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ARTICLES

ABUSE OF DOMINANT POSITION AND ITS LEGAL CONTROL UNDER COMPETITION LAW

JATINDRA KUMAR DAS*

ABSTRACT : Section 4 of the Competition Act, 2002 prohibits abuse of dominant position by an enterprise or a group, while Section 19(4) of the Act indicating factors which are to be considered while establishing abuse of dominant position by the Competition Commission of India (CCI). However, in determining the abuse of dominant position certain issues are to the examined such as: What is the concept of dominant position and why its abuse is prohibited? How the terms "enterprise" and "group" are defined? What are the criteria for determination of dominant position of an enterprise or a group? What is relevant market and what are its components? How the relevant geographic market and relevant product market are to be determined? What are the tools are to be used for identification of abuse of dominant position? What are the factors to be considered while establishing abuse of dominant position? This paper demonstrates the aforementioned aspects.

KEY WORDS : Competition Law, Dominant position, Enterprise, Relevant Market, Competition Commission of India.

I. INTRODUCTION

The concept of dominant position in competition law is an admixture of criteria relevant to determine the presence of market power and criteria relevant to find out the commercial power. While the former is based on economic principles which equate the dominant position with substantial market power, i.e., the power to increase prices and reduce output, the later suggests that dominant position is to be defined by reference to commercial power. Market power is a key concept in competition law.[1] In this connection, the term "market power" refers to the ability of a firm (or a group of firms, acting jointly) to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded.[2] Whenever an enterprise or group is in dominant position there is a chance of abusing its position which may adversely affect the fair competition in the market.[3] The Section 4 of the Competition Act 2002 has

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1. For detail discussion see Louis Kaplow, "On the Relevance of Market Power," 130 (5) *Harvard Law Review* (2017) pp. 1304-1407.
2. See Richard A. Posner and William M. Landes, "Market Power in Antitrust Cases", 94(5) *Harvard Law Review* (1980) pp. 937-996 at p. 937.
3. For various aspects of abuse of dominant position see John Temple Lang "Some Aspects of

prohibited abuse of dominant position and thus "No enterprise or group shall abuse its dominant position."[4] The reason behind of this prohibition is that the abuse of a dominant position is a way of inferring with competition in the market place by an enterprise or a group. Such an enterprise or a group may be in a position to disregard market forces and unilaterally impose trading conditions, fix prices etc. Some of the various forms of abuse are price fixing, imposing discriminatory pricing, predatory pricing, limiting supply of goods or services, denial of market access etc.

The Competition Act sets out the factors that are to be considered by the competition authorities in determining whether an enterprise or a group enjoys a dominant position.[5] The Act also provides the method for determining the relevant product and geographic market in which the dominant position is to be found.[6] The Competition Act defines when there is abuse of a dominant position.[7] Section 4 of the Act lists the anti-competitive practices which imposing unfair or discriminatory trading conditions or prices or predatory prices, limiting the supply of goods or services, or a market or technical or scientific development relating to goods or services, denial of market access, imposing on other contradicting parties obligations not related to the basic contract with them, and using a dominant position in one market to gain entry into another market or to protect that other market.

The Section 4(2)(a) of the Competition Act defines the "dominant position" which is similar to the one provided by the European Commission in *United Brand* v. *Commission of the European Communities*[8] case. In this case the Court observed that: "a position of strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitor, customers and ultimately of its consumers." Under Section 4(2) (a) of the Act the "dominant position" is defined thus:

> "[A] position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to: (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour."[9]

The aforementioned two expressions as mentioned in Section 4(2)(a) of the Act has been explained by the Competition Commission of India (CCI) in *Beliaire Owner's*

Abuse of Dominant Positions in European Community Antitrust Law," 3(1) *Fordham International Law Forum* (1979) pp. 1-50.

4. See Section 4(1). This sun-section 1 has been substituted by Competition (Amendment) Act, 2007 for "No enterprise shall abuse its dominant position" w. e. f. May 20, 2009. For the commentary on the amendment see Aditya Bhattacharjea, "Amending India's Competition Act", 41 *Economic and Political Weekly* (2006) pp. 4314-4317; "Bureaucrat as CCA Chief: SC Displeased with Government" *Economic Times*, November 21, 2003. For useful discussion on the issues involved and practice in other countries see T. C. A. Anant and S. Sundar (ed.), *Towards a Functional Policy for India* (Academic Foundation, New Delhi, 2006).
5. Competition Act 2002, Section 19(4).
6. Ibid., Section 19(4)-(7).
7. Ibid., Section 4(2).
8. [1978] ECR 207.
9. Ibid., Section 4(2), Explanation (a).

Association v. *DLF Ltd*.,[10] and held that DLF has contravened the Section 4 (2) (a) (i) and (ii) of the Competition Act, directly and indirectly, imposing unfair or discriminatory conditions in the sale of services. CCI found DLF guilty of abusing its dominant position in the market and imposed a penalty of Rs. 630 crores on DLF. The CCI further directed DLF to cease and desist from formulating and imposing such unfair conditions in its Agreement with buyers in Gurgaon and to suitably modify unfair conditions imposed on its buyers as referred to above, within 3 months of the date of receipt of the order on DLF. The Anti-Monopoly Law of the People's Republic of China of 2007 (AML) prohibits monopoly agreements, abuse of dominant market position, anticompetitive concentrations between undertakings, and abuse of administrative power to eliminate or restrict competition. A precondition for abuse of "dominant market position" is that the undertaking has such a position.[11] Under the AML the "dominant market position refers to a market position held by a business operator (undertaking) having the capacity to control the price, quantity or other trading conditions in a relevant market, or to hinder or affect any other business operator to enter the relevant market."[12] The anti-monopoly law of China identifies dominant market position with capacity to control the price, quantity or other trading conditions, while the Indian Competition Act identifies dominant market position with the position of strength. In *MCX Stock Exchange Ltd.* v. *National Stock Exchange of India Ltd.*,[13] the aspect of dominance and position of strength has been described by the CCI thus:

> "[T]he position of strength" is not some objective attribute that can be measured along a prescribed mathematical index or equation. Rather, it has to be a rational consideration of relevant facts, holistic interpretation of (at times) seemingly unconnected statistics or information and application of several aspects of the Indian economy. What has to be seen is whether a particular player in a relevant market has clear comparative advantages in terms of financial resources, technical capabilities, brand value, historical legacy etc. to be able to do things which would affect its competitors who, in turn, would be unable to do or would find it extremely difficult to do so on a sustained basis. The reason is that such an enterprise can force its competitors into taking a certain position in the market which would make the market and consumers respond or react in a certain manner which is beneficial to the dominant enterprise but detrimental to the competitors.

Section 4 of the Competition Act deals with abuse of dominant position, while Section 4(1) of the Act provides that no enterprise or group shall abuse its dominant

10. 2011 Comp LR 239 (CCI): [2011] 109 SCL 655 (CCI).

11. For detail discussion see Ksenia Belikova, General Approaches to Dominant Market Position, Prohibition of Abuse of Market Power, and Market Structure Control within the BRICS Countries," 3(1) *BRICS Law Journal* (2016) pp. 7-33 at p. 14. See also Bong Eui Lee, "Prohibition of Abuse of Market-Dominant Undertakings under the Monopoly Regulation and Fair Trade Act," 4(2) *Journal of Korean Law* (2005) pp. 61-81.

12. See Anti-Monopoly Law of the People's Republic of China of 2007, Article 17.

13. Comp LR 129 (CCI): [2011] 109 SCL 109 (CCI).

position and what matters shall be considered to be abuses of dominant position are given in Section 4(2) of the Act. The abuses of dominant position is taking place if an enterprises or a group (i) directly or indirectly, imposes unfair or discriminatory (a) condition in purchase or sale of goods or service, or (b) price in purchase or sale (including predatory price) of goods or service; (ii) limits or restricts (a) production of goods or provision of services or market there for or (b) technical or scientific development relating to goods or services to the prejudice of consumers; or (iii) (c) indulges in practice or practices resulting in denial of market access in any manner; or (iv) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or (v) uses its dominant position in one relevant market to enter into, or protect, other relevant market. Thus, the abuse of dominant position is taking place through an enterprise or a group which is always an issue for determination.[14] Now, question arises what is the meaning of enterprise or group?

II. DEFINITION OF ENTERPRISE OR GROUP

An enterprise or a group is formed by establishment of means of production with a permanent organisation and thus all enterprises contain both, material and human components. However, the legal theory of enterprise or group is only at an emergent stage.[15] The lack of a common understanding of enterprise or group should not be regarded as a limitation as such debate encourages a rethinking of the theoretical definition of enterprise or group and its legal structure.[16] The European Commission, the executive body of the European Union, has standardised the definition of micro, small and medium enterprises. This definition is appropriated beyond the geographical scope that falls under the jurisdiction of the European Union. The definition is based on the idea that the existence of different definitions at community level and at national level could create inconsistencies. If economists claim that small and medium enterprises are the backbone of the economy, how come they can't determine the number and the order of its disc?[17] Probably for this reason the Section 2(h) of the Indian Competition Act 2002 adopted a

14. See Pranti Shubha, "Emergence and Applicability of Indian Competition Law Regime," 5(2) *Bangalore Law Journal* (2014) pp. 211-217; T. Ramappa, "Competition Act, 2002: Some Points to Ponder" 36(7) *Chartered Secretariat* (2006) pp. 1032-1034; Kartick Maheswari, "Radious Clauses in Shopping Centres: Competition Law," 5 *Company Law Journal* (2006) pp. 65-75; S. K. Verma, "New Competition Regime of India: An Appraisal," 26 *Delhi Law Review* (2004) pp. 17-35.

15. See Khatuna Jinoria, "The Definition of Business Enterprise Overview of Legal and Economic Approaches," 1 *European Scientific Journal* (2014) pp. 130-135 at p. 130. See also Antonio Fici, "Recognition and legal Forms of Social Enterprise in Europe: A Critical Analysis from a Comparative Law Perspective," *European Business Law Review* (2015) pp. 1-29; Ovidiu Horia Maican, "Legal Status of Public Enterprises and Commercial Monopolies in the European Union," 3(1*) Juridical Tribune* (2013) pp. 90-100.

16. For detail discussion see Giulia Galera and Carlo Borzaga, "Social Enterprise: An international Overview of its Conceptual Evolution and Legal Implementation," 5(3*) Social Enterprise Journal* (2009) pp. 201-2028.

17. See Gentrit Berisha and Justina Shiroka Pula, "Defining Small and Medium Enterprises: A Critical Review," 1(1) *Academic Journal of Business, Administration, Law and Social Sciences*(2015) pp. 17-28 at p. 17.

specific legal definition of enterprise. According to Section 2(h) "enterprise" means-

> "[A] person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space."

plain reading of this definition indicates that for an entity to be classified as an enterprise for the purpose of this act, it needs to be engaged in the activities mentioned in the section like production, storage, supply, distribution acquisition etc or it needs engaged in the provision of services or in the business of acquiring, holding or underwriting of shares. Hence from a reading of this definition it can be said that the emphasis of the definition is more on the nature of the activity carried out by an entity. The definition does not seem to provide importance to the nature and purpose of an entity i.e. whether it is carried out for commercial, profit making or any other purpose. The word "activity" as used in the definition of "enterprise" in Section 2(h) includes profession or occupation.[18] In *Lal Pathlabs Pvt. Ltd.* v. *Arvinder Singh*,[19] the Delhi High Court observed that the Competition Act, 2002 defines "trade" *inter-alia,* as meaning business, profession or occupation relating to provision of any services etc. Similarly, the Indian Partnership Act, 1932 defines business as "including trade and profession". The court citing the decisions in *Institute of Chartered Accountants of India* v. *Director General of Income Tax*,[20] and in *Christopher Barker* v. *IRC*,[21] held that "all professions are businesses, but all businesses are not professions." Similarly, according to the Explanation to Section 2(h) of the Competition Act, "unit" or "division", in relation to an enterprise, includes (i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods; (ii) any branch or office established for the provision of any service.[22] However, the expression "branch or office" has not been defined in the Act. Besides this, while speaking of "branch or office" in the Act, it does not mention about goods, its sale, distribution or storage etc. In such a case the definition used in the Companies Act 1956 shall have the same meaning as per Section 2(z) of the Competition

18. See Delep Goswami, "Should the Indian Legal and Accountancy Profession be Allowed to Advertise and Through Open to Foreign Competition" 36(7) *Chartered Secretariat* (2006) pp. 1016-1018.
19. 2014 (60) PTC 309 (Del).
20. (2012) 347 ITR 99.
21. [1919] 2 KB 222.
22. See Explanation to Section 2(h), Competition Act 2002.

Act 2002 provides that "branch office, in relation to a company, means any establishment described as such by the company." Thus, the concept "enterprise" contains a wide meaning and thus also includes "group".

According to Section 4(2)(c) of the Act[23] "group" means two or more enterprises which, directly or indirectly, are in a position to-(i) exercise twenty-six per cent or more of the voting rights in the other enterprise, or (ii) appoint more than fifty per cent of the members of the board of directors in the other enterprise, or (iii) control the management or affairs of the other enterprise. In *Sananda Banerjee* v. *Union of India*,[24] Calcutta High Court held that as right is not recognized in the contract itself, the petitioner cannot claim a right of an exclusive distributorship of oil companies. Besides this, competition is foreseen in the contract itself. The Court citing Section 4(2)(c) of the Competition Act observed that there is no abuse of their dominant position by the oil companies *qua* their right to appoint a new distributor. It is trite economic policy that a state authority, such as an oil company, shall ensure a level playing field among the distributors. The provisions of the Competition Act embody the essence of Article 19 (1)(g) of the Constitution of India. Thus, reading the provisions of both the Competition Act and the domain of Article 19(1)(g) of the Constitution, one can point out that no exclusive right to do business can be conferred on or inferred by the petitioner.

The definition of "enterprise" under Section 2(h) of the Act recognises two kinds of enterprises, namely, (i) a person, and (ii) any department of the government engaged in any supply of goods or services. But, the definition excludes various activities of the government from the purview of the Act such as any activity of the government "relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space." However, the concept of "sovereign functions" have been debated over time and thus in *Bangalore Water Supply and Sewerage Board* v. *A. Rajappa*,[25] a seven judges Bench of the Supreme Court while interpreting the term "industry" as defined in Section 2(j) of the Industrial Disputes Act, 1947 exempted the sovereign functions from the ambit of industrial law. However, the Court confined only such sovereign functions outside the purview of law which can be termed strictly as constitutional functions of the three wings of the State, viz., executive, legislative and judiciary and not the welfare activities or economic adventures undertaken by government or statutory bodies. Thus, supply of water to the citizen is not the sovereign function of the government.[26]

Citing various decisions of the Supreme Court,[27] in *Union of India* v. *Competition Commission of India*,[28] the Delhi High Court held that only primary, inalienable and non-delegable functions of a constitutional government should quality for exemption within the meaning of "sovereign functions" of the government under Section 2(h) of the

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23. Ibid., Section 4(2)(c) read with Clause (b) of Explanation to Section 5.
24. W. P. 22152 (W) of 2011, decided on May 11, 2016. See MANU/ WB/ 0379/ 2016.
25. AIR 1978 SC 548: (1978) 2 SCC 213.
26. *Jai Balaji Industries Ltd.* v. *Union of India*, AIR 2011Gau 109: (2011) 3 GLR 43.
27. See *Agricultural Produce Market Committee* v. *Ashok Harikuni*, AIR 2000 SC 3116: (2000) 8 SCC 61; *Common Cause* v. *Union of India*, AIR 1999 SC 2979: (1999) 6 SCC 667; *N. Nagendra Rao* v. *State of A. P.*, AIR 2000 SC 3116: (1994) 6 SCC 205.
28. AIR 2012 Delhi 66: (2012) 3 Comp LJ 303 (Del).

Competition Act. Welfare, commercial and economic activities, therefore, are not covered within the meaning of "sovereign functions" and the State while discharging such functions is as much amenable to the jurisdiction of competition regulator as any other private entity discharging such functions. In this case the Delhi High Court examined the criteria to determine "enterprise" as defined in Section 2(h) of the Competition Act, 2002. In this case, the Court held that whenever the activity is classified as "relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space", it cannot be classified as an "enterprise" under Section 2(h) of the Act. If it is an "enterprise" under Section 2(h) of the Act, the Competition Commission of India (CCI) gets jurisdiction under Chapter IV of the Act. According to Section 54 of the Act, the Central Government may, by notification, exempt from the application of the Act, or any provision thereof, and for such period as it may specify in such notification, inter alia, "any enterprise which performs a sovereign function on behalf of the Central Government or a State Government".[29] Only primary, inalienable and non-delegable functions of a constitutional government should quality for exemption within the meaning of "sovereign functions" of the government under Section 2(h) of the Competition Act, 2002. Welfare, commercial and economic activities, therefore, are not covered within the meaning of "sovereign functions" and the State while discharging such functions is as much amenable to the jurisdiction of competition regulator as any other private entity discharging such functions. The High Court observed:

> "[R]uning of Railways as an activity will come within the expression "business" and even when the government runs the Railways for providing quick and cheap transport for people and goods and for strategic reasons, it cannot be said that it is engaged in an activity of the State as a sovereign body."

In *Taj Pharmaceuticals Ltd.* v. *The Department of Sales Tax*,[30]the CCI held that the department of Sales Tax/Professional Tax was a department of government of Maharashtra and its activity dealing with "tax of professions, trades, callings and employments" was sovereign function of the government and as such was not in any economic activity to be covered with in definition of an enterprise. Similarly, in *Rajat Verma* v. *Public Works (B and R) Department*,[31] the CCI held that the Public Works Department was one of the departments of government of Haryana entrusted with the responsibility of construction and maintenance of roads, bridges and government buildings of the State. Since the department was not directly engaged in any economic and commercial activities and was limited to provide infrastructural facilities to the people without any commercial construction, it was not held to be an enterprise. In *Hemant Sharma* v. *Union of India*,[32] the Delhi High Court had held that the All India Chess Federation, a similar entity which was a regulator and organizer of a sport in the country, was to be considered as an

29. Competition Act 2002, Section 54(c).
30. 2015 Comp LR 799 (CCI).
31. [2015] 130 SCL 1 (CCI).
32. 2011 X AD (Delhi) 362: 2012 Comp LR 1 (Delhi).

"enterprise" within the meaning of the Act. In *Union of India* v. *Sarathi Enterprises*,[33] the Bombay High Court held that on perusal of the definition of "enterprise" as defined under section 2(h) of the Competition Act 2002, it is clear that the concept would be applied whenever the "enterprise" is engaged in any activity relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate.

In *Reliance Big Entertainment Ltd.* v. *Karnataka Film Chamber of Commerce*,[34] the issue before the CCI was whether the Karnataka Film Chamber of Commerce (KFCC) an Association of Enterprises fall within the meaning of "enterprise" under Section 2(h) of the Act and if yes, could their acts and conduct be said to be violative of the provisions of Section 4 of the Act? The CCI noted that to qualify as an enterprise it is require that any person or department of the government is or has been engaged in any activity relating to production, storage, supply, distribution, acquisition or control of articles or goods or the provision of services, of any kind, or in investigation, or in the business of acquiring, holding, under writing or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more office units or division or subsidiaries. The association comprised of the members who were producers, distributors or exhibitors. The associations themselves were not producing or distributing or exhibiting any film. These activities were being performed by their constituent members who in turn were the producers, distributors and exhibitors. And associations were only providing a platform to the constituent members engaged in economic activities and are regulating their affairs. The CCI further remarked that it was possible that some associations on their own might be engaged in some activity as mentioned in Section 2(h) of the Act and in that case their conduct would also become liable for examination under Section 4 of the Act. However, in the present case, the association were not engaged in any economic activity on their own and so they did not qualify to be "enterprise". Once the associations are not enterprise in terms of Section 2(h), their conducts also cannot be examined under Section 4 of the Act since it is only the conduct of an enterprise or a group of enterprises as defined in Section 5 of the Act, which is subject matter of examination as is apparent from the wordings of Section 4(1) of the Act.

Similarly, in *Shivam Enterprises* v. *Kiratpur Sahib Truck Operators*,[35] the issue was whether Kiratpur Sahib Truck Operators Society Ltd. can be seen as an "enterprise" under the Act? The CCI noted that the society was a "person" within the meaning of the term as given in Section 2(l) of the Act, to qualify as "enterprise", it must be engaged in any activity relating to, *inter alia*, the provision of services, of any kind in terms of the provisions contained in Section 2(h) of the Act. Where association themselves do not engage in any such economic activities and were therefore not held as enterprise, while in the present case the society was engaged in activities relating to the provision of freight transport services and as such was an "enterprise" within the meaning of the term as given in Section 2(h) of the Competition Act. In *Hyundai Motor India Ltd.* v.

33. See MANU/ MH/ 0677/ 2015.

34. 2012 Comp LR 269 (CCI): [2012] 108 CLA 166 (CCI).

35. 2015 Comp LR 232 (CCI).

Competition Commission of India,[36] the Madras High Court observed that the expression "person" is defined in Section 2(l) of the Competition Act 2002 to include (i) an individual; (ii) a Hindu undivided family; (iii) a company; (iv) a firm; (v) an association of persons or a body of individuals whether incorporated or not in India or outside India; (vi) any corporation established by or under any Central or State Government or Provincial Act or by a Government company as defined in Section 617 of the Companies Act, 1956; (vii) any body corporate incorporated by or under the laws of a country outside India; (viii) a cooperative society registered under any law relating to cooperative societies; (ix) a local authority; (x) every artificial juridical person not falling within any of the preceding sub-clauses. The definition of the expression "person" as found in Section 2(l) is very exhaustive. As per Section 2(1)(x), every artificial juridical person not falling within any of the sub-clauses, may fall within the definition of the expression "person". Thus, the Director General of Competition of India (DGCCI) will come within the definition of person, their association or trade association.

However, in *East Line Projects Pvt. Ltd.* v. *Dr. B. Borooah Cancer Institute Guwahati,*[37] a condition in a tender to establish a pharmacy was challenged on the ground that "the stockist enjoy a dominant position and if he is allowed to compete with the distributor or the retailer, it will amount to abuse of dominant position which will be violative of the provisions of Section 4 of the Competition Act, 2002". The Gauhati High Court found that "considering the avowed object for which the pharmacy is going to be established, the Competition Act, 2002 does not apply in the matter." But, the question is how far this definition consistent with the concept of enterprise under the Competition Act, 2002? Referring the functional approach rather than form of entities the Supreme Court in *Competition Commission of India* v. *Co-ordination Committee of Artists*,[38] held:

The expression "enterprise" may refer to any entity, regardless of its legal status or the way in which it was financed and, therefore, it may include natural as well as legal persons. Thus, any entity, regardless of its form, constitutes an "enterprise" within the meaning of Section 3 of the Act when it engages in economic activity. An economic activity includes any activity, whether or not profit making that involves economic trade. Thus, any entity, regardless of its form, constitutes an "enterprise" within the meaning of Section 3 of the Act when it engages in economic activity. Hence, "enterprise or association of enterprises" must be found to be functionally involved in economic activity in relevant market, regardless of its form. Agreement or concerted practice is the means through which enterprise or association of enterprises or person association of persons restrict competition. Thus, entitles claiming to be trade unions and acting solely in their capacity as trade unions would be beyond the purview of the Act.

36. [2015] 127 CLA 46 (Mad.): 2015 (3) CTC 290.

37. AIR 2005 Gau 5. However, the decisions taken by association of enterprises can still be scrutinized under Section 3(3) of the Competition Act 2002. See also in *re Bengal Chemist and Druggist Association and Dr. Chintamoni Ghosh,* [2014] 121 CLA 196 (CCI): 2014 Comp LR 221 (CCI); *Mrs. Manju Tharad* v. *Eastern India Motion Picture Association, Kolkata*, 2012 Comp LR 1178 (CCI): [2012] 114 SCL 20 (CCI).

III. DETERMINATION OF DOMINANT POSITION OF AN ENTERPRISE OR GROUP

Section 19(4) of the Competition Act 2002 provides that in determining whether an enterprise enjoys dominant position in the relevant position in the relevant market (both geographic and product or any of them) the Competition Commission of India shall have regard to several factors. Prominent among these factors is the market share, economic power, size and recourses of the enterprise, including commercial advantages over competitors.[39] Some of the other factors which play a significant role in determining the influence of an enterprise or a group of enterprises in the market including: (i) size and importance of competitions, (ii) market structure and size of market, (iii) vertical integration of the enterprises or sale or service network of such enterprises, (iv) dependence of consumers on the enterprise, (v) entry barriers, including barriers such as regulatory barriers, financial risk, high capital cost of entry etc., (vi) social obligations and social costs, (vii) any other factors which the CCI may consider relevant for the enquiry.[40] Citing the decision of the COMPAT in *National Stock Exchange* v. *Competition Commission of India*,[41] the CCI in *Atos Worldline India Pvt Ltd.* v. *Verifone India Sales Ltd*.,[42] observed:

> While applying the factors listed in Section 19(4) of the Act, a check the box approach should not be followed and the factors in that Section should only be considered as an aid in assessing dominance. Thus, even if an enterprise is a leader in terms of factors set out under Section 19(4) of the Act, such an enterprise can be considered as dominant only if these factors confer upon the enterprise a position of strength in the relevant market which enable it to operate independently or affect competitors or consumers or the relevant market in its favour.

Considering the various factors of determination of dominant position of an enterprise the CCI in *Automobiles Dealers Association* v. *Global Automobiles Ltd*.,[43] held that an indirect basement of dominance is through the market share of the enterprise in the relevant market. Though the importance of market share may vary from market to market, nevertheless, market share indicates the position of strength of the enterprise to some extent. The CCI further observed:

> The Explanation (a) to Section 4 very clearly defines "dominant

38. AIR 2017 SC 1449: (2017) 5 SCC 17.

39. For different issues on determination of dominant position see John Temple Lang, "Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law," 3(1) *Fordham International Law Journal* (1979) pp. 1-50; Virginia Morris, "*Interim Measures in EEC Competition Cases"*, 3 *Fordham International Law Forum* (1985) pp. 102-152.

40. See Lynette CXhua Xin Hui, "Merger Control in Small Market Economy," 27 *Singapore Academy of Law Journal* (2015) pp. 369-402; Paul A. Pautler and Michael G. Vita, "Hospital Market Structure, Hospital Competition, and Consumer Welfare: What Can the Evidence Tell Us?," 10 *Journal of Contemporary Health Law and Policy* (1994) pp. 117-167; Henry Hansmann, "Nonprofit Enterprise in the Performing Arts," 12(2) *The Bell Journal of Economics* (1981) pp 341-361.

41. COMPAT case no. 13/2009, decided on June 23, 2011.

42. 2015 Comp LR 327 (CCI).

43. 2012 Comp LR 827 (CCI).

> position" as "a position of strength". This strength should enable the enterprise to "operate independently of competitive forces prevailing in the relevant market" or to "affect its competitors or consumers or the relevant market in its favour." The evaluation of this "strength" is to be done not merely on the basis of the market share of the enterprise in the relevant market but on the basis of a host of stipulated factors such as sizeand importance of competitors, economic power of the enterprise, entry barriers etc. as mentioned in Section 19 (4) of the Act.

In *Belaire Owners Association* v. *DLF Ltd. and HUDA*,[44] the CCI also held that dominant is established by the position of strength enjoyed by an enterprise to "operate independently of competitive forces prevailing in the relevant market" or to "affect its competitors or consumers or the relevant market in its favour." More importantly, it was held that the evaluation of this "strength" is to be done not merely on the basis of a host of stipulated factors such as size and importance of competitors, economic power of the enterprise, entry barriers etc. as mentioned in the Section 19(4) of the Act. According to Section 27(b) of the Competition Act 2002, the Competition Commission of India (CCI) after the inquiry may pass order imposing such penalty, as it may deem fit, which shall be not more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse. But, the question is what the meaning of "turnover"? According to Section 2(r) of the Act "turnover" includes value of sale of goods or services,[45] while Section 28 of the Enterprise Act 2002 of UK which is supplementary to Competition Act, 1988 of UK sets out that the turnover of the remaining enterprises after deducting the turnover of the enterprises that have ceased to be distinct enterprises. It also provides that the secretary of state may determine: (a) the amounts which are, or which are not, to be treated as comprising an enterprise's turnover, (b) the date or dates by reference to which an enterprise's turnover is to be determined; and (c) the connection with the UK by virtue of which an enterprise's turnover is turnover in the UK.[46] Thus, there is no such statutory provision in India like UK regarding which is essential to clarify the law. However, in India the expression "turnover" is not limited or restricted in any manner and introduction of concept of "relevant turnover" amounts to adding words to the statute. It is a well-settled principle of the Supreme Court of India regarding the statutory interpretation that where the language of a statute is plain and clear, the Court ought not to add words to limit or alter the meaning of the statute.[47] In *Reliance Industries Ltd.* v.

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44. 2011 Comp LR 239 (CCI): [2011] 109 SCL 655 (CCI).

45. See Atul Dua, Vijay Kumar Aggarwal and Ankush Walia, "Significance of the Definition of Turnover under the Competition Act, 2002,"1(2) *Competition Law Reports* (2016) pp. 22-27.

46. For detail discussion on government turnover See Shale Horowitz, Karla Hoff and Branko Milanovic, "Government Turnover: Concepts, Measures and Applications," 48 *European Journal of Political Research* (2009) pp.107–129; J. Molina, "The Electoral Effect of Underdevelopment: Government Turnover and its Causes in Latin American, Caribbean and Industrialized Countries. 20(3) *Electoral Studies* (2001) pp. 427–446. C. Goergen and H. Norpoth, "Government Turnover and Economic Accountability", 10(3) *Electoral Studies* (1991) pp. 191–207; W. M. Landes and R. A. Posner, " The Independent Judiciary in an Interest-Group Perspective", 18(3) *Journal of Law and Economics* (1975) pp. 875–901.

State of U.P.,[48] the Allahabad High Court held that turnover shall be payable where the turnover of purchase relates to the amount of purchase price paid or payable in respect of purchase of goods made by a dealer either directly or through another dealer.

In *Excel Crop. Care Ltd.* v. *Competition Commission of India*,[49] the issue was whether penalty under Section 27(b) of the Competition Act 2002 has to be on the entire turnover of offending company and what should be the amount of penalty? The Supreme Court held that under Section 27(b) of Act penalty of 10 per cent of turnover is prescribed as maximum penalty with no provision for minimum penalty. In this case, the CCI had chosen to impose 9 per cent of average turnover keeping in view serious nature of breach on part of these Appellants. The Competition Appellate Tribunal (COMPAT) has maintained rate of penalty i.e. 9 per cent of three years average turnover. However, it has not agreed with CCI that "turnover" mentioned in Section 27 would be "total turnover" of offending company. In its opinion, it has to be "relevant turnover" i.e. turnover of product in question. Penalty cannot be disproportionate and it should not lead to shocking results. That is the implication of doctrine of proportionality which is based on equity and rationality. It is, in fact, a constitutionally protected right which can be traced to Article 14 as well as Article 21 of Constitution. Doctrine of proportionality is aimed at bringing out "proportional result or proportionality *stricto sensu*". It is a result oriented test as it examines result of law, in fact the proportionality achieves balancing between two competing interests: (i) harm caused to society by infringer which gives justification for penalising infringer, and, (ii) right of infringer in not suffering punishment which may be disproportionate to seriousness of Act. Purpose and objective behind Act is to discourage and stop anti-competitive practice. Penal provision contained in Section 27 of Act serves this purpose as it is aimed at achieving objective of punishing offender and acts as deterrent to others. Such a purpose can adequately be served by taking into consideration relevant turnover. It is in public interest as well as in interest of national economy that, industries thrive in this country leading to maximum production. Therefore, it cannot be said that, purpose of Act is to "finish" those industries altogether by imposing those kinds of penalties which are beyond their means. It is also purpose of Act not to punish violator even in respect of which, there are no anti-competitive practices and provisions of Act are not attracted. The Supreme Court held that there was no error in approach of order of COMPAT in interpreting Section 27(b) of Act.

For determination of the abuse of dominant position of enterprises it is essential to determine a market which must be a "relevant market" and that relevant market would be identified with its two components such as "relevant geographic market" and "relevant product market". Market means where the buyers and sellers have access to each other. The relevant market is the area of effective competition.[50] The relevant market with its

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47. For the rule of statutory interpretation see *Prabhudas Damodar Kotecha* v. *Manhabala Jeram Damodar*, AIR 2013 SC 2959: (2013) 15 SCC 358; *V. L. S. Finance Ltd.* v. *Union of India*, AIR 2013 SC 2959: (2013) 6 SCC 278; *Bharat Aluminium Company* v. *Kaiser Aluminium Technical Services Inc.,* 2012 (8) SCALE 333: (2012) 9 SCC 552; *Raghunath Rai Bareja* v. *Punjab National Bank*, 2006 (13) SCALE 511: (2007) 2 SCC 230.

48. 2012(9) ADJ 10: 2012 (194) ECR 293(All).

49. AIR 2017 SC 2734: 2017(6) SCALE 241.

50. See *United States* v. *E. L. Du Pont De Nemours and Co.,* 351 U.S. 377 (1956); *Standard Oil Co.* v. *United States*, 337 U. S. 293 (1949) 1. For detail discussion on the concept market see

product and geographic scope assessing the dominance of market players whose conduct has been alleged to be abused.[51] The contours of relevant market guide the competition authority, both in terms of product and geographic reach, as to what competitive constrains are faced by such market player. Thus, following the definition of "relevant market" as defined in Section 2(r) of the Competition Act 2002, the Competition Commission of India (CCI) with reference to the "relevant geographic market" and "relevant product market" determines the abuse of dominant position of enterprises and in this connection Section 19(6) and (7) of the Act specify the different factors which may be considered by the CCI while determine the relevant market. In *Atos Worldline India Pvt Ltd.* v. *Verifone India Sales Ltd.*,[52] the Competition of India observed:

> For examination of the matter under the provisions of Section 4 of the Competition Act 2002, the Commission is required to delineate the relevant market in terms of section 2(r) of the Act. The relevant market is to be determined with reference to the relevant product market as defined under the provisions of section 2(t) of the Act and the relevant geographic market as defined under the provisions of section 2(s) of the Act.

IV. IDENTIFICATION OF ABUSE OF DOMINANT POSITION

Under the present system of competition law in India, the dominance *per se* is not bad, what is bad is the abuse of this dominant position. The identification of abuse of dominant position under competition law is a stage of its working. Thus, once the dominance of an enterprise is established, the next step is to examine the conduct of the dominant enterprise and to see whether that falls under the categories of abuse mentioned under the Competition Act. An abuse of dominant position may generally be categorised into two, namely, (i) "exclusionary abuses", and (ii) "exploitative abuses". According to "exclusionary abuses" an upstream dominant enterprise supplies the input to its downstream affiliate at lower cost than its downstream rival- leading to price squeeze, causing a competitive disadvantage to the downstream rival, while under "exploitative abuses" the dominant player charges excessive price from consumers or exploits them due to its dominance. However, the Competition Act in India does not make such distinction. The anti-monopoly law in China has also made no such distinction rather a list of circumstances of abuse of dominant position have been included in the law. According to Anti-Monopoly Law of the People's Republic of China of 2007 abuse of dominant position consists in: (i) selling commodities at unfairly high prices or buying commodities at unfairly low prices; (ii) selling products at prices below cost without any justifiable cause; (iii) refusing to trade with a trading party without any justifiable cause; (iv) requiring a trading party to trade exclusively with itself or trade exclusively with a designated business operator(s) without any justifiable cause; (v) tying products or imposing

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Thomas E. Kauper, "The Problem of Market Definition Under EC Competition Law," 20 (5) *Fordham International Law Journal* (1996) pp. 1682-1767; Per Jebsen and Robert Stevens, "Assumptions, Goals, and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union", 64 *Antitrust Law Journal* (1996) pp. 443-516.

51. See for the concept of relevant market see Adriaan Ten Kate and Gunnar Niels, "The Relevant Market: A Concept Still in Search of a Definition" 5(2) *Journal of Competition Law and Economics* (2009) pp. 297-333.

52. 2015 Comp LR 327 (CCI).

unreasonable trading conditions at the time of trading without any justifiable cause; (vi) applying dissimilar prices or other transaction terms to counterparties with equal standing; (vii) other conduct determined as abuse of a dominant position by the Antimonopoly Authority under the State Council.[53] However, this list is not exhaustive. The concept of abuse is an objective concept as held by the Court of Justice of the European Communities in *Hoffmann-La Roche and Co. AG* v. *Commission of the European Communities,*[54] thus:

"The concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators , has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

Abuse of dominant position alleged before the Competition Commission of India (CCI) in *Union of India* v. *Competition Commission of India*.[55] In this case the issue was whether the existence of an arbitration agreement between the parties was a bar to the maintainability of the information and the proceedings arising there from before the CCI? The Delhi High Court held that the CCI has been set up with special focus "to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto".[56] The CCI is not merely concerned with the aspect of breach of contract or with regard to implementation of the contract, its mandate is to ensure compliance of, *inter alia*, Sections 3 and 4 of the Act. The provisions of the Act are in addition to, and not in derogation of, the provisions of any other law for the time being in force.[57] This provision is *pari materia* with Section 3 of the Consumer Protection Act, which also states that the provisions of the Consumer Protection Act shall be in addition to, and not in derogation of any other provisions of law for the time being in force. The scope of the proceedings and the focus of its investigation and consideration was very different from the scope of an enquiry before an Arbitral Tribunal. An Arbitral Tribunal may not go into aspects of abuse of dominant position by one of the contracting parties. Its focus was to examine the disputes in the light of the contractual clauses. A contract may not be invalid or hit by Section 23 of the Contract Act, but the conduct of one of the parties may still fall foul of the provisions of the Act. Therefore, an informant may not get the desired relief before an Arbitral Tribunal, whose mandate is circumscribed by the contractual terms even if he were to raise issues of breach of Sections 3 and 4 of the Act before the Arbitral Tribunal. Moreover, the Arbitral Tribunal would neither have the mandate, nor the expertise, nor the wherewithal to conduct an investigation to come up with a report, which may be necessary to decide issues of abuse of dominant position by one of the parties to the contract. Therefore, the Court held that the arbitration agreement to be devoid of any

53. See Anti-Monopoly Law of the People's Republic of China of 2007, Article 17.
54. [1979] ECR 461, p. 541 .
55. AIR 2012 Delhi 66: (2012) 3 Comp LJ 303 (Del).
56. Competition Act 2002, Preamble.
57. Ibid., Section 62.

merit. The reason behind is that the Section 4 of the Indian Competition Act 2002 provides for five categories of abuses which may be exploitative or exclusionary: (i) unfair or discriminatory condition or price, (ii) limiting production or technical or scientific development, (iii) denial of access to market, barriers to entry and expansion, (iv) imposition of supplementary obligations, (v) protection of other markets. Each of these categories has been discussed below.

V. RELEVANT FACTORS ARE TO BE CONSIDERED WHILE ESTABLISHING ABUSE OF DOMINANT POSITION

The underlying principle in assessing dominant position of an enterprise in any relevant market is that whether the enterprise in question can act independently of competitive forces in the relevant market and affect the relevant market in its favour to the detriment of its competitors and consumers.[58] The Competition Act clearly provides that while inquiring whether an enterprise enjoys a dominant position or not in the relevant market under Section 4, the Competition Commission of India (CCI) shall have due regard to all or any of the factors provided in Section 19(4).[59] The Supreme Court in *Competition Commission of India* v. *Co-ordination Committee of Artists*,[60] observed:

Purpose of defining "relevant market" is to assess with identifying in a systematic way the competitive constraints that undertakings face when operating in a market. The concept of relevant market implies that there could be an effective competition between the products which form part of it and this presupposes that there is a sufficient degree of inter-changeability between all the products forming part of the same market insofar as specific use of such product is concerned. In this context, the relevant product market comprises all those products which are considered interchangeable or substitutable by buyers because of the products' characteristics, prices and intended use. The relevant geographic market comprises all those regions or areas where buyers would be able or willing to find substitutes for the products in question. While identifying the relevant market in a given case, the CCI is required to look at evidence that is available and relevant to the case at hand and to define the boundaries of the relevant market as precisely as required by the circumstances of the case.

According to Section 19(4) of the Competition Act, to determine whether an enterprise is in a dominant position or not in a relevant market, the Competition Commission of India may have due regard to all or any of the factors such as: (i) market share of the enterprise, (ii) its size and resources, (iii) size and importance of its competitors, (iv) its economic power including commercial advantages over competitors, (v) vertical integration of the enterprise or sale or service network of such enterprise, (vi) dependence of consumers, (vii) whether monopoly or dominant position acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise, (viii) entry barriers including barriers such as regulatory barriers, financial

58. See *Saint Gobain Glass India Ltd* . v. *Gujarat Gas Company Ltd*., 2015 Comp LR 431(CCI).

59. See *Meru Travels Solutions Private Ltd.* v. *Competition Commission of India*, 2017 Comp LR 43 (Comp AT): I (2017) CPJ 1 (TA); *Sunil Bansal* v. *Jaiprakash Associates Ltd*., 2015 Comp LR 1009 (CCI).

60. AIR 2017 SC 1449: (2017) 5 SCC 17.

risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers, (viii) countervailing buying power, (ix) market structure and size of market, (x) social obligations and social costs, (xi) relative advantage, (xii) by way of contribution to the economic development, by the enterprise enjoying a dominant position, and (xiii) any other factor which the Commission may consider relevant for the inquiry.[61]

VI. CONCLUSION

The abuse of dominant position is bad under Completion Act, 2002 but it has to be determined in "relevant market." For the purpose of competition law analysis, a market is a collection of products and geographic locations, delineated as part of an inquiry aimed at making inferences about market power and anticompetitive effect. A market defined for this purpose is often termed a "relevant market".[62] A claim under the US Sherman Act 1890 is an allegation of harm to some competitive process, which must be identified. Delineating the relevant market specifies the product and geographic scope of the particular competitive process allegedly harmed and thereby clarifies the claim and facilitates its assessment.[63] In US, courts have played an important role in examining market power or monopoly power in various cases in the context of relevant market. To state a claim under the antitrust laws, a plaintiff must allege a plausible relevant market in which competition will be impaired.[64] The burden is on the antitrust plaintiff to define the relevant market within which the alleged anticompetitive effects of the defendant's actions occur.[65] The government must demonstrate that within the relevant market, the defendants' actions have had substantial adverse effects on competition.[66] Proving injury to competition ordinarily requires the claimant to prove the relevant geographic and product markets and to demonstrate the effects of the restraint within those markets.[67] Now question arises what is the role of relevant market to maintain proper competition.

According to Professor Louis Kaplow, the only role for the relevant market is "to make market power inferences from market shares."[68] Thus, relevant market is used only

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61. See *Prasar Bharati* v. *TAM Media Research Private Ltd*., 2016 Comp LR 595 (CCI); *Three D Integrated Solutions Ltd.* v. *VeriFone India Sales Pvt. Ltd*., 2015 Comp LR 464 (CCI); *Global Tax Free Traders* v. *William Grant and Sons Ltd.,* 2015 Comp LR 503 (Compat): IV (2015) CPJ 55 (TA); *Financial Software and Systems Pvt. Ltd.* v. *ACI Worldwide Solutions Private Ltd*., 2015 Comp LR 253 (CCI).

62. See Jonathan B. Baker, "Market Definition: An Analytical Overview," 74 *Antitrust Law Journal* (2007) pp. 129-173 at p. 130.

63. See Gregory J. Werden, "The Relevant Market: Possible and Productive," 80 *Antitrust Law Journal* (2014) pp. 1-7 at p. 2; See also Gregory J. Werden, "Why (Ever) Define Markets? An Answer to Professor Kaplow," 78 *Antitrust Law Journal* (2013) pp. 730-732; Gregory J. Werden, "Identifying Exclusionary Conduct under Section 2: The 'No Economic Sense' Test", 73 *Antitrust Law Journal* (2006) pp. 428-430; R. Soundra Rajan, "Anti Trust Laws in Global Business," 38(9) *Chartered Secretary* (2008) pp. 1221-1226.

64. See *City of New York* v. *Group Health Inc*., 649 F.3d 151, 155 (2d Cir. 2011).

65. See *Worldwide Basketball and Sport Tours, Inc.* v. *NCAA*, 388 F.3d 955, 962 (6th Cir. 2004).

66. See *United States* v. *Visa U.S.A., Inc.,* 344 F.3d 229, 238 (2d Cir. 2003).

67. See *Thurman Industries, Inc.* v. *Pay 'N Pak Stores, Inc*., 875 F.2d 1369, 1373 (9th Cir. 1989).

68. For justification of the idea see Louis Kaplow, "Market Definition: Impossible and Counterproductive", 79 *Antitrust Law Journal* (2013) pp. 361-380 at p. 363.

to help assess a firm's market power based on its market share. In this way he claims that: (i) it is impossible to determine which market definition is superior (in inferring market power) without already formulating one's best estimate of market power;[69] (ii) there exists no valid way to make market power inferences from shares of a multi-product market;[70] and (iii) delineating the relevant market is "counterproductive in a number of specific (merger) applications."[71] In fact market shares can never be better than crude indicators of market power, but hypothetical monopolist formula can only possess significant market power. Therefore, Professor Kaplow argues that market power should be gauged in the context of "a homogeneous goods market,"[72] even when a monopolist would not possess significant market power. He advocates quantitative gauging of market power using a formula describing the equilibrium price set by a dominant firm. The formula relates the amount above short-run marginal cost the firm sets its price to its market share and other factors. Kaplow argues that the formula is "meaningful only in a homogeneous goods market," so "there exists no valid way to make market power inferences from the shares" in the broader relevant market where the hypothetical monopolist formula might delineate.[73] Section 2(s) of the Indian Competition Act 2002 recognises market as "comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous."[74] However, the concept of relevant market is a fluid concept. Hence, in *Pankaj Aggarwal* v. *DLF Gurgon Home Developers Pvt. Ltd.*,[75] the CCI held that a relevant market may change in changes in circumstances. Depending upon the facts and circumstances of each and every case, various alternative market definitions can be employed in apparently similar, yet different, circumstances.

Section 4 of the Competition Act 2002 describes the dominance position in terms of the position of strength enjoyed by an enterprise or group, in the relevant market, relevant geographic market, relevant product market in India, which enables it to- (i) operate independently of the competitive forces prevailing in the relevant market, (ii) favourably affect its competitions or consumers or the relevant market. Thus, it is obvious that in an enquiry under Section 4 it is essential to identify: (i) the position of strength, (ii) ability to operate independently of the market forces, and (iii) casual link between the position of strength and the ability to operate independently of the market forces. In order to determine dominance for the purpose of Section 4 of the Act is necessary to determine the existence of dominance in particular relevant market. Besides this, dominance of an enterprise or group is to be assessed in that market. Thus, the dominant position of an enterprise is always determined with respect to a particular relevant market.[76] The concept

69. Ibid., at p. 361.
70. Ibid., at p. 365.
71. Ibid at p. 369.
72. Ibid., at p. 364.
73. Ibid., at p. 365.
74. Section 2(s) of the Competition Act 2002 defines "relevant geographic market".
75. 2015 Comp LR 728 (CCI).
76. See Hanumanth A. Satwik, "Abuse of Dominance with Special Reference to Predatory Pricing: An Analysis," 1(2) *Company Law Journal* (2013) pp. 54-58; Raymond F. Jeffers, "European Works Council Directive: Where We Are Today?," 25 *International Business Lawyer* (1997), pp. 246-251.

of "relevant market" is important to competition law, and in the case of an abuse of dominance investigation, set the parameters to determination of "dominance." In *Ajay Devgn Films* v. *Yash Raj Films Pvt. Ltd*.,[77] the Competition Commission of India (CCI) held that to determine abuse of dominance under Section 4 of the Act it is necessary to determine the relevant market and thus the CCI held that temporal markets are not be considered as a market. Thus, a temporal market like Diwali or Eid release of film cannot form the market and the entire year should be considered as the market. Section 19(5) to 19(7) of the Competition Act provides factors are to be taken into consideration for the purpose of determining the relevant product market and relevant geographic market.

The Competition Act 2002 has given inclusive definition of "relevant market." According to Section 2(r) of the Act "relevant market" means the market which may be determined by the Competition Commission of India (CCI) with reference to the relevant product market or the relevant geographic market or with reference to both the markets. As the existence of dominant position is applicable only in the relevant market, identifying the relevant market assumes significant importance in an enquiry under Section 4 of the Act. In determination of the relevant market is the most crucial element and its importance cannot but be underlined as the result of any enquiry under Section 4 hinges on market effect determination. The Act lists the various factors which ought to be considered while determining the relevant market. The purpose of ascertaining the market is to be able to examine whether an enterprise is dominant in a specific market, made up of the product, or the service, the competing suppliers and the buyers of the product or service, all operating in a particular geographic area. If an enterprise is found to be enjoying a dominant position in a specific market, comprising a geographic and a product market, the next step would be to investigate if the prohibited abuse of the dominant position has taken place. According to Section 19(5) of the Act for determining whether a market constitutes a "relevant market" for the purposes of the Act, the CCI shall have due regard to the "relevant geographic market" and "relevant product market". Thus, in *Shri Kaushal K. Rana* v. *DLF Commercial Complexes Ltd.*,[78] the CCI observed that the relevant market in every case must be determined after giving due regard to the relevant geographic market under Section 2(s) and relevant product market under Section 2(t) as required by the provisions under Section 2(r) read with section 19(5) of the Act. In *Avtar Singh* v. *Ansal Township and Land Development Ltd*.,[79] the CCI explained the concept of relevant market and defined the relevant geographic market as the services for the development and sale of commercial space in shopping malls. The relevant geographic market was identified as Jalandhar. The CCI did not find the opposite party as dominant in the relevant market as according to them there was a number of real estate developers of mals such as EMAAR MGF, DLF, and TDI etc. They are also developing malls of Jalandhar and thus CCI concluded that there is no prima face case of abuse dominant position.

V. Senthilnathan v. *The United India Insurance Company and M/S Meditalk (TPA) Services Ltd.,*[80] is a case on the definition of relevant market. In this case the issue was whether an enterprise is dominant or not is dependent on how the relevant market is

77. 2015 Comp LR 728 (CCI).
78. [2013] 117 SCL 512 (CCI).
79. 2014 Comp LR 154 (CCI).
80. 2013 Com LR 698 (CCI).

defined. M/S New Insurance Co., New Delhi entered into a group health care insurance with information provider (IP) and issued Cancard for this purpose. The CCI referring to Sections 2(r), 2(s) and 2(t) of the Competition Act held that relevant market consists of substitutable and interchangeable services within a geographical area where the conditions are homogeneous. The CCI further says there is hardly any difference between group and individual insurance as far as the terms of the contract are concerned. The medical insurance, as the relevant product market, is a different product compared to other insurance products provided by various general insurance companies. Thus, it has no substitute available in the market. It can be sold as a product to an individual buyer or can be sold to a group of person under group health insurance scheme. In case of group health insurance, since, there is not much difference in the policy patterns between these two categories such as: (i) group health insurance, and (ii) individual health insurance, cannot be considered as different product in this case. The relevant geographic market in this case is the whole of India as medical insurance of a company can be sold to any person residing in any part of the country and a policy holder can avail the medi-claim benefits anywhere within India where the services are available. Thus, the relevant market in this case, prima facie, is the market for the services of medical insurance in India.

In *Sponge Iron Manufacturers Association* v. *National Mineral Development Corporation*,[81] the CCI observed that the relevant market is to be considered as per Section 2(r) read with section 19(5) of the Competition Act. The relevant market comprises of relevant product market and relevant geographic market. As per the informant, the iron ore market can be divided broadly into two product markets (i) low grade iron ore (less than 60% ferrous content) and (ii) medium to high grade iron ore (more than 60% ferrous content). The informant stated that since low grade iron ore having less than 60% Fe was unsuitable for use as input by steel manufacturers of India, the low grade iron ore would not form part of the relevant market. Therefore, the relevant product market proposed by the informant is the market for "non-captive iron ore with more than 60% Fe content excluding exports." The CCI considered the facts and data placed on record by both sides and is of the view that the relevant market definition proposed by the informant cannot be accepted. Having regard to the facts and circumstances, the CCI is of the view that the relevant market in this case would be the market of "iron ore production/supply in India" and OP 1 (which holds only 16% for the year 2011-12) is not a dominant player in this market. However, the relevance of determining relevant market and dominance of an enterprise is only there in free markets. In *Adcept Technologies (P) Ltd.* v. *Bharat Cocking Coal Ltd.*,[82] the CCI has examined the information and heard the informant at length. Dealing first with allegations made under Section 4 of the Competition Act, it is to be seen if OP was a dominant player with respect to a particular relevant market. The informant has not defined the relevant market in this case. The OP is the procurer while the informant is the supplier of slope stability monitoring services, a common technique to determine slope stability so as to monitor the small precursory movements, which occur prior to collapse. Although, the tender invited by OP in the present case is a global tender, the Commission has to look at the competition effects only within the geographic market of India. Therefore, the relevant geographical market to be taken is India. As a

81. 2013 Comp LR 0265 (CCI).

82. 2013 Comp LR 488 (CCI).

result, the relevant market is the market for "procuring slope stability radar services in India."

In *Competition Commission of India* v. *Co-ordination Committee*,[83] the issue was the determination of "relevant market" for purposes of inquiry into activity of Coordination Committee Limited? The Supreme Court held that word "market" used in Section 19(3) of the Competition Act, has reference to "relevant market". As per Section 19(5) of Act, such relevant market can be relevant geographic market or relevant product market. Factors which are to be kept in mind while determining relevant geographic market are stipulated in Section 19(6) of Act, and factors which need to be considered while determining relevant product market are prescribed in Section 19 (7) of Act. Market definition is a tool to identify and define boundaries of competition between firms. Purpose of defining "relevant market" is to assess with identifying in a systematic way the competitive constraints that undertakings face when operating in a market. Concept of relevant market implies that, there could be an effective competition between products which form part of it and this pre-supposes that, there is a sufficient degree of inter-changeability between all products forming part of same market insofar as specific use of such product is concerned. While identifying relevant market in a given case, Competition Commission of India (CCI) is required to look at evidence that is available and relevant to case at hand. CCI has to define boundaries of relevant market as precisely as required by circumstances of case. Relevant product and geographic market for a particular product may vary depending on nature of buyers and suppliers concerned by conduct under examination and their position in supply chain. In instant case, geographic market is State of West Bengal and to this extent there is no quarrel inasmuch as activities of Coordination Committee were limited to aforementioned State. Dispute is as to whether relevant market would cover "broadcast of TV serial" or it would take within its sweep "film and TV industry of State of West Bengal". Tribunal upheld minority view of CCI in saying that nature of information does not show anything which could even be distinctly connected with whole "film and television industry in State of West Bengal". Information is only against showing dubbed serial on television and it has no relation whatsoever with production, distribution etc. of any film or any other material on TV channels. Relevant market was not limited to broadcasting of channel but entire film and television industry of West Bengal.

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83. AIR 2017 SC 1449: (2017) 2 Comp LJ 372 (SC).

EVENTUAL PANORAMA OF INDIAN DEMOCRACY : STRIDING AHEAD

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'We pray for a spirit of unity; may we discuss and resolve all issues amicably, may we reflect on all matters (of State) without rancor, may we distribute all resources (of the State) to all stakeholders equitably, may we accept our share with humility'.

-*Rig Veda*[1]

'At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper – no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point.'[2]

ABSTRACT : : Democracy is a multidimensional concept.[3] It is a method of government envisioned to maximize public participation in the government. It is the rule of the people, acting through their representatives in the Legislature.

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1 संसविद्युवसे वृषन्नग्रे विश्वान्यर्य आ। इळस्पदे समिध्यसे स वसून्या भर।।1।।
सं गच्छध्वं सं वदध्वं सं वो मनांसि जानताम्। देवा भागं यथा पूर्वे संजानाना उपासते।।2।।
समानो मन्त्रः समिति समानी समानं मनः सह चित्तमेषाम्।
समानं मन्त्रमभि मन्त्रये वः समानेन वो हविषा जुहोमि।।3।।
समानी व आकूतिः समाना हृदयानि वः। समामस्तु वो मनो यथा वः सुसहासति।।4।।
--Rig Veda , 10/191/2

2. *Mohinder Singh Gill and Anr. v. Chief Election Commissioner, New Delhi and Ors.* (1978) 1 SCC 405*,* Krishna Iyer, J. quoted with approval the statement of Sir Winston Churchill

3. It refers to political activities or ideas that claim to promote the interests and opinions of ordinary people- Collins Dictionary; a political approach that strives to appeal to ordinary people who feel that their concerns are disregarded by established elite groups-Oxford dictionary; political ideas and activities that are intended to get the support of ordinary people by giving them what they want- Cambridge Dictionary.

It recognizes the power of the majority on one side but on the other, it imposes limitations upon this power too. It is a political doctrine that supports the rights and powers of the common people in the struggle with the privileged elite. The foundation of democracy does not lie only on legislative supremacy but more importantly, it also lies on the supremacy of values and human's rights. The world is witnessing the emergence of extended democratic institutions traditionally governed under authoritarian rule.[4] However, deterioration in its inherent fundamental values is resulting in transferring a considerable amount of the power to the judicature. A data reveals that the number of full democracies has declined from 20 in 2015 to 19 in 2016, the democratic recession worsened in 2016, when no region experienced improvement in its average score and almost twice as many countries recorded a decline in their total score as recorded an improvement.[5] In the dynamic global environment, the convergence of democratization and judicialization implies that the judiciary is also part of transformation by playing role in the political system. Over the last six decades, India, the largest democracy in the world, is no exception to that. The present paper works on the quality of democracy while evaluating the contemporary politics beyond those encompassed by a minimal definition of democracy and examines the deep roots of today's crisis of democracy in the developed world, and looks at how democracy fared in every region. It also assesses whether, in India, democracy is spelling out the substantive assumptions of democratic values? And identifies facing specific problems and challenges to parliamentary democracy.

KEY WORDS : Democracy; Representative democracy; Constitutionalism; Liberty; Equality

I. INTRODUCTION

The idea of democracy has existed in every civilization in different forms from time immemorial. Numerous attempts have been made constantly to develop a better understanding of the political systems and to present a typological illustration by the philosophers, political thinkers, theorists, and jurists. A vibrant democracy is the key political concept that lies in political action across the globe. However, analyzing this concept is a very complex matter. On the one hand, democracy may be one concept, on the other, it may continue to spawn many conceptions. It is a government by the citizens themselves[6] and refers both to the political system and political aspiration, thereby

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4. Out of the 193 countries worldwide that are recognized by the United Nations, 123 are said to be democratic; according to the 2016 Democracy Index almost one-half of the world's countries can be considered to be democracies of some sort

5. See , a published report by the Economist Intelligence Unit, Democracy Index 2016, seventy two recorded a decline in their total score as recorded an improvement in thirty eight

6. The words of Abraham Lincoln to honour the soldiers that sacrificed their lives in order *"that government of the people, by the people, for the people, shall not perish from the earth,"* were spoken at Gettysburg, is the real definition of Democracy; D. D. Raphael (*Problem of Political Philosophy, 1976)* analyses this definition and observes that all government is 'government of the people'; hence 'government of the people' does not convey much; as regards 'government for the people' Raphael argues that a benevolence despotism, as much

operates as a key term within political rhetoric[7]. As a name for a political system, it refers to the fact that people themselves rule in some sense and as an aspiration, it stands for the desire to deepen and extend the ideal of self-government, including in systems that are already regarded as democracies[8].

In the modern world, democracy is the most successful and popular form of governance. Over the past four decades, democracy has grown across the world. The countries have set up a form of government by the participation of their people. Since this form gives a collective power to the people to determine its own fate to some extent, it is, indeed, a set of ideas, values, and principles about liberty and equality consisting of the practices and procedures to institutionalise them. The promise of democracy is life, liberty and, the pursuit of happiness.[9] It is both a promise as well as a challenge. It is a promise because human beings freely work together and govern themselves to serve their aspirations for personal freedom, economic opportunity, and social justice in a planned manner; it is a challenge because the success of the democratic enterprise rests upon the shoulders of citizens and no one else.

In a democratic system, people realise that they are responsible for choosing the right and proper persons to represent them in national affairs. The justification of values of democracy vests in producing beneficial outcomes in terms of stability and relative social peace; equality; and people's participation in policy-making. On the whole, it rescues ordinary people from both the tyranny and the mayhem that have prevailed in most political regimes. While discussing narratives of the core values of democracy[10], it is worth mentioning the observation of the Supreme Court:

> '[T]hat in a democracy, the citizens legitimately expect that the Government of the day would treat the public interest as the primary one and any other interest secondary. The maxim *Salus populi suprema lex,* has not only to be kept in view but also has to be revered. The faith of the people is embedded in the root of the idea of good governance which means reverence for citizenry rights, respect for fundamental rights and statutory rights in any governmental action, deference for unwritten constitutional values, veneration for institutional integrity, and inculcation of accountability to the collective at large. It also conveys that the decisions are taken by the decision making authority with solemn

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as democracy, may be government for i.e. in the interest of the people, the basic idea of democratic government is govt. by the people.

7. *Democracy*, vol I, *General Introduction*, p. 1, Edited by Michael Saward, Routledge, London 2007
8. *Id* at 2
9. Thomas Jefferson, *Unanimous Declaration of Independence* passed by the US Congress , Philadelphia, General Congress, July 4, 1776, by the representatives of the American people[United States; https://www.loc.gov/recourse/ rbpe34.3460440
10. Constitutionalism; organs of the State (the Executive authority, the Legislative realm, an independent Judiciary); rights and responsibilities; rule of law; due process; political parties; democratic election (loyal opposition) and culture of democracy etc.

> sincerity and policies are framed keeping in view the welfare of the people, and including all in a homogeneous compartment.[11]

The Court, further, stated that:

> '[T]he concept of good governance is not a Utopian conception or an abstraction. It has been the demand of the polity wherever democracy is nourished. The growth of democracy is dependent upon good governance in reality, and the aspiration of the people basically is that the people with responsibility with service orientation carry out the administration'.[12]

Thus, democracy is a government in which powers and civic responsibilities are exercised by all adult citizens, directly, or through their freely elected representatives to strengthen fundamental values – liberty and equality based rights in the society. A successful democracy stands only on these principles.

II. DEMOCRACY : A HISTORICAL OVERVIEW

The historical perspective of democracy reveals its long history. In the beginning, it was comprehended not to be good for the government and was considered more or less synonymous with the rule of the mob[13]. The chief malady that afflicts democracy is the absence of a responsible electorate. Historically, democracy emerged to prominence in ancient Greece, most famously in Athens around 550 BC. Ancient Greek democracy, most notably in Athens, was practised in city-states[14] rather than nations or empires. It featured direct citizen participation in a face-to-face assembly making decisions for the community rather than representation. However, women, slaves, and resident foreigners were not citizens and were excluded from the public political life of the city[15]. The struggle for existence obliterates all the finer qualities of man. Rome was not built in a day, nor a democracy in a century. In 431 BC a fact finds place in history from Sparta to Athens in the name of peace.[16]

A new kind of democracy has come up after happening certain revolutions around the

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11. *Manoj Nurula v. Union of India*, 2014 (9) SCC 77, para 69
12. *Ibid*
13. Democracy finds a puzzling and paradoxical feature of the history. It is used to be a bad word. Everybody knew that democracy, in its original sense, is rule by the people or government in accordance with the Will of the bulk of the people, would be a bad thing fatal to individual freedom and to all the graces of civilized living— C.B. Macpherson, *the Real World of Democracy*, chapters 2 & 3, House of Anansi Press Inc. (1966)
14. City-states were a political system consisting an of independent city having sovereignty over contiguous territory and serving as a centre and leader of political, economic, and cultural life- *the Encyclopaedia Britannica*; a city-state, or polis, was the community structure of ancient Greece. Each city-state was organized with an urban center and the surrounding countryside. Characteristics of the city in a *polis* were outer walls for protection, as well as a public space that included temples and government buildings.
15. Supra, Note 4, p4
16. Ancient Greeks are still relevant to today's thinking about democracy in terms of quite specific institutions, (Finely 1985);

world[17], - the English Glorious Revolution 1688; the American Revolution 1776, and the French Revolution, 1789 are the best examples. Britain has become a matured democracy after 800 years from the days of *Magna Carta* and went through a prolonged persistent struggle for devolution of authority from the crown to the people. Britain had also patches of nepotism and corruption during the period of the struggle. Democracy spread rapidly in the form of government of nation-states at the end of some important events[18]. Thus, democracy took a long time to emerge. Its gradual and ultimately triumphant emergence as a working system of governance was bolstered by many developments.

Democracy is a political system of any country with institutions that allow citizens to express their political preferences and to have constraints on the power of the executive and guarantee of civil liberties. The global political circumstances after the end of World War I, led to the birth of democracies across the globe. However, during the 1930s, many of these young democracies reverted soon, but after World War II, the number of democracies began growing again. In the 19th century, most of the world's population lived in colonial empires, autocracies, or isocracies. The end of the 19th century saw a limited expansion of democracies and since that time, there has been a general upward trend in the share of the world population living under democracies, and during the second half of the 20th century, colonies gained independence and more countries became democracies. In the post-cold war era, democracy emerged as the most acceptable form of governance. Today, more than half of the world's population lives in democracy[19].

III. DEMOCRACY : AN INTERNATIONAL INCLINATION

There has been an international inclination towards democracy. The United Nations

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17. The Glorious Revolution or the Revolution of 1688, was a bloodless revolution, it took place from 1688 to 1689 in England. It involved the overthrow of the Catholic King James II. The Glorious Revolution led to the establishment of an English nation that limited the power of the king and provided protections for English subjects. Through the 1689 Bill of Rights, it established a constitutional monarchy and stipulated independence of Parliament from the monarchy and protected certain rights of Parliament, such as the right to freedom of speech, the right to regular elections, and the right to petition the king; The American Revolution,1776 or the American Revolutionary War (1775 – 1783) also known as American War of Independence, was initiated by delegates from the thirteen American colonies in Congress against Great Britain over their objection to the policy of taxation of the Parliament and lack of colonial representation and the *French Revolution 1789* established constitutional monarchy in France, replacing the power of the King, by a 'legislative assembly' and declared the colony as the Republic of France. Some historians regard the French Revolution as a turning point in the history of Europe, and some the Declaration of Independence. The famous slogan 'Liberty, Equality and Fraternity' called for every person's right to freedom and equal treatment.
18. the fall of the Berlin wall in 1989; the end of the Cold War in 1991 and the end of apartheid in South Africa in 1994 are some of the defining moments that gave reason to be optimistic about the future of democracy in the world
19. Pew Research Centre, Washington US; A Discussion paper prepared by Dr V K Agnihotri, Secty. General, Rajya Sabha, Parliament of India, New Delhi on the topic evaluating Parliament : Objective, methods, Results and Impact for the Conference, jointly organized by IPU and ASGP held on October, 22, 2009

has taken the democratic system of governance as the core value of its functions. Its essential characteristics are embodied by the United Nations in the Universal Declaration of Human Rights. It projects the concept of democracy by stating "the will of the people shall be the basis of the authority of government[20]. The values of freedom, respect for human rights and the principle of holding periodic and genuine elections by universal suffrage are salient features of democracy. In turn, democracy provides an environment for the protection and effective realization of human rights. In 2015, the world leaders committed in the 2030 Agenda for Sustainable Development to a world in which "democracy, good governance, and the rule of law as well as an enabling environment at national and international levels, are essential for sustainable development[21]. The UN supports democracy by promoting human rights, development, and peace and security through different programmes[22]. The Agenda reaffirmed commitments that were made earlier at the World Summit in 2005 and in the Millennium Declaration. Today, the majority of the countries, across the world have democratic regimes, though the structure and substance of democracy differ significantly from one another. The justifications for the growth and proliferation of democracy are far too many.

IV. INDIAN PERSPECTIVE OF DEMOCRACY

India, on becoming independent in 1947, deliberately has chosen the Westminster type of parliamentary democracy. Most of the leaders, struggled for freedom, were from the legal profession with skills to match the foreign government in knowledge and debates. Many among them have had their education, general and legal, in England and had imbibed the liberal traditions of J. S. Mill and Herold Laski. Besides, Britain in their days was a super power spread over the entire globe and it used to be said that the 'sun never sets in the British Empire'. Authors extolled the British Parliamentary system so profusely that it appealed to many intellectuals in the world as an unerring model for the others to follow. Ivor Jennings described the British Constitution as one of the stronger, if not the strongest, in the world.[23] Keeping in view, the Framers of the Indian Constitution envisaged a parliamentary system of government. Dr. B R Ambedkar, Chairman of the Constitution Drafting Committee, while presenting the new Constitution, in the Constituent Assembly said that:

> 'In the Draft Constitution, there is placed at the head of the Indian Union a functionary who is called the President of the Union. The title of this functionary reminds one of the President of the

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20. Preamble of the Declaration, 1948
21. Transforming our world : the 2030 Agenda for Sustainable Development, point- 9
22. United Nations activities in support of democracy are carried out through the United Nations Development Programme (UNDP), the United Nations Democracy Fund (UNDEF), the Department of Peace Operations (DPO), the Department of Political and Peace building Affairs (DPPA), the Office of the High Commissioner for Human Rights (OHCHR),and the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), among others.
23. W. Ivor Jennings, *The British Constitution,* The Macmillan Co., Pp. xiv, 232.Cambridge University Press; New York (1941.)

> United States. But, beyond the identity of names, there is nothing in common between the forms of Government prevalent in America and the form of Government proposed under the Draft Constitution. The American form of Government is called the Presidential system of Government. What the Draft Constitution proposes is the Parliamentary system. The two are fundamentally different.'[24]

While delineating the comparative merits and demerits of both the systems, Dr. Ambedkar, further, opined that :

> 'Under the non-Parliamentary system, such as the one that exists in the United States, the assessment of the responsibility of the Executive is periodic. It takes place once in two years. It is done by the Electorate. In England, where the Parliamentary system prevails, the assessment of responsibility of the Executive is both daily and periodic. The daily assessment is done by members of Parliament.....
> Periodic assessment is done by the Electorate at the time of the election.....The Daily assessment of responsibility which is not available under the American system, it is felt far more effective than the periodic assessment and far more necessary in a country like India. The Draft Constitution in recommending the Parliamentary system of Executive has preferred more responsibility to more stability.[25]'

Dr. K.M. Munshi, one of the architects of the Indian Constitution has summed up the prevalent thinking at the time in his speech in the Constitution Assembly. He said that the most of us and during the last several generations before us, public in India have looked up to the British model as the best. For the last thirty or forty years some kind of responsibility has been introduced in the governance of this country. After this experience why should we go back to the tradition that has been built for over 100 years?

No wonder, India has adopted the Westminster type of parliamentary democracy with the addition of a few chapters such as Fundamental Rights and Directive Principles of State Policy etc. In colonial administration, the Government ruled without the consent and concurrence of the people and the government was totally different from the common people. Peoples do not realise that the general election is the occasion for them to choose a government for themselves. However, its success or failure is still a matter of debate.[26] Representative democracy advocates the Parliamentary independence of thought. However, in Westminster model democracy, the executive has strong control over the legislature but in modern times the Executive rules through the Parliament. At the same time, India has seen increased state intervention in everyday life, greater awareness of individual rights

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24. CAD., Vol.VII, p. 32
25. *Ibid* p33
26. The Westminster system or Westminster model is a democratic system of government that incorporates three organs of government - the executive, the legislature and an independent judiciary,

and less deferential attitudes to authority. This pattern of Parliamentary democracy has succeeded in India.[27]

Historically, in India, the indication of a democratic system of governance is found from the Vedic period. Since that time, the democratic political system has been strong and matured. The basic principles of democracy are mentioned in Vedas[28]. The facts relating to modern parliamentary democracy, where policy decisions are taken by the majority, are existed in various descriptions of small Republics where people participate together in the decision-making process relating to administration. The Republic is defined as a democratic system in ancient India in the *Atreya Brahmins*, *Ashtadhyayi* of Panini, *Manusmriti.* In Mahabharata, the *Shanti Parv* gives a detail information of *Jan Sadan*. Democracy was also prevalent in the Buddhist period. Other writings of various Buddhist and Jain scholars also describe about this system. Ashoka pillars and Licchavi, Vaishali, Malak, Madak, and Kamboj etc. are the examples of the democratic system of that era. The King of Vaishali- Vishal, the first king, was chosen via election. In Kautilya's *Arthashashtra,* the Republic has been described in two categories, '*Ayudh Republic'*, in which only king makes decisions and the second is '*Republic*' in which everyone can participate in the decision making process. The term *Janapad*a used by Panini refers to the system in which the representatives were elected by the people and took care of the administration.

V. THE VALUES OF DEMOCRACY : AN EXPLICATION Of INDIAN PERSPECTIVE

The quest for the value of democracy or in more guarded terms its justification encloses a set of issues. Such issues are whether democracy produces beneficial outcomes in terms of stability and relative social peace? Or it embodies intrinsic values-equality and liberty? Or it produces more confident citizens? These unanswered issues need to be defined and justified.

Independent India has been a large-scale experiment in democracy. Unlike many other nations that gained independence from colonial rule descended into dictatorship and military rule. India remained a democracy. India stands as a model for many emerging democracies around the world. Parliamentary democracy is the bedrock of the polity of India. Representation of people by a vehicle called the 'political party' has been adopted in India, which is often referred to as the 'Westminster system of Parliamentary democracy'. Why did India adopt such a system? How did it get evolved over the decades? What are the intricate processes and developments which moulded India to adopt such a model? Does the Indian subcontinent in the pre-medieval era, possessed traces of such models of governance? These are questions that might be answered in various history books, but not with the specific objective of taking the evolution of Parliamentary democracy as the central theme. It is utterly simplistic to assume that the entire Westminster model was directly transported to India and imposed on

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27. A.G. Nooranii, *The Presidential System: The Indian Debate*, p30, Sage Publications, 1989
28. The Sabha and Samiti are mentioned in both *Rig Veda* and *Atharva Veda*. In these meetings decision were made after the discussion with the king, ministers and scholars. Therefore, it is come to be known that how politics was at that time, because people together used to settle the decisions of the *Sabha* and *Samiti* with good vision.

us and we did not first experiment on its processes. India did so. An attempt is made to delve into this unique timeline. It is an organic process. A question that has been publicly debated often is whether we should not opt for a Presidential form of government. Parliamentary form being a basic feature of the Constitution[29], as held by the Supreme Court, legal problems might arise to switch over to any other form. The parliamentary form has its own merits. The Parliament is in a position to keep the Prime Minister and Council of Ministers under constant vigil through its oversight mechanisms and devices such as - Question Hour, Adjournment Motions, Calling Attention Notices, debates, Confidence and No-Confidence Motions, Scrutiny of budget and its implementation, public accounts audit etc.

However, the affirmation of the principles of liberty and equality, the participation of the people in the nation-building process, free access of all members of the society to public offices, the availability to all members of the society the opportunities to express their will freely and to determine their own political, economic, social and cultural choices, are some of the core values that foster democracy over the word. In India, equality and liberty the two values of democracy that are guaranteed in part III of the Constitution protecting the different rights of citizens. It is important to note that the doom and gloom narratives about the state of democracy do carry some truth. However, it is not the whole truth. In particular, such narratives tend to overshadow stories about positive democratic developments around the world which equally deserve to be highlighted.

There are certain key elements that represent the well performance of a democratic system in India.

i. Respect of individual rights and fundamental freedoms

ii. Access to power and its exercise in accordance with the rule of law

iii. The holding of free and fair elections periodically by universal suffrage

iv. A pluralistic system of political parties and organizations

v. The separation of powers and independence of the judiciary

vi. Informed Citizenry, Transparency and accountability in public administration

vii. Free, independent and pluralistic media

i. Respect of individual rights and fundamental freedoms

The basic human rights attribute aggregates scores from three sub-attributes: Social Rights, Civil Liberties, Access to Justice, and Equality. Overall it measures the fair and equal access to justice, the extent to which civil liberties such as freedom of expression or movement are respected, and the extent to which countries are offering their citizens basic welfare and political equality. A democracy rests upon the basic principle that

29. *Kesvananda Bharati v State of Kerala*, AIR 1973, SC 1461, as per P. Jaganmohan Reddy, J, "parliamentary democracy is part of the basic feature; parliamentary democracy being essential part of basic structure of the Constitution…….. in *P.V. Narimha Rao v State* AIR 1998 SC 2120

government exists to serve the people[30]. The people are citizens of the democratic state, not its subjects. Because the state protects the rights of its citizens, they, in turn, give the state their loyalty. Thus, this relationship of citizen and State is the first and foremost fundamental value of democracy. M. Patanjali Shastri, J has remarked that fundamental rights had been retained by the people after they had delegated certain powers to the State (Centre and States' Government.)[31].

This needs a mention of the Bangalore Principles[32] which deal with how national courts absorb international law to fill existing gaps and address uncertainties in domestic law with respect to the fundamental human rights and freedoms:

> 'Fundamental human rights and freedoms are universal. They find expression in constitutional and legal systems throughout the world; they are anchored in the international human rights codes to which all genuinely democratic states adhere; their meaning is illuminated by a rich body of case law, both international and national'[33].

Thus, in democracy, fundamental rights include freedom of speech and expression; freedom to assembly; freedom to form association; freedom of movement; freedom to reside and settle; freedom to practise any profession, or to carry occupation, trade or business and freedom of religion and conscience, and the right to equal protection before the law and citizen should enjoy these rights. Since the rights are transcendental and primordial, hence a human being is entitled to the protection of certain rights from birth[34]. The Indian Constitution extends constitutional protection to these human rights and these rights become constitutionally protected fundamental rights[35].

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30. Aristotle, *Politics*, translated by Benjamin Jowett- 'the state comes into existence originating in the bare needs of life and continuing in existence for the sake of good life'; the State is conceived by an important section of political thinkers (John Locke's *Political Philosophy*) to have originated in a social compact which the people entered into for the better protection of their rights. The thesis is that while surrendering to the government the powers of governance, the people reserved certain basic rights with themselves with which no government could interfere. These basic rights are said to be the natural rights of the man which inhere in him because he is a human being. The rights belong to him naturally and are not dependent on any grant by law or the constitution' cited by Uday Raj Rai, in *Constitutional Law-I, Structure* p 20
31. *A.K. Gopalan v State of Madras* AIR 1950 SC 27
32. In December 1998, the Commonwealth Judicial Colloquium on the 'Domestic Application of International Human Rights Norms' was held in Bangalore, India. The participants affirmed their commitment to the principles that had been declared in the 1988 colloquium as well as the deliberations in colloquia held in different commonwealth countries in subsequent years- in Harare, Zimbabwe (1989); in Banjul, the Gambia (1990); in Abuja, Nigeria (1991); in Balliol College, Oxford, England (1992); in Bloemfontein, South Africa (1993); and in Georgetown, Guyana (1996).
33. Michael Kirby, '*Domestic Implementation of International human rights norms*', 1999 *Australian Journal of Human Rights* p.27
34. As per Subba Roa, CJ in *I.C. Golak Nath v State of Punjab*, AIR 1967 SC 1643,
35. Articles 32, 226 the Constitution of India

ii. Access to power and its exercise in accordance with the rule of law

Rule of law reveals that no one is above the law. All are equal. The rule of law also refers to the fundamental political, social, and economic justice that requires to be protecting and defending from the apprehension of tyranny of the State. A democratic government exercises authority by way of the law. To strengthen the value of democracy, the Constitution of India accepts not only the supremacy of law but also that of the Constitution. It is one of the basic features of the Constitution as had been suggested by the Supreme Court[36]. In case of *State of M P v Bharat Singh*,[37] the Supreme Court has held that the State could not encroach upon the rights and liberties of the people except by the authority of law.

Democracy, which has been the best defined form of the Government, expects prevalence of genuine orderliness, positive propriety, dedicated discipline and sanguine sanctity by constant affirmance of constitutional morality which is the foundation stone of good governance. While dealing with the concept of democracy, the majority in *Indira Nehru Gandhi v Raj Narain*[38], Suprem Court stated that 'democracy,' as an essential feature of the Constitution, and is unassailable. This principle was reiterated by the Supreme Court in *T.N. Seshan, CEC of India v Union of India and ors*[39] and in *Kuldip Nayar v Union of India & Ors*[40]. It was pronounced with asseveration that democracy is the basic and fundamental structure of the Constitution. There is no shadow of doubt that democracy in India is a product of the rule of law and aspires to establish an egalitarian social order. It is not only a political philosophy but also an embodiment of constitutional philosophy.

iii. The holding of periodically free and fair elections by universal suffrage

The representative character of the Government is ensured by the grant of the right of equal political participation to the people including the right to vote. The accountability of Government is maintained by the requirement that the representatives should seek renewal of their mandate to rule after defined periods of interval. In a developed democracy, election has virtually come to mean as an ongoing process of regular dialogue between rulers and the ruled. People regularly ventilate their grievances, views, appreciations and comments through the participation in free and fair election process. A periodical election maintains high competition in national politics and keeps democracy vibrant. Schumpeter has rightly said that :

> '[T]he democratic method is that institutional arrangement for arriving at political decisions realizes the common good by individuals who are to assemble in order to carry out its will……The only thing, barring stupidly and sinister interests, that can possibly bring in disarrangement and account for the

36. *Indira Nehru Gandhi v Raj Narain*, (1976) 2 SCR 347
37. AIR 1967 SC 1170
38. Supra Note 36
39. (1995) 4 SCC 611
40. AIR 2006 SC 3127

> presence of an opposition is a difference of opinion as to the speed with which the goal, itself common to nearly all, is to be approached'[41].

In India, the Election Commission is a constitutional body responsible to foster the democratic process of election. It is one of the political institutions among the five. The provision of the Constitution of India ensures its autonomy and maintains it as a politically neutral agency to conduct free and fair elections having superintendence, direction and control over it.[42]The provision is so broadly worded that it has been held to be a vast reservoir of all the necessary powers- administrative as well as semi-legislative and semi-adjudicative[43]. Elections take place from time to time and all adults have the right to vote. There is no artificial restriction and discrimination in the matter of adult suffrage. In *People's Union for Civil Liberties and Anr v. Union of India and Anr*[44], the apex Court has observed that :

> 'democracy and free elections are a part of the basic structure of the Constitution and, thereafter, proceeded to lay down that democracy being the basic feature of our constitutional set-up; there can be no two opinions that free and fair elections would alone guarantee the growth of a healthy democracy in the country. The term "fair" denotes equal opportunity to all people. Universal adult suffrage conferred on the citizens of India by the Constitution has made it possible for millions of individual voters to participate in the governance of our country. For democracy to survive, it is fundamental that the best available men should be chosen as the people's representatives for the proper governance of the country and the same can be best achieved through men of high moral and ethical values who win the elections on a positive vote.'

In *Mohinder Singh Gill and Anr* v. *Chief Election Commissioner, New Delhi and Ors*[45], Supreme Court has said that holding of free and fair election by adult franchise in a periodical manner is the heart and soul of the parliamentary system.

For a long-lasting democracy, the electorate should not feel that the franchise is a patronage and they should not vote on their kith and kin, or one of their caste and religious fraternity. They should trust him to stand firm by the policies and programmes proposed in the wider interest of the Nation. The electorate not to vote for a criminal or a corrupt candidate and bemoans that they have a bad government. Furthermore, the electorate does not realise that even as they contribute to their own Household expenditure, they have to contribute to their country's governance. Sometimes, common people are easily misled by unscrupulous promises of political parties of free food, free clothes, free electricity, free everything, even

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41. Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* , P 250, 3rd ed. (2008)
42. Supra note 32, Article 324,
43. See, Uday Raj Rai, *Constitutional Law-I, Structure*, p. 581, Eastern Book Comp.(2016)
44. (2013) 10 SCC 1
45. (1978) 1 SCC 405

enlightened people plead for tax concession, subsidies and incentives oblivious of the fact that they are met by borrowing which in turn imposes burdens indirectly on themselves. These are absolutely bad for healthy democracy and Indians are well aware of these facts.

iv. A pluralistic system of political parties and organizations

Election process is a festival of common people in a democratic country. Political parties and intereste-groups take part in the political process. They form a healthy public opinion so as to force the government to run according the will of the people. The election campaigns in a democracy are often elaborate, time consuming and sometimes silly. But their function is serious. It is a process to provide a peaceful and fair method by which the people can select their representatives and determine public policy. Political parties participate in election process to recruit, nominate, and campaign to elect public officials; draw up policy programmes for the government if they are in the majority; they offer criticisms and alternative policies if they are in opposition; they mobilize support for common policies among different interest-groups; educate the public about public issues; and provide structure and rules for the society's political debate. In some political systems, ideology may be an important factor in recruiting and motivating party members. In others, economic interests or social outlook may be more important than the ideological commitment. The Opposition party necessarily has to play the role of vigilant keeper to up keep the government on leash. But, it has a very constructive role to play. It keeps government initiated laws and policies under scrutiny and offers alternative policies. Opposition unity and integrity is as important as unity and integrity of the ruling dispensation.

The Indian Constitution has modelled many attractive features in the Parliamentary Democracy which is based on Westminster system. The Prime Minister being the leader of the majority party in the Parliament is able, unlike the American President, to carry out the policies and programmes of his party without any hindrance. The chances of conflict between the legislature and the executive are minimal. Furthermore, in India the Executive's accountability to Parliament is total and the continuance of the government itself depends on the support of the majority in Parliament. India's political process runs in a pluralistic system of political parties. Various activities of political parties such as making political speech, organizing public meeting and political protest and forming political party constitute an essence of the democratic process and undoubtedly facilitate the exercise of the right to vote in a meaningful manner.[46] No democracy can be visualized without enough room for the play of political forces.[47]

v. The separation of powers and independence of Judiciary

In the parliamentary democracy, the governmental powers of the constitutional instrumentalities are typically divided by the Constitution among the Legislature; Executive and Judiciary to practise constitutional governance by the rule of law which is the bedrock of democracy. The purpose of democracy is to protect the interests of individuals against the

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46. See Uday Raj Rai, *Fundamaental Right And Their Enforcement,* p.47 PHI, (2011)
47. *Ibid*

possible abuse of powers, and therefore democracy insists upon separation of powers of the government. It is the division of powers of the government into the three major organs. In a democratic setup, the powers of the government are controlled efficiently by itself. Furthermore, an efficient and credible judiciary is a necessary prerequisite for the fair functioning of the political system. A competent and impartial judiciary ensures division of powers and Rule of Law as well. The judges of the nation are the mouths that pronounce the words of the law, inanimate beings, who can moderate neither its force nor its regour.[48] The primacy of the Judiciary is backbone of the democratic political system. In the participatory consultative political process, each constitutional functionary requires the task of discharging constitutional functions. An independent judiciary always keeps a keen watch by tracking all the actions of the constitutional and non- constitutional functionaries.

Among the main instrumentalities of the State, the Judicature has pre-eminence by the reason for providing effective safeguards to the spirit and notions of the Constitution; strengthening the democratic values; protecting individual's rights and maintaining the boundaries sketched by the Constitution for constitutional and public functionary[49]. To be truly great, the judiciary, in the exercise of democratic powers, enjoys independence of a high order. Therefore, independence of the judiciary is a necessary concomitant of power of the judicial review under the democratic Constitution. The Constitution of India envisages all the measures by incorporating specific provisions to flourish the democratic political process.[50]

vi. Informed Citizenry, Transparency and accountability in public administration

Democracy grants citizens the right to access information of all the public decisions taken by the government and bringing transparency in the functioning of every action in its all spheres. An opaque functioning of government weakens democracy. In a democratic political process, it is an inherent obligation upon the government to take the public into confidence and share information. Democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed.[51] Openness generates confidence and trust towards the government. Public opinion is a key factor in the decision-making process, subjecting all government actions to public scrutiny. In a matured democracy, vigilant public opinion is taken into care. Right to Information, transparency in governmental affairs and accountability in public administration are part of democratic culture which always needs to be nurtured.

The principle of democratic accountability would yield to the public the right that the governing institutions and administrative agencies shall not create artificial obstructions to shield their working from the common man's sight and that the different departments shall make available the information that is sought by public[52]. The

48. Montesquieu, *The Spirit of the Laws* (*Esprit des Lois),* LIV, XI chap. Quoted by Ehrlich, cited by Benjamin N. Cardozo, in *Nature of the Judicial Process,* p 169
49. Supra Note 35, Article 12,
50. *Ibid*, Articles 124, 127, 128, 217, 222, 224, 224A and 231
51. Preamble of the Right to Information Act, 2005
52. Supra Note 43, p 48

accountability of public authorities in public administration needs to be administered under public gaze and scrutiny by knowing the justification of their actions. The statement of James Madison clearly emphasises the fact that knowledge empowers the citizens and ignorance of it is the biggest enemy of human dignity. He has observed that:

> "A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.[53] "

In India, the Right to Information Act 2005 is a giving a concrete shape to that basic constitutional democratic principle[54]. It is internationally recognized as a strong and effective law to protect the values of democracy. However, in many countries, where RTI laws have been used primarily by the media to have information to share with the citizens, in India, the RTI law is used extensively by common citizens to demand a vast range of information from every authority of the government. In series of the cases, the Supreme Court has made it clear that the right to know is a basic feature of the democratic system and fundamental right of the citizen extended against the prison authorities and prisoners[55]. Bhagwati, J has emphasized the importance of right to know in a democracy in case of *S P Gupta v Union of India*.[56] Thus, the RTI law established a landmark in the evolution of the democratic system of governance into a transparent and accountable one. This enactment should be seen as the end of the movement for access to information.

vii. Free, independent and pluralistic media

Public opinion is of a decisive importance for democracy. Public opinion is made up with citizens or specific groups that reflect on their community and express their criticisms, their proposals or their agreement to influence the construction of political will. For a democratic set up free, independent media reveals truth and correct image of news and views about the serious matters of public concern. An independent media plays this part in making public opinion. Public opinion constitutes a controlling tool. It implies that it is only politicians who confront this public opinion and display true interest for the citizens.'

VI. CONCLUSION

Modern democracy is based on the rule by the majority which means that

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53. Letters and other writings of James Madison, (father of the Constitution for the USA, 4th US President letter to W.T. Barry, August 4, 1882), vol. 3 (276); A government of the people must, accordingly, mean a government by discussion and criticism- discussion of competing ideas leading to a compromise in which all the ideas are reconciled and which can be accepted by all, because it bears the imprint of all.' E. Barker, *Reflections on Government,* p. 36 (1953)
54. Supra Note 43
55. *Prabha Dutta v Union of India* , AIR 1982 SC 6; *Sheela Varse v State of Maharastra* (1987) 4 SCC 373
56. AIR 1982 SC 149

50.1% rules the country excluding 49.9% from participating in administration.lt rests on confrontation between the government and opposition. It excludes a large section of the people from participation in decision-making through their representatives. It breeds jealousy among the deprived and arrogance among the rulers. It leads to abuse of the government machinery for strengthening the party in power. In matured democracies, the opposition is reconciled to bide its time till the next general election through which it tries to defeat the government on popular issues. Nascent democracies attempt to destabilize the government from the very next day after the formation of the government. Engineering defections and purchase of political loyalties are resorted to without any care or concern for the nation and the people. The tendency to substitute duels for debates is growing in legislatures. Parliamentary dignity and decorum are found only in textbooks. We have all been witnesses to these unseemly activities in our legislatures.

These worrying signs notwithstanding, there are also reasons to be optimistic. The number of democracies around the world continues to grow, and a wide range of countries has transitioned to democracy in recent years. Despite its shortcomings, democracy is still by far the preferred form of government in all continents. Democracy continues to be an aspiration for those who have never experienced it. When democracy is threatened, citizens all over the world have united to protect it. In nearly every democracy, most people want democracy to work, even when they feel that it may not be working perfectly for them. It is worth mentioning the concern of the then President of the United States-Mr. Reagan's expressed in Westminster's speech:

> 'No, democracy is not a fragile flower. Still it needs cultivating. If the rest of this century is to witness the gradual growth of freedom and democratic ideals, we must take action to assist the campaign for democracy……We must be staunch in our conviction that freedom is not the sole prerogative of a lucky few, but the inalienable and universal right of all human beings. …… Let us now begin a major effort to secure the best—a crusade for freedom that will engage the faith and fortitude of the next generation. For the sake of people and justice, let us move towards a world in which all people are at last free to determine their own destiny.[57]'

Finally to sum up, a mention of the words of Dr. Rajendra Prasad, the President of the Constituent Assembly seems to be very essential to quote[58]:

'We have prepared a democratic Constitution. But successful working of democratic institutions requires in those who have to work them willingness to respect the view points of others, capacity for compromise and accommodation. …'

And thus, it is clear that views expressed by the various scholars to land democracy as the best possible form of the government where man has been able to design a system of governance for himself; at the same time, there is no dearth of critics who denounce it in equally in bad terms. It is now universally acclaimed that democracy alone is the most

57. Reagan, 2004: 116-17

58. CAD , vol. 11, November 26, 1949

suitable and appropriate form to run the country. It would be better to remove all shortcomings of populism, than to replace it with any form of authoritarian system like fascism, communism in general , or in the Indian context with the Presidential form of government in particular. The sovereign people of the country should come forward to cure all the defects and emerging challenges faced by the democratic political process. The people should have an abiding interest in public affairs; a keen sense of public responsibility; a readiness to accept and abide by the decisions of the majority; and an inclination to protect the rights and safety of the minority, and over and above relatively a high degree of political intelligence.

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FROM KYOTO TO PARIS : CONTOURS OF A NEW, EMERGING CLIMATE CHANGE REGIME

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ABSTRACT : This Article is aimed to examine the key elements of a new climate change regime established by the Paris Agreement with the aim to "to strengthen the global response to the threat of climate change…" The Agreement was adopted on 12 December 2015 at the twenty-first session of the Conference of Parties (COP-21) to the 1992 United Nations Framework Convention on Climate Change (UNFCCC). Since the climate regime created by the new Agreement, as shown in this Article, departs from the existing one established by the UNFCCC and Kyoto Protocol in some important respects, the Article compares the new regime with the existing one highlighting the differences between the two regimes. For this purpose, this Article, first, in Part II briefly examines the characteristic features of the existing climate regime. It then in Part III focuses on the post-Kyoto process which ultimately led to Paris Agreement. Part IV examines the principal elements of the new regime and compares the regime of Kyoto Protocol with that of Paris Agreement. Finally, Part V concludes the study. Since the climate change regime is still developing, an analysis of the key elements of the new regime may be helpful in crafting a more equitable and efficient climate regime in future.

KEY WORDS : Climate change; United Nations Framework Convention on Climate Change; Kyoto Protocol; Paris Agreement; Bali Action Plan

I. INTRODUCTION

In a significant development, on 12 December 2015 at the twenty-first session of the Conference of Parties (COP-21) to the 1992 United Nations Framework Convention on Climate Change (UNFCCC)[1] a new climate change treaty "enhancing the implementation" of the objectives of the UNFCCC was adopted. The new treaty, officially known as the Paris Agreement[2], is aimed "to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty" by

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1. Adopted on 9 May 1992, entry into force: 21 March 1994.Currently, 197 countries are Parties to the UNFCCC. For the text, see (1992) 31 I.L.M. 84.

2. Adopted on 12 December 2015 by 196 countries—the 195 Member States to the UNFCCC and Palestine—at twenty-first session of the Conference of parties (COP-21) to the UNFCCC, FCCC/CP/2015/L.9/Rev.1, entered into force on 4 November 2016. The entry into force of the Paris Agreement requires ratification by 55 signatory states accounting for at least 55 per cent

keeping the increase in average atmospheric temperature rise "well below 2 degrees Celsius" above pre-industrial levels and, at the same time, aspiring to hold the temperature rise to 1.5 degrees Celsius above pre-industrial levels.[3] It is worth noting that the new Agreement, which is the result of several years of hectic negotiations, commits all countries across the world to make meaningful contributions towards addressing the problem of climate change which is one of the toughest challenges the humanity is facing. Interestingly, the adoption of the Paris Agreement not only breaks the long impasse in the negotiations on a new climate change regime but also in a sense completes the process began with the reaching of the Copenhagen Accord and the Cancun Agreements in 2009 and 2010 respectively.[4] Interestingly, as will be noted below, it is these instruments which for the first time introduced certain novel elements including the "bottom-up" and global approaches in the still-evolving legal regime of climate change paving the way for adoption of Paris Agreement in its present form.[5]

The Paris Agreement which is hailed as "historic"[6], marking "a milestone in preserving the earth's environment,"[7]"a monumental triumph"[8]is an implementing agreement which builds upon the UNFCCC and retains many elements of this regime. However, as will be seen below, the new legal regime created by the Paris Agreement makes significant departures from the existing one established by the UNFCCC and the Kyoto Protocol.[9] Here, mention may be made of some of the most significant elements of the new regime marking departures from the existing one. First, in contrast to the scheme of the legally-binding emissions reduction targets set by the Kyoto Protocol, the Paris Agreement relies on the non-binding intended-nationally determined contributions (INDS) from each state Party. The scheme of voluntary pledges under the new Agreement reflects a preference for the "bottom up", "flexible" approach which is in sharp contrast to the rigid, "top-down" approach of the existing legal regime. Secondly, the new regime adopts a truly universal or "global" (or inclusive) approach in creating legal framework for climate change. It is for the first time that an attempt is made to get all UNFCCC Parties on board in the international community's efforts towards mitigating the adverse effects

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of global emissions. Text of the Agreement is available at:https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement.India ratified the Agreement by depositing the instrument of ratification with the United Nations on October 02, 2016, which coincides with the 147th birth anniversary of Mahatama Gandhi. See Hindustan Times, October 3, 2016; The Hindu, October 3, 2016, https://www. the hindu.com/news/national/India-ratifies-historic-Paris-climate-deal-at-U.N./article15422334.ece

3. Paris Agreement, ibid, Article 2(a). Further, see below, Part. III.

4. See Daniel Bodansky, "The Paris Climate Change Agreement: A New Hope?" 110 *American Journal of International Law*288-319, 291 (2016) [hereinafter referred to as Bodansky (2016)].

5. For more discussion, see Lavanya Rajamani, "The Making and Unmaking of the Copenhagen Accord" 59*International and Comparative Law Quarterly*824-843 (2010); Rajamani, "The Warsaw Climate Negotiations: Emerging Understanding and Battle Lines on the Road to the 2015 Climate agreement"63*International and Comparative Law Quarterly*721-40, 725 (2014)[hereinafter referred to as Rajamani (2014)]; Daniel Bodansky, "The Copenhagen Climate Change Conference: A Postmortem" 104 *American journal of international Law* 230-40, 232-33(2010) [hereinafter referred to as Bodansky (2010)]

6. See Daniel Bodansky (2016), p. 289.

7. *The Hindu*, New Delhi, December 14, 2015, at 10, Editorial.

8. Per Ban Ki-moon, the UN secretary General, *The Hindu*, id, at 13.

9. Throughout this paper, the phrase, "existing legal regime" refers to the legal regime created by the UNFCCC and the Kyoto Protocol.

of climate change and thus strengthening the global response to the threat with enhanced support to developing countries in their endeavor to meet their mitigation related commitments. Thirdly, although Paris Agreement is a treaty adopted within the UNFCCC and it, much like the existing regime, adheres to the "common but differentiated responsibilities and respective capabilities (CDR) principle, in no uncertain terms, the Agreement applies the principle differently. In other words, while the new Agreement retains certain key elements of CDR, in applying the principle, it abandons the rigid categorization of states Parties based on their level of economic development into Annex 1 and non-Annex 1 countries. However, as will be seen below, the scheme of voluntary pledges in some respects, under the Paris Agreement, still applies differently to developed and developing countries thus broadly conforming to the differentiation requirement of the CDR Principle.

In this setting, the main aim of this paper is to examine the contours of the new climate change regime established by the 2015 Paris Agreement while highlighting the differences in the architecture of the two implementing legal regimes—one established by the Kyoto Protocol and other by the Paris Agreement. It may be clarified here that this paper does not intend to assess the effectiveness or adequacy of the new Agreement. Rather, its scope is limited to present an overview of the Agreement while focusing on the differences between the new and existing climate regimes.

For this purpose, the paper, in Part II briefly examines the characteristic features of the existing climate regime created by the UNFCCC and the Kyoto Protocol. It, then, in Part III focuses on the post-Kyoto process which ultimately led to a legally binding agreement in the form of Paris Agreement that was acceptable to all states Parties including the United States of America, China and India. The purpose of the discussion in this Part is to highlight the changes the international climate change politics and law had already undergone before the adoption of the Paris Agreement in 2015. Part IV examines the principal elements of the new regime and compares the regime of Kyoto Protocol with that of Paris Agreement. Finally, Part V concludes the study. Since the climate change regime is still developing, an analysis of the key elements of the new regime may be helpful in crafting a more equitable and efficient climate regime in future.

II. EVOLUTION OF THE EXISTING INTERNATIONAL CLIMATE CHANGE REGIME : UNFCCC AND KYOTO PROTOCOL UNFCCC

International cooperation towards developing a legal framework for addressing the problem of global warming began with the establishment of the intergovernmental panel on climate change (IPCC) in 1988.[10] The IPCC was jointly established by the World Meteorological Organization (WMO) and the United Nations Environment Programme (UNEP) to: (i) assessing the scientific information related to the climate change problem, "such as emissions of major greenhouse gases (GHGs)[11] and the modification of the

10. Cinnamon Carlarne, 'Climate Change—the New "Superwhale" in the Room: International Whaling and Climate Change Politics—Too Much in Common?' 80 *Southern California Law Review* 753-91, 766 (2007)

11. There are six GHGs, namely carbon dioxide, methane, nitrous oxide, hydroflurocarbon, perfluorocarbon and sulpher hexafluoride. Of these, the most important is carbon dioxide. See Annex A to Kyoto Protocol.

Earth's radiation balance resulting there from, and that needed to enable the environmental and socio-economic consequences of climate change to be evaluated"; (ii) formulating response strategies for addressing the problem.[12] The first assessment report of the IPCC appeared in 1990 which found that the growing accumulation of GHGs in the atmosphere would give rise to climate change which was likely to have significant impacts on the natural and human systems. IPCC predicted that in the "Business-as-Usual" scenario, we would witness an increase in global mean temperature by about 0.3 degree Celsius, per decade, during the next century, which is higher than that seen over the past 10,000 years.[13]According to the IPCC, this will result in a likely increase in global mean temperature of about 1 degree C above the present value by 2025 and 3-degreeC before the end of the next century.[14] These findings, which were later confirmed by a subsequent report of the IPCC, known as the 1992 Supplement[15], were indeed startling and served as the basis for negotiations on a climate change treaty. Ultimately, in response to the heightened concern over the climate change problem, during the 1992 United Nations Conference on the Environment and Development (UNCED), the UNFCCC was adopted which entered into force in 1994.

The UNFCCC is a framework convention which contains the broad objectives of the international response to the problem of climate change; guiding principles and the "hortatory" commitments on the part of the States Parties. The Convention is hailed as "a crucial first step" towards addressing the threat of climate change.[16] Its purpose, according to Article 2 of the Convention, is the :

> stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

However, as will be seen below, the Convention does not put any legally binding obligations on the States Parties to reduce their emissions of GHGs nor specifies quantitative targets in regard to emissions reduction.

The guiding principles are contained in Article 3 of the Convention. According to Article 3, in achieving the above-said objectives, the Parties shall be guided inter alia by "equity" and their "common but differentiated responsibilities"; the specific needs and special circumstances of developing country parties; the precautionary approach principle according to which precautionary measures should be taken to prevent or minimize the causes of climate change and mitigate its adverse effects; the need to promote sustainable

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12. See JT Houghton, GJ Genkins and JJ Ephraums (eds.) Climate Change: The IPCC Scientific Assessment, Report Prepared for IPCC by Working Group 1,(Cambridge: Cambridge University Press, 1990), Preface, available at the official website of the IPCC: https://www.ipcc.ch/report/ar1/wg1/ [hereinafter referred to as FAR 1990};Peter G. G. Davies, "Global Warming and the Kyoto Protocol" 47 *International and Comparative Law Quarterly*, 446-461 (1998) p. 446
13. FAR 1990, id, at XI.
14. Ibid.
15. 1992 IPCC Supplement: Scientific supplement, available at:https://www.ipcc.ch/report/climate-change-1992-the-supplementary-report-to-the-ipcc-scientific-assessment/
16. Ibid, Peter GG Davies, supra note 12, p. 449.

development; the need to promote a supportive and open international economic system that would lead to sustainable economic growth and development.[17]Significantly, Preamble to the UNFCCC takes note of the responsibilities of developed countries for their past emissions when it states that :

> the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development need.

Notably, as indicated above, UNFCCC does not impose any concrete emissions reduction obligations on the Parties. It commits the Parties only to take measures like the preparation of (a) "national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol…"; (b) formulation and implementation of national and, where appropriate, regional programmes containing measures to mitigate climate change; (c) promotion and cooperation in the development of "practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors"; (d) promoting sustainable management and promote of "sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol, including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems"; (e) cooperate in preparing for adaptation to the adverse effects of climate change; (f) take climate change considerations into account in their relevant social, economic and environmental policies and actions; (g) promote and cooperate in

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17. The text of Article 3 reads as follows:
    1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.
    2. The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.
    3. The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost.
    4. The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system … should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.
    5. The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

scientific, technological, technical, socio-economic and other research related to the climate system; (h) promote and cooperate in the exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate change ; (i) promote and cooperate in education, training and public awareness related to climate change; and (j) communicate to the Conference of the Parties information related to implementation of the Convention. These measures are to be taken by developed and developing countries alike.

While the Convention commits both—the developed and developing country parties—to take above-said measures, it is only the developed country Parties which committed themselves to reduce emissions of GHGs to certain levels. In other words, no significant limits are placed on the emissions of the developing countries.

However, under the UNFCCC developed country Parties' emissions reduction commitment is not legally binding.[18] According to Article 4(2) (a) and (b), the developed country Parties and "other Parties" included in Annex I commit themselves specifically to take measures on the mitigation of climate change, by limiting their anthropogenic emissions of greenhouse gases "with the aim of returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol." To quote the relevant part of Article 4 (2) (a):

> Each of these Parties [the developed country Parties and economies in transition] shall adopt national policies and take corresponding measures on the mitigation of climate change by limiting its anthropogenic emissions of greenhouse gases…. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention, recognizing that the return by the end of the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol would contribute to such modification….

And Article 4(2) (b) reads as follows:

> In order to promote progress to this end, each of these [developed countries] Parties shall communicate, within six months of the entry into force of the Convention for it and periodically thereafter, and in accordance with Article 12, detailed information on its policies and measures referred to in subparagraph (a) above, as well as on its resulting projected anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol for the period referred to in subparagraph (a), with the aim of returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon

18. See Margaret Rosso Grossman, 'Climate Change and the Law" 58 *American Journal of Comparative Law* 223-55, 226 (2010);); Brendan P. McGivern, "Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol" 37 *International Legal Materials* 22-43, 23 (1998).

> dioxide and other greenhouse gases not controlled by the Montreal Protocol.[Emphasis added].

Notably, the "aim" of reducing the emissions of GHGs to 1990 levels by the year 2000 which applied only to the developed country Parties is not legally binding.[19]

Further, as will be noted below, the UNFCCC is notable for unequivocally incorporating the CDR Principle. Some of the provisions in this regard have already been noted. Now mention may be made of the provision of Article 4(7)according to which, "[t]he extent to which developing country Parties will effectively implement...the Convention...will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties."

a) Kyoto Protocol

As required by Article 4 (2) (d), the First Conference of the Parties to the UNFCCC (COP-1) met in Berlin in 1995 to review the adequacy of the provisions of the above-said Article 4 (a) and (b).[20] With the meeting of the COP-1, we saw the beginning of a second phase of the development of the climate change regime.[21] At COP-1, a process was launched to adopt a protocol or any other instrument setting legally binding emissions reduction obligations for the Annex I Parties to be achieved within a specific time frame. Consequently, after a couple of years of "intense" negotiations, on 11 December 1997, at Kyoto, Japan, a protocol, known as the Kyoto Protocol, was adopted which required the industrialized countries (Annex I Parties) to reduce their emissions of six GHGs at least by 5 % during a "first commitment period" i.e.2008-2012.[22] Significantly, the Protocol exempted the developing countries (non-Annex I Parties) from meeting any specific emissions reductions targets. Remarkably, the Protocol, like the UNFCCC, is based on the equitable version of CDR principle. Accordingly, it requires only developed country Parties (Annex I Parties) to reduce their overall emissions of a range of GHGs by at least 5 per cent below 1990 levels in the (first) commitment period of 2008-2012.[23]

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19. Ibid.

20. According to Article 4 (2) (d), the Conference of the Parties shall, at its first session, review the adequacy of subparagraphs (a) and (b) above. Such review shall be carried out in the light of the best available scientific information and assessment on climate change and its impacts, as well as relevant technical, social and economic information. Based on this review, the Conference of the Parties shall take appropriate action, which may include the adoption of amendments to the commitments in subparagraphs (a) and (b) above.

21. Daniel Bodansky (2010), supra note 5, p. 231.

22. Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN Doc.FCCC/CP/1997/L.7/Add.1. The text can be accessed from the official website of the UNFCCC: https://unfccc.int/ . On Kyoto Protocol, see Clare Breidenich, Daniel Magraw, Anne Rowley and James W. Rubin, "The Kyoto Protocol to the United Nations Framework Convention on Climate Change" 92 *American Journal of International Law* 315-331 (1998);Peter GG Davies, supra note 12, pp. 446-461; Leonard Nurse and Rawleston Moore, "Adaptation to Global climate Change: An Urgent Requirement forSmall Island States" 14(2) RECIEL 100-107, 102 (2005);Eric Shaffner, "Repudiation and Regret: Is the United States Sitting Out the Kyoto Protocol to Its Economic Determent?" 37 *Environmental Law* 441-461(2007); Duncan French, "1997 Kyoto Protocol to the 1992 UN Framework Convention on Climate Change" 10 *Journal of Environmental Law* 227-39 (1998); Brendan P. McGivern, supra note 18, pp. 22-43 .

23. See Lavanya Rajamani, 'From Berlin to Bali and beyond: Killing Kyoto Softly?' 57 *International and Comparative Law Quarterly* 909-39, 913 (2008) [hereinafter referred to as Rajmani (2008).

Some of the most relevant provisions in this regard as contained in Article 3.1 of the Protocol are as follows:

> The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed theirassigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008-2012.[Paragraph 1].
>
> Each Party included in Annex I shall, by 2005, have made demonstrable progress in achieving its commitments under this protocol. [Paragraph 2]
>
> In the first quantified emission limitation and reduction commitment period, from 2008-2012, the assigned amount for each Party included in Annex I shall be equal to the percentage inscribed for it in Annex B of its aggregate anthropogenic carbon dioxide equivalent emissions of greenhouse gases listed in Annex A in 1990… multiplied by five. [Paragraph 7]
>
> Commitments for subsequent periods in Annex I shall be established in amendments to Annex B to this Protocol…the Conference of the parties serving as the meeting of the Parties to this protocol shall initiate the consideration of such commitments at least seven years before the end of the first commitment period mentioned in paragraph 7 above. [Paragraph 9]

In addition, the Kyoto Protocol established certain market-based mechanisms to provide the Parties with sufficient flexibility in implementing the obligations of the Parties as contained in Article 3. These mechanisms include: emissions trading; joint implementation (JI); and clean development mechanism (CDM). In emissions trading mechanism, the emitting country which has surplus quotas can transfer (or sell) such quotas to those that need additional credits to offset their emissions elsewhere.[24] Further, Article 16 bis provides that Annex B Parties "may participate in emissions trading for the purposes of fulfilling their commitments under Article 3. Any such trading shall be supplemental to domestic actions for the purpose of meeting quantified emission limitation and reduction under that Article."

For the purpose of the joint implementation of the commitments under the Protocol, the developed countries and the economies-in-transition may form a partnership to carry out emissions-reduction or removal projects in the latter. Article 6 provides that "any Party included in Annex I may transfer to, or acquire from, any other such Party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any

24. See Duncan French, supra note 22, p. 235.

sector of the economy" provided that certain conditions are met.

Under CDM, emissions-reduction projects are implemented by the Annex I Parties in the developing countries. According to Article 12 the purpose of CDM "shall be to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist parties included in Annex 1 in achieving compliance with their quantified emission limitation and reduction commitments under Article 3. Article 12 further provides that "(a) Parties not included in Annex I will benefit from project activities resulting in certified emission reductions; and (b) Parties included in Annex I may use the certified emission reductions accruing from such project activities to contribute to compliance with part of their quantified emission limitation and reduction commitments under Article 3…."[25]

Kyoto Protocol thus implements the objective of the UNFCCC as stated in Article 2 and is the first legal regime which establishes legally binding commitments for the developed countries to reduce emissions from a considerably wide range of gases and across a large cross section of the economy.[26]Although, a similar international regime in the form of the Montreal Protocol to address a similar environmental problem—the depletion of ozone layer—had already been established, the Kyoto Protocol is no less significant achievement in that it not only attempts to address "a much more scientifically complex and wide-ranging problem, but also requires a more politically, technologically, and economically comprehensive set of solutions."[27]

The Protocol, which entered into force on 16 February 2005, was indeed a welcome development. But, unfortunately, the Kyoto regime was not fully implemented. The United States, which is alone responsible for approximately 20% of emissions and which played a leading role in the negotiations and giving final shape to the agreement strongly opposed the Protocol. The country opposed the Protocol for two principal reasons. First, under the Protocol, developing countries—some of which like China are major emitters of GHGs—were granted exemptions from the mandatory emission reduction targets. According to the United States, the exemption for developing countries was inconsistent "with the need for global action on climate change and is environmentally flawed." The second main reason for opposing the protocol by United States was the "uncertainty" of the climate science. In fact, the United States administration used the scientific uncertainty as a cover for not joining the Kyoto Protocol.[28] It may further be stated that United States was not alone in opposing any binding commitments in respect of emissions reduction. The developing countries, including China, India and Brazil have consistently maintained that since it is the developed countries that are responsible for the past emissions only they should share the burden of averting the problem.

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25. For further discussion, see Clare Breidenich et al, supra note 22, p. 325.

26. Cinnamon Carlarne, supra note 10, p. 767

27. Ibid. For an interesting account of the similarities and differences between the Ozone and Climate Change Regimes, see ibid and Laura Thoms, 'A Comparative Analysis of International Regimes on Ozone and Climate Change with Implications for Regime Design', 41 *Columbia Journal of Transnational Law* 795-859 (2003).

28. Cinnamon Carlarne, supra note 10, p. 771.

III. POST- KYOTO DEVELOPMENTS

At the COP-11, serving as the Meeting of Parties to the Kyoto Protocol, in Montreal, in December 2005, discussions began about the post-2012 scenario. In other words, the Parties to the Kyoto Protocol turned their attention to the fresh commitments for developed countries as the first commitment period was to conclude in 2012.[29]As a result, at the COP-11, an Ad Hoc open-ended Working Group on Further Commitments for Annex I parties under the Kyoto Protocol(AWG-KP) was established to consider a fresh round of reduction commitments for the industrialized countries. Another significant achievement of the COP-11 was the initiation of a '[D]ialogue on long term cooperative action under the UNFCCC.[30] However, no progress in respect of the latter was made until the thirteenth Conference of the Parties to the UNFCCC met in December 2007 in Bali. At the COP-13, serving as the meeting of the Parties to the Kyoto Protocol, the historic Bali Action Plan was adopted which established the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA) thereby formally launching "a comprehensive process" to reach an "agreed outcome" through long-term cooperative action on climate change.."[31]The first paragraph of the Bali Action Plan 2007 notes that in the light of the IPCC's Fourth Assessment Report which emphasized the urgency of addressing the problem and keeping in view that "deep cuts in global emissions will be required…" the COP decides:

> to launch a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012, in order to reach an agreed outcome and adopt a decision at its fifteenth session, by addressing, inter alia:
>
> (a) A shared vision for long-term cooperative action…
>
> (b) Enhanced national/international action on mitigation of climate change…
>
> (c) Enhanced action on adaptation…
>
> (d) Enhanced action on technology development and transfer to support action on mitigation and adaptation….

The Bali Action Plan adopted at the Bali Conference is a major milestone in the evolution of the global climate change regime. Although, at COP-17, decision was taken to terminate the AWG-LCA from the time when COP-18 was to meet in Doha, Qutar, the Plan, neverthelen, played a key role in shaping the post-kyoto climate regime.

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29. Lavanya Rajamani (2008), supra note 23, p. 913; Danie Bodansky (2010), supra note 5, p. 230 (2010).

30. Lavanya Rajaman,i id, p. 913; Rajmani, "The Durban Platform for Enhanced Action and the Future of the Climate Change Regime" 61 *International and Comparative Law Quarterly* 501-18, 503 (2012) [hereinafter referred to as Rajmani (2012)]

31. Decision 1/ CP13, text of the Bali Action Plan is available at: https://unfccc.int/sites/default/files/resource/docs/2007/cop13/eng/06a01.pdf . Paragraph 2 of the Plan notes that COP-13 decides that "the process shall be conducted under a subsidiary body under the Convention, hereby established and known as the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, that shall complete its work in 2009 and present the outcome of its work to the Conference of the Parties for adoption at its fifteenth session." See also Rajmani (2012), supra note 30, p. 503

Since the process of reaching "an agreed outcome" under the Convention was to be different from that launched under the Kyoto Protocol, after 2007 negotiations began to take place on two tracks—one under the Kyoto Protocol which were limited to reaching an agreement on the second commitment period for the developed country parties and other under the UNFCCC to develop an "agreed outcome" through long term cooperative action.[32]

However, the use of the term, "agreed outcome" in the Bali Action Plan was problematic. As Rajmani put it, it showed considerable disagreement among the UNFCCC Parties on the question whether or not the outcome which was to emerge from the process was to have legal force.[33] Put differently, it was not clear whether the outcome would take the shape of a legal instrument like a protocol or the outcome was to be a non-legal instrument. Further, Parties also differed on the question whether the agreed outcome was to supplement the Kyoto Protocol or replace it by a new legal instrument.[34]

As already noted, the two working groups—the AWG-KP and the AWG-LCA were to conclude their work at the fifteenth Conference of Parties (COP-15) in Copenhagen, 2009.[35]However, despite high expectations, the two working groups could make only a little progress at the COP-15.[36]As a result, the Copenhagen Accord was "at best, a political agreement."[37]The Accord is not a COP decision; only an agreement without legal force of which the COP only "takes note of".[38] Although, later 141 States joined it and submitted their voluntarily undertaken pledges under the accord, originally the Accord was reached among only a small number of the Parties.[39]At the COP-15, the decision was also taken to continue negotiations under the UNFCCC and Kyoto Protocol. The Copenhagen Accord also included the pledges made by countries to reduce their emissions. But these pledges addressed only the period through 2020.[40]

Copenhagen Award, nevertheless, marked a major shift in the climate change law and policy. In contrast to the "top-down", "rigid" approach of the Kyoto Protocol it adopted a "bottom-up", "flexible" approach according to which each state Party was allowed to fix its emission targets. Further, in the Accord, we witness the emergence of a trend towards abandonment of the sharp categorization of all Parties into developed and developing country parties.[41]

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32. See Daniel Bodansky (2010) pp. 232-33; Lavanya Rajaman, "Addressing the Post Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime" 58 *International and Comparative Law Quarterly* 803-34, 804 (2009).
33. For further discussion on this aspect, see Rajmani, id, pp. 806-09.
34. Rajmani (2009), id, p. 809. For further discussion, see ibid.
35. Supra note 31.
36. Notably, the progress achieved by the AWG-LCA in addressing the elements contained in paragraph 1 of Decision 1/CP.13 was welcomed by the fourteenth Conference of Parties (COP 14) held in Ponzan. COP 14 also welcomed the determination of the Working Group "to shift into full negotiating mode in 2009." Decision 1/CP 14.
37. Daniel Bodansky (2010), supra note 5, pp. 233-34; Rajmani, "The Cancun Climate Agreements: Reading the Text, Subtext and Tea Leaves" 60 *International and Comparative Law Quarterly* 499-519, 499-500 (2011).
38. Decision 2/CP. 15. See Bodansky (2010), supra note 5, pp. 231 & 238.
39. Daniel Bodansky (2016) p. 301.
40. Id, p. 292.
41. Ibid.

Many key elements of the Copenhagen Accord were later incorporated in the regime of UNFCCC through Cancun Agreements, adopted at the sixteenth Conference of Parties (COP-16)[42]. Since Cancun failed to resolve the issue—whether to extend Kyoto Protocol beyond 2012 or to adopt a new agreement under the Convention track the issue became the focus of the 2011 Durban Conference.[43]At the Durban Conference, 2011, negotiations began towards a 2015 climate agreement.[44] Significantly, the conference decided to launch a (new) process "to develop a protocol, another legal instrument or an agreed outcome with legal force under the convention applicable to all Parties, through..." the Ad Hoc Working Group on the Durban platform for Enhanced Action (ADP). It is the work of ADP which ultimately resulted in the Paris Agreement in 2015. Further, at the eighteenth session of Conference of the Parties, held in Doha from 26 November to 8 December, the parties expressed their determination :

> "to adopt a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties at its twenty-first session", due to be held from 2 December to 13 December 2015, and "for it to come into effect and be implemented from 2020…." [Emphasis added].[45]

Reference to "all Parties" showed the willingness of the Parties to abandon the categorization of developed and developing country parties in favour of agreeing to an architecture which is more efficient than the existing one.[46]

IV. PARIS AGREEMENT

As already noted, Paris Agreement was adopted at the twenty-first Conference of the Parties (COP-21) in December 2015, in Paris. The text of the Agreement is annexed to the COP decision and is an integral part of it.[47] It is short one consisting of only 27 articles. Further, the agreement establishes a new, universal (legal) regime to deal with the problem of climate change beyond 2020. Notably, as will be noted presently, the deal struck at Paris in the form of a legally binding agreement departs from the existing regime established by the UNFCCC/Kyoto Protocol in many important respects.

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42. For further discussion, see Rajmani "The Warsaw Climate negotiations: Emerging Understanding and Battle Lines on the Road to the 2015 Climate agreement"63 *International and Comparative Law Quarterly* 721-40, 725 (2014)[hereinafter referred to as Rajmani (2014)] See also Bodansky (2016), id, p. 292.

43. Daniel Bodansky, id, pp. 288-319.

44. Decision 1/CP. 17, Para 2, Report of the COP-17, Addendum, Part Two : Action takenby the Conference of the Parties at its seventeenth session, FCCC/CP/2011/9/Add. 1, Rajamani (2012), pp. 501-18, See also. Rajamani, "The Warsaw Climate negotiations: Emerging Understanding and Battle Lines on the Road to the 2015 Climate agreement"63 *International and Comparative Law Quarterly* 721-40, 722 (2014).

45. Decision, 2/CP.18 Advancing the Durban Platform, FCCC/CP/2012/8/Add.1, at: https://unfccc.int/sites/default/files/resource/docs/2012/cop18/eng/08a01.pdf.

46. See also Bodansky (2016) p. 299.

47. According to Article 23 (2) of the Agreement, Annexes to the Agreement "shall form an integral part thereof and, unless otherwise expressly provided for, a reference to this Agreement constitutes at the same time a reference to any annexes thereto."

According to Article 2, the Agreement while "enhancing the implementation" of the UNFCCC has the overarching objective of strengthening "the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty", by

(a) "Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels…"

(b) "Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development…" and

(c) "Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development."

A central feature of the Agreement is that it not only makes provision for mitigation but also for adaptation strategies, finance and technology transfer, capacity-building and enhanced transparency of action. Obviously, provisions related to finance and technology transfer are meant to support developing countries in taking their mitigation and adaptation actions under the UNFCCC.

In enabling the Parties to meet their obligations in regard to mitigating the adverse effects of climate change and to achieve long term goals, the Agreement relies on the nationally determined contributions (NDCs) which are a kind of voluntarily undertaken (international) pledges as against the mandatory emissions reduction targets set by the Kyoto Protocol for each Annex 1 Parties. In other words, in contrast to the Kyoto Protocol, the Paris Agreement does not set binding emissions reduction targets. According to the Agreement, it is the Parties who are to prepare, communicate and maintain successive NDCs that they intend to achieve. Paragraphs 2 & 3 of Article 4 provide:

> Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions. [Paragraph 2].

Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances. [Paragraph3].

It is worth emphasizing that the new Agreement moves away from a burden sharing scheme like that relied on by the Kyoto Protocol under which industrialized countries were to undertake emissions reduction obligations. In other words, it departs from the reciprocal, multilaterally negotiated, legally binding emissions reduction targets and adopts a scheme under which all Parties voluntarily make reduction pledges; have considerable degree of ûexibility in fixing these pledges.[48]In this way, the Agreement adopts a "bottom-up" approach which is based on the premise that since states best understand their domestic conditions, they should be given sufficient degree of flexibility in fixing their

48. Cara A. Horowitz, "Paris Agreement" 55 *International Legal Materials* 740-55, 740 (2016).

reduction pledges according to their domestic policies.[49] This is in contrast to the approach adopted by the Kyoto Protocol which imposed the internationally negotiated emissions reduction obligations on developed countries Parties. As already noted, the system of NDCs under the Agreement replicates the system of voluntary pledges agreed under the Copenhagen Accord.

However, since NDCs, which are comparable to the legally binding emission reduction targets fixed for Annex 1 Parties under the Kyoto Protocol, are not legally binding it is doubtful whether they will be taken seriously by the states Parties. Put differently, it is doubtful whether the provision on NDCs will provide the Parties sufficient incentives to act in ways that are collectively efficient. There is the reason to believe that the voluntarily undertaken pledges under the Agreement will not prove sufficient in holding the temperature rise well below 2 degrees Celsius above pre-industrial levels.[50]

Further, under Paris Agreement, like the existing climate regime, the CDR remains the guiding principle. CDR is one of the fundamental principles of the international environmental law emphasizing the need to differentiate between developing and developed countries in respect of their responsibilities and capabilities.[51]According to this principle, while all nations have to contribute commonly to avert a risk that affects every nation at the same time their responsibilities are differentiated in the sense that "not all countries should contribute equally."[52] The principle finds recognition in Articles 6 and 7 of the 1992 Rio Declaration on Environment and Development. Article 6 states:

> 'The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special priority.

And Article 7 states:

> In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command'.

The regime established by UNFCCC/Kyoto Protocol furnishes a striking example of a regime which explicitly recognizes the principle. Notably, UNFCCC demands higher contributions from the rich countries in addressing the threat of climate change and requires the Parties to take into account specific needs and special circumstances of developing country Parties. As already noted above (Part II), Article 3 of UNFCCC states that in achieving the objective of the Convention the Parties shall be guided, inter alia, by the principles of equity and common but differentiated responsibilities and respective

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49. Daniel Bodansky (2016) p. 300.

50. The Hindu, New Delhi, December 14, 2015, Editorial.

51. For an excellent discussion of the CDR in different contexts including climate change, see Christopher D. Stone, "Common but Differentiated Responsibilities in International Law" 98 *American Journal of International Law* 276-301 (2004).

52. Id, pp. 276-77.

capabilities. In consonance with the CDR, Article 3 requires the developed country take the lead in combating climate change and the adverse effects thereof and to consider the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention…" [53] Thus, the basic thrust of the scheme adopted by the UNFCCC/ Kyoto Protocol has been to distinguish between developed and developing countries. Responsibility, both for historical and present emissions "was very much placed on the developed countries as a matter of 'climate justice'".[54]

Turning now to Paris Agreement, it may be sated that the Agreement applies CDR differently in that it, in contrast to the UNFCCC/ Kyoto regime, provides equal emphasis on both aspects of the principle, namely differentiated and common responsibilities. As Bodansky suggests, so far as the basic commitments with respect to NDCs are concerned, the Agreement applies to all Parties commonly.[55]

While basic commitments under the Agreement apply to all parties commonly, the Agreement relies on the differentiated responsibilities aspect of CDR, as it provides that developed country parties "should" continue to take the lead by undertaking economy-wide, absolute emissions reduction targets, while only "encouraging" developing countries to move towards economy-wide targets over time.[56]

The Agreement also provides that developing countries shall get support for implementing their mitigation related obligations.[57]The provisions for support for developing countries through finance[58] and technology transfer;[59] capacity building[60]; support for poor countries that experience loss due to global warming reflecting the differentiated responsibilities aspect of 'CDR' principle.

V. CONCLUSION

The new climate regime as established by Paris Agreement makes significant

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53. Similar provisions to this effect are contained in Article 4 (8) & (9) of UNFCCC.
54. See David Campbell, "After Doha: What Has Climate Change Policy Accomplished?" 25 Journal of Environmental Law 125-136, 127 (2013).
55. Bodansky (2016) p. 305.
56. Paris Agreement, Article 4 (4) ("Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances").For more discussion, see Bodansky (2016) p. 305.
57. Paris Agreement, Article 4 (5). See Bodansky (2016), ibid.
58. See Paris Agreement, Article 9. Paragraph 1 of Article 9 reads: "Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention."
59. See Id, Article 10. Article 10 requires the parties, inter alia, to "strengthen cooperative action on technology development and transfer."
60. See Paris Agreement, Article 11.Article 11 requires all Parties, inter alia, "to cooperate to enhance the capacity of developing country Parties to implement this Agreement. Developed country Parties should enhance support for capacity-building actions in developing country Parties."

departures from the existing one in some important respects. This article has mainly focused on the two such changes. First, rather than requiring only developed countries to reduce their emissions of GHGs as it is the case with the Kyoto Protocol, it adopts a truly global or inclusive approach in requiring all states Parties to the UNFCCC to contribute meaningfully in mitigating the effects of climate change. Hitherto, the reduction commitments applied to the Parties differently. Under Kyoto Protocol, in order to achieve the objectives of climate regime as stated by the UNFCCC, emission targets and specific timeframe for meeting those targets are fixed only for Annex I countries. The end result is that developing countries and those developed countries which are not parties to the Protocol are under no obligation to reduce their emissions of GHGs. This position which might seem equitable has proved simply inefficient in dealing with a "collective- action" problem like the climate change. Contrary to this, under the new scheme of things, the provision related to NDCs applies to all parties, rather than only developed country Parties. In this way, the new regime applies the principle of CBD in a different form. Unlike the existing regime, Paris Agreement does not differentiate between developed and non-developed countries sharply. This represents a remarkable departure from the version of CBD principle adopted by the UNFCCC and Kyoto Protocol.

A second striking feature of the new regime is that it, contrary to the rigid approach of Kyoto Protocol, adopts a quite flexible approach and gives the parties sufficient freedom in determining their NDCs which are equivalent to emission reduction targets under Kyoto Protocol.

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DISTRIBUTION OF GOVERNMENT LARGESSE : A PROBE INTO THE LEGITIMACY CONCERNS

GIRI SANKAR S. S.*

ABSTRACT : The massive availability of administrative discretion and its employment in the matter of distribution of government largesse has consistently generated heated debate regarding its legitimacy. The constitutional and statutory underpinnings of the grant of largesse in a big way lend credence to its rightful claims. The sheer spectrum of largesse in a welfare state is indeed bewildering and hence the statutory and constitutional borderlines for legitimate conferment assume significance. Consequently many such instances have under-went scorching judicial scrutiny and the manifestations of largesse in different tone and tenor have indeed posed challenges to the judiciary in adjudicating the legitimacy of the conferment. The appropriate tools for conveying largesse and its contextual bearings often have generated thick judicial discourses. The need to strike a balance between the competing interests of policy considerations, good governance requirements as well as the legitimacy of the claims, have persuaded the judiciary to evolve several legal propositions informed by judicially manageable standards. A careful analysis of the judicial discourses may also discern the lost chances wherein more public accountability could have been infused in varied contexts.

KEY WORDS : Government Largesse; Administrative Discretion; Auction, Bids Tenders; Misfeasance in Public Office.

I. INTRODUCTION

The distribution of government largesse has always been in the midst of controversies and has been the subject matter of invasive indulgence by the Supreme Court over more than four decades. The distribution of the largesse assumes many shapes - from the distribution of petrol outlets and gas agencies, shops and other outlets, licenses, quotas, permits, awarding of contracts, disposal of public properties and natural resources to even the appointment to various offices of the state. Over a period of time, the challenges before the judiciary in this matter has proliferated and indeed a probe is warranted on the multifarious ways in which the same is accomplished and the principles evolved by the court in addressing such instances.

The transcending role of State in a welfare state and the ever growing domain of

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state largesse were addressed by Prof. Reich in his article[1] more than half a century back. It was identified that when Government accomplishes different functions such as money, benefits, services, contract, franchises and licenses, the Government has become the major source of wealth.[2] As pointed out by Prof. Reich, the more closer the state moves to welfare state, the domain of largesse widens as it is to assure the well being of the individual who cannot attain it owing to the disabilities beyond their control. The vast province of discretionary powers made available through legislations and other means are attempts on the part of a welfare state to assure the general wellbeing of its people. But paradoxically instances of abuse of this power was on ascendancy and the courts were called for evolving new principles to curb such excesses and enforce accountability to executive actions much needed in a constitutional democracy. While many of the largesse assume the shape of rights, a large chunk of them bear the complexion of privileges. When the State confers privileges, the enabling power to accomplish the same is discretionary power and it is trite that massive discretion is available to a welfare state in this context. This calls for streamlining of power in such a manner that such privileges can be disbursed but only informed by reason and non-arbitrary decisions ensuring accountability.

II. CONSTITUTIONAL JURISPRUDENCE IN AWARDING LARGESSE

There is always a visible terrain of constitutional and statutory jurisprudence that underlines the distribution of government largesse. The constitutional jurisprudence is visible on a larger note in Directive Principles of State Policy which reflects the need for such distribution and the legality parameters spanning over the dynamics of non-discrimination and non- arbitrariness engrained in Article 14. The Courts are called in to strike a balance between the constitutionally espoused needs and the dynamics of distribution in tune with the constitutional riders and statutory precepts. Thus the most important initial question that the courts confront in the area of 'largesse' concerns the proper conceptualization of the constitutional constraints before it.[3]

(a) Directive Principles of State Policy

The enabling provision for distribution of state largesse is unmistakably the realm of Directive Principles of State Policy. It is up to the State to decide as to the modality of

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1. See Charles A. Reich, "The New Property", 73 *Yale Law J*, 733 (1964). He identifies incomes and benefits, jobs, occupational licenses, franchises, contracts, subsidies, use of public resources and services. To this one may add social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare, benefits to victims of crime, accidents happening out of acts perpetrated by private individuals and also government agencies.
2. It offers a perspective of the transformation of society as it bears on the economic basis of individualism.. Prof. Reich used a republican vision to perceive the sharp shift in the law. There are different linkages that are drawn between law and the larger realm of political discourse. What Prof. Reich suggests is a different vision of property.
3. See Seth F. Kreimer, "Government "Largesse" and Constitutional Rights: Some Paths Through and Around the Swamp" 26 *San Diego Law Review,* 229, 234 (1989). The term "largesse" has been coined by Frankfurter J. in *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 149, 173 (1951), wherein he had concurred with the proposition that the problem arises whenever government has discretionary authority to allocate benefits and that such authority is not confined to the modern welfare state alone.

framing a scheme, which can be the conduit for extending benefits to improve the living standards directly or indirectly by increasing the means of livelihood. Hence generally the Courts have a very limited role in the adjudication of disputes regarding the same as the device of judicial review cannot be profitably employed to carry out an objective assessment owing to the lack of judicially manageable standards.

An interesting query of alleged erosion of accountability was raised in the indiscriminate distribution of consumer durables, the expense of which has been met from the state exchequer solely for the reason that the promises made in the election manifesto has to be honoured. The constitutionality of election manifestos which declared distribution of free gifts by the political parties (popularly known as freebies) was queried before the Supreme Court in *S. Subramaniam Balaji* v. *Govt. of Tamil Nadu*.[4] The DMK and its political allies while releasing the election manifesto for the Assembly Elections 2006, announced a Scheme of free distribution of colour television sets to each and every household which did not possess the same and distributed, and they emerged victorious followed by AIDMK in 2011. The allegations pertaining to these were broadly (1) funds raised through taxation can be used by the State only to discharge its constitutional functions and not to be used for funding State largesse, (2) it is against the most important constitutional mandate is that a public purpose cannot be the one that results in the creation of private assets, (3) while statutory authorities can confer social or economic benefits on particular sections of the community, their power is limited by the principle that such benefits must not be excessive or unreasonable.[5]

The Supreme Court answered the allegations in the following manner. (a) The concept of State largesse is essentially linked to the directive principles of state policy. (b)The concepts of livelihood and standard of living are bound to change in their content from time to time and hence the State distributing largesse in the form of distribution of colour TVs, laptops, etc. to eligible and deserving persons is directly related to the Directive Principles of State policy. (c) If certain benefits are restricted to a particular class that can obviously be on account of the limited resources of the State. (d) All welfare measures cannot at one go be made available to all the citizens and therefore, the principle not to treat unequals as equal has no applicability as far as state largesse is concerned. (e) Further, the State can gradually extend the benefit in consonance with the very creed of the directive principles of state policy which is the progressive realisation of the goals enshrined.

The Members of Parliament Local Area Development Scheme was challenged in *Bhim Singh* v. *Union of India*[6] and the prayer was for scrapping of the MPLADS Scheme and for impartial investigation for the alleged misuse of the funds allocated in the Scheme and also for necessary guidelines for proper utilization of public funds. Repelling the allegations, the Constitution Bench of the Apex Court upheld the scheme on the grounds that there were adequate levels of safeguards built into the scheme to ensure that the funds given to the Members of Parliament would not be misused. It further held that the court can strike down a law or scheme only on the basis of its *vires* or unconstitutionality,

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4. (2013) 9 SCC 659.
5. Lord Atkinson stated in *Roberts* v. *Hopwood*, [1925] All.ER 24, held that the State cannot act in furtherance of eccentric principles of socialistic philanthropy.
6. (2010) 5 SCC 538.

but not on the basis of its viability.

In the 1970s, in *Ramana Dayaram Shetty* v. *International Airport Authority*[7], the Apex Court had discussed the key aspects mentioned above which forms the substratum of this topic. The Court discussed the probity with which the state has to dispense the forms of wealth which lies within its disposal. The scope for judicial intervention when Governments deal with public in disbursing largesse was summarized in the following propositions *viz*., (a) the Government cannot act arbitrarily at its sweet will like a private individual, but has to conform to the standard or norms which is not arbitrary, irrational or irrelevant, (b) The discretionary power in the matter of grant of largess must be confined and structured by rational, relevant and non-discriminatory standard or norm and (c) Any departure from the standard or norm in any particular case or cases warrant striking down the same, unless it manifest that the departure was not arbitrary and was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.[8]

The taming of the massive discretion in the matter of award of largesse has been the major challenge in ensuring the legitimacy of the ever growing instances of award of largesse. The Supreme Court in *Kasturi Lal Lekshmi Reddy* v. *State of Jammu & Kashmir*[9] has portrayed the new forms of wealth of which some assume the shape of privileges, which the legal system was comparatively slow to recognize. The Court identified the need to protect individual interest in it and hence stressed on the new forms of protection and acknowledged that some interests in Government largess previously regarded as privileges, have been recognized as rights. The Court also comprehends that in giving legal protection to other categories not only that procedural safeguards were forged but confining, structuring and checking Government discretion also was employed in the matter of grant of such largess.[10]

The Supreme Court spelt out two limitations imposed by law which structure and control the discretion of the government in this behalf. The first pertains to the terms on which largesse may be granted whereas the other, with regard to the persons who may be the recipients of such largesse. Further the Court relied on decisions which had aesthetically interpreted how the requirements of directive principles in the matter of distribution of the benefits in the shape of largesse can be woven together with the safeguards premised on the principles of non- arbitrariness and reasonableness engrained in Article 14, in particular. The Apex Court in *R.D. Shetty*[11] had posited the bridging of the requirement of reasonableness which runs like a golden thread through the entire fabric of fundamental rights with its positive manifestation and expression in the lofty ideals of social and economic justice inspiring and animating the directive principles. Any distribution of largesse in view of the two limitations stated above should necessarily reflect the following considerations, *viz*., (a) unlike a private individual, the State cannot act as it pleases in the matter of giving largesse. (b) The governmental action is subject to restraints inherent in its position in a democratic society and the constitutional power conferred on the

7. (1979) 3 SCC 489.
8. *Ibid* at 506.
9. (1980) 4 SCC 1.
10. *Ibid* at 11.
11. *Supra* note 7.

Government can be exercised only for the public good. (c) Every action taken by the Government must be in public interest and liable to be tested for its validity on the touch-stone of reasonableness and public interest. (d) The directive principles apart from concretizing and defining the national aims and the constitutional goals also give shape to the concept, standards and forms of reasonableness envisaged in Articles 14, 19 and 21 of the Constitution which must guide and animate governmental action and (e) In selecting the recipients for largesse the Government cannot choose to deal with any person it pleases in its absolute and unfettered discretion, unlike a private individual deal with any person it pleases, but that its action must be in conformity with some standard or norm which is not arbitrary, irrational or irrelevant.

When distribution of largesse is viewed from the enabling language in the directive principles, it is an entrenched legal position that the public interest involved in the distribution of largesse receives its orientation from there. Thus ascertaining of legitimacy in the matter of a government action of distribution of government largesse as well as its relegation pursuant to overriding considerations has to necessarily be informed by public interest. It is a well settled legal position that Articles 37 and 39 (b) and (c) have a special bearing when it comes to the decision of distribution of government largesse. Article 37 states that the directives are fundamental in the governance of the country and further requiring the state to make laws adopting it matters, when decisions on conferment of government largesse are being taken. Looking through a constitutional prism, the idea of how to best sub serve common good, makes the decisions even more contesting on the premise as to whether common good can be furthered with mathematical precision by employing the tools like auction, etc.

In *Sachidanand Pandey* v. *State of West Bengal*[12], the Court elucidated that the State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. The Court distinguished between the causes, nature and purposes for which state owned socialist property is to be disposed. The two purposes include the one which is exclusively for earning revenue to enable the state to pursue welfare measures and the other for materializing any of the constitutionally designed purposes like the realization of any of the directives in the directive principles of state policy. The former requires the adoption of methods like auction to get the maximum revenue and in the case of the latter, any other method can be adopted because in that context the market value is not the prime consideration, but the materialization of the constitutional objectives is what matters. The Court held that by adopting the 'net sales' method instead of inviting tenders or holding a public auction, the financial interests of the State were in no way sacrificed and that the government acted in a *bona fide* manner.

The Supreme Court has rightly posited in *Natural Resources Allocation, In re Special Reference No. 1 of 2012*[13] that the concept of common good is being informed by the overarching principle of distribution and thus natural resources being material

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12. AIR 1987 SC 1109. The West Bengal Government when allotted Taj Group of Hotel for the construction of a Five Star Hotel at the expense of the zoological garden, did not invite tenders or public auction but opted for the 'net sales' method as against the 'rent-based-on-market-value' method which is far from being objective.

13. (*2012)* 10 SCC *1*. This case was occasioned by the decision of the Supreme Court in *Centre for Public Interest Litigation*. v. *Union of India*, (2012) 3 SCC 1.

resources of the community cannot be conferred as largesse. The disposal of natural resources being a facet of the use and distribution, the generic sense of the term 'distribution' can only be ascribed the meaning by employing the economic and social philosophy of the government. It can be gainfully maintained that the directive principles enshrine equitable way of distribution and not just revenue maximization through disposal of natural resources and hence the modalities to be employed for its disposal needs to be structured accordingly. The structuring of the massive discretion should be guided by the expression to "best sub-serve common good". Further it is submitted that any misdirected moves from any dispensation running counter to the constitutionally ordained notions in the matter, will be earning the wrath of the electorate which is more effective. On the contrary, if the disposal of the resources falls foul on the touch stone of non-arbitrariness and unreasonableness standards, it is the judicial intervention that matters.

Thus the burden is always on the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest. Hence the State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants particularly when it comes to alienation of scarce natural resources like spectrum, etc.[14]

(b) Touchstone of Article 14

The questions touching upon the legitimacy of awarding largesse has to necessarily stand the test of scrutiny of Article 14. Obviously the massive discretion in the matter attracts the principles of non-arbitrariness and unreasonableness to be applied. Hence to rule out pick and choose method or more seriously to avoid favouritism, nepotism, corruption etc. and to promote accountability, the methods like auction, tenders, contracts etc. are resorted to. The following principles are seen to have been evolved through various judicial decisions on the matter and can be profitably summarised thus: (a) the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State[15] and (b) the distribution of government largesse as is an executive action has to be a non-discriminatory, arbitrary and reasonable action.[16] Thus the dynamics of Article 14 has become an operative rule in the matter of streamlining of the vast powers that the government wields in the matter of conferment and divesting of largesse on the strength of a long line of judicial decisions.

III. REVIEW OF ADMINISTRATIVE DISCRETION - A TIGHT R ROPE WALK

(a) Wide Latitude for Exercise of Discretion

The employing of the principles of non-arbitrariness and unreasonableness premised on Article 14 as a touch stone to evaluate the legitimacy of conferring largesse is a strenuous judicial exercise. The Court in doing so has to strike a chord between the scope of review of policies and the constitutionally ordained powers enabling the

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14. See *Center for Public Interest Litigation* v. *Union of India*, (2012) 3 SCC 1.
15. See *New Horizons Limited*. v. *Union of India,* (1995) 1 SCC 478.
16. See *Akhil Bhartiya Upbhokta Congress* v. *State of Madhya Pradesh,* (2011) 5 SCC 29.

government to adopt strategies for effecting distributive justice. The review of the voluminous discretion in the matter of adjudicating on the legitimacy of largesse has a firm bearing on the economic policy considerations. The United States Supreme Court in *Metropolis Theatre Company* v. *City of Chicago* [17] had legibly held more than a century back that the expediency factor may require illogical and unscientific inclusions, but since choosing the best is not easily discernible the wisdom behind the choice will be questioned, and hence mere errors of the government cannot be subject to the judicial review.[18]

The judicial discourses consistently reflect the cautious approach in addressing the issues by not remaining a stumbling block in the governance matters, but at the same time the courts have refrained from annulling such grants while comprehending suspected largesse instances,. On a broad note, the judicial reasoning for non-interference in various instances of adjudication of economic policies can be summarised in the following propositions *viz*., (a) the lack of expertise in public and political, national and international economy;[19] (b) it is outside the domain of the courts to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved;[20] (c) the questions of the wisdom of giving colour TVs, laptops, mixer- grinders, tune with the election manifesto must be debated and decided in the legislature and not in the court;[21] and (d) no interference is warranted and it is immaterial whether the court does not agree with the decision of the government.[22]

Thus the prevailing notion was that the State must be left with wide latitude in devising the ways and means of imposing fiscal regulatory measures, and the interference from the Court is called for, only if compelled by the statute or by the Constitution.[23] In *Air India* v. *Cochin International Airport Ltd*[24] the Apex Court held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all and if some defect is found in the decision making process, the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of overwhelming public interest and not merely on the making out of a legal point. Hence when the State, while granting largesse must confine itself to rational, relevant and non-discriminatory standards or norms and any departure made should be justified as not arbitrary, but as based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

It is also interesting to note that the Apex Court has been very considerate in fixing the standard of review of judicial discretion by paying deference when considerable volume of discretionary power is invested with functionaries holding high Offices. A

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17. 228 U.S. 61(1912)
18. *Ibid* at 69,70.
19. See *Liberty Oil Mills* v. *Union of India* (1985) 3SCC 465, on the appropriateness or the adequacy of a particular import policy.
20. *Villianur Iyarkkai Padukappu Maiyam* v. *Union of India,* (2009) 7 SCC 561.
21. *Subramanian Balaji* v. *State of Tamil Nadu,* (2013) 9 SCC 659.
22. *Sri Sitaram Sugar Company* v. *Union of India*, AIR 1990 SC 1277; see also *BALCO Employees Union (Regd.)* v. *Union of India,* (2002) 2 SCC 333.
23. See *M/S Bajaj Hindustan Ltd* v *Sri Shadi Lal Enterprises Ltd.,* (2011) 1 SCC 640.
24. (2000) 2 SCC 617.

Constitution Bench of the Supreme Court in *B.P. Singhal* v. *Union of India*[25] while explaining the nature of judicial review of discretionary functions of persons holding high offices held that such authority entrusted with the discretion need not disclose or inform the cause for exercise of the discretion.

(b) Fair play and Transparency

The Apex Court, while acknowledging the volume of discretion available in the matter of grant of largesse, has placed riders that it should be open, fair and honest and completely above board. In *Asst. Excise Commissioner* v. *Issac Peter*[26], the Supreme Court has made a fine distinction between the statutory contracts entered into between state and others and the auction through tenders, bids etc. in the matter of the import of natural justice principles. In the former, the concept of fairness and reasonableness has a scant application as the terms of the mutually agreed contract is binding. In the case of contracts for the distribution of largesse, the government has only a limited interest in the matter of the structured fees/other payments due in the matter of award of licenses or permits and in the strict terms state do not suffer any financial loss and consequently the judicial overview will also be not much incise.

IV. KINDS OF LARGESSE AND THE MODALITIES FOR DISTRIBUTION

(A) Allotment of Land and Public Properties as Largesse

Land being a scarce public resource, when public bodies are vested with control over lands which are acquired for facilitating planned development, the settled legal position is that no authority can claim immunity from its accountability to matters of public interest. In awarding state largesse in its various forms in conformity with the statutory and constitutional requirements, several objective tools like bids, tenders etc. are seen embraced, particularly when economic value has to be reconciled with equitable and social justice oriented propositions. The general notion as laid down by the Apex Court is that public property owned by the State or by an instrumentality of State should be generally sold by public auction or by inviting tenders. This mode of sale achieves the twin purposes of getting the highest price for the property besides ensuring fairness ruling out the vitiating factors like bias, favouritism or nepotism etc. But at the same time the Court has clarified that this is not an invariable rule and the departure from the rule of auction could be made on sound justifications.[27] Thus in the matter of the disposal and development of public properties as well as natural resources, auction has been considered as the better vehicle and bids, tenders etc. are the common devices for finalising auction in awarding the same to the beneficiary. These processes are at times caught in the quagmire of controversies and the judiciary though having only a constricted space, has in a substantial manner intervened to tone down the executive excesses so as to improve the distribution more equitably and legally.

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25. (2010) 6 SCC 331.

26. (1994) 4 SCC 104.

27. See *Sachidanand Pandey* v. *State of West Bengal*, AIR 1987 SC 1109. The Court held that is one of the methods of securing the public interest in disposing a property by sale. Compelling reasons alone will necessitate departure from the rule , which must be rational and non-discriminatiory. See also *Haji T.M. Hassan Rawther v. Kerala Financial Corporation*, (1988) 1 SCC 166; *M.P. Oil Extraction* v. *Indian Oil Corporation,* (1990) 3 SCC 752.

(a) Public Auction by Bids and Tenders

Three questions assume importance in the matter of fixing the paraphernalia for auction of properties. The primary question writ large on the face of the decision making is as to what should be the tools that are to be pressed into service for the auction of properties or even natural resources. Secondly, the exclusivity of the tools to be used for the purpose. Thirdly, while employing those tools, how far the purpose for which the attempted disposal/distribution of largesse has been materialised need to be answered. All these questions are interconnected and require a broader accommodation for giving credible answers.

Answering the first question, the sheer employment of voluminous discretion involved in the distribution/disposal of largesse necessarily requires adoption of some tools like auction, tenders etc. The justification is that it will lend more objectivity and credence and will check arbitrariness and discrimination in such actions. Over a period of time this has become the operative rule in judicial decisions. In *Akhil Bhartiya Upbhokta Congress* v. *State of Madhya Prades*[28], the Apex Court very emphatically reflected the following when state and or its agencies or its instrumentalities give largesse or confer benefit *viz*., (a) transparency through publication in the Official Gazette and other recognised modes of publicity. (b) the need for a sound, transparent, discernible and well-defined policy and (c) implementation or adopting of a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distributions of largesse like allotment of land, grant of quota, permit, license, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the government.

In the conveyance of largesse, especially land or public property, private applications made by individuals, organisations or institutions cannot be a vehicle for conveying largesse supplanting democratic modes of staking claims. Such type of disbursal involves exclusion of other eligible persons from lodging competing claims. In *City Industrial Development Corpn*. *v*. *Platinum Entertainment* [29], the Apex Court held that any policy, much less, a rational policy of allotting land on the basis of applications made by individuals, bodies, organisations or institutions *dehors* an invitation or advertisement by the State or its agency/instrumentality is devoid of legitimacy. Accordingly the Court held that any allotment of land or grant of other form of largesse by the State or its agencies/instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favouritism and/or nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution.

It has been commonly accepted that public auction is the normal mode of selling public property or rights in it and when it is not feasible or has failed to attract bidders after due publicity alone, a private contract can be negotiated. When the department,

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28. (2011) 5 SCC 29.

29. (2015) 1 SCC 558. The respondent, proprietor of a private concern submitted two applications to the then Chief Minister and got allotment of two valuable plots in two different areas for setting up multiplex-cum-auditorium-cum-entertainment centre and for multiplex theatre. Later the respondent formed a trust and in its name submitted another application for allotment of land for private venture and was accorded allotment of the third plot also.

after initiating public re-auction abandons the same and decides to resell and vends by private contract that too without letting known the reasons and without due publicity, offends Article 14. In *State of Haryana* v. *Jage Ram,*[30] the excise authorities when abruptly decided to retreat from their original intention of holding a public re-auction and decided to grant licenses by private negotiations on the spur of the moment, that very day and at that very hour, the Court held that the decision smacks of arbitrariness and is unfair and unreasonable, and cannot be allowed to sustain.

The Apex Court approved in many an instance that the exercise of discretionary power in distribution of largesse has to be in furtherance of clear and unequivocal guidelines, criteria, rules or regulations and should not be otherwise. While disposing of properties as largess, the preference to public auction based on proper Rules and Guidelines over other modes is very much visible in *New India Public School* v. *Haryana Urban Development Authority (HUDA).*[31] The Supreme Court held that when the public authority discharges its public duty, the word 'otherwise' would be construed to be consistent with public purpose. Further that, clear and unequivocal guidelines or rules are necessary and the same should not be at the whims and fancies of the public authorities or under their garb or cloak for any extraneous consideration. The employment of discretion would depend upon the nature of the scheme and object of public purpose sought to be achieved and in all cases relevant criterion should be pre- determined by specific rules or regulations and published for the public..

An attempt to answer the second question evinces that it is a profoundly canvassed legal position that auction is not the only mode of vehicle to disburse government largesse, but the government can opt for any other modes keeping in view the intended purposes. The Supreme Court has clearly observed that no constitutional principle underpins the device of auction. A perceptible symmetry is visible in the matter of the best available options in the context of disposal of public property. In *Mahesh Chandra* v. *Regional Manager, U.P. Financial Corporation*[32] the Supreme Court made a comparison with the available modes of disposal of properties *viz*., sale by public auction or tender or private negotiation. The Court unequivocally stated that the basic requirement is that, whatever be the mode, it should be *bona fide* action. The Court stated that sale by public auction is universally recognised to be the best and most fair method as it is expected to fetch best competitive price and is beyond reproach. The Court opined that the scope of tender which was invited or calling for quotation to execute public work or to award contracts is narrow and the same will be pressed into service only if public auction is impossible. The Court did not find favour with private negotiation as it cannot withstand public gaze and can breed corruption and lacks public or social interest.[33] There may be situations where there are compelling reasons necessitating departure from the Rule.

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30. (*1983) 4 SCC 556.*

31. (1996) 5 SCC 510. On an appeal preferred by the non-allotees of certain plots against the judgement of the single bench which upheld the allotment of plots earmarked for building schools by the HUDA, the Division Bench of the High Court set aside the order of the learned single judge.

32. (1993) 2 SCC 279.

33. In *Lakshmanasami Gounder* v. *C.I.T., Selvamani*, (1992) 1 SCC 91, in the context of sale of debtor's property for recovery of the Government dues, public auction was endorsed as one of the fair modes of sale intending to get highest competitive price for the property.

Such situations may arise when specialized technical know-how is required and in such instances recourse to normal methods of inviting tenders may be prejudicial to the interest of the state. All that is needed is overwhelming public interest demanded by the situation and the bonafides of the authority.[34]

Reflecting on the third question, the purpose for which the disposal or distribution of largesse is conceived is critically dependent on (a) whether the policy considerations are actuated by the social welfare purpose or (b) whether it is driven by the concept of maximization of revenue. It is submitted that the same has been reiterated and has come to stay in the jurisprudence of awarding largesse in India.

The Supreme Court in *Master Marine Services (P.) Ltd*. v. *Metcalfe and Hodgkinson (P) Ltd*.[35] examined the contours of power of the High Court under Article 226, where the challenge was to cancellation of an auction held by a public body where the prime consideration was fairness and generation of public revenue. It was held that the general principles of judicial caution employed by the courts regarding interference in the stages of awarding contract informed by executive wisdom is applicable in the case of award of largesse in the shape of contracts etc.

(b) Rejection of Highest Bid and Dynamics of Fairness

In *Ram and Shyam Company* v. *Union of India,*[36] the highest bidder whose bid was rejected on the ground that the bid did not represent the market price and was not given an opportunity to raise his own bid. Afterwards when privately a higher offer was received the bid was permitted and the same was held as an infraction of the fundamental principles of natural justice. Instantly, after confirming the offer in the name of the highest bidder, the failed participant made lateral interventions by writing to the Chief Minister casting aspersions on the highest bidder and claimed that the highest bid did not reflect the adequate lease rent. He also put up an offer that if he is awarded the contract he is willing to accept the same at an amount higher than the one confirmed in the highest bid which the Chief Minister accepted. The Court quashed the grant in favour of the respondent holding that in the prevailing situation, fair-play in action even at its minimum demands that the appellant should have been given an opportunity to counter and correct the same.

Every citizen of this country has vital interest in the community property and its effective use and legitimate disposal. The legitimacy of the tender or bids in auction process for disposal of public property has to address some essential legal permutations and combinations. The considerations of the state differ depending upon the purpose for which the disposal of the public property is conceived. It is trite that the State Government has an obvious right not to confirm the to demonstrate that the highest bid does not represent the adequate market price of the property. The onus is very high, that it cannot substitute the public bidding with a secret offer on that guise without giving the

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34. See *Sachidanand Pandey* v. *State of West Bengal*, (1987) 2 SCC 295,300.

35. (2005) 6 SCC 138.

36. In the auctioning of a minor mineral quarry, the appellant offered the highest bid in the rent/ .royalty which was accepted. As the authority felt that the highest bid did not represent the adequate lease rent, exercised powers under clause (4) of sub-rule 2 of Rule 130 or the Punjab Minor Mineral Concession Rules 1964 and declined to confirm the same.

highest bidder an opportunity to improve his bid as is in *Ram & Shyam* case.[37] This particularly happens when the property is disposed for revenue earnings wherein the public interest is to align with the idea to get maximum earnings. Further it is also a settled legal position that the highest bid need not be acted upon if the claims of a vulnerable section who could not outbid the highest bidder are to be accommodated which again is the manifestation of a public interest[38].

In *M/S. Ajar Enterprises Pvt. Ltd.* v. *Satyanarayan Somani*[39], a large tract of land was originally leased out to IISCO, a subsidiary of a public undertaking to enable it to construct a residential colony for its employees. When IISCO went for liquidation, the Official Liquidator assigned all the leasehold rights of IISCO in favour of Ajar, a private player. The Supreme Court found fault with Ujjain Development Authority (UDA), which conferred largesse on Ajar when there was no absolute or indefeasible right to renewal either with IISCO or in Ajar, and further held that the same was unreasonable and arbitrary. It also held that the act of the public authority amounts to forsaking the trust with which valuable resources such as land under its control are impressed.

In *State of UP* v. *Vijay Bahadur Singh*[40], it was held that inadequacy of the bid is only one among other several reasons for the Government not to conform to the highest bid. This can include (a) enormity of the bid; (b) change in the policy of the government subsequent to the auction and prior to confirmation. To this one may add, if the highest bid is not representing the market price, there cannot be any doubt that the authority's action in accepting or refusing the bid must be free from arbitrariness or favouritism[41].

In the matter of disposing public property for encouraging entrepreneurship or raising business, the considerations differ from the one in the matter of largesse. This leeway can be seen in the context in which the Apex Court decided *Kasturi Lal Lekshmi Reddy* v. *State of Jammu & Kashmir.* [42] The Court held that where the state allocates the resources such as water, power, raw materials, etc., for the purpose of encouraging setting

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37. AIR 1985 SC 1147. In *K.N. Guruswamy* v. *The State of Mysore*, AIR 1954 SC 592, the bid of the appellant was the highest and when the contract was subject to formal confirmation alone by the Deputy Commissioner, the fourth respondent who did not take part in the auction, approached the Excise Commissioner and made a higher offer. The Excise Commissioner accepted the tender of the respondent, cancelled the sale in favour of the appellant and directed the Deputy Commissioner to take action under the relevant rule. The Constitution Bench of the Apex Court rejected the approval and held that the arbitrary improvisation of an *ad hoc* procedure to meet the exigencies of a particular case is not allowed.

38. See *Nand Kishore Saraf* v.*State of Rajasthan,* AIR 1965 SC 1992, the challenge over the rejection of the highest bid and finalizing the contract in favour of a cooperative society formed by workmen from weaker section was disallowed as it serves the public purpose enshrined in Art. 41 of the Directive Principles of State Policy.

39. 2017 (10) SCALE 346. The High Court decided to take back the land from the Appellant *interalia* on the ground that the disposal of public property through private negotiations reflects the breach of trust and that the state is duty bound to ensure that it realises the best price for the transfer of land by inviting tenders with open participation or a public auction in order to generate funds for its welfare activities.

40. (1982) 2 SCC 365. In the auction for felling unwanted trees in the forest, bids of unbelievable stake were put forward and the department smelling that the bidders are aiming for illegal felling of trees did not accept the highest bid and eventually cancelled the auction.

41. See *Meerut Development Authority* v. *Association of Management Studies*, (2009) 6 SCC 171.

42. (1980) 4 SCC 1.

up of industries within the state when any private entrepreneur approaches, a parallel cannot be drawn with the principles underlining the grant of largesse. Similarly in *Villianur Iyarkkai Padukappu Maiyam* v. *Union of India*[43] the selection of contractor for development of the port of Pondicherry without floating a tender or holding public auction was challenged. It was held that where the State was allocating resources such as water, power, raw materials, etc., for the purpose of encouraging development of an existing port, the State was not bound to advertise and tell the people that it wanted development of the port in a particular manner and invite those interested to come up with proposals for the purpose. It was further held that as the instant case was one of developing an existing port to meet rapid changes in transport technology and to improve the existing port facilities on Build, Operate and Transfer basis, (BOT) the same can never be equated with intended sale of government land or transfer of state largesse. In the above two cases the Apex Court acknowledged the constraints on judicial review of economic policies and paying deference to the executive decisions, as there is a paucity of judicially manageable standards in the process.

When the Government, as a model employer makes the land available at the highest of the guideline value/ruling rate/market value to the Government servants who bear the cost of construction through a self financing process, the same will not amount to largesse to the Government servants.[44]

(B) Natural Resources as Largesse

The auction of public property as well as natural resources as largesse has turned out to be a potential space for abuse of power in India. Judicial interventions galore which set right the deviance identified in the process of auction to balance alienation of natural resources with the letter and spirit of the Constitution. The national interest implicit in natural resources has unequivocally been put across by the Supreme Court in *Association of Natural Gas*. v. *Union of India,*[45]when it observed that the people of the entire country have a stake in natural gas and its benefit has to be shared by the whole country. The public trust aspect involved in the matter of distribution of national properties like natural resources which is a state largesse, has been comprehended by the Supreme Court in *Reliance Natural Resources Ltd*. v. *Reliance Industries Ltd*.[46] The argument was that the distribution of natural gas in the manner in which it is being claimed to have been allocated by the MOU, in secret and without it being offered to others, is to be struck down by the courts. After detailed scrutiny, the following principles were culled out by the Court: (1) The duty of the State to protect the national interest in the matter of natural resources is vested with the government as a matter of trust in the name of the people of India. (2) Even though exploration, extraction and exploitation of natural resources are within the domain of governmental function, when the Government decides to privatise some of its functions, the constitutional restrictions on the Government would equally apply to the private players in this process. (3) Natural resources must

43. (2009) 7 SCC 561.
44. See *P. Pugalenthi* v. *State of Tamil Nadu*, 2016 SCC OnLine Mad. 31412.
45. (2004) 4 SCC 489.
46. (2010) 7 SCC 1.

always be used in the interests of the country, and not private interests. (4) The broader constitutional principles, the statutory scheme as well as the proper interpretation of the Product Sharing Contract mandate the government to determine the price of the gas before it is supplied by the contractor.

The very acts of alienation, the modality used for alienation etc. were disputed in a host of instances. In *Centre for Public Interest Litigation* v. *Union of India*,[47] (2G case) the Supreme Court quashed all the 122 licences for 2G telecom spectrum issued by the then Government in 2008 on a first-come-first-served basis and ordered auction for grant of fresh licences. The Court stated that State being a trustee of like national assets, it has to ensure a duly publicised auction conducted in a fair, equitable, transparent and impartial manner for alienation of natural resources, as the best method. It was observed that while transferring or alienating the natural resources, the State is duty bound to adopt the method of auction by giving wide publicity enabling all eligible persons to participate in the process and that the methods like first-come-first-served are prone to be misused by unscrupulous people.

In *Natural Resources Allocation*, *In Re Presidential Reference No. 1 of 2012*[48], Kehar J. very pertinently observed that no part of the natural resource can be dissipated as a matter of largesse, charity, donation or endowment, for private exploitation. The Constitution Bench also clarified the scope of the statement of law by interpreting a sentence in 2G cases, *viz*., "a duly publicized auction conducted fairly and impartially is perhaps the best method for discharging this burden" and hence that the court has not ruled out other methods. The court held that the auctions are not the only permissible method for disposal of all natural resources across all sectors and in all circumstances, but is one of the several price recovery mechanisms and certainly not the only constitutionally recognized method for alienation of natural resources. On the question regarding whether there was a constitutional mandate under Article 14 for holding auction as a lone method in the sale of natural resources, the court held that, it would be odd to derive auction as a constitutional principle only for a limited set of situations from the wide and generic declaration of Article 14 and also that the same runs counter to the "distribution of common good" conceived in Article 39 (b). The near non-negotiable nature of alienation of natural resources as highlighted by the court is evidently manifesting in the following propositions, (a) no part of the natural resource can be dissipated as a matter of largess, charity, donation or endowment, for private exploitation, (b) each bit of natural resource expended must bring back a reciprocal consideration, (c) there cannot be a dissipation of material resources free of cost or at a consideration lower than their actual worth and (d) the consideration may be in the nature of earning revenue or may be to "best sub-serve the common good".

In *Manohar Lal Sharma* v. *The Principal Secretary,*[49] the allocation of coal blocks made during for the period 1993 to 2010 by the then central government, both under the screening committee route and the government dispensation route, were

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47. 2012 (3) SCC 1. Power vested by the State in a Public Authority should be viewed as a trust coupled with duty to be exercised in larger public and social interest, see Noida Entrepreneurs Association v. NOIDA, (2011) 6 SCC 508.

48. (2012) 10 SCC 1.

49. (2014) 9 SCC 516.

challenged as illegal, arbitrary and unconstitutional *inter alia* as violation of the principle of trusteeship of natural resources by gifting away precious resources as largesse. The Court held that the allocation letter does confer a very important right amounting to grant of largesse upon the allottee to apply for grant of prospecting licence or mining lease. Further the allocation of coal block entitles the beneficiary to get the prospecting licence and/or mining lease from the State Government. Consequently the court was of the opinion that the allocation of coal blocks amount to grant of largesse. The legitimacy hence had to be evaluated on the twin constitutional tests as to, firstly, whether the distribution of natural resources that vest in the State is to sub serve the common good and, secondly, whether the allocation answers to the test of Article 14.

The legal flaws identified by the Apex Court include, lack of proper application of mind, acting on no material in many cases, relevant factors have seldom being its guiding factors, lack of transparency, guidelines have either not guided the allocation or have been breached and lack of objective criteria. The court also noticed that the approach had been *ad-hoc* and casual and that there was no fair and transparent procedure. It was found that the flaws-ridden allocation resulted in unfair distribution of the national wealth and in the process common good and public interest suffered heavily. Hence, the allocation of coal blocks based on the recommendations made by the screening committee was declared as illegal.

(C) Awarding of Government Contracts as Largesse

In a welfare state the government has to invariably resort to award of contracts and the same involves in a big way to diversify the welfare activities. The judicial overview of contractual matters which was too narrow in the earlier days has undergone phenomenal change owing to the progressive permeation of public law element and constitutionalization of government contracts. The manifestation of an added scope of judicial review *interalia* is very much visible in the matter of the award of contracts as largesse particularly in the matter of fixing the party with whom the contract is made, the legality of the decision making regarding the process of awarding contract etc. In these matters the Government has voluminous discretion and can end up with arbitrary and discriminatory decisions to part with the assets and wealth against public interest.

It is trite that the award of a contract is a commercial transaction and the modality of the grant of the contracts has considerable leeway for *bonafide* reasons whether it is a public or a private entity. The locus classicus on the topic is *Tata Cellular* v. *Union of India*[50] wherein the Apex Court acknowledged that Government being the guardian of the finances of the State is expected to protect the financial interest of the State and hence the right to refuse the lowest or any other tender is always available to the Government. But when it comes to the state entity, it has to be mindful of the fairness that the constitutional jurisprudence sets out in Article 14, Article 298 and 299. The Supreme Court in *Union of India* v. *Dinesh Engineering Corporation*[51] did not shy away from interfering when the policy of Railways without opting for tenders decided to create a

50. (1994) 6 SCC 651.
51. AIR 2001 SC 3887.

monopoly on proprietary basis from one company on the ground that the spares required by it for replacement in the "governors" used by the Railways required a high degree of sophistication, complexity and precision. The Court held that a public authority even in contractual matters should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded to such authorities, they are bound to follow the norms recognised by the courts while dealing with public property.

Any discussion of award of contracts as largess would be fruitful only when the delineation between the government contracts entered into by using the executive power and statutory power is properly understood. The executive power of the State to make contract is affirmed by Article 298 of the Constitution. The public policy and the public interest underlying Article 299 (1) is that 'the State should not be saddled with liability for unauthorised contracts which do not show on their face that they are made on behalf of the State'. There is a distinction between contracts which are executed in exercise of the executive powers and contracts which are statutory in nature. The three conditions envisaged under Article 299 (1) are to be satisfied before a binding contract by the Union or the State government with individuals and entities in exercise of the executive power comes into existence. It is also trite that Article 289 (1) applies to a contract made in exercise of the executive power of the Union or the State, but not to a contract made in exercise in exercise of statutory power. Article 299 (1) has no application to a case where a particular statutory authority as distinguished from the Union or the States enters into a contract which is statutory in nature. Such a contract, even though it is for securing the interest of the Union or the States, is not a contract which has been entered into by or on behalf of the Union or the State in exercise of its executive powers.[52]

While sketching the instances of award of Government contracts as largesse, one may come across several instances wherein the executive excesses reflect in the shape of private negotiations and without following any procedure for awarding the contract. As already discussed above there is an obvious legitimacy crunch in the matter of private negotiations, given the chances of perpetration of illegalities. But the same is ruled out if the government can demonstrate compelling need because of the overriding public interest or because of the need for giving space to expert or technical knowledge.

Arbitrariness in State action in commercial/contractual transactions with private parties hurts the spirit of Article 14 of the Constitution and would be open to judicial scrutiny.[53] A clandestine way of distribution of largesse can be seen in the matter of awarding contracts through supplemental agreements to the main contracts. In *United India Periodicals Pvt. Ltd.* v. *M & N Publications Ltd.*[54] the extension of the contract given for the publication of telephone directories for Delhi and Bombay to UIP/UDI/ Sterling by MTNL was challenged. The defense offered was that the extension was given to avoid any stalemate and that the same was done in the larger interest of the MTNL. The Delhi High Court set aside the supplemental agreement holding that it is in effect a new contract and without calling for fresh tenders as per policy laid in 1986 by the

52. *State of Haryana* v. *Lal Chand,* (1984) 3 SCC 634.

53. *Sanjay Vijay Kumar Gupta* v. *State of Maharashtra* , MANU/MH/1648/2008.

54. (1993) 49 DLT 380

Government of India and contravening the law as laid down by the Supreme Court. The court also found that extra and more benefits have been conferred on the UIP/UDI/ Sterling under the supplemental agreement than contemplated in the original agreement. It was further held that the impugned act was illegal, arbitrary and *malafide* act and has caused substantial loss to the exchequer. The court held that naked favouritism was shown by a Government company which is an instrumentality of the State, to a private party at the cost of public revenue of a staggering amount. The High Court directed MTNL to call for fresh tenders as per policy and the money so collected shall be made over to the tenderer who ultimately succeeds as per the terms of the contract that might be entered into. This Supreme Court in *Sterling Computers* v. *MTNL Ltd*.[55] dealt with this issue and upheld in principle the judgment of High Court which held that the supplemental agreement is nothing but a fresh contract and the same was put in place without inviting fresh tenders and hence void on the touchstone of Article 14.

In *Jespar I. Slong* v. *State of Meghalaya*,[56] it was held that if the State decides to give its largesse to public, it has an obligation to see that it fetches the best possible value for the same, provided otherwise it does not in any manner affects the rights of other citizens. No bidder has any right in law to demand the State to give away its largesse for an amount which he considers to be reasonable even when there are bidders willing to pay more for it.

(D) Allotment of Petrol and Gas Outlets and Shops and Shop Outlets as Largesse

The distribution of petrol and gas outlets have always been a fertile area were the massive discretion available to those in power has been rampantly abused and the constitutional courts addressing the challenges have evolved principles based on probity that those in power have to scrupulously abide.

In *Common Cause, A Registered Society* v. *Union of India,*[57] the Supreme Court had opportunity to examine the legality of allotment of petrol and gas outlets in the discretionary quota of the minister handling the portfolio when allegations of arbitrariness, nepotism and favouritism were traded. The Court observed that for such type of allotments, a transparent and objective criteria/procedure has to be evolved based on reason, fair play and non- arbitrariness. On finding that the allotment was tainted, all the 15 petrol outlets, allotted by the Minister to various persons out of his discretionary quota, were cancelled. Further on finding that the explanation to the show cause was not acceptable, holding that awarding of exemplary damages in a case where the action of a public servant is oppressive, arbitrary or unconstitutional is unexceptionable, ordered that the minister shall pay a sum of 50 lakh rupees to the exchequer. The mister again approached the Supreme Court in *Common Cause, A Regd. Society* v. *Union of India*[58] and pleaded substitution of exemplary damages with nominal damages. The Court refused to budge and asked to deposit the amount as it was public property which was handled and that government'by the people' need to be compensated. It is history that the Supreme Court

55. (1993) 1 SCC 445.
56. (2004)11 SCC 485.
57. (1996) 6 SCC 530.
58. (1996) 6 SCC 593

this order when a review was preferred three years later[59]

In *Indian Oil Corporation Ltd.* v. *Shashi Prabha Shukla*[60] in the matter of granting petrol pumps from the discretionary quota of the Minister wherein the Apex Court found that the appellant has flagrantly defied the Order of the Delhi High Court cancelling the allotments way back in 1997 [61] as the same was vitiated by favourtism due to the exercise of fanciful discretion of the then Departmental Minister. It was found that the Corporation visibly did not act in terms of the judgment and order of the High Court of Delhi in initiating the fresh process for auction in a different site. Instead its stance that notwithstanding the cancellation of the dealership, the lease of the land of the respondent with it did subsist and that consequently the Corporation through the auction process initiated was entitled in law to induct the new dealer in the same location was against the letter and spirit of the judgement. The Appellant also gave faulty advertisements and the corrigendum which enabled her to secure an order from the Allahabad High Court to continue with the outlet and later a direction to convert the dealership which was already cancelled in 1997 to a new one in line with the new policy in 2004. The Apex Court viewed it as a deliberate and predetermined ploy set by the Corporation for perpetuating a gross illegality and arbitrariness in granting the earlier dealership which was pointed out by a constitutional Court. The Court set aside the Order of the Allahabad High Court as well as the new dealership granted and held in strong terms that the *malafide* attempts to sabotage the objective of securing transparency, fairness and non-arbitrariness in the matter of distribution of public contract has to be brought out and report to the Court on actions taken against the errant officials.

In *Mahinder Kumar Gupta* v. *Ministry of Petroleum and Natural Gas*,[62]the question raised was whether the government is justified in imposition of eligibility restrictions in the award of retail outlets, SKO-LD dealerships and LPG distributorships guidelines. The impugned Guidelines insisted that a candidate is not entitled to apply for dealership if his/her spouse, father/mother, brother/sister, son/ daughter, son-in-law/daughter-in-law and parents-in-law if already had been given dealership. In the case of partner- ships, partners should individually fulfill the abovementioned eligibility criteria/conditions and all of them must appear for an interview together. The Court found that the distribution of the largesse of the State is for the common good and to sub serve the common good of as many persons as possible and hence there is rational nexus with the object sought to be achieved. It was held that the guidelines are based on public policy to give effect to the constitutional creed of Part IV of the Constitution and there was neither arbitrariness nor unjustness in prescribing the criteria.

In *Onkarlal Bajaj* v. *Union of India,*[63] complaints proliferated through news papers against chairman/members of the Dealer Selection Board alleging favouritism and nepotism in the matter of allotments of outlets of petroleum products exactly seven years after the decision in *Common Cause* case[64]. In order to uphold probity in governance, ensure fair

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59. See *infra* for the discussion carried out in the context.
60. 2017 SCC Online SC 1482.
61. *Centre For Public Interest Litigation* v. *Union of India*, (1997) 68 DLT 650
62. (1995) 1 SCC 85.
63. (2003) 2 SCC 673.
64. *Common Cause, A Registered Society v. Union of India,* (1996) 6 SCC 530

play in action and in larger public interest, the government cancelled all allotments of retail outlets. The court held that instead of passing the impugned order, the government should have ordered an independent probe into the alleged tainted allotments. According to the court, the impugned order had the twin effect of (1) scuttling the probe and (2) depriving a large number of others of their livelihood that had been ensured for them after their due selections pursuant to a welfare policy of the Government. If governance is not based on justice, equity and fair play and is driven by extraneous considerations, the decision of the Government though on the face of it may look legitimate is aimed at achieving popular accolade and hence cannot be allowed to operate.

The Supreme Court in *Shiv Sagar Tiwari* v. *Union of India* [65] indicted the then Union Minister for Housing and Urban Development who was found fault with for wrongfully allotting shops and outlets to relatives, employees and domestic servants. It was found that she abused her official position and made these allotments and caused wrongful loss to the Government by effecting allotments on economical licence fees basis without inviting any tender or by issuing public notice for inviting the response from the general public to earn maximum revenue for the Government. The court computed exemplary damages to the tune of sixty Lakh rupees and ordered to be remitted within a span of nine months. But the fate of the *Common Cause* case was found replicated in this matter also as the Apex Court quashed the levying exemplary damges.[66]

(E) Allotment of Government Accommodations as Largesse

A rampant conferring of largesse is in allotting government bungalows in favour of influential political persons and bureaucrats and also several trusts and organizations without any justifiable reason. Such allotment of government bungalows to private organizations was also the bone of contention in the Supreme Court in *Shiv Sagar Tiwari* v. *Union of India*.[67] The court held that the allotment of government property to someone without adequate market rent, in absence of any special statutory provision, would be bad in law. The reason is that the State has no right to fritter away government property in favour of private persons or bodies without adequate consideration and therefore, all such allotments, which have been made in absence of any statutory provisions will fail. In denouncing such illegal conferment as largesse, the shortage of the accommodations to those eligible persons, the unnecessary expense that the government incurs in accommodating its offices and its officers and the payment of house rent allowance were the persuasive factors

The conferment of largesse on private trusts etc., at a nominal rate is even more depreciable as the exchequer suffers in multiple ways. In *Lok Prahari* v. *State of U.P.*[68] an NGO through a PIL raised the issue that several former Chief Ministers of the State of UP continue to occupy government bungalows of Type VI several years after demitting the respective offices. The Court scrutinized whether the Ex-Chief Ministers Residence Allotment Rules, 1997 was valid or contrary to the provisions of the Uttar Pradesh

65. (1996) 6 SCC 599.

66. *Common Cause, A Registered Society* v. *Union of India,* (1996) 6 SCC 530, see *infra*, where the same is discussed.

67. (1997) 1 SCC 444.

Ministers (Salaries, Allowances and Miscellaneous Provisions) Act, 1981. The Court found that the Rules 1997 are only executive instructions and cannot override the statute in 1981. The court held that the allotment was bad in law and ordered for handing over the possession wiithin two months, besides, directed the government to recover appropriate rent for the period of unauthorized occupation of the said bungalows.

The Apex Court, earlier in *SD Bandi* v. KSRTC[69], in the context of the occupation of government bungalows, beyond the period for which the same were allotted called for an introspection observing that law or directions can hardly control this act of disobedience. Instead the self realization among the unauthorized occupants that rights and duties are correlative and that the rights of one person entail the duties of another person and vice versa are needed. But it is trite that the despicable state of affairs continue despite several interventions from the judiciary.

(F) Ex-gratia Payments and Compensations and Offer of Employments as Largesse

The distribution or monetary relief under the relief fund constituted for specific purposes like Chief Ministers Distress Relief Fund or otherwise have been fraught with controversies as the the distribution of the same has traversed the entrenched imperatives of equity, non-discriminatory and non-arbitrariness principles.

In *State of Rajasthan* v. *Sanyam Lodha*[70] the challenge was that huge amounts have being paid only in one or two instances merely because of media focus on those cases or because the case had become caste-sensitive or because it was politically expedient, while ignoring other similar cases. It was also contended that disbursement of monetary relief to the victims cannot be in the absolute discretion or according to the whims and fancies of the Chief Minister and grant of monetary relief under the relief fund should not become distribution of government largesse to a favoured few. A direction was sought for adopting a fair and non- discriminatory policy regarding the disbursement of amounts from the relief fund to similarly situated persons. The Apex Court disagreed with the High court when it modified the language of Rule 5 and only perfunctorily suggested that the disbursal of huge amounts is improper and inadvisable as it will reduce the reach of this benefit to maximum number. It was also held that the disbursal from the funds should be reasonable, to meet the immediate need of coming out of a trauma/catastrophe. But the Court was clearly not in line with the demand for the patent application of the principles of non-discrimination and non-arbitrariness, but casually opined that the power of discretion will be safe in the higher echelons and that the accountability is secured through its auditing. The attitude of the Court in adopting a non-interfering stand is best manifested when it noticed that basis for the category under which the money was disbursed was absent in the relevant Rules and an innocuous suggestion was made to include the same in the Rules.

It is trite that the declaration of ex-gratia payments, providing government employments, huge compensations to the affected persons or families etc. are being

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68. (2016) 8 SCC 389.
69. (2013) 12 SCC 631.
70. (2011) 13 SCC 262.

indiscriminately made by dispensations unmindful of the purpose for which the purposes are earmarked for its disbursal. It is indeed a sad state of affairs that such grants either sans Guidelines or even if Guidelines are there, are thrown to wind squandering public money in a big scale. Hence the courts as guardian of Constitution cannot afford to shy away from interfering in appropriate instances sparing the indiscriminate deferential attitude pursued presently.

(G) Loan waivers as largesse

The waivers of farm loans and corporate loans have become a regular phenomenon in our country and no doubt the same is nothing but conferring largesse. The political parties with impunity are regularly engaging in this exercise to woo the voters or as a measure to curb orchestrated campaigns. The statistics on bad loans cut a dismal picture and is steadily bleeding the economy.[71] Many of the States across the country have extended farm loan waivers of substantial nature to predominantly farmers having small and medium holding which runs into thousands of crore rupees. It is submitted that in most of the states, the debt relief and waiver schemes are already in place in tune with the legislative and executive wisdom. If such objective measures are pressed into action, the waivers if any needed of different complexion could have been purposively accomplished. One has also to be mindful of the fact that the pilferage of farm loans has been common where the farm loans have been diverted to some other use. In the event of an objective non-estimation of the impact of such declarations on the targeted groups as well that on the economy, the same will be nothing but a misplaced conferment of largesse.

The Madras High Court in *National South Indian River Interlinking Agriculturists Association* v. *Govt. of Tamil Nadu* [72]directed to extend the farm loan waiver to all the farmers irrespective of the extent of their holdings, holding that the method adopted to identify the farmers either as marginal farmers or small farmers or other farmers is demonstrably irrational and is in conflict with Article 14.[73] The order had the effect of raising the liability of the government running into crores of rupees. However the Apex Court has stayed the operation of the Order when the same was appealed against by the State of Tamil Nadu.

(H) Jobs, Appointments etc. as Largesse

The conferment of largesse on arbitrary terms is very much visible in the matter of providing jobs and other employments at the will of the dispensations. In India public employment comes under the constitutional rubric and hence any such entry has to be strictly in compliance with the constitutional dynamics. Instances galore wherein the ruling dispensations at their will continue to confer largesse in the shape of appointments

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71. See The Financial Stability Report, 2017, released by the RBI, spelling out India's gross NPAs. See *The Hindu*, December 9, 2017, available at https://www.thehindu.com/business/Economy/all-you-need-to-know-about-indias-npa-crisis-and-the-frdi-bill/Article21379531.ece) CIC/DGEAT/A/2018/117567, p. 5. Last accessed on June 12, 2017.

72. 2016 SCC OnLine Mad 6901. .

73. The High Court distinguished the earlier decision of the Division Bench in *R.Karuppan* v. *Government of India*, (2008) 5 MLJ 785, wherein a similar prayer was made for the extension of waiver of loan to all farmers, wherein it held that the policies are framed by the appropriate Government in larger public interest and as a welfare measure and possibly to tide over any emergent situation. It was further held that no one has a right to get waiver of the loan he takes.

to their kith and kin in total disregard of probity and accountability. The appointment of part time contingency employees, regularisation of ad-hoc employees, appointing officers of state for a particular period or for a particular purpose like law officers etc. are some such instances. The Apex Court has come down heavily on several occasions prompting the dispensations to withdraw such appointments at times. Though the term largesse has not been used in *Secretary, State of Karnataka* v. *Uma Devi*[74] the Constitution Bench considered different facets of the issue relating to regularization of services of *ad hoc*/temporary/daily wage employees and unequivocally declared that such appointees are not entitled to claim regularization of service as of right because it will be nothing but backdoor appointments.

The appointment of Law Officers of the State over a period of time has became political appointments by doling out largesse to the kith and kin. The consequences are, firstly, it is an invidious doling out of largesse and secondly, by appointing incompetent persons who may suffer on the integrity front also in crucial positions, the public interest in state litigation mechanism is seriously compromised. In *State of Punjab* v. *Brijeshwar Singh Chahal*[75] the grievance was that the State Government had formulated no criterion and followed no norms for absorption on a non-discriminatory basis of those working as Law Officers of the State. It was found that the appointment of law officers in the State of Punjab, which instead of a fair and realistic assessment of the requirement, are driven by political aggrandizement, appeasement or personal benevolence of those in power towards those appointed. The court found that such uncanalised and unregulated system of appointment results in erosion of the rule of law and public faith in the fairness of the system and injury to public interest and administration of justice.

In the matter of appointment of notaries in *Nandkishor S/o Gangaram Dhudkekar* v. *Union of India*[76], the petitioner contended that the Government while selecting and appointing Notaries did neither issue an advertisement of available vacancies from sanctioned post of Notaries for the State of Maharashtra nor made it public, the rejection of the applications leaving the applicants in dark regarding the fate of their applications. Consequently the eligible candidates were prevented from staking rightful claims and that the Government was in fact distributing government largesse to a select few without any Guidelines or policies in flagrant violation of Article 14. The Bombay High Court was not inclined to hold that the post to Notary can be equated to government largesse, though a relief to the petitioner in the shape of reconsideration of his application was directed.

The executive high handedness in the matter of conferment of largesse is also reflected in the manner in which the incumbents of contract appointments are divested from their engagements. These blatantly irrational acts are perpetrated as if the same belongs to the era of the bygone 'spoils system' and that such appointments are a bounty extended by the Government devoid of any legal requirements. In *Kumari Shrilekha Vidyarthi* v. *State of U.P.*[77], the *en masse* cancellation of panel of Government

74. (2006) 4 SCC 1.
75. (2016) 6 SCC 1.
76. AIR 2007 Bom.186.
77. (1991) 1 SCC 212.

Law Officers was quashed by the Supreme Court holding that conferment of the power together with the discretion which goes with it is to enable proper exercise of the power . It was further held that the same is informed with the duty to shun arbitrariness in its exercise and to promote the object of conferment of power. Hence an authority while being conscious of the concomitants of these power have to be necessarily informed that the dominant consideration is public interest and not individual or private gain, whim or caprice. This was apparently lost sight of in the present case while issuing the impugned circular. The Court further held that arbitrariness and non- application of mind was writ large in the impugned circular and hence it falls foul of Article 14.

(I) Compassionate Appointment as Largesse

Though appointment based on descent is an anathema on our constitutional scheme, compassionate appointment is nothing but a largesse extended to the families of the incumbent breadwinner whose untimely death or medical invalidation have landed them in difficult situations. Such appointments are conceived to meet the sudden crisis occurring in the family on account of the casualties mentioned above occurred to the breadwinner while in service. It certainly cannot offend the constitutional scheme of public employment and the rationale for the same brings out the compatibility with the demands of Article 14. Though such appointments can neither be claimed as a matter of right nor be extended as largesse,[78] the structured conditions carved out by the respective establishments provide the much needed legitimacy for the same. Thus the settled position is that compassionate employment cannot be granted by way of largesse irrespective of the financial condition of the deceased/incapacitated employee's family at the time of his death or incapacity, as the case may be.[79]

IV. CHOOSING THE BENEFICIARY FOR CONFERRING LARGESSE AND DEMANDS FOR AFFIRMATIVE ACTION

Even in the matter of choosing a beneficiary for legitimate conferment of largesse, the Government cannot act in an arbitrary manner. The democratic component in the exercise of such power has been lucidly put across by Mathew J. in *Punnen Thomas* v. *State of Kerala*[80] when he observed that a democratic government irrespective of the nature of its activities is restrained from laying down arbitrary and capricious standards for the choice of persons with whom alone it will deal.[81]

The Apex Court in *R.D. Shetty*[82] has comprehended the matter in its perspective when the court in unequivocal terms has laid down that in selecting the recipients for largesse the government cannot choose to deal with any person it pleases in its absolute and unfettered discretion unlike a private individual, but that its action must be in conformity with some standard or norm which is not arbitrary, irrational or irrelevant.

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78. See generally *Umesh Kumar Nagpal* v. *State of Haryana*, (1994) 4 SCC 138 ; *V. Sivamurthi* v. *State of Andhra Pradesh,* (2008) 13 SCC 730.
79. *Bhawani Prasad Sonkar* v. *Union of India*, 2011 (4) SCC 209.
80. AIR 1969 Ker. 81.
81. *Ibid* at 90.
82. See *Ramana Dayaram Shetty* v. *International Airport Authority*, AIR 1979 SC 1628.

In *Humanity and Another* v. *State of West Bengal* [83] the question was whether the impugned order of the Government for allotment of a plot of land in a prime area in Salt Lake City is an allotment which is different than the previous allotment of 50 kathas for setting up of a school by a Trust which comprise predominantly the family of the celebrated cricketer Sourav Ganguly. Though the initial grant was after publication of advertisements, the same was abandoned and a subsequent grant of a bigger plot was done without any advertisement by swiftly acting on the request of the beneficiary who citied demands from the ICSE authority. The High Court brushed aside all the counter arguments and refused to interfere with the governmental action. The Supreme Court disapproved the action of the High Court and held that the government action was driven by *malafides* and that it has failed to discharge its constitutional role. The Court also found that the High Court wrongly placed reliance on *Sachidanand Pandey*[84] and *Kasturilal*[85] decisions and held that the conferment of largesse was in haste, unreasonable and arbitrary and is liable to fail on the touch stone of Article 14.

The massive discretion available to the Government is not only to grant largesse but also to revoke or divest the beneficiaries of such benefits. In *Erusian Equipment and Chemicals Ltd.* v. *State of West Bengal*,[86] where blacklisting of a contractor was challenged, the Court held that the State has a right to trade, but it cannot choose to exclude persons by discrimination as it is a government of laws and not of men. Since government is trading with the public, democratic governance demands that the individuals are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods, devoid of arbitrariness and discrimination.

There is a common practice of giving government lands in terms of largesse for charitable or altruistic purposes like orphanages, schools, hospitals etc. for trusts or other organisation at concessional rates and the government is not precluded from laying any conditions in the character of reciprocal benefits. The Government can impose constitutional obligation on such organisations to give effect to the directive principles of state policy and even any of the duties mentioned in the Fundamental duties enlisted under Article 51-A of the Constitution. In *Social Jurist, A Lawyers Group* v. *Government of NCT of Delhi*[87], the Division Bench of the Delhi High Court held that the State has to prescribe a proper course of action and take steps well in time to ensure that while establishing their big multi-specialty and super-specialized hospitals, must conform to the conditions of law and the concerned authorities should not only check the breach of conditions but also ensure consequential actions. The court added that state can impose obligation on such institutions when the Government land is held by such hospitals as it is the constitutional obligation under Article 47 which is imposed upon such hospitals under which the State has to make constant endeavour to raise the level of nutrition and the standard of living and to improve public health. It is submitted that when the state largesse is being enjoyed by these hospitals in the form of government land, it is their reciprocal obligation by the very nature of the medical services to extend free treatment

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83. AIR 2011 SC 2308.

84. *Sachidanand Pandey* v. *State of West Bengal*, AIR 1987 SC 1109.

85. *Kasturi Lal Lekshmi Reddy* v. *State of Jammu & Kashmir,* AIR 1980 SC 1992.

86. AIR 1975 SC 266

87. (2007) DLT 698.

as envisaged in the impugned order to the public. Any attempts to wriggle out of it and not to comply with it should be at the risk of surrender of the land and they should opt out of the continuing benefit which they are receiving by virtue of holding the government land in aforesaid manner.

V. DISTRIBUTION OF GOVERNMENT LARGESSE AND MISFEASANCE IN PUBLIC OFFICE

(a) Misfeasance Examined

The distribution of government largesse has always been in the midst of challenges and often controversial requiring the courts to step in and has given room for profound expositions in administrative law spelling out its scope and limitations. The consideration for selecting the beneficiaries and the quantum of the largesse distributed, if do not lie within the legal limits will be breach of public trust and also violation of accountability. There have been abundant instances wherein the measures adopted have been caught in controversies bordering on misfeasance or abuse of power. Several instances where there when the political executive had acted without even the semblance of accountability towards Constitution and law and unmindful of the statutory prescriptions for realising their ulterior motive. In *Dipak Babaria* v. *State of Gujarat*[88], according to the Gujarat Tenancy and Agricultural Lands (Vidarbha Region and Kutch Areas) Act, 1958, the collector is to ascertain the legitimacy of the transfer of the agricultural land to ensure that the statutory prescriptions are complied with particularly when the transferee does not utilize the land as well as to give certificate for purchase of bonafide industrial purpose. The statute envisages that an agriculturist in possession of a land, either as an owner or as a tenant protected by the statute can transfer of his land for industrial purposes only subject to stipulated conditions. The industrial house approached the Chief minister and Revenue minister directly bypassing the collector who is the statutory authority to facilitate a legitimate transfer to the industrial house and managed to get permission. In spite of the repeated advices from the Secretaries, the Minister for Revenue insisted on treating this case as a special case for which no justifiable reasons whatsoever were recorded and orders were issued accordingly. The Apex Court held that though the State was bound to act as per the requirements of the statute, the overriding decision of the revenue minister clearly indicated an arbitrary exercise of power and hence the impugned orders passed by the Government cannot be legally sustained.

(b). Personal Liability for Misfeasance in Administering Largesse

The enormity of discretionary powers that are conferred upon the executive has necessitated the need for fixing the accountability and it has gone past compensation and has reached the contours as to who shall bear the brunt. Apart from the welfare of the individual, the enabling power conferred on the authorities in a welfare state has a wider ramification as the grant of power is intended to promote general welfare and common good. Hence the consequences of any infraction of its purposive execution will not be confined to individual alone, but it transcends to a larger canvass. William Wade in his treatise *Administrative Law* strongly posits that public authorities or officers may be

88. (2014) 3 SCC 502.

liable in damages for malicious, deliberate or injurious wrong-doing. Hence a tort which is addressed as misfeasance in public office, and which includes malicious abuse of power, deliberate maladministration, and perhaps include other unlawful acts causing injury also.[89]

When it comes to the matter of distribution of largesse the capricious exercise of discretionary power as well its abuse will have serious impact on the general well being of the state. Hence the need to fix the accountability in personal terms becomes all the more important. The discourse of the Apex Court in *Lucknow Development Authority* v. *M.K. Gupta*[90]becomes significant in the parlance of legitimacy of imposing damages and compensation on the state rather than on the erring personnel. It is plain fact that it is the tax payers' money which is spared for the inaction of those who are entrusted under the Act to discharge their duties in accordance with law. Whereas what is needed is that the responsibility has to be fixed on the person responsible for the inaction or abusive action.

The Supreme Court in *Common Cause, A Registered Society* v. *Union of India*[91] entertaining a Review petition over its decision in *Common Cause, A Registered Society* v. *Union of India*[92]revisited its earlier stance holding that the direction for payment of Rs 50 lakh rupees as exemplary damages and the further direction for a case to be registered by CBI against the petitioner for criminal breach of trust and investigation by them into that offence was an error apparent on the face of record. The Court also recalled its direction to investigate whether the petitioner has committed any other offence in connection with the impugned exercise of the power.

The court even expressed doubts over the very basis for awarding exemplary damages and the reasons which it catalogued were (a) causing of unintended injury to someone despite power being exercised in all *bonafides* (b) the potentiality of opting for defensive administration in the wake of putting the authorities to constant fear, (c) absence of rationale in arriving at the quantum of compensation, (d) the impropriety on the part of state to stake a claim for getting compensated from its own officers for alleged violations of fundamental rights and allied matters.

Similarly the Supreme Court in an identical context, was approached by a petitioner for review of its judgement in *Shiv Sagar Tiwari* v.*Union of India*[93] wherein the petitioner, a union minister was asked to foot exemplary damages of fifty lakh rupees for causing revenue loss to the exchequer by illegally conferring largesse by allotting shops and commercial outlets to her near and dear. The two judge bench of the Supreme Court in

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89. See C.F. Forsyth & William Wade, *Administrative Law*, 669(10th edn., 2010). See also *Cassell.* v. *Broome*, [1972] A.C. 1027 on the principle that, an award of exemplary damages can serve a useful purpose in vindicating the strength of law, *per* Lord Hailsham.

90. (1994) 1 SCC 243.

91. AIR *1999* SC 2979. The propositions adopted by the Courts were the following: (a) The minister cannot be held as a 'trustee' in the real sense nor does a "trust" come into existence in respect of the government properties., (b) The concept of 'public trust doctrine' cannot be availed the administration of the portfolio is informed by the Rules of Business.(c) The "power to allot petrol pumps", under discretionary quota, cannot be treated as "property" within the meaning of section 405 of the Indian Penal Code which defines Criminal breach of trust.

92. (1996) 6 SCC 530.

93. (1996) 6 SCC 599

Sheila Kaul v. *Shiv Sagar Tiwari* [94] though did not find favour with the rationale of the reviewed judgement *viz*., *Common Cause, A Registered Society* v. *Union of India,*[95] elected to toe the line of the judgement to meet the demands of judicial discipline as it was pronounced by a three judge bench and fervently hoped that a constitution bench in an appropriate time will consider the correctness of the judgement. Further the Court quashed the damages levied against the Review Petitioner considering her old age, indisposition and gross hardship of the case. But unlike in the *Common Cause* case, where the criminal charges were also dropped, the Court in the instant case did not intervene in the direction to launch criminal prosecution in the judgement under review.

In *Manohar Joshi* v. *State of Maharashtra,*[96] the matter was about shifting of an area reserved for a public amenity of primary school done in an illegal manner in favour of the kin of Chief Minister for developing a commercial residential facility, upon express directions of the Chief Minister. The Court found that the high officials holding discretionary powers failed to resist the ulterior motive of the political executive. Misfeasance in public office as well as breach of public trust was found and the Court directed the then Chief Minister and the Minister involved to pay a cumulative amount of twenty five thousand rupees levied as cost both by the High Court and Supreme Court to the writ petitioners.

The fixing of accountability of a public servant who is invested with voluminous discretionary power especially in the matter of providing largesse demanded the fit and proper remedy to be fastened with personal liability, if is guilty of misfeasance. Though the Supreme Court was well on road to institutionalize an effective instrument in fixing public accountability in the shape of exemplary damages for misfeasance in public office, it backtracked and failed to capitalize an invaluable opportunity.

VI. CONCLUSION

The conferment of government largesse is a reality and it is growing with the times. As far as India is concerned, the distribution of largesse has firm constitutional ordainment in the shape of directive principles of state policy for fair, equitable conferment. A proper exploration and application of the scope and content of Article 14 has progressively brought the constitutionalism conferring largesse. The complexity in the overview of legitimacy of distribution of largesse is always on the increase because of the massive discretion available to the executive, the complexion and spread of largesse as such and the high stakes that the political executive has got in the matter. The aesthetic blend of the directives and the paraphernalia in Article 14 can assure durable finesse in the matter of distribution of largesse. Further the aspects of probity in governance and accountability has got a lot to offer in effecting meaningful translation of largesse into tangible benefits to the common man. The large space occupied by the judiciary in addressing the ever increasing challenges has to be carefully handled because many instances border on policy domain of the government. The judiciary has done commendable job in expanding the terrain of scrutiny, but instances galore where lack of consistency manifests. The

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94. *Sheila Kaul* v *Shiv Sagar Tiwari*, AIR 2002 SC 2868.
95. (1996) 6 SCC 530
96. (2012) 3 SCC 619.

need for fixation of personal accountability and consequential relief through damages has to be institutionalized in the matter of distribution of largesse, as the brunt of any abuse of discretionary power in this parlance has to be borne by the society as against an individual. If the political executive is instrumental in misfeasance in office, they need to be disqualified from contesting elections as their complicity in the misfeasance reflects that they cannot live up to the public trust reposed on them. The legislature by providing more objectivity through Rules and Guidelines, the executive with more probity and understanding of the reasons for providing such largesse and the judiciary with a consistent indulgence can alone answer to the larger constitutional and statutory demands for an objective and legitimate distribution of government largesse.

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ENFOCEMENT OF FOREIGN AWARDS IN INDIA : AN APPRAISAL

V.K. PATHAK*

ABSTRACT : Enforcement of foreign awards is covered in Part II of the Arbitration and Conciliation Act, 1996. On various occasions it has been held by courts that once the award passes the test of Part II, a separate proceeding under CPC is not required. Further it is also a settled proposition that the grounds to oppose the enforcement mentioned in section 48 are exhaustive and must not be given expansive interpretation. The paper examines the grounds and presents arguments against the possible situation of double/multiple exequatur. The paper argues that in order to avoid the problem of multiple exequatur, a possible amendment of the provision to delete the procedural grounds may be explored. The element of discretion which finds place in the provision has also been discussed. It is also relevant to note that the grounds of arbitrability of subject matter and violation of public policy of India have been the subject matter of many cases before various Indian courts. It seems that a balanced view is emerging of late. The present paper makes an endeavour to examine the case law on the above issue. In the process the 246th Report of Law Commission of India plays a significant role. The suggestions provided in the report have been duly given place in the Act by way of 2015 amendments. An attempt has also been made to bring to fore the discussion on enforcement of non-convention awards in the light of the fact that such non-convention awards are neither covered by chapter I nor chapter II of Part II of the Act..

KEY WORDS : Foreign awards, New York Convention awards, enforcement, public policy of India, multiple exequatur, non-convention awards

I. INTRODUCTION

An arbitral award is the outcome of a private course of action for the settlement of dispute, whereas a decision of a court represents the sovereignty of the country where it is given. Generally, the term "foreign award" means any award given in an arbitral proceeding being conducted in any foreign country. It is seen that there are more multiparty conventions and mutual or reciprocal agreements to facilitate enforcement of foreign arbitral awards than these are for enforcement of decisions of the courts. Because of these facts the enforcement of an arbitral award is at all times easier than decision of a

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court given in a foreign country. The enforcement of an arbitral award is also considered easier for the parties of the dispute than a decision of the court because of the contractual nature of arbitration. It is always more easy for a domestic court of a country to enforce the consequence of a contractual agreement between two private parties, than a decision of the court representing the sovereignty of a foreign country. Therefore, in the area of international trade, commerce and business, the arbitration has been the most favoured method of dispute resolution. In India, prior to 1937, foreign awards and foreign judgments based on foreign awards were enforceable on the same grounds and in the same circumstances as they were enforceable in England under the common law. It means that the grounds for enforcement of these foreign awards and foreign judgments were the justice, equity and good conscience. In 1937, the Arbitration (Protocol and Convention) Act 1937[1] was enacted to provide for the procedure for filing the foreign awards in India, their enforcement and the conditions of such enforcement. The Indian Parliament enacted the Foreign Award (Recognition and Enforcement) Act 1961[2] to deal with different issues of recognition and enforcement of foreign awards in India.

Prior to the enactment of Arbitration and Conciliation Act 1996, the enforcement of arbitral awards in India was to be regulated by three different enactments. Enforcement of domestic awards was dealt with under Arbitration Act 1940.[3] Enforcement of foreign awards was regulated by two statutes i.e. 1937 Act[4] to give effect to the Geneva Convention[5]awards and 1961 Act[6] to give effect to the New York Convention[7] awards. As the Geneva Convention became almost indolent by reason of clause 2 of Art VII[8] of the New York Convention, enforcement of foreign awards, for all realistic aspirations, came under the 1961 Act and domestic awards became the subject of 1940 Act. The system and administration for enforcement of awards in these two enactments was, however, relatively discrete. The 1961 Act restricted the challenge to an arbitral award only on the limited grounds allowed under the New York Convention. With the appearance of UNCITRAL[9]

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1. This Act was enacted by then Indian Legislature to give effect to the Geneva Protocol on Arbitration Clauses 1923 and enabling the Geneva Convention on the Execution of Foreign Awards 1927 to become operative in India.
2. According to the Preamble of the Act this legislation was enacted to enable and to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,1958 in India to which India is a signatory.
3. *The Arbitration Act, 1940* (No 10 of 1940) ('the 1940 Act').
4. *The Arbitration (Protocol & Convention) Act, 1937* (No 6 of 1937) ('the 1937 Act').
5. The Convention on the Execution of Foreign Arbitral Awards, Geneva, 26 September 1927. India became a signatory to this Convention on 23 October 1937.
6. The Foreign Awards (Recognition & Enforcement) Act 1961.
7. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958. India became a signatory to this Convention on 13 July 1960.
8. Clause 2 of Art.VII of the New York Convention 1958 affirms and declares that "…the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention…"
9. The United Nations Commission on International Trade Law (UNCITRAL) is an ancillary body of General Assembly of United Nations. It plays an important role to ameliorate the legal structure and frame for international trade by producing model legislative content to be used by the member states for modernizing and harmonizing their law of international trade.

law, the claim for harmonization of law of arbitration at international and domestic level as well was augmented. The international framework now consists of rigid law in the form of New York Convention and flexible law in the form of the Model law[10]. It is in this context that the present paper brings to fore an appraisal of the law relating to enforcement of foreign awards in India so as to see whether we are moving in the direction of the claim of harmonization of law on the subject.

II. ENFORCEMENT OF CONVENTION AWARDS

Enforcement of foreign awards, which was governed by two different kinds of legislation; the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961, is now regulated by Part II of the Arbitration and Conciliation Act 1996.[11]A foreign award can be enforced in India under the multilateral international conventions, the New York Convention[12]and the Geneva Convention,[13]subject to two reservations. First, the award must have been made in a country which has ratified either the New York or Geneva Convention and which has made reciprocal provisions for the enforcement of Indian awards in its country.[14] Second,

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10. The UNCITRAL Model Law on International Commercial Arbitration was adopted by the UNCITRAL on June 21, 1985 at the closure of its18th annual session. The General Assembly of United Nations, in its resolution 40/72 of December 11, 1985 commended, "… all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice…"

11. According to the statement of objects and reasons, it is an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards and also to specify the law relating to conciliation in India.

12. Arbitration & Conciliation Act, 1996, Sections 44 to 51 deal with the recognition and enforcement of New York Convention awards, whereas sections 53 to 60 are concerned with Geneva Convention awards. Under section 44, which deals with New York Convention awards, a foreign award means "…an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 (a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and (b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies…"

13. *Id.* ,Section 53 of the Act deals with the Geneva Convention awards and according to this section a foreign award means, "…an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July, 1924, (a) in pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and (b) between persons of whom one is subject to the jurisdiction of some one of such Powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Third Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and (c) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies, and for the purposes of this Chapter an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made…"

14. For understanding the contrast between enforcement of a domestic award and a foreign award, see *Jindal Drugs Ltd.* v. *Noy Vallesina Engg. Spa*, in (2002) 2 Arb LR 323 (Bom).

only those awards which cover or relate to differences emerging out of legal relationship and which are viewed to be 'commercial' under Indian law, may be enforced.[15]

Any foreign award requires the satisfaction of the court for the purposes of its enforcement. The party looking for enforcement of a foreign award is obliged to produce before the court the necessary evidence in order to prove that the award is a foreign award.[16] As a matter of general practice the following documents are considered sufficient for *prima facie* evidence: (1) the original award or an authentic copy of the award. The authentication is to be made in accordance with the law of the country wherein award was made;[17] (2) the original arbitration agreement or its certified copy.[18,19]The foreign award becomes a decree of the court after the court is satisfied that such a foreign award is enforceable in accordance with the provisions of section 48.[20]In the case of *Fuerst Day Lawson Ltd.* v. *Jindal Export Ltd.*,[21] the Supreme Court of India has confirmed that for the purposes of enforcement of a foreign award, there is no need to hold two separate proceedings, such as one for determining enforceability of award to make it a rule or decree of the court and another to take up execution thereafter.

Section 48 of the Act provides a comprehensive list of the grounds for refusing enforcement of a foreign award.[22] The court is obliged and even bound to grant the enforcement of the award unless it is satisfied on the basis of its conclusion that one or more of the conditions set forth in the section exists.[23] Though the grounds under section 34 and section 48 are almost similar, yet the Indian judiciary, from very distant past, has frequently accentuated that the grounds for withstanding enforcement of a foreign award under Section 48 are exceedingly limited and cannot be comprehended in the same manner

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15. *R.M. Investment and Trading Co. Pvt. Ltd*. v. *Boeing Co.*, AIR 1994 SC 1136.
16. *The Arbitration and Conciliation Act*, 1996, Section 47
17. *Id.*, Section 47(1)(a)
18. *Id.,* Section 4791)(b)
19. A parallel provision for Geneva Convention Awards under section 56 requires that "…the party applying for enforcement of a foreign award shall produce before the court (a) the original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made; (b) evidence proving that the award has become final; and (c) such evidence as may be necessary to prove that the conditions mentioned in clauses (a) and (c) of sub-section (1) of section 57 are satisfied…"
20. The Arbitration and Conciliation Act, 1996, Section 49
21. AIR 2001 SC 2293. The court stated, "…once the court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award as a rule of court decree again…"
22. The intention of the legislature is that the grounds for refusing enforcement of foreign awards should be used with sufficient caution, prudence and vigilence. For instance, refusal to enforce a particular foreign award may itself be against the public policy of India. In the language of Albert Jan van den Berg, "…as far as the grounds for refusal for enforcement of the award as enumerated in Article V are concerned, it means that they have to be construed narrowly…", OP Malhotra, *The Law and Practice of Arbitration and Conciliation,* Lexis Nexis Butterworths, 2nd Edition (2006), p.1379
23. The grounds for refusal of enforcement of foreign awards are similar to those for setting aside a domestic arbitral award under section 34 except one additional ground under s. 48(1)(e) wherein three sub grounds are mentioned i.e. the award has not been yet become binding on the parties or it has been set aside or has been suspended by the adequate and efficient authority of the country in which, or under the law of which, that award was made.

as the grounds available for challenging an award under Section 34 of the Act.[24]With a view to congregate the objective of least judicial intervention, the Act constricts the possibility of appeal from the order of the court in two circumstances; refusal to refer the parties to arbitration under section 45 and refusal to enforce a foreign award under section 48.[25] The Act does not allow for second appeal, without affecting, however, the right of appeal to Supreme Court.[26]

i) Discretion of Court under Section 48

The phraseology 'enforcement of foreign award may be refused' in section 48 of the Act has come from the New York Convention,[27] 1958, through the Model Law[28] with slight modifications. The discretion of court under section 48 to refuse or to grant enforcement has two aspects. First sub-section (1) is concerned with procedural flaws which vitiate an award in the foreign country in which or under the laws of which the arbitral process took place and the award was made.[29] Secondly, sub-section (2) is concerned with the situations where the subject-matter of the dispute is not capable of being determined by the process of arbitration under Indian law[30] or where the enforcement of award would be contrary to the public policy of India.[31] It is acknowledged by the New York Convention that the country in which the award has been passed has the primary jurisdiction over such an award and only such a country shall have the authority to rescind such an award. The country with secondary jurisdiction may only determine about the enforcement of the award. Section 48 of the Act incorporates Article V of the New York Convention. It specifies the limited and comprehensive grounds on which recognition and enforcement of an arbitral award may be denied by a competent authority in the country with secondary jurisdiction where the recognition and enforcement is sought, only if party resisting the enforcement produces the evidence of the subsistence of any of these grounds.[32] The grounds for resisting enforcement of a foreign award under Section 48 may be classified into three categories; (a) grounds which relate to the jurisdiction of arbitral tribunal,[33] (b) grounds which affect the interest of the party alone[34] and (c) grounds which relate to the public policy of India.[35] Where the enforcement of an award is opposed on any ground questioning the very jurisdiction of the tribunal such as the award has not yet become binding on the parties, or has been set aside, or suspended by the competent authority of the country in which, or under the law

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24. To see this approach of Indian judiciary, see *Renusagar Power Plant Ltd.* v *General Electric Co.*, 1994 Supp(1) SCC 644 and *Cruz City 1 Mauritius Holdings* v. *Unitech Ltd.*, (2017) 239 DLT 649
25. Arbitration and Conciliation Act, 1996, Section 50(1)
26. *Id.*, Section 50(2)
27. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Art. V
28. UNCITRAL Model Law on International Commercial Arbitration, 1985, Art. 36
29. Arbitration and Conciliation Act, 1996, Section48(1)(a) to(e)
30. *Id.*, Section48(2)(a)
31. *Id.*, Section 48(2)(b)
32. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, Clause 1 of Art. V
33. The grounds provided under section 48(1) ((a),(c),(d),(e) and (2)(a)
34. The grounds provided under section 48(1)(b)
35. The Arbitration and Conciliation Act, 1996, Section 48(2)(b)

of which, that award was made[36] or where the subject-matter of dispute is not capable of settlement by arbitration under Indian law,[37] it seems to be the correct assumption that the court cannot exercise any discretion in these matters. This assumption may be justified on the basis of the fact that the issue of enforcement of a foreign award made without jurisdiction cannot probably be considered in the scales of discretion to be exercised by the court to enforce such award if the scales are slanted in favour of enforcement. Therefore it is argued that where an objection is raised against the jurisdiction of tribunal and the parties are able to convince the court that the award was made by the arbitral tribunal without having jurisdiction, then the court cannot exercise any discretion in refusing the enforcement of an award. However, it is also relevant to mention that the grounds provided under section 48(1)(a) to (d) are similar to the grounds provided under section 34 for setting aside a domestic award and thereby the court may have some extent of discretion in enforcing a foreign award in India.[38]Where the award is resisted on the grounds that the enforcement of the award would be contrary to the public policy of India[39]the court would not have any discretion in weighing the enforcement of foreign award on the parameters and standards of public policy of India.[40]

ii) Double/Multiple Exequatur of Foreign Awards

The conference[41] which approved the New York Convention chose the term 'binding'[42] as a substitute to 'final'[43]with a view to avoid a double exequatur of arbitral awards, one in the country where the award was made and the other in the country where it is sought to be recognized and enforced. Mutual recognition of awards is the superglue that clasps the international arbitrating community together, and this will be strong only if the enforcing court is enthusiastic to trust. The convention supposes that they will trust the supervising authority of the chosen venue.[44] Discretion to enforce or refuse enforcement is exceptionally afforded by the Convention and should be very sparingly exercised. It is mandatory for the courts in India under section 48 to enforce a foreign award which has become binding on the parties, unless it suffers from any one or more

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36. *Id.*, Section 48(1)(e)
37. *Id.*, Section 48(2)(a)
38. In the opinion of the author, in determining the issues like the capacity of the parties or the validity of an arbitration agreement or the validity of the composition of an arbitral tribunal or the application of principles of natural justice or in determining whether the award contains the decisions on the matters beyond the scope of the submission to arbitration, the court would always be in position to enjoy and exercise some extent of discretion.
39. *The Arbitration and Conciliation Act,* 1996, Section 48(2)(b)
40. Because after the amendments made by Indian Parliament in section 48(2)(b) of the Act through Arbitration and Conciliation (Amendment) Act, 2015, the meaning and content of public policy of India has been specified by providing the definition of the term public policy and the court, now, has no opportunity and discretion to determine the meaning and content of public policy of India as it had earlier.
41. United Nations Diplomatic Conference on 10 June 1958
42. Under Art. V(1)(e)
43. The Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 uses the term 'final' under its Art. 1(e) for the same purpose.
44. Mustill and Boyd, *Commercial Arbitration,* Companion Volume to 2nd edition, 2001, p.90 cited from OP Malhotra, *The Law and Practice of Arbitration and Conciliation,* Lexis Nexis Butterworths, 2nd Edition (2006), p.1386

defects set out in it. However, if the party against whom it is invoked makes a request to the court and produces evidence that the award has yet not become binding, the court may refuse to enforce the award. An award which has become binding on the parties imports *res judicata* effect. Once a dispute has been settled for good by one court, it cannot be re-agitated before another court or in any arbitral proceedings. The first four grounds set forth in section 48 for refusal of enforcement of a foreign award are incapacity of the parties or invalidity of the arbitration agreement,[45] non-compliance of due process or violation of principles of natural justice,[46] jurisdictional defects[47] and improper composition of arbitral tribunal or improper procedures.[48] All these grounds unfold the procedural imperfection. Suppose if one or more of these grounds contained in analogous statute of a convention country are rejected by the court in a request for setting aside the award, in the country where it was made, the award becomes binding on the parties. It will have *res judicata* effect against adducing those grounds in the proceedings for enforcement under section 48 in India. Consequently, this will avoid double exequatur, once in the country where the award was made and the other where it is desired to be recognized and enforced. It is assumed that the double exequatur is incompatible with homogeny and equivalence in International Commercial Arbitration and harmony and courtesy of the adopting States. The Supreme Court of India, in the case of *Escorts Limited v Universal Tractors Holdings LLC,*[49]examined the issue whether affirmation of a foreign award by the court of the country of its origin[50] is necessary before enforcing the same in India and rejected the contention of the petitioner that the respondent ought to have proceeded for confirmation of the foreign award under US Law before coming to India for its execution. The court upheld the decision of the single judge of the Delhi High Court that the principle of double exequatur or double recognition has no application in view of the modified law provided under the Arbitration and Conciliation Act, 1996 which negated the application of this rule in India. It is suggested that in the interest of harmony, integration and synchronism of international commercial arbitration, the likelihood of double exequatur of the foreign awards should be put to an end by way of appropriate legislations by Member States. Legislative reforms by the legislature only of one country will not be sufficient to unravel the problem. This provision has been adopted by all countries adopting and implementing the UNCITRAL Model Law. The possibility of uniform legislative reform is not free from doubt, because views of various countries are bound to vary. In the interest of uniform international commercial arbitration, the State legislation of the countries corresponding to Article 36(1)(a) of the Model Law need to be suitably amended. It is submitted that clauses (a) to (d) of section 48(1) of Arbitration and Conciliation Act, 1996 corresponding to Article 36(1)(a) of the Model Law may be omitted.[51]

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45. *The Arbitration and Conciliation Act*, 1996, Section 48(1)(a)
46. *Id.*, Section 48(1)(b)
47. *Id.*, Section 48(1)(c)
48. *Id.*, Section 48(1)(d)
49. (2013) 10 SCC 717
50. The country where the arbitration took place and the award was given.
51. O P Malhotra, *The Law and Practice of Arbitration and Conciliation,* Lexis Nexis Butterworth, 2nd Edition (2006), p.1386, 1388, 1390

iii) Country in which, or under the law of which

The Indian Act provides a ground for refusing the enforcement of foreign award in India if the "…award has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made…"[52] The Supreme Court, in the case of *M/s Centro trade Minerals and Metals Inc* v. *Hindustan Copper Ltd.,*[53] held that the expression, "under the law of which, that award was made" refers to the law of the country in which arbitration had its seat. Doesn't this imply a differentiation of competences between Indian and foreign courts? That is to mean that while the competence to set aside would be within the authority of the country in which, or under the law of which, the award was made, the power of enforcement would be with the Indian court. The acknowledged construction and explanation of Art. V of NYC is that it apprehends two kinds of jurisdiction in respect of foreign awards.[54] The primary jurisdiction to set aside a foreign award is vested only in the courts of the country where the award is made or under the law of which it is made. The expression "under the law" refers to the curial law governing the arbitral proceedings. It will mostly be the law of the country where the arbitration has its seat. The secondary jurisdiction is vested in the courts of all other Convention countries wherein the courts of that country have limited authority to determine whether or not to recognize and enforce the foreign award in that jurisdiction. It is important to note that the setting aside of such an award in the primary jurisdiction has the international effect of rendering the award unenforceable in all Convention countries whereas the refusal to recognize and enforce the foreign award by the courts in a secondary jurisdiction has an effect limited to only that country.[55] This understanding and elucidation has been approved by courts in the United States[56] which undoubtedly fortifies certainty and efficiency in the regime of international arbitration.[57]In intercontinental disputes, international arbitration is preferred over litigation due to global enforceability regime for foreign awards under the Convention.[58] Its pro-enforcement standpoint has been justified by judicial forums globally by interpreting narrowly the grounds for refusal of enforcement of foreign awards. The intrusion of the primary jurisdiction by the courts of secondary jurisdiction, as has happened in *Venture*[59], would produce "…dramatically disagreeable results in an international context…" and this would, "…inevitably invite reactions that jeopardize the stability of cross-border arbitration…".[60]Thus, if the other court sets aside the foreign award, the Indian court

52. Arbitration and Conciliation Act, 1996, Section 48(1)(e)

53. [2006] 5 S.C.A.L.E. 535 at [160],

54. E.R. Hellbeck and C.B. Lamm, "The Enforcement of Foreign Arbitral Awards under the New York Convention: Recent Developments" (2002) 5 *Int. A.L.R.* 137.

55. *Ibid*.

56. *International Standard Electric Corp* v. *BridasSociedadAnonimaPetrolera*745 F.Supp 172; *M & C Corp* v. *Erwin Behr GmbH & Co* 87F.3d 844; *Yusuf Ahmed Alghanim & Sons* v. *Toys "R" Us IncThr. (HK) Ltd* 126 F.3d 15; *Karaha Bodas Co L.L.C.* v. *Perusahaan Pertambangan Minyakdan Gas Bumi Negara* 364 F.3d 274.

57. C.A. Giambastiani, "Recent Development: *Lex Loci Arbitri* and Annulment of Foreign Arbitral Awards in U.S. Courts" (2005) 20 *American University International Law Review* 1101, 1112.

58. Hellbeck and Lamm, "The Enforcement of Foreign Arbitral Awards under the New York Convention" (2002) 5 *Int. A.L.Rev*. 137.

59. *Venture Global Engineering* v. *Satyam Computer Services Ltd*., AIR 2008 SC 1061

60. W.W. Park, "Amending the Federal Arbitration Act" (2002) 13 *American Review of International Arbitration* 75, 125.

may refuse enforcement. However, if such a challenge fails before the competent authority, how can the Indian courts look into the issue again and set aside the award. It is correct to say that interpretation in *Venture*[61] runs against the objectives of the New York Convention and such an interpretation which goes in divergence with India's international commitments should not be adopted.[62] Moreover, section 48 is exhaustive of the grounds for refusal, as it uses the words "only if" in the opening part. If the Indian court sets aside a foreign award and the other party files an application for enforcement of the same award, it will have to be refused on the ground that it has been set aside by an Indian court. As already pointed out, in an international commercial arbitration outside India, section 48(1)(e) will not contain a reference to India or its law unless so designated by the parties. Therefore, the enforcement of the foreign award would be refused on a ground other than those listed under section 48, which is impermissible.

iv) Arbitrability of the Subject Matter

Arbitrability can be read in UNCITRAL Model Law, when it permits the courts of the seat to set aside an arbitral award on the ground that the subject matter of the dispute is not capable of resolution by arbitration under the law of the State[63] and when it gives the authority to the courts of all Member States to refuse the recognition and enforcement of the foreign awards on the same ground.[64] The arbitrability leads to the simple question of what kind of subject matters can and cannot be adjudicated and determined by the process of arbitration. The Arbitration and Conciliation Act 1996 is silent on types of non-arbitrable disputes. The Supreme Court of India, during the course of interpretation based on the types of rights involved, has recognised some subject matters excluded from the scope of arbitration and thus non-arbitrable. In *Booz Allen*[65], the Supreme Court of India has discussed the concept of arbitrability in detail and observed that the term 'arbitrability' has different meanings in different contexts. According to the Court three important facets to the meaning of the term arbitrability are: i) whether the dispute is capable of being adjudicated through arbitration, ii) whether the dispute is covered by the arbitration agreement, and iii) whether dispute was referred by the parties to arbitration. It seems that as ii) and iii) aspects are already covered by section 34(2)(a)(iv) and 48(1)(c), therefore the possible meaning of the arbitrability under section 34(2)(a)(i) and 48(2)(a) relates to the i) aspect as pointed out by the Court that whether the dispute is capable of being determined by the process of arbitration. In this regard, the Supreme Court observed that any dispute that can be decided by a civil court can also be determined by the process of arbitration.[66] However, the disputes involving rights in rem cannot be adjudicated by an arbitral tribunal and the parties can resolve only those disputes by way of arbitration which involve rights in personam. The Court recognized certain non-arbitrable disputes which can only be adjudicated by the competent courts. Such non-arbitrable disputes include: i) disputes relating to rights and liabilities which give rise to

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61. *Venture Global Engineering* v. *Satyam Computer Services Ltd.*, AIR 2008 SC 1061
62. *G.P. Singh, Principle of Statutory Interpretation,* 9th edn (Nagpur: Wadhwa & Wadhwa, 2005), pp.529-534.
63. UNCITRAL Model Law, 1985, Art. 34(2)(b)(i)
64. *Ibid*.
65. *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd,* (2011) 5 SCC 532
66. *Ibid*

or crop up out of criminal offences; ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, or child custody; (iii) matters relating to guardianship; (iv) matters relating to insolvency and winding up; (v) testamentary matters such as grant of probate, letters of administration and succession certificate; and (vi) matters relating to eviction or tenancy which are governed by special statutes where a tenant enjoys special protection against eviction and particular courts are conferred with the exclusive jurisdiction to deal with the dispute.[67] Further, this court recognized one additional category of cases to the six non-arbitrable categories identified in *Booz Allen*, that is, disputes concerning to trusts, trustees and beneficiaries arising out of a trust deed and the Trust Act.[68] In N. Radhakrishnan v. M/S Maestro Engineers[69], the Supreme Court had held that where, there is allegations of fraud and serious malpractices, the matter cannot be referred to an arbitral tribunal and such a matter can only be adjudicated by the court for the reason that an arbitral tribunal, the creation of the contract between two or more private parties, has a limited jurisdiction whereas the courts are more equipped to adjudicate serious and complex allegations and would be more competent in providing wider range of reliefs to the disputants. But the apex court also held that allegations of fraud are not an exemption or prohibition to refer parties to a foreign-seated arbitration and that the only exception to refer parties to foreign seated arbitration are those which are specified in Section 45 of Act.[70] Certain High Courts in India pointed out a distinction between a serious and complex issue of fraud and a mere allegation of fraud and it was held that the serious and complex issue of fraud is not arbitrable.[71]In *A. Ayyasamy* v. *A. Paramasivam*[72] the Indian Supreme Court clarified the situation and maintained the distinction between serious issues of fraud and mere allegations of fraud. The Court held that serious issues of fraud are not arbitrable in India. The Law Commission of India with a view to set this entire confusion and controversy and to make issues of fraud explicitly arbitrable in India has recommended certain amendments to section 16 of Arbitration and Conciliation Act 1996.[73]It may be submitted that the Legislature should take some effective initiatives to make the amendments as recommended by Law Commission a reality with a view to ensure the objective of the Act to promote party autonomy by minimising the intervention of the court in arbitral proceedings and to promote the principle of *competenz-competenz* for making the Indian arbitration law conducive to international arbitration and foreign awards.

v) Public Policy of India

Both the New York Convention[74] and UNCITRAL Model Law recognize 'public

67. *Ibid*.

68. *Vimal Kishore Shah* v. *Jayesh Dinesh Shah*, (2016) 8 SCC 825

69. 2010 (1) SCC 72

70. See *Swiss Timing Limited* v. *Commonwealth Games 2010 Organising Committee, (2014) 6 SCC 677* and *World Sport Group (Mauritius) Ltd.* v. *MSM Satellite (Singapore) Pte. Ltd., (2014) 11 SCC 639*

71. See *Ivory Properties and Hotels Private Ltd* v. *Nusli Neville Wadia*, 2011 (2) Arb LR 479 (Bom); *CS Ravishankar* v. *CK Ravishankar,* 2011 (6) Kar LJ 417)

72. (2016) 10 SCC 386

73. Report No. 246 on Amendments to *the Arbitration and Conciliation Act* 1996, Law Commission of India, August 2014

74. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Art. V(2)(b)

policy' as a ground for refusing the enforcement of foreign award. They provide that a State may refuse to recognise and enforce an arbitral award if it is in conflict with or contrary to the public policy of that state.[75] However, the term 'public policy' was not defined and it was left to the member states to define the scope of the ground 'public policy' in the law of that state. The Indian legislation[76]provided the ground of 'public policy' to set aside a domestic award under section 34 and to refuse the enforcement of a foreign award under section 48 and 57 but the term 'public policy' was not defined in the original enactment. It gave the opportunity to the courts in India to determine the meaning and scope of 'public policy' as a ground to refuse the enforcement of foreign awards in India which lead to the state of confusion and uncertainty because of divergent opinions in judicial interpretation. The Supreme Court of India, when it was construing the term 'public policy' under section 7(1)(b)(ii) of Foreign Awards (Recognition and Enforcement) Act, 1961 in *Renusagar*[77] case interpreted the term narrowly but in *Saw Pipe*[78] 'public policy' of India was construed in broad and liberal manner when it was to be applied to domestic awards under section 34. In *Saw Pipes* the Court included patent illegality as a component of public policy in addition to the fundamental policy of Indian law, the interest of India and the justice and morality as determined by the Court in *Renusagar* case as components of public policy. The Supreme Court observed that meaning of public policy would have broader and wider import when it is applied to domestic awards under section 34. These two decisions of the Supreme Court created a distinction in the meaning of public policy for the purpose of its application to domestic awards under section 34 and enforcement of foreign awards under section 48. Again, we find two divergent opinions of the Supreme Court when it held in the case of *Phoolchand*[79] that the meaning of 'public policy' under sections 34 and 48 of the Act is same and a party could resist enforcement of a foreign award on the ground of 'patent illegality' whereas in *Shri Lal Mahal*[80]the Court refused to give the wide and liberal import to the meaning of expression 'public policy' under section 48 and rejected the 'patent illegality' as the component of public policy for resisting the enforcement of foreign awards in India. In this backdrop, the Law Commission of India had recommended[81] that in cases of foreign awards and awards passed in international commercial arbitration in India, a narrower construct be given to 'public policy'.[82]In this regard, the Law Commission suggested substantial amendments to section 34 and 48 with a view to ensure that *Renusagar* position applies to all foreign awards and all awards passed in International Commercial Arbitration. When these recommendations of the Law Commission were under consideration, the Supreme Court while showing its agreement with the ratio of *Saw*

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75. UNCITRAL Model Law on International Commercial Arbitration, 1985, Art.36(1)(b)(ii)
76. *The Arbitration and Conciliation Act*, 1996
77. *Renusagar Power Co. Ltd.* v. *General Electric Co., (1994) SCC Supl.(1) 644*
78. *ONGC* v. *Saw Pipes,(2003) 5 SCC 705*
79. *Phulchand Exports Ltd.* v *O.O.O. Patriot*, (2011) 10 SCC 300
80. *Shri Lal Mahal Ltd v Progetto Grano Spa, (2014) 2 SCC 433*
81. In the Report No. 246, Amendments to the Arbitration and Conciliation Act 1996, Law Commission of India, August 2014
82. According to the narrower construct as suggested by the Law Commission of India that shall include only; (a) the fundamental policy of Indian law; and (b) the most basic notions of justice or morality.

Pipes, went a step forward in expanding the scope of the meaning of the expression 'fundamental policy of Indian law' by applying the *Wednesbury* principle within the 'public policy' test.[83] The Law Commission had to relook into the suggested amendments and found that the verdict in *Western Geco* would undermine Commission's attempt to bring the Act in line with international practices and would discourage the possibility of international arbitration in India. Therefore the Commission suggested further amendment to include Explanation II to section 34(2)(b)(ii) and 48(2)(b).[84]The Indian Parliament has made certain amendments to section 34,48 and 57 of the Act[85]whereby the term 'public policy' was defined narrowly by substituting Explanation 1and 2 to section 34(2) (b)(ii), 48(2)(b) and57(1)(e) for an earlier Explanation and by inserting a new sub-section (2A) along with a proviso in section 34. This amendment specifies the 'patent illegality' as a separate ground for setting aside purely domestic awards which arises out of arbitrations other than international commercial arbitrations[86]and restricts and narrows the meaning of 'public policy' as a ground for refusing the enforcement of foreign awards in India.

The High Court of Delhi in *Cruz City I Mauritius Holdings v. Unitech Limited*,[87] has held that mere contravention of a provision of Indian law is not sufficient and that for holding 'public policy' as a ground to refuse enforcement of a foreign award, there shall be a breach of the basic and fundamental rationale, values and legal principles which shape the foundation of laws in our country and it is not liable to be compromised.

III. ENFORCEMENT OF NON-CONVENTION AWARDS

The Supreme Court of India disapproving the *Bhatia International*[88] ruling has held in the case of *BALCO*[89] that Part I of the Arbitration and Conciliation Act 1996 would not be applicable to international commercial arbitrations being conducted at any place outside India. Consequently, the awards which are the result of international commercial arbitrations seated in a country which is not a member of Geneva Convention or the New York Convention are neither covered by Part I nor by Part II of Indian Act. Therefore, foreign awards which are made in countries not bound by either the Geneva or the New York Convention cannot be enforced in the same manner as foreign awards from countries where those Conventions apply. Such foreign awards are, however, enforceable in India on the same grounds, and in the same circumstances, in which they are enforceable under the general law, justice, equity, and good conscience. It means that they can be enforced in an action, in the form of civil suit, brought before a court of law. A foreign award will not be enforced by courts if its enforcement would be contrary to public policy or the laws in India.[90] A foreign award arising out of commercial arbitration is generally

83. *ONGC Ltd*. v. *Western GECO Ltd.*, (2014) 9 SCC 263

84. Supplementary to Report No. 246 on Amendment to Arbitration and Conciliation Act, 1996, "Public Policy", Dev elopements Post – Report No. 246, Law Commission of India, February 2015

85. Through the Arbitration and Conciliation (Amendment) Act, 2015

86. The amended Arbitration and Conciliation Act 1996, Section 34(2A)

87. (2017) 239 DLT 649

88. *Bhatia International v. Bulk Trading SA*, (2002) 4 SCC 105

89. (2012) 9 SCC 552

90. G.K.Kwatra, *Arbitration and Conciliation Law of India*, Universal Law Publishing Co., 7thedn., (2008), New Delhi, pp. 42-43.

based on a contract to arbitrate but it is not a contract by itself. Such an award is enforceable in India as if it is made on reference to arbitration in India on the same grounds and in the same circumstances in which it is enforceable in UK under the common law on grounds of justice, equity and good conscience.[91] In order to enforce such awards, the claimant has to prove that: a) there was an arbitration agreement; b) the arbitration was conducted in accordance with that agreement; c) the award was made pursuant to the provisions of the agreement; d) the award is valid according to law of the country where the arbitration was conducted and where the award is made; and e) the award has obtained the finality according to the law of the place where it was made. Thus, in order to be enforceable in India, a non-convention foreign award must be final and valid.[92]

IV. CONCLUSION

The foregoing leads to the conclusion that despite efforts at the global level both in the form of soft law and hard law, the fact remains that the state of laws is much less than harmonized. The above state is broadly because of two reasons *viz.* maintaining superfluous grounds for challenging enforcement of foreign awards (mostly procedural) leading to multiple exequatur and secondly inclusion of subjective phrases like public policy and arbitrability in the legislations. It may be argued that the aim of harmonization may be achieved only when the true scope of the above terms is described. In the interest of uniform international commercial arbitration the State legislation of the countries corresponding to Article 36(1)(a) of the Model Law need to be suitably amended. With a view to minimise discretion of the court for ensuring its minimal intervention and to avoid double exequatur in matters of enforcement of foreign awards, it may be submitted that clauses (a) to (d) of section 48(1) of Arbitration and Conciliation Act, 1996 corresponding to Article 36(1)(a) of the Model Law may be omitted. For removing the state of confusion and for settling down the controversy on the issue of arbitrability of 'fraud' in India, it is suggested that the recommendation of Law Commission of India in its 246th Report for certain amendments in this regard to section 16 of the Act should be made a reality. This will certainly help the Indian legal regime to be more conducive for international commercial arbitration and enforcement of foreign awards. The approach of Indian judiciary and Indian Legislature that public policy grounds to resist the enforcement of foreign awards must be interpreted and read in the strictest possible manner for making Indian arbitration law more suitable to facilitate the enforcement of foreign awards, certainly, deserves the appreciation. Developing an international public policy in place of domestic public policy is one such attempt to bring harmonization. It is also required on the part of Indian Legislature to take initiatives for making expressly and with certainty provisions for the enforcement of non-Convention awards in India.

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91. Badat and Co. v. East India Trading Co., AIR 1964 SC 538

92. *Ibid*.

REGULATION OF COMBINATIONS AND MERGER CONTROL UNDER THE COMPETITION LAW IN INDIA

MAYANK PRATAP*

ABSTRACT : *The Indian Competition Act,* 2002 is a modern piece of economic legislation. Indian law has all the essential ingredients of anti-competitive practice provisions viz. prohibition of anti-competitive agreements; prohibition of abuse of dominance; and regulating mergers & acquisitions. Anti-competitive agreements and abuse of dominance are intended to be prohibited by orders of the Commission; whereas, combinations are to be regulated by orders. This distinction in law indicates the intentions of the legislators. Combinations ensure economic growth, more economic opportunities for businesses to compete with their overseas counterparts and consumer welfare ultimately. On the other hand, anti-competitive combinations harm markets and subvert the interests of the consumers. If the motive of the merger and acquisition is to create anti-competitive effects likely to reduce the number of competitors or to create dominance in the market, it needs to be regulated by formulating a suitable competition policy. The Act contains adequate provisions for the regulation of combinations. The principle for exercising merger control under the Act is that if a merger is likely to give rise to market power, it is better to prevent this from happening than to control the exercise of market power after the merger has taken place, that is to say, prevention is better than cure. This article extensively analyses pertinent statutory provisions related to combination and their regulations. this article offers significant insights into the salient aspects pertaining to the Indian competition authority's law and practice in this key area including the treatment of joint ventures and cross border merger under the Act.

KEY WORDS : Competition Law, Anti-competitive agreements, Merger, Competition Commission of India.

I. INTRODUCTION

In the wake of liberalization of economy in the early nineties, trade entities in India felt compelled to re-structuring their business enterprises so as to survive and compete in the new economic environment. Restructuring and reorganizing of enterprises has become one of the key feature of globalization of trade and commerce in India when India entered into the club of market economies which used legislative instrument to promote market efficiency and attract foreign investment with the opening up of economy to foreign investment and reduction of government control over investment decision. Merger,

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amalgamation and acquisition are the method of such restructuring or reorganizing of enterprises.

With the economic liberalisation making sweeping changes in industrial and trade policies, foreign investment rules, capital controls and other spheres, it was felt that there is a need for a new and modern competition law in the place of the old Monopolies and Restrictive Trade Practices Act, 1969. Under the MRTP Act, the Central Government had the power to approve mergers, amalgamation and takeovers etc. As a result thereof, this Act became another tool for the government to keep with itself the control over big companies, which wanted to grow faster and become globally competitive[1]. As this Act could not keep pace with the sweeping changes introduced by liberalisation and globalisation, *the Competition Act, 2002* was enacted. The background to the enactment of the Competition Act was succinctly explained by the Supreme Court in the case of *Competition Commission of India v. Steel Authority of India Ltd.*[2]

> "The decision of the Government of India to liberalize its economy with the intention of removing controls persuaded the Indian Parliament to enact laws providing for checks and balances in the free economy. The laws were required to be enacted, primarily, for the objective of taking measures to avoid anti-competitive agreements and abuse of dominance as well as to regulate mergers and takeovers which result in distortion of the market. The earlier Monopolies and Restrictive Trade Practices Act, 1969 was not only found to be inadequate but also obsolete in certain respects, particularly, in the light of international economic developments relating to competition law. Most countries in the world have enacted competition laws to protect their free market economies – an economic system in which the allocation of resources is determined solely by supply and demand. The rationale of free market economy is that the competitive offers of different suppliers allow the buyers to make the best purchase. The motivation of each participant in a free market economy is to maximise self-interest but the result is favourable to society. As Adam Smith observed that there is an invisible hand at work to take care of this."

India enacted *the Competition Act* in 2002, as part of the second-generation economic reform. The Act aims to prevent practices having appreciable adverse effect of competition and to promote and sustain competition in markets, to protect the interest of consumers and to ensure the freedom of trade carried on by other participating in relevant market. But one the basic concern of the new regime was to ensure the arrangement in the nature of merger and acquisitions of assets and management control, do not adversely affect existing competition in business of the supply of goods or services offered by the undertakings affecting the reorganization. Therefore, the merger control provisions were

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1. S. Ramanujam, *Mergers et al (Issues, Implications and Case Law in Corporate Restructuring),* LexisNexis Butterworths Wadhwa, Nagpur, 2012, p. 1175.
2. (2010) 103 SCL 269 (SC).

made under the Competition Act, 2002 so as to provide for an appropriate competition policy for the country. The provision of the Act relating to Regulation of Combinations came into effect from 1st June, 2011 with the notification of The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011[3].

The significant goal of any business firm is to achieve growth. It is possible for a firm to grow organically or inorganically. Organic growth, which is also called as internal growth is driven by the firm's own business activities such as innovation, development of new products or by development of markets. In contrast, inorganic growth or the external growth refers to growth in business operations or finances facilitated by the mergers, acquisitions, takeovers etc. Both the organic and inorganic growths have respective merits and demerits. While growth is a positive virtue and leads to a number of efficiencies, it may also cause an increase in market power of a firm giving it the ability to indulge in anticompetitive practices. This negative impact of growth underscores the need for regulation. The conduct of a firm which has grown organically or internally is regulated under the provisions of section 4 of the Competition Act, 2002 relating to abuse of dominance. The instances of inorganic growth through the route of mergers and acquisitions (M&As) are regulated ex-ante at the time of entering into the transaction.

In this article, effort has been made to develop understanding of the regulatory philosophy and the basic concepts of M&A activity and the discussions are centered on the regulations of mergers and acquisitions including cross border combination, the joint venture activity and their impact on market competition and the need for regulation.

II. COMBINATIONS UNDER *THE COMPETITION ACT*, 2002

The Competition Act, 2002 is a modern piece of economic legislation. Globally, competition or anti-trust laws have three main contours. They are – (i) prohibition of anti-competitive agreements; (ii) prohibition of abuse of dominance; (iii) regulating mergers & acquisitions. Indian law has all these essential ingredients of anti competitive practice provisions. Anti-competitive agreements and abuse of dominance are intended to be prohibited by orders of the Commission; whereas, combinations are to be regulated by orders. This distinction in law indicates the intentions of the legislators. Combinations ensure economic growth, more economic opportunities for businesses to compete with their overseas counterparts and consumer welfare ultimately. On the other hand, anti-competitive combinations harm markets and subvert the interests of the consumers. The Act contains adequate provisions for the regulation of combinations. The Act uses this composite expression - 'Combination'- to cover nearly all the modes of reorganizing of enterprises viz. merger, amalgamation, acquisition of shares, assets, acquiring control of an enterprises.

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3. No. 1-1/Combination Regulations/2011-12/CD/CCI.— In exercise of the powers conferred by sub-section (1) and clauses (b), (c) and (f) of sub-section (2) of section 64 read with sub-sections (2) and (5) of section 6 of the Competition Act, 2002 (12 of 2003), the Competition Commission of India hereby makes the following regulations, namely:- The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011

Section 5 of the Competition Act explains combination[4] as: '*Acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises*'. Broadly, combination under the Act means acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has direct or indirect control over another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act. The thresholds are specified in the Act in terms of assets or turnover in India and abroad. Entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India is prohibited and such combination shall be void.

In nutshell, combinations mean any situation in which the ownership of two or more enterprises is joined together. In business world joining of ownership may take many different forms, and may be either amicable and consensual, or unwelcome and hostile. In India reorganizing of enterprises are regulated through various legislation[5] including the Companies Act and under the SEBI Act. With the enactment of the Competition Act in 2002, mergers also come within the ambit of this legislation. In the Companies Act mergers between companies inter alia essentially tries to protect the interests of the secured creditors and in the SEBI Act it tries to protect the interests of the investors. Apart from protecting the interests of private parties, the objective of them is different or mutually exclusive. But in the Competition Act the objective is much broader. It aims at protecting the appreciable adverse effect on trade-related competition in the relevant market in India (AAEC).

Let us consider an illustration[6]. Air India and Indian (erstwhile Indian Airlines) have combined. Consequent upon that, the market share of the combined entity has increased considerably. The enhanced market share may cause:

i. barriers to entry to other competitors; (competitors may not have market to trade)

ii. rise in passenger fares;

iii. poor quality of service

On the contrary, it may not cause any concern at all if we look at the following factual issues:

i. Passengers have wider choice (Jet Airways, Spice jet, Kingfisher, Air Deccan, Indigo, Go Air, foreign airlines etc.);

ii. with wider choice, the combined entity may not be able to create entry barriers;

iii. in order to maintain an optimal passenger base (for successful and viable business venture) the combined entity may have to provide competitive level price for tickets and maintain highest or at least similar levels of quality of services that its competitors would extend.

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4. The Competition Act, 2002, Section 5

5. Few legislation which regulates the merger& acquisition of enterprises other than Competition Act, 2002 are Companies Act, 2013, SEBI, 1992, RBI Act, 1934, TRAI Act, 1997, FEMA,1999 IRDAI, 1999

6. Manas Kumar Chaudhuri, '*Mergers & Acquisitions under the Indian Competition Law – a critical legal view*' *JSA* New Delhi

In *the Companies Act* and SEBI Act, though both are mutually exclusive yet aim to protect the interests of private individuals. Whereas, in *the Competition Act,* the impact of combinations, directly, affects the market and the players in the market including the consumers. We may, therefore, safely say that apart from the fact that all these legislations are mutually exclusive, the Companies Act and the SEBI Act are the sub-sets of Competition Act in so far as legal scrutiny of mergers are concerned.

III. RELEVANT DEFINITIONS

For the purpose of better analysis of topic it is important to understand the meaning and definitions of various words and phrases used in the Act,

i. Merger and Amalgamations

In General Merger is the fusion of two or more enterprises, through the direct acquisition by one of the net asset of the other or others. A merger differs from a consolidation in that in the former no new concern is created, whereas in a consolidation a new corporation or entity acquires the net assets of all combining units[7] and Laws in India use the term 'amalgamation' for merger.

The term merger and amalgamations are not defined under the Act, However, the Companies Act, 2013 explains the concept. A 'merger' is a combination of two or more entities into one; the desired effect being not just the accumulation of assets and liabilities of the distinct entities, but organization of such entity into one business. The possible objectives of mergers are manifold - economies of scale, acquisition of technologies, access to sectors / markets etc. Generally, in a merger, the merging entities would cease to be in existence and would merge into a single surviving entity.

The Income Tax Act, 1961 defines the analogous term 'amalgamation': the merger of one or more companies with another company, or the merger of two or more companies to form one company.

Commercially, mergers and amalgamations may be of several types, depending on the requirements of the merging entities. Although, corporate laws may be indifferent to the different commercial forms of merger and amalgamation, but the Competition Act, 2002 does pay special attention to the forms.

a. Horizontal Mergers

This kind of merger takes place between entities engaged in competing businesses which are at the same stage of the industrial process[8]. A horizontal merger takes a company a step closer towards monopoly by eliminating a competitor and establishing a stronger presence in the market. These mergers are viewed as presenting a greater danger to competition than any other type of mergers. They have effect on market concentration and use of market power as they lead to (a) reduction in number of market players and (b) increase in market share of the merged entity[9]. Such increases in market power may result

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7. Erick L Kohler in dictionary of Accountant See: Siddharth Bawa, *Law of Competition in India,* Allahabad Law Agency, First Edition 2005,
8. J.C Verma 'Corporate Mergers Amalgamations and Takeovers', 4th edn., 2002, p.59
9. Alan H. Goldberg, 2007, p. 93.

in turn in increased prices, restricted output, diminished innovation, etc. which is damaging to the competitive process.

b. Vertical Mergers

Vertical mergers refer to the combination of two entities at different stages of the industrial or production process. Vertical integration helps a company move towards greater independence and self-sufficiency. However, in certain circumstances, vertical mergers may be harmful. For example, if a dominant enterprise acquires source of raw materials, this enterprise could deny access to raw materials to competitors or potential competitor.

c. Conglomerate Mergers

A conglomerate merger[10] is a merger between two entities in unrelated industries. The principal reason for a conglomerate merger is utilization of financial resources, enlargement of debt capacity, and increase in the value of outstanding shares by increased leverage and earnings per share, and by lowering the average cost of capital. Merger with a diverse business also helps the company to foray into varied businesses without having to incur large start-up costs normally associated with a new business[11].

ii. Acquisition' or Takeover

An 'Acquisition' or 'takeover' is the purchase by one person, of controlling interest in the share capital, or all or substantially all of the assets and/or liabilities, of the target. A takeover may be friendly or hostile, and may be effected through agreements between the offer or and the majority shareholders, purchase of shares from the open market, or by making an offer for acquisition of the target's shares to the entire body of shareholders[12]. The term acquisition is defined under section 2(a)[13] of the Competition Act, 2002.

iii. Appreciable Adverse Effect

The term 'appreciable adverse effect on competition," has not been defined in the Act. However, The Competition Act, 2002, envisages appreciable adverse effect on competition in the relevant market in India as the criterion for regulation of combinations. In order to evaluate appreciable adverse effect on competition, the Act empowers the commission to evaluate the effect of Combinations on the basis of factors mentioned in sub-section (4) of section 20[14]. The Act prescribes these factors to be taken into

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10. V.K Bhalla, Financial Management and Policy-Text and Cases, 5th revised edn.
11. Nisith Desai Associates, *Merger and Acquisition in India* , April 2016 available at nisithdesai.com
12. Ibid p.3
13. According to Section 2(a) of the Competition Act, 2002, acquisition means directly or indirectly, acquiring or agreeing to acquire: 1. Shares, voting rights or assets of any enterprise; 2. Control over management or Control over assets of any enterprise.
14. (4) For the purposes of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the Commission shall have due regard to all or any of the following factors, namely:—
    (a) actual and potential level of competition through imports in the market;
    (b) extent of barriers to entry into the market;
    (c) level of combination in the market;
    (d) degree of countervailing power in the market;
    (e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;

consideration by the Competition Commission while determining whether an agreement has an appreciable adverse effect on competition. In the case of the *Board of Trade of the City of Chicago* v. *United States*[15], it was held: If the expression "appreciable adverse effect on competition" is not defined abstractly or in general terms in the Competition Act, every case has to be examined individually and facts are to be considered peculiar to the business condition before and after the restraint was imposed, the nature of restraint and its effect- actual or probable, as to the competition generally prevailing in the relevant market.

In *Haridas Exports* Supreme Court[16] observed that, The words 'adverse effect on competition' embraces acts , contracts, agreements or combinations which operate to the prejudice of the public interests by unduly restricting competition or unduly obstructing due course of trade. Public interest is the first consideration. It does not necessarily mean only of the industry.

iv. Relevant Market

In order to assess whether a combination shall have that effect, it is necessary to determine that the combination has acquired a market power. As a result of which the competition is, or likely to be, affected adversely and appreciably within the relevant market. Section 2(r) of the Act defines the term relevant market. The relevant market would be the geographic market[17] or the market for product or service.[18] The object of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining their behavior and of preventing them from behaving independently of an effective competitive pressure. With the perspective, that the market definition makes it possible, relevant market is important and also to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance.

IV. REGULATION OF COMBINATIONS

Competition Act prescribes financial thresholds linked with assets or turnover for

(f) extent of effective competition likely to sustain in a market;

(g) extent to which substitutes are available or arc likely to be available in the market;

(h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;

(i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;

(j) nature and extent of vertical integration in the market;

(k) possibility of a failing business;

(l) nature and extent of innovation;

(m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;

(n) whether the benefits of the combination outweigh the adverse impact of the combination, if any

15. 246 U.S. 231

16. *Haridas Exports* vs. *All India Float Glass Manufacturers Association* [2002] 111 Comp .Cas .617 (SC)]

17. See section 2(s) of the Act

18. See section 2(t) of the Act

the purposes of determining whether a transaction, restructuring of enterprises is a 'combination', and CCI approval is required only for combinations. A transaction that satisfies any of the following tests is a combination[19]: An acquisition where the parties to the acquisition, i.e. the acquirer and the target, jointly have:

Test 1: India Asset Test and India Turnover Test - in India (i) assets higher than INR 2,000 crore; or (ii) turnover higher than INR 6,000 crore; or

Test 2: Global Asset Test and Global Turnover Test - Total assets in India or outside higher than USD 1 billion of which assets in India should be higher than INR 1,000 crores; or (ii) total turnover in India or outside is higher than USD 3 billion of which turnover in India should be higher than INR3,000crores; OR

The acquirer group[20] would have –

Test 1: India Asset Test and India Turnover Test - in India (i) assets higher than INR 8, 000 crores; or (ii) turnover higher than INR 24,000 crores; or

Test 2: Global Asset Test and Global Turnover Test - (i) Total assets in India or outside higher than USD 4 billion of which assets in India are higher than INR 1,000 crores; or (ii) total turnover in India or outside is higher than USD 12 billion of which turnover in India should be higher than INR 3,000 crores.

On March 4, 2016 vide a notification, the CCI has increased the de-minimis thresholds for small companies. Now an exemption has been granted to companies which have assets of less than INR 350 crores or turnover of less than INR 1,000 crores in India **"**SME Exemption**"**. However, this exemption is only valid for a period of five years and is available until March 04, 2021. It is also important here to note that government has notified the 2017 amended notification[21]. The 2017 Notification has enhanced the 2016 Notification and the de-minimus exemption in terms of scope as well as term. While there

19. The 2011 Notification was superseded by the notification dated March 4, 2016 ("2016 Notification") whereby the threshold for the asset value to be exempt was increased from INR 2.5 billion to INR 3.5 billion and the threshold for the turnover was increased from INR 7.5 billion to INR 10 billion for an additional period of 5 years

20. A 'group' for the above purposes would mean two or more enterpris-es which, directly or indirectly, are in position to –

    i Exercise of not less than 50% or more of the voting rights in the other enterprise; or

    ii Appoint more than fifty per cent of the members of the board of directors in the other enterprise, or

    iii Control the management or affairs of the other enterprise

21. However one key concern that continued to prevail despite the de-minimus exemption was that it was interpreted to apply to a select types of combinations and not all types of combinations. The words "enterprise *whose control, shares, voting rights or assets were being acquired"* was interpreted by the CCI to mean that only combinations that were in the form of acquisitions were entitled to the benefit of this exemption. Therefore only if the acquirer was acquiring shares or voting rights or control or assets of a small enterprise (i.e. an entity whose assets or turnover fell below the prescribed thresholds), would the exemption apply. Should a combination take the form of an 'amalgamation' or 'merger', such combination would not be accorded the benefit of the exemption. Hence transactions which involved a merger of small enterprise as opposed to an acquisition of such an enterprise were denied the benefit of the 2011 Notification and 2016 Notification, as the case may be.

    The 2017 Notification seeks to rectify this anomaly. The 2017 Notification now exempts enterprises being party to any form of combination described under Section 5 of the Competition Act – acquisitions and mergers / amalgamations alike, where the value of assets being acquired,

is no increase in the thresholds for the asset value and turnover, the 2017 Notification intends to cover more situations in relation to small enterprises and transactions.

i. Pre-Filing Consultation

Any enterprise which proposes to enter into a combination may request in writing to the CCI, for an informal and verbal consultation with the officials of the CCI about filing such proposed 'combination' with CCI. Advice provided by the CCI during such pre-filing consultation is not binding on the CCI.

ii. Mandatory Reporting

Section 6 which deal with regulation of Combinations makes void any combination which causes or is likely to cause an AAEC within India. As per the section 6(2) of the Act, an entity proposing to enter into a combination, shall notify the Commission in the specified form disclosing the details of the proposed combination within 30 days of the approval of such proposal by the Board of Directors or execution of any agreement or other document. The Commission may, however, admit the notice received beyond the time as provided in section 6(2) of the Act without being prejudiced by the penal sanctions that get attracted for failure to file. In failure of giving such notice to the commission the commission is empowered to impose penalty under section 43A[22] of the Act. Once the notification is triggered, notice of the proposed combination is to be given to the Commission in Form I or Form II[23] duly filled in, verified and accompanied by evidence of payment of requisite fees as prescribed in Reg. 11. Ordinarily notice shall be filed in Form I with the option to file in Form II to those who prefer to do so. If during the course of enquiry, the Commission finds that it requires additional information, it may direct the parties to file such information. If the Commission requires information in Form II to form its prime facie opinion whether the combination is likely to cause or has caused AAEC within the relevant market, it shall direct the parties to file notice in form II.

V. PROCEDURE FOR INVESTIGATION OF COMBINATIONS

The CCI must form a prima facie opinion under Section 29(1) of the Act, as to whether a combination has caused or is likely to cause an AAEC within the relevant market in India[24], within 30 days of filing[25]. The time period can be extended by 15 working

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taken control of, merged or amalgamated is not more than 3.5 billion in India or turnover is not more than INR 10 billion from the provisions of Section 5 of the Competition Act ("2017 De-minimus Financial Thresholds").

Additionally, the 2017 Notification extends the period of exemption in such cases for a period of 5 years from the date of publication of the notification (that is March 27, 2017) and hence extends the exemption for an additional period of one year compared to the 2016 Notification.

22. If any person or enterprise fails to give notice to the Commission under sub-section (2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one percent of the total turnover or the assets, whichever is higher, of such a combination.

23. Combination Regulations, Schedule II.

24. In order to evaluate appreciable adverse effect on competition, the Act empowers the commission to evaluate the effect of Combinations on the basis of factors mentioned in sub-section (4) of section 20.

25. Regulation 19(1) of the 2011 Regulations, and Section 29 of the Competition Act,

days in cases where the parties offer to modify the terms of the combination. The CCI can either decide to approve the combination within this period or subject it to further investigation. If the CCI forms a prima facie opinion that a combination is likely to cause, or has caused, an appreciable adverse effect on competition, it initiates a detailed investigation Before forming this *prima facie* opinion the CCI may call for additional information from the parties concerned or examine and accept any modification offered by the parties[26]. If the *prima facie* opinion is against the combination, show cause notice is issued to the parties for them to respond within 30 days of its receipt, 'as to why an investigation in respect of such combination should not be conducted[27]'. The CCI can conduct the investigation itself or direct its Director General to conduct an investigation. After receiving response from the parties concerned, the CCI may call for a report from the Director General, within the directed time[28]. Where the *prima facie* opinion is against the combination, parties are directed to publish the details of the combination, as directed, so that the affected stakeholders including, members of the public have the knowledge of the combination and can be permitted to file written objections before the CCI[29]. The culmination of combination review results in a Section 31 order under its relevant sub-section. Three courses are provided for by that provision. If the CCI opines against the combination on the basis that it is likely to cause or has caused an appreciable adverse effect on competition (AAEC) it results in a Section 31(2) order, ordering that the combination shall not have effect, resulting it to be void[30]. However, if in addition to this finding the CCI is also of the opinion that 'such adverse effect can be eliminated by suitable modification to such combination', under Section 31(3), the CCI may propose appropriate modification to the parties, to be carried out within the time specified by the CCI. The third course of action open is to render a Section 31(1) order approving the combination. Subject to statutorily prescribed relaxations, a period of two hundred and ten days from the date of Section 6(2) notice is prescribed under Section 31(11) for the CCI to pass an appropriate order under subsections (1), (2) or (7) of Section 31.

The Central Government has notified the Competition Appellate Tribunal (COMPAT) to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under respective sections of the Act, such as orders relating to notification of combination, inquiry by the Commission and penalties[31]. An appeal has to be filed within 60 days of receipt of the order/direction/decision of the Commission.

VI. COMPOSITE COMBINATION

The term "composite combination" is not defined in the Competition Act, 2002 or in the Combination Regulations however regulation 9 (4) explain the concept of "composite combinations". A business transaction is considered as a composite transaction when it

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26. Regulation 19(2) of the 2011 Regulations
27. Section 29(1) of the Competition Act, The section bears the heading "Procedure for investigation of combinations".
28. Section 29(1-A) of the Act, and Regulations 20 and 21 of the 2011 Regulations,
29. Sub-sections (2) and (3) of Section 29 of the Act.
30. Section 31(13) of the Act
31. Section 53A of the Competition Act, 2002- Establishment of Appellate Tribunal.

is given effect by way of a series of individual transactions which are inter-dependent and inter-connected to each other, and all the steps or individual transactions coalesce together to give effect to the ultimate intended effect of the business transaction[32]. Recently, the Competition Appellate Tribunal gave verdict on composite combination[33]. The CCI had penalised Thomas Cook (India) Limited (and others) for failure to seek approval of CCI before consuming certain market purchases which were part of the transaction, but were otherwise/individually exempted. The CCI had considered the market purchases and the other notifiable aspects of the transaction as part of a composite combination and hence held that the otherwise non-modifiable market purchases should have been sought approval before consummation by the combining parties. A penalty of INR 1 Crore was accordingly imposed on account of non-notification of the said market purchases. The COMPAT over-ruled the CCI in appeal, primarily because COMPAT opined that even though the market purchases as well as the scheme for combination were authorised in the same meeting of the Directors, the implementation of two-stage scheme for demerger/amalgamation was not dependent on the market purchases. COMPAT held that the said transaction would have taken place irrespective of the market purchases and achievement of the ultimate objective was not dependent on the market purchases.

It should be noted that at the time when the CCI issued its Thomas Cook decision, Regulation 9(4) used the word "may be filed" instead of the current "shall be filed". COMPAT noted that in so far as Regulation 9(4) is concerned (in its unamended form), it is merely an enabling provision. The object thereof is to facilitate filing of one notice in respect of various interconnected/interrelated/interdependent transactions. This implies that if the parties take several steps or enter into multiple transactions for achieving the object of combination then they are not required to file separate notice under Section 6(2) and it will be sufficient if one notice is filed for seeking approval of CCI. After the decision of CCI in Thomas Cook, Regulation 9(4)[34] of the Combination Regulation has been amended twice. Firstly, the 2015 amendment replaced the then existing "may be filed" to "shall be file". This takes away the facilitatory/enabling nature of Regulation 9(4) and imposes a liability on the parties to file a single notice for composite combinations. Secondly,, the phrase "or inter-dependent on each other" now stands omitted.

VII. CROSS-BORDER COMBINATION

Cross-border merger means any merger, amalgamation or arrangement between an Indian company and a Foreign Company[35]. Cross-Border Merger could be either inbound

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32. Danish Khan & Anand Shree the condrum of composite combination: file or no to file Mondaq online blog available at https://www.mondaq.com/india/antitrust-eu-competition

33. Combination Registration No. C-2014/02/153

34. Regulation 9(4) of the Combination Regulations (as amended by the 2016 amendment) reads as follows: "Where the ultimate intended effect of a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected, one or more of which may amount to a combination, a single notice, covering all these transactions, *shall be* filed by the parties to a combination"

35. Section 2(42) of the Companies Act 2013 defines Foreign Company as any company or body corporate incorporated outside India which: (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and (b) conducts any business activity in India in any other manner.

merger or Out-bound Merger. Inbound Merger means a cross-border merger, where the resultant company is an Indian company. An outbound merger means a cross-border merger where the resultant company is a foreign company. A resultant company means an Indian company or a foreign company which takes over the assets and liabilities of the companies involved in the cross-border merger.

In any cross-border combinations with an Indian nexus due to the target being an Indian company reporting is mandatory under section 6 of the Act but if say, the combination between foreign companies takes place outside India, the CCI's jurisdiction to review such combination may be questioned on the basis of territorial scope of the Act.

Extraterritorial Application

Keeping in line with global practices, the competition law of India makes provision for extra-territorial merger control. Justification for this form of extra-territorial application of laws is found in the realisation that even mergers taking place wholly outside the borders of a country can result in reducing or affecting the competition within a country. So that section 32 provides that the Commission shall have the power to inquire into combination even if it has taken place outside India or party or enterprise is outside India provided that it has an appreciable adverse effect on competition in the relevant market in India. Thus the governing factor is the effect in the domestic market, this is also referred to as the *'effects doctrine*[36]*'*. Section 32 confers extraterritorial jurisdiction to the CCI to *inter alia* inquire in accordance with Sections 20, 29 and 30 in respect of a combination outside India[37] or where all the parties to the combination are located outside India provided the concentration has or is likely to have an AAEC in the relevant market in India, and to pass such orders as it may deem fit in accordance with the provisions of the Competition Act, 2002.

Now, Foreign-to-foreign transactions are regulated by the CCI, subject to the financial thresholds being met. The CCI, in *Titan International &Titan Europe*[38] clarified that foreign-to-foreign transactions resulting in an indirect acquisition of shares of a company in India must be notified to the CCI.

VIII. TREATMENT OF JOINT VENTURES

A joint venture is the coming together of two or more businesses for a specific purpose, which may or may not be for a limited duration. The purpose of the joint venture may be for the entry of the joint venture parties into a new business, or the entry into a new market, which requires the specific skills, expertise or the investment of each of the joint venture parties.

There is no explicit guidance in the Competition Act or the Combination Regulations relating to joint ventures. Joint ventures are however stated to be exempt from the

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36. Vinod Dhall, "*The Indian Competition Act*, 2002, in Vinod Dhall (ed.), *Competition Law Today (Concepts, Issues and the Law in Practice),* Oxford University Press, New Delhi, 2007, pp. 498-539, pp. 530-531.

37. *See* clause (d) of Section 32 of the Competition Act,

38. Combination Registration No. C-2013/02/109), April 2, 2013

application of Section 3 sub-section 3 of the Act dealing with presumption of appreciable adverse effect on competition if they increase efficiency in production, supply distribution, storage, acquisition or control of goods or provision of services.

Since, joint ventures have not been defined under the Act, there is much confusion regarding their status. Conflicting opinions have been expressed on the question of applicability of the provisions of section 5 of the Act to joint ventures. One such view suggests that notwithstanding the express non-inclusion of joint ventures under the 5 of the Act, it is applicable to joint ventures when they are treated as regular combinations, such as the traditional 50/50 equity/corporate joint ventures[39] and will be subject to filing under section 6(2)[40]. But a filing is mandated under section 6(2) only if the combining entities fulfil certain threshold requirements prescribed in section 5. It is quite likely that the threshold may never be met by joint ventures, especially the ones created specifically to generate newer benefits which do not entail the transfer of any assets to the entity. Additionally, the '*de minimis exemptions'* created by the Ministry of Corporate Affairs notification[41] gives a significant leeway to corporate entities to circumvent notification by working within the target exemptions.

Now, Under the Indian Competition regime, any joint ventures would have to be notified under Combinations regulation if it meets the requisite thresholds given under the Act**.** CCI has cleared joint ventures under Combinations and in certain cases given reasons for doing so, which include low market share of joint ventures[42] no horizontal overlap between parents or joint ventures[43] parents not being close competitors[44] etc. In the *APGDC & Shell* joint ventures[45]. CCI also considered the efficiencies being brought to the market because of the joint ventures

IX. CONCLUSION

Combinations whether in the form of mergers, amalgamations or acquisitions are very important for developing economy. They provide numerous advantages in the form of diversification of business, increased synergy, accelerated growth, tax benefits, improved

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39. Joint ventures are frequently characterized by a 50/50 participation in which each partner contributes 50 percent of the equity in return for 50 percent participating control. The relative contributions, as well as degree of ownership and control, are largely matters for negotiation. They relate to the value each party places, and the other party accepts, on the contributions, and reflect the objectives of the venturers. In short, the parties equally share control and residual cash flow rights. See Robert Hauswald, Ownership and Control in Joint Ventures: Theory and Evidence, March 2, 2002, available at http://www.hec.fr/var/fre/storage/original/applic ation/ 2a07ce9f75fa751877e5ef28d12d1b66.pdf (Last visited on September 20, 2012); Rahul Sayal, Joint Venture, August 4, 2010, available at http://www.scribd.com/doc/29576027/JointVenture
40. T. Ramappa, Competition In India 224 (2009); Vidyullatha Kishor, Comparative Merger Control Regulations-Lessons From EU And US, http://cci.gov.in/images/media/ ResearchReports/ VidyullathaKishor30jan2012.pdf
41. Ministry of Corporate Affairs, Notification S.O.-482(E), March 4, 2011 (The referred notification provides relief to certain entities whose interests are being acquired if either their assets are not more than 250 crores or turnover is not more than 750 crores in India).
42. CCI Combination Registration No. C-2013/07/126 on 06.11.2013
43. CCI Combination Registration No. C-2013/02/110 on 19.03.2013
44. CCI Combination Registration No. C-2015/01/241 on 05.05.2015
45. CCI Combination Registration No. C-2015/10/333 on 04.02.2016

profitability etc. They enable foreign collaboration through cross-border mergers and enable companies to withstand global competition. Combinations are economic enhancing trade practices hence they necessarily need to be encouraged by all so as to ensure ultimate benefit to the end consumers. But on the other hand, there is a flip side of it too. Today's combination can be tomorrow's dominance and though dominance is not frowned upon under the Act but its abuse and Abuse of Dominance is mandatorily prohibited under the law. They may lead to monopoly or create barriers to entry and similar anti-competitive practices. Therefore, they need regulation. This article analyzed the Indian competition law pertaining to the 'combination' review, giving special focus on the mergers with a cross-border component and status of joint ventures under the Act. The article discussed 'combinations' review mechanism as contained under the pertinent provisions of the Indian Competition Act, 2002 read with the Combinations Regulations, 2011 and amended notification 2016 and 2017 of the regulation.

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NOTES & COMMENTS

ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT UNDER ISLAMIC JURISPRUDENCE

GHULAM YAZDANI*

ABSTRACT : Man's environment also provided another dimensions in his relationship with nature. This relationship is not only a natural one but also probably as old as the proverbial hills. Islam as religion is not only about rituals but it considers and discusses all spheres of life. Environment is an important aspect of life which includes and affects everything. In Islam, man's relation to the earth is seen as that of a custodian mainly responsible for improving the quality of life and guaranteeing a healthy environment. The holy Quran says that God has created everything in this universe in due proportion and measure both quantitatively and qualitatively in many verses which will be discussed in paper. It also mentions plant, tree, mountain, sea, river, and animals like elephant, ant, bee, spider, bird and much more which all are major ingredients of environment. The last prophet of Islam also emphasised on environment protection and preservation which can be seen in many Hadiths. Islam has attached much importance to the protection of environment asking its followers not to cut trees, pollute rivers or contaminate the atmosphere. Prophet Mohammed (peace be upon him) taught people to live on less, to protect animal and plant life, and to worship the Creator by being merciful to the creation. "If a Muslim plants a tree or sows seeds, and then a bird, or a person or an animal eats from it, it is regarded as a charitable gift (Sadaqah) for him." (Al-Bukhari). This paper is an attempt to depict the Islamic view on Environmental Protection and sustainable development. Where, the aim of both the conservation and development of the environment in Islam is for the universal good of all created beings.

KEY WORDS : Environment, Nature, Quran, Hadith, Sustainable Development.

I. INTRODUCTION

When we respect the environment then nature will be good to us. Environmental concern has most noticeably arrived at this epoch of time in the form of climate change concerns. The changing pattern of climatic condition is disrupting the topography, weather, occupation and sustainability. It has also let to the increase in the migration of people due to changing pattern. The poor and the indigenous population are the most affected.

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With the rise in the disparity between the poor and the rich, the blunt of environmental degradation falls most severely on the most marginalised population. However, this malice has not limited itself to the deprived section and the recent degradation of air quality, land and water degradation has shown that no one is spared from this mischief. The environmental protection movement in the modern times is rather diabolical. The resistance exerted by the peasants and tribal population against the commercial ruthless exploitation of forests by the British Raj in India let to series of measures to curb this resistance in various garbs. Many of the resisting tribes were branded as criminal tribes and thugs while forest laws were passed to prevent the access and utilisation of forest resources by the local and tribal populations.

Literatures were produced by British academicians, poets and writers to establish the causal link between human and environmental health. The Forest conservation programmes were introduced in India by British colonists in 1855 which soon became a model for conservation efforts in other parts of the worlds including the United States. However, much of these hailed conservation measures were primarily directed towards securing sustainable commercial benefit for the East India Company and British Raj that happen to provide genesis for more robust discipline of environmental law in the contemporary times. Strikingly diverse range of actors takes part in the making of the Environmental Law through diverse processes both at the international level and also at the domestic forum. In the making of the international norms, some countries have some upper hand over the other states. Countries also affect the content of the environmental law through the domestic legislations. Lastly, the various cultural, regional traditions and religions have also greatly encouraged the value systems that can be utmost significant for the protection of our surrounding.

Religion of Islam is no exception to this. Islam teaches and discusses every aspect of human life and it has great concern for environment too. The book of God Quran says (*Al Qasas* 28:77). The pedigrees of the Islamic environmental practice are to be found in the holy book of religion i.e., *Quran* and *Sunnah* of Prophet Muhammad (PBUH). Islamic law contains a well-established ethical framework of concern for the environment and its diverse inhabitant.[1] Generall, known as "Islamic law"- "the *Shariah*," which includes much more than the law. The *Quran* and *Hadith* are primary sources of Islamic law. There is no sacred scripture that speaks about nature and earth as much as the Quran. It contains numerous guidelines about our treatment of the earth and the rest of God's creation so much so that the revelation intimately connects itself with the notion of sacredness of nature. A whole eco-theology unfolds as a result that distinguishes Islamic spirituality with characteristics of its own. A closer look at the *Quran* and Prophetic *Hadith* reveals a set of principles that point to a rich reservoir of environmental ethics with far-reaching socio-economic and political ramifications in global perspectives.[2]

The concept of sustainable development in Islam can be defined as "the balanced and simultaneous realization of consumer welfare, economic efficiency, attainment of

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1. Umar F. Moghul et al, Green Shukuk: T*he Introduction of Islam's Environment Ethics to contemporary Islamic Finance*, 27 Geo. Intl Envt. L. Rev. I. 2014-2014.
2. Mohammad Hashim Kamali, *Environmental Care in Islam: A Quranic Perspective*,(April 18, 2016), www.icrjournal.org/icr/index.php/icr/article/viewFile/529/490.

social justice, and ecological balance in the framework of an evolutionary knowledge-based, socially interactive model defining the Shuratic process". The Shuratic process is the consultation or participatory ruling principle of Islam.

As per Islamic belief, the universe has been created by God with a specific purpose and for a limited time while human being is the custodian of resources on the earth. Islam's solution to environmental problems lies in man's adaptation of the guidance of Islam. God has stated that he made all the material objects on earth for man's use, and not for their abuse.

II. ENVIRONMENTAL PRINCIPLES AND *QURAN*

The first known Coded efforts to determine principles of environmental protection at the International forum happened during the "Earth Summit". The 1992 summit pronounced a catalogue of principles which aimed to determine the direction of countries and other actors in creating an environmental protection regime. Broadly two classification principles can be identified- general principles of law, as applied in the environmental issues and the principles of environmental law in the strict sense, these principles provide a framework for negotiating and implementing new and existing agreements. Some principles provide the rules of decision for resolving trans-boundary environmental disputes. Some principles provide a framework for the development and convergence of national and sub-national environmental laws. While some other assist in the integration of international environmental law with other fields such as international trade or human right. The general principles of law relevant to environment include concept of state sovereignty, common heritage of mankind, state responsibility etc. State sovereignty: at the core of legal regime. It implies both "territorial sovereignty" and "territorial integrity" The two aspects are reflected in 1. Rio principle, 2. Stockholm principle-21 states that the states have the responsibility to ensure the activities within their jurisdiction or control do not cause damage to environment.

The current interest in the principles of international environmental law stems to a large extent from a need to define and give content to the notion of sustainable development which was substantially emboldened with time. Some of the recognised general principles of environmental law are intergenerational equity, common but differentiated responsibility, obligation not to cause environmental harm, the precautionary principle, the polluter, environmental impact assessment, etc. The central message of sustainable development is that we need to use natural resources at rates where the resources replenish themselves coupled with moral obligation to safeguard the environmental needs of current and future generations. This is idea manifest itself most profoundly in the field of religion theology that integrates the whole of physical and meta-physical world into unity.

There are many verses in the *Quran* which talks about the environment but it has not used the abstract word nature or environment while it mentions the word creation i.e. *Khalq*. *Quran* declares that :

"[A]nd to God belongs whatever is in the heavens and whatever is on the earth. And ever is God, of all things, encompassing."[3]

3. The *Quran*, Ch.4:126.

And it asks people about creation of the universe and reply the same "Is not he who created the heavens and the earth, able to create the likes of them? Yes, [it is so]; and He is the Knowing Creator."(36:80). The *Quran* too expressly mentions that God has created everything in this universe in due proportion and measure both quantitatively and qualitatively.[4]

There are many verses describing environemntal principles in the *Quran* as follows:

"Verily, all things have we created by measure." (Quran 54:49)

"And the earth we have spread out, and have placed therein firm mountains, and caused to grow therein are all kinds of things in due proportion."(15:19)

"…Everything with Him is in due proportion." (Quran 13:8)

"And we have produced therein everything in balance." (Quran 55:7)

"..And we do not send it down except according to a known measure."(15:21)

This also mentions that God has ordained severe punishments for those who disturb this balance and damage or abuse natural resources. God Says which means "Eat and drink from the provision of God, and do not commit abuse on the earth, spreading corruption. [Quran 2:60]" And further said "Corruption has appeared throughout the land and sea by (reason of) what the hands of people have earned, so he (i.e. God) may let them taste part of (the consequences of) what they have done that perhaps they will return (to righteousness)." (Quran 30:41)

In Islam, the relationship between humankind and the environment is part of social existence, an existence based on the fact that everything on earth worships the same God. This worship is not merely ritual practice, since rituals are simply the symbolic human manifestation of submission to God. The actual devotions are actions, which can be practiced by all the creatures of earth sharing the planet with the human race. Moreover humans are responsible for the welfare and sustenance of the other citizens of this global environment.[5] The *Quran* contains many verses that can be referred to for guidance in this respect. The following verse 21 of the second *Surah* of the *Quran*, is one example:

"O people! Worship your Lord, Who hath created you and those before you, so that you may ward off (evil). Who hath appointed the earth a resting-place for you, and the sky a canopy; and causeth water to pour down from the sky, thereby producing fruits as food for you. And do not set up rivals to God when you know better." (Al-*Baqarah* 2: 21-22).

Indeed, all of nature, in the Islamic view, is in a state of continuous worship. Trees and grasses, fish and animals, are all bending in a sweet, invisible breeze that wafts their worship back toward their creator. Human beings can learn from this process of unwavering devotion and seek harmony with it by joining with other creations in worship of God.[6]

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4. See, A. Bagader et al, Islamreligion.com (Apr18,2016), http://www.islamreligion.com/articles/307/viewall/environmental-protection-in-islam.
5. Islam online, *Islam and Environment*, (Apr 18, 2016), https://archive.islamonline.net/?p=5271.
6. Khaled Dardir, http://www.khaleafa.com/khaleafacom/environmental-justice-in-islam.

III. ENVIRONMENTAL PRESERVATION AND PROTECTION

Law is an instrument to uphold the order and preserve good values. It also acts as a means to create new values over existing values. In both cases, the law becomes effective when it is followed by the masses. Particularly the concerns like environmental preservation and protection cannot be overcome without the awareness and willingness of the masses to cooperate. In such a case, religious obligations or examples from the lives of exemplary personalities can be a great influencer for the religious and pious believers. On the other hand, it also is the study of cultural values that helps foster the determination for environmental protection in a community. For example, in case of Nilgiri hills, the whole community living around the Nilgiri biosphere treat the Nilgiri Mountain as sacred. This has been compelling the government to declare the Nilgiri as protected biosphere reserve.[7]

Prophet of Islam is one of the most, if not the only one who reached a pinnacle of success by not only verbally teaching, but stringently applying Islamic principles of ecological welfare. His concern for preserving nature was so consistent that history reports the only time he cut down plants were the palm trees in Madina to impede the Jewish tribe Banu Nadhir. He categorically taught people to live on less, to protect animal and plant life, and to worship the Creator by being merciful to the creation. [8]

According to Francesca De Chatel that guidance on the environment was given 1400 years ago. And yet a closer reading of *Ahadith*, the body work that records significant events in Prophets life, reveals that he was a staunch advocate of environmental protection.[9]

The environmental philosophy of Prophet can be summarised in three key principles. These three most important principles of the Prophet's (SAW) philosophy of nature are based on the *Quranic* teachings and the concepts of Tawhid (unity), Khalifa (stewardship) and Amana (trust). This suggests that man's natural relationship to the rest of God's creation should be one of "sustainable utilization, whereby he lives according to God's will while conserving natural resources and preventing degradation of the natural world created by God.[10]

The oneness of God is a cornerstone of the Islamic faith. It recognizes the fact that there is one absolute Creator and that man is responsible to Him for all his actions. The concepts of Khalifa, stewardship, and Amana (trust) emerge from the principle of Tawhid. The Qur'an explains that mankind holds a privileged position among God's creations on earth: he is chosen as khalifa, "vice-regent" and carries the responsibility of caring for God's earthly creations. Each individual is given this task and privilege in the form of God's trust.[11] F. D. Chatel's opined that one could say that the Prophet was an

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7. K A Shaji, https://india.mongabay.com/2020/08/silent-valley-to-soon-get-a-conservation-ring-around-it/
8. Zaufishan,(Apr 18,2016), http://www.theecomuslim.com/2012/05/10-green-hadith-muhammad.html.
9. Muqeet, *Islam and the Environment*, (April 19,2016)
10. See, Geoffrey E. Roughton*, the Ancient and the Modern: Environmental Law and Governance in Islam*,32 Colum. J. Envtl. L. 99, 2007.
11. Francesca De Chatel ,Prophet Muhammad(SAW); *Pioneer of the Environment*,(April 19, 2016), http://www.islamicbulletin.org/newsletters/issue_23/environment.aspx.

environmentalist before his time, "a pioneer in the domain of conservation, sustainable development and resource management and one who constantly sought to maintain a harmonious balance between man and nature.

IV. IMPORTANCE OF WATER AND ITS SUSTAINABLE USE

Water is both the source of life and the life itself. The conservation of water is of pivotal importance for us. 50% of India is gripping under draught like condition with many major cities reaching ground zero level.[12] Water laws in India are generally state based. Although there are definite cooperative federalism water management, a lot more effort needs to be done. Legislations like- *the Water (Prevention and Control of Pollution) Act*, 1974; *the Environmental Protection Act,* 1986, various other environmental protection laws and active judiciary and tribunals can greatly impact the protection of environment. Similarly, the incentiveisation and awareness program for the communities through their cultural and religious reference may also be a great motivator towards an effective water management.

The word 'water' occurs 66 times in the *Quran* which contains many such verses that speak of the life-giving properties of water: "Do you not see that God sends down water from the sky and then in the morning the earth is covered in green? God is All-Subtle, All-Aware", (Al Hajj 22:63). Water is the most important molecule in the life of an organism. That life originated from water is a fact mentioned in the *Quran*: "We made from water every living thing", (Al-Anbiya' 21:30). "God created every animal from water…, (An-Nur 24:45). Thus water is an important commodity that has to be conserved and sustainably utilized.[13] In Islam, person has no right to adversely affect his neighbour's well by lowering the water table or polluting the aquifer.

The Prophet (pbuh) said do not waste water even during *wudu*. There is a *Hadith* in this support. Prophet Muhammad (pbuh), happened to pass by a Companion, Saad(ra), as he was performing ablution (wudhu) next to a river. At this, the Prophet said, "Saad what is this wasteful?" Saad replied: "Can there be an idea of squandering (israf) in ablution?" Prophet said: "Yes, even if you are by the side of a flowing river." – Ibn Majah. The Prophet said: "Don't waste water even if you are on a running river". He also said: "Whoever increases (more than three), he does injustice and wrong". Prophet Muhammad (pbuh) always persuaded its companions not to pollute water. It was narrated from Jabir (ra) that, "The Messenger of God forbade urinating into standing water."[14]

V. RESTRICTIONS ON EXCESS USE OF RESOURCES AND WASTAGE

The principle related to the environment is the Islamic prohibition concerning thoughtless consumption; that is, wastefulness and extravagance. Wastefulness is not only the thoughtless consumption of natural resources; it is at the same time disrespectful towards God, the Creator and Owner of all the bounties. For this reason, in Islam, eating

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12. Mahreen Matto, https://www.downtoearth.org.in/blog/water/india-s-water-crisis-the-clock-is-ticking-65217
13. Ibid p.2.
14. Sunan Ibn Majah, Book 1, Vol 1, Hadith 343.

and drinking of permissible food is lawful, but wastefulness is forbidden. At this time we know better than at any other that the world's resources are limited. Extravagance and over-consumption will affect not only us, but forthcoming generations.[15]

There are many verses in the *Quran* in this regard:

"…But waste not by excess: for God loveth not the wasters." (6:141)

"O children of Adam! Wear your beautiful apparel at every time and place of prayer: eat and drink: but waste not by excess for God loveth not the wasters."(7:31)

"And render to the kindred their due rights as also to those in want and to the wayfarer: but squander not (your wealth) in the manner of a spendthrift. Verily spendthrifts are brothers of the Evil Ones; and the Evil One is to his Lord (Himself) ungrateful."(17:26-27)

"Those, who when they spend are not extravagant and not niggardly but hold a just balance between those extremes." (25:67)

Islam permits utilization of the resources, but this should not be arbitrary. Wastefulness and extravagance are prohibited by God. The Prophet also promoted the modern principle of RRR i.e. Reduce, Recycle and Reuse. Once Prophet's wife, Aisha (may God be pleased with her), said that he used to repair his shoes, sow his clothes and used to do all such household works done by an average person.

VI. SUSTAINABLE FORESTRY AND WILDLIFE PROTECTION

a) Environmental Protection by Plantation

In the *Quran*, the word 'tree' has been mentioned at numerous places from which it can easily be understood that it is an important thing for human beings. The interesting thing in this behalf is that in *Quranic* terminology green, the colour adopted by the environmentalist's current day, is the most supreme colour in Islam. The *Quran* states: 'See you not that God sends down water (rain) from the sky, and then the earth becomes green? Verily, God is the Most Kind and Courteous, Well-Acquainted with all things.' Mentioning to the people of Sheba (settlement in Arabia), God compliments them for usage of gardens from which they used to get food.

There was for Saba, a foretime, a sign in their homeland¯ two Gardens to the right and to the left. Eat of the Sustenance (provided) by your Lord, and be grateful to Him, a territory fair and happy, and a Lord Oft-Forgiving[16].

The *Hadith* restates, "The earth is green and beautiful." Meaningfully, the imagery used in the Quran for paradise is penetrated with greenery, flowing streams, vegetation, gardens of delight rich in fruits of all kinds: in contrast the description of Hell is of a raging fire, rotting heat boiling water and molten brass. One feels tempted to infer that a green eco friendly earth is paradise and an earth oppressed by global warming is hell. Some recent writers have been suggesting the idea of a "green jehad" which may not only address itself to the global environmental crisis but also create awareness of the

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15. Ibrahim Ozdemir, *An Islamic approach to the environment*,(April, 2016), http://environment-ecology.com/religion-and-ecology/489-an-islamic-approach-to-the-environment.html.

16. See, Islam, *Water Conservation and Public Awareness Campaigns*,p.7

environment as a symbol of God's perfect plan and fertile purpose[17].

Muslims have been said to promote tree plantation individually and collectively. Islam has proclaimed tree plantation and conservation of plants an act of charity, and has given itthe status of obtaining concrete benefits and bliss in the hereafter. This has been done with a view to making Muslims self sufficient regarding food. Furthermore, if there are trees lining a road, then people on journeys can also benefit. An important hadith of the prophet forbids that one needlessly and wrongfully cut down a tree which provides valuable shelter (shade) to men and animals in the desert[18].

Islamic legislation on the preservation of trees and plants finds its roots in *Quranic* teachings of Prophet. They include the following: "Whoever plants a tree and looks after it with care, until it matures and becomes productive, will be rewarded in the Hereafter" and "If anyone plants a tree or sows a field and men, beasts or birds eat from it, he should consider it as a charity on his part.[19]There are many Hadith related to promoting plantation one them is, Anas (ra) reported that the Prophet (pbuh) said, "If the Hour (the day of Resurrection) is about to be established and one of you was holding a palm shoot, let him take advantage of even one second before the Hour is established to plant it." (Authenticated by Al-Albani)

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b) Animal Protection

Animals have a huge role in the ecological welfare system. The tenets of the Shariah law towards animals' rights make it obligatory for any individual to take care of crippled animals, to rescue strays and to guard a bird's nest of eggs.[20] There should be always mercy to animals and care for. Prophet (pbuh) said, "Whoever kills a sparrow or anything bigger than that without a just cause, God will hold him accountable on the Day of Judgment." The listeners asked, "O Messenger of God, what is a just cause?" He replied, "That he will kill it to eat, not simply to chop off its head and then throw it away." (An–Nasa'i)

We learn of great example which reflects clearly the essence of Islamic civilization and how it regards animals from 'Abdullah ibn Mas'ud, one of the Prophet's close Companions:

"We were on a journey with God's Messenger when we came across a bird the size of a sparrow with two chicks. We seized the chicks, whereupon the hen started beating its wings and screeching. God's Messenger turned and when he saw what we had done,

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17. See, *Ecology and Religion*, p.168.
18. See, *An Islamic Understanding Of The Environment - Theory and Practice* - A Survey on Turkish University Students by Ömer Faruk Gürlesin, February,2009.
19. The *Quran* 39:21; 34::15.
20. Zaufishan, (Apr 18, 2016),http://www.theecomuslim.com/2012/05/10-green-hadith-muhammad.html.

asked: 'Who separated those chicks from their mother? Return them at once!' So we left them free." [21]

Prophet (PBUH) prohibited the ill-treatment of animals, and warned us concerning this question when he said: A woman was sent to Hell because she tied up her cat and neither gave it food nor allowed it free to hunt the cockroaches.[22]

Prophet (PBUH) stated that like men, animals employed in various tasks had the right to rest, and when stopping to rest on journeys, in particular insisted that the animals' needs should be met and that they should be rested. Anas ibn Malik, one of the Companions, related:

"Whenever we arrived at a stopping-place, we would never start the prayers until we had removed the loads from the pack-animals and left them free to rest." [23]

The Prophet thus enjoined the protection of animals and birds that they should not be ill-treated, but should be well looked after and kept clean, and employed in work suitable to their natures, and should not be loaded with burdens greater than they can bear. He put a ban on hunting, forbidding the arbitrary hunting of animals for pleasure. He also directed that while slaughtering keeps them away from their young. Even first caliph Abu Baker (ra), instructed their troops not to chop down trees and destroy agriculture or kill an animal.

VII. ISLAM AND SUSTAINABLE DEVELOPMENT

Sustainable development should not be a new concept to Muslims. In fact, Sustainable Development is not really a new concept. Governments and civil society may have recently adopted the concept but the principles, which underpin it, have existed for centuries. The Qur'an and the Sunnah of Prophet provide the framework for the spiritual and physical well being of humanity. A number of resource management and welfare institutions were created during Islamic history and which contributed to sustainability objectives in the economy and society like waqf, and many more. There are over 500 verses in the Qur'an giving us guidance on matters relating to the environment and how to deal with it. In addition, there are numerous examples from the Prophet's life and his sayings, which provide a model for justice and equity.[24]

VIII. CONCLUSION

The religion has a practical view. It seeks, in all its principles and injunctions, to give pragmatic shapes to its concepts and values. The protection, conservation, and development of the environment and natural resources is a mandatory religious duty to which every Muslim should be committed. This commitment emanates from the individual's responsibility before God to protect himself and his community. God has said, "Do well, even as God has done you good, and do not pursue corruption in the earth. God does not love corrupters". The world belongs to all of us. We are all obliged to conserve and

21. Abu Daud, Book of Jihad, 122, No: 2675; iii, 125-6.
22. Bukhari, Adhan, 90; Musaqat, 9; Muslim, Birr, 133; Musnad, iv, 351.
23. Supra Note 21, p. 48.

protect. We must co-operate and work together for a better world, a better future, and a better environment. We must love and preserve our environment and all the living creatures within it in the name of our sustainers, who created them and entrusted them to us. In this way, the 21st century will be the century of peace, happiness, tolerance, and brotherhood. Not only for men, but for all creatures, animate and inanimate.

The prevailing environmental crisis is very much a religious and spiritual issue and demands a befitting sustainable response. All religions of the world in its own way have crucial role through their unique set of morals and spiritual precepts and values to guide mankind's conduct and relationship with nature and the environment.

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24. Asma Hassan and Zeinoul Abedien, *Islam, Muslims and Sustainable Development: The message from Johannesburg* 2002,http://www.imase.org/reading/reading-list-mainmenu-34/27-islam-muslims-and-sustainable-development-the-message-from-johannesburg-2002.

TIBETANS IN INDIA: A STUDY IN NATIONALITY *VIS-À-VIS* CITIZENSHIP

INDRANI KUNDU*

ABSTRACT : Tibetans' life in continuous denial of citizenship right in India is the gross violation of the principle of the Rule of Law. Citizenship right ensures the participation of an individual in the public affairs. This participation in the public affairs (for e.g. election) is promoted as right. The very meaning implanted in the idea of Rule of Law is that no man is above the law. It envisages that each and everyone including the government itself within the territory shall be governed by the Law of the Land. As supposed, the acquisition of Indian citizenship by the Tibetan nationals born in India is not going to dilute the 'Free Tibet' cause. Absence of any legislation distinguishing refugees from other non-citizens aggravates the plight of Tibetan refugees in India. India's abstention from being a party to the 1951 Refugee Convention also exemplifies India's lack of obligation towards the acceleration of the state of refugees in India.

KEY WORDS : Rule of Law, Tibetan Refugees in India, Nationality, Citizenship, International instruments and National enactments on Refugees.

I. INTRODUCTION

It is a well-known fact that Tibetans have been given refugee status in India. Yet after almost fifty eight years of their exodus to India, we have second, third even fourth generation of Tibetans in India who have been born and brought up in India and they know of no other identity or country to call their own. This raises certain legal issues regarding the status of Tibetans in India. Calling or branding them as refugees appear to be over simplification of the complex issues involved. 'Rule of Law under the Indian Constitution' as stated in *Golak Nath* case[1] 'serves the needs of people without undoubtedly infringing their rights. It recognizes the social reality and tries to adjust itself from time to time avoiding authoritarian and path. Rule of Law under the Constitution has the glorious content'. It embodies the concept of Law involved over the centuries. In *Satvant Singh Sawhney* v. *D. Ramanathanana*[2] it was stated that the Doctrine of Equality before the Law is one of the necessary corollary of the Rule of Law that has been accepted by Indian Constitution and extended to 'any person'[3]. The doctrine of Rule of Law has

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1. *Golaknath* v. *State of Punjab* AIR 1967 SC 1643, para 98.
2. AIR 1967 SC 1836
3. Article 14 of the Constitution of India guarantees that '*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*'

been adopted in the Constitution of India and it forms one of the basic features of the Indian Constitution. The Rule of Law recognizes two fundamental principles; these are (i) Supremacy of Law, and (ii) Equality before the Law. The Constitution of India has guaranteed Justice, liberty and equality to the citizen of India and people other than its citizens residing within its territory. The principle of 'Rule of Law' has been given new interpretation over the years besides these two conventional interpretations. The role of this principle in good governance is to ensure accountability and transparency on the part of administrative action. This principle ensures that there will be no discrimination between an individual and a government official unless such discrimination is the requirement of the post that the official is holding.

To ensure democratic rights to individual the strict adherence to the principle of rule of law is indispensable. Expressing concern over the Tibetans in Tibet Autonomous Region in China HH XI Vth Dalai Lama in his speech said that except for some problems, India as the world's most populous democracy has largely been very stable compared to many of its neighbors because the country has a very ancient and rich tradition of non-violence and religious harmony[4].Tibetans are indeed happy with the fact that despite India's geo-political situation India continues to extend assistance to Tibetans departing from their motherland since 1959.

Condition of Tibetans has been deteriorated both inside and outside Tibet since the occupation of Tibet by Chinese troupe. The exodus of Tibetans from their motherland to neighboring countries has only worsened the plight of Tibetans scattered worldwide. However, in this paper the author has restricted the topic to the issue of denial of the citizenship right to Tibetans by the Indian Government.

II. THE TIBETAN DILEMMA

Even after fifty eight years of Tibetan settlement in India, the dispute between acquisition of Indian Citizenship by the Tibetans and retention of Tibetan nationality continues. The policy of 'non-assimilation' formulated by the Tibetan Government in Exile in India in order to recreate Tibetan society in this territory with its core values intact is an example of infringement of the rights of Tibetans in India. Even after fifty eight years of stay in exile in India the interest of the Tibetan community is jeopardized as they have not been conferred with citizenship right. Tibetan community in India being considered as foreigner is deprived of a number of constitutional rights. There is no willingness on part of the Central Tibetan Administration[5] to help them acquire Indian Citizenship nor did Tibetans have any hope for returning to their motherland.

One of the reasons behind such harassment of Tibetans in India is due to the arbitrary policy of CTA in granting 'No Objection Certificate'[6] to a Tibetan who wants to take up Indian Citizenship. Provision of getting 'No Objection Certificate' from CTA

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4. Speech delivered at Fourth Annual Lecture of National Commission for Minorities at India International Center on 10th August, 2011. Available at http://tibet.net/2011/08/his-holiness-the-dalai-lama-hails-india%E2%80%99s-democracy-rule-of-law/# (visited on 31.10.2015).
5. Tibetan Government in Exile in Dharamsala, India.
6. No Objection Certificate is a certificate issued by the CTA officials, Tibetan Government in Exile in Dharamsala, India, to a Tibetan who wants to acquire Indian Citizenship.

officials to acquire Indian Citizenship is not only arbitrary but also against the Rule of Law when Tibetans born in India can acquire Indian Citizenship by Birth[7].

This paper deals with the citizenship issue of Tibetans in exile in India. Tibetans who fled from their own country to India following HH XI Vth Dalai Lama in order to escape persecution now want and in need of Citizenship after almost fifty eight years of their stay in India. This paper seeks to analyze whether the denial of the demand of Indian Citizenship by the Tibetans born in India conforms to the Rule of Law principle or not.

III. HISTORY OF TIBET

Since the subject of this paper is Tibet and Tibetans, the first question that comes up is 'what is Tibet?' or 'Who are Tibetans?'.The area of Tibet can be described in several ways, for instance, from geographical, ethnic or political point of view[8].Tibet indicates area that comes under political Tibet as well as area coming under ethnic Tibetan borderland. Tibet is situated to the south west of china bordering India, Nepal, Burma, and Bhutan. Today Tibet is under China's occupation and is divided up, renamed and incorporated into Chinese provinces.

Tibet has a history dating back over 2000 years. Since 1949 Tibet avoided any undue foreign interference and acted as an independent state. It was back in 1949 when people's Liberation Army of People's Republic of China invaded Tibet after defeating small Tibetan Army[9]. Tibetan Government was then forced to sign the "Seventeen- Point Agreement for Peaceful Liberation of Tibet". It has been claimed time and again that this agreement is void under international law as Tibetan Government had to sign the agreement under duress in the fear of immediate occupation of Lhasa by the huge Chinese troops present in Tibet at that time.

(a) EXODUS FROM TIBET

There was a mass departure of Tibetans to India in 1959 following the HH XI Vth Dalai Lama Tenzin Gyasto in the fear of persecution. The spiritual leader of Tibetans i.e. the HH XI Vth Dalai Lama fled from Tibet to India at the outset of Tibetan Uprising in 1959. He set up a Government of Tibet in Exile in Dharamshala, India now referred as "Little Lhasa". There were several times after 1959 Tibetan exodus to India when Tibetans had to immigrate to India in the fear of persecution by Chinese Government. This emigration of Tibetans is still continuing increasing the number of Tibetans in exile in India.

(b) ISSUES RELATING TO STATUS OF TIBETANS

Tibetans during the Chinese invasion of Tibet in 1951 fled Tibet and sought refuge to India. Tibetans in India has been treated as refugees. The status of Tibetan refugees in India has been a unique. Tibetan refugees have Tibetan Government in Exile with headquarter in Dharamshala, India. Separate school run by the Central Government of

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7. *The Citizenship Act*, 1955.
8. Stephanie Roemer, *The Tibetan Government in Exile: Politics at large* (Routledge, New York, 1st Edition, 2008).
9. *Is Tibet a Country* (n.d.).Available at http://freetibet.org/about/legal-status-tibet (visited on 6.11.2015).

India has been provided for children of Tibetan refugees. Special rights, relaxations have been provided to Tibetans in India. It is evident from the assistance extended to Tibetans that the status of Tibetan refugees is different from the status of other refugees living within the territory of India[10]. However, the discriminative and ever changing policy regarding Tibetan refugees in India is indicative of Indian Government's unwillingness to solve the citizenship problem of Tibetans in India.

(c) ACCORDING REFUGEE STATUS TO TIBETANS IN INDIA

India accords refugee status to nationals of other countries on a bilateral basis. India has received a large number and variety of refugees throughout the past. Due to the lack of uniform national policy governing refugees in India, India has given different treatment to different refugees coming from different countries. Amongst all the refugees the condition and treatment offered to the Tibetans is far better[11].

One of the principle elements to satisfy the claim of refugee status is that the claimant must be 'genuinely at risk'[12].

(d) LIMITED FREEDOM' GUARANTEED TO TIBETANS IN INDIA

Tibetans in exile in India are living in restrictive atmosphere. During the first three years of exile even though India allowed Tibetans to reside within its territory as refugees, India never wanted to worsen its diplomatic relation with China and this trend continues. Tibet issue has not been discussed in 24 Agreements signed between India-China during Prime Minister's visit to China in May, 2015[13].

Nevertheless, the situation of Tibetan refugees is better if not satisfactory than other refugees staying in India. Tibetans are issued Registration Certificate by the Indian Government. Registration Certificate is to be renewed after an interval of 5 years[14]. Registration Certificate is the permit for Tibetans to make their stay in India legal and is issued by the Indian Government. However, according to Tibetans in exile in India the renewal of Registration Certificate is a constant reminder of their impermanent life on Indian soil.

Tibetans are issued Identity Card by the Indian Government instead of passport if they want to travel abroad. Tibetans are issued Identity card only when they hand over their Registration Card to the authority. The process for getting Identity Certificate in order to travel abroad is rigorous.

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10. TungaTarodi, *Tibetans In Bylakuppe: Political and Legal Status and Settlement Experience*, Institute for Social and Economic Change, (2011). Available at http://www.isec.ac.in/WP%20260%20-%20Tunga%20Tarodi.pdf. (visited on 08.11.2015).
11. T. Ananthachari, *Refugees In India: Legal Framework, Law Enforcement And Security*, 7, ISILYBIHRL (2001). Available at http://www.worldlii.org/int/journals/ISILYBIHRL/2001/7.html (visited on 08.11.2015)
12. In *INS*v. *Cardoza Fouseca*467 US Supreme Court Case, 407 (1987) the US Supreme Court has articulated the standard of risk which may deem to be dangerous for a person to stay within a country .
13. Available at http://www.ndtv.com/cheat-sheet/24-agreements-signed-between-india-and-china-during-pm-modis-visit-763246(accessed on 08.11.2015).
14. Available at http://timesofindia.indiatimes.com/city/mysuru/Home-ministry-revises-renewal-period-of-certificate-for-Tibetans-to-five-years/articleshow/15626612.cms(accessed on 8.11.2015).

IV. LEGAL REGIME GOVERNING REFUGEES IN INDIA

Statutes that govern refugees in India are

I. The Citizenship Act, 1955.

II. The Registration of Foreigners Act, 1939.

III. The Foreigners Act, 1946.

IV. The Passport (Entry into India) Act, 1920 &

V. The Passport Act, 1967.

Articles 5-10 of part II of the Constitution of India also determine that who is citizen of India. Therefore, there is a difference between citizens of India and those who are not citizens of India. Rights guaranteed to the non citizens by the constitution of India are restricted. According to the humanitarian definition refugee is a person who fled his country due to the well founded fear of persecution[15]. However, there is no statutein India defining the rerm refugee. Therefore, refugees are considered as foreigners or aliens living within the territory of India. Moreover, the terms like illegal migrant, refugees, asylum seekers have not been distinguished. All are considered as foreigners oraliens of India. Inevitably, foreigners or aliens receive different treatment than the Citizens of India.

Section 2 (a) of the Foreigners Act, 1946 defines 'foreigner' as a person who is not a citizen of India.

Section 2 (b) of the Citizenship Act, 1955 defines 'illegal migrant' as a foreigner who has entered India without valid document or with valid document but stays back in India beyond the prescribed period of time.

The Constitution of India has also laid down provisions regarding who are the citizens of India at time of the commencement of the constitution. The citizenship Act, 1955 provides several modes of acquiring Indian citizenship while the Constitution of India only provides for citizenship by birth. Despite the fact that the Central Government of India is empowered to provide legislation and policies governing refugees within its territory[16], India does not have any statute or uniform national policy governing refugees. Therefore, absence of uniform legislation/ policy leads to difference of treatment extended to refugees staying in India which, in turn, has worsened the situation of refugees in India. Refugees are not protected under Article 22 of the Indian Constitution[17] which leads to arbitrary retention of refugees at the whims of the government[18].

India has not been signatory of the 1951 Convention related to the status of refugees. Moreover, India's abstention from signing 1967 protocol defining refugees in International Law is found to be one of the reasons behind India's lack of obligation to

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15. Rajeev Dhavan, *India's Refugee Law and Policy*, the Hindu on Friday, June 25, 2004.
16. Seventh Schedule, List I, Entry 17.
17. Clause 3 of the Article 22 of the Constitution of India has exempted aliens from the purview of the Protection against Arrest and Detention in certain cases.
18. Tibetans protesting during the visit of Chinese officials in India have been arrested by Indian police arbitrarily.

provide refugee protection and service within its territory to the refugees. Except the right provided under Article 14 of the Universal Declaration of Human Rights to refugees regarding the principle of non-refoulment[19] and obligation to provide asylum to the asylum seekers India does not have international, national or regional obligation to the refugee population within its territory[20].

V. TIBETANS: STATELESS NATIONALS

The need of Indian citizenship was felt by a few members of Tibetan community when they understood that acquisition of Indian citizenship will liberate them from their refugee status and help them lead a better life. The majority of older generation expressed their views against taking up of Indian citizenship. The reasons that have been showed are that they are Tibetans and acquisition of Indian citizenship may dilute the struggle of Tibetans in exile in India to free their motherland. Though, data reveals that there is a mixed reaction among the middle generation regarding acquisition of Indian citizenship[21]. Some of the Tibetans want to acquire Indian citizenship and are willing to prosper in life while the remaining does not wish to take up Indian citizenship.

Tibetans who are willing to take up Indian citizenship has expressed that the rights and benefits accrued to the Tibetans after acquiring Indian citizenship will definitely help them prosper and help them get better job opportunities. While those who are not willing to take up Indian citizenship has showed possible negative repercussion that may have had on the Tibetan community and Tibetan cause on taking up of the Indian citizenship.

(i) NATIONALITY *VIS-À-VIS* CITIZENSHIP

The concept of nationality and citizenship is more or less similar; nevertheless, there is a thin line difference between these two terms. Both the terms, i.e. nationality and citizenship, are used to denote the link between an individual and a country. The term Nationality refers to the link between a person and a particular community. The era of Greek city state shows that the membership to a national community is always by ascription i.e. by birth, descent and religion. Membership by ascription connotes an extended family or tribe where members are held together by blood ties. The tie that binds the members of a national community is often a myth. However, this is always applied in order to finding out the common ancestry of a national community.[22]The English common law conception of nationality as stated in Calvin's[23]case ruled that allegiance and protection were correlative aspects of nationality. In *Stoeck*v. *Public Trustee*[24], Russel J has observed:

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19. Non-refoulement is the practice of not forcing refugees or asylum seekers to return to a country in which they are liable to be subjected to persecution.
20. Tibetan Refugees' Rights and Services in India by Claudia Articles (n.d.).
21. TungaTarodi, Tibetans In Bylakuppe: Political and Legal Status and Settlement Experience, Institute for Social and Economic Change, (2011). Available at http://www.isec.ac.in/WP%20260%20-%20Tunga%20Tarodi.pdf.
22. William Safran, *Citizenship and Nationality in Democratic Systems: Approaches to Defining and Acquiring Membership in the Political Community,* International Political Science Review, 18 (1997).
23. (1608) 7 Co. Rep. 1a.
24. (1921) 2 Ch 67 at 78; applied by Buckley LJ in *Oppenheimer* v. *Cattermole* (1973) Ch 264 at 270, 273.

> "[T]he question as to what State a person belongs to must ultimately be decided according to the municipal law of the state to which he claims to belong to or it is alleged that he belongs."

Article 2 of the Hague Convention 1930 laid down- Any question as to whether a person possesses the nationality of a particular state shall be determined according to the law of that state.

It used to be assumed that a duly authorized passport is prima facie evidence of nationality. But in Luke T. Consular Law and Practice (1961) and *R* v. *Brails ford*[25] it has been clearly laid down that passport is not the exclusive evidence of nationality rather passport can be relied on as one of the evidences in conjunction of other evidences of nationality and is not conclusive in the absence of any other evidence of nationality.

Conceptually, citizenship is different from nationality. Citizenship focuses on the internal political life of the person i.e. the role of a person that he plays in the political community. Citizenship is a legal expression. A citizen can enjoy the rights that have been guaranteed to the citizens of the country by the constitution[26]. The Constitution of India has guaranteed several rights along with six fundamental rights to the citizens of India.In any country, the most important right of all other rights possessed by any citizen is the right to vote the public representatives to hold public offices in that country. Citizen enjoys all the fundamental rights guaranteed by the Constitution of the country while all the rights are not available to non-citizens.

Thus, all the members of a particular national community may be citizens of different countries. In other words, all the citizens of one country may be nationals of different community scattered worldwide.

VI. THE NEED FOR INDIAN CITIZENSHIP

As long as HH XI Vth Dalai Lama is staying in India Tibetans have been provided with some protection. But that does not reduce the amount of problem faced by Tibetans in day today life. For last 55years people of Tibetan origin born in India are legally recognized as foreigners and are issued Registration Certificate by the Indian Government. The Registration Certificate issued by The Indian Government to the Tibetans is an important document regarding the identity of Tibetans and has to be renewed every year[27].

The exile of Tibetans began when Pandit Jawahar Lal Neheru created a temporary Tibetan settlement in Dharamsala, India for the Tibetans who fled Tibet following their spiritual leader HH XI Vth Dalai Lama. Almost after 55 years there is a growing debate within the community itself regarding acquiring Indian Citizenship.

In a recent 2014 Update Report on Tibetan Refugees in India published by Tibet

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25. (1905) 2 KB 730.

26. Nationality and Citizenship (n.d.). Available at http://www.differencebetween.net/miscellaneous/difference-between-nationality-and-citizenship/ (accessed on 13.11.2015).

27. SaranshSehgal, *Tibetans-in-exile divided over the right to vote in Indian election,* the Guardian, may 07, 2014. Available at http://www.theguardian.com/world/2014/may/07/tibetans-in-exile-india-elections-right-to-vote (visited on 6.11.2015).

Justice Centre on June 30, 2015[28] grave concern has been expressed regarding the legal status of Tibetan refugees in India as it is still unfixed and changeable. Indian law and policies governing Tibetans are variously implemented and situations of Tibetans are vulnerable to change. In a recent research conducted in Dharamsala, Delhi, Simla in June 2014 by Prof. Eileen Kaufman of Touro Law Centre, New York and a member of TJC[29] board has showed that- i) a number of Tibetans who either lack the Registration Certificate or forget to renew the same have been deported.

ii) In many land cases Tibetans who reside there for longer time have been served with eviction notice.

iii) Tibetans are facing problem in getting Identity Card issued by the Indian Government which is essential for Tibetans for international travel.

iv) A number of lawsuits have been instituted in Indian Courts suggesting growing hostility towards the community[30].

VII. CITIZENSHIP ISSUE OF TIBETANS *vis-a-vis* RULE OF LAW

The Central Government has enacted the Citizenship Act, 1955, which has been amended in 1986 and 2003, specifying the modes of acquiring Indian Citizenship. Section 3(1)(a) of the Citizenship Act, 1955 has laid down that every person born in India on or after the 26th day of January, 1950, but before the 1st day of July, 1987 shall be the citizen of India by birth. Despite the provisions Tibetans born in India within the specified time limit are routinely denied citizenship and have been treated as foreigner or alien. The denial of citizenship has subjected Tibetans-in-exile to host of difficulties in India

It is almost difficult for Tibetans-in-exile in India to find a good job due to various official procedures for which they are almost left with no choice but to pursue call centre job and other job which is often suboptimal. In most of the Job Advertisement it is instructed that Tibetans are required to hold Certificate of Eligibility issued by the Central Government of India in case any Tibetan wants to apply for the post. Tibetans are not eligible for the employment in any public sector. Therefore, Tibetans are forced to take up jobs in private sectors. No one except Indian citizen is eligible to teach in schools for Tibetan children under Central Tibetan School Administration funded by the Central Government and governed by Central Civil Services Rules[31]. Therefore, Tibetan refugees are not even eligible for the post of teaching staff in schools exclusively for Tibetan children in India.

Research done by Tibetan Justice Centre has shown that Tibetans can not own any shop, taxi cab and can not even practice in India as medical practitioner. The decision of Indian Nursing Council prohibiting foreigners including Tibetans from practicing as

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28. 2014 update report on Tibetan refugees in India released by the Tibetan Justice Centre, (June 30, 2015). Available at http://www.tibetjustice.org/?p=764 (visited on 7.11.2015)
29. Tibetan Justice Centre.
30. Tibet's Stateless Nationals II: Tibetan Refugees in India- 2014 update (June 20, 2015). Available at http://www.tibetjustice.org/?p=724 (visited on 8.11.2015).
31. *Satish Kumar Singh &ors.* v. *Union of India.*

nurses in India has left the Tibetan community worried[32]. Therefore, there is very little economically viable activity within the community.

Being recognized as refugees in India Tibetans cannot hold Land in India and often evicted by the Court orders due to the non-availability of proper document to own a land in Indian Territory. The effort to evict the community from its land was started when one individual named Pawan Kumar filed a writ petition contending that Tibetans were occupying forest lands. He also prayed in his petition for the removal of Tibetan prayer flags and Om Mane Padme Stones from the land[33]. Tibetans were evicted even though the Government documents showed that they were staying on the land for decades, Revenue records also revealed that government collected tax for electricity, water for many years. But this situation has changed since Central Tibetan Association is negotiating with the Indian Government to forestall the eviction of Tibetans from their lands[34].

VIII. DIFFICULTIES FACED BY TIBETAN REFUGEES IN ACQUIRING CITIZENSHIP IN INDIA

While most of the Tibetans including officials of Central Tibetan Administration believe that taking up of Indian citizenship will dilute the free Tibet cause, the educated Tibetan youth has taken a different view. The principle of Rule of Law envisaged that every person should be governed by the law of the land. The principle of Rule of Law permeates the Indian constitution which guaranteed Right to Equality to its citizens as well as non citizens. CTA Officials have opportunities to acquire citizenship by virtue of being representative of HH XI Vth Dalai Lama and have acquired citizenship of countries of their choice for themselves and their relatives. CTA Officials neglect the crisis of statelessness of the Tibetan Community in India thereby leaving the community vulnerable to many social vices. The Tibetans are in legal limbo which is being overlooked time and again by the Indian Government and the CTA as well[35].

One of the main difficulties for Tibetans in acquiring Indian citizenship is that they need to receive 'no objection certificate' from CTA in order to take up Indian citizenship. CTA is reluctant to issue the 'no objection certificate' as they believe that taking up of Indian citizenship means relinquishment of loyalty towards Tibet by the Tibetans-in-exile in India. The dual policy of CTA proves to be harmful for the Tibetan community in India as CTA Officials have acquired citizenship but prohibiting the Tibetan community from acquiring so. Therefore, the Tibetan community is stranded in legal limbo where the community keeps on asking that why they must endure the permanent refugee status while CTA Officials have already acquired Citizenship. There are a large number of Tibetans who are legally eligible for acquiring Indian Citizenship by Birth[36] but are denied to the

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32. Anand Bodh, *Nursing Council's decision leaves Tibetan nurses worried,* T.O.I., Sept. 30, 2013. Available at http://timesofindia.indiatimes.com/india/Nursing-councils-decision-leaves-Tibetan-nurses-worried/articleshow/23295785.cms (visited on 8.11.2015)

33. Tibet's Stateless Nationals II: Tibetan Refugees in India- 2014 update (June 20, 2015). Available at http://www.tibetjustice.org/?p=724 (visited on 8.11.2015).

34. Ibid.

35. Tibetans in India: the Case for Citizenship By Maura Moynihan posted by Tibetan Political Review on Aug 27, 2012.

36. Section 3(1)(a) of the Citizenship Act, 1955.

same by both the Indian Govt. and CTA Officials. This treatment to the Tibetan community in India is not only against the principle of Rule of Law but also in opposition to the Right to Equality guaranteed under the Indian Constitution.

IX. VOTING RIGHTS TO TIBETANS : A STEP FORWARD

The 'foreigner' status of Tibetans in India has constrained Tibetans for more than five decades. Tibetans can not pursue higher study; they are not eligible for posts under Indian Government[37].Tibetans, even, can not stage protest during the visit of Chinese officials to India as in India foreigners do not possess the right to protest. Tibetans are arrested in many instances for not having proper identity card or for committing illegal activities. There are many instances where Tibetan youths are denied job opportunities due to their confusing legal status in India. Hence, there was a growing discontent amongst the community against the policy of Indian Government and CTA (in exile) for not providing them with citizenship right.

The first attempt to acquire Indian citizenship was made by Namgyal Dolkar[38], a Tibetan. The petitioner was born in 13th April, 1986. By virtue of Section 3(1)(a) of the Citizenship Act, 1955,[39] she is the citizen of India by birth. She was denied to Indian Passport by the Ministry of External Affairs when she applied for the same on the ground that she was born to Tibetan parents and is recognized as refugee in India. It was then when she approached the High Court of Delhi contending that denial of Indian Passport to her by the MEA is totally arbitrary and whimsical. After verifying all the documents and weighing the facts S. Muralidhar J. of Delhi High Court has ordered in her favor and held that by virtue of Section 3(1)(a) of the Citizenship Act, 1955 Namgyal Dolkar is the citizen of India and can not be denied to Indian passport. Again in 2013 a writ petition was filed by Tenzin C.L. Rinpoche[40] in the High Court of Karnataka stating that he has been denied to Indian passport by the Ministry of External Affairs arbitrarily. He was born on Nov 18, 1985 in Mcleodganj, Dharamsala, India. Referring the judgment pronounced by Delhi High Court in Namgyal Dolkar case the Bopanna J. of Karnataka High Court was of the view that:

> "Having noticed that decision rendered by the High Court of New Delhi, I am of the opinion that if a similar circumstance arises, certainly the petitioner would be entitled to the benefit of the conclusion reached therein inasmuch as I see no reason whatsoever to take a different view from what has been stated by the Delhi High Court".

Therefore, Tenzin C.L. Rinpoche is considered as citizen of India by birth. He was born within 26th day of January, 1950, but before the 1st day of July, 1987 and can not be denied to Indian citizenship. The fact that his parents are treated as refugees in India has

37. In *Satish Kumar Singh &ors*. v. *Union of India* the petitioner sought to remove the official from the Government post as he was a Tibetan.

38. *Namgyal Dolkar* v. *Union of India*, Ministry of External Affairs, W.P.(C), 12179/2009.

39. Every person born in India on or after the 26th day of January, 1950, but before the 1st day of July, 1987 shall be the citizen of India by birth.

40. *Tenzin Choephag Ling Rinpoche* v. *Union of India & others*, Writ Petition No. 15437/2013 (GM-PASS).

nothing to do with his Indian citizenship. The issue of conferring Indian citizenship to Tibetans came to prominence following the judgments pronounced in cases related to legal status of Tibetan refugees born in India. It was after 2013 Karnataka High Court's judgment Election commission of India ordered for the enrolment of Tibetans in voters list for 2014 Loksabha election. Another implication of 2013 Karnataka High Court Judgment on the legal status of Tibetan is that Indian Government has allowed Tibetan nurses born within the stipulated period[41], prescribed by the Citizenship Act, to practise in India.

There was a hope that after these two cases relating to legal status of Tibetan refugees in India more Tibetans would come up in order to acquire Indian citizenship by birth. But, there is lack of willingness amongst Tibetan community to acquire Indian citizenship. N K Trikha, national convener of Core Group for Tibetan Cause, a pan-India group which advocates Tibet's independence from Chinese rule, said, "Acquiring Indian citizenship will knock the bottom out of their reason for living in exile with a determination to return to their motherland or see her become free at some point in time[42]". He also added that acquisition of Indian citizenship will amount to loss of sovereign identity of Tibetans for some 'mundane' advantage in search of greener pastures.

X. CONCLUSION

W.H. Auden says that this city has ten million souls, some are living in mansions, and some are living in holes: Yet there's no place for us, my dear, yet there's no place for us[43].

These lines from 'Refugee Blues' seem to be very true for people who are forced to leave their homeland. The poet finely narrated the miseries of persons forced to relocate in a new territory. Without having any fault on their part they are forced to leave their own country and enter another country in search of peace and better life. Mass influx of refugees to a territory, undoubtedly, effects the socio-economic and legal condition of a country. They are often vulnerable to various vices and crimes at the new place. That is why United Nations High Commissioner for Refugees (UNHCR) has been set up by United Nations in 1950 to protect and support refugees in the host country.

United Nations Convention relating to the Status of Refugees, 1951 is the centerpiece of refugee protection. This Convention codifies rights of refugees at international level. This Convention is underpinned by a number of fundamental principles for the protection of refugees; non- discrimination, non-penalization and non-refulgent being the most notable ones amongst them. The member countries of this Convention are requested to apply the provisions of this Convention without discriminating as to race, sex, caste, creed, nationality of refugees. A human right is a universal moral and legal right, something which all men, everywhere, at all times ought to have, something of which no one may be deprived except by 'Procedure established by Law'[44] without a grave affront to justice,

41. 26th day of January, 1950, but before the 1st day of July, 1987.

42. Tibetan community in India at variance over citizenship right (Jan 18, 2015). Available at http://indianexpress.com/article/india/india-others/tibetan-community-in-india-at-variance-over-citizenship-rights/#sthash.GJ9LXzZW.dpuf (visited on 11.11.2015).

43. Refugee Blues written by W.H. Auden, available at http://allpoetry.com/Refugee-Blues (visited on 17.11.2015).

44. Article 21 of the Constitution of India has been interpreted by the Apex court of India in

something which is owned by every human simply because he is a human[45].

India has provided shelter to a number of refugees at different point of time. Nevertheless, it is reported that refugees are subjected to gross human rights violation in India every day. Refugees are also guaranteed some rights and every host country is expected to provide some basic rights to them. One of the factors of Rule of Law is assurance of security to the person residing within the territory. Even after more than five decades of Tibetan settlement in India there is a growing discontent among Tibetans that there is no enough security to their property and person. They can be arrested if there is slightest of suspicion against them. They are easily evicted from their own land due to the fact that they do not possess necessary documents.

Another factor of Rule of Law is to treat each citizen equally. The demand raised by Tibetans born in India to confer them with Indian Citizenship is quite justifiable and genuine now-a-days as they also have the right to prosper and lead a better life. Tibetans born in India have not been conferred with Citizenship right yet, while some of the CTA Officials have already acquired citizenship of some countries. Therefore, *prima facie* inequality of treatment is apparent. Bentham argued that "Principle of Utility" should be the basis of law i.e. the law should serve greatest amount of happiness for greatest number of people in the community. The rules of CTA officials and India's policy regarding Tibetans both are not in conformity with Bentham's utility concept of law nor does it conform to John Rawls's theory of "Justice as Fairness" where citizens hold same basic equal rights in egalitarian economic system.

However, there is always a financial restriction on a country. A country cannot accommodate more people than what its economic condition allows. Therefore, conferring citizenship rights to refugees may give rise to another problem in India. Indian Supreme Court's order to Indian Government to confer citizenship right to Tibetan refugees or Chakma refugees[46] will undoubtedly affect the demography of India. Concentration of large number of refugees in developing countries like India has proved to have severe impact on the country. In the 6th meeting of the standing committee of UNHCR on 6th January, 1997[47] it was assessed that large number of refugee concentration in any country aggravates social, economic, legal or political difficulties that are already existing. From the very moment of their arrival in the host country refugees are on constant competition with local people for scarce resources such as land, water, food and medical facility. This, undoubtedly, gives rise to hostility between refugees and the local people of the host

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Maneka Gandhi v. *Union of India* (1978) in order to expand the horizon of 'Procedure established by Law'. It was held by the Supreme Court that procedure must be 'just, fair and reasonable' and not 'arbitrary, fanciful and oppressive'.

Article 10 of the Universal Declaration of Human Rights declares that 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'. Moreover, Article 11 of UDHR further elaborates what constitutes fair trial in criminal charges.

45. S. Augender, *Questioning the Universality of Human Rights*, Indian Sociological Journal, 80, (2002).

46. Supreme Court of India Has pronounced this judgment in a Civil Writ Petition No. 510 of 2007. Chakma is an ethnic group concentrated in the Chittagong Hill Tracts of Bangladesh.

47. Social and Economic Impact of Large Refugee Population in the Host or Developing countries (Jan 6, 1997). Available at http://www.unhcr.org/3ae68d0e10.html (visited on 11.12.2015).

country. Another threat the concentration of refugees in host country poses that it may add to security problem in general. Moreover, in host country refugees are likely to be blamed for the increase of any criminal activity (such as murder, theft) no matter whether they are involved or not.

It is widely accepted that during the influx of refugees in any country the host country has to pay a heavy price. India being the 2nd most populous country has several challenges to master besides its financial and economic crisis. Hence, it is definitely burdensome on any developing country like India to provide economic, social, legal and political security to refugees staying within its territory besides its own citizens. Besides, internal issues India, being a member of international community, also needs to maintain its international relations with its neighboring countries. Tibet is one of the factors that is creating tension along the India-China border since 1959. Indo-China war in 1962 and the Tibet issue have been regarded as major impediment in the improvement of bilateral relation between India and China. Moreover the recent visit of the spiritual leader HH XI Vth Dalai Lama to Arunachal Pradesh has made China send a strong message that the visit will damage the Indo-China bilateral tie further. Therefore, for India the Tibetan refugee crisis has become an internal and as well as an international issue which remains unsolved till date.

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BOOK-REVIEW

TEXT BOOK ON *INTERNATIONAL LAW AND HUMAN RIGHTS*

(Third ed., 2016), By Prof. K. C. Joshi, Eastern Book Company, Lucknow, Pp. LVI + 623, Price 525/=

In modern world, no State can live in isolation. International Law is the need and concomitant of Statehood. It is a *sine qua non* to prevent chaos among nations and provides rules for order and peace. It is the indispensable body of rules regulating for the most part the relations between States, without which it would be virtually impossible for them to have steady and frequent intercourse. It is in fact an expression of the necessity of their mutual relationships. In the absence of some system of International Law, the international society of States could not enjoy the benefits of trade and commerce, of exchange of ideas, and of normal routine communication.[1] It has not just expanded horizontally to embrace the new States which have been established since the end of the Second World War; it has extended itself to include individuals, groups and international organizations, both private and public, within its scope.[2]

Since International Law is a living law, this present book on *International Law and Human Rights* is a meticulous contribution of Prof. K. C. Joshi published in the year 2006 which subsequently revised in the year 2012. In this present third edition, 2016 author substantially updated the contents of the *International Law and Human Rights* which covers comprehensively the subject matter meets the latest syllabus prescribed in the major universities across India. Written in a simple and lucid style, this book provides an illuminating overview of the International Law and Human Rights aims to broaden the perspective of the reader and stimulate him to think critically.

The author aptly remarks that the march of International Law from the days of Austin has been progressive and in the 21st century, States and the international community cannot exist without cooperation. This is possible only when the rules of International Law are observed. In the context of environment and economic relations, International Law has emerged as the meeting ground. Terrorism, tsunami and Fukushima

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1. J.G. Starke, *Introduction to International Law*, (London: Butterworths, Seventh Edition, 1972) at 15, 16; It is true that in some quarters there is a tendency to disparage International Law, even to the extent of questioning its existence and value. There are two main reasons for this: (a) the generally held view that the rules of International Law are designed only to maintain peace; and (b) ignorance of the vast number of rules which, unlike the rules dealing with 'high policy', that is, issues of peace or war, receive little publicity.
2. Malcolm N. Shaw, *International Law*, (Cambridge University Press, Sixth Edition, 2008) at 45, 48; the range of topics covered by International Law has expanded hand in hand with the upsurge in difficulties faced and the proliferation in the number of participants within the system. It is no longer exclusively concerned with issues relating to the territory or jurisdiction of States narrowly understood, but is beginning to take into account the specialized problems of contemporary society.

Daichi nuclear (Japan) like disasters need help of International Law. The WTO has proved that no nation can progress and survive in isolation. Thus, International Law becomes the only hope for universal peace and prosperity.

In this latest edition of the book, the author made significant contribution to the knowledge database of International Law and Human Rights. Explaining Dworkin's criticism of the consent theory of International Law based on law on command of sovereign and Hart's rule of recognition, he added Dworkin's new theory of International Law. However, the author found Professor Dworkin so averse to positivist view of International Law, by analyzing the Dworkin's words that "we must free the subject from torpor of legal positivism. We need, now, to nourish the roots, not the twigs, of international law".

Adding differentiation between equity to *ex aequo et bono*, the author referred the *Case Concerning Continental Shelf (Tunisia/Libyan Arab PLOT Jamahiriya)* adjudged by the International Court of Justice on 24th February 1982. He explained how the Court clearly pointed out the distinction between *ex aequo et bono* and equity and referred observation that equity as a legal principle is direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term 'equity' has been used to define various legal concepts...the legal concept of equity is a general principle directly applicable as law. Moreover, when applying positive International Law, a Court may choose among several possible interpretations of the law, the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice. The Court can take such a decision only on condition that the parties agree (Art. 38, para. 2, of the Statute) and the Court is then free from the strict application of legal rules in order to bring about an appropriate settlement.

The author accounts serious concern of Islamic State and International Law, and raises a number of important issues of International Law, including attributes of State, its recognition, State responsibility, violation of UN Charter, observance of International Humanitarian Law, respect for and observance of Human Rights. Moreover, he also presented the status of Islamic State under the International Humanitarian Law regime.

The notable feature of this edition is the exploration on environment and human rights concerns, explaining Stockholm Conference, 1972 to Paris Climate Change Conference 2015, including the Prevention of Trans-boundary Harm from Hazardous Activities Draft, 2001 and the Uttarakhand Disaster, 2013. Explaining the significance of environment and human rights interdisciplinary studies, he observed that development and technological advancement have created new problems by adversely affecting the environment. This has underlined the urgency of improvement and protection of the environment. The population explosion coupled with urbanization has placed an unprecedented burden on nature and its resources. Technological efficiency has exploited and destroyed the balance of nature. Deforestation has resulted in water scarcity and desertification. Mindless exploitation of natural resources by the developed nations has compelled the developing nations to follow suit. All such human activities have resulted in a global concern for the conservation and protection of the environment.

Thematic structure of this book is composed of two parts i.e. International Law and Human Rights, divided into forty-five chapters, covering almost entire gamut of the subject-matter. The author cogently elucidates the theoretical aspects of International

Law, such as Sources, Codification and Subjects of International Law, relation between International Law and State Law, Recognition, State Territory, State Jurisdiction, Law of the Sea, State Responsibility, State Succession etc. This book covers not only the conceptual framework relating to States across a broad range of domains, including War, Diplomacy, Trade, And Human Rights, but also moves into new fields covering such areas as International Maritime Warfare, International Environmental Protection, Air & Outer Space, and Human Duties & Responsibilities. To sum up, this book is a valuable addition to the academic feat and extremely advantageous for the students pursuing their LL.B., LL.M., International Relations and Political Science courses, those appearing in competitive examinations, and the academic community at large.

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