation was born in 1980's and 1990's, at times when the exiled community in India was comparatively established and stable. The responsibility of the entire community is on this generation now. This comprises Tibetan youth in present times who are in their 20's and 30's.

The first-generation Tibetans have grown old now and are in their 70's and 80's. They have very strong memories of their home-land Tibet and the times when Chinese invaded their lands. They still preserve the emotional bond which they have with Tibet. This generation had an important role to play in supporting and strengthening the foundations of Tibetans during the first two decades of exile, and they also comprise the first batch of Tibetan officials to be part of the Tibetan Government in Exile set up in Dharamshala, Himachal Pradesh, India. They helped in establishing various institutions under their Government in Exile and worked hand in hand under the guidance of their leader, His Holiness the Dalai Lama. They helped thousands of Tibetans who fled Tibet along with His Holiness in 1959 and afterwards resettle and develop as a community in the foreign land. They involved themselves in the new democratic process introduced to them and worked to strengthen their education system. It was really difficult for them to establish themselves in a land where they had to confront a lot of social, cultural and linguistic challenges, along with climatic challenges they were facing.

Unlike the first generation, the second generation have vague and faint memories of life before exile, as they were children when they were brought to India after Tibet's invasion. They were first to be introduced and exposed to the world outside of Tibet. The education system established by the first-generation Tibetans helped them learn about the traditional Tibetan culture and also about the modern curriculum. This system tried to provide these second-generation Tibetans the best of both the worlds. This generation filled the urgent need of educated man-power in the 1980's and 1990's and became the backbone of Tibetan community in exile in India. They helped maintain the institutions established by the first-generation Tibetans to preserve their Tibetan identity in the foreign land. By providing support to maintain the critical institutions like Tibetan Institute of Performing Arts (TIPA) and Library of Tibetan Works and Archives (LTWA) located in Dharamshala, they helped Tibetan Government in Exile in preserving their roots.

The third generation of Tibetans in exile in India are in their 20's and 30's. Educationally, they are far better off than the previous generation and have much more exposure to the outside world compared to the first- and second-generation Tibetans in exile. The system of universal education, flourishing under His Holiness has helped mould Tibetan

[12] *Supra* note 1 at 68.

identity in exile by getting away with the traditional class-based society and transforming the same into modern society based on the principle of equity, where every Tibetan is provided with an equal opportunity. The democratic system of Tibetan Government in Exile had, this way, a huge impact in this positive transformation. This helped them being united in the foreign land and preserve their primary identities as Tibetans.

The biggest challenge for the new generation of Tibetans in exile in India and other places around the world is to cautiously study, understand and analyse the concept of identity, which comprises of their language, culture, religion and much more. They need to analyse how this concept applies to them and what the latest challenges are to preserve their identity, in absence of any land or territory of their own, where they have control over the political matters. Their identity is being undermined in both Tibet, which is now in total control of Chinese government, and in exile. Unlike the previous generations they definitely lack direct historical continuity.

The generation gap is unavoidable and natural in all communities of the world. It is an issue which needs to be tackled with utmost diligence in Tibetan context, as they lack a common piece of land which they can call home, and have political control over. Preserving identity in exile could be difficult when a generation undermines the efforts of the previous conditions. Tibetans, today, need to preserve their social fabric, which is the biggest challenge for them as they are spread across the worlds and can easily be diluted in the dominant cultures, they exist in.

IV. Conclusion And The Way Forward

"If you really want to, bring me some sand from Tibet"[13] was what Tenzing Gelek replied on being asked by his Chinese friend, who was visiting Tibet, what he would want her to get him from Tibet. He writes that with one request, he had bared the innermost feelings that he shared with most exiled Tibetans – the longing to touch a place called home, the longing to belong.[14] Tibet for him is a place he had grown up listening to his grandparents speak about while living in a refugee settlement in India. This is the place which he, and many others, have never seen, but imagined and pictured through the stories they have heard in their childhood. It pains him as well as thousands of others, to explain to the people difference between themselves and Chinese. With regard to the question of need of preserving Tibetan identity, he believes Tibet to be more than just a cause. He believes Tibet to be his way of life and the ultimate purpose like many other members of his community. It motivates him to study that extra hour each night, and he firmly believes it to be the driving force for many others making them pay extra attention teaching their children about their language and culture and who they really are and to stand true to their responsibilities that they have inherited from older generations.

Language has played a major role of custodian of Tibetan cultural heritage in the lives of Tibetans in exile. Perhaps this is one of the most crucial issues that Tibetan community is facing in the light of unintentional neglect by the Tibetan community in exile. It is really important to create a favourable environment at homes for the language which is mother-tongue for this community in exile. It is undoubtedly an essential ingredient of parenthood and childhood.

[13] *Id.* at 64.
[14] *Ibid*.

Minority groups are always under threat of being absorbed and diluted into the majority groups. In places with multi-ethnic geography, it is important for such minority groups to safeguard themselves from dominant ethnic groups. Within their own land, they are purportedly being integrated and absorbed into the larger groups. Tibetan community in exile have accommodated themselves quite well in their host cultures at various places, but at the same time it must be noticed that not all the transformation and adaptation has been positive for them. The new generation has a bigger challenge to save themselves from the process of subconscious acculturation which, if not taken care of, might lead them to irreversible assimilation in the future.

The language is growing unpopular among the new generation, for being economically disadvantaged. In Tibet, as well as in exile, the community is forced to learn more 'lucrative' languages like Mandarin and English. Until now, Tibetans in exile have successfully preserved their linguistic identity by providing favourable environment within their private spaces for speaking Tibetan language. Exposure of young children to the outside world, technological advancement, and increasing dependence on English is forcing youth to focus more on English compared to 'less-profitable' Tibetan.

The first generation exiled Tibetans had the responsibility of inter-generational transmission of Tibetan language. The responsibility then fell onto second generation Tibetans in exile. The present and future generation need to keep in their minds that it only takes just one or two generation gaps before a language is completely forgotten, and goes into total extinction. It is very important to have your own language to safeguard your culture. In context of Tibetans in exile, their Tibetan-ness is deeply encoded in their distinct culture, which can only be articulated through own distinct language. Therefore it is necessary to have a distinct language and culture in order to preserve their identity in foreign land. Languages hold the cultural and traditional folklore within them. With the loss of language ancient knowledge and wisdom are also lost. In such a situation, it is advisable for such communities to ponder over this and save themselves well in advance before subconsciously inflicting cultural and linguistic suicide upon themselves. Therefore, Tibetan youth today must work hard to safeguard, protect, and revive the vitality of their language.

Yanki Tseering rightly says, "The importance of preserving our culture becomes greater when we realise that we don't have a place to call our home."[15] Tibetan youth today will have to make extra efforts to educate themselves and to make them aware about their background and traditional identity. They need to understand what their parents' culture was, and where do they belong to as individuals and as a community. They need to be always attached to their roots, especially in the current situation, when they have been in exile since last three generations.

For majority of young Tibetans in exile in India and at other places, it is important for them to be aware of their culture as ignorance can be embarrassing for them. As admitted by many of them, they are forced to know all about their culture as they are faced with a lot of curious people from other communities who know little about them and want to know more. Therefore, it may be said, that for these people, exile could be a blessing in disguise as it has given them a keener appreciation of their roots. Moreover, when they are exposed to other cultures, it makes them aware about their own distinct culture more.

[15] *Id.* at 78.

Both the Tibetan Government in Exile and the Tibetan communityhave made conscious efforts in the last few decades to save their religion, language, and culture, all of which is under real threat of elimination and extinction in Tibet, because of occupation by Chinese. They had been successful in preserving some of the religious institutions and their religious literature, but in other aspects of the culture, the result has only been satisfactory to some extent. TIPA is one the non-religious institutions set up for the preservation of their unique culture. TCV schools have played huge role in providing Tibetan education to the young kids, along with modern education. They have played an important role in providing these young kids with a favourable 'Tibet-like' environment and strengthening their cultural understanding at young age.

The Italian town of Bellagio hosted a conference for prominent western and Japanese Tibetologists in 1962, where they observed and concluded that Tibetan culture had no chance of survival in Tibet and other parts of the world.[16] They were sure that it would not be able to survive the acculturation process around the globe, but so far, Tibetan community has shown tremendous resilience, by safeguarding Tibetan culture and keeping it alive. It is yet to see how Tibetan youth respond to the latest challenges posed by the changing environment around them. It is yet to see how they manage to preserve the age-old traditional culture of Tibet, especially amidst the technological advancement in the last decade, apart from political and legal challenges for survival.

[16] *Id.* at 62.

ENVIRONMENT AND PUBLIC HEALTH: PRECAUTION AND FOOD SAFETY IN INDIA

Akash Anand[*]

I. INTRODUCTION

Humans are also an important component, as like plants or animals, of the environment as it always is the interrelationship between the living and the non-living constituents of the ecosystem.[1] If a dangerous gas leaks in the atmosphere which is injurious to humans then the courts of record and the environmental tribunals invoke Article 21 of the Constitution of India to guarantee the fundamental right to clean and healthy air for the citizens.[2]The statement, in a certain way, provides us the general and proportional relationship between environment protection and public health. However there arises few questions. What if the injurious thing is not inhaled involuntarily but is consumed unknowingly?What if the injurious thing is not a byproduct of commercial activity but an active ingredient of another thing that is produced for consumption? It was the year 2015, when the "Maggi" incident became popular, people started to talk about the *monosodium glutamate*and lead as an injurious additive to the foodstuff.[3] It, without any doubt, increased the awareness of the consumers of the things which could be harmful to their health and had earlier been consumed without any intervention. However, not surprisingly, the legislature was already aware of such harmful effects and therefore in the year 2006 passed the Food Safety and Standards Act.[4] This paper will try to contribute to the existing knowledge in the areas of food safety taking help of the environmental principle known as the precautionary principle.

II. PRECAUTIONARY PRINCIPLE IN INDIA

A. Recognition as a law

The precautionary principle is known in the national and international law as "to err on the side of caution"[5] "better safe than sorry"[6] "principle of foresight"[7] "prudent foresight"[8] and by many more terms[9]. The principle has been a part of the law of the land in India since 1996 when in the *Vellore Citizens Welfare Forum*case the Supreme Court of India held it to

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[1]See definition of "Environment" in the Environment Protection Act, 1986.

[2]See*MC Mehta* v.*Union of India*, AIR 1987 SC 1086 (Oleum Gas Leak case).

[3]SeeReuters, "Food inspectors order recall of Maggi noodles, say it contains excess lead" *Indian Express*, May 20, 2015, *available at*: https://indianexpress.com/article/india/india-others/food-inspectors-order-recall-of-maggi-noodles-say-it-contains-excess-lead/ (last visited on Oct. 02, 2019).

[4]SeeFood Safety and Standards Act, 2006, *available at*:https://www.fssai.gov.in/cms/food-safety-and-standards-act-2006.php (last visited on Oct. 02, 2019).

[5] Charmian Barton, "The Status of the precautionary principle in Australia: Its Emergence in Legislation as a Common Law Doctrine" 22 *Harvard Environmental Law Review* 512 (1998) (also referred in A.P. Pollution Case).

[6] Tim Jackson, *Material Concerns: Pollution, Profit and Quality of Life*51-52 (Routledge, 1996).

[7] Konrad Von Moltke, "The Vorsorgeprinzip in West German Environmental Policy", in Royal Commission on Environmental Pollution, *Best Practicable Environmental Option*, Twelfth Report,1988, p.no. 57.

[8]*M/s Sterlite Industries (India) Ltd*. v. *Tamil Nadu Pollution Control Board*, NGT, Appeal No. 57 of 2013,p.no. 125.

[9]Due Diligence, Best Available Technology, Reasonable Anticipation, Risk Management.

be so.[10]After the judgement, the principle has been applied in numerous disputes relating to the environment protection.[11] In 2010 it got a statutory recognition, though not defined, with the enactment of the National Green Tribunal Act.[12]The relevant provision, section 20, states that the tribunals while deciding disputes shall apply the precautionary principle among other principles. The definition of the precautionary principle was presented by the court in *Vellore Citizens*[13] case and its evolution were discussed in the *A. P. Pollution* case in 1999.[14] These judgments could be stated as the watershed in the development of the law relating to the environment in India.

B. Constituents Explained

The court in *Vellore Citizens Welfare Forum* case was faced with balancing the economic need of the developing country with the need of the environment to keep it free from pollution and degradation which in turn, if not checked, will again cause, were already causing too, grave problems to the current, immediate and the future generations of the country. It recognized precautionary principle as a part of the balancing concept known as the sustainable development. Further it held that "*precautionary principle is the law of the land*" and the principle means:

> "*(i) Environment measures - by the State Government and thestatutory Authorities must anticipate, prevent' and attack the causes of environmental degradation.*
> *(ii)Where there arethreatsofserious and irreversible damage lack of scientific certainly should not be used as the reason for postponing, measures to prevent environmental depredation.*
> *(iii)The "Onus of proof" is on the actor or the developer/industrial to show that his action is environmentally benign.*"[15]

In *A. P. Pollution Control Board* case the balancing to be found was not as tough as in the Vellore case as the matter was for only few industries which were asking a relief to be located near the twin lakes in Hyderabad.[16] Therefore the court without even discussing the contribution of the industries to the GDP of the country discussed in detail the reason for the emergence of the precautionary principle.[17] It discussed the shift from the *assimilative capacity principle* to the precautionary principle and also stated that the inadequacies of science was the real basis of the precautionary principle.[18]It also provided that the threats which are identifiable an non- negligible will ask for the application of the precautionary principle incorporating the reversal of the burden of proof element of the principle as stated in the Vellore Citizens case.[19]

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[10]The principle was nowhere mentioned expressly in any of the legislations till the date of the judgment.
[11]*M.C. Mehta* v. *Union of India*, AIR 1997 SC 734(Taj Mahal case);*Research Foundation for Science* v.*Union of India*, (2005) 10 SCC 510(Ship Breaking Case);*Murli. S. Deora* v. *Union of India*, (2001) 8 SCC 765(Smoking in Public Place case) etc.
[12] National Green Tribunal Act, 2010, s. 20.
[13] AIR 1996 SC 2715 18.
[14] AIR 1999 SC 812 26.
[15]*Supra* note 13 at 12
[16]*Supra* note 14 at 2.
[17] In *Vellore* case the issue revolved around tanneries which were stated to contribute greatly to the GDP of the country.
[18]*Supra* note 14 at 11,12.
[19]*Id.* at 13.

III. THE FOOD ACT AND MAGGI

A. Authorities and their powers under the Food Safety and Standards Act

The year 2006 saw the enactment of the Food Safety Act in India.[20]One of main contribution of this act is the establishment of the food authority popularly known as the FSSAI.[21] However apart from this, it importantly provides in its preamble that it establishes the authority "*to lay down science based standards for articles of food and to regulate*" its "*manufacture, storage, distribution and sale purchase and to ensure safe and wholesome food for human consumption"*.[22]The act reaffirms the above aspiration and states that the "*food authority shall regulate and monitor the manufacture, processing, distribution, sale and import of food so as to ensure safe and wholesome food*" as one of the duty or functions of the authority.[23]In the chapter for the enforcement of the Act it mentions the "*food authority, state food authorities, food safety officers, Commissioner of food safety and designated officers as responsible for the enforcement of the Act"*.[24]

The commissioner of food safety is to be appointed by the state government for the efficient implementation of food safety and standards and other provisions of the Act.[25] It is also expressly provided that the officer "*shall prohibit in the interest of public health manufacture storage distribution or sale of food articles notified in the official gazette"*.[26] The officer can also sanction for prosecution for offences made punishable under the Act.[27]The Commissioner of Food Safety has to appoint in each district of the state, mandated for each district[28], officers for food safety administration, known as "Designated Officer, who shall not be below the rank of a Sub-Divisional Officer".[29] The designated officer is also provided with the power to grant or reject licenses, prohibit manufacture, sale and distribution of food articles, recommend for, for offences for which punishment is imprisonment, and sanction or launch prosecution, for offences for which punishment is fine, as mentioned in the Act.[30] The commissioner of food safety shall also appoint food safety officers in local areas for the implementation of the provisions of the Act.[31]The "Food Safety Officer" can take a "sample, seize any article of food which appears to the officer is in breach of the provisions of the Act"and keep in its custody the food article on a reasonable doubt as per involvement in "any offence related to food and thereafter inform the Designated officer of the actions" undertaken by the officer.[32]The food safety officer shall send the sample to the food analyst who in return sends the report of the analysis to the Designated Officer and its copy to the Commissioner of food Safety.[33]The designated officer after analyzing the report sends his recommendation to the commissioner of food safety for launch of prosecution if the

[20] Food Safety and Standards Act,2006, *available at*: https://www.fssai.gov.in/upload/uploadfiles/files/FOOD-ACT.pdf.
[21] *Id.*, s. 4.
[22] *Id.*, Preamble to the Act.
[23] *Id.*, s. 16.
[24] *Id.*, s. 29.
[25] *Id.*, s. 30(1).
[26] *Id.*,s. 30(2)(a).
[27] *Id.*, s. 30(2)(e).
[28] *Id.*, s. 36(2).
[29] *Id.*, s. 36(1).
[30] *Id.*,s. 36(3).
[31] *Id.*, s. 37(1).
[32] *Id.*, ss. 38(1) and 41.
[33] *Id.*, s. 42(1) and (2).

offence is punishable with imprisonment.[34] The "commissioner of food safety sends its decision to the designated and the food safety officer who then launches the prosecution in the courts of jurisdiction".[35] It is also provided that the "Commissioner of food Safety and the Designated officer can exercise the same powers which are conferred upon the Food Safety Officer".[36]

B. The application in the MAGGI case[37]

(i) Background of the case

Nestle India filed petition in the Bombay High Court for an appropriate writ to be issued against the order of the Commissioner of Food Safety. It all started when a food inspector in Uttar Pradesh in Barabanki district after he became suspicious about its claim that it doesn't have MSG in it, sent a packet for analysis in the laboratory recognized by the state.[38]After knowing of the result that showed that the package contained MSG contrary to the claim sent the report to the petitioner, the Food Safety Authority and the Chief Executive Officer.[39]On the request of the Nestle India the sample was also sent to a laboratory in Kolkata which in its report also stated the level of lead in the product, at 17 ppm, which was higher than the allowed limit i.e. 2.5 ppm.[40] The petitioner after publication of a news item on the excess quantity of lead in its product in a press release withdrew its products from the market.[41] The petitioner was asked to meet the Chief Executive Officer and the same day it ordered for the ban of the product.[42] The Commissioner of Food Safety also issued an order prohibiting the product in the Maharashtra state.[43]On the basis of averments made by the petitioner and the respondents in the case many issues were framed by the High Court of Bombay which included right of being heard as a principle of natural justice not followed by the authority and the recognition of the laboratories by NABL etc. In almost all of the issues the respondents could not present a case in their favour and therefore the claims of the petitioner were accepted by the Court.The court passed the order in the favour of the petitioner.

(ii) The relevant legal issue

Irrespective of the result of the petition in the High Court it is important to assess one of the determinations to an issue framed by the Court. The issue farmed is as follows: -

> "*(VII)What is the source of power under which the impugned orders were passed and whether such orders could have been passed under sections 10(5), 16(1), 16(5), 18, 22, 26, 28 and 29 of the Act?*"[44]

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[34]*Id.*, s. 42(3).
[35] *Id.*, s. 42(5).
[36]*Id.*, s. 29(6).
[37]*Nestle India Ltd.* v. *Food Safety Authority of India*, WPL/1688/2015, Bombay High Court.
[38]*Id.*at 11, para. 11.
[39]*Id.* at 12.
[40]*Id.* at 12, paras. 11,13.
[41]*Id.* at 14, para. 16.
[42]*Id.* at 14, para. 17.
[43]*Id.* at 15, para. 18.
[44]*Id.* at 23.

The Court answered the issue in this manner: -

> "*In our view, from the perusal of the aforesaid provisions it is difficult to accept that the Food Authority can pass the impugned orders under these provisions. It is difficult to trace the origin of the power to ban the product on emergency basis to sections 10(5), 16(1), 16(5), 18, 22, 26, 28, 29 of the Act.*"[45]

Before deciding the abovementionedissue, the court explained some of the provisions of the Food Safety and Standards Act. The court stated that the food authority, Commissioner, designated officer and the food inspector has been provided powers under the Act with ascending order of coercion.[46] It further stated that the powers of the food authority can be divided into three forms i.e. suspension of license, imposition of ban or prohibition and launch of prosecutions.[47]The court was at this juncture assessing the order passed by the Chief Executive officer which stated that the food authority under subsection (1) of section 16 and clauses (a), (b), (c), (f) and (g) of subsection (1) of section 18 and further read with sections 26 and 28 directs the company to withdraw and recall its products from the market and stop its manufacture, distribution and sale.[48]The court stated that under subsection (1) of section 16, calling it "*an omnibus provision*", the Act imposes "*a duty and obligation on the food authority to regulate food business to ensure food safety and does not empower the food authority to ban a product*".[49] It referred to subsection (5) of the section 16 and sated that the it only empowers the food authority to pass directions to the commissioner of food safety and nothing else.[50]

The court then referred to subsection (1) and (2) of the section 18 and stated that it enumerates guiding principle for implantation of the provisions of the Act and guiding principle for framing regulations under the Act respectively.[51] It stated that the section is no more than guidelines and cannot be said to be the source of power.[52] The words are: -

> "*We fail to understand as to how these guiding principles can be said to give power to the Food Authority or Commissioner of Food Safety in passing the impugned order at Exhibit-A. This section also cannot be said to be a source of power since it only lays down the guidelines.*"[53]

Finally, the court stated that under section 26 and 28 the food authority has no power to issue the impugned order as these section only enumerates the responsibilities of the food business operation and imposes a duty and obligation upon them and therefore the food authority cannot trace its powers under these provisions.[54]

IV. THE CODEX AND EU LEGISLATION

[45]*Id.* at 60, para. 65.
[46]*Id.* at 18, para. 25.
[47]*Id.* at 18, para. 26.
[48]*Id.* at 28, para. 38.
[49]*Id.* at 61, para. 67.
[50]*Id.* at 62, para. 69.
[51]*Id.* at 63, para. 73.
[52]*Ibid.*
[53]*Ibid.*
[54]*Id.* at 67-72, paras. 72-74.

A. Codex: What it has?

The "Codex Alimentarius Commission" was formed jointly by the FAO and the WHO which can be said to be the result of the *Codex Alimentarius Europaeus* formed in 1958. In 1961 the *Council of the Codex Europaeus* passed a resolution that its working shall be taken over by the FAO and WHO and in the 11th Conference of the FAO the Commission was formed.[55]The Codex is the "collection of internationally adopted food standards" which aim at protecting human health and is "intended to guide and promote the elaboration of definitions and requirements to assist in their harmonization".[56]India is the member of the Codex Alimentarius Commission since 1964.[57] India is also currently the regional coordinator for the Codex Coordinating Committee for Asia (CCASIA).[58]The commission publishes a working manual which provides the guiding principles to be applied in food safety. The 27th edition of the manual in its Seventh Section contains the working principle for risk analysis adopted in 2003 to be applied in the framework of the Codex and the definition of risk analysis terms relating to food safety adopted in 1997 among other things.[59] It mentions that risk analysis is composed of three elements i.e., risk assessment, risk management and risk communication.[60] It also states as follows: -

> "*Precaution is an inherent element of risk analysis. Many sources of uncertainty exist in the process of risk assessment and risk management of food related hazards to human health. The degree of uncertainty and variability in the available scientific information should be explicitly considered in the risk analysis*."[61]

B. EU legislation on Food Safety

The European Parliament in 2002 passed a regulation, No. 178/2002, laying own the "general principles and requirements of food law" which established the "European Food Safety Authority".[62] The regulation states that it is for providing the basis "for the assurance of a high level of protection of human health" by a strong science based procedures and efficient organizational arrangements for "decision making" in matters for food safety.[63] Further that, for the purposes mentioned above, it lays down the general principle and that it shall apply to all stages of production, processing and distribution of food.[64]Article 2 of the regulation defines food :-

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[55]See Codex Alimentarius, "About Codex: History",*available at*: http://www.fao.org/fao-who-codexalimentarius/about-codex/history/en/ (last visited on Oct., 02, 2019).
[56] FAO and WHO, *Codex Alimentarius Commission: Procedural Manual*21, para. 1 (Rome, 27thedn., 2019).
[57]SeeCodex Alimentarius, "About Codex: Members",*available at*:http://www.fao.org/fao-who-codexalimentarius/about-codex/members/en/(last visited on Oct., 02, 2019).
[58]*Ibid.*
[59]*Supra* note 56 at 121.
[60]*Id.*, para. 5.
[61]*Id.* at 122, para. 11.
[62]Regulation (EC) No. 178/2002 of the European Parliament and of the Council (Jan. 28, 2002), *available at*: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R0178&qid=1572287272009&from=EN (last visited on Oct. 02, 2019).
[63]*Id.*,art. 1 para. 1.
[64]*Id.*,art. 1 paras. 2,3.

> "*as any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans and includes drink, chewing gum and any substance, including water, intentionally incorporated into the food during its manufacture, preparation or treatment and does not include feed, live animals unless they are prepared for placing on the market for human consumption, plants prior to harvesting, medicinal products, cosmetics, tobacco and tobacco products, narcotic or psychotropic substances and residues and contaminants*".[65]

Under Article 5 the regulation provides that the objective of the food law "*is high level of protection of human life and health and also consumers interests including fair practices in trade*" and "*where appropriate taking in account animal health and welfare, plant health and environment"*.[66] It also lays down that international standards shall be taken into consideration except when it is ineffective or inappropriate for the fulfillment of the legitimate objectives.[67] Further it lays down that in order to ensure the high level of protection food law shall be based on "*risk analysis except when not appropriate*".[68] It states that risk assessment shall be based on available scientific evidence and the precautionary principle as laid down in Article 7(1).[69] The Article 7, with the heading "precautionary principle" states as follows:-

> "*1. In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment*."[70]

The Article further provides that if any measure is adopted under the above principle then such actions shall be proportionate and shall also take into consideration the economic and technical feasibility.[71]The regulation under Article 22 establishes the European Food Safety Authority with one of the missions to contribute to the high level of protection of human health and life, plant health and environment.[72] It consists of a management board, executive director, scientific committee and scientific panels and an advisory forum.[73]

V. NATIONAL GREEN TRIBUNALAND GOA

The National Green Tribunal established in 2010 is a judicial body which decides on matters or disputes relating to environment. The jurisdiction of the tribunal is provided in section 14 of Act which states that "*the tribunal has jurisdiction over all civil cases where*

[65]*Id.*,art. 2.
[66]*Id.*,art. 5 para. 1.
[67]*Id.*, art. 5 para. 3.
[68]*Id.*,art. 6 para. 1.
[69]*Id.*,art. 6 para. 2,3.
[70]*Id.*, art. 7 para. 1.
[71]*Id.*, art. 7 para. 2.
[72]*Id.*, art. 22 paras. 1,3
[73]*Id.*, art.24.

substantial question relating to environment is involved" and what is a substantial question is defined in clause (m) of Section 2. However, it is important for the discussion for this paper to refer to a decision of the National Green Tribunal where it has explained its jurisdiction as warranted by the Act in addition to Section 14 or included impliedly under it. The case is *Goa Foundation* v. *Union of India* in which the petitioners asked the tribunal to pass an order restraining the responsible authorities from granting any consent or environmental clearance for any project in the region of the Western Ghats.[74] One of the legal issues that was discussed was that the tribunal does not have jurisdiction to pass such an order and therefore the petition was not maintainable.[75] It was the contention on the part of the state that there is no dispute in this case which could be related to section 14 and also that no legal injury had been stated to be inflicted upon any person and therefore there was no cause of action under the rules of practice.[76] In order to answer the issue the tribunal referred to GP Singh's *Principlesof Statutory Interpretation*and stated that the preamble to the Act is a percept to gather legislative intent and an instrument guiding a prudent legislative interpretation.[77]It then states:-

> "*The essence of the legislation, like the NGT Act, is to attain the object of prevention and protection of environmental pollution and to provide administration of environmental justice and make it easily accessible within the framework of the statute. The objects and reasons of the scheduled Acts would have to be read as an integral part of the object, reason and purposes of enacting the NGT Act*."[78]

The tribunal then referred to Section 20 of the Act and stated that "*precautionary principle would operate where actual injury has not occurred*" and would constitute sufficient cause of action as the "*principle is permissible and is opposed to actual injury or damage*".[79] It also stated that the application of the precautionary principle is a statutory command and even an apprehended violation would be actionable under the principle. It stated further that "inaction could itself be a violation of the precautionary principle" and thus bring it under the jurisdiction of the Tribunal. Further that, when the above provision is read with subsection (1) of Section 3 and Section 5 placing statutory obligations on the government, it shows that the intention of the legislature wasto provide a wider jurisdiction to the tribunal and any violation of the obligations will be a "*substantial question of relating to environment*".[80] Finally the tribunal held that the petition was maintainable as the applicant was able to make a case of "*non-performance of the statutory obligation*" under the precautionary principle.[81]

VI. "GUIDING PRINCIPLE" OR "A SOURCE OF POWER"

In the previous part of the paper,it was stated that the High Court of Bombay in the "Maggi" case, when discussing about the section 18, held the section to be only guidelines

[74]M.A. No.49 of 2013 in Application No. 26 of 2012, NGT.
[75]*Id.* at 15, para. 14.
[76]*Id.* at 16, para. 15.
[77]*Id.* at 18-20, paras. 17-19.
[78]*Id.* at 24, para. 24.
[79]*Id.* at para 42 page 37.
[80]*Id.* at para 42 page 38.
[81]*Id.* at para 43 page 40.

and not a provision which can provide power to the authorities to take any action. However, it is pertinent to note that Europe in its jurisdiction does use the similar and almost the same statute in a different manner. In this regard, it is regularly stated in literature relating to the precautionary principle that precaution is not for the Americans but for the Europeans whenever a comparative study is presented.[82] It is because of the fact that European Union has in its treaty forming the Union declared that they will be applying the principle of precaution in protecting the environment and public health.[83] In the year 2000 it also issued a communication on the principle for the better implementation of the principle.[84] It will be surprising to know that the precautionary principle became popular at the level of the European Union when the European Court of Justice delivered a judgment against the plea of United Kingdom to hold a ban invalid which prohibited the export of beef, as a food, on the basis of the principle.[85]It was stated in the judgment that in cases "where there are uncertainties" regarding the "existence of risks" then in these cases protective measures shall be taken without even "waiting for the proof" that such a risk is "fully established". The words are: -

> "*Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.*"[86]

After this judgment the principle has been repeatedly applied to question many issues relating to food trade and business in order to protect the health of the Europeans. The communication on the precautionary principle also holds that it is a part of the general international law and reads the principle to be included in the Sanitary and Phytosanitary agreement of the WTO.[87] Imperative to be mentioned here is that European Union while defending the status of the principle in WTO Dispute Settlement Body referred to the judgments of the Supreme Court of India to state that countries have adopted the principle and have been using it in domestic matters.[88] The Section I of the EU legislation, discussed earlier, mentions the precautionary principle in Article 7 under the heading of "general principles of food law".[89] The Section 18 of the Indian Food Safety Act incorporates the same Article. Therefore, something which has given so much power to authorities like the European Commission/Union, cannot provide power to authorities under the Indian Act appears to be unacceptable.

VII. CONCLUSION

The question here is whether precaution is for Indians also or not? The Food Safety and Standards Act under section 18 provide the guiding principles which is to be referred to while implementing the provisions of the Act by the governments, food authority and other

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[82] Joakim Zander, *The Application of the Precautionary Principle in Practice: Comparative Dimensions*267 (Cambridge University Press, 2010).
[83] Maastricht Treaty, Part XVI, Article 130r, 1992.
[84] Communication on Precautionary Principle, 2000, *available at*: https://publications.europa.eu/en/publication-detail/-/publication/21676661-a79f-4153-b984-aeb28f07c80a/language-en (last visited on Oct. 02, 2019).
[85] C-180/96, *United Kingdom* v.*Commission, available at*: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61996CJ0180&from=EN (last visited on Oct., 02, 2019).
[86]*Id.* at 2298.
[87]*Supra* note 84 at 10, para. 4.
[88]SeeWT/DS291/R, *Biotech* Case.
[89]*Supra* note 70.

agencies. It would be interesting to note that whole Section 18 is the combination of the Article 5,6 and 7 of the regulation "178/2002" which is the "EU Food Law" as discussed in the earlier part of the paper. This particular article of the "EU Food Law" appears to be the outcome of the developments in the food safety decisions of the European Court of Justice and the principle is being applied in the same manner as was applied in the BSE case of 1998. Therefore, the precautionary principle has seen its development in food safety and environmental issues taken together and if Indian courts and tribunals have contributed to the development of the principle in the area of environment protection then the same shall, in proportionate manner, be applied in the food safety issues also. If the undefined but the words itself "precautionary principle" can give additional jurisdiction to the National Green Tribunal then it is paradoxical that a defined, outlined, detailed procedure of precautionary principle, provided in section 18 of the Food Act, where measures are required to be taken does not provide power to the responsible agencies to take precautionary action in the interests of public health just because the marginal note of the section does not say precautionary principle but only guiding principle.

In the A.P. Pollution case the court talks about effective state institutions while discussing the weakness of the then existing Acts which had created authorities to solve disputes regarding environmental degradation. The court discussed the above because Good Governance was seen as an important policy for the state to see that inaction on the part of the state is not a reality in future. The question then is how an institution can be effective. Is it not correct to say that unless and until, an authority endowed with an object, clearly mentioned in the preamble of the Act which has created it follows it in its true spirit, it cannot be an effective institution? Further that when such an authority takes an action in pursuance of the object for which it has been created should the adjudicating authorities also give a wider and purposive interpretation of the statute under which it has acted as the question involves an important aspect which is the right to healthy life or public health concerns. The author is not shy in claiming that in the context of environmental disputes the courts have proceeded to give directions against the erring parties acting under the pretext of breaches of the fundamental right to healthy environment even when they are not states under Article 12 of the Constitution of India. Importantly, the question whether it is a state or not is not all discussed, and all thanks goes to the judgment of the *Oleum Gas Leak case* which started a new jurisprudence in the context of environmental law in the country. Shall we wait for another Oleum to get a landmark judgment is a question that does not need an answer.

As said in the introduction to the paper a pollutant is as equally dangerous as an adulterant because one is inhaled and the other is consumed. The route of assimilation may be different but the consequence of both may be same or it is the same. When the country is moving forward with schemes directed towards fit and improved India then the courts shall also not lose sight of the developments which are happening internationally in the regime of food safety. The courts should, at every opportunity, give more power to the regulatory authorities in cases of breach by the industrial conglomerates who are still oblivious towards the environment and also now towards food safety. The author takes the opportunity to state that one of the origins of the precautionary principle is the result of arsenic poisoning in England in 1899 when the Royal Commission in 1900 decided to provide a minimum level of arsenic allowed in beer after scientific studies could not present a safe level.[90]Therefore, even

[90] See for details Akash Anand, Evolution and Development of Precautionary Principle in Furtherance of Environment Protection, Chapter 2 (Thesis submitted in Faculty of Law, University of Delhi).

the origin of the precautionary principle overlaps between environment protection and food safety.

India is a country still struggling to become a developed nation and international corporates see the country as a huge market for their products. If the authorities responsible for food safety are not made powerful with provisions already mentioned in the statutes, then it may lead to a situation from where there may be no reversal. So, the time is ripe with the provisions already existing and the thing needed is foresight and anticipation.

ROLE OF FORENSIC EXPERT EVIDENCE IN CRIMINAL JUSTICE DISPENSATION: A CRITIQUE

Sumiti Ahuja[*]

I. INTRODUCTION

Trials in criminal and civil issuesare held under the same rules of evidence as stated under the Indian Evidence Act, 1872, despite this, the actual application of those rules in both these trials is dissimilar. In other words, both the criminal and civil procedures are very different from each other. Rules overseeing prosecution and defence in criminal litigation tend to maintain a balance between justice dispensation system's requirement for accuracy and its need for convictions.[1]

The very first point of distinctionin civil dispute and criminal proceedingwith regards to rule of evidence is in terms of standard of proof, that is to say, in the former mere balance of probabilities plays the trick whereas, in the latter 'beyond reasonable doubt' is the keyword. It means, there is a requirement of stringent standard of proof in case of criminal justice administration.[2] Criminal justice administration has been defined as- *"The personnel, activity and structure of the justice system - courts and police - in the detection, investigation, apprehension, interviewing and trial of persons suspected of crime."*[3]Role of scienceis important in detection of crime because of its reliance on universally accepted methods which is of assistance in identification of the offender.

Witnesses play a crucial role in trial and, as general rule of evidence, witness must only give information of the facts seen, heard, or perceived by him whereas his personal opinion or belief holds no relevance in court of law. It has been observed that, allowing a witness to state his own opinion may come across as'delegation of judicial function'.[4] Sections 45-51 of the Indian Evidence Act, 1872, lay down the exceptions to this rule. Specifically, section 45[5] deals with the opinion of experts. The reason for this exception is that, it is impossible for the court to lead to an accurate opinion in cases of subject matter requiring technical expertise, wherein assistance of subject-matter expert becomes pertinent. Although, it has been time and again emphasised regarding the evidentiary value of expert opinion, that the same is not decisive in nature but is only an opinion, to be received with caution; the courts have been reluctant to accept it as sole basis for conviction.[6]Section 45 mentions five broad aspects on which an expert can give his opinion in the court, science

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[1] See R. Erik Lillquist, "A Comment on the Admissibility of Forensic Evidence" 33 *Seton Hall Law Review* 1191, 1196 (2003).

[2] The author has used the term 'justice administration' and 'justice dispensation' interchangeably throughout the paper. Meaning denoted to these terms is 'an act or process of providing justice'.

[3] As defined by Duhaime's Legal Dictionary, *available at*: http://www.duhaime.org/LegalDictionary/A/AdministrationofJustice.aspx(last visited on Jan. 31, 2019).

[4]*Mubarak Ali Ahmed* v. *State of Bombay*, AIR 1957 SC 857.

[5] "Opinions of experts. —When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting] [or finger impressions] are relevant facts. Such persons are called experts."

[6]Himanshu Setia, "Evidentiary Value of Forensic Reports in Indian Courts" 4 (6) *Research Journal of Forensic Sciences* 5 (June, 2016).

being one of them. Therefore, forensic[7]testimony by forensic expert is covered under this section.

"The term 'forensic expert' is used to refer an expert witness who testifies or gives forensic related opinions at a dispute resolution trial or hearing by virtue of his/her specialized knowledge. Forensic opinions are sought from forensic experts to explain past, present, and future events."[8] Forensic experts can be referred as consultants to legal system. It will not be wrong to say that in contemporary criminal proceedings, expert evidence and scientific proof can play influential role. But there are in existence many issues and challenges which refrain the Indian criminal justice dispensation system from recognizing, relying upon and utilizing the forensic evidences in the fullest possible manner.

The author in her paper has tried to highlight those issues and challenges at the same time looking into the positive aspects in admissibility of forensic evidence as relevant in criminal justice dispensation. This paper has been divided into six parts: Part I of this paper introduces the topic and gives the scheme of further discussion; Part II summarizes the history and development of forensic science in Indian jurisdiction; Part III elaborates the role of forensic expert in Indian legal system; Part IV deals with the issue and extent of admissibility of forensic expert evidence in criminal justice administration; Part V provides certain suggestions in terms of factors that can enhance effective use of forensic expert evidence in criminal justice dispensation and mentions the practices that can make the Indian system match global standards.

II. HISTORY AND DEVELOPMENT OF FORENSIC SCIENCE IN INDIA

Forensic science isnot a pure science as such, instead it involves application of various types of sciences.[9] Its' main function lies in investigation of situations or questions which hold importance in solving of disputes. Forensic science methodology is to recover and test the trace evidence[10] in scientific lab to find out the wrongdoerand establish his link to the

[7] Black's Law Dictionary defines Forensic as 'Belonging to courts of justice' (*available at*: https://thelawdictionary.org/forensic/) and Forensic Evidence as 'Evidence that can be used in a court based on science. It can be blood tests, ballistics, and DNA' (*available at*: https://thelawdictionary.org/forensic-evidence/). Merriam-Webster Dictionary defines Forensic as 'relating to or dealing with the application of scientific knowledge to legal problems' (*available at*: https://www.merriam-webster.com/dictionary/forensic).

[8] See https://definitions.uslegal.com/f/forensic-expert/(last visited on Jan. 31, 2019).

[9] Some authors have recognised and elaborated the tension between the areas of 'science' and 'forensic science'. Further providing that the issue with much of the theory of forensic science is that it is mainly inductive and has never been subjected to strict tests aimed specifically at falsifying it. Inductive in the sense for example, people generally believe that: 'Nobody has ever observed two indistinguishable fingerprints that belong to different individuals. Hence, the generalised observation that, all fingerprints must be extraordinary or unique.' Now, this is inductive reasoning going from specific to general. In contrast to inductive reasoning, deductive reasoning provides for sufficient opportunity to test the hypothesis. Taking the same fingerprint example, the deductive form of reasoning maybe: "The level of variance between two fingerprints coming from same person is little, and there is a high level of variance among fingerprints from various individuals. In this manner almost certainly, fingerprints from two unique individuals will be recognizably different."
Bowers after highlighting this issue in his book, suggests that it's still not correct to refer to forensic science as 'junk science' and of absolute null value to criminal justice system. According to him, "The problem is that many forensic science practices lack robust support for their theoretical and scientific underpinnings…the only way out is to ascertain the boundaries of what the forensic sciences can and cannot do. Fortunately, there is already a tried and tested framework available to forensic scientists on which to base this attempt: it's called science." [See C. Michael Bowers, *Forensic Testimony: Science, Law and Expert Evidence* 23-36 (Elsevier, San Diego, USA, 2014).

[10] Based on Locard's principle, i.e., every contact leaves a trace.

crime being investigated.[11]Forensic examinationmay even help in identifying victims.

Since 1897, India is using fingerprint for classification of the records of criminals. In search of truth, judiciaryhas been taking into consideration forensic evidences like fingerprints, post-mortem report, serology, toxicology, odontology, ballistics, DNA profiling, etc. Recent times have witnessed a spurt in the use of modern forensic techniques for deception detection like, lie detector, brain mapping,narco-analysis for helping judiciary in reaching the truth in delivery of justice.[12]

The forensic science development in India can be traced through the following chart:

1849, 1853, 1864, 1870	Setting up of Chemical Examiner's Laboratories	Madras, Calcutta, Agra and Bombay
1892	Establishment of Anthropometric Bureau	Calcutta
1897	Creation of the First Fingerprint Bureau in the world	Calcutta
1898	Setting up of Department of Explosives, Headquarters	Nagpur
1904	Post created for Government Handwriting Expert	Bengal
1910	Establishment of Serology Department	Calcutta
1915	Establishment of Footprint Section	CID, Government of Bengal
1917	Setting up of Note Forgery Section	CID, Government of Bengal
1930	Ballistics Laboratory	Police Department, Calcutta
1936	With the objective of examination of bullets, cartridges, firearms, etc. found at crime scenes, scientific unit was developed.	CID, Bengal.
1952	Formation of First State Forensic Science Laboratory in India	Calcutta
1955	Establishment of Central Finger Print Bureau (Central Finger Print Bureau first established in 1905 at Shimla; CFPB restarted functioning from 1955 in Delhi under the administrative control of Intelligence Bureau (IB). In July 1986, the administrative control of the CFPB was transferred to the National Crime Records Bureau (NCRB), Delhi.)	Shimla, Delhi.
1956	Establishment of Central Detective Training School. Purpose was to impart training in scientific investigation of crimes like drug abuse, terrorism, explosion, crime against women, investigation of	Calcutta

[11] The type of forensic evidence that is typically sought to admit in a criminal case focuses on identity, i.e., tying the defendant to the crime. Its use is immense in cases where identity of the perpetrator is a contested issue.
[12] Gajendra K. Goswami, "Forensic Law" L *ASIL* 649 (2014).

	road accidents and enforcement of traffic laws, etc.	
1957	Creation of First Central Forensic Science Laboratory.; In 1965, the second central forensic science laboratory was established.	Calcutta Hyderabad
1960	Establishment of the Indian Academy of Forensic Sciences. Purpose was to hold annual scientific meetings/seminars as well as assist in holding seminars in forensic science.	Calcutta
1964	Establishment of first Central Detective Training School. In 1973, the second such school was established. Their main objective was to train the operational police personnel in modern scientific techniques of crime investigation, with a view to improve their professional standard and efficiency.	Hyderabad Chandigarh
1968	Establishment of The Central Forensic Science Laboratory, (CBI) as a scientific department to provide scientific support and services to the investigation of crime. It was a scientific department under the administrative control of CBI and overall control of the Ministry of Home Affairs with the Govt. of India.	Delhi
1972	Establishment of Institute of Criminology and Forensic Science (ICFS). Main objective was to imparting training to the in-service personnel and conducting research in Criminology and Forensic Science.	Delhi
1972	Conversion of Central Forensic Science Advisory Committee into Standing Committee on Forensic Science, which is functional even today in BPR&D.	Delhi
1983	Sanctioning of the post of Chief Forensic Scientist and creation of Forensic Science Directorate in BPR&D.	
1983	Declaration by the Government of India regarding the forensic science institutions, at the Central Government level as being the Science and Technology institutions with objectives of functioning in an autonomous fashion, with complete modernization of equipment and manpower capabilities.	

1991	Renaming of Institute of Criminology and Forensic Science to National Institute of Criminology and Forensic Science (NICFS) in 1991. It was again renamed after Lok Nayak Jayaprakash Narayan in 2003.	
1997	Redefining of the roles of 3 CFSL's at Calcutta, Hyderabad and Chandigarh as most of the States by that time had their own forensic science laboratories, therefore, the role of CFSL's seemed diluted. Designated roles were as follows: CFSL, Calcutta----Forensic Biological Sciences CFSL, Hyderabad----Forensic Chemical Sciences CFSL, Chandigarh----Forensic Physical Sciences The Neutron Activation Analysis Unit of CFSL, Calcutta, operating at the BARC, Mumbai, was brought under the administrative control of CFSL, Hyderabad.	
1998	Formation of DNA typing laboratory.	CFSL, Calcutta
2002	Integration of Central Forensic Science Institutions under one umbrella under the Ministry of Home Affairs. Creation of separate Directorate of Forensic Science in New Delhi under the direct charge of MHA, India. CFSL at Kolkata, Chandigarh and Hyderabad placed under it.	
2010	Renaming of Directorate of Forensic Science to Directorate of Forensic Science Services (DFSS). Charter of duties prepared.	
Sources Referred: http://www.jpgmonline.com/text.asp?2000/46/4/303/250 http://dfs.nic.in/pdfs/First%20resolution%20of%20DFSS.pdf http://dfs.nic.in/pdfs/MHA%20resolution%20for%20DFSS.pdf http://nicfs.gov.in/		

III. ROLE OF FORENSIC EXPERT IN INDIAN LEGAL SYSTEM

A. Who Is An Expert?

It has been observed by the Supreme Court in *State of H.P.* v. *Jai Lal and Ors.*[13] that, "in order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words

[13] (1999) 7 SCC 280.

that he is skilled and has adequate knowledge of the subject."

(i) Definition of Expert

Section 45 of the Indian Evidence Act, 1872, does not define 'expert' in clear terms. It provides that the Court may allow opinion of persons skilled in technical areas of foreign law, science, art, handwriting or finger impressions, in order to form its own opinion in such specialized fields. Such opinions, are termed as relevant facts and the person providing opinion is an expert. The section only mentions that specially skilled person is an expert who gives an opinion in court. It doesn't mention any specific criteria for any person to come under the purview of the term expert, except for that he should be specially skilled in either of those five criteria on which experts opinion holds relevance.

If this provision be compared with Federal Rules of Evidence of the United States on point of defining the expert. Article VII, Rule 702 on Testimony by Expert Witnesses, of the Federal Rules states that: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise…..". The rule makes it clear that person may be termed as an expert in his area, because of his knowledge/skill/experience/training/education; whereas, section 45 of the Indian Act, uses the term 'skilled' only for an expert. In other words, it maybe said that a person who does not possess academic qualification although he has professional skills as well as experience in hand is an expert.It is the responsibility of judiciary to choose whether ability of an individual pertaining to issue, on which proof of his supposition is offered, is adequate to classify him asexpert.

Rule 702, Federal Rule of Evidence is comparatively clearer in terms of definition of expert and what constitutes expert opinion, unlike section 45, the Indian Evidence Act, 1872.

(ii) Meaning of Expert Opinion and its' scope

A witness who is an expert in his field is perceived by the court as an individual who will put forth his opinion in a particular subject matter that is beyond comprehension of a 'person with average intelligence'. He is supposed to give detailed explanation forhis opinion as well as rule out all other probable possibilities being involved.[14] The experts are required to examine evidence in a logical way, to translate the outcomes unbiasedly, and to report their discoveries steadfastly.

The expert's testimony in court needs to be convincing and effective in nature. It should come across as a scientist's persuasion, who very systematically and logically puts forth the fact and thereby makes the listener believe in his findings.[15]

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[14] See Samuel R. Gross, "Expert Evidence" *Wisconsin Law Review* 1113-1232 (1991). The author of this paper has in one of the sections presented a short case study of a trial that depicts many problems in the methods of using expert evidence. He points in his paper that "…. isn't it, in fact, shocking-that casual observers and even interested partisans are treated by the legal profession with at least reasonable respect, but trained and experienced doctors, engineers and scientists are castigated?" (p.no. 1114).

[15] Donald Doud, "Elements of Effective Expert Testimony" 44(4) *The Journal of Criminal Law, Criminology, and Police Science* 522-524 (1953). In the words of the author, "Convincingness, clarity, interest-these are the elements of effective expert testimony".

Section 45 of the Indian Evidence Act, 1872, lists five areas in which expert opinion may be given in the court.[16]For the purpose of this paper,author's focus is upon forensic expert giving scientific opinion. The various central and state level forensic science laboratories in India, have divisions with experts working in different areas like ballistics, toxicology, psychology, digital forensics, documents etc. The Forensic Science Laboratory, Delhi,[17] has five divisions, namely, chemical sciences, physical sciences, biological sciences, documents division and forensic psychology division.[18] The Central Forensic Science Laboratory, Delhi,[19]"is one of the most comprehensive laboratories in the country with 10 fully equipped divisions namely physics, chemistry, biology, serology, ballistics, documents, fingerprints, forensic psychology, photo, computer forensic science andscientific aids divisions with addition of state-of-the-art laboratories for computer forensics and DNA profiling."[20]

B. Role of Forensic Expert

Role of forensic expert is three-fold: at crime scene, in the laboratory and inside the court room. At crime scene, it is believed that the role of forensic expert is advisory in nature.[21] He assists the investigating officer in establishing *corpus delicti*, in ascertaining real or false nature of the crime, in identifying the clues, etc.[22] In the laboratory, his role becomes more active in nature and he works towards, *"proving the existence of a crime, the perpetrator of a crime, or a connection to a crime through the: Examination of physical evidence, administration of tests, interpretation of data and clear & concise reporting"*.[23] Inside the court room, his role courtesy, section 45 of the Indian Evidence Act, 1872, is that of an expert giving his view based on application of universally sound scientific principles. His opinion in the court room, assists the judge to draw a reasonable conclusion. The two parameters for admissibility of an expert witness testimony are:

i. when a dispute is such that it cannot be resolved without expert opinion, and;

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[16] See Article VII, Rule 702 of Federal Rules of Evidence on Expert Witnesses' Testimony. The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus, within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values[See https://www.law.cornell.edu/rules/fre/rule_702(last visited on Jan. 31, 2019)].

[17] It takes care of cases referred by Delhi Police and Court of Law.

[18] See http://delhi.gov.in/wps/wcm/connect/doit_fsl/FSL/Home/Divisions/(last visited on April 26, 2019).

[19] It investigates cases for CBI mainly and Delhi Police, Judiciary and Vigilance Departments of Ministries & Undertakings & State/Central Govt. Departments.

[20]CFSL, CBI, *available at*: http://www.cbi.gov.in/cfsl/about.htm(last visited on Feb. 24, 2019).

[21] In India, First Responder, is generally a police officer who is a non-forensic personnel and therefore, providing of adequate training to such officer for handling evidence at the scene of crime becomes important for successfully carrying out fundamental recovery procedures before the crime scene investigators arrive, if there is a danger of the evidence being destroyed, lost or contaminated. [See, *A Forensic Guide for Crime Investigators: Standard Operating Procedures* (LNJN National Institute of Criminology and Forensic Science, Ministry of Home Affairs, Delhi) *available at*: https://jhpolice.gov.in/sites/default/files/documents-reports/jhpolice_ebook_a_forensic_guide_for_crime_investigators.pdf (last visited on April 28, 2019).
In fact it has also been pointed out by other sources that forensic expert is rarely called at crime scene; physical evidence is collected by police officer and is sent for examination in the labs.

[22]Dr. B.P. Maithil and Rajesh Mishra, "Crime Scene Investigation: The foundation stone of crime detection, investigation and prosecution" 34(3) *The Indian Police Journal* (July – Sep., 2007).

[23]Crime Scene Investigator, "What is Forensics?",*available at*:https://www.crimesceneinvestigatoredu.org/what-is-forensic-science/(last visited on April 28, 2019).

ii. the expert witness expressing the opinion is actually a certified expert.[24]

C. Expert Testimony: Ethical Issues

(i) Credibility of expert's opinion

Impartiality and truthfulness towards one's work should be the foremost virtue of an expert, and the same shall contribute towards the credibility of expert's opinion. The expert opinion although is still considered to be a weak evidence due to certain reasons.Sometimes, conformity to the societally developed expectations of their respective disciplines, create a burden on the expert while they conduct investigation and thereafter present the result. Forensic examination being done by a human being, it's not wise to rule out the chances of bias.[25]In fact to add on, apart from bias, the scientific errors are the ones which affect the credibility of expert opinion.[26]

(ii) Forensic Evidence v. Ocular Evidence

This issue in front of trial judge, when there arises a clash between forensic evidence and ocular evidence, is of great contention in the field of law and forensics. When such clash is there, court,considering the fact that ocular evidence or eyewitness's testimony is direct in nature gives it prevalence over forensic evidence.[27]

In case of *Ram Swaroop* v. *State of Rajasthan*[28], it was observed that:

> "A doctor is usually confronted with such questions regarding different possibilities or probabilities of causing injuries or post-mortem features which he noticed in the medical report may express his views one way or the other depending upon the manner the question was asked. But the answers given by witness to such questions need not become the last word on such possibilities. After all, he gives only his opinion regarding such questions. But

[24]Redefining the Role of an Expert Witness, *available at*:https://jguforensics.wordpress.com/2017/06/22/redefining-the-role-of-an-expert-witness/(last visited on April 28, 2019).

[25] M. Redmayne, *Expert Evidence and Criminal Justice* 13 (Oxford University Press: Oxford, 1st edn., 2001). The author goes to an extent of stating that bias appears to be universal tendency in forensic science.

[26] See Mingxiao Du, "Analysis of Errors in Forensic Science" 3(3) *Journal of Forensic Science and Medicine* 139-143 (2017). The author emphasises on scientific errors being the more prevalent reason in comparison to bias which paralyses the helpful contribution of experts. He highlights three categories of errors: systematic errors, random errors and gross errors. Systematic errors consist of errors caused by defect in instrument, method, environmental defect etc.; random errors are caused due to uncontrollable reasons which can be prevented by replication; gross errors are caused by human errors, like recording of erroneous readings.
He further states that bias can still be removed by replacing experts and it's indeed a tough task to eliminate scientific errors; for which he elaborates the concept of peer review.
He concludes his article by stating: "…. if a scientific principle or method fails to pass peer review, it tends to be inadmissible. If it passes peer review and is published, knowledge, professional ethics of the specialists, and the confidence level of the forensic testimony's findings need to be considered by judges, especially when the results are around the thresholds." (p.no. 143).

[27] See *Abdul Sayeed* v. *State of M.P.* (2010) 10 SCC 259; *State of U.P.* v. *Krishna Gopal* (1988) 4 SCC 302. One of the major differences between evidence of an expert and evidence of an ordinary witness is, court can't pass an order of conviction on the basis of expert opinion as the same is not conclusive, whereas, court may pass an order of conviction on the basis of ocular witness.

[28] AIR 2008 SC 1747.

> to discard the testimony of an eye-witness simply on the strength of such opinion expressed by the medical witness is not conducive to the administration of criminal justice."[29]

Forensic evidence must be attached with more weightage in comparison to evidence given by eyewitness as there can be chances that the onlooker has been overstating actualities and giving a twisted variant of the genuine episode. Till the late 20th century, due to lack of relevant technology, courts were inclined towards non-scientific evidences.Major issues connected with those evidences were:

a. Eyewitness observes the occurrence for a brief period.
b. Inter-minglingof roles carried on by various personsduring the occurrence.
c. Existence of eyewitness's bias towards either of the party (i.e., culprit or victim).
d. Eyewitness tends to forget, rationalise, oreven deal with confusion because the statement may have been recorded aftersubstantialpassage of time.
e. The environment inside court room may frighten him.
f. He could have discussed about the happening with others and may take into account the opinion of those others.
g. His observation power, memory and description tend to have a significant impact.[30]

(iii) The Ethics of Expert Testimony

The ethics that an expert need to understand and respect can be stated as follows:[31]

a. to act with integrity, honesty, and impartiality;[32]
b. keeping himself abreast with latestchanges in his area of specialization;
c. providing for expert opinion in their respective area of expertise;
d. applying universally accepted scientific standards in examination of evidence in lab and drawing conclusions;
e. inside the courtroom, makes full-fledged and impartial disclosure of all the laboratory results irrespective of its' implications;
f. apprise the court with any factor that may have adversely affected his findings;
g. expert must be persuasive and not advocative about factual accuracy;
h. expert needs to understand that he is not the witness for any specific side but is the witness for the court.

The author came across a word of caution for the experts by *C. Michael Bowers*[33]: *"Forensic experts must realize that the courtroom environment is the antithesis of a scientific*

[29]*Ram Swaroop* v. *State of Rajasthan*, AIR 2008 SC 1747 (Para 9).
[30]B.R. Sharma, *Forensic Science in Criminal Investigation* 33-34 (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 4thedn., 2003).
[31] See Melanie Klinkner, "Forensic science expertise for international criminal proceedings: an old problem, a new context and a pragmatic resolution" 13 *The International Journal of Evidence & Proof* 123 (2009); J. L. Peterson and J. E. Murdock, "Forensic Science Ethics: Developing an Integrated System of Support and Enforcement" 34 *Journal of Forensic Sciences* 753 (1989); Sadhna S. and K. Roja, "A Study on the Admissibility of expert evidence in Indian Evidence Act" 120(5) *International Journal of Pure and Applied Mathematics* 1130 (2018).
[32] Credibility of a witness in the field of law is an assemblage of multiple behaviours that the witness must possess in order to be effective.
[33]C. Michael Bowers, *Forensic Testimony: Science, Law and Expert Evidence* (Elsevier, San Diego, USA, 2014).

forum due to its adversarial nature." Unlike any scientific forum, inside the courtroom, a judge is under no obligation to accept the findings of expert. An expert deposes and his job is not to decide. Forensic experts' testimony is more of ethically challenging and complex in nature.[34]

The expert brings in the ethics of his own discipline into the legal system, the system which in itself is governed by ethics of altogether different kind. One of the inherent differences between the two fields can be highlighted during the cross-examination.

In the words of founding father of the Indian Evidence Act, 1872, *Sir James Fitzjames Stephen*, "The substance of the rules as to experts is that they are only witnesses, not judges; that their evidence, however important, is intended to be used only as materials upon which others are to form their decision."[35]

IV. ADMISSIBILITY & RELEVANCY OF FORENSIC EXPERT EVIDENCE IN CRIMINAL JUSTICE ADMINISTRATION

Common Law scholars have feared the absence in legal systems of correct tools for evaluating scientific information. In the words of *Gary Edmond*, "Because the various sciences maintain different approaches, theories, canons of practice, metaphysics, status, levels of relevance, levels of abstraction and so on, it would be highly naive to suggest that we could expect some universal criteria which could be applied consistently to determine 'reliability'."[36]

The main factors that can be attributed as the reasons pertaining to doubtful acceptability of forensic expert evidence is the gap in existing law and non-clarity in definition of 'who is an expert'. Second set of issue lies in treating the expert evidence as mere opinion and the tussle between *forensic evidence* v. *ocular evidence*. In other words, in case there is a contradiction between the version of unimpeachable eyewitness or a documentary evidence and expert opinion, then the latter will not prevail over the direct evidences.[37] The court is allowed to differ from the experts conclusion and can place reliance on other existing evidences in order to reach to a decision. There is absence of parameters to assess the cogency and dependability

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[34] See N.J. Schweitzer and Michael J. Saks, "THE CSI EFFECT: Popular Fiction About Forensic Science Affects The Public's Expectations About Real Forensic Science" 47(3) *Jurimetrics* 357-364 (2007). The authors in this paper have presented results of an empirical study conducted by them on sample of 48 university students on one of the aspects of CSI effect, i.e., "do CSI viewers give forensic science more weight than it deserves?". The results were: "CSI leads viewers to expect high-tech science and something more than the intuition of the witness, so that when in court they are presented with much lower-tech science and the witness's subjective judgment, they are likely to find it less convincing than do non-CSI viewers". It kind of justifies the title of their paper that indeed, 'popular fiction about forensic science affects the public's expectations about real forensic science' (in other words, that is what CSI effect or CSI syndrome mean). [CSI (or, Crime Science Investigation) is an American TV show].

[35] Sir James Fitzjames Stephen, *The Indian Evidence Act (I. of 1872): With an Introduction on the Principles of Judicial Evidence* 121 (Macmillan and Co., London, 1872).

[36] Gary Edmond, "Judicial Representations of Scientific Evidence" 63(2) *The Modern Law Review* 251 (2000). See Justice Robert French, "Expert testimony, opinion argument and the rules of evidence" *available at*: http://classic.austlii.edu.au/au/journals/FedJSchol/2008/3.html (last visited on July 10, 2018); the author observes that- the wide range of issues that the courts are expected to decide upon unavoidably requires various types of experts who may guide them towards formation of their judgments. These experts can be differentiated not only on the basis of their subjects, but also on the basis of their "conceptual foundations and methodology and the nature of the intellectual or other enterprises they represent".

[37] "It is the golden principle of criminal jurisprudence ocular evidence must always be given preference to the expert opinion even if the expert opinion does not support the ocular evidence." See *Sri Dandeswar Barman* v. *The State Of Assam &Anr*, Gauhati High Court judgment dtd. February 23, 2017.

of forensic evidence in courtroom.

In criminal proceedings, the prosecution, and in civil cases, the plaintiff, carries the burden of proof, whereas, in case of any party bringing the expert for tendering his opinion, that party has burden of proving the scientific admissibility.

A. Real parameters or elements that constitute forensic evidence

Forensic expert prepares a report on the basis of his findings from the examination of physical evidence procured from the crime scene. He thereafter, gives his opinion in the court based on those findings. This opinion of a forensic expert if admissible in court is referred as forensic evidence.

Forensic Science encompasses and applies all branches of science for the purpose of law.All the methods were originally borrowed from different science fields such as chemistry, surgery, medicine, etc.But it has created its own branches over the previous few years that are more or less exclusive forensic science fields.Significant progress has been made in serology, voice analysis, odor analysis and studies of nose prints and ear patterns in recent years.

The capacity to accept forensic evidence lies at discretion of presiding judge, who hasto consider validity of evidence, the credibility of the science behind it, and how important each piece of evidence can prove in a particular situation.

B. Needof Forensic Expert Evidence in Criminal Justice Administration

It is courts duty to decide: (i)whether expert evidence is needed, and;(ii) establish the expert witness' competency. The basic questions that forensic testimony is designed to address are 'who','what', 'when' and 'how'.[38]If the clues retrieved don't connect the accused to victim or crime scene, the accused's innocence will stand established.

As the popular saying in judicial system goes: "Truth must triumph is the hallmark of justice"[39]. The truth can be established by various scientific tests and therefore contribute to justice administration.It's been long that the police have been blamed for adopting shortcut easy methods during interrogation which have led to violation of human rights. They have been accused of using coercive methods to extract information. The scientific evidence is said to have brought about fairness during investigation as well as it assists in corroborating other evidences through the trial thereby helping judiciary in deliverance of justice.[40]

In recent literature on 'Expert Evidence and Scientific Proof in Criminal Trials',*Paul Roberts* in his introduction states that "forensic science as prosecution evidence, in reliably proving guilt and bringing offenders to justice, is only part of the real story". While

[38]Pete Frick, "Forensic Science in Court: Challenges in the Twenty-First Century" 27 *Syracuse Journal of Science & Technology Law* 146 (Fall 2012).
"Who" committed an act is the subject of areas such as DNA, fingerprint, handwriting, hair or bite-mark analysis; "how" an incident took place can be addressed through as tool mark analysis, firearm and bullet comparisons, bloodstain pattern analysis; question of "what" can be catered through forensic toxicology and forensic pathology; "when" may be determined by forensic entomology and forensic geology.
[39]*Nandlal WasudeoBadwaik*v. *Lata Nandlal Badwaik* (2014) 2 SCC 576.
[40]*Supra* note 12.

comparing forensic science to a powerful medicine which is either capable of killing or curing, he further highlights that, like a powerful medicine, forensic science depending on the dosage and skill with which it is administered can either promote administration of criminal justice or frustrate its ambitions as well as corrupt its ideals.[41]

Indian authors have mostly shared the view, i.e., role of forensic science and opinion of forensic expert, in administration of Criminal Justice in India is still in a rudimentary or restrictive phase.[42] But, there is no research as such explaining in detail the reason behind the same, citing proper data and thereafter giving suggestions for bringing the transformation. At the same time, the reason that has been attributed to infirmities in expert evidence is limited knowledge and availability of limited facilities for examination.[43]

C. Evidentiary Value of Expert Opinion

If there is a dearth of direct evidence and it requires affirmation for prevailing evidence, the view of the expert is required which can be utilised as an evidence. Science is said to have that capability to powerfully corroborate and settle the fact in dispute. Forensic evidence is considered to be secondary evidence that may be used to validate the primary evidence.

D. Role of Cross-Examination

One can identify basic parallels between the particular waysof legal system and forensic science dealing with knowledge creation. Law depends ontestimony in court, on the other hand, science is based on noted observations. There is a similarity between testing of evidence via cross-examination and scientific methods of testing of hypothesis & falsification.[44]

Cross-examination of expert is a tool for checking the reliability of scientific evidence. It's a crucial requirement in adversarial system of justice that if a particular evidence is to be used against the adversary, the latter should be given chance to check the truthfulness of the same. Cross-examination may tend to put a question mark on the expert's methods or his specific finding. The cross-examiner may use other technique of calling upon another expert to counter and *rebut*.

Gross's paper points out that there has been much written on the aspect that experts of law (lawyers) and experts of other fields (forensic experts for our purpose) do not share very warm feelings for each other at all times. The contempt this process (calling of expert witness

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[41]Paul Roberts (ed.), *Expert Evidence and Scientific Proof in Criminal Trials* (Routledge, London, 2016).

[42]Manisha Chakraborty and Dr. Dipa Dube, "Applicability of Forensic Science in Criminal Justice System in India",*available at*: http://vips.edu/wp-content/uploads/2017/07/Forensic-Science.pdf (last visited on Feb. 20, 2019).

[43] Dr. T.R. Baggi (Former Director of Central Forensic Science Laboratory, Hyderabad) had in 2011 in The Hindu, opined that: "'forensic science' is an ornamental and cosmetic utility of the investigating agencies which completes the formality of legal process and satisfies the lay public. It is showcased and remembered only when major or sensational crimes occur to satisfy the inquisitive and demanding media and citizens. Compared to other disciplines of science and technology, forensic science is static and stunted in India. It is not being utilisedin its own right with the full thrust to help the investigating law enforcement agencies and the criminal justice system."
See Dr. T.R. Baggi, "Why is forensic science stunted and static in India?" *The Hindu*, Sep. 11, 2011.

[44] Melanie Klinkner, *supra note* 31at 114.

in court to testify and being cross-examined) ends up generating is not one-sided. *Gross* quotes an author *Karl Menninger*, who states: "the expert is not self-invited to these parties. He is not a trespasser. He is called, then he is questioned, criticized, disputed, attacked, suspected, disregarded and ridiculed." Furthermore, from the perspective of experts from other fields in regards to legal experts, *Gross* furnishes that "Experts in other fields see lawyers as unprincipled manipulators of their disciplines".[45]

E. Constitutional and Legal Issues

The common grounds on which the admissibility of expert evidence can be denied are as follows:

a. professional competency and status of expert;[46]
b. questionable methodology[47] raising objections on the reliability;
c. jeopardising fair trial; or
d. lacking probative value[48].

In light of a legitimate concern for justice, the court must follow balanced approach between right of an individual and that of community while ordering for a forensic examination.

The Constitution of India, 1950, through Article 20, highlights two vital differences in civil and criminal court issuesin form of protection against self-incrimination and double jeopardy, both being defendant favouring.However, when we consider forensic evidence, in this case as mentioned earlier, the evidence for examination is collected from crime scene investigation only and the accused is not forced to testify against himself in such case.[49] Moreover, as mentioned above, forensic evidence is not conclusive evidence on sole basis of which the court may decide against the accused. Article 21 mandates that the State cannot deprive any person off his right to life and personal liberty except according to a just, fair, and reasonable procedure established by law. Therefore, violation of right to privacy of the accused is justifiable only if it is done within bounds of fairness, justness and reasonableness of procedure established by law.

A question arises here, what is the fate of the evidence that is procured through unlawful, improper, or illegal means? Response to this can be that Indian courts go with balance of considerations while deciding on the issue of admissibility of evidence obtained through usage of unfair means. If the probative value of the evidence outweighs its prejudicial effect, this may lead to admissibility of such evidence.

Coming to the legal provisions under the Code of Criminal Procedure, 1973, i.e., the law laid down in sections 53 and 54.[50] Section 53 permits the criminal courts to use reasonable amount of force in order to conduct forensic examination. On the other hand,

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[45] *Supra* note 14 at 1115.
[46] See Gary Edmond (*supra* note 35) describing judicial skills used to evaluate scientific evidence.
[47] This will include collection of evidence and thereafter, its examination or scientific inquiry.
[48] Merely because the report is being submitted by expert doesn't ensure its' acceptability in court, unless it possesses probative value.
[49] Section 73 of the Indian Evidence Act,1872, authorizes the court to guide any individual including an accused to let his finger impressionsbe taken. The Supreme Court has also ruled that the obligation to give fingerprints does not breach the constitutional safeguards laid down in Article 20(3) of the Indian Constitution.
[50] The relevant provisions under the Criminal Procedure Code, 1972, and Identification of Prisoners Act, 1920, allow for the collection of bodily samples for forensic analysis.

section 54 offers an opportunity to accused to propose medical examination for proving his innocence.[51]

Further, throwing some light on section 293 of CrPC, which provides for an exception to the rule stated under section 273 of the same Code, i.e., 'all evidence received during the trial shall be received in the presence of the accused person'.Section 293 further departs from the primary rule that 'evidence not stated on oath and tested by the party against whom it is intended to be used can't be accepted as evidence'.[52]This section considers reports of the experts mentioned, as admissible evidence even without calling upon them as a witness in the case.[53]

F. Judicial Approach

Despite the near accuracy of scientific reports, the courts though have allowed the reports but have been reluctant to accept them as sole basis for conviction and seek corroboration.

In *Malay Kumar Ganguly* v. *Dr. Sukumar Mukherjee and Ors.*[54], it has been observed:

> "An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions."[55]

In *Mahmood* v. *State of U.P.*[56], an observation was made by the Supreme Court on the lines that, "it is highly unsafe to convict a person on the sole testimony of an expert.

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[51] See *Halappa*v. *State of Karnataka*, 2010 CrLJ 4341 (In this case the court observed "Drawing of the blood sample for the purpose of civil proceedings without the consent of the party is not desirable. But drawing of the blood sample for detection of the offence of rape wherein the investigating agency has to establish its case beyond reasonable doubt cannot be termed as violative of Article 20(3) of the Constitution"); consent is of importance in case of civil disputes Also see, *State of Delhi Administration* v. *Pali Ram*, 1973 SCR (1) 931.

[52] Section 293 of the Code deals exclusively with certain government scientific experts. Sub-section 1 states: "Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code."

Sub-section 2 provides: "The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report."

Sub-section 4 lists the government scientific experts to whom the section is applicable. The report of expert who is not listed in this section is not admissible in evidence without calling him as a witness.

[53] See http://admis.hp.nic.in/himachal/home/Forensics/ActsandRules.htm (last visited on Feb. 05, 2019).

[54] Supreme Court's decision dated August 07, 2009.

[55] *Ibid.*

[56] AIR 1976 SC 69.

Substantial corroboration is required. Thereby, it is very evident that conviction cannot be granted only on the basis of forensic report of an expert."

The Hon'ble Supreme Court of India in *Dharam Deo Yadav* v. *State of U.P.*,[57] stressed upon the necessity of promoting and applying scientific evidence for sake of interest of criminal justice system. It emphasised the pivotal role of forensic science specially in cases based on circumstantial evidence. The need of scientifically dealing with the crime scene without any error has been pressed upon in this case. The court observed: "In this age of science, we have to build legal foundations that are sound in science as well as in law." It was also mentioned that traditional methods of investigating crimes and procuring evidences have become outdated looking at the increased levels of sophistication in case of new kinds of crimes.

In the case of *Mukesh and Another* v. *State (NCT of Delhi) and Others*,[58] Supreme Court considered the application of fingerprint analysis, footprint analysis and alsoodontology branch of forensic science. These forensic evidences in the case proved presence of particular accused in the bus, also bite marks on the body of prosecutrix were proved to be of the accused through the technique of forensic odontology (herein, evaluation of bite marks for identification of suspect).

At the same time Supreme Court in certain cases has criticised the negligence in improper utilisation of skills in collecting relevant evidence from scene of crime. In *Varun Chaudhary* v. *State of Rajasthan*,[59] there was no evidence to the fact of collection of tyre marks of motorcycle from the scene of occurrence in order to compare it with the tyre marks of the motorcycle alleged to have been used in the commission of the offence.[60]

V. FACTORS THAT WILL ENHANCE EFFECTIVE USE OF FORENSIC EXPERT EVIDENCE IN CRIMINAL JUSTICE DISPENSATION

A. Factors that can enhance acceptability of forensic expert evidence in courtroom

The major lacuna that lies in Indian system pertaining to hesitation in acceptability of forensic expert evidence in courts is lack of legislative framework. A bill titled 'Forensic Regulatory and Development Authority of India Bill, 2011',[61] was introduced in the Parliament with a particular objective in mind for the favourable future of forensic science in court, but the bill never saw light of the day.

B. Practices that will make the Indian System match global standards

[57] (2014) 5 SCC 509.
[58] (2017) 6 SCC 1.
[59] (2011) 12 SCC 545.
[60] Also See the Sessions Court judgment in the case of Arushi Talwar Murder Case, *available at:* http://online.wsj.com/public/resources/documents/AarushiVerdict.pdf (last visited on April 26, 2019).
[61] The objective of the bill as stated in the long title read as: "To establish a Forensic Sciences Development and Regulatory Authority and to provide for regulation, standardization and accreditation of forensic science services, and certification of forensic science practitioners, and for matters connected therewith or incidental thereto."
The Bill is *available at*: http://iafmonline.in/data/circular-notifications/FDRA-Bill-2011.pdf (last visited on April 24, 2019).

Studies have shown that investigating agencies often avoid forensic evidence because of unreasonable delays in forensic reporting, and they end up relying back upon traditional forms of evidence only.[62]To put it in other words, the investigation agency as well as judge may seek the expert opinion simply after exhaustion of all other modes of obtaining evidence. This can lead to delay in court proceedings.One of the reasons for the delay in reporting can be said to be poor infrastructure of our Forensic Science Laboratories. It has been time and again reiterated by experts that the infrastructure of our FSL's doesn't match with the global standards and that acts as one of the major drawbacks as well as a challenge. There is also one issue pertaining to the independence of Central and State Forensic Science laboratories. There is lack of legislative framework for regulating functions of forensic labs in India. How much time is required for analysing evidence collected and who monitors the same and what happens in case of delay in submitting report based on analysis? These questions if satisfactorily answered, may bring the forensics assistance in Indian courts at par with other forensics assistance favouring nations.

VI. CONCLUSION

Necessity is a major reason that the court looks out for expert opinion in order to corroborate already existing evidence to prove the guilt of the accused. This defines the role of an expert at present in the justice administration system. But on the point that, who appoints this expert for giving expert opinion in the court is not mentioned under the written law. The definition or law relating to expert opinion under the Indian Evidence At, 1872, is not comprehensive in nature. The definition of expert under section 45 of the Act is incomplete. The court has been given complete discretion to decide upon whether to accept or reject the opinion of the expert. Out of the five areas of specialisation mentioned under the section, science is one such field which keeps on developing exponentially with new discoveries. This is evident from the fact that the types of forensic techniques that existed earlier, were lesser in number than the number of techniques that now exist. Recognition has been given to science and technology in our court rooms but due acknowledgement is still missing because of number of reasons as explained in this paper previously. In order to match the standards of application of forensic science at global level, the foremost need is the overhauling of law related to the opinion of expert and more specifically forensic expert here.

[62] As pointed out by Dr. G. K. Goswami, IPS, Joint Director, CBI, Lucknow in a recently held debate (February 13, 2018 in Ahmedabad, Gujarat) on the topic: "Can India develop a passion for DNA casework even without a criminal offender database?" *available at*: https://businesswireindia.com/news/fulldetails/india-leading-legal-forensic-experts-call-transforming-dna-into-courtroom-evidence-combat-rising-sexual-crimes/56986 (last visited on Jan. 31, 2019).

ANALYSING THE EVOLVING CONTOURS OF ENVIRONMENTAL IMPACT ASSESSMENT

Ashutosh Raj Anand[*]
Kislay Soni[**]

I. INTRODUCTION

> *"Today our planet and our world are experiencing the best of times, and the worst of times. The world is experiencing unprecedented prosperity, while the planet is under unprecedented stress."*[1]

We are undoubtedly living in best of times and the worst of times! And it is not hard to find and extrapolate the reasons for the axiom which forewarnslurking grim reality. The human civilization which is bursting with enormous progress and development is being actualized by consistently feeding on the natural resources. This current scale of developmental paradigm would not find any parallel in the annals of human history and it is this trend which is asphyxiating planet earth. This planet is awash with the effects seen due to incessant human developmental activity which leads to calamitous pollution of natural environment. So, while humans have made massive stride in growth and prosperity enabling them to live life in excesses; at the same time, on the other hand the environment is tremendously trampled upon and rendered emaciated. It cannot be denied that the sheer ingenuity of human civilization is unrivalled in terms of dominance it wields over the natural resources and consequently on this planet earth. Therefore, to state that the fate of this planet squarely hinges on the conscientious choices the human is to state the obvious. Unfortunately, the story thus far is hardly propitious. The civilization paradigm for growth hitherto has been marked by obsession for seeing things mostly in binaries such as profit and loss and has been directed towards shoring up trade and business and associated activities. The prejudiced reverence for industrialization, urbanization *inter-alia* veritably constricts the space for the sacrosanct environment. It is in these contexts that the role of *Environmental Impact Assessment* must be emphasized. It is a mechanism devised to bring environment as an inescapable and intrinsic element of State policy and to buttress sustainable development. It is pertinent to mention that developmental trajectory in the 20th century has shown least concern for the environment and was commonly seen in every part of the world. The objectification of natural resources espoused by the developed economy spurred unprecedented exploitation of resources. And this pattern unfortunately was emulated by the rest of the other nations as they endeavour to script their own developmental story. Environmental Impact Assessment is a unique intervention aimed at putting the check on reckless development where the environment is unabashedly desecrated. Environment impact assessment (EIA) epitomizes the principle,i.e., prevention is better than cure by assessing the consequences of any planned activity on the environment beforehand.[2]

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[1] United Nations Secretary-General's High-level Panel on Global Sustainability, *Resilient People, Resilient Planet: A future worth choosing* 10 (United Nations, New York, 2012).

[2] John Glasson, Riki Therivel, *et.al.*, *Introduction to Environmental Impact Assessment* (Routledge, 2nd edn., 1999).

Any developmental activities come with cost. The effect of these activities does not confine to mere environment. The fallout can be seen - most definitely - in the physical environment becoming penurious; but at the same time the social and economic aspects also get deeply affected. Various countries have adapted different setting to plan and offset the adverse effect of developmental actions. Invariably most of these settings have accounted for and considered *socio-economic assessment* as an integral part of environmental impact assessment. It is a veritable fact that the developmental activities impinge deeply on almost every facet of human society. And therefore, effort has been laid to design a comprehensive method to deal with human activity. One method which of late has gained huge credence is strategic environmental assessment. It is often contrasted with environmental impact assessment. Ideally environmental impact assessment is confined to specific project. Strategic impact assessment expands the confines of environmental impact assessment into the realm of policies, plans and programmes. Strategic environmental assessment is gaining lot of traction in developed economy. Initiation of impact assessment which begins with - 'polices' and thereafter 'plans,' then 'programmes' and eventually for 'projects' are perfect recipe for the holistic *developmental-plan*. But generally, especially is developing economy the impact assessment of individual projects is the most commonly seen phenomenon. Similar to environmental impact assessment and strategic impact assessment there has been profusion of many disparate methods such as risk assessment, health impact assessment, psychological impact assessment, gender impact assessment, climate impact assessment which is being evolved as a set of tools to assess environment *vis-à-vis*relevant thematic areas.[3]

It is not hard to see the reason why EIA is hailed as one of the most notable policy innovations designed for the conservation of environment.[4]This mechanism found footing and popularity in many different countries as they seek to adopt EIA into their setup. Countries irrespective of their different levels of "development, types of government and cultural traditions" went ahead with this.[5]It is worthwhile to mention that Rio Declaration (Conference on Environment and Development, UNCED), also underlined the importance of EIA and its components in some of its principles, such as Principles 10, 15 and 17.[6] These principles were aimed at ramping up the efforts of sustainability and reducing the severity of environmental impacts due to developmental activities.[7] Principle 17 of the Rio Declaration specifically outlines the contour of EIA and exhorts to integrate EIA by percolating into the domestic instrument - directing it to be used for " such propositions,which if not tested timely,could have a significant adverse impact on the environment" [8] EIA necessarily involves a sound strategy to acquire and assess environmental information. It is widely used as a *consent procedure* throughout the world for specified individual project. Each country

[3]*Ibid*.

[4] Centre for Science and Environment, "Understanding EIA",*available at*:https://www.cseindia.org/understanding-eia-383 (last visited on Sep. 30, 2019).

[5] UNEP, *Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach* (2004), *available at*: https://unep.ch/etu/publications/textONUBr.pdf (last visited on July 31, 2019).

[6] Principle 10: Each individual shall have the opportunity to participate in decision-making processes, facilitated by the widespread availability of information.

Principle 15: The precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Principle 17: EIA, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment; alsosee *Supra* note 5 at3.

[7] EIA Training Resource Manual (UNEP),*Introduction and Overview of EIA* 104 (2002), *available at*: https://wedocs.unep.org/bitstream/handle/20.500.11822/26503/EIA_Training_Resource_Manual.pdf?sequence=1&isAllowed=y (last visited on Sep. 30, 2019).

[8]*Ibid*.

over the years has evolved its own methods and terminology for EIA. Depending upon the interpretation of 'environment' and involvement of other terms such as social, economic, cultural, and ecological consideration - the process of EIA firmed up distinctly in each country. Though, some similar and relatable steps could be seen across the board.[9]

II. ENVIRONMENT IMPACT ASSESSMENT – SETTING THE CONTEXT

The concept of Assessment of an activity, and its impact on environment as a national instrument began in United State of America in the year 1969. From there it diffused across Europe through EC directive on EIA in the year 1985.[10] National Environmental Policy Act of 1969 (NEPA) can be hailed as the landmark legislation which accorded environment an important and intrinsic space in the infrastructural and developmental processes in America. The failure of "large infrastructural agencies in charge of water resources projects, highways, and energy facilities" in protecting environment spurred widespread consternation. It was soon followed by the surge in awareness concerning the consequences of severe environmental hazards posed by unchecked developmental activities. Not surprisingly, during those decades and up till then environment was considered as an extraneous factor and non-essential consideration in the infrastructural or developmental activity. It inevitably gave rise to various environmental issues. National Environmental Policy Act was an attempt to preclude unabated environmental exploitation and related problems.[11] NEPA in its wake brought tremendous change. It mandated all federal agencies to bring into equation the environmental factors resulting from their decisions.[12] This legislation can be seen as a watershed event which brought environment at the forefront and eventfully by 1990s as many as 40 countries had adopted EIA in their respective national instrument.[13] EIA in its wake helped in establishing new paradigm wherein "environmentally sensitive decisions and the integration of environmental and social consideration in development planning" were foregrounded and duly prioritized. These new initiatives consolidated synergy between various agencies such as private sector and government instrumentality. These changes helped in entrenching transparency in the "decision making process during the development, implementation, monitoring and follow-up stages of a development project."[14] EIA has cemented its position as a mandatory regulatory procedure in USA. As stated before, various other countries took the leaf out of America's book as they sought to take advantage of the environmental impact assessment model. It is striking but not strange to observe that the initial evolution and development of EIA happened mostly in high-income countries such as Australia, Canada, New Zealand etc. while very few developing economies such as Philippines, Columbia also followed the suit and experimented with the EIA early-on.[15] The National Environmental Policy Act (NEPA) is often considered as the Magna Carta which bolstered the cause of environment in America. The core of this act was to enable synergized and "balanced decision making regarding the environment occurs in the total public interest." Efforts were laid to integrate "technical, economic, environmental, social and other factors."

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[9] UNDP/UNEP/GEF Biodiversity Planning Support Programme (BPSP),"Integrating Biodiversity with National Environmental Assessment Processes: A Review of Experiences and Methods",*available at*:https://www.cbd.int/doc/nbsap/EIA/EIA-Main-Report.pdf (last visited on Sep. 30, 2019).

[10] *Supra* note 2.

[11] Leonard Ortolano & Anne Shepherd, "Environmental Impact Assessment: Challenges and Opportunities" 13 *Impact Assessment* 5 (1995).

[12] *Ibid*.

[13] *Id*. at 6.

[14] See https://unep.ch/etu/publications/UNEP_EIA_Manual.pdf (last visited on Sep. 30, 2019).

[15] *Supra* note 4.

Focus which was confined to the technical and economic factors in decision making process shifted to 'the three Es' i.e., engineering, economics, and the environment.[16]

A. EIA Paradigm

Environmental Impact Assessment can be seen as a potent tool for realizing informed decision making.[17] It is a decision-making tool which predicts the impact of any proposed project on the overall environment. It is a process wherein various alternatives for a project are assessed and the best suitable option is identified which would augur well for every distinct parameter such as environment and economic and associated costs and benefits.[18] UNEP on relevance of EIA lays down that,"it provides a legal sanctity for organizing an integrated approach which projects a strategy while integrating the modes of analysis as a tool for decision-making, whereby demonstrating benefits of environmentally sound development along with new policy valuesbacked by professional and institutional capacity enhancement."[19]

The EIA process can be considered as "an objective analysis of the probable changes in the physical, bio-physical, and socio-economic characteristics of the environment from a proposed project."[20]Contextualizing the foregoing description and about the relevancy of EIA; this process can be stated as, "being a process, which systematically examines the adversities as well as beneficial consequences of a project design,and taking them into account, while implementing the project. The consequential results being to identify both theeffects in a project, but keeping in mind to mitigate the adverse effects and predictions as far as possible,during and even after the implementation of the project.The identification of adverseenvironmental predictions at the early stages of a project planning and its cycle with mitigative measures, environmental assessment helps gain benefits such as environmental protection, optimum utilisation of resources and saving of time and cost of the project."[21]

Pioneers of environmental projects, Armin Rosencranz and Shyam Divan have explained EIA as,[22] "an effort to anticipate measure and weigh the socio-economic and bio-physical changes that may result from a proposed project. It assists decision-makers in considering the proposed project's environmental costs and benefits. Where the benefits sufficiently exceed the costs, the project can be viewed as environmentally justified."

The foregoing definitions aptly explicate the fundamental aspects of Environmental Impact Assessment. Extrapolating thesedefinitions, it can be inferred that this instrument is a formidable planning tool. As a planning tool it helps in assessing and evaluating impacts of proposed projects and suggests sound alternatives.[23] This instrument – as it has been - underscores environmental issues which should be prioritised and mooted before arriving at

[16] Larry W. Canter, *Environmental Impact Assessment* 1 (McGraw-Hill Publishing Company, New York, 2nd edn., 1996).
[17]*Supra* note 14.
[18]*Supra* note 4.
[19] *Supra* note 5.
[20] Pramod Kumar & Kumar Nikhil, "Environmental Impact Assessment (EIA) Study of Non-Metal Mines: A Critical Review" 2(5)*International Journal of Engineering and Technical Research* 324 (2014).
[21]*Supra* note 18.
[22] Shyam Divan and Armin Rosencranz, *Environmental Law and Policy In India*417 (Oxford University Press, New Delhi, 2001).
[23]*Supra* note 11 at 3.

any decisions and thereby requires informing interested parties who are likely to be affected by the proposed developmental project.[24] EIA therefore could be understood as a systematic process which involves plumbing and assessing environmental consequences of developmental activity in advance.[25]Simply put, we may see EIA as an innovative approach which evaluate, predict and identify environmental effects of proposed developmental projects. It entails identifying, evaluating, and predicting the effects caused due to proposed projects. These entire processes kick in prior to the major decision making on the developmental project. Attention is given to offsetting, preventing, and mitigating the adverse effects of proposed projects. It strives to glean relevant information pertaining environmental consequences of developmental undertakingto enable astute decision making and bolster sustainable development through identification of suitable measures.[26]

B. EIA – Aims and Objectives

The overarching purpose of EIA is to facilitate the involvement of environmental issues as an intrinsic part in decision making process. This involves collating and assessing information pertaining potential environmental effects of a given developmental proposals. This further involves finding suitable measures to preclude or mitigate harmful effects by delineating specific do's and don'ts. It becomes but obvious that the decision-making process in EIA would warrant meticulous involvement from the very first stage of project initiation to the implementation and post EIA and monitoring process. EIA is always subject to the formal approval by the competent authority. They are vested with the power to accept or reject the project and setting terms and conditions for the approved project.[27] EIA as process performs several important purposes. First and foremost, it is an important aid in decision-making. For decision makers it offer reliable set of information regarding the environmental implication of a given project and provides inputs on suitable alternative to facilitate better decision.[28] Unfortunately many have casted aspersion on the entire EIA process. It is often seen as the time consuming and costly affair. It is in this context it must be brought up that the EIA is a formidable tool for the sustainable development. Even if the process gets protracted it is still the surest and safest way to safeguard environment and life existence for which EIA is aimed for. The various aims and objective of EIA as enshrined in international instrument make it amply clear.[29] EIA as it is,operates under two categories of different time-lines. The firstcategory explicates aims and objectives which are 'immediate' in nature and the second revolves around 'ultimate or long-term' aims and objectives. "The first strivesto identify potentially significant environmental fallout and associated risk of the given developmental projects and the second pertains to nurturing sustainable development by ensuring that the given developmental projects do not threaten critical resources, ecology, livelihood, and the well-being of the people".[30]The immediate aimlays the foundation and constitute as a critical and fundamental to EIA in ensuring many things. As they function to improve environmental design of the project. It strives to ensure that the resources are judiciously and efficiently used. It further aims at identifying suitable mitigating measure and

[24]*Id*. at 4.
[25]*Supra* note 2.
[26]*Supra* note 7.
[27]*Supra* note 5 at 40.
[28]*Supra* note 2.
[29] John Glasson, Riki Therivel,*et.al.*,*Introduction to Environmental Impact Assessment* 8 (Routledge Taylor & Fracis Group, London, 2005).
[30]*Supra* note 7.

facilitates informed decision-making processes by listing out litany of environmental terms and condition for the execution of the developmental projects. On the other hand, the long-term objectives aim at protecting human health and to avert irreversible changes and protecting environment from irreparable damage. It shields natural resources and ecosystem from ruination. It facilitates in synchronizing the proposal within the complex and diverse paradigm of social set-up.[31]

C. EIA Processes

EIA serves various important purposes. The overarching benefit of this important instrument helps in decision making processes. This invariably helps to prevent project with adverse environmental impact which could induce irreparable damage. EIA process entails a very extensive analysis which targets at 'prevention'. And as a corollary this entire process enables the state to acquire 'proactive' position than 'reactive' in controlling the damage subsequent to bearing considerable environmental loss. The overarching EIA frameworkactively involves number of steps which are: "a) Screening b) Scoping, consideration of alternatives and public consultation c) Impact analysis and Mitigation d) Environmental assessment report e) Review/Appraisalf) Decision-making and g) compliance and monitoring the clearances condition".[32] Each of these steps enables EIA process to buttress sustainable development. These series of steps brings about various advantages, such as: improving project design; enabling more informed decision-making by bringing public involvement; ensuring environmentally sensitive decisions; enhancement of accountability and transparency;establishing integration of developmental project with every important and divergent settings such as social, environment, *inter-alia*; lessening of environmental damage; and to entrench sustainable development.[33]Environmental assessment is used as a policy tool to stave off negative environmental effect of developmental activities and to bolster sustainable development.[34] EIA entails meticulous planning. It begins even before fixing the site location. It commences way before any given project's imprint becomes conspicuously visible in altering the physical characteristics of an earmarked place. Any alteration or changes in the environment without proper impact assessment holds the danger of causing irreversible change. EIA as a matter-of-factly is a 'continuous-process' than a mere 'one-time-activity'. It cannot be circumscribed in its scope - as it envelops the entire 'action' which goes into making and actualizing a developmental project. Therefore, EIA oversee various steps which obviously are spanned over a considerable period of time.[35] It can be stated that EIA is a multi-stage process. These different stages inevitably benefit from adhering to and adopting multi-disciplinary approach. It draws from innumerable inputs stemming from experts such as wildlife experts, sociologist, economist, agricultural scientist, forestry experts, and geologist *inter-alia*.[36] This multi-stage process involving methods such as screening, scoping, public hearing, impact prediction, monitoring and clearances conditions etc. are fundamental in nature. Every environmental assessment begins with the process known as 'screening'. This step involves determining whether EIA is needed or not

[31]*Id*. at 105.
[32]*Supra* note 20.
[33]*Supra* note 5 at 7-8.
[34] ECSSD, World Bank, "Environmental Impact Assessment Systems in Europe and Central Asia Countries" 1 (2002).
[35]*Supra* note 5 at 41.
[36]*Supra* note 22 at 418.

for a given project.[37]It aims to establish the requirement of full, comprehensive, limited or no environmental assessment for any given project. Screening criteria are intrinsically connected to – a) location of development b) types of development and c) scale of investment.[38]Screening is followed by 'Scoping'. It begins once the screening is complete. It is very crucial step in EIA. This step involves setting down the content and scope of an EIA report. It delimits the boundary and provides the time-frame of the study.[39] Scoping helps in classifying all relevant concerns and issues which required to be addressed for a given project. Most importantly, it determines Terms of Reference (TOR) for preparation of Environment Impact Assessment Report. [40] Scoping could be closed scoping wherein developer and the competent authority get involved via consultation in drafting EIA report which is pre-determined by law. And it could also be an open/public scoping wherein public consultation is required. The scoping does take into account – a) the physical and chemical environment; b) the biological environment; c) the human (social) environment; d) the human (economic) environment as a crucial *marker* while identifying 'key-issues' for the preparation of term of reference.[41]Based on the terms of reference – draft EIA is prepared which is essential for holding Public Consultation. In this process public is duly involved. It is done by organizing meetings and public hearing to seek comments, concerns, and suggestion from the public. The project proponents are bound do give detailed and correct information regarding the project to the people during this process. 'Impact Analysis' and 'mitigation' help in predicting the effect of developmental project and assess their significance and to plan out measures to thwart, trim down or compensate the ill-effect of the project. These foregoing processes culminate in the drafting of 'report' which is known as 'EIA Report'. It is often known by different names such as 'environmental impact assessment report'; 'environment impact assessment'; 'environmental effect statement'; 'environmental statement' 'environmental assessment report' etc. The content of the report includes: description about the project, environmental impact, measures to prevent or offset adverse environmental effect, *inter-alia*.[42]This EIA report is evaluated in the next step which is referred as 'review'/ 'appraisal'. Often taken up by environmental agency, appraisal committee; assessment authority; or designated panel - this stage involves detailed scrutiny of every document including the EIA report and the proceedings of the public hearing. The final stages involve 'the final decision' and 'compliance and monitoring'. Final decision has to be taken by the 'regulator'. It minutely looks into the recommendation of the appraisal committee and deicide upon it by either accepting the recommendation (along with stipulating conditions) or rejecting the developmental proposal of project proponent. Monitoring constitutes the post clearance process of the project. It warrants project proponent to submit time-bound report on steps taken for compliance and on imposed condition. It also involves periodic checks and third-party audits.[43]

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[37] Bikram Kumar Dutta, Sanhita Bandyopadhyay, "Environmental Impact Assessment and Social Impact Assessment - Decision Making Tools for Project Appraisal in India" 5(6) *International Journal of Human and Social Sciences*352 (2010).

[38] Saswati G, "Stages of Environmental Impact Assessment",*available at*: http://www.environmentalpollution.in/eia-2/stages-of-environmental-impact-assessment-environment/4428 (last visited on Sep. 30, 2019).

[39] See https://www.soas.ac.uk/cedep-demos/000_P507_EA_K3736-Demo/unit1/page_14.htm (last visited on Sep. 30, 2019).

[40]*Supra* note 37.

[41] See https://www.lakeheadu.ca/sites/default/files/uploads/53/outlines/201314/GEOG1120/Week%209b.pdf (last visited on Sep. 30, 2019).

[42]*Ibid*.

[43] United Nations Environment Program (UNEP), Geneva, *available at*: https://unep.ch/etu/publications/EIA_ovrhds/top02.pdf (last visited on Sep. 30, 2019).

III. EIA LEGAL FRAMEWORK

A. The Background

The process to assessing the impact of environment was first introduced courtesy of Central Water Commission. The commission in the year 1975 issued guidelines for conducting investigations for hydroelectric and irrigation projects. However, the firm rooting of EIA process can be said that it began in the year 1976-77 when the planning commission asked the Department of Science and Technology to examine'river-valley' projects. This project which many feared would jeopardize environment forced the government to initiate the assessment of environmental impact of the impending project. Later, this kind of assessment was extended to also include many of those projects which required approval of Public Investment Board. Thesehowever, were primarily administrativedecisions without any legislative support.[44] Up till 1994 Ministry of Environment and Forest mandated submitting environmental information by filling out questionnaires for 'Environmental Clearance'. It was predominantly done under the administrative guidelines which required project proponents to secure clearance from the Union Ministry of Environment and Forest. This clearance was overseen by the ministry's Environmental Appraisal Committee. It must be stated here that during the decades of 1970s and 80s India witnessed rising concern being voiced against many developmental projects. Different stakeholders pitched their voice and battled against various project proposals. River valley was one such project. So, in the year 1977-78 Indian government took to itself the task of appraising river valley project. River valley project in its wake prompted the Department of Environment and Forest, Government of India to issue guidelines requiring studies pertaining the effect of this project on wildlife and forest, aquatic ecosystem, seismicity, and the related other concerns. This resulted in various other projects which were also brought within the purview of environmental assessment.[45]Consequently, the Environmental Protection Act, 1986 brought paradigm shift. It is this umbrella legislation which helped in institutionalizing *environmental impact assessment* process in India.

B.EIA Notification

The legislative measure which spurred the legal course and validated environmental assessment stemmed from section 3 of Environment Protection Act, 1986 read with rule 5 of the Environment Protection Rule, 1986.[46]The afore-mentioned provisions broadly delineate

[44] Devarshi Tathagat and Dr. Ramesh D. Dod, "The Inception and Evolution of EIA and Environmental Clearance Process – Laying Emphasis on Sustainable Development and Construction" 5 *International Journal of Engineering Research and Applications* 23 (2015).

[45]George Cyriac and Shamik Sanjanwala "Environmental Impact Assessmentin India: An Appraisal" 10 *The Student Advocate* 74-75 (1998).

[46]The Environmental Protection Act 1986, s. 3(1): Power of Central Government to take Measures to Protect and Improve Environment. - (1) Subject to the provisions of this Act, the Central Government, shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing controlling and abating environmental pollution. s. 3(2): In particular, and without prejudice to the generality of the provisions of sub-section (1), such measures may include measures with respect to all or any of the following matters, namely:-- (v) restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards; The Environmental Protection Rules1986, rule 5(3)(a):Prohibition and Restriction on the Location of Industries and the Carrying on Processes and Operations in Different Areas. - Whenever it appears to the Central Government that it is expedient to impose prohibition or restrictions on the locations of an industry or the carrying on of processes and operations in an area, it may by

the environmental assessment law in India wherein Indian government notified two principalenvironmental impact notificationsi.e., on in the year 1994 which was superseded by another notification in the year 2006. It is interesting to see various amendment, guidelines, official memoranda, and circulars have followed the principal notification. As per the tenor of notification various stakeholders are mandated with certain roles and responsibilities such as:

(i) Roles of different actors in the EIA process

a. The Project Proponent:The entire process of environmental impact assessment begins with the project proponent. They are required to furnish feasibility report, detailed project report which should incorporate the information on project and the findings of EIA study. This document should be available to the concerned public. Proponents has to initiate public hearing with due approval. Consequently, they are required to submit application for environmental clearance to the concerned authority.[47]
b. The Environmental Consultants:An environmental consultant plays a crucial role in the impact assessment processes. It is required of them to fully familiar with the legal norms and procedural requirements required for obtaining environmental clearance for the proposed project. Project proponent facilitate the project proponent from the very outset starting from screening process up till *right at the end* when the regulator peruses through the environmental assessment report for the proposed project. The consultants are responsible to provide all the necessary information sought by pollution control board and regulator.[48]
c. The State Pollution Control Board / Pollution Control Committees (PCCs): It is vested with the responsibility of facilitating public hearing and giving NOC to the concerned project. Though pollution control board has no direct role in the Environmental consultation process, it does identify critically polluted areas and industrial clusters. These are relevant information which helps in determining the grant of Environmental Consultation.[49]
d. The Public: They constitute the most important factor in the entire process. They are required to review information as furnished by the proponent and voice all their concerns regarding the developmental project. They are required to examine minutely all the positive and negative consequences of the project.
e. The Impact Assessment Agency: They are vested with the power to assess EIA report. They are required to prepare list of recommendations and set of clearance condition in case they approve the project. Environmental monitoring process is also overseen by the agency.[50]

C. Salient features of the 1994 and the 2006 Notification

(i) 1994

notification in the Official Gazette and in such other manner as the Central Government may deem necessary from time to time, give notice of its intention to do so.

[47]WWF India, "Session 13: National Legal Policy/ Framework/ Processes: Environmental Impact Assessment", *available at*: http://awsassets.wwfindia.org/downloads/session_13_1.pdf (last visited on Sep. 30, 2019).

[48]*Ibid*.

[49] Shibani Ghosh,"Demystifying the Environmental Clearance Process in India" 6 *NUJS Law Review* 439 (2013).

[50]*Supra* note 47.

Ministry of Environment &Forests notified mandatory EIA for 29 designated projects on 27th January 1994 under rule 5 of Environmental Protection Rules, 1986. The notification made mandatory for the project proponent to prepare environmental impact assessment report so as ensure a) proper prediction of impact caused to the environment by the project b) to mitigate its adverse effect c) to mould the project in sync with the local environment and to d) provide sufficient room to predict and afford alternative options before the decision makers.The 1994 notification called for certain mandates related to projects which are listed in Schedule 1 for obtaining an environmental clearance from the authorities.[51]

(ii)2006

The 2006 notification superseded previous notification. Significant changes were introduced under the new notification. Decentralization of the regulatory function is the major hallmark of the current notification. The State level environment impact assessment agencies were vested with the responsibility to oversee small scale projects i.e., Category 'B' whereas MOEF are to regulate category 'A' which is larger scale projects. The Environmental ministry at the centre and the respective state are required to base their approval on the recommendations of the Expert Appraisal Committee (EAC) and State Expert Appraisal Committee (SEAC).[52] The State Pollution Control Board and the Union Territory Pollution Control Committee (UTPCC) were tasked with the major responsibility for conducting public hearing. The current notification has brought in manygreaternumbers of projects under the purview of environmental clearance process. Emphasize has been laid on to the size or capacity of the project rather than based on investment in the current notification.

IV. EIA - PUBLIC CONSULTATION, EIA REPORT AND JUDICIAL DECISIONS

Public consultation is a very crucial component in the EIA process. It may be hailed as the most fundamental determinant for a required and necessary *consummate-impact-assessment*. It veritably embodies the virtues of the principle of natural justice. This stage affords the people the necessary forum to participate and raise concerns. Any developmental project *directly or indirectly* affects people. These developments may give rise to expected/anticipated situations or many a times would also result in unintended and unwarranted consequences. Public consultation is mechanism to address and thwart thepossibility of unintended consequences. Therefore, it must be said that involving public becomes cornerstone to any given EIA process.[53]

The United Nations Environment Program has in its report,"emphasized the importance of public involvement, as an indispensable part of implementing procedural principles and the objectives which are substantive in nature for the EIA process. The requisite of making information available to the affected or concerned public,who would express their views or comments about the project, would help in achieving the goals of EIA procedures being implemented in an accountable, open, and a transparent manner. It further promulgates and encourages the preparation of EIA studies and reports in a robust and defensible manner. On the other hand, previous studies indicate that such public participation has proven useful for EIA processes which involve scoping, impact identification, examination of alternatives and taking mitigation measures for environmental protection.

[51]See http://cesorissa.org/PDF/EIA.pdf (last visited on Sep. 30, 2019).
[52]*Ibid*.
[53]*Supra* note 5 at 28.

This process further promotes informed and equitable choices along with acceptable and environmental outcomes for such activities."[54]

The report further outlines that - through public consultation - which warrant disclosure of information via public notification along with providing access to EIA documents various purposes are achieved which are central to an 'active' EIA. The good practice would lay emphasis on active and participative public consultation than mere 'passive' EIA and so therefore various stakeholders should be brought into for consultation and dissemination of information. Especially disadvantaged community interests should be considered in the public consultation process.[55] Here it would be worthwhile to quote Principle10 of the Rio Declaration (1992), which emphasizes on, "Environmental matters being at a good footing when such matters involveall concerned citizens participating at all relevant levels. The National level involvement is appreciated, when citizens have access to information on environment which is in the fold of public authorities and they provide it to the public for hazardous materials and activities involving their communities along with the opportunity to participate in decision-making processes. It also entails the States to encourage and facilitate participation of the public and creating awareness among them by the public having access to all environmental information. This is further promoted when the public also has access to judicial and administrative proceedings where remedies and redressal is also provided to them."[56]

The United Nations Environment Program has underlined aims and objectives of public involvement which inter-alia include: "allowing the public to express its view on the scope and content of an EIA (and the proposed development action); obtaining local and traditional knowledge (corrective and creative) before decision-making; allowing more sensitive consideration of alternatives, mitigation measures and trade-offs; ensuring that important impacts are not overlooked and benefits are maximized; reducing conflict through the early identification of contentious issues; influencing project design in a positive manner (thereby creating a sense of ownership of the proposal); improving transparency and accountability of decision-making; and increasing public confidence in the EIA/SEA process."[57]

The discussion,has outlined the importance of 'active' public consultation which is *sine qua non* for a robust EIA. The 2006 EIA notification, has emphasized that that EIA process should take into account all concerns of those citizens or stakeholders, who are affected by the outcomes of such projects or activities, and which involves an impact assessment to be carried out before starting this activity.[58]The notification also states that "all Category 'A' and Category B1 projects or activities shall undertake Public Consultation".[59] However, there are many projects which are exempted under the notification.[60]The 2006 notification,[61] states that - the*public consultation* constitutes of two component i.e.public hearing and obtaining written responses.

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[54]*Ibid*.
[55]*Ibid*.
[56] The Rio Declaration on Environment and Development (1992), *available at*: http://www.unesco.org/education/pdf/RIO_E.PDF (last visited on Sep., 30, 2019).
[57]*Supra* note 5 at 66.
[58] Para 7(i)(III)(i).
[59] Para 7(i)(III)(i).
[60]*Supra* note 49.
[61]Para 7[i] [III] [3] [i] SO 1533.

As stated in the foregoing paragraphs –it is seen – that that Indian courts and tribunals in the similar tenor has been giving dueemphasis to the 'active' public consultation.[62] Supreme Court, High courts and National Green Tribunal have adjudicated upon the validity of Environmental Clearance wherein theimpugned public consultation processes in various developmental projects were minutely assessed. It must be stated here that the Supreme Court, High Court and NGT are vested with power to adjudicate upon the validity of Environmental Clearance "on the ground of illegality or irregularity in public hearings.[63] Public hearing can be challenged for the want of "procedural impropriety; adequate and authentic information; place of hearing and adequate consideration".[64]

Similarly, the Apex Court on numerous occasions has opined in favour of the pivotal nature of EIA report. The Apex Courthas displayed its acute exasperation over distorted, manipulative, and evasive environmental impact assessment report. As recently the Supreme Court in the case of *HanumanLaxman Aroskar*v. *Union of India*[65] expressedits displeasure, in the manner in which the EIA report was described as an attempt to overlook the existence of trees. The report further misguided the observation by mentioning the existence of only a few trees and bushes and being very sparse at the site. Further evidence displayed the fabrication of the fact that the proposed activity involved felling of 54,676 trees. The explanations given after these facts were exposed displayed a failure of the due process in matters related to environment and its governance. The Supreme Court thenset aside, suspended, and even annulled environmental clearance due to the shortcomings in public consultationand faulty EIA report.[66]

Supreme Court in Vedanta case i.e.,*Orissa Mining Corporation Ltd*.v. *Ministry of Environment & Forests*[67]has stated that as per theScheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and Panchayats (Extension to Scheduled Areas) Act, 1996 – these laws mandate scheduled tribes and traditional forest dwellers right to protect their custom and traditions and therefore their opinion becomes valuable, paramount and indispensable for any decision taken for the diversion of forest land

[62] Justice D Y. Chandrachud in the case of *Hanuman Laxman Aroskar*v. *Union of India* writing the judgment states that: "The importance of public consultation is underscored by the 2006 notification. Public consultation, as it states, is 'the process by which the concerns of local affected persons and others who have a plausible stake in the environmental impacts of the project or activity are ascertained with a view to take into account all the material concerns in the project or activity design as appropriate'. This postulates two elements. They have both, an intrinsic and an instrumental character. The intrinsic character of public consultation is that there is a value in seeking the views of those in the local area as well as beyond, who have a plausible stake in the project or activity. Public consultation is a process which is designed to hear the voices of those communities which would be affected by the activity". See also *Adivasi Majdoor Kisan Ekta Sangthan*v.*MoEF*(2011), *Jeet Singh Kanwar* v. *Union of India* (2011).

[63] M P Ram Mohan, Himanshu Pabreja "Public Hearings in Environmental Clearance Process Review of Judicial Intervention" 50 *Economic & Political Weekly* (2016): "The Supreme Court (under Article 32, 136, Constitution of India [1950] and Section 22, National Green Tribunal Act [2010]), High Courts (under Article 226, Constitution of India), and NGT (constituted under National Green Tribunal Act [2010]) have the power to adjudge the validity of ECs on the grounds of illegality or irregularity in public hearings".

[64]*Ibid*; See *Samata* v. *Union ofIndia* (2011)*; Adivasi Majdoor Kisan EktaSangthan*v.*MoEF*(2011)*; Utkarsh Mandal* v. *Union of India* (2009)*; T Mohana Rao* v. *Ministry ofEnvironment & Forests* (2011)*; Ramesh Agrawal* v. *State level EnvironmentImpact Assessment Authority* (2011).

[65] M.A. No. 965 of 2019, Civil Appeal No. 12251 of 2018; Judgement delivered by the Supreme Court of Indiaon March 29, 2019.

[66] On the ground of maintainability, Supreme Court in February 18,2019 has set aside the judgement of NGT and refused to open the copper smelter plant in Tuticorin in the case of *Tamil Nadu Pollution Control Board* v.*Sterlite Industries (I) Ltd. &Ors*. (2019) SCC OnLine SC 221.

[67]Writ Petition (Civil) No. 180 of 2011; (2013) 6 S.C.R. 881.

for non-forest purposes. In *Lafarge Umiam Mining* v *Union of India*,[68] the Apex Court stated that both the earlier notification (EIA notification 1994 as amended in 1997) and 2006 notification make public hearing a mandatory aspect for the EIA process.[69] Further in the case of *Orissa Mining Corporation* v *Ministry of Environment and Forest*,[70] the Court observed that even for the expansion and modernization sought for the existing project environmental clearance should be taken from the appropriate authorities.[71] In *Alaknanda Hydro Power Company*v. *Anuj Joshi*,[72]case the Apex Court observed that the avowed and intended purpose of public hearing is to forge a proper and holistic environmental management plan.[73] The foregoing proposition was further cemented in the case of *Electrotherm (Electrotherm (India) Ltd* v. *Patel VipulkumarRamjibhai*,[74] wherein the Supreme Court stated that public hearing forms an integral part and a prior requirement for granting an environmental clearance certificate. Further in the case of *Talaulicar& Sons* v. *Union of India*,[75] the Supreme Court emphasized on the effective public hearing. The Court stated that public hearing is *sine qua non* process which must be done in letter and spirit before the grant of environmental clearance. The improper method would only vitiate the entire process and the impugned public hearing would frustrate the environmental clearance.

V. CONCLUSION

EIA in its variegated form faces enormous challenges. Irrefutably, in almost every country EIA is besieged by the naysayer and detractors. For EIA to find a foothold is a continuous and daunting task – especially in the wake of - blind eulogization of *development* and *development project.* Development with blatant disregard and shorn of environment concerns seems ubiquitous. For many detractors who swear by developmental plank they have consistently peddled EIA asinordinatelylengthy and time-consuming exercise. They regard it as an anti-development. No doubt these narratives are far stronger, entrenched, and pervasive. It is for these reasons it seems that the EIA has had far less influence than the supporter had hoped for. Nevertheless, it must be categorically stated that EIA when sought and done properly and diligently manages to lessen the possible conflicts. EIA when done with the able community participation and buttressed by *relevant information* aids in promoting sustainable development. It veritably becomes important instrument which render and metamorphose any given project into a – *environmentally sound developmental projects*. Experience with EIA has been a unique tryst for India! She is uniquely placed in terms of aspiring millions for prosperityin contrast with the pangs of reality. In her ponderous stride, EIA do come as an able enabler – a formidable starting point and a *desired innovative instrument*. EIA as practiced in India faces some of the unique challenges: such as EIA report being highly technical which disable the people in understanding the nuances of the report. It has also been seen – many a times – during public participation that the people end up asking for jobs and facilities instead of understanding the implications of the project. Supreme Court has able to secure moderate success in thwarting environmental deterioration. EIA - as a matter of fact - has received ample support and patronage from the Apex Court. The Supreme Court in its catena of cases has reinvigorated the tenor of EIA. It has pushed for the

[68]AIR 2011 SC 2781.
[69]Arup Poddar, "Public hearing and environmental protection" 3(3) *International Journal of Law*67 (2017).
[70](2013) 6 SCC 476.
[71]*Ibid*.
[72](2014) SCC 769.
[73]*Ibid*.
[74]AIR 2016 SC 3563.
[75]AIR 2016 SC 3351.

compliance of EIA. It has invoked the – *rigours of EIA* – as the touchstone for the grant of environmental clearance. It is a foregone conclusion that the principles of EIA if not duly complied with would be ominous for the sustainability of life. Environment bears no responsibility if it becomes penurious and too infirm to sustain life as it exists now. EIA is a good starting point!

ARBITRATION TO ACHIEVE SUSTAINABLEDEVELOPMENT GOAL OF 'ACCESS TO JUSTICE' IN INDIA: A CONSTITUTIONAL AND JURISPRUDENTIAL PERSPECTIVE

Akshay Verma[*]

I. INTRODUCTION

The Constitution of India, which holds preservation of human rights in high esteem, dearly embraces the idea of social justice. Amongst the chief components of the idea of social justice, the jurisprudence of access to justice holds extreme prestige. With the Constitution inspired by the tenets of a 'Welfare State', it is the primary duty of the State to ensure that its citizens have access to time-bound justice and due effectuation of their legal and fundamental rights. To achieve this, it is pertinent that the State provides for judicial as well as non-judicial forms of dispute resolution which can cater to the above-mentioned needs. The State must further ensure that social-evils like ignorance and poverty do not pose as impediments in the path of securing justice.

It cannot be doubted as one of the most effective means to achieve speedy justice is to embolden the Alternative Dispute Resolution (ADR)mechanism within the country as it will encourage reforms in the areas of expediting resolution process together with ensuring a strong in-country mechanism for out-of-court settlement of disputes.Even though, in today's time several new ADR mechanisms have developed, yet Arbitration, already a well-known traditional alternative to litigation, still retains its popularity for it has truly proven to be a sustainable andreliableformofdisputeresolution. It is known fact that administration of justicein India is plagued with delay and access to justice is rather a cumbersome process. This leaves the people wanting for a forum which can provide them with speedier and not-so-costly access to justice, andADR mechanism can prove to be a leading example for such requisites in view of the newly adopted sustainable development goals (SDGs).

II. ARBITRATION

India is one of the signatories to the New York Convention, which opens the door for the enforcement of international arbitral awards. In the context of the details provided in the introductory part of the paper, it can be simply put that arbitration as a process provides for an alternative method for dispute resolution which has proven to be affordable, cheaper, and quicker when compared to the ordinary methods or the formalprocess of litigation.The procedures adopted by the arbitrationare generally suited to the facts and circumstances of each case in furtherance to the aim to avoid futile expenses and unnecessary delays along with providing a fair means for settling the disputes at hand.

The essence of equity and contract, both acquires a position when deliberating upon the concept of arbitration. *Firstly*, the fact that Arbitration as a method of dispute resolution involves the contours of equity also does not come as a surprise, for its very invention was inspired by the idea to expressly capture full power in favour of equity. The philosophy of arbitration is centred around settling disputes peacefully than by force. It aims at securing maximum benefits and avoiding injuries. It calls for parties to have patience when wronged

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and provides the option of negotiations for solving dispute than by opting to use force. It is due to these philosophies that general preference for dispute resolution must shift from normal court motions to arbitration.[1]*Secondly*, the philosophy of contract is an offshoot to the philosophy of arbitration. It establishes a connection between the economic and philosophical theories of law. The economic contract theories give due weightage to efficiency and gives a fillip to individual autonomy and maximisation of social welfare.[2] The Natural Law theory via its descriptive sociological claims that search of knowledge is the devout pursuit of all humans along with ensuring justice to fellow men as they are devoted for ensuring their survival.[3]Arbitration clause is of unique significance and character in a contract in comparison to other constituent clauses. While the latter clauses determine the mutual obligations undertaken by the parties in all circumstances, the arbitration clause does not impose any obligations for either of the parties to each other. Rather the arbitration clause is a product of agreement between both the parties to settle in a tribunal (constituted by them) any dispute which shall emerge with respect to the obligations which are mutually agreed and reciprocated by the parties to one another.[4]

III. HISTORY & DEVELOPMENT

"*Cut the living child in two and give half to one and half to the other*".[5]

Interestingly, this statement may represent what was to be the first decision given by an arbitrator for resolving a dispute. The case was that King Solomon was approached by two women, each claiming the parentage of the boy. The King thus called for a sword and ordered the bifurcation of the child into two, with one half going to one woman and the other half going to the other woman.[6]What this case reflects is that the women sought to approach a third party whom they considered to be a wise, trusted, and independent entity, to resolve their dispute. Thus, they may have opted to appear before the wise and trusted King Solomon as their arbitrator instead of treading on the path of litigation. It is possible that at that point of time all disputes were solved in this manner only, but the striking fact that the women pursued justice by referring the matter to an arbitrator of their choice. This choice of preference of judge characterises this proceeding as an arbitral proceeding.[7]

However, this story has led to the birth of various myths about arbitration, such as arbitrationbeing a process wherein parties, instead of going to the courts, approach an arbitrator of their own choice, with whom they discuss the matter with and the arbitrator "splits the baby". Yet, these myths stand unsupported by the story of King Solomon's first arbitration.This is because, as the story further reveals, after giving the decision to cut the baby into two, the woman who was the real mother of the boy pleaded before the king to spare the boy even if he orders him to be given to the first woman. But the first women, supporting the king's decision, replied that neither of them should have the child and the child thus must be cut in two! Confronted by these new testimonies, King Solomon modified

[1]Jody S Kraus, *Philosophy of Contract Law*, The Oxford Handbook of Jurisprudence and Philosophy of Law, (Oxford University Press,2004).
[2]*Ibid.*
[3] Philip Selznick, *Sociology and Natural Law,* Natural Law Forum, Notre Dame Law School (1961).
[4] Abraham Mathew,"The Philosophy of Arbitration" 8(4)*International Journal of Business, Economics and Law* (2015).
[5]New King James Version, *The Bible* (1982).
[6]*Ibid.*
[7]Frank D. Emerson, "History of Arbitration Practice and Law"19 *Cleveland State Law Review* 155 (1970), *available at*:https://engagedscholarship.csuohio.edu/clevstlrev/vol19/issl/19.pdf(last visited on Aug. 05, 2019).

the order and refrained from splitting the boy in two.[8] This again raises the unsaturated question regarding the reality of arbitration. The following probabilities would have been considered by King Solomon for deciding the outcome: -

"1. Concur with the first woman's request to cut the baby into two halves so that neither gets to have him;

2. Deliver the boy to the first woman heeding the request of the other woman.

3. Deliver the baby to the second woman by dissenting to the requests of both the women

4. Deliver the baby to any other person not paying heed to the pleas of both the women."

Philosophically, these questions reveal that parties have no say in the elimination of possible outcomes. The parties may prefer their own possible solutions, but they are not binding on the arbitrator to follow what the parties present before him/her. In the above example of King Solomon's story, it is clearly discernible that it was the strategy of the mother to say that the baby does not belong to her to save the boy's life. The King thus could clearly decide that the best way to settle the dispute was to let the real mother have her child back. An important observation is also that arbitrators do possess the autonomy to reject certain possible outcomes as per their discretion.This is indeed what King Solomon did, for he discarded all the other probabilities and chose the third option to give the baby back to his mother. It is therefore widely believed that he had been bestowed by God, the wisdom to administer justice.[9]

One may infer from this case that Divine Wisdom or Divine Providence or Divine Reason is the real power ruling over the world. The nature of law is present in all concepts and ideas of the government of things by God, who is the Ruler of the Universe. It is of a type, proper for the creation of laws or the norms. Moreover, as the conceptions of things by Divine Reason is not subjected to time, it must be considered as eternal.[10]In terms of legal philosophy however, Natural Law is a requisite for the administration of justice by God. It is therefore undisputed that Natural Law is a major component of the arbitration jurisprudence. Therefore, the arbitrators are bound by the principles of natural law and rules of natural justice even though there is no application of precedents. One must not forget that these principles are basic constituents of the vast sea of legal philosophy.It is for this reason only that no person, who stands to gain or profit by the victory of one party over the other, should be chosen to be an arbitrator, for he has taken a bribe and consequently cannot be labelled as trustworthy. This also means that the conditions of war and controversy are antithetical to the laws of nature.[11]King Solomon's famous judgement[12] is therefore, observed as amongst the earliest examples of arbitral procedures, for one can clearly spot the principles of flexibility, speed andfairness associated with it backed by the wisdom and experience of King Solomon as themutually chosen arbitrator, whose deft application of the principles of equity and law guided the case to its final conclusion. All these principles are the hallmarks of arbitration.[13]

Arbitration as a mechanism can be simply explained as the method in which two parties approach a mutually appointed third party to resolve the emergent disputes between the parties. The decision of such a party is binding on both the parties.The roots of arbitration can be found to extend way deep into ancient history. In earlier days (i.e. even before history

[8]*Ibid*.
[9]*Ibid.*
[10] J.G. Dawson, *Aquinas: Selected Political Writings,* (Oxford Blackwell,1948).
[11]Abraham Mathew, *supra* note 4.
[12]*Ibid.*
[13]*Ibid.*

was recorded), with an organised legal and judicial system being non-existent, it was natural for humans to seek the assistance of the elders of the tribes to hand down a final and binding judgement to resolve the disputes between neighbours. The society continued to progress and after considerable time elapsed, there started to emerge new ideas such as those dealing with property and exclusive rights of men. These ideas emerged before the establishment of a system for distributive justice. This unsettled period saw the disputes being settled either by mutual agreement or by reference to an indifferent unbiased person, whose superior wisdom and sense of equity was trusted by them.[14]It is a well-established fact that possession of rights would become meaningless if they are not backed by supportive mechanisms for their effective justification. It is this philosophy which led to the idea of access to justice being labeled as 'the most basic human right'. Thus, the States not only had to provide their citizens with the formal right of having equal right to justice, but the states also had to back these claims with an affirmative action to provide their people with effective access to justice.

The year 1956 saw the emergence of three practical approaches in the U.S.A, U.K and other European countries, centering on the idea of access to justice.[15]The first wave of approach in this new movement dealt with the concept of legal aid. The second approach aimed to reform the provision of legal representations for 'diffused' interests, especially in the realms of consumer protection and environment protection.The third approach to access-to-justice dealt with it, yet, at the same time, went much beyond the earlier approaches and tried to articulately and comprehensively attack the barriers preventing easy access to justice. This last approach further encouraged the exploration of a wide and diverse variety of reforms which ranged from changes in the structure of the courts to the creation of new courts; utilizing lay persons and para-professionals both on the bar and bench; modifying the substantive law to avoid disputes and facilitate their effective resolution; and promoting the use of private informal mechanism for resolution of disputes.This approach, therefore, is undoubtedly unafraid to adopt radical and comprehensive innovations, which traverse much beyond the realm of legal representations.[16]

IV. ROLE OF ARBITRATION IN ACHIEVING SUSTAINABLE GOAL OF 'ACCESS TO JUSTICE'

Sustainable Development Goal 16 of the United Nations: Peace, Justice, and Strong Institutions[17]

The 2030 Agenda for Sustainable Development comprises of 17 interlinked goals were set up by United Nations general assembly in 2015. It provides a strong plan to achieve peace and a sustainable future for everyone. The goals serve as call to action by all the countries – be they developed and developing countries - and achieve collective ideals through global partnership.

The promotion of peaceful and inclusive societies is important for achieving the ideal of social justice within all societies. This requires that address the pertinent issues facing the

[14] Vincet Powell Smith, "Settlement of Disputes by Arbitration Under Shari'ah and Common Law"34 *Islamic Studies* (1995).
[15]Ved Kumari,Aman Hingorani, *et.al., Alternative Dispute Resolution*1 (Faculty of Law, University of Delhi 2018).
[16]*Ibid.*
[17] U.N. SDG Report 2018 highlights progress being made in many areas of the 2030 agendas, provides the blueprint for dignity, peace and prosperity for people and the planet, now and in the future; *available at:* http://www.sdgs.un.org/sdg16/eng.pdf (last visited on Aug. 05, 2019).

world today such as the threats of international homicide, violence against children, human trafficking, and sexual violence. This would ensure the provision of access to justice for all and for building effective, accountable institutions at all levels. The relevant provision of the SDGs in this regard is mentioned as below:

"***SDG 16:****Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.*"[18]

"***16.3 Promote*** *the rule of law at the national and international levels and ensure equal access to justice for all*

16.6 Develop *effective, accountable and transparent institutions at all levels*

16.7 Ensure *responsive, inclusive, participatory and representative decision-making at all levels*

16.8 Broaden *and strengthen the participation of developing countries in the institutions of global governance*

16.a Strengthen *relevant national institutions, including through internationalcooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime*

16.b Promote *and enforce non-discriminatory laws and policies for sustainable development.*"[19]

The 16th goal of SDG goals i.e., Peace, Justice and Strong Institutions, talks about conflict, insecurity, weak institutions and limited access to justice, that remains a huge threat to sustainable development. Therefore, SDG goals promote the creation of just, peaceful and inclusive societies for only they can ensure sustainable development, provide access to justice for all and build effective and accountable institutions at all levels.

Besides, section 89 of the Indian Code of Civil Procedure, 1908, provides fortheoptionof ADR mechanism. With the introduction of Indian Arbitration Act in 1940, the issues whichcould not be resolvedwithin the stipulated time frame by following the traditional courtprocedures, were redressed through arbitration.Sub-section 2 of section 89, of the Code of Civil Procedure, provides that "where a dispute has been referred for Arbitration or Conciliation, the provisions of the Arbitration and Conciliation Act, 1996 would apply".The 129th Report of the Law CommissionofIndia[20]and the Justice Malimath Committee Report[21]advocated the need for amicable settlement of disputes between parties and also made it mandatory for the courts to refer the disputes for resolutionthrough alternate means other than litigation,once the issues were framed by the court.

Arbitration today has emerged as the most popular out of all other ADR mechanisms be it that of mediation, negotiation etc. Arbitration & Conciliation Act of 1996 is the most important Indian legislation dealing with Arbitration within the country. This act laid the foundation stone of the Arbitration Tribunals and bestowed on it, certain powers mentioned in its various provisions. This Act is inspired by the United Nations Commission on International Trade Law[22] (UNICITRAL), Chambers of Commerce (organized by either

[18]*Ibid.*

[19]*Ibid.*

[20]Law Commission of India, "129th Report on Arbitration" (1988),*available at*: https://lawcommissionofindia.nic.in/129report/1988.html (last visited on Aug. 08, 2019).

[21] Justice Malimath Committee Report(1989-90) underlined the need for alternative dispute resolution mechanism such as mediation, conciliation, arbitration, etc. as a viable alternative to the conventional court litigation. See https://www.mha.gov.in/sites/defult/files/criminal-justice-system.pdf(last visited on Aug. 08, 2019).

[22]United Nations Commission on International Trade Law UN Doc A/31/98, 31st Session Supp. No 17.

region or trade), the Indian Council of Arbitration (ICA), the Federation of Indian Chamber of Commerce and Industry (FICCI), and the International Centre for Alternate Dispute Resolution (ICADR) are some of the major forums of arbitration in India.

The commitment to neutrality and mutuality are the biggest advantages derived through the recourse to arbitration for resolving disputes. This is achieved by the various choices provided to the contending parties with respect to- place of arbitration, language to be employed, rules/procedure to be followed,legal representation, nationality of the procedure (in case of international commercial arbitration), appointment of arbitrators, element of confidentiality. Moreover, with the development of intellectual property rights and the patent regime, fast track arbitration is needed for the resolution of various disputes such as: copyrights, patents, and trademarks infringement; destruction of evidence; violation of patent and trademark laws; construction disputes in time-bound projects, licensing contracts; and others.[23]

Judiciary in India, has unquestionably failed to dispense justice expeditiously. In-fact the challenge to deliver speedier justice has been an insurmountable one so far for the Indian judiciary. Surprisingly, this is not a first-hand challenge but rather this challenge is as ancient as laws themselves and today has accelerated to such an extent that failure to solve it would soon lead to a catastrophic collapse of the entire edifice of the judicial system. This problem is further compounded by the astoundingly low population to judge ratio as compared to the developed countries.

The absence in any Act or Code of a fixed deadline for termination of cases has been one of the banes plaguing the Indian Justice System. This means that sometimes years are spent in solving cases. Arbitration thus can act as a major succor in relieving the justice system of its present burdens. The case in favour of arbitration is also made due to the complex laws along with cumbersome court procedures. The district court are further afflicted with poor infrastructure and lack of proper computerized records which further displays the diabolic state of our justice system. Arbitration with its easy to understand, informal and hassle- free procedures presents itself as an attractive forum for the parties to refer their dispute to it. Thus, the Indian Judiciary needs to identify, realize, and rectify its inefficiencies. All these truly justify the adoption of arbitration and implementation by the Indian Judicial system as a means to resolve disputes.

Arbitration law with the application of neutral transnational rules helps in ensuring equal access to justice for all at the national and international levels. The ease of dispute settlement and acceptance of arbitration will definitely lead to the development of effective, accountable and transparent arbitral institutions with uniform rules and simple procedures. The aim to reach a win-win situation without compromising on inclusivity, participation, responsiveness, and representative decision making attracts parties as they feel comfortable in dealing with their respective differences through arbitration rather than referring it to conventional litigation forums. Arbitration is not only beneficial to the disputants, but it also helps in developing a good governance within developing countries like India, since people start developing the habit of co-operation and working together, which is the foremost requirement for a country to develop. This in-turn helps in achieving the SDG 16.8 i.e.,broaden and strengthen the participation of developing countries in the institutions of

[23]*See generally,* WIPO Arbitration and Mediation Centre: Guide to WIPO Arbitration, *available at:* http://www.wipo.int/amc.html (last visited on Aug. 06, 2019).

global governance. Moreover, the non-discriminatory laws of arbitration help in achieving the constitutional goal of Welfare State thereby promoting and enforcing policies for sustainable development.

V. CONSTITUTIONAL PERSPECTIVE

The basic need of democracy is to secure the rule of law, which means governance not by people but by principles. It is the dynamic concept of supremacy of law.It imposes negative constraints on government action and also an affirmative duty of fairness. In the context of judiciary, rule of law means independent judiciary.The rule of law and principles of natural justice are inherently related to each other. It is protection from excesses of power by the authorities or who are in a commanding position. It means fairness, equity and equality, reasonableness.

The Rule of law and principles of natural justice do have constitutional basis and are well founded in Articles 14 and 21 of Constitution of India. These Articles incorporate substantial and procedural due process. For instance, Article 21 includes the element of fairness and brings it into action when any accused is deprived of personal liberty. In the same way, Article 14 also provides for natural justice by prohibiting discriminatory class legislation.The foundation of ADR lies in three basic principles of natural justice as such:

i. *Nemo judex in causa sua*(rule against bias)i.e.,no one should be made a judge in his own cause.[24]
ii. *Audi alterum partem* (hear the other side) i.e.,No one can be deprived of his/herabsolute right or be punished without having been given an opportunity to propose explanation. Each and every person has a right to have notice of the case, a right to present his/ her case, a right to provide evidence and a right to rebut adverse evidence. Evidence should not be taken on the back of other party.[25]
iii. *Reasoned decisions*(rule against dictation) i.e.,The Report of the enquiry to be shown to the other party, should be based on reasoned decisions.The order should speak for itself.[26]

The Constitution of India is based on the tenants of a welfare state. Thus, a primary responsibility of the State then is to remove all hinderances towards them securing access to justice. The enforcement of fundamental and legal rights, along with an efficient, effective, and time-bound deliverance of justice through judicial as well asextra-judicial forums of dispute resolution is a way forward approach for the state.The duty of the State is to ensure free legal aid to the indigent and vulnerable person, who cannot defend himself/herself in a court of law due to the lack of moneyor other social handicaps. Providing legal aid is implied under Article 39A and Article 21 of the Indian Constitution.It was initiated by Committee report made by Justice P.N. Bhagwati and Justice V.R. Krishna Iyer. CILAS (Committee for the implementation of Legal Aid Services) also came into existence within all the courts starting from Munsif courts to the Supreme Court of India. It became approachable for the poor and weaker sections of the population. This formed the basis of the states adopting Lok Adalat through the State Legal and Advice boards. These developments were inspired by the

[24]*See generally*, Amita Dhanda, MP Jain and SN Jain,*Principles of Administrative Law*(Lexis Nexis, India, 7th edn., 2017).
[25]*Ibid.*
[26]*Ibid.*

pristine philosophy that the law should help and supportthe poor and needy who have inadequate means to fight their causes.

The Indian Constitution[27] reflects these aspirations within the Preamble[28]of the Indian Constitution when it envisions about justice in all its forms i.e., social, economic, and political justice. The Preamble further secures to the people Social, Political, Economic, liberty to of this country. The expression Justice symbolises a plethora of judicial and non-judicial apparatus which are tasked with securing the ideals mentioned in the constitution namely those of Legal Aid Camps, Village Courts, Family Courts, Mediation Centres, Commercial arbitration, Consumer Protection Forums, Women Centres, etc. which are but various facets of effective Alternative Dispute Resolution system. The Constitution of India through its several provisions which aim to promote justice, seeks to create social harmony between the individual conduct and the general welfare of society. A just act is one where the conduct of an individual promotes general well-being of the entire community.

Pursuing Justice thus essentially means pursuing the attainment of common good as distinct from good of mere individuals. Legal justice is an important component of social justice as the society gets disturbed when legal justice is denied. A legal justice systemmaintains social harmony by resolving the potential dispute at its very inception. In India, which aims to keenly guard the socio-economic and cultural rights of its citizens, it is exceptionally important to ensure expeditious disposal of cases. It is common knowledge that the Courts alone cannot lift the burden of huge backlog of cases before it. However, this can be efficiently mitigated through the application of mechanisms of Alternative Dispute Resolution. Arbitration can play an effective role in this regard.Article 21[29]declares*that "no person shall be deprived of his life or his personal liberty except according to procedure established by law"*.The words, *'life and liberty'*have to be interpreted broadly thereby widening its ambit.In *Hussainara Khatoon* v. *Home Secretary, Bihar*[30], right to speedy trial was considered as anelement of the right to life and personal liberty. The reason of this liberty in simple terms is that Article 21 is meant to redress that mental distress and anxiety which a person undergoes when wading through the litigation process which, along with delay, may hinder the capacity and the ability of the accused to defend himself.

Further, Article 39A[31](Free Legal Aid) states - "*The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities"*.[32]The promotion of justice is a pertinent function of the state, the achievement of which is facilitated by the ADR mechanisms. Therefore, legislations like Arbitration and Conciliation Act 1996, Legal Services Authority Act1987 along with Section 89 of Code of Civil Procedure, 1908 have been passed to promote justice *via* ADR mechanisms.

The purpose under Article 51(d)[33], which states that *"The state shall endeavour to*

[27]The Constitution of India, 1950. It lays down the framework to achieve justice to the people of India.
[28]*Id.*, Preamble.
[29]*Id.*, art. 21.
[30] AIR 1979 SC 1360.
[31]Inserted by the Constitution (42nd Amendment) Act, 1976.
[32]*Ibid.*
[33]The Constitution of India, *supra* note 27.

encourage settlement of International disputes by Arbitration".[34]Itis to provide of international peace and security.The main intention behind the Arbitration Act is speedy dispute resolution between the parties with a win-win situation.Our Constitution is supreme and the main source of other laws. It promotes peaceful settlement by arbitration which is the real motive behind the Arbitration Act. Mutuality and neutrality as basic elements of Arbitration, should be taken into consideration while resolving any commercial dispute with other countries. This will help in bringing harmony and co-operation among the nations. Therefore, the constitutional law is to be read in harmony with arbitration law.

VI. JURISPRUDENTIAL PERSPECTIVE

One theory is not applicable in totality but some element of each is taken. The same goes with Arbitration and it never developed in isolation. It is a law which developed with the passage of time along with the progress of society in which people started negotiating amongst themselves and following their own procedures. The Bentham's[35] perspective of 'Utmost happiness to Utmost people' is a thing which can hardly be achieved. In other words, it is a thing next to impossible.But to meet the ends of justice in the present society, which is largely composed of diverse people, arbitration can help in achieving 'Utmost satisfaction to Utmost people', which is the contemporary notion of the Bentham's proposition.

Balancing of the interest among the people in society is the basic concept of social engineering, propounded by Roscoe Pound[36], which evidently emphasizes on balancing of the conflict of interests between Individual and society. This conflict needs to be harmonized at the earliest, so that, it does not lead to further dispute. Pound's theory is called as Functional theory because ofits emphasis upon the function of law. To achieve this goal, ADR can be implemented, and Arbitration needs to be encouraged to further restrict the parties from approaching the court to settle their disputes and parties are given a friendly environment to settle their difference with amicable solutions.Principles of Socio-economic justice, liberty, fraternity, etc., were existing much before the coming of the Constitution and controlling the Indian Society, which means the Indian Justice System did not derive its normality solely from the Constitution but follows its normativity hierarchy from the principles of Natural Justice, Rule of Equity, etc.

The Grundnorm, the normative concept given by Kelsen[37], in case of Arbitration is the Rule of Natural Justice.The norms which existed in the society automatically and naturally can be properly referred to as Grundnorm. A Grundnorm will continue to remain a Grundnorm as long as it has minimum efficacy upon the society i.e., it continues to govern the society and also there is basic minimum effect and following of that principle in society e.g., secularism, socialism, dignity of life. Therefore, arbitration in order to succeed shall not hamper the continuity of Grundnorm i.e., it must not be opposing to public policy.In India, essence of Constitution, upon which other provisions even of arbitration, are based on, cannot

[34]*Ibid.*

[35] Jeremy Bentham (1748-1832), English utilitarian philosopher and social reformer who gave theory of utilitarianism (doctrine of hedonism), founder of positivism and expounded principle of utility in his "Limits of Jurisprudence defined", published in 1945.

[36]Rosoce Pound (1870-1964), belonged to social school of thought, a prolific writer and propounded theory of social engineering, interest theory.

[37]Hans Kelsen(1881-1973), an American jurist, legal philosopher, teacher and writer on International Law, formulated "Pure theory of law", belonged to the school of legal positivism.

be violated. Whole legal system derivesits validity from essence of the Constitution so that the normative order is followed properly.

Arbitration is a voluntary process which can only be done with the consent of the parties. Unlike the Austin's[38] theory which included the issue of command to the society coupled with the element of fear called the psychologized. It is based on de-psychologized command in which the element of fear is missing, and individual feels a sense of self-imposed obligation to follow the code of conduct. This theory of de-psychologized command was seen in Kelsen's theory where it is not because of the command given by the sovereign and due to the fear created by that. The command here is a de-psychologized command that is without fear. Therefore, the arbitration referred under section 89 of the Code of Civil Procedure, 1908 imposes self-obligation upon the parties to bind by the arbitral award without the element of fear.

The existence of numerous normative communities in a diverse and multifaceted world makes the existence of a unique fundamental test of law and a unique source of law, near impossible. Both state and non-state actors have the responsibility of regulating important aspects of business and non-business endeavours. Arbitration Agreements for arbitration are an exemplary reservoir of inter-party normativity and is mainly a subject of the contract law. Constant arbitration practices supported by contributions from a diverse range of national and transnational sources have led to the emergence of procedural norms which clearly regulate the conduct of arbitration. These are followed by the members of the arbitration community who are guided by these norms in their behaviour and conduct. Arbitration institutions, associations and councils, departments of law firms specialising in arbitration, commercial organisations and chambers have proved to be major storehouses of these procedural norms which are followed by members of arbitration community and give their assent to be guided by them in their conduct and behaviour.

Normativity can be identified only when the arbitration community members give their assent to the transnational rules which shall guide their conduct.The incremental growth of harmonised arbitration practices and standards have led to the emergence of a common ground of settled assumptions with respect to the conduct of arbitration. Furthermore, certain aspects of arbitration are so well established that they have generated expectations of their compliance amongst the lawyers practicing arbitration. Norms in arbitration practice far from being an accidental development have rather originated from sound legal principles like that of fair process, requiring that contending parties are entitled to equal treatment, having the opportunity to present their respective case and that the arbitral process proceeds without unnecessary delays. Thus, the normative potency of the arbitration community is strengthened by the legal principle of fair process.

Critics however argue that the normativity of arbitration is lacking in its coercive powers in ensuring enforcement and execution of the outcomes of the international tribunals inclusive of procedural orders and awards. Moreover, it is further argued that the fear of being tarnished as 'recalcitrant parties' is the major motivating factor ensuring the compliance of parties with the arbitral awards. International corporations view international arbitration as the fundamental avenue for resolving disputes and their awards are perceived as authoritative pronouncements. These pronouncements are seen as norms, informally (without

[38]John Austin (1790-1859), belonged to the natural school of law, defined jurisprudence as the philosophy of positive law thereby stated law as commands of sovereign with the element of sanction.

domestic judicial intervention) regulating international trade groups. This has led to a marked shift of the spotlight, from 'enforceability' to 'compliance' and from 'coercion' to 'normative persuasion.'

The pluralistic world of today is witness to the mutual co-existence of state and non-state communities with overlapping jurisdictions. The arbitration's claims of autonomy thus reject enmity and isolation and promotes co-existence and co-operation with nation states.[39]According to the theory of analytical naturalism as proposed by the Hart[40], in a society the prime concern of an individual is that he has to peacefully survive in the society, and such survival is not possible unless a minimum content of morality and human reasoning is incorporated in the law. Hart did not suggest that law is morality rather the law is an independent instrument but within law, the elements of morality shall be incorporated. The idea of peaceful society with the element of morality can best be achieved by peaceful settlement through Arbitration which incorporates Principle of Natural Justice as the guiding principle.

Henry Maine[41] talks about the transformation of the society from the static stage to progressive stage. As the society progresses, the law evolves and as a result an individual evolves with the passage of time. Earlier in a static society, individual would have got rights and obligations on the basis of existing practices but in a progressive society, new mechanisms of developing law will take place, new methods of creation of law or development of law will take place. Law will now develop from the methods of equity, legal fiction and legislation. In Arbitration, by and large, codification of old practices and addition of new things have taken place for balancing the interests of an individual to serve the ends of justice which is evident by the various amendments taken place in the Arbitration Act from the very beginning of its incorporation in 1940 to the present Arbitration and Conciliation Act, 1996 along with the 2015 and 2018 amendments.

The concept of 'Organic theory' of Herbert Spencer[42] also fits well for the development of commercial arbitration. According to the theory, the society undergoes several internal processes, and these processes affect the legal system. There is a mutual link between the law and society. The growing idea of property amongst the individuals in the society leads to the conflict of their interests and there is always a possibility to arbitrate the matter and resolve it at the very first stage. This social jurisprudence has developed because the idea of State had gradually changed from being a law and order state to a Welfare State. In the past times, a lot many social revolutions had taken place and there had been always a quest to find out some new mechanisms to organize the society, among which Arbitration finds a noble place.

VII. CONCLUSION

[39]Stavros L. Brekoulakis, "International Arbitration Scholarship and The Concept of Arbitration Law"36 *Fordham International Law Journal* (2013).

[40]Herbert Lionel Adolphus Hart (1907-1992), conceives law as a social phenomenon, can only be understood and explained by reference to the actual social practices of a community.

[41]Henry Maine(1822-1888), British jurist, historiananthropologist, pioneered the study of comparative law, notably primitive law and anthropological jurisprudence.

[42]Herbert Spencer (1820-1903), sociologist and influencer of the structural functionalist perspective, one of the principle proponents of the evolutionary theory in the mid-nineteenth century, his synthetic philosophy, political thought primarily for the defense of natural rights was popular.

It is a well-established fact today that the justice system in India is over-burdened with a huge backlog of cases. This has hampered its ability to meet out justice expeditiously which is a worrisome sign for any country but more so for a vibrant democracy. What is more worrisome is that this problem is not new, but this problem is as old as our laws. The Constitution of India in its introductory preamble itself talks of high-sounding noble principles such as those of justice which includes social, economic, and political justice. But what use will these high-sounding phrases be of when the very access to justice is uneasy and the traditional process of achieving justice is abhorred by all for its inability to deliver speedy justice? As the adage goes- Justice delayed is Justice denied!Thus, there is an urgent need more than ever to strengthen the alternative dispute resolution (ADR) mechanisms in the country so as to deliver quality justice expeditiously out of court settlement. Adoption of such systems would not only be beneficial for the parties involved but it would also help in the better governance of the country.

One such ADR mechanism is that of arbitration. In simple terms arbitration refers to the dispute resolution method in which parties refer their dispute to a mutually appointed arbitrator who acts as a neutral judge in resolving the dispute between the parties by giving out an award which is binding on both parties. It is an informal mechanism as opposed to the formal litigation process and ensures cost efficient and easy access to justice. The concept of arbitration is not new to humans rather it has existed since ancient times. In earlier times people used to refer their disputes with neighbours to their tribal chiefs. In tracing the history of arbitration, King Solomon's famous 'Split the Baby' story is an oft quoted example for arbitration for it displays the principles which stand to be the hallmarks of arbitration. These include the mutual appointment of a wise third party who acts as a neutral party in resolving disputes in a swift, flexible, and fair manner. Moreover, it also showed that neither of the party has a say in hampering the discretion of the arbitrator in marking the probabilities of outcome based on which the arbitrator delivers the final award.

Arbitration is not only recognised with in the domestic realm but is also prevalent in the international arena. Today, all standard forms of contract be it national or international do contain an arbitration clause. This is so because arbitration is highly popular for its commitment to neutrality and mutuality. This is further supplemented by various other advantages of arbitration for ensuring a responsive, inclusive, participatory, and representative decision-making at all levels which leads to a win-win situation for both the parties and parties too feel comfortable in dealing with their differences, unlike they do in traditional judicial system. Moreover, the concept of arbitration is jurisprudentially sound for it satisfies Bentham's theory of 'Maximum Gains with Minimal Pain' and Pounds theory of 'Balancing of Interest'. Arbitration law with the application of neutral transnational rules helps in ensuring equal access to justice for all at the national and international levels, thereby complying with the 16thSDG (Peace, Justice and Strong Institutions) under the 'United Nations 2030 Agenda for Sustainable Development'.

An efficient dispute resolution mechanism maintains social harmony and makes the legal system one of the most prestigious organs of the state. Thus, swift disposal of cases is extremely important for India to safeguard the socio-economic and cultural rights of citizens. As the conventional courts are finding it difficult to achieve this, the application of Alternative Dispute Resolution mechanisms, especially arbitration have the requisite potential for its actualisation.One must also never forget that the legitimacy of the justice system of India is based on the trust of the people. However, access to speedy and cost-effective justice cannot be termed as mere expectations for having such access to justice is a

human right which all humans are entitled to by birth. If the people lose faith in the system, then not only will the system lose its legitimacy, but the entire country might plunge into chaos. Thus, speedy and cost-effective justice is a necessity and strengthening of the ADR mechanism is the undisputed need of the hour.

THE DEBATE ON ABSOLUTE AND LIMITED IMMUNITY: A CASE STUDY OF UNITED NATIONS

Dr. Kumari Nitu*

I. INTRODUCTION

Immunities and privileges have been bestowed on public officials since ages so that the independency and efficiency of their work could be ensured. It dates back to the year when the Treaty of Westphalia was signed in 1648 which concluded the Thirty Years' War. It established a whole regime of the concept of State as an independent political entity. It was further strengthened by the development of modern international law which recognized the status of State as a legal person.[1] The concept of sovereign equality of States became a buzzword and a reality. This sovereign equality of States was furthered by the bar of immunity. The imposition of this bar of immunity was seen as a means to prevent the subjection of one State to the adjudication of disputes in another States's court.[2] The International Court of Justice (ICJ) also had the opportunity to comment on the foundation of the principle of immunity in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*[3], where it observed that 'the principle of inviolability of the persons of diplomatic agents and the premises of the diplomatic missions is one of the very foundations of the regime of conduct of relations between States.'[4] At both international and national level, the courts have identified the basis of immunity in the principle of sovereign equality of States. The ICJ in the *Jurisdictional Immunities Case*[5] reiterated the principle of sovereign equality of States which is stated under Article 2, paragraph 1 of the Charter of the United Nations[6]. The national courts on the other hand, have cited the Latin maxim *par in parem non habet imperium* which means an equal has no power over an equal which again highlights the principle of sovereign equality of States. The same approach of immunity has been bestowed on the international and regional organization created by States. This has become such a common practice that it has become part of customary international law. The court in USA have even invoked the writings of highly qualified publicists which is a source

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[1] Hazel Fox, "The restrictive rule of state immunity-The 1970s Enactment and its contemporary status" in Tom Ruys, Nicolas Angelet, *et.al.* (eds.), *The Cambridge Handbook of Immunities and International law* (Cambridge University Press, Cambridge, 2019).

[2] Lori Fisler Damrosch, "The sources of immunity law-between international law and domestic law" in Tom Ruys, *Ibid.*

[3] Case concerning United States Diplomatic and Consular Staff in Tehran (*United States of America* v. *Iran*); Order, 12 V 81, International Court of Justice (ICJ), *available at*: https://www.refworld.org/cases,ICJ,4023aaf77.html (last visited on May 19, 2019).

[4] Dapo Akande and Sangeeta Shah, "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" 21(4) *The European Journal of International Law* 818 (2011). The organization either sends the Peace keeping forces or special representatives in the form of rapporteurs to control and report on the situations of areas relating to human rights violations.

[5] Jurisdictional Immunities of the State (*Germany* v. *Italy*: Greece intervening), Judgment of February 03, 2012, I.C.J. Reports 2012.

[6] The United Nations Charter, art. 2, para. 1, *inter alia* states: "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:
1. The Organization is based on the principle of the sovereign equality of all its Members".

of international law under the Charter of ICJ. For example, in the earliest case of *The Schooner Exchange* v. *MCFaddon*[7], Chief Justice Marshall paid close attention to international authorities including Vattel and Bynkershoek in upholding the immunity of a public armed ship which had entered a US port in bad weather.[8]

II. IMMUNITIES OF STATES AND INTERNATIONAL ORGANIZATIONS: A LINE OF DISTINCTION

The officials and key position holders of many International Organizations (IOs) and of the Governments of country are provided with diplomatic immunities and privileges so that they can carry out their work without any fear of prosecution. However, the rationale for granting immunity to international organizations is totally different from the object underlying State immunity or diplomatic immunity.[9] The grant of privileges and immunities to international organization and their staff was based on *functionalism* which was meant to preserve and ensure the independence of the organization and to enable it to fulfill its functions, which could otherwise be compromised by unwarranted interference from the host State.

On the other hand, State immunity is based on the *par in parem non habet imperium principle*.[10] This *par in parem* principle does not apply to immunity of international organizations. This principle of sovereign equality of States has no similar effect on IOs because IOs are neither sovereign nor equal and are fundamentally different from States. They have no territory and are generally weaker and more vulnerable than States. It is because of this reason that IOs need immunity protection even from States. It is based on the principle of functional necessity that IOs need immunity to perform their function.

Many scholars such as Blokker have debated the concept of absolute immunity of IOs. He contends that:

> *"…the concept of immunity of international organization does not mean that they are immune from any jurisdiction. Rather it means that they enjoy immunity from the jurisdiction of national courts of their members. From the early days in which immunity rules became part of the law of international organizations, it has been recognized that such immunity should not leave complainant without any remedy"*[11]

III. IMMUNITY OF REGIONAL ORGANIZATIONS

At the organizational level, let us have a look at the provision with respect to some of the major regional organization and then we will proceed to the debate of use and misuse of immunity under the international legal regime.

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[7] *The Schooner Exch*. v. *McFaddon*, 11 U.S. 116, 3 L. Ed. 287, 7 Cranch 116 (U.S. Mar. 02, 1812).
[8] *Supra* note 2 at 23.
[9] Eric De Brabandere, "Measures of Constraint and the Immunity of International Organisations" in Tom Ruys, *supra* note 1 at 328.
[10] Neils Blokker, "Jurisdictional Immunities of International Organizations- Origins, Fundamentals and Challenges" in Tom Ruys, *Id.* at 185.
[11] *Id*. at 186.

One of the biased approaches commonly found under legal scholarship is inadequate focus on the regional organizations in the studies of international organizations.[12] Regional organizations are defined as international organizations whose membership is restricted to States of a particular global region. Most of the regional organizations were founded after 1945 and hence were inspired by the immunity granted to the UNO in order to allow the regional organizations to carry out its task without any obstruction like the UNO. Regional organizations and sub regional organizations, hence, in matters relating to immunity are guided by the Convention on the Privileges and Immunities of United Nations, and the Convention on the Privileges and Immunities of the Specialized Agencies in addition with the headquarters agreements concluded between the organization and the host State.[13]

Regional organizations such as the Council of Europe (CoE) in its Statute refers to the immunities and privileges of the organization in its Article 40.[14] African Union (AU) does not entail a provision on the immunities and privileges of the organization its Constitutive Act. It relies on the General Convention on the Privileges and Immunities of the Organization of African Unity[15] which is largely based on the UN Convention on Privileges and Immunities.[16] In addition, specific rules on immunities can be found in the 1980 Additional Protocol to the OAU General Convention on Privileges and Immunities.

The Organization of American States (OAS) which is considered as a Pan-American Organization aiming to bring together States in both North and South America is regulated by the OAS Charter with respect to immunities clause.[17] Asia, unlike other global regions is characterized by a singular lack of regional organizations as compared with Europe, the Americas and Africa. However, there are some objective specific sub regional organizations such as the Asia Pacific Economic Cooperation (APEC), Association of South East Asian Nations (ASEAN) etc. APEC cannot be considered as a full-fledged sub regional organization because even Canada and USA are members of it. ASEAN on the other hand is a well-known sub

[12] Ramses A. Wessel, "Jurisdictional Immunity of Regional Organisations- Substantive Unity in Instrumental Diversity?" in Tom Ruys, *supra* note 1 at 214.
[13] *Id*. at 216.
[14] The Statute of the Council of Europe, 1949, art. 40, *inter alia* states: "The Council of Europe, representatives of members and the Secretariat shall enjoy in the territories of its members such privileges and immunities as are reasonably necessary for the fulfilment of their functions. These immunities shall include immunity for all representatives to the Consultative Assembly from arrest and all legal proceedings in the territories of all members, in respect of words spoken and votes cast in the debates of the Assembly or its committees or commissions" [See https://rm.coe.int/1680306052 (last visited on May 19, 2019); also see Ramses A. Wessel, *Id.* at 234].
[15] The General Convention on the Privileges and Immunities of the Organization of African Unity, art. IV(2), *inter alia* states: "The Organization of African Unity shall have the right to use codes and to despatch and receive its official correspondence, either by courier or in sealed bags which shall have the same immunities and privileges as diplomatic couriers and bags" [See https://au.int/sites/default/files/treaties/7760-treaty-0001_-_general_convention_on_the_privileges_and_immunities_of_the_oau_e.pdf (last visited on May 19, 2019)].
[16] *Supra* note 12 at 219.
[17] Charter of the OAS, art. 103, states that: "The Organization of American States shall enjoy in the territory of each Member such legal capacity, privileges and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes" [See Organization of American States (OAS), Charter of the Organisation of American States, April 30, 1948, *available at*: https://www.refworld.org/docid/3ae6b3624.html (last visited on May 19, 2019)].

regional organization. Its legal personality was acknowledged by the 2007 Asian Charter. However, the provisions with respect to its immunities and privileges were codified much later in a separate 2007 Agreement on the Privileges and Immunities of the ASEAN.[18] This agreement again is largely based on the UN Convention.

IV. IMMUNITY OF INTERNATIONAL ORGANIZATIONS: THE CASE OF UNITED NATIONS

The immunity to International Organizations consists of two basic elements: First, claims against international organizations are not submitted before any domestic tribunal or court because of the existence of immunity from jurisdiction of international organizations. Second, international organizations' immunity from execution which means an exemption from pecuniary obligation or liability.[19]

The prominent international organizations such as the International Criminal Court (ICC), United Nations Organizations, International Organization for Migration, International Renewable Energy Agency[20] etc. have in their own Statutes incorporated the provisions regarding immunity. For instance, Article 3 of the Agreement on the Privileges and Immunities of ICC states that the Court enjoys 'such privileges and immunities as are necessary for the fulfillment of its purpose'.[21] Similarly, Article 23 (1) of the Constitution of the International Organization for Migration provides that 'the Organization shall enjoy such privileges and immunities as are necessary for the exercise of its functions fulfillment of its purpose'.[22]

The United Nations Organization provides for such immunities in Article 105 of the Charter. The protection covers not only the organization but also its officials and representatives of its members.[23] A detailed outline dealing with immunities and privileges of UN is also found

[18] Agreement on the Privileges and Immunities of the ASEAN, 2007, art. 3, *inter alia* states: "ASEAN and the property and assets of ASEAN shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution" [See https://asean.org/wp-content/uploads/2021/09/Agreement-on-Privileges-and-Immunities.pdf (last visited on May, 19, 2019)].

[19] *Supra* note 9 at 327.

[20] Agreement on Privileges and Immunities for the International Renewable Energy Agency, 2012, *available at*: https://www.irena.org/-/media/Files/IRENA/Agency/About-IRENA/Assembly/Third-Assembly/A_3_13_Privileges-and-Immunities.pdf (last visited on July 10, 2019).

[21] Agreement on the Privileges and Immunities of ICC, *available at*: https://www.icc-cpi.int/news/agreement-privileges-and-immunities-icc (last visited on July 12, 2019).

[22] Constitution of the International Organization for Migration, *available at*: https://www.iom.int/iom-constitution (last visited on April 12, 2019).

[23] The United Nations Charter, art. 105 *inter alia* states:

"1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

3.The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose."

in Convention on Privileges and Immunities of UN.[24]

The immunities and privileges extend to both ad hoc and resident representatives and also to persons who are on mission or are doing in house jobs in the host country. The immunity and privileges extend to immunity from arrest, inviolability for all papers and archives, use of codes, exemption from immigration restrictions, facilities in respect of currency restrictions and baggage etc. but they have no right to claim exemption from custom duties on goods imported or from excise duties or sales taxes.[25] The UN peace keeping forces or experts on mission which are sent on the soil of the member state cannot be prosecuted for anything done in course of their business. If such a protection is not provided, then it will be impossible for them to accomplish the mission. Who would like to bear the pain of doing the work and then be ready for the prosecution? The immunities provide them security. The immunities continue not only till the mission last but after that also. The scope of immunity was extended so that the person in question should not be brought to the jurisdiction of the host state after they are over with the designated work of their mission. They continue to enjoy the immunity until their mission is terminated either by the sending or the receiving state.

With respect to UN, it can either appoint a member from the home country or can send its representatives to carry out its assigned objectives in the host country. The immunity will extend to both categories, so there is no concept of *extra-territoriality* as in the case with diplomatic envoys. It becomes all the more important to protect them with such shield as they work in all the corners of the world protecting the realm of human rights and fighting for peace and stability. The organization either sends the Peace keeping forces or special representatives in the form of rapporteurs to control and report on the situations of areas relating to human rights violations.[26] The approach of governments of all the countries of the world is not the same. Some are running in an autocratic manner and some are riddled in conflict zones. The UN officials visit all those countries and carry out detailed report. It is hence necessary that they are saved from the wrath of governments so that they can come out with a true report of the situations.

Despite of clear provisions relating to immunities and privileges laid down in both UN charter and UN Convention on privileges and immunities there have been cases where the officials have been questioned and brought to the court for their act (done outside the course of employment). The Secretary General has often come to their rescue by declaring that the officials were covered under the immunity clause. The immunity and privilege are given to ensure the independence of work which is free from any fear or pressure from the host country.[27] However, the immunity which the UN officials, representatives, experts, and peace keeping officials enjoy by virtue of being employee of UN and to carry out specific tasks has in some cases did not have the smooth journey of unfettered privilege. There have been instances where they have been

[24] UN General Assembly, Convention on the Privileges and Immunities of the United Nations, February 13, 1946, *available at*: https://www.refworld.org/docid/3ae6b3902.html (last visited on May 19, 2019).
[25] Leo Gross, "Immunities and Privileges of Delegations to the United Nations" 16(3) *International Organization* 48, 52 (1962), *available at*: http://www.jstor.org/stable/2705179 (last visited on July 20, 2019).
[26] Anthony J. Miller, "Privileges and Immunities of United Nations Officials" 4 *International Organisation Law Review* 169 (2007).
[27] Rosemary Rayfuse, "Immunities of Human Rights Special Rapporteurs: Who Decides?" 7(1) *Australian Journal of Human Rights* 169 (2001).

deliberately troubled by the host states. However, in all the cases it was finally established that they had the immunity.

The immunity saves them from the long and lethargic process of trial prevalent in each member state. Moreover, it was also contended that it is very undesirable on the part of the courts to determine the legality of the acts of the United Nations because every court has different modes of interpretation. It also leaves the organization at the mercy of the countries hence impairing their work. The organization has its own system to check the working of its officials posted anywhere in the world. The United Nations reserves the right to waive the immunity of its officials where it exceeds its limits.[28]

Immunity to the United Nations and its officials is provided only within the territorial limits of the member states and only with respect to their work.[29] Anything done out of the course of employment stresses the organization to put the obligation of waiving the immunity on the member state. The Convention deals with such cases in Article IV section 14 which states the provision of 'waiver'.[30] Hence, it becomes the prerogative of the member state and not of the Organization to decide.[31] Member states who are not party to the Convention are governed by provision of the Charter.[32]

V. LIMITATIONS: *JUS GESTIONIS V. JUS IMPERII* ANALOGY

An international organization enjoys those immunities that are 'necessary for the fulfillment of its purpose.' Though the phrase does not contain any explicit limitation of immunity but can it be impliedly understood that if the organization works beyond that purpose or if they fail to fulfill the objective then the cover of immunity will have its limitation?

The mothers of Srebrenica case manifest a potential example where it was alleged that UN failed to fulfill its purpose. The case represents the story of 6000 women who lost their family members during the Srebrenica genocide in 1995.[33] The Mothers of Srebrenica was an

[28] William C. Gordon, "International Law: Immunity of United Nations Representative from Jurisdiction of Municipal Courts" 47(7) *Michigan Law Review* 1025,1026, *available at*: http://www.jstor.org/stable/1284396 (last visited on May 04, 2019).

[29] As stated in Article 105 of the UN Charter that Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

[30] Section 14 of the General Convention states that privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently, a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

[31] Yu-Long Ling, "A Comparative Study of The Privileges And Immunities Of United Nations Member Representatives And Officials With The Traditional Privileges And Immunities Of Diplomatic Agents" 33(1) *Washington and Lee Law Review* (1976), *available at*: https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=2225&context=wlulr (last visited on June 11, 2019).

[32] Ehrenfeld Alice, "United Nations Immunity Distinguished From Sovereign Immunity" 52 *International Law and the Political Process* 88, 94 (April 24-26, 1958), *available at*: http://www.jstor.org/stable/25657402. (last visited on June 08, 2019).

[33] *Stichting Mothers of Srebrenica and Others* v. *The Netherlands*, Appl. No. 65542/12, ECtHR, June 11, 2013 (hereinafter referred to as 'Mothers of Srebrenica').

NGO who fought for the rights of the victims. The NGO contended that since UNPROFOR (UN protection force) had the responsibility to protect them, the genocide proved that they failed in their responsibility. Hence, they brought a suit against UN and asked for compensation.[34] The case centred on the July 1995 genocide in which the Safe Haven of Srebrenica in Bosnia and Herzegovina was attacked by Bosnian Serb forces resulting in the death of approx. 10,000 people.[35] Members of the Dutch battalion working under the UN command responsible for the safeguarding of the enclave were completely overturned by the forces of General Mladic.

The case went on for hearing on 10 July 2008 and the Dutch court citing the immunity provisions of the UN refused to entertain the case against the organization. The matter was then brought to the European Court of Human Rights (ECtHR) contending the violation of right to bring a claim[36] as the case was dismissed by the Dutch court. The ECtHR though entertained the petition at the first instance citing absence of alternative means to settle the dispute could not grant relief to the petitioners holding that the UNPROFOR were covered under the protection of the immunity clause.[37]

Also in Haiti Cholera Case, the question of accountability of UNPKF (UN peacekeeping forces hereinafter referred to as 'peacekeepers) and its role in outbreak of cholera in the earthquake effected Haiti in 2010 was raised. In this case UN peace keeping forces who were previously deployed in cholera affected Nepal were called on to provide their services in earthquake hit regions of Haiti.[38] The organization by allowing the peacekeepers without any medical screening committed an act of gross negligence due to which cholera broke out in Haiti too.[39] As a consequence, more than 8000 people were killed due to the epidemic.[40] Cholera was unheard of for over a period of 100 years in Haiti but the 2010 relief work by UN brought more destruction than construction. Even though there were clear evidence for such negligence, United Nations declined to take any responsibility for its act.[41] However, in December 2012, Secretary-

[34] Maria Irene Papa, "The Mothers of Srebrenica Case before the European Court of Human Rights United Nations Immunity versus Right of Access to a Court" 14 *Journal of International Criminal Justice* 893, 896 (2016).
[35] Selma Leydesdorff, "Stories from No Land: The Women of Srebrenica Speak Out" *Human Rights Review (*April- June 2007), *available at*: https://link.springer.com/content/pdf/10.1007%2Fs12142-007-0005-7.pdf (last visited on April 20, 2019).
[36] The right is laid down in article 6(1) of ECHR which states that: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".
[37] Maria Irene Papa, *supra* note 34 at 896.
[38] Kristen E. Boon, "The United Nations as Good Samaritan: Immunity and Responsibility" *Chicago Journal of International Law* 341, 342 (2016).
[39] Farhan Haq: "Spokesman for U.N. Secretary-General Ban Ki-moon and a 2011 study by the U.S. Centre for Disease Control and Prevention admitted that U.N. peacekeepers from Nepal were the possible cause of introduction of cholera to Haiti" (See Anastasia Moloney, "U.S. judge upholds U.N. immunity in Haiti cholera case" *Health News*, Aug. 19, 2016, *available at*: https://www.reuters.com/article/us-haiti-cholera-idUSKCN10U1H6 (last visited on July 07, 2019).
[40] *Ibid.*
[41] Felix Boos, "The Haiti Cholera case – Limits to the Immunity of the United Nations from Domestic Jurisdiction?", *available at*: http://studzr.de/medien/beitraege/2015/1/pdf/StudZR-WissOn_2015-1_Boos_Haiti_Cholera_case.pdf. (last visited on July 07, 2019).

General Ban Ki-moon announced a $2.27 billion initiative to help eradicate cholera in the impoverished Caribbean nation.[42]

Similarly, for instance, in some cases the UN officials have gone out of their course of employment and committed wrongs which have brought defamation to the organization. The acts committed by UNPKF in Central African Republic shows that such acts were completely out of their functional domain and added to the misery in the affected regions.[43] Similar allegations were made in Burundi, Ivory Coast, East Timor, Congo, Cambodia, and Bosnia as well.[44] Due to the acts there have been strong resentment that United Nations should take some responsibility of the act of its officials which has been done outside the course of employment.

Considering the huge number of resentments, the UN General Assembly and Security Council (SC) took certain measures to tackle the issue. The matter was first taken up by the General Assembly (GA) in its resolution A/RES/59/300 adopted on 30 June 2005 wherein it affirmed the need for the Organization to adopt without delay a comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations.[45]

In tandem with the succeeding resolutions by the GA requesting the Secretary General (SG) to prepare a report and suggest recommendations, the SG came up with various reports from time to time, the recent one being 2018 submitted to the GA under resolution A/72/751 on 15 February 2018.[46] 11 The measures suggested by SG ways back to 2009 wherein it suggested a strategy to deal with the problem. It was submitted as GA res. A/64/176 on 27 July 2009 titled "Implementation of the United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel" which tended to ensure that victims of sexual exploitation and abuse by United Nations staff and related personnel receive appropriate assistance and support in a timely manner and in the form of medical care, legal services, support for psychological and social care and immediate material care, including food, clothing and shelter, as necessary.[47] The Security Council further adopted resolution 2272 on 11 March 2016 wherein it emphasised that, "…*sexual exploitation and abuse by United Nations peacekeepers undermines the implementation of peacekeeping mandates, as*

[42] UN 'immune' from Haiti cholera lawsuit, *Al Jazeera*, Jan. 10, 2015, *available at*: https://www.aljazeera.com/news/americas /2015/01/un-immune-from-haiti-cholera-lawsuit-201511042941667258.html (last visited on May 19, 2019).

[43] Marie Deschamps, Hassan B. Jallow, *et.al.*, "Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic" (Dec. 17, 2015), *available at*: http://www.un.org/News/dh/infocus/centafricrepub/Independent-Review- Report.pdf (last visited on June 06, 2019).

[44] The U.N. sex-for-food scandal, *The Washington Times*, *available at*: https://www.washington times.com/news/2006/may/9/20060509-090826-9806r/ (last visited on June 06, 2019).

[45] A/RES/59/300, "Comprehensive review of a strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations", *available at*: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/ RES/59/300 (last visited on July 01, 2019).

[46] A/72/751, "Special measures for protection from sexual exploitation and abuse: Report of the Secretary-General" (Feb. 15, 2018), *available at*: https://undocs.org/en/A/72/751 (last visited on March 15, 2019).

[47] A/64/176, "Implementation of the United Nations Comprehensive Strategy on Assistance and Support to Victims of Sexual Exploitation and Abuse by United Nations Staff and Related Personnel", *available at*: https://www.un.org/preventing-sexual-exploitation-and-abuse/content/secretary-generals-reports (last visited on April 07, 2019).

well as the credibility of United Nations peacekeeping…" and urged "…*all Member States to take concrete steps aimed at preventing and combating impunity for sexual exploitation and abuse by members of United Nations peace operations*."[48]

The international organization enjoy absolute immunity both in cases of immunity from jurisdiction and immunity from execution. Even though there have been reported incidents of alleged misuse of power by the officials of prominent IOs such as the UN, much less has been said and done to rectify the damage. The least that was expected since the misuse came to light was to at least acknowledge the wrong. The draft article on state responsibility entails apology as one of the means of reparation.[49]

The divide between acts *jure imperii* and *jure gestionis* is inextricably linked with the development of the rationale and rules on State immunity especially with the emergence of the call for restrictive immunity and the demise of the absolute immunity.[50] As there have been demands for State accountability for human rights and other international law violations, similar has been the demand in context of international organizations as well to exempt their wrong doings from the scope of immunity.

The absolute immunity grants a blanket cover to all acts of the entity concerned whereas the restrictive doctrine looks at the nature of the work and then decides the immunity. In due course of time, the discussion was supplemented by the division of sovereign and non-sovereign acts.

However, the category of non-sovereign acts (*acta jure gestionis*) is not about exceptions to the category of *acta jure imperii*. Nor has the restrictive doctrine developed as a pattern of exceptions from any pre-existing general and absolute rule on immunity. Instead, the restrictive rule has emerged as an alternative to, if not as a consequence of, the wholesale abolition of the absolute immunity rule as a general standard. This has amounted to replacing one standard by another, not to one standard evolving into another.[51]

The analogy which the author is trying to draw here is within the functional limit as analogous to the sovereign acts (*acta jure gestionis)* and outside the functional limits as similar to non- sovereign acts *(acta jure imperii)* of the States. In addition, the distinction between sovereign and non- sovereign acts has to be based on legal and normative background. The acts can be distinguished on the basis of their purpose, motive, context or nature.

VI. UNDERSTANDING *RATIONE PERSONAE* AND *RATIONE MATERIAE* IN CONTEXT OF UN

[48] UN Security Council, SC Res 2272, SCOR, UN Doc S/RES/2272 (2016) on sexual exploitation and abuse by United Nations peacekeepers, *available at*: https://www.refworld.org/docid / 56e915484.html (last visited on May 12, 2019).
[49] Richard Bilder, "The Role of Apology in International Law and Diplomacy" 46(3) *Virginia Journal of International Law* (Spring 2006), University of Wisconsin Legal Studies Research Paper No. 1028, *available at*: https://ssrn.com/abstract=932609 (last visited on May 02, 2019).
[50] Alexander Orakhelashvili, "Jurisdictional immunity of States and General International Law- Explaining the *Jus Gestionis* v. *Jus Imperii* divide" in Tom Ruys, *supra* note 1 at 106.
[51] *Id*. at 109.

Immunity *ratione materiae* is attached to the functions of the official, while immunity *ratione personae* relates to the position of the official. These are immunities of State officials under international law but since the immunity clause of international organizations have developed from the concept of immunity to the States, reference can be made to these two maxims in context of international organizations as well.

The 'Mazilu'[52] and 'Cumaraswamy'[53] cases are good examples of *ratione materiae* while the Ranallo case adequately represents *ratione personae.*

In 'Mazilu' case the cause of dispute of the case was the applicability of Article VI, section 22, of the Convention on The Privileges and Immunities of The United Nations,1989.[54] The parties to the case were United Nations and the Government of Romania. The case involved the immunity question of Mr. Dumitru Mazilu who was appointed as a special rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities in Romania. Despite of continuous efforts from UN to reach the rapporteur and for submission of the report, the message did not reach. The report was supposed to be submitted in 1986 but no whereabouts of Mazilu were heard until 1988. Mr. Mazilu somehow managed to inform the under-Secretary General of human rights that he has not received the communication of the centre. He also informed that he was also forced to retire from the government posts he was holding and was not allowed to travel to the office of the commission. Not only this, he and his family were also being pressurized so that he can voluntarily decline the submission of the report. The sub commission then requested the Secretary General to establish contacts with the Romanian government to find about the whereabouts of Mr. Mazilu. The Romanian government on the other hand instead of cooperating alleged that any investigation carried out in Bucharest will be considered as an intervention in the internal affairs of Romania. Unfettered by the statement, the under Secretary asked the Romanian government to cooperate. The issue came up to International Court of Justice (ICJ) when the Romanian government declined to recognize the "expert" status of Mr. Mazilu and held that the convention on privileges and immunities apply only when the person on mission travel in respect of its mission and not otherwise. The court interpreted the meaning of the term mission and held that a person can be on mission irrespective of the fact that whether he travels or not. It was also held that the immunities are provided to the person on mission in the interest of the organization and such persons on mission are provided with certain independency so that they can carry out their effectively and this is the essence of the privilege clause in the convention. And this independence should be respected by all states including state of nationality and state of residence.

[52] International Court of Justice (advisory opinion), Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations, *available at*: https://www.icj-cij.org/en/case/81 (last visited on May 01, 2019).
[53] International Court of justice (advisory opinion), Difference relating to immunity from legal process of a special rapporteur of the commission of human rights, *available at*: https://www.icj-cij.org/en/case/100 (last visited on May 02, 2019).
[54] *Supra* note 52.

In the 'Cumaraswamy' case, the issue involved the immunity of a special rapporteur of the commission of human rights from legal process.[55] The parties to the case were the United Nations and the Malaysian government. Mr. Cumaraswamy, a Malaysian jurist was appointed as the special rapporteur to inquire into the independence of judges and lawyers in Malaysia. Mr. Cumaraswamy in its findings reported the instances of involvement of corporate sector in the judiciary which affected the impartiality of the judiciary. The lawyers and the people from the corporate sector filed defamation case against the rapporteur claiming the report to be malicious and false. The district court declined to give any relief citing that he was not covered within the immunity clause. The Secretary General conveyed a message to the Malaysian Government that Mr. Cumaraswamy was an expert on mission and was covered within the immunity clause. But the Malaysian government did not convey it to the Malaysian court. When the matter was brought to the International Court of Justice, it decided that the special rapporteur on UN mission was within the immunity provisions and hence no case lies against him.

Ranallo case was the first case where the US court had the opportunity to analyze the immunity provision of an UN employee.[56] Ranallo was an employee of the United Nations organization and was driving a car for UN business purpose and was at the time accompanied by the Mr. Trygve Lie, Secretary-General of the Organization. He was charged for violation of speed laws of the Westchester County Park Commission. The matter was brought to the City court of New Rochelle. It was contended on the part the defendant that since he was an employee of the UN, he was covered under the immunity clause and hence was liable to be released. The court, however, did not release him instantly and ordered for the trial and ordered that the decision of the fact that whether he was covered under the immunity or not can only be determined after the trail.[57] The temporary order upheld the rule of natural justice and maintained the ethos of equality of law. However, on the other hand it also took notice of the fact that America was not party to the General Convention, so whether the immunity can be provided by it was also a question to be decided.

The UN employees are accorded immunity only in the territory of those member parties which are either party to the General Convention or to the UNO. America at the time of the incident was not party to the General Convention. USA though voted in favour of the United Nations convention on privileges and immunities but did not become a party to it. However, USA had the International Organization Immunities Act, 1945 in place which was enacted to extend the provision of immunities to international organizations as were provided to diplomatic envoys. Under the act USA will grant immunities to those organizations only to which it is a member.[58] Hence, Ranollo was granted immunity taking into consideration the Immunities Act, 1945 and Article 105 of the Charter.[59]

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[55] *Supra* note 53.

[56] David Monroe Geeting, "Privileges and Immunities" 37(6) *Journal of Criminal Law and Criminology* 480, 483 (1947), *available at*: http://www.jstor.org/stable/1138959 (last visited on July 19, 2019).

[57] Lawrence Preuss, "Immunity of Officers and Employees of the United Nations for Official Acts: The Ranallo Case" 41(3) *The American Journal of International Law* 555, 556 (July, 1947).

[58] Lawrence Preuss, "The International Organizations Immunities Act" 40(2) *The American Journal of International Law* 332, 345 (1946), *available at*: http://www.jstor.org/stable/2193194 (last visited on June 18, 2019).

[59] *Supra* note 31 at 556.

The other prime objective is also to assert that no member state may hinder in any way the working of the organization or take any measure which can increase the financial liability of the organization.[60] Moreover, it would be a serious burden if the organization has to defend itself in the local courts of the diverse countries in which it operates or maintains an office. For instance, the working of the United Nations Relief and Work Agency (UNRWA)[61] for Palestine has suffered great difficulty due to the numerous suits filed in different countries where the agency has been operating and recruiting employees.[62] In defence, the agency repeatedly insisted on its international character and immunity granted to it. The suits hindered the effective working of the relief programme. The courts in Lebanon, Jordan, Syria, and Egypt entertained actions against the agency. [63] Though the courts have acknowledged and accepted the immunity provision, the acceptance has been slow accompanied be the long and lethargic court proceedings. In many cases the ministries had to intervene and recognize the immunity given to the officials. The works carried on by United Nations cuts across national borders.

In view of this, it becomes all the more essential that the United Nations official should be provided with adequate immunity so that they can complete the work assigned to them.

VII. WAIVERS OF JURISDICTIONAL IMMUNITY

An understanding of the immunity provisions outlines some basic principles of immunity which are as follows:

a) Functional necessity is the basis of immunity
b) Organizations can waive immunity

However, the immunity that is enjoyed by the international organizations is absolute in practice and the immunity is rarely waived. For instance, even if there has been a waiver of immunity from jurisdiction, there has to be a second waiver of immunity from execution which is impossible to achieve. So, technically the organizations and its staff/experts/employees end up having absolute immunity having no obligation towards the victim. Section 2 of the Convention on the Privileges and Immunities of the United States, after providing that '*the United Nations, its property and assets… shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity*', adds the following final clause: '*It is, however, understood that no waiver of immunity of waiver shall extend to any waiver of execution'*.

The persons entitled to immunities and privileges under the General Convention enjoy it from the moment they enter the premises of other state. Immunity to the United Nations and its

[60] *Supra* note 32.
[61] The agency was established in 1949 by a resolution of General Assembly to carry relief and works programmes for the Palestine refugees. The Governments concerned were called upon to accord to the Agency all privileges, immunities, exemptions and facilities necessary for the fulfilment of its function [See William Dale, "UNRWA: A Subsidiary Organ of the United Nations" 23(3) *The International and Comparative Law Quarterly* 579, 581 (1974), *available at*: http://www.jstor.org/stable/757888 (last visited on May 14, 2019).
[62] *Ibid.*
[63] *Ibid.*

officials is provided only within the territorial limits of the member states and only with respect to their work.[64] Anything done out of the course of employment stresses the organization to put the obligation of waiving the immunity on the member state. The Convention deals with such cases in Section 20 which reads as follows:

> "*…Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.*"[65]

In addition, abuse of immunities by UN officials can also be tackled by separate agreement between the organization and member states. In same context, Section 13 of the United Nations Headquarter Agreement with United States of America, gives USA the right to require an official of the United Nations or a representative of a member government to leave the territory of the United States in case of abuse of privileges in matters outside official duties.[66] Under the headquarters agreement the right to require a representative to leave the United States is designed to protect the United States against the abuse of privileges and immunities which are performed outside the activities.[67]

The matter has been much debated and discussed within the realm of UN General Assembly as well. In its resolution A/RES/74/181 of 27 December 2019, the GA raised concerns about this matter with the caveat that the "the present resolution is without prejudice to the privileges and immunities of United Nations officials and experts on mission and the United Nations under international law".[68] The objective is to bring harmony and balance between the allegations against UN officials and the original intent of the Charter of the United Nations which states that United Nations staff and experts on mission would never be effectively exempt from the consequences of criminal acts committed at their duty station, nor unjustly penalized, without due process. However, the allegations if not investigated and in light of available evidence, if not prosecuted, would create the negative impression that United Nations officials and experts on mission operate with impunity. Hence, it strongly urged States to take all appropriate measures to ensure that crimes by United Nations officials and experts on mission do not go unpunished and that the perpetrators of such crimes are brought to justice, without prejudice to the privileges and immunities of such persons and the United Nations under

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[64] *Supra* note 29.
[65] *Supra* note 30.
[66] United Nations Headquarters Agreement, 42(2) *The American Journal of International Law* 445, 447 (1948), *available at*: http://www.jstor.org/stable/2193692 (last visited June 19, 2019).
[67] *Ibid.*
[68] A/RES/74/181, "Criminal accountability of United Nations officials and experts on mission" (Dec. 27, 2019), *available at*: https://undocs.org/en/A/RES/74/181 (last visited on June 19, 2019). The General Assembly has been reiterating the issue of misuse of immunity by its experts on mission since 2005; for more details please visit, https://www.un.org/en/sections/documents/general-assembly-resolutions/index.html (last visited on June 19, 2019).

international law, and in accordance with international human rights standards, including due process.

It also requested the Secretariat to prepare a report in this regard and urges the Member States to also impart them with due training that persons who serve in that capacity should meet high standards in their conduct and behaviour and be aware that certain conduct may amount to a crime for which they may be held accountable. As requested by the resolution, the SG submitted its report at the 73rd session of the GA in which it provided a general overview of the information received from Member States since 2007 regarding the establishment of jurisdiction over their nationals whenever they serve as United Nations officials or experts on mission.[69]

VIII. CONCLUSION

The immunities provided to the United Nations and its officials are no doubt necessary for the impartial and proper functioning of the United Nations and its special mission. However, there should not be a blanket impunity for all the misuse of power and privileges. It is hence contended that the immunity which is granted to the United Nation personnel is functional immunity and cannot be extended to include immunity from every act i.e., absolute immunity. The blanket protection given to the UN personnel though is necessary for their impartial functioning tends to flout several principles of the Charter itself. It flouts the basic principle of the United Nations itself which asserts in its preamble the principle of equality.

In Ranallo case, the court raised its concern over the inequality being practiced under the garb of immunities and privileges. The court contended that if the immunity from traffic regulation is included in the term privileges and immunities, then the principle of both public law and the charter of the United Nations will get defeated. The court asserted that the primary purpose of the United States of America with United Nations was to promote peace and safety for every person in the world. Traffic regulations exist all over the world to protect the person and property. It follows that every person who drives a motor vehicle is under a moral obligation to exercise due care and diligence that no harm is caused to others irrespective of the country where they are driving. This duty of care applies to all whether he is a common person, a high commissioner, or a United nation envoy. No exception should be allowed on any ground. The countries which claim themselves to be a democratic country should never forget that equality of justice and equal protection for all is the fundamental principle of democracy.

The charter of the United Nations also conforms to the principle of equal status for all. Hence, the granting of immunity on every and any ground without going into the merits of the case is violative of the principle of equality. It also violates the principle of natural justice. This unrestricted immunity often proves to be against the principles of natural justice. The officials are considered above all judicial proceedings. The ordinary court of law cannot determine their accountability and they are declared to be immune even without considering the grievances of the aggrieved person.

[69] The full report is *available at*: https://digitallibrary.un.org/record/1637561/files/A_73_128-EN.pdf (last visited on May 19, 2019). In addition, a summary table of information received from member states since 2007 can be *accessed at*: http://www.un.org/en/ga/sixth/gov_comments/criminal_accountability.shtml (last visited on May 19, 2019).

The immunity bestowed has acted as a protective shield for the UN officials against prosecution, it at the same time has also been used as an excuse to do unethical acts as seen in the cases of Liberia, Congo, Haiti etc. It is also a matter of grave concern that despite having an internal mechanism to deal with such issues, they have never been invoked. In light of the past misuses of immunity and to act as a check on any such acts in future it is high time that the United Nations as the super organization to maintain peace and security in the world should review the use and misuse of the immunity provisions. It has been reiterated in several of the resolutions of GA and reports of the Secretary General that the Organization has the high repute to carry and should lead by example. It at the same time has also recognized that some uncalled-for acts of some its officials have brought bad name to the organization. In some of the incidents they have done things out of their course of employment or have put the Organization into bad light. However, in all the cases it was finally established that they had the immunity and were released. But this did not exempt from the international criticism when they were involved in acts outside their course of employment or did acts negligently which brought untold misery (as witnessed in Haiti Cholera Case). The General Assembly (GA) Resolutions has helped in addressing the issue of misuse of the immunity provision and also in the development of a soft normativity in this regard. These resolutions and reports help in evolution of soft normativity to address a particular problem. These soft laws though are not binding, play an essential role in development of international law and in gradual hardening of soft normative structure. Soft normative framework is also appealing and convenient for the state parties as it gives them sufficient time to consider the matter and adopt them gradually. However, it is desirable that timely action should be initiated. This will help in maintaining the trust over the rule of law that in case of gross violations of human rights, nobody is above law.

DIMENSIONS OF A JUDICIAL DISSENT

Dr. Seema Gupta[*]

I. INTRODUCTION

A viewpoint recorded by single or more judges on a bench showing difference of opinions with the viewpoint of majority of judges is known as minority view or a 'dissenting opinion'. Majority judgement, dissenting opinion and concurring opinion are normally written simultaneously and even delivered and published alongside each other. If all the three opinions are the part of the same judgment, it is read and understood cumulatively.

Article 145(5) of the Constitution of India states, "No judgment and no such opinion shall be delivered by the Supreme Court save with the concurrence of a majority of Judges present at the hearing of the case, but nothing in this clause shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment or opinion." Basically, Article 145(5) empowers the Judges to differ from the majority and deliver their own judgment.[1]

II. SOMERECENTDISSENTINGJUDGEMENTS

Though the dissenting judgments do not have authority parallel to precedents, they have a great persuasive value. Through the course of time, it has been found that a previous dissent encourages to bring about better changes in law.

A. Christian Medical College v.*Union of India and Ors.*[2]

On validity of National Eligibility Entrance Test (NEET) for MBBS aspirants, the Supreme Court, in May 2013, with 2:1 split verdict, struck down the common entrance test taking the plea that Medical Council of India and Dental Council of India cannot conduct the test. Justice Anil Dave dissented. Subsequently, in 2016, this dissent was followed as the majority view by the Constitution Bench in *Medical Council of India* v. *Christian Medical College, Velloreand Others*[3] reviving the conduct of NEET for medical aspirants of India. This majority judgement was authored by Justice Anil Dave itself, who had dissented in 2013. Justice Dave said that NEET is a boon to aspiring medical students. National Eligibility Entrance Test will attract merit and do away with money-minded businessmen operating in educational field.

B. Supreme Court Advocates-on-record Association v. *Union of India*[4]

Justice Chelameshwar contradicted the majority in *Supreme Court Advocates-on-record Association* v. *Union of India* in holding the National Judicial Appointment Commission Act and 99th amendment as constitutionally valid. He concluded that Judiciary is

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[1] M.P. Jain, *Indian Constitutional Law* 477(Lexis Nexis Publications, 7thedn., 2014).

[2] (2014) 2 SCC 305.

[3] (2016) 4 SCC 342.

[4] (2016) 5 SCC 1.

not the only institution which can safeguard the independence of Judiciary, and thus the Act cannot be deemed unconstitutional on mere suspicions that the Executive's involvement in judicial appointments would compromise Judiciary's independence. This dissenting opinion provoked various debates and discussions on the separation of powers between the Executive and Judiciary, and the validity of the majority view in the judgement.

C. Abhiram Singh v. *CD Comachen*[5]

In *Abhiram Singh* v. *CD Comachen*, the majority held that the word '*his*'in section 123(3) of the Representation of People's Act 1951, includes not only the contesting candidate, but also the voters. No political leader will give reference to religion, race, caste, community, or language of the candidate or of his rivals or of the voters to secure votes. Such conduct will be declared 'corrupt practice'. In a nutshell, the majority judgement banned religion in politics. Therefore, no appeals can be made by any candidate on religious or caste grounds. Justices Chandrachud, AK Goel and UU Lalit dissented from this view and noted that the statute does not prohibit discussion, debate, or dialogue during the course of an election campaign. They commented that, from this stand-point of majority, even marginalized communities would not be able to use their identity to galvanise votes. In contrast, the dissent gave broader interpretation to section 123(3) which shows Judges's deeper understanding of the interface between law and society and provides strong argument to litigants fighting for the transformation.

D. Indian Young Lawyers Association v. *State of Kerala & Ors.*[6]

In the case of *Indian Young Lawyers Association* v. *State of Kerala*, the question before the Apex Court was whether the Sabarimala Temple's customary religious practice, which prohibits the entry of women, violates fundamental rights guaranteed to women by the Indian Constitution.

The 5-judge Constitutional bench did not give a unanimous decision in 2018, whereby 4:1 majority judgement held that this prohibitory practice is not within the spirits of Constitution. Disagreement came from Justice Indu Malhotra.

In Kerala, the Sabarimala temple rules prohibits the entry of women in their 'menstruating years', its being place of worship. Indian Young Lawyers Association filed a PIL before the Supreme Court in 2006. They challenged the temple's custom of prohibiting women, on the ground that the exclusion infringes women's right to equality and right to freedom of religion. In a 4:1 majority, the court ruled that Sabarimala's prohibition rule for women violated their basic fundamental rights. Justice Indu Malhotra dissented. She argued that Courts should restrain itself in intruding in religious practices and beliefs of citizens in a secular nation. Justice Malhotra suggested, it should be left to those practicing the religion. J. Malhotra banked upon rights of religious denominationsunder Article 26 to establish and maintain institutions for religious and charitable purposes. Denominations are free to manage its own activities in terms of religion. This daring dissenting judgement surely needs to be applauded.

E. Justice K.S. Puttaswamy (Retd.) v. *Union of India and Others*[7]

[5](2017) 2 SCC 629.
[6]Writ Petition (Civil) No. 373 of 2006; 2018 SCC OnLine SC 1690.

The constitutionality of Aadhaar Act, 2016 was on stake in this case. Through petition, it was alleged that the Aadhaar act violates privacy. The majority upheld the constitutional validity of Aadhaar Act on the plea that Aadhaar does not tend to develop India into a surveillance nation. The final judgement ruled that all matters pertaining to an individual do not qualify as being an inherent part of right to privacy. Only those matters over which there would be a reasonable expectation of privacy are protected by Article 21. Majority decision declared only section 57 of the Aadhaar Act as unconstitutional as it enables individuals and corporate bodies search for authentication.

The dissenting judgement of Justice J. Chandrachud held the Aadhaar project wholly unconstitutional. The dissenting judgement states that Aadhaar Act violates informational privacy, data protection as foreign company has source code of Aadhaar project. It has access to citizen's information. Therefore, there is potential for surveillance. The Act poses risk on the potential violation of leakage of the database. Justice J. Chandrachud said, "If a constitution has to survive, the political leaders, notions of power and authority must give compliance to rule of law". The dissenting judgement of Justice Chandrachud is strong and appealing. He has upheld the Constitutional values of integrity, individual dignity, privacy, and the sanctity of individual rights against the State.

Justice R F Nariman, a member of nine Judges Bench recalled the 'Three Great Dissents'which changed the landscape of fundamental rights.[8]Justice Nariman lauded Justice Fazl Ali, Justice Subba Rao and Justice H. R. Khanna in their Judgments in celebrated cases[9] for their judicial opinions, views and 'dissent'for protecting the basic rights of individuals. Specifically talking about Article 21, he observed how previous judgments gave a narrow construction for this intrinsic right, but these dissents broke away from such interpretations in the right direction.

In *A.K.Gopalan* v. *State of Madras*[10],the constitutional validity of detention under the Preventive Detention Act, 1950 was challenged as they pleaded that it was encroaching upon Article 19(1)(d)[11] promising the right to freedom of movement. Since Article 19(1)(d) gives power of 'personal liberty' under Article 21, therefore, hence the Preventive Detention Act, 1950 must also satisfy the requirement of Article 19(5). In addition to this, the petitioner argued that Article 19(1) and Article 21 must be read together because Article 19(1) deals with substantive rights and Article 21 deals with procedural rights. The two articles cannot be understood in isolation of each other.[12]

The majority held that preventive detention could not be deemed unconstitutional in itself, since the Constitution has expressly authorized legislation providing for it. They flatly denied the possibility of admitting into Article 21 any ingredient of the reasonableness concept from Article 19 of our Constitution to arrive at the proposition that whatever was laid

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[7]2017 (10) SCALE 1.
[8]*Ibid*.
[9]*A.K.Gopalan* v. *State of Madras*, AIR 1950 SC 27;*Kharak Singh* v. *State of UP*, AIR 1963 SCR 1295; *ADM Jabalpur* v. *Shivkant Shukla*, AIR 1976 SC 1207.
[10]AIR 1950 SC 27.*A.K. Gopalan, Ibid.*
[11]The Constitution of India, art. 19(1)(d).
[12]A.V. Dicey, *Introduction to The Law of Constitution* 207-208, 263 (Macmillan, 9[th]edn., 1939).

down by the legislature in a penal law would satisfy Article 21 and the court could not intervene.

Dissenting viewpoint of Justice Fazl Ali, demanded that the Constitution of India should be given a deeper interpretation whereby Article 19 should be read with Article 21 and Article 22, the basic fundamental rights, which provide for processes established by law and provisions for preventive detention respectively. The minority opinion of Justice Fazl Ali's suggested a broader interpretation of the term in Article 21, 'procedure established by law 'to include higher principles of natural justice, and not just statutory law. Finally, the bench followed the dissent of Justice Fazl Ali after twenty years in *Maneka Gandhi* v. *Union of India*[13]. The judgement in *Maneka* case stated that, "any law depriving a person of his personal liberty should fulfil the conditions listed under Article 19" and the 'procedure established by law 'must be 'fair, just and reasonable'.

In *Kharak Singh* v. *State of U.P.*[14], Regulation 236 of the U.P. Police Regulations was challenged as found to be violative of the fundamental rights under Article 19(1)(d) and Article 21, because it authorised the visit to private house for search at night. The majority view found regulation 236 to be in contravention with right to personal liberty as they found the entry interrupting the privacy of the subject.

In the dissenting view Justice Subba Rao stated, "Since a law is challenged as infringing the right to freedom of movement under Article 19(1)(d) and the liberty of the individual under Article 21, it must satisfy the tests laid down in Article 19(2) as well as the requirements of Article 21."

Thus, in *Aadhar* case[15], the Court overruled the majority view in *Kharak Singh*[16], and relied on Justice Subba's dissent to rule that right to privacy is also enshrined in the fundamental rights. Again, a foresighted dissent turned into the majority view after some years.

ADM Jabalpur v. *Shivkant Shukla*[17] arose in the political context of the Emergency, whereby the Preventive Detention laws were being misused to suppress any opposition to the government rule. Deprivation of people's liberty in such a manner was challenged in this case. The majority opinion of 4:1 held that Article 21 is an exclusive depository for all rights to life and personal liberty. Consequently, these rights are also altogether suspended when Article 21 is suspended during Emergency.

However, Justice HR Khanna, in his dissent, took a strong stand that Article 21 is not the sole repository of these rights and contended that the basic right to life and liberty is not suspended by proclamation of Emergency. He supported the position that imposition of Emergency and the maintainability of *habeus Corpus* petitions work on different planes, with one not affecting the other. Thus, legality of detention orders could be questioned, as right to life and liberty could not be automatically suspended in a judicial system governed by rule of law.

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[13] AIR 1978 SC 597.
[14] *Kharak Singh*, *supra* note 9.
[15] *Supra* note 7.
[16] *Supra* note 14.
[17] *ADM Jabalpur*, *supra* note 9.

This bold dissent of Justice Khanna was later widely applauded. This dissent became the majority judgment in the *Maneka* case[18]. Finally, this dissent caused the 44th Amendment Act in 1978. The foresighted view of Justice Khanna was recognized after long forty-one years in the *Aadhaar*judgement[19].

In a recent discussion in Rajya Sabha regarding a bill proposing to allow voluntary use of Aadhar as identification proof for opening bank accounts and sim cards for cell phones, a group of opposition leaders, who were the petitioners in *Aadhar* case quoted the dissenting view of J. Chandrachud to bring to the notice that the government was trying to overreach the Supreme Court judgement, which had questioned at Aadhar being the basis for opening bank accounts and cell connections.[20]

In light of these great dissents and the huge impact they had on the nature and scope of the Indian judicial landscape, the author contends that dissenting opinions have substantive value.

III. IMPACTFUL DIMENSIONS OF DISSENT

Broadly, the form and function of dissents highlight the importance of diversity of perspectives to our judicial decision-making. Ability to dissent ensures that the Judiciary enjoys some key capabilities associated with a democratic government, which are in line with the tenets of political settlements.[21]Some of the strongest impacts of dissents are thus as follows:

i. Majority opinions create the fiction that their decision and legal reasoning flow naturally from the legal question posed. Dissents prove otherwise by publicly challenging the arguments upon which the majority stands, pointing up the fallibility in law. [22] Consequently, dissents are believed to actually strengthen and clarify majority opinions.[23]
ii. Dissents offer other means by which laws can be interpreted and cases can be decided, by offering a different legal perspective. They not only provide more arguments for petitioners to use when contesting the law at a later time, but also establish a precedent through its persuasive effort for later justices, to follow.
iii. While unanimous opinions resolve legal issues, divided courts provide for the opportunity for looking beyond the specific circumstances of the case and its impact on the future. Dissent opens a debate among the Judges, jurists, and the legislators. Thus, dissents work as mediums for advocating higher values, alternative judicial ideologies, and overturning earlier cases.[24]

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[18]*Supra* note 13.
[19]*Justice K.S. Puttaswamy (Retd.)* v. *Union of India and Ors.*, 2017 (10) SCALE 1.
[20] Dhananjay Mahapatra, "Significance of SC's Minority judgements and their place in Polity"*Times of India*,July 15, 2019.
[21]Andrew Lynch, "Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia" 27 *Melbourne University Law Review* 724,725(2003).
[22] Robert W. Bennett,"A Dissent on Dissent" 74 *Judicature* 256(1991).
[23]Hampton L. Carson, "Great Dissenting Opinions" 50 *Albany Law Journal*126 (1894).
[24]Refer Dissent Magazine, *available at*: https://www.dissentmagazine.org/ (last visited on May 20, 2019).

iv. Dissenting opinions facilitate the advancement of law itself, as they introduce new legal proposals and suggest amendments by exposing the flaws in the old doctrines and principles. They, thus, help in correcting the legislator's mistakes.[25]

v. A majority opinion opposed by one or more dissents indicates that the Court's decision is the product of independent and thoughtful minds.[26] With this, the independence of Judges gets strengthened.

vi. Judicial dissent increases the scope and ambit of the interpretation of constitutional provisions. By offering an outlet for individuality, dissent support Judges to diverge from the accepted precedent, and thus giving progressive direction to social transformation.

vii. Judicial dissents help in raising the legal consciousness of the society. Dissents also provide a stimulus to write well researched judgments. The losing party feels that the adjudicating Judges understand their position, thus carries a psychological value too.

IV. BEHAVIOURAL ASPECT OF JUDGES

The researcher peeped into the Judge's behavioural aspect and found that their individual decision-making pattern is due to solidified habits over long years of experience. Their perception of problems and their outlooks are fully matured due to diverse exposure and family background. A distinctive elite class might differ on how certain issues confronting the society should be resolved. Such differences would normally be reflected in non-unanimous decisions in the form of dissenting votes as overt manifestations of their individuality. But because of several constraints, such overt manifestations seem to have been very few in number. This may not mean that the Judges are one in outlook and hence they rarely dissent. It is more likely that the behavioural differences of the Judges in their day-to-day decision-making activity get institutionally accommodated as a result of the fragmented Bench structure adopted by the Indian Supreme Court. Accordingly, this kind of institutional accommodation may sometimes result in bringing together Judges with similar outlook on the same panel which minimises the possibility of a split in the decisions.[27]

V. CONCLUSIVE FINDINGS

When an area of law is at its infancy stage, dissents are bound to increase and subsequently decrease with the crystallization of its jurisprudence. The presence of authoritarian government, ideology of Judges, heavy workload, size of benches are some causative factors for the no-dissent culture. We cherish dissent but it should be meaningful. Soli J Sorabjee had stated that, "Dissenting judge speaks to the future and his voice is pitched to a key that will carry through the years."[28]

Through the course of writing this paper, the researcher has aimed to highlight the power and impact of dissenting judgments through cases. The researcher humbly urges judges to boldly face the disagreements with their colleagues on the legal reasoning in reaching an outcome. By not blindly submitting to the majority view in an effort to form

[25]Julia Laffranque, "Dissenting opinion and Judicial independence" 8 *JuridicaInternational*162,165(2003).
[26]Antonin Scalia, "The Dissenting Opinion"19(1) *Journal of Supreme Court History* 33-44 (1994), *available at*:https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-5818.1994.tb00019.x (last visited on May 20, 2019).
[27]In Re TheDelhi LawsAct case, AIR 1951 SC 332.
[28] Soli J Sorabjee,"Dissenting judges are the future of law", *available at*:http://www.newindianexpress.com/columns/article445645.ece. (last visited on May 20, 2019).

artificial unanimity, judges demonstrate their role in the development of the law and transformation with changing needs of the society.

ANALYSIS OF TELECOMMUNICATION LAWS AND POLICIES IN THE CONTEXT OF HUMAN HEALTH

Dr. Sapna Bansal[*]
Prof. Kumud Malviya[**]

I. INTRODUCTION

Information technology[1] has brought tremendous change in the social, economic, and political systems in India.India has emerged as one of the growing marketson the global platform due to the enormous growth of information technology and its positive impact on the Indian economy. Cell phone use has become inevitable because of economic necessity. Increased use of cell phones and wireless devices gives theexpansion of the mobile mast and base station. The mass radiation from these towers has the potential of causing health hazards.[2]There is no doubt that cell phone and base station has become inevitable but at the same time, it requires a proper introspection of the problem which it may create and its solution. We are taking benefit of the use of cell phones but at the same time, we have to raise our concerns to reconsider the problems that are caused by the mobile mast especially when mobile towers are installed in populated areas. The mushrooming of new mobile phones and telecom industries which are flourishing in India has increased the number of subscribers in the recent past. This is raising a huge debate on how to tackle the problem. The importance and benefits of the telecom sector cannot be ignored.[3]

The mobile mast and the antenna of the base station are made of heavy iron and steel which may be harmful to the people of that area. It is inherently dangerous irrespective of its impact on human health. However, it is to be noted that the mobile tower or mast does not release any radiation but the antenna which generates RF radiation. There are several cases filed in the different high courts and the Supreme Court against the installation of these towers in the residential area. The concerned authorities kept saying that there is no scientific proof that the level of radiofrequency radiation is sufficient to cause any harm to the human body. Health agencies, including WHO have denied any adverse health impact of the mobile tower radiation.[4]They have claimed that there is no harm from the cellular tower. The question arises that why there is fear in the mind of people those mobile tower causes harmful radiation andare the primary cause of increased cancer and other diseases. There is also a perception that these reports of the authorities and health agencies are not fair. The IT

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[1]Information technology signifies computing technology, such as the Internet, networking, software, hardware, or the people that work with these technologies [John Daintith (ed.), *A Dictionary of Physics*(Oxford University Press, 2009).
[2]Mobile masts refer giant structures that are designed to support antennas for broadcasting and telecommunications. These masts are tallest among all the human-made structures and the reason behind are that the radio waves are available at a certain height.
[3] Rei Ohkuma, Jumpei Takahashi, *et.al.*, "Thirty-two years post-Chernobyl: risk perception about radiation and health effects among the young generation in Gomel, Republic of Belarus" 59(6) *Journal of Radiation Research*765-766 (Nov., 2018), *available at*: https://doi.org/10.1093/jrr/rry079 (last visited on Aug. 01,2019).
[4]World Health Organisation, "Ionizing radiation, health effects and protective measures",*available at*: https://www.who.int/news-room/fact-sheets/detail/ionizing-radiation-health-effects-and-protective-measures (July 01,2019).

industries are doing well, and they are in a position to affect the decision of the government and other bodies. The present study seeks to know the reality behind the scene.

II.THEORETICAL FRAMEWORK

Increased demand for mobile phonesrequires more and more installation of mobile towers and masts that will certainly result in huge radiation of Radio Frequency waves. In the past decades, there has been also an increase in cancer patients and other diseases that were not earlier. The rapid rate of declination of several animal and bird diseases bound us to rethink before any further expansion of these masts that is triggered by the inadequate regulatory framework on telecommunication and the lack of willpower by the government which is reflected by their approach towards the encouragement of more and more expansion of mobile tower and blanket denial of the harmful impact of the same.

III. METHODOLOGY

The purpose of this study is to draw attention to the key issues related to the radiation by the antenna fixed in the mobile tower and how the current legal regime has failed to tackle these issues. To accomplish this objective, the paper will be identifying the lacunas in laws on telecommunication and unfold the proof of adverse effects of Radio Frequency radiation. The currentstudy will be explicating the detrimentaleffect of mobile tower radiation and propose the wanted changes in the existing laws to introduce reforms that may lead towards suitable suggestions.

IV. HOW DOES MOBILE TECHNOLOGY WORK?

A mobile handset is of no use without communication between the caller and receiver through radio waves that work on two-way telephonic line bases. Mobile phones receive signals through radio waves and as such both the handset and mobile tower antenna release radiation. The cell phone works based on radio waves naturally available in the atmosphere but becomes usable only by satellite launched by nations and therefore government regulates the use of these radio waves by allocating spectrum to the bidders. The radio signals communicate through an antenna mounted on a handset and a big antenna on a mobile tower. The connection between the handset and the base station through radio waves carries the voice call and there are two such links; one is known as uplinks which carry voice from the mobile users and the other one is known as downlink which carries voices from base station to the mobile users.[5]

V. ELECTRO-MAGNETIC RADIATION

Communication technology and the use of other electric devices have exposed us to electromagnetic radiation. Increased use of electronic devices and the information revolution has the potential of causing huge quantities of these electromagnetic waves. Hence there is a close relation between electronic devices which emanate radio frequency waves called electromagnetic radiation. These radiations from power lines constitute to electromagnetic spectrum that is characterized by their occurrence or frequency. Most of the devices emit a low level of frequencies and there is no harm from the release of that level but enormous rate

[5]ManasiDash and Arun Mehta, "Understanding Mobile Phone Radiation and Its Effects" 46(17) *Economic and Political Weekly* 22-25(Apr. 23, 2011).

of frequencies such as X-rays has a high level of frequency that can break the chemical bonds.[6]In other words, there are two types of radiation; one is electromagnetic waves measured in Hertz and enough to break the chemical bonds. On the other side there are radio frequency radiationsand the energy release thereby has a low level of frequency and cannot break the chemical bonds.[7]

VI. RF RADIATION AND HUMAN HEALTH

Signals in the form of RF waves are transmitted from and back to the base station while making or receiving calls. Radiation effects are of two types- thermal and non-thermal. Thermal effects are similar to that of cooking in the microwave oven but there is no definition prescribed for non-thermal effects and no concrete findings are there. But it is delineated that thermal effects are seldom less dangerous than non-thermal effects.[8]Radiation from cellphones is described by its SAR value which is 1.6W/Kg in the USA, which means mobile phones can be used for 6 minutes in a day. These limits are set by having a protection margin of 3 to 4, so someone can use a mobile phone for 18 to 24 minutes per day.[9]

People have reported suffering from ear lobes getting warm which escorts to hearing impairment and even ear tumours if they operate cell phones for more than 20 minutes. This is reported that it is caused because microwave energy produced by mobile phones heating the blood. Certain other problems such as skin drying, watering eyes, absentmindedness, loss of memory, and different types of cancer can be caused due to overuse of cell phones.[10]

The radiation emitted by the antenna at the base station spread in the environment and affects human health as well as animals and plants. The energy released at the base station and radio and broadcasting station are set free parallel to the land with a downward scatter. The level of energy release at the base station is much higher and that is why it is important at least to keep maximum distance from the ground.[11]It is considered that there is no harm to human health by radio frequency radiation due to the low level of frequency. But one of the studies conducted by the International Agency for Research on Cancer (IARC) suggests that there are two criteria for the assessment of the impact of these radiations on human health; one is in short-termeffect[12]and the other is in long-term effect.[13] There is no doubt that contact with radiofrequency radiation for a short period does not cause any harm but in the long term, people residing in those areas where mobile towers are installed have continued exposure to these radiations for a longer time that increase the risk of glioma and acoustic neuroma.[14]RF has been labelledas carcinogenic to humans (Group 2B) by International Agency for Research on Cancer (IARC). Epidemiological research shows the increased risk

[6]Jacquelyn L. Banasik, *Pathophysiology*73(Elsevier Health Sciences, 6th edn., 2018).
[7]*Id.*at 75.
[8]IIT Kharagpur,"Technical Advisory Committee Report on cell phone towers radiation hazards" 4 (2011), *available at*:https://www.ee.iitb.ac.in/~mwave/Cell-tower-rad-report-WB-Environ-Oct2011.pdf (last visited on May 07,2019).
[9]*Ibid.*
[10]*Ibid.*
[11]The consensus of the international scientific community is that the power from these mobile phone base station antennas is far too low to produce health risks as long as people are kept away from direct contact with the antennas. See Manasi Dash and Arun Mehta, *supra* note 5.
[12]Short term effect on the health from the radiation can be blood pressure, heart rate etc. See *ibid.*
[13]Long term health effect may result into headaches, muscle problem, tinnitus, cancers, joint pain, memory loss, tumours etc. See i*bid.*
[14]Lennart Hardell, "World Health Organization, radiofrequency radiation and health:A hard nut to crack" (Review)51(2) *International Journal of Oncology* 405-413(2017).

of radiation in the frequency range of 30 to 300 GHz which may be cancerous.[15]The cumulative effect of the base station on the health of people residing in these areas puts them atlife-threatening risk. The continuous exposures to these radiations are long-term and round the clock have the potential to cause radiation-related diseases. In the long-term heating effects occur with the increased rate of installation of mobile masts escalating environmental exposure levels. Heat release from the mobile mast increases the body temperature by a degree Celsius after long-term exposure.[16]

High-frequency fields can infiltrate the human body, though if the frequency is high; it has a low chance to impact. The human body can regulate its internal temperature which is why small temperature increases can be adjusted or controlled while doing any type of exercise or similar activities. But if the degree of temperature is expanded past versatile limits; exposure to high frequencyalong with an increase in temperature, can cause serious well-being impacts.[17]

VII. RADIATIONS FROM TELECOM MASTS

A high-frequency range of the electromagnetic spectrum is used in mobile phones for the functioning of wireless phone calls, data transfer, and communication through the internet. Countries have the control to fix thefrequency band used according to technologies (GSM, UMTS, 4G, 5G, etc.).[18]Antennas from mobile towers transmit radiation in the following frequency range[19] :-

869 to 890 MHz	CDMA
935 to 960 MHz	GSM900
1810 to 1880 MHz	GSM1800
2110 to 2170 MHz	3G
2 to 8 GHz	4G
600 MHz to 6 GHz	5G

A region is divided intoa large number of cells by mobile phone operators, and then every cell is divided into a range of sectors. There is a connection between base stations and directional antennas which are set up on the roofs of buildings or Ground Based Towers. There is a down tilt of the antennas which capacitates the signals to be directed closer to the ground degree. Huge numbers of mobile masts are erected near highly populated residential areas and workplace buildings to provide good cell phone coverage to the users. These mobile towers keep on transmitting radiation all the time, so those whoresidecloser to the

[15]IARC Monographs, CII *Non-Ionizing Radiation, Part 2: Radiofrequency Electromagnetic* (WHO Press, Lyon, France 2013).

[16]Standards for low frequency electromagnetic fields ensure that induced electric currents are below the normal level of background currents within the body. Standards for radiofrequency and microwaves prevent health effects caused by localized or whole-body heating[Kanu Megha, Pravin SuryakantraoDeshmukh, *et.al.*, "Low Intensity Microwave Radiation Induced Oxidative Stress, Inflammatory Response and DNA Damage in Rat Brain" 51 *NeuroToxicology* 158-165 (Dec., 2015), *available at*: https://www.sciencedirect.com/science/article/abs/pii/S0161813X15300097?via%3Dihub (last visited on July 28, 2019)].

[17]ICNIRP's note on Recent Animal Carcinogenesis Studies(2018), *available at*:https://www.icnirp.org/cms/upload/publications/ICNIRPnote2018.pdf (last visited on July28,2019).

[18]*Ibid.*

[19]*Supra* note 5.

tower will receive multiple times stronger signals than needed for telecommunications. Crores of unaware people in India live within these high EMF radiation zones.[20]

VIII. ICNIRP'S GUIDELINES FOR LIMITING EXPOSURE TO EMF RADIATION

International exposure guidelines for radiofrequency (RF) electromagnetic fields were set by the International Commission on Non-Ionizing Radiation Protection (ICNIRP) in 1998 and later on, revised guidelines were issued in 2010. These guidelines prescribe calculable EMF levels for safe personal exposure. If these safety levels are adhered to, humans can be protected from all proven detrimental effects of EMF radiation subjection. The guidelines make a classification between occupationally-exposed individuals and members of the general public. Occupationally-exposed individuals are described as healthy adults who work under such controlled conditions associated with their occupational duties, but they are aware of probable EMF radiation risks and trained to mitigate those harms. The general public is described as people of different ages with differing health conditions, which may include vulnerable individuals such as children and patients and those who may have no awareness of or control over their exposure to EMF. This classification proposes the necessity to have more strict limitations for the general public, as members of the general public would not be knowing how to mitigate harm, or sometimes they may not even have the capability to do so. Occupationally-exposed individuals are not considered to be at greater riskthan the general public, because appropriate protection and training are so provided to incapacitate the probable risks.[21]The latest guidelines were about to be issued in 2018 which had to replace 1998 guidelines for restricting high-level exposure of EMF so that people can be protected against familiar unfavourable health effects, but no strong pieces of evidence were found against the adverse impact of EMF on human health and environment if the set limits are adhered to.

As per ICNIRP[22], EMF radiation can affect the body through three primary biological effects i.e., nerve stimulation, membrane permeabilization, and temperature elevation. For the compliance of prescribed low-frequency guidelines by ICNIRP (2010), the exposure cannot exceed any of the limitations, which include protection against nerve stimulation, and significant temperature rise due to EMF power deposition within tissues.[23]

U.S. National Toxicology Program and the *Ramazzini Institute* conducted animal studies for the investigation of the causation of cancer from long-term subjection to EMF radiation released from cell phones. ICNIRP took these studies into account while doing revisions of guidelines related to radiofrequency exposure. Both studies need to be appraised within the context of other animal and human carcinogenicity research because of their invariability and restrictions that impact the usefulness of their outcomes for deciding on exposure guidelines. Based on the reports submitted by both, ICNIRP decided to non-revision the existing radiofrequency exposure guidelines based onthe non-availability ofreliable pieces of evidence.[24]

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[20]*Ibid.*

[21] ICNIRP Guidelines for Limiting Exposure to Time-Varying Electric, Magnetic And Electromagnetic Fields, p.no. 3, *available at*:https://www.icnirp.org/cms/upload/consultation_upload/ICNIRP_RF_Guidelines_PCD_2018_07_11.pdf (last visited on July 28, 2019).

[22]*Id.*at 5-6.

[23]*Id*. at 11.

[24]*Supra* note 17.

IX. CASE STUDIES ON THE EFFECT OF TELECOM MASTS ON HUMAN HEALTH

A. Study in Nigeria

An empirical study was conducted in Gombe Metropolis (Nigeria)[25] to find out the effects of GSM masts on human health and the environment. The questionnaires were being filled by inhabitants residing within a 700m radius of GSM masts. The study revealed that GSM masts were erected within the residential areas and the majority of people were not comfortable living close to masts due to the following problems-

i. Noise emission from power generator sets
ii. Carbon Monoxide from generator exhaust
iii. Oil and fuel spills

B. Study in Israel

A study conducted in Israel indicatesthere is an affiliation betweenthe elevated incidence of cancer and residing in the proximity of a cell phone transmitter station (withina 350 m radius).[26]

C. Study in Germany

A study was conducted on two categories of patients- one who were residing within 400m ofthe cellular transmitter site for 10 years and the second those who were living farther away. The study was conducted on 1,000 patients in Naila, Germany and it was revealed that the ratio of newly growing cancer cases was drastically higher among first category sufferers compared to second category.[27]

Another study conducted on 575 inhabitants in Westphalia, Germany revealed an arithmetically notable increase in the cancer incidences that happened to inhabitants residing insidethe radius of 400-metre of a mobile mast after five years since its erection there.[28]

X. POSITION IN INDIA

In India the total no of telecom (wireless) subscribers as of 31st March 2018 is as follows[29]: -

Particulars	Wireless
Total Telephone Subscribers (Million)	1183.41
Urban Telephone Subscribers (Million)	662.18
Rural Telephone Subscribers (Million)	521.23

[25]M.A. Husain, M.S.Gwary, *et.al*., "Perception of Effects of GSM Infrastructure on Human Health in GOMBE, Nigeria"1(2) *IOSR Journal of Environmental Science, Toxicology and Food Technology* 44-52 (2017).
[26]Ronni Wolf and Danny Wolf,"Increased Incidence of Cancer near a Cell-Phone Transmitter Station" 1(2) *International Journal of Cancer Prevention* 1-19 (Jan., 2004).
[27]H. Eger, K.U. Hagen, *et.al*.,"The Influence of BeingPhysically Near to a Cell Phone Transmission Station Mast on the Incidence of Cancer" 17 *Umwelt-Medizin-Gesellschaft* 1-7 (2004).
[28]*Id.* at 55-60.
[29] TRAI Annual Report (2017-18), *available at*:https://main.trai.gov.in/sites/default/files/Annual_Report_21022019.pdf(last visited on May10,2019).

Broadband Subscribers (Million)	394.65

As per the above report, the total no. of telecom subscribers(wireless) as of 31st March 2019 was 1183.41 million and to provide services to these many subscribers, more base stations were needed to be installed, so telecom operators installed 6.34 lakh new Base Transceiver Stations(BTS) and 65,000 mobile towers from November 2016 to November 2018. This added to the existing 13.66 Lakh (BTSs) on 4.35 Lakh Mobile Towers and took the total number up to 20 Lakh BTSs on 5 Lakh Mobile Towers.[30]

The reason for erecting such a huge no. of towers within the residential areas is explained that nowadays human beings depend upon cellular phones working everywhere at home, at college, and places of job. The transmitter strength necessitated by the cell phone and the base station to communicate is comparatively low when base stations are positioned close to users. If base stations are located further away, the strength required is typically higher, which means a higher EMF. Hence, base stations are necessitated to be located near users for good reception and minimum EMF. But is that not harmful to the students if masts are erected near schools, and to the patients if masts are erected near hospitals because these people are vulnerable to receiving more radiation than a normal healthy person?

Rajasthan High Court in *Justice I.S. Israni (Retd.)* v. *Unionof India*[31] has held that towers on hospitals and school buildings etc. should be avoided as children and patients may be more vulnerable to probable harmful effects of EMF radiation. The main issue, in this case, was related to the erection of mobile towers in certain high-risk areas such as schools, hospitals, and highly populated residential areas and the validity of bye-laws that prohibited the erection of mobile towers in such areas. The court directed the State Government and the local authorities to decide where the towers can be installed in the densely populated regions accordingto law.

Madras High Court has opined differently in the case of *Reliance Jio Infocom Limited*v. *The Commissioner of Police, TiruppurDist, and others*[32]. that no one can be averted from erecting cell phone towers on a mere apprehension about the effect of radiation from the mobile phone tower. The apprehension does not have scientific backing. Cell phone towers cannot be prevented to be installed on mere apprehensionsuntil a positive finding is given in this regard*viz*., *(a*) Telecom authorities such as DOT (Department of Telecommunication) and TRAI (Telecom Regulatory Authority of India) are taking the best possible measures to control EMF radiations by reducing the limit to 1/10 of the limit prescribed by ITU (International Telecommunication Union) so that no harm can be caused either to human health or to the environment.But now the question rises about the erection of telecom masts of different service providers in a particular area even if they are complying with the guidelines of ITU and ICNIRP when they do not share the infrastructure and establish their set-up. In that case, it becomes a cluster of masts and the amount of EMF radiations they release exceeds the limit prescribed by any regulatory authority. So now the problems are the following cluster of telecom masts in residential areasreleasinggood amount of EMF radiations.*(b)*Such clusters near schools and hospitals.

[30] Press Release, "65,000 new mobile towers, 6.34 lakh new base stations installed between November 2016 and November 2018", *available at*:https://www.digit.in/press-release/telecom/65000-new-mobile-towers-634-lakh-new-base-stations-installed-between-november-2016-and-november-2018-44674.html (last visited on Aug. 10,2019).

[31]2013(4) CDR1973(Raj.).

[32]MANU/TN/0487/2019.

*(c)*How far are these EMF radiationssafe for human health and the environment in light of different studies conducted in different countries?

In a PIL made by the famous actress Miss Juhi Chawla, she alleged that a Parliamentary committee had earlier found that the Department of Telecommunications (DoT) had selectively recognized studies that were in the interests of telecom companies and higher power-density limits, while ignored studies that had concluded that electro-magnetic frequency (EMF) radiation from cell phones and cell-phone towers might be causing health risks to humans, flora and fauna.[33] Supreme Court of India has admitted this plea and the result is long-awaited.

A relevantpronouncement was madeby Apex Court in *M.C. Mehta* v. *Union of India*[34], that even in case of suspicion or reasonable doubt, the precautionary principle needs that preventive action be taken toavoid any harm. Hence, considerations on the absence of direct proof on this issue certainly should not matter given the cases of ancillaryloss and efforts should be made to take precautionary steps.

XI. CONCLUSION

The Indian Council of Medical Research has indicated, based on a number of studies that adverse impact may be caused by the radiation from mobile phones and towers. Besides, World Health Organization has categorized the RF electromagnetic radiation does not only affect the human body but can hurt wildlife as well. Though there are not sufficient evidence to prove the apprehended harmful effects of EMF radiations on human health and the environment, one thing is clear even WHO somewhere has an idea about the potential effects of EMF radiations, that is why ICNIRP and ITU have provided certain limits and guidelines for the functioning of telecom system.

Mobile mast radiation and related legal issues are a recent phenomenon that has emerged with the increased use of Information Technology. It is an environmental issue that is recognizedas a subtle and unseen pollutant that affects life in multiple ways. The health of the people is at stake and there is a need for balanced approach that can tackle the issue without compromising socio-economic development. There is an environment principle called the "Precautionary Principle" which says thatpolicy makers have discretionary powers where harm is probable from taking a particular decision when substantial scientific knowledge on the matter is not available. It also suggests that the state has the social responsibility to protect the public from subjection to harm when a believable risk is found by conducting a scientific investigation. This principle can be kept at rest if sound evidence of no harm is found by further scientific investigations. So, in light of this principle, the policymakers can design some more stringent policies to deal with EMF radiation which has the potential of causing harmful effects on the whole environment.

[33] Maitri Porecha, "SC admits pleas against mobile tower radiation" *The Hindu: Business Line*, Sep. 14, 2018, *available at*:https://www.thehindubusinessline.com/info-tech/sc-admits-pleas-against-mobile-tower-radiation/article24949596.ece (last visited on Aug. 10, 2019).
[34] I.A. Nos. 2310-2311 IN W.P. (C) No. 202/1995.

CYBER VICTIMIZATION: ATTENTION FOR PREVENTION

Jatin Kalon[*]

I. INTRODUCTION

Cyber victimization requires urgent attention, especially when the Internet has become the need of the hour.[1] Governments, both at national and international levels are promoting digitalization as a new way of governance. Internet, which initially started with the desktop computer only, now has omnipresence. 'Mobile Phones', which once were known as the means of communication, are converted into 'smartphones' and are now used both as a fashion symbol and a way to do commerce. So many smartphones' based applications are available by which it is very convenient to do transactions.All this shows as to how cyberspace has created such a powerful and omnipresent virtual world without which we cannot live in the present times. And, therefore it is neither easy to prevent cyber-crimesnor easy to even detect them and more so, when identified, it is very difficult to prosecute the criminal and punish him. And, therefore, cyber victims are the most vulnerable of all; sometimes they are even not aware of as to who is the criminal. In this article, the author has *firstly*, tried to explain the term 'cyber victimization',*secondly*, the author has examined reasons as to why there is a need to give attention to the cyber victims and *thirdly*, as to what are the possible ways to prevent cyber victimization.

II. CYBER VICTIMIZATION

Cyber-victimization is a process of victimizing any human being by using information and communication technologies such, as the internet, computers, smartphones, etc. And, a cyber victim can be anyone, including, from an individual to the big-big organizations and many times, even the governments. In the traditional crimes, the offender and victims are required to interact physically, but in the cyber victimization 'there is no physical convergence in space and time of offenders and victims'.[2] Generally, people who spend more time on online transactions are more prone to cyber victimization of online fraud.We have often heard the sentence, 'Sorry! I had not sent that message. My mail was hacked'. We have also heard a number of the times that some political party's website has been hacked. Hacking is the most prominent cyber-crime. There isample evidence which clearly establishes the fact that individual organizations and governments are the most vulnerable cyber victims.[3] Similarare cyber sexual offences, cyber bully, etc. In cyber sexual offenses, it is often seen that the victims are harassed by cybercriminals by sending them morphed images, messages, etc. Constant threats are also made to cyber victims, which creates mental and physical stress. Many times, this has led to psychological disturbances of the cyber victims. And, because Cyber-crimes are increasing every day, therefore there is a strong need to do research on cyber-victimization and how to prevent it.

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[1] Jacqueline D. Lipton,"Combating Cyber-Victimization"26(2) *Berkeley Technology Law Journal*1103-1155 (2011).

[2]M. W.Kranenbarg, T. J.Holt, *et.al.*, "Offending and Victimization in the Digital Age: Comparing Correlates of Cybercrime and TraditionalOffending-Only, VictimizationOnly and the Victimization-Offending Overlap"40(1) *Deviant Behavior* 40-55 (2019).

[3]United Nations Office on Drugs and Crime, "Cybercrime" (2013), *available at*: https://www.unodc.org/documents/data-and-analysis/tocta/10.Cybercrime.pdf (last visited on July 05, 2019).

III. TYPES OF CYBER VICTIMS

All internet users are vulnerable to the cyber-attacks. It is found that most of the crimes in cyberspace are the online version of the traditional forms of crimes.[4]Internet users are harassed by unsolicited digital communications or interactions that threaten to defame. This platform is being used by the perpetrator to victimize or bully through abusive or humiliating comments or pictures, and personal identification.[5] Individual social media and digital footprints are used to harass, intimidate and cyberstalk.[6] It has been seen that the victims also suffer identity theft and are subjected to malware and viruses.[7] There are primarily three types of abusive online conducts, Cyber-bullying, Cyber-harassment, and Cyber-stalking[8] and in all these three categories, the victims face mental harassment, which at times, compels them to end their lives. Cyber-bullying often happens in the case of juveniles, where one person tries to dominate over the other students and this is very commonon social sites. Similarly, in Cyber-harassment, the harassment is done on social media sites, by either using vulgar languages or by sharing some verypersonal information on social media. And, in Cyber-stalking, the conduct of the accusedis directly aimed at the cyber victim, as the person starts following the other person everywhere, intrudes into personal social media accounts and tries to access almost every cyber account.

'Online sexuality' like 'pornography, sex shops, sex work, sex education, sex contacts, and sexual subcultures' which engaged large volume of Western people irrespective of age, gender and sex.[9] While Doring[10] argues internet sexuality should not be considered as ‘‘virtual pseudo-sexuality” in comparison to ‘‘real sex” as 'online dating' services' is a successful mechanism to meet the sexual partner in the real world. Cyber sexuality has both positive and negative consequences. In a positive way, it gives sexual satisfaction without facing sexually transmitted diseases but the negative side is that it has an adverse impact on the sexual attitude and identities. All these offences are severe in nature and cause extreme cyber-victimization.

IV. CYBER VICTIMS: IMPACT OF CYBERCRIMES ON BUSINESSES AND INSTITUTIONS

Every crime plays a negative role in the lives of the victims and cyber-crimes also have a negative impact on all the businesses and institutions and particularly on the finance sector. The cyber-criminals steal the confidential data and other critical information by using various types of malware, or by simply hacking the server or the websiteof the businesses and organisations. They can even spread viruses.[11] The above threats forced companies especially online/ e-commerce companies to spend huge amounts on digital security.

[4]A. Baxter, “Improving responses to cyber victimisation in South Australia” (2014), *available at*:http://www.victimsa.org/files/cybercrime-report-2014.pdf (last visited on July 09, 2019).
[5]*Supra* note 1.
[6]L. Roberts, “Cyber Victimisationin Australia: Extent, impact on individuals and responses” 6*Tasmanian Institute of Law Enforcement Studies*1–12 (2008).
[7]Supra note 2.
[8]Supra note 3.
[9]N.M. Doring, “The Internet’s impact on sexuality: A critical review of 15 years of research” 25(5) *Computers in Human Behavior* 1089-1101 (2009).
[10]*Ibid*.
[11]P.R.J. Trim and Y.I. Lee, “Issues that managers need to consider when undertaking research relating to the cyber environment”, in P. R. J. Trim and H. Y. Youm (eds.), *Korea-UK initiatives in cyber security research: Government, University and Industry collaboration* 66–79 (Republic of Korea: British Embassy Seoul, 2015).

Sometimes, the budget of digital security is extremely huge as compared to the rest of the expenses. There are various individual organisations which provide special digital security services to the governments and the other organisations, such as, Norton Anti-Virus, and others.

A. IMPACT OF CYBER-CRIMES ON THE HEALTH OF CYBER VICTIMS

Health is wealth, but when the wealth is lost in a cyber-crime then the health automatically derails. The impact of cyber-attack on the individual victims can be seen directly on their health and sometimes,the victims even suffer depression, fear and anxiety, mental trauma and in extreme cases, even suicide.[12]Cyber-attacks directly affect the savings, financial assets and credit ratings and sometimes employment too.[13]The financial cost to an organisation and businesses to prevent cyber victimization is sometimes very high. Various cyber-crimes include hacking, defrauding, extortion and stealing of financial and intellectual assets of the firms/entities/individuals. There are various types of cyber-crimes can be happened with the Firms, such as, they can be hacked, defrauded, extorted and have their financial and intellectual assets stolen. Not only this, their brand and name value can also be compromised in cases of severe cyber-attacks. According to Google, hackers steal almost 250,000 web logins each week[14] and the average cost of cybercrime for an organization has increased from US$1.4 million to US$13.0 million.[15]Not only the individuals but the governments havealso been targeted for taking political and financial advantages. Maximum information of government is available online which invitesa sophisticated and severe systematic attack on the critical information and infrastructures.

V. CAUSES OF CYBER VICTIMISATION

The first step of the Cyber-criminals is to identify their soft targets in the cyberspace. For instance, they constantly use public announcements, as a means to identify their soft targets. Children and aged persons are more prone to cyber-crime than anyone else. Like a year back in India, there was a public announcement that every bank account holder should connect their Aadhar card details with the bank accounts. Now, these cyber-criminals started making calls to the persons on behalf of the bank and started pressurizing them to share their phone number, and Aadhar details so that their bank account can be linked with the bank accounts. And, by this process, people voluntarily started sharing their confidential details with the cybercriminals and ended up losing their money. This is not the only instance, there isa plethora of such pending complaints and further, many cases even go unreported. It is, therefore, necessary to examine the causes of Cyber-victimization. There are various other types of cyber victims also. It is seen in many cases, that women harassment clips are made available on social media, which causes tremendous stress to cyber-victims. Similarly, in many cases, it has also been found that cyber financial frauds are caused in which, the most vulnerable part of the society, children and aged persons are the victims. In fact, the world is facing another threat of cyber terrorism where the victims are going to be all the citizens of the county.

[12]R. Dredge, J. Gleeson, *et.al.*, "Cyberbullying in social networking sites: An adolescent victim's perspective" 36 *Computers in Human Behavior*13–20(2014).
[13]*Supra* note 6.
[14]See https://money.cnn.com/2017/11/09/technology/google-hackers-research/index.html (last visited on July 05, 2019).
[15]See https://www.accenture.com/us-en/insights/security/cost-cybercrime-study (last visited on July 05, 2019).

Victims of cyber-attacks, often, are rich and wealthy people and organizations, banks, casinos, financial firms, etc. And, it is very difficult to first, identify the criminals in cyberspace, and even more difficult to arrest them. This is one of the major reasons forincreasing cyber-crimes because the criminals are aware of the fact that it is not easy to identify the, and the herculean task is to arrest them. The followings are the main causes of cyber victimization.

A. Saving Oneself in the Cyber-world

While working in cyberspace, many of cyber users are not aware of the safeguards attached with it, such as, how to secure oneself from the cyber hacking, when they are logged in through their desktop, laptop, smartphones, etc. In fact, in a number of cases, it is found that the cyber victims found noting 'ID' and 'Passwords' of their applications, phones, etc. in a notebook accessible to all or in the mobile phones, which if stolen, can lead to loss of complete data. Therefore, ignorance or unawareness of internet users has made them more vulnerable to cyber-attack. It is very easy for the Hackers to steal or access internet users' codes or retina images or advanced voice recorders of those internet users, and it is further very easy for them to fool biometric systems easily and bypass firewalls, which can be utilized to get past many security systems.[16]

B. Data is Available in a Compatible Format

One of the major cyber-crimes is stealing one's data. In today's world, data is everything. Everybody needs data and due to excessive demands of data, there is an increase in number of data theft cases. The smartphones and computers have a unique quality to store maximum data in minimum storage. This unique feature helps the cybercriminals to steal data and information from the machine's storage easily and victimize the users and many times, this results into demand for ransom, defame or killing the victims. There are various reported cases, where stolen data was used for ransom and in many cases, victims give up by ending their lives.

C. Computer Programming is Complex

Computers and smart devices operate through millions of codes and the human capabilities are very limited and therefore, the possibility of negligence increases. Even a single negligent step is enough for cybercriminals to victimize the victim by accessing or controlling their computer or any other smart system.

D. Negligible Reporting of Cyber Crimes

In many cases, people, very late get to know that they are cyber-victims. All the internet users are not aware ofthe fact that police complaintscan be filed about cyber victimization. In fact, every police station has a cyber cell to report cybercrime cases. Yet, very few cases are reported at the police station. Even, sometimes the police officers themselves are not aware of the provisions of IT Act 2000. Therefore, many of the instances of cyber-victimization remain unreported.

[16]See https://krazytech.com/technical-papers/cyber-crime (last visited on July 09, 2019).

Cybercrime is nothing but human destructive activities in the cyberspace, which lead to severe destructive results.

VI. THE WAYS OF TACKLING CYBER-VICTIMIZATION

We are aware of the fact that cybercriminals are sharp in their activities, but only by taking certain precautions, one can no doubt save oneself from the cyber-attacks. One should be aware of the fact that every person is vulnerable, when he connects his electronic machines to the internet. Below, certain steps have been discussed to tackle Cyber-victimization.

A. Using Random Passwords

Most of the cybercriminals before hacking computers get personal information of the victims so that by using that information, they can easily hack their e-mail and other accounts. It is, therefore, necessary to know that, internet users must not use personal information in their IDs and Passwords, such as, one must not use birthday date, year, son's or daughter's name, date of birth, etc. as either e-mail IDs or passwords. One should always use random numbers and alphabets, caps lock feature, numbers, and symbols for making passwords.

B. Using Firewalls and Security Software

There are various ways of protectingthe computer system from cyber-attacks. One of them is to use firewalls and the other is to use various types of customized security software available. The government sites are managed and controlled by the government's specialized agencies. While in the case of big businesses, they either have to set up their separate departments to continuously check updates and firewalls of the websites or they take specialized services from other big companies for securing and protecting their sites and data from hacking. E-Commerce companies such as, Flipkart, Amazon, Infibeam, etc.use secure platforms for online transactions and keep updating their sites for better performance and protection. In short, everyone including governments is focused on taking measures to keep the computer system, data, and server, safe. And, they spend huge amounts on cybersecurity to protect them.

C. Combating Cyber Harassment from SocialMedia

Cyber-victims are most vulnerable to crimes such as, cyber-harassment, because any news on social media spreads like wildfireand comments and reviews start coming in within minutes. It is therefore essential to know as to how to combat it. On social media sites such as, Facebook, there are provisions for reporting the contents, which can be used to inform the social media provider about the harassment the victim is facing[17]. In this way, not only strict action is taken against the cyber-criminal, but it also helps the cyber-victim not to fall prey to mental stress and trauma.

VII. EMPOWERING CYBER-VICTIMS

[17] Tom van Laer, "The Means to Justify the End: Combating Cyber Harassment in Social Media" 123(1) *Journal of Business Ethics*85-98 (Aug., 2014).

It is therefore essential to empower the internet users who become cyber-victims so that they not only save themselves from the cyber-attacks but, they also help in authorities to catch hold the cybercriminals. It is only by empowering cyber-victims with the requisite knowledge that cyber-victimization can be avoided. There are various e-initiatives taken by the Banks and Income Tax Department by issuing time to time notices in the newspapers regarding fake calls demanding Bank Account Number or Permanent Account Number (PAN) issued by the Income Tax Department or Aadhar Number. In fact, the customers are informed by the banks and Income Tax Department, directly *via* e-mails and also on their registered mobile phone numbers. By dissemination of timely information like this, the cyber-victims can be empowered. The solution to cyber-victimization is to take timely-precautions and all the possible preventive measures to save oneself from cyber-crimes such as, online fraud and not to panic at any time and immediately report any such suspicious event. By taking the above preliminary steps, cyber-victimization can be prevented.

VIII. CONCLUSION

Cyber Crimes have become a big challenge which has engulfed almost everybody. Every function of the government is executed on the internet. All the banks, public transport system, businesses, stock exchanges, etc. are completely dependenton internet for their smooth running and therefore, there is a constant threat, of securing the network from the cybercriminals, because any cyber-attack will make the situation precarious. In fact, the security of the State is also internet-based, and therefore, the threat is alarming and deserves urgent attention.

A TALE OF CHANGING PROSPECTIVE OF WELL- KNOWN TRADEMARKS IN INDIA

Varsha Dogra*

"Every Trade Mark you build adds to the financial value of your business, much more than your tangible assets"
— Kalyan C. Kankanala[1]

I. INTRODUCTION

In this new era of social networking and its broadcasting, the creative advertisement is prevailing with time; easiest way to reach target customers and to fascinatedly associates with the product or services. This is the most growing culture spreading its tentacles and customers being aware of marks related with products and services. But this is not an easy task to get famous and to connect with target customers. To become famous in India or globally; one is required a huge amount of money, resources, creativity, more toil as well as time spend with motive to attain popularity[2].

In the world of competitive market, gaining the tag of a "well- known mark" is most likely to achieve the stage of nirvana.[3]The protection provided to well- known trademarks is the outcome of all the judicially evolved precedents which are set up by Indian courts. With the changing idea of globalization policies, the IP laws alleviate foreign companies to invest in India which permit the use of their brand names in India. Although in India there was no specific provision relating to well-known trademarks before the Trademark Act 1999. Presently, the new rule 124 is added in 2017 which created a lot of buzz[4].

II. WHAT IS WELL-KNOWN TRADEMARK?

"A trademark is not simply an image, a design, a slogan or an easily remembered picture. It is a studiously crafted personality profile of an individual, institution, corporation, product or service."
—Daniel J. Boorstin[5]

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[1]Fun IP, Fundamentals of Intellectual Property quotes, *available at*, https://www.goodreads.com/work/quotes/24076699-fun-ip-fundamentals-of-intellectual-property(last visited on June 18, 2020).

[2] Mathew Thomas, *Understanding Intellectual Property* 131-132 (Eastern Book Company, Lucknow, 1st edn., 2016).

[3] In philosophy of Hindu, "Nirvana" relates to the state of bliss gained by liberating oneself from desire, jealousy, ignorance, and anything holding one back. The state of Nirvana is considered to be free yourself from fear and death.

[4] Sonal Joshi and Vikash Singh, "Provision of well-Known Mark under rule 124 of the trademark rule 2017" 21 *H K Acharya And Company Intellectual Property Law News*, *available at*: http://www.hkindia.com/news_letter/trademarks/58/trademark%20issue-21.html?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration(last visited on June 18, 2020).

[5] Quote *available at*: https://www.brainyquote.com/quotes/daniel_j_boorstin_103178 (last visited on June 11, 2020).

Section 2(1)(zb) of the Trademark Act, 1999,[6] explain the meaning of'trade mark'. The section elaborates thattrademark is any sign, shape or logo which has ability to represent graphically that differentiate between goods and services from the goods and services of its contenders.The whole concept of well- known trademark is little baffled in the field of intellectual property. But researcher consider the concept the most baronial in true meaning. Section 2(1) (zg) of The Trademark Act, 1999 defines *"well-known trade mark" in relation to trade of goods and services, the mark is required to become familiar in substantial segment of the public*[7].The concept of Well-known Trademark spring up with a word that is reputation. The concept originated first time in 17th century with a case named as *JG* v. *Stanford*[8] . It was held in the case that the law of passing off prevents commercial dishonesty on the part of traders.[9]For instance,mother dairy is a registered well-known trademark. This implies that the company can register the mentioned term or mark as mother dairy of goods and services. No other party or company can register its products or services as mother dairy in its term or trademark[10].

Listing of Well-known trademarks are provided on the website of Trademark Registry in India. Presently, 97 trademarks are listed as well- known trademarks in India. For example: - Mother dairy, Siemens, Vogue, ZEE (with reference to services like media, entertainment, and infrastructure), India Gate, TCS (for Software development), Bajaj, Bisleri, BBC, Google, and Revlon etc.

India Gate[11]

Mother Dairy[12]

) of The Trademark Act, 1999 defines *'trade mark' as* a mark capable of being represented which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours.

[7]In relation to any goods or services, means a mark which has become so to the substantial segment of the public which uses such goods or receives such services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services.

[8] (1617) 79 ER 400.

[9] Vivek Kumar Chaudhary, "Protection of Well-Known Trademarks and Weakening of Honest Concurrent User Defence" 15 *Journal of Intellectual Property Rights*293 (2010), *available at*: http://nopr.niscair.res.in/bitstream/123456789/10008/1/JIPR%2015%284%29%20293-301.pdf (last visited on June 18, 2020).

[10]Dr. M. K. Bhandari, *Law Relating to Intellectual Property Rights* 131 (Central Law Publication, Allahabad, 1stedn. 2006).

[11] Image available at: https://www.google.com/search?q=india+gate+well+known+trademark+mark+on+product&tbm=isch&ved=2ahUKEwirzdyE_sHpAhV0DbcAHSRHDdIQ2-cCegQIABAA&oq=india+gate+well+known+trademark+mark+on+product&gs_lcp=CgNpbWcQA1Cc8QFYhesCYKPuAmgAcAB4AIABngKIAcYSkgEGMC4xNC4ymAEAoAEBqgELZ3dzLXdpei1pbWc&sclient=img&ei=FuXEXqvqEPSa3LUPpI61kA0&bih=657&biw=1366&rlz=1C1CHBF_enIN884IN884#imgrc=ljth2UvY8VdMbM&imgdii=Gv-0pRHoTBXypM (last visited on June 12, 2020).

[12] Image available at: https://www.google.com/search?q=mother%20dairy%20well%20known%20trademark%20image%20on%20product&tbm=isch&hl=en&hl=en&tbs=isz%3Al&rlz=1C1CHBF_enIN884IN884&ved=0CAEQpwVqFwoTCIiI

BBC[13]

III. How Well-Known Trademark Comes Into Picture?

In September, 1999 a Joint Resolution was passed by the General Assembly of the WIPO[14] as WIPO Resolution in concern with well-known trademarks.A concept of protection of well-known marks was first introduced by the *Paris Convention*[15] *inArticle 6bis*[16]. Significantly, while in drafting of the TRIPs Agreement, provisions of well-known marks elaborated by Article 6bis of the Paris Convention were incorporated as *TRIPs Articles 16.2 and 16.3.*

The Paris Convention defined well-known marks in respect of goods only. It provided protection in relation with goods which are identical or similar in nature. Further, The TRIPs Agreement further extended the protection which was mentioned in Paris Convention.[17] The protection was provided to member Countries having registered trademark against the use of mark in relation with not only goods but services also. TRIPS provided protection to goods

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wtP8wekCFQAAAAAdAAAAABAD&biw=1349&bih=657#imgrc=5wcWoCoEzoIUIM&imgdii=ZhHvQBs7iewahM (last visited on June 12, 2020).

[13] Image available at: https://www.google.com/search?q=BBC++well+known+trademark+mark+on+product&tbm=isch&ved=2ahUKEwirzdyE_sHpAhV0DbcAHSRHDdIQ2-cCegQIABAA&oq=BBC++well+known+trademark+mark+on+product&gs_lcp=CgNpbWcQA1CWBljsG2D8IWgAcAB4AYABqwSIAeYXkgELMC4zLjIuMC4xLjOYAQCgAQGqAQtnd3Mtd2l6LWltZw&sclient=img&ei=FuXEXqvqEPSa3LUPpI61kA0&bih=657&biw=1366&rlz=1C1CHBF_enIN884IN884#imgrc=prNkGTe4N13DTM (last visited on May 20, 2020).

[14]World Intellectual Property Organization.

[15] Article 6bis [Marks: Well–Known Marks] (1) The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well–known mark or an imitation liable to create confusion therewith. (2) A period of at least five years from the date of registration shall be allowed for requesting the cancellation of such a mark. The countries of the Union may provide for a period within which the prohibition of use must be requested. (3) No time limit shall be fixed for requesting the cancellation or the prohibition of the use of marks registered or used in bad faith.

[16] Professor G. H. C. Bodenhausen, Director of BIRPI, *Guide to the Application of the Paris convention For the Protection of Intellectual Property as revised in Stockholm in 1967*, 89 (BIRPI), *available at*: https://www.wipo.int/edocs/pubdocs/en/intproperty/611/wipo_pub_611.pdf (last visited on June 18, 2020).

[17]Tam Phan Ngoc, *Well-known trademark protection. A comparative study between the laws of the European Union and Vietnam*138 (2011)(The Faculty of Law, Lund University), *available at*: https://portal.research.lu.se/portal/files/5994712/4024269.pdf (last visited on June 18, 2020).

and services both. It also broadened the scope in the field of dissimilar goods and services.[18] Considerably, although both these conventions pondered on well- known trademarks but did not provide the true meaning constituting well-known marks. Therefore, it was left to define the definition of well-known to the individual Member States. In 2003, India came up with a new Trade Marks Act, 1999 constituting provision for the protection of well-known marks. The provision of well-known marks under this Act was influenced by the WIPO Resolution[19]. In *McDonalds Corporation* v.*Joburger*,[20] the court of South African held that "*the term well-known should be tested on the basis of whether sufficient people knew the mark well enough to entitle it protection against deception or confusion*"[21].

IV. THE POSITION OF WELL-KNOWN TRADEMARKS BEFORE THE TRADEMARK ACT, 1999

Prior to the Act of 1999,the well-known trademarks were guaranteed protection under passing off principles based upon common law. Well-known trademarks gained their recognition on the criteria based upon their global reputation and reputation in India.The one of the most notable casesin relation to the well-known trademarks was *Daimler Benz* v. *Hybo Hindustan*[22] where suit for passing off was initiated by the plaintiff. The Court held that the Defendant were restrained from using the questionabletrademark. The court further explained that *'Benz' is big brand name dealing with manufacturing of one of the finest model of cars in the world. Any other party using the same name as 'Benz' for ordinary goods like undergarments would definitely not justiciable.* Similarly, one of the landmark cases was *Whirlpool Co. &Anr.* v.*N.R. Dongre*[23].The Court in this case applied the principle of the *trans-borderreputation.* The court stated that *the plaintiff was having reputation globally for its product 'Whirlpool' for the manufacturing of washing machines. In India, the Plaintiff was selling product to the US embassy and it was published in international magazines which also circulated in India.* The court granted injunction against defendant from using the similar mark.

V. CRITERIA OF WELL-KNOWN TRADEMARKS

The Trademark Act1999 provides an exclusive definition explaining well-known trademarks. Section 2(zg) provides definition of well-known trademark dealing with the marks associated with goods or services.Sections 11(2), 11(6), 11(7), 11(9) and 11(10) of Trademark Act, 1999 relates with well-known trademarks.

Section 11(2) explained the protection in relation to the well-known trademarks by protecting and recognising the marks in all the classes of goods and services.

Sections 11(6) and11(7) of the Act penned down the criteria for determination of well-known trademarks.

Key factors -

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[18] Uruguay Round, TRIPS Agreement, WIPO, *available at*: https://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm (last Visited on June 19, 2020).
[19]*Supra* Note 16.
[20] 1997 (1) SA 1 (A).
[21]*Ibid.*
[22]1994 PTC 287 (Del). The defendant used the mark for the manufacturing and selling of undergarments and used the logo which was similar to the plaintiff's logo 'Benz'.
[23] 1995 PTC 21.

a. **Knowledge about the mark in relevant sections of the public:**The Registrar should consider the following factors to determination of well-known trademark in a relevant section of the public. -
    i. Actual number of customers.
    ii. People involved in the supply chain of goods or services.
    iii. Number of business units dealing with the goods or services.

In *Rolex Sa* v. *Alex Jewellery Pvt. Ltd. &Ors*.[24],the Court held that:"Over the years and very quickly in recent times, the international boundaries are disappearing. With the advent of the internet in the last over ten years it cannot now be said that a trademark which is very well known elsewhere would not be well known here. The test of a well-known trademark in section 2(zg) is qua the segment of the public which uses such goods"[25]

b. **The duration, geographical area, and extent in which the trademark is used:** The Statute did not pen down the criteria for acquired distinctiveness of the marks but legal principles for the same was settled through judicial precedents. In *ITC Ltd.* v. *Britannia Industries*[26]the Delhi High court provided the principle that "to acquire secondary meaning it is not necessary that product is in the market for number of years. If a new idea is fascinating and appeals to the consumers, it can become a hit overnight".
c. **The duration, geographical area, and extent in which the trademark is promoted:**Registrar should consider the extent of marketing of the mark. In *R. Dongre and Anr.* v.*Whirlpool Corporation and Anr.*[27], the Apex Court considered the trans-border reputation of the trademark "Whirlpool". Although in India, the Whirlpool at that time was not practically in use or existence.
d. **Registration orapplication for registration of the trademark to the extent they reflect the use or recognition of the trade mark.**
e. **The record of successful enforcement of the rights in that trade mark including the record stating that the trademark has been recognised as well known by any court or Registrar**[28].

Section 11(9)specifically mentions certain conditions which are not necessarily required for grantingthe mark as well-known trademark. Provision provides that for the grant of protection of the trademark in India; neither the registration or existence of business in India nor the knowledge of mark to masses as whole is required. This provision connotes the trans-border reputation of trademark[29].

Section 11(10)provides thatwhen there is any opposition filed relating to the application of registration, the registrar shall protect the well-known trademark relating to the similar or identical trademark and should consider the mala-fide intention of respective parties.[30]

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[24]2009 (41) PTC 284 (Del).
[25] Elizabeth Verkey, *Intellectual Property* 191 (Eastern Book Company, Lucknow, 1stedn. 2015).
[26]CS (COMM) 1128/2016.
[27]*Supra*note 21.
[28] T. K. Bandhyopadhyay and Saurabh Bindal, *Intellectual Property Law- An Introduction* 87 (Eastern Book Company, Lucknow,1stedn. 2015).
[29] Dr. B. L. Wadehra, *Law Relating to Intellectual Property* 137 (Universal Law Publication, New Delhi, 5thedn. 2011).
[30] P. Narayanan, *Law of Trademarks and Passing Off* 218(Eastern Law House, Calcutta, 6thedn. 2004).

VI. THE TRADE MARK RULES 2017: - RULE 124

The new Rule 124 was added in the Trade Mark Rules of 2017.As per Rule124 the owner of the trademark can file an application in form TM-M for grant of "well-known" trademark. Prior the Rule 124, the picture was different where a trademark could be declared well-known by registrar as per section 11(6) of Trademark Act, 1999 or by judicial pronouncements.With the introduction of procedure in the Rule 124, presently an owner of the trademark can apply for status of a well-known trademark even without knocking the doors of the court. Simply, researcher concludes, Rule 124 guarantees a trademark tagged as"well-known" trademark merely by an application along with fees of Rs. 1, 00,000 to the registry as per Schedule 1 entry 18. Through e-filing services, it is mandatory to fill the online application along with required documents which will be scrutinized by the registry[31].

VII. WELL-KNOWN TRADE MARKS AND DOCTRINE OF TRADE MARK DILUTION

There is no exclusive definition for the concept of dilution of trademark but the traces of it can be inferred from section 29(4)[32] of the Trademark Act1999. In *Tata Sons Ltd.* v. *Manoj Dodia&Ors.*[33], Delhi High Court garnered the Dilution doctrine. When capacity to beunique and distinctive of a well-known trademark is diluted or destroyed, this leads to dilution of well-known trademark. If the distinctiveness of well-known trademark is destroyed by any mark, this will lead to change in perception and consequently effects the selling power as well as market value of the product. Well-known trademark is tarnished by use of trademark for the goods or services having inferior quality which persuade the perception in the mind of the public in relation to that goods or services. The customer loses its confidence about the expected standard and quality of the product[34].

VIII. CONCLUSION

Researcher summed up the article and observed that the shift of protection of trademark from 'consumer deception' to protect the distinctiveness of trademark. Earlier traditional requirement was based upon proof of confusion and deception of trademark infringement as well as passing-off. Presently, it has become secondary consideration to protect the well-known trademarks in India.

Some provisions of the statute create muddiness in respect of the two concepts that is "well- known trademarks" and "mark having reputation" in India as it comprises the lack of guidance in section 29(4) and leads to inconsistencies. The disarray in the statute somewhere hampering the right interpretation of the related provisions for the protection of marks which falls in the category of well-known marks. Whereas the definition of well-known provides no parameters.The inconsistencies in the definition of a "well-known mark" of the Trademark Act provides noprecise formula to infer whether a mark is well-known or not.The ambiguity

[31]Dubey and Partners – Advocates, "Well-Known Marks – Trademark Rule 2017" (Oct. 2017), *available at*: https://www.dubeypartners.com/media/newsupdate/trademarksrules2017.pdf (last visited on June 19, 2020).

[32]A registered trademark is infringed by a person who not being a registered proprietor or person using by way of permitted use, uses in the course of trade, a registered mark which has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trademark.

[33] 2011 (46) PTC 244 (Del).

[34] Supra note 31.

is because of words "*a mark which has become so to the substantial segment of the public which uses such goods or receives such services*" still have wider scope of interpretation. The definition will not be able to reach a satisfactory conclusion regarding the mark to be well-known in nature. Different courts would rely on different considerations as per different facts and circumstances to decide claim of parties.

Researcher concluded that the dubiousness arises in concern with Rule 124. With the introduction of new ofRule 124, the more power is in the court of trademark registrar office that would lead to human errors. The errors could be intentional or unintentional. The big brand names having reputation and goodwill become well-known marks will grab its security from future misuse. Researcher summed up the article that the whole criteria of amendment Rule 124 is somehow alien to the parent scheme of Trademark Act, 1999. Rule 124 grants a mark as well known by simply filing or requesting an application to the Registry with required documentation. These provisions of the Trade Mark Act is required to be amended thoroughly keeping in mind the complications and introduction of this new procedure. It would defeat the purposeof the enactment if any party takes the undue advantage of the rules prescribed.

IX. SUGGESTIONS

Every trademark owneraspires to become well-known trademark but very few are lucky to have the status of well-known trademark. The Registrar from Trademark registry has provided with immense powers as per Rule 124 of Trademarks Rule 2017 for the criteria of registration of well-known trademarks. With the existence of this new rule there is a huge flow in number of applications,as power comes with great responsibility, registrar should be very heedful as to avoid intentional or unintentional errors. Another concern researcher would like to discuss that the whole concept of granting status of "well-known" trademark defines vast protection as the mark having recognition amongst the large section of the public not just a "relevant section of the public".So, the status is little dubious which requires changes. Foreign company without having any existence in India can have the status of well-known trademark by proving cross border reputation which hampers the growth of upcoming Indian trademarks. There should be stringent measures so that foreign companies should not take undue advantage.

TEXTBOOK ON INDIAN COMPETITION LAW. By Dr. Versha Vahini, Lexis Nexis, India, 2020,Pp.iii-280, Hardcover:Rs. 550/-, ISBN:978-93-8999-128-4.

Dr. Amrendra Kumar[*]

In this era of globalization, most of the nations across the world have not only favored free trade and fair market for sustainable economy, but also adopted robust competition law in their domestic jurisdictions. From last two decades, there have been major competition related issues surfacedin legal arena due to free and open marketthrough anti-competitive agreements and use of dominant/monopolist position by enterprises or industries for their goods and services. India, being one of the major developing economies has also followed the path of competitive market and developed its own competition law jurisprudence for sustainable economic growth.The legislative history of competition law in India could be traced down with the major enactment of 'Monopolies and Restrictive Trade Practices Act, 1969' which remained operational with its effectiveness and weakness till the year 2002. Further, the 'Competition Act, 2002' was enacted with aims to prevent practice having adverse effect on competition; to promote the competition in markets; to protect consumer's interest; and to ensure freedom of trade in Indian markets. The major subject matters regulated in this regard are: prohibition of anti-competitive agreements; abuse of dominant position of enterprise; and regulation of combinations besides other competition related policies and institutional arrangements. Since then, the competitionlaw jurisprudence in India has taken firm shape with new amendments made, specific competition rules notified, orders and decisions given by competition authorities inspired by the competition related enactments of other jurisdictions such as United Kingdom (UK), United States of America (USA) and European Union (EU). Adding to her own part of contribution in this competition law jurisprudence, Dr. Versha Vahini, a renowned writer and scholar from India has made remarkable and timely publication of a book titled as '*Textbook on Indian Competition law'.*

The book in hand finds its unique place along with already published books as Vinod Dhull's '*Competition Law Today: Concept, Issues and Law in Practice (2019)*' and T. Ramappa's '*Competition Law in India: Policy, Issues and Developments (2013)*'. It distinguishes itself with other competition law literatures due to its blend of theoretical and practical approach applied for economy, law and policy interface for free and fair competition; descriptive and analytical method used in interpretation and explanation of provisions and decisions on competition related matters; and reference of competition laws of other jurisdictions on different aspects and places. The book contains twelve chapters analyzing the fundamentals of competition law and policy; basic principles of competition law, important and relevant competition related definitions and expressions; nature, kinds and exceptions of anti-competitive agreements; abuse of dominant position; regulation of combinations; and composition and power of competition authorities established in India. At the end, it also includes highlights of the 'Raghavan Committee Report' for the background and justification of competition law in India.

In its first chapter, the book deals with fundamentals of competition law and policy introducing the concept of competition, its underlying theories and economic basis for development of law and policy. It also outlines the rationale and need for competition policy and law; its economic, social and political goals; and approaches required for determining

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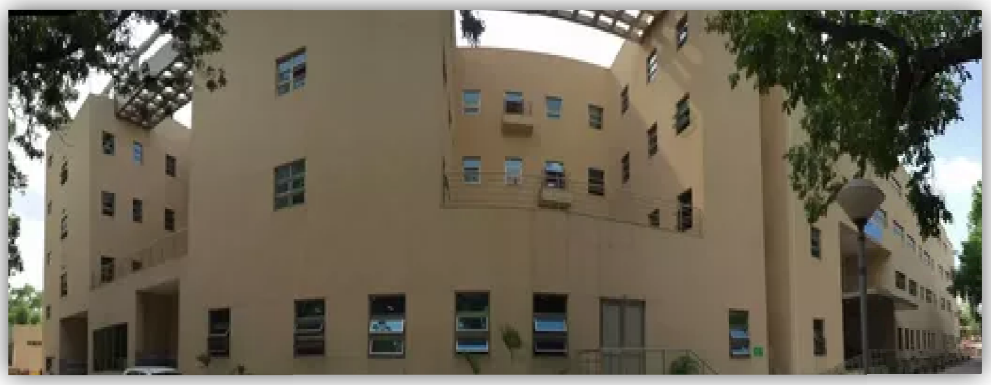
choices of such goal(s) by the competition authorities. The second chapter discusses general framework of competition law in India outlining the historical trails, goals, scope and application in territorial and extra-territorial jurisdiction. It emphasizes at the end that 'the existing competition law endeavors to balance the consumer welfare standard and efficiency standard for progressive society.' Further, third chapter explains competition related relevant and important definitions and expressions required for interpretation and application in given context. The terms 'agreement'; 'understanding'; 'person acting in concert'; 'relevant market'; 'relevant geographic market'; and 'relevant product market'are adequately analyzed as per section 2 of the Act. 'Appreciable adverse effect on competition' has been examined giving the context from USA, EU and India. In this context, chapter four described two (Il)legality principles such as 'Rule of *Reason*' and 'Rule*Per Se*' for restraint of trade or determining appreciable adverse effect on competition giving examples from USA, EU, and India. However, Supreme Court of Indiahas recognized, upheld and applied both the rulesfor the agreements that causes or likely to cause appreciable adverse effect on competition on India.

Chapter five discusses about anti-competitive agreements in general, outlining its nature and kinds(horizontal and vertical), legal framework dealing with such agreements, and factors relevant for determining appreciable adverse effect applicable to horizontal and vertical anti-competitive agreements with help of sections 3 and 19 of the Competition Act, 2002. In furtherance to this, chapter six specifically deals with 'horizontal agreements' as cartels for fixing the price and/or limiting the production, supply and distribution of goods and services in transport, chemical, cement, pharmaceuticals, film and travel industry. 'Refusal to deal' and 'bid rigging' are also analyzed taking the examples of cases form different sectors decided by the Competition Commission of India (CCI). Besides, chapter seven separately examines the 'vertical agreements' mentioned in section 3(4) of the Competition Act such as tie-in arrangements, exclusive supply agreement, exclusive distribution agreement, refusal to deal and resale price maintenance.All these kind of vertical anti-competitive agreements have been analyzed with relevant provisions of the Act and decisions of CCI and other courts.Further, chapter eight discusses certain exemptions and exceptions given against these anti-competitive agreements under the competition law in India. However, grant of such exemptions and exceptions does not weaken the enforcement of competition related provisions and decisions. Still, there have been analyzed certain exceptions given for the licensing of intellectual property rights and exemptions provided in the case of export agreements/cartels. Chapter nine provides the explanation on procedure for investigation and punishment for anti-competitive agreements/cartels as provided under section 26 of the Act. It also describes the leniency policy and programmesapplicable in USA, EU and India against the punishment prescribed and sanction imposed to the cartels for anti-competitive agreements.

Chapter ten deals with abuse of dominant position by the enterprises or cartels through occupying the strength in relevant market in India. It provides explanations on statutory provisions, procedures and punishments for the abuse of dominant position taking examples from automobile, media, real estate, sports, and software industries. With help of case laws, it categorically analyses 'exclusionary abuses' as well as 'exploitive abuses' done in relevant market by these sectors detrimental to consumer and the market itself. Apart from this, chapter eleven outlines the relevant regulation prescribed for combinations under the Competition Act. It defines the term 'combination' as merger, amalgamation and acquisition of person or enterprise on the basis of section 5 of the Act. Such person or enterprise in combination is prohibited from entering into anti-competitive agreements which have

appreciable adverse effect on competition within relevant market in India. However, the approval for the combination is given and regulated under sections 6, 29, 30 and 31 of the Act. This chapter interestingly analyses the regulation of combination in two stages: '*Ex Ante'* and '*Post Facto'*. The last chapter explains about the competition authorities established for the administration, facilitation, investigation and dispute resolution of competition related matters in India. It discusses the composition, power and jurisdiction of Competition Commission of India (CCI), Competition Appellate Tribunal (COMPAT) and Supreme Court (SC). At the end of the book, there has been added an annexure of chapter IV titled as 'Contours of Competition Policy' as a highlight of the report of 'Raghavan Committee' (2000).

The book is properly written and designed to provide the basic and updated information, explanation, and decisions on competition related matters in India. However, the book has been unevenly organized with content and scope in different chapters. Chapter four and elevenhave been devoted with very less pages compare to the chapter six and ten. It gives more emphasis on anticompetitive agreements and abuse of dominant position leaving other completion related issues and matters unbalanced with information and argument. The book also uses the laws and policies of other jurisdictions such as USA and EU, but avoided the reference of UK laws as by and large India follows the common law system in its jurisdiction. The role of 'Director General (DG)' and other related investigating agencies would have been given more place and reference in different chapters. There are certain emerging issues which are not dealt in this book such as competition advocacy, government intervention, and consumer education having deep relation with competition law in India. Still, this book provides comprehensive and clear standing on several vital areas of competition law through statutory provisions and rules, case laws from different jurisdictions, and procedures for investigation outlined in Indian context. It would be significant legal literature under competition law jurisprudence for the students pursuing bachelor and master course in law, economics and management. Above all, the author has tried her best with great zeal and devotion to bring this book in light of the day for legal studies.



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