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Pandit Madan Mohan Malaviya Ji

(The Founder of Banaras Hindu University)

(25.12.1861 - 12.11.1946)

"It is my earnest hope and prayer, that this centre of life and light, which is coming into existence, will produce students who will not only be intellectually equal to the best of their fellow students in other parts of the world, but will also live a noble life, love their country and be loyal to the Supreme Ruler."

- Madan Mohan Malaviya

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NOTES AND COMMENTS

BOOK-REVIEWS

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FEDERAL AND DEMOCRATIC ISSUE *VIS-A-VIS* NCT OF DELHI - AN EVALUATION OF PARLIAMENT'S POWER

ALI MEHDI*

ABSTRACT : Constitution of India with certain basic features reflects the polity of the country that embodies inter-alia federal and democratic form of the Government. Federalism denotes accommodation and adjustment of the linguistic, regional and social diversities in free India with strong central orientation for controlling the situation for limited duration during some extra-ordinary adverse circumstances. Sovereignty of the country fathoms to the people who in turn elect the representatives to form Central and the Provincial democratic Governments. Democracy grew as tradition, whereas federalism was adopted in India, but both advanced hand in hand acting and supplementing each other. A flexible Indian federal Constitution contains provisions for the States, special provisions for the special status of some States, Union Territories and for the National Capital Territory (NCT) of Delhi. The NCT has constitutionally constituted Legislative Assembly but the powers of the Government are not like that of other State Assemblies. The extent and scope of the power of the executive body of the Assembly and power of the L-G appointed by the Central Government was in dispute over the past few years that engaged the issue of basic features of the Constitution in ultimate analysis. The Supreme Court has clarified the constitutional position of the respective authorities. The present article aims to examine the decision of the court in the background of the federal democratic character of

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Constitution of India.

KEY WORDS : Federalism, Democracy, Basic structure, Collaborative federalism, Constitutional morality, Aid and advice, Executive-power.

I. INTRODUCTION

Federalism stands as the most viable form of government for a country witnessing multiple strains of perceptible traits and plurality of the society, contrary to the unitary form that reflects no such separate identifying feature of the people or the region within its enclave. It does not repel diversities among the people but provides a forum to get together with a common thread of union and co-existence. It offers a climate of tolerance and accommodation of political culture particularly in large nations where the different units through a bond of statehood do recognise central machinery with limited or assigned powers enjoying the identity of respective marks of distinctions. Federalism overweighs the unitary set up of the government in decentralisation of powers with a judicial tribunal to caution the components of the governments to remain within their domain and thus acts as fulcrum to support the mutually cooperative - existence of the constituents. It differs from the confederation in having inseparable close tie between central and provincial units. A state following the federal principles does not negate the existence and survival of the federating units at one hand and empowers the federal or Union government on the other hand to accommodate and take measures to keep them united. Centre-State relations are, therefore, governed by a written constitution that establishes a legal relationship in between.

Federal principles, however, do not portray a uniform Centre- State relation in working of the world's federal leading Constitutions because of the pre-existing politico-civil culture of the country. Ordinarily it is the units in the form of independent local or regional provinces with territorial proximity having common interest agree to surrender some of their authority to a federal or central government while retaining the other areas within the respective domain. Democracy provides opportunity to the people to form Government at both the fora. Madison, on Federal Republic relating to American Constitution, made a very factual observation, "assent and ratification of the people of America is not as individuals composing one nation but as composing the distinct and independent

States to which they respectively belong"[1]. The exercise of electorates' power to elect the representatives for different Legislatures, may be for the Union Territory, supports the very base of federalism. Constitution is founded on the agreement and concurrence of the people having a common and collective purpose in a typical federal organisation. Once Federation is formed, it is administered and governed by the principles of Federal Constitution. The basic premise, however, has been distribution of the powers by the Constitution between two units (Centre and the State unit or the Union Territory) though the pattern in terms of quality and quantity of the subject matters are different in the Constitution. Federalism is a compromise between the identity of a separate unit and a desire for a national union. A Federal state is a political contrivance intended to reconcile national unity and power with the maintenance of 'state rights'[2].

II. FORMATION OF INDIA'S FEDERATION

Indian Constitution is comfortably falling in the category of federal constitution distinct from the unitary or confederacy and so it may be placed between the two. The Central Government is "amphibian", in the Constitution, in the sense that it can move either on the federal or unitary plane, according to the need and circumstances of a case[3]. The decision, however, is taken by the Central Government to take measure like Unitary State. Unlike the 'classical federal constitutions', Constitution of India has not been the result of any compact arrangement among the smaller state units. It owes its existence to the 'resolve of the people' to have "Union of States" and so, a product of the Constitution itself. In Indian context although federalism came first and the units were carved out afterwards, the sub-national loyalist based on language or region and the existence of the Princely States were the factors that precipitated the adoption of a federal government[4]. Constitution is a first legal and social document providing for a federal government on the Indian soil, though,

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1. Ralph H. Gabriel (ed), *Hamilton, Madison and Jay on the Constitution,* Federalist Papers (1954), p.48
2. A.V. Dicey, *Law of the Constitution*, (10th ed), 143
3. *State of Rajasthan v UOI* (1977) 3 SCC 592, p 623
4. S. P. Sathe, *Nehru and Federalism: Vision and Prospects* (ed) 1992, p 196,197

it is said as replica of the Government of India Act, 1935. By enforcement of the 1935 Act all the powers were vested with the Crown[5]and redistributed between the Central authority and the British India Provinces. It further provided that the powers connected with the function of Crown in relation to the Indian States shall be exercised by person acting under the authority of His Majesty's representatives. Prior to Government of India Act, 1935, there was a dual system of governance for the provinces[6] of British India, known as "Dyarchy"[7], introduced by the Government of India Act 1919. It gave autonomy to the British India provinces. During that period there were regions forming British India (comprising 13 provinces[8]) administered by the Crown and other regions of Princely States, governed by the local rulers of different background[9]. These rulers were allowed some measures of internal autonomy in exchange of British suzerainty.

At independence in 1947, the British India - 60% of the territory had 17 provinces and about 584 Princely Sates[10] for 40% of the territory. The Indian Territory had a history of geographical demarcations comprising units under the Portuguese, French, Dutch and the British crown and the units of Princely States. These features lead to label the system of governance as unitary form of governance either under the British or the Princes' rule as British India Provinces were not autonomous and the Princely provinces were in existence at the concession of the British Emperor. The system was based on and in operation by an understanding between the British ruler and the rulers of Provinces in India. The Government of India Act, 1935 lays down the framework of the present Constitution but on the issue of federal principle it could not

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5. Sec 2(1) reads as All rights, authority and jurisdiction heretofore belonging to His Majesty the king, Emperor of India ... are exercisable by His Majesty, except in so far as may be provided by or under this Act...
6. Known earlier as Presidency Towns and later as Presidencies of British India.
7. Lord Chelmsford the then Viceroy of India (1916-1921) introduced the dual system of governance. The principle of diarchy was a division of the executive branch of each provincial government into executive councillors appointed by Crown ministers chosen by the Governor from the elected representatives of the provincial legislatures.
8. Imperial Gazetteer of India, Vol. IV 1908, p 46
9. Ibid p 56
10. www.worldstatesmen.org

provide a true model for the Indian federation like the present Constitution though it used the expression 'Federation of India', it was a unitary set up until. After partition of the country the Constituent Assembly had a fresh look over the preservation of multiplicity in language, culture and traditions as well as the plurality of society and aimed at forming an "indestructible union" with co-existence of the regional units which were transformed into a federal State. The another feature of Indian geo-political condition was the existence of various smaller units which either because of their size, distant location, unique culture and character and strategic position could not be equated at par with the other regional units and, therefore, categorised in Part A, B, C and D[11] but there was no concept of Union Territory at the commencement of the Constitution till the seventh constitutional amendment, 1956.

The Constitution framers had to reconcile the power of a central authority along with continuity of the regions with special status and identity. Such categorisation of the regional units led to formation of a Federal State to be called Union of States comprising voluntary, natural as well as some conditional alliance. This model was the most convenient form of federation as the union does not assure unity. Union may be oneness of purpose and at the same time diversity of principle[12]- The States Reorganisation Act, 1956 was passed for the reorganisation of the States superseding the States' categorisation of Part A, Part B and Part C in Schedule I annexed to the Act and reducing to only two categories, "State" and "Union Territory" (Schedule I)[13] by substituting Union Territories for Part C States in Ch VIII of the Constitution. The concept of Union Territory was, however, not known in any of the federal Constitutions and even at the time of final draft of the Constitution but for the very peculiar reasons[14] adopted subsequently. It is administered by the Lt-Governor and may have Legislative Assembly[15](Delhi and Puducherry). Union Territories are under the jurisdiction and power of

11. Part A- British India administered by the Governor; Part B- Princely States administered by the *Rajpramukh*; Part C- Provinces in British India administered by the Chief-Commissioner; PartD- administered by Lt-Governor
12. J. Boyd Nicholson, *Union and Unity*, http//playmouthbrenthern.org) on 29/3/21
13. The Constitution (Seventh Amendment) Act 1956
14. Territorial size, distance from the other States, strategic location, culture etc
15. Articles 239 (1) and 239A; 14th Constitutional Amendment, 1962

the Central Government. Parliament may by law under Article 239-A (1) create a body to function as legislature or a Council of Ministers with powers and functions as may be specified in the law.

III. FORM OF INDIAN FEDERATION

The Constitution was adopted in the form of a written instrument that partakes of the nature of a treaty[16] that set at rest the powers and domain of the Central and the State Legislative and Executive authorities within a defined periphery. The Indian Constitution, however, reflects arrangement with Central orientation. There was nothing fundamentally unusual in such arrangement and it was optimistically observed, "...only strong Centre can effectively preserve the unity and integrity of nation"[17]. Federal principle is a method of dividing powers so that the general and regional governments each co-exist within a sphere, coordinate and independent[18]. Adherence to theoretical connotation of the federal principle, however, cannot be found precisely in functioning of any of the federal constitutions. The different federations either under a compact arrangement or for the historical and political reasons have, by reason of resilience and capacity of adjustment, modified form of federal principles to respond the requirement of respective stable governments[19]. But in all forms of the federal Constitutions three features are common and compulsory; namely instrument in writing, its supremacy and existence of court having jurisdiction to settle the authority in the matter of conflict between Union and the States or among or between the States.

Federalism seeks union not unity[20]. Even the Constitution of USA, called a classic federation does not use the word federal but refers to form "a perfect union", the Constitution of Canada (British North America Act 1867) use "federally united" and the Commonwealth of Australia Constitution 1900, use the word "Federal Commonwealth". The Indian Constitution also does not use the word, 'federal', in the preamble but

16. Supra note 2, p 147
17. Commission on Centre-State Relations Report (1988) Part I p III
18. K C Wheare, *Federal Government* (4thed) p 10
19. Constitutions of USA, Australia and Constitutions of Canada and India may be kept in separate category.
20. Supra note 2, p 141

Article 1 declares and designates India "a Union of States". The nomenclature indicates the background of formation of the federal State. Like other classic federations Indian federal Constitution does not refer to any sort of agreement among the constituents. It was an Assembly comprising representatives of "We the people" who resolved to constitute India and have this Constitution for the country - Union of States. Federation has passed through several modifications that is regarded nothing else but a modified form of federalism as permissible exceptions[21]. It may be quasi-federal[22] or Unitary State with federal features[23] or federation with strong inclination towards the Central government[24] or essentially a unitary[25] system. Prof W.T. Wagner[26] is of the view that whether a State is federal or not, depends upon how many federal features it possesses. India has adopted a loose federal structure forming an indestructible union of destructible units[27]. The Chairman of the Drafting Committee, Dr Ambedkar remarked:

> "the term union was used in the constitution of two reasons, first one was that the Indian Federation was not the result of an agreement by the units, and secondly none of these had freedom to secede"[28].
>
> "I think it is agreed that our Constitution notwithstanding the many provisions which are contained in it whereby the Centre has been given power to override the provinces nonetheless, is a federal Constitution"[29]. He reiterated.

Federal nature of Indian Constitution also displays some features different from the others by giving some of the States special status and privileges by creating Part XXI, titled "Temporary, Transitional & Special

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21. Supra note 10 p 15
22. Ibid, p 29
23. Ibid, p 28
24. Jennings, Some Characteristics of the Indian Constitution, (1953) p 1
25. Mc Whinney, Federal Constitution-making for a Multinational World (1966) p 132, He regards the Indian Constitution essentially unitary
26. Federal States and their Judiciary, (1959) p25
27. *Raja Ram Pal* v *Hon'ble Speaker* (2007)3 SCC 184
28. Draft Constitution, (on 21.02.1948) p iv
29. CAD vol. IV p 133

Provisions"[30]. Further there are also provisions providing for the executive powers of a State for the Administration and Control of Scheduled Areas and Scheduled Tribes[31], and provisions for Administration of Tribal Areas[32] in some of the north-eastern States. Incorporation of these special provisions for some of the States, and certain areas within the States are the features that too mark the federal structure of co-operative federalism by way of accommodation of their distinct culture, language, race, traditions and geographical significance in the Union of States. It also displays a special federation where indications of more autonomy to some States or to the areas within the States justifies the statement of Aristotle who more than 2000 years back said, Constitution "is the way of life of a citizen-body"[33], that inculcates belongingness in the people for the country. Constitution of India is the outcome of historical process and contains life of the country.

IV. FEDERALISM IN ACTION

Conspectus review of the formation of the Union of India in retrospect reveals the sentiments of the people in different parts of the country were accommodated by the Constituent Assembly by adopting a flexible federal Constitution recognising and providing the people of the States a fair opportunity of enjoying and preserving the linguistic and regional socio-cultural rights at one hand, and protection of statutory and constitutional rights in common on the other hand; whereas the Union Government has the power to issue directions and it may assume power of the State Government to itself. But such taking over of the power is occasional arising out of extra-ordinary circumstances[34] and for a limited duration. Another example of flexibility in action but with central inclination can be cited in the initial articles of the Constitution wherein Parliament may after taking view[35] of the concerned State pass simple majority law to form new States, alter boundaries by addition or diminishing the existing

30. Articles 370, 371 and 371A to 371H
31. Fifth Schedule
32. Sixth Schedule
33. Aristotle's Political Theory (1998) *plato.stanford.edu* (*Po*l,IV.11.1295a40-b1)
34. Part XVIII containing Emergency Provisions
35. Taking view does not mean concurrence

States or alter the name of the States[36]. These alterations do not insist special procedures required under Article 368 (Amendment of the Constitution) and, therefore, are not considered as amendment of the Constitution[37] though, First Schedule annexed to the Constitution containing list of State and Union Territory stand amended. Power of alteration of the States' territory or creation of new States out of the existing States or by inclusion[38] or change of name of the State suggest Central dominance in Centre-State equilibrium that is considered to be a relevant characteristics of a federal constitution. Unlike Indian federation, the Constitution of USA[39] requires consent of the Legislatures, for formation of new State erected within the jurisdiction of the State/States concerned. The Constitution of Australia[40] prescribes more stringent provision and requires approval of the majority of the electors of the State in addition to the consent of the Legislatures. The Canadian Constitution empowers the Parliament to alter the limits of a Province upon terms and conditions authorised by the Legislature of such Province[41]. The constitutional position regarding the formation of new States in India's federal structure vindicates its background of indestructible 'union of destructible units' as the Constitution insists only for the view of the relatable Legislatures.

Functioning of the Indian federalism, save with the extra-ordinary situations[42], may be flagged as 'co-operative' as people of the country have pledged to themselves. The socio-economic and political conditions of the units (Provinces) and the Union Government needed a Nation with minimum stresses and strains and it was viable through a 'co-operative' not through the 'competitive approach'. The Constituent Assembly, the largest body in the world constituted to prepare a Constitution, comprised members representing the Indian people with difference of language, religion, culture, region and race could fairly foresee the way out to make India a successful federation by incorporating the provisions for mutual

36. Articles 2 and 3
37. Article 4(2)
38. State of Sikkim- a Princely Province during British Rule continued till anti Royal protest that subsequently led to referendum and included in 1975 as 22nd State
39. Article IV, Section 3(1)
40. Sections 123-124
41. Section 38,The Constitution Act, 1982
42. Part XVIII-Emergency Provisions

cooperation and a horizontal basis. "The practice of administrative cooperation between general and regional governments with practical dependence of the regional governments upon payments from the general government"[43], is the hallmark of cooperative federalism. The Sarkaria Commission in its Report in unequivocal terms records that Indian federalism is a perfect co-operative Federalism[44].

Moreover the other federal constitutions also do not comply with the strict distribution of power between the constituents. United States of America is known to be more federal in the outline of the Constitution but in practice, based on the provisions in "necessary and proper clause"[45] and the "Supremacy clause"[46], there is not much difference between the two [47]. In all the classical Constitutions known to be Federal, the transformation has been towards centralisation[48]. This is the reason perhaps, K. C. Wheare said, "the practice of Constitution is more important than the law of the Constitution"[49], and Livingston remarked, "Federation is more a "functional" than that of an "institutional"[50] concept.

V. FEDERALISM AND DEMOCRACY

Preservation and encouragement of the desire of the people to have a responsible and responsive government is best achieved through a democratic form wherein on periodical interval they get a chance to appraise and decide what people shall be the best to form the government at the Centre or State level. In the countries with federal form of government democracy operates as the interface and both complement each other. It provides opportunity to the people to have regional party at the provincial level and alliance of the Parties at the central level to have a national government. Such arrangement reinforces the concept of

43. A.H. Birch, Federalism, Finance and Social Legislation in Canada, Australia and the United States, (1955) p 305
44. Commission on Centre-State Relations Report, (1988)
45. Article I section 8 (18)
46. Article VI
47. V G Ramchandran, 1958 (SCJ) p 79
48. DD Basu, Comparative Federalism (2008) p 18
49. Supra note 18 pp 26-27
50. Federation and Constitutional Change (1956) p 6-7

federation. Democracy is a means of formation of a Government that stands accountable to the people who have formed it. Highlighting the charm of the democracy, Winston Churchill once said that:

> "Many forms of the Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all wise. Indeed it has been said that democracy is the worst form of Government except for all those other forms that have been tried from time to time."[51]

People in exercise of the sovereign power elect to form the Government and the Government rules for the people supposedly having no ulterior motive for the electorates. The confidence of the people shown in the process of democracy through a popular mandate cannot be avoided by a perfidious means. There is a relationship of belongingness that motivates people to elect their representatives and it does continue after the process is over leading to formation of the Government. The popular mandate awarded cannot be transformed into "own rule"[52]. The sense of affinity and proximity facilitates the functioning of any democratic Government qua Union or the State. Democracy has grown out of tradition and federalism is an adopted concept in India. Federalism gets strength from democracy that reinforces the spirit of the Constitution. The Supreme Court of India in *Indira Nehru Gandhi* v *Raj Narain*[53] has mentioned democracy as part of the basic structure and federalism has also been included therein by the apex court in *S R Bommai*[54] case.

VI. SPECIAL STATUS OF DELHI-CAPITAL OF UNION OF INDIA

Constitution has allocated subjects to the Parliament and State Legislature in List I, List II and List III of the VII Schedule following the core element of federalism i.e. distribution of subjects for the Parliament and territory of the States. Because of the diversity on various counts the

51. Winston Churchill, 11 Nov. 1947. https//winstonchurchill.org
52. *Government of NCT of Delhi* v *UOI* (2018) para 54
53. (1975) Supp SCC 1, see also *Kihoto Hollohan* v *Zachillu* (1992) Supp 2 SCC 651
54. *S R Bommai* v *UOI* (1994) 3 SCC 1

Constitution of India also accommodated the demands of the people of regional units as mentioned in Articles 371, and 371-A to 371-J. These Articles refer to special status of the States. Certain parts of the territory of India named Union Territories (earlier categorised as Part C States) by the 7th Constitution amendment, owing to special features, have been kept in separate Part (Part VIII) of the Constitution and are administered by the President of India. Further under Article 246 (4) Parliament has the power to make laws with respect to any matter for any part of the territory not included in a State.

Delhi has the privilege of being known as the capital of British India since 12 December, 1911, when the Emperor V shifted it from Calcutta. It was given name as "New Delhi" in 1927 and new capital in Feb 1931; and finally capital of Union of India on 15th August, 1947. By the 69th Constitution amendment, 1991, it was called as National Capital Territory (NCT) of Delhi and the Administrator was designated as the "Lieutenant Governor" (L-G) instead of (Governor). The aforesaid amendment[55] also provided for constitution of Legislative Assembly having power save with Entries 1, 2 and 18 of the State List, to make law with respect to the subjects enumerated in List II and List III. These Entries refer to public order, police and land respectively. The Government of National Capital Territory of Delhi Act, 1991, (referred to Principal Act) was also passed to supplement the constitutional provisions and to take care the incidental matters that are germane to Article 239-AA, added to Constitution by sixty-ninth Constitution amendment in the year 1991. Parliament possesses power to make law for the NCT along with the Legislative Assembly of the NCT supported with Article 239 –AA (3)(b). In a situation of repugnancy between the two laws sub-Article (3)(c) stipulates that the law enacted by Parliament to the extent of repugnancy shall prevail provided the law passed by the Assembly was reserved for consideration of the President and assent has been received. The L-G shall act on aid and advice of the Council of Ministers in exercise of his functions except on the matters he acts in his discretion. The Provisions further lay down a resolution in case of difference of opinion between the L-G and the Ministers on any matter the L-G shall refer it to the President for decision and act accordingly. If the matter is urgent calling immediate action

55. Article 239-AA

pending the decision the L-G shall be competent to take action as he deems necessary. The Council of Ministers shall be collectively responsible to the Legislative Assembly.

National capital of Delhi, however, does not fit into the Centre-State relation paradigm of a federal model though the Legislative Assembly has the power with few exceptions to make law on the subjects in the State and Concurrent List like any other State. Article 239-AA does not spell out the executive powers of the NCT as Article 162 of the Constitution clarifies that the executive power of a State extends to matters with respect to which the Legislature has power to make laws. By way of analogy same inference, however, may be drawn that the executive authorities of the NCT have the powers to implement the laws passed by the Legislative Assembly. It has ordinarily been seen that there are disputes on the matters of legislative competence of the Centre and the State alleging crossing over the respective arena under VII Schedule by the other Legislature. The court has devised doctrines, viz. harmonious construction, territorial nexus, pith and substance and the colourable legislation to resolve the issue or struck down the impugned legislation invoking the *ultra-vires* doctrine. On the executive front collaborative attitude is manifest from the scheme of executive powers because the executive power extends to follow the legislative trend and there is no distribution of the executive power between the Union and the States like the Legislative relations. In case of NCT Delhi the L-G shall act as Administrator but carry out functions on aid and advice of the Council of Ministers except on any matter resulting into difference of opinion for reference to the President. His administrative position cannot be equated to that of the Governor of a State but can be put to the level of like 'Administrator' in any other Union Territory. Further if he has the liberty of discretion in exercise of function the collective responsibility of the Council of Ministers to the Legislative Assembly becomes meaningless.

VII. SUPREME COURT AND THE STATUS OF THE L-G *VIS-A-VIS* COUNCIL OF MINISTERS

There has been a tug of war situation on the ambit and reach of the phrase "aid and advice", between the Council of Ministers and the L-G, as it is conceived of binding nature like the relationship between the Council

of Ministers and the Governor of a State in parliamentary government in general and particularly under Article 163 of the Constitution. The controversy and disagreement had been simmering since the "Aap" a political party led by Shri Kejriwal came to power by a scintillating win over the opposite party (at the Centre) in the Legislative Assembly election of the NCT and continued consecutively. The Central Government limited the powers of the NCT Government pertaining to appointment of senior bureaucrats and to probe the Central Government employees for certain alleged charges. The power conflict was brought before the Delhi High Court. The High Court upheld the authority of the L-G and observed that L-G was not bound by the "aid and advice" of the Council of Ministers and he was the administrative head of the NCT and his approval on the decision of the Council of Ministers was compulsory for implementation. Aggrieved by this judgment of the High Court, the NCT Government preferred an appeal before the Supreme Court. The matter was ultimately referred to the constitution bench as issues in the case pertained to interpretation of Article 239-AA, constitutional structure, democratic culture of the Government and citizenry participation of the residents of NCT in the governance. The case[56] was heard by a 5 Judges Constitution-bench comprising Dipak Misra CJI, and Justices A K Sikri, A M Khanwilkar, D Y Chandrachudand and Ashok Bhushan. Chief Justice Misra delivered the judgment for himself and for Justices Sikri and Khanwilkar; Chandrachud and Ashok Bhushan JJ., each authored separate concurrent judgment. The apex court reversed the High Court's judgment and clarified the constitutional status by laying down that the L-G shall act on aid and advice of the Council of Ministers in exercise of his functions in relation to matters included within the domain of Legislative Assembly. In the event of difference of opinion between the two the L-G shall refer "any matter" to the President does not mean every matter - "every trifling matter but only those rare and exceptional matters so fundamental to the governance of the Union territory that it deserves to be escalated to the President", the court observed.

Power of the elected Government and legal ramifications of their decision in a democratic set up based on the Westminister model is represented by the executive branch formed out of the members of the

56. *Government of NCT of Delhi* v *UOI* (2018) https://main.sci.gov.in

legislatures in NCT, a homologue to the State-Union Territory, against the stand of the "Administrator" (L-G) was examined. It may not be out of context to mention that position of L-G is not the same as that of the Governor in the State as NCT is the capital of the nation and assumes special significance; through the L-G, it remains under the control of the President of India who acts on aid and advice of the Council of Ministers chaired by the Prime Minister. So there is supervening control of the Union Government over this regional unit. If there is difference of opinion between the L-G and the Council of Ministers and he does not act on aid and advice of the Council of Ministers but opts to refer the matters customarily to the President for consideration, the democratic institution of Legislature and the 'government of the people' is reduced to nugatory and pointless., particularly when the Council of Ministers are collectively responsible to the Legislative Assembly. The present case contributes to the discussion on the constitutional values in terms of citizens' participation in the decision making through the elected representatives and co-ordinate status of the Union Government along the Legislative Assembly in a federal set up. The representatives are in the House by exercise of sovereign power of the citizens and they are the real Government in democracy recognised by the Constitution. Krishna Iyer J. delivering the judgment in *Mohinder Singh Gill* v *Chief Election Commissioner*[57] underlined the pervasive philosophy of democratic election and importance of vote with the help of quote from Sir Winston Churchill in the introductory part of the judgment:

> "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."

Dipak Misra CJI, writing the majority judgment emphasised the value of vote in electing the representative to the Assembly as a component of the constitutional morality in the form of democracy that cannot be edged off by exercise of the executive power, and observed that the L-G was bound to act,save with the domain of his discretion, by the aid and advice

57. (1978) 1 SCC 405

of the Council of Ministers. Justice, however, hastened to note a word of caution, "support expressed by casting vote should not become an excuse to perform actions that fall foul to the Constitution"[58]. The observations of the Chief Justice on the democracy - a basic feature - supports the constitutional values; and it is submitted that democracy endeavours to protect the people's opinion on the one hand and contrarily ordain the representatives not to convert their position in the guise of majority rule into a rule of majoritarianism. Such principle in a federal Constitution applies both to the authority of Parliament as well as the State Legislative Assemblies lest in a multi-party nation the political parties at variance may take unwarranted decisions coloured with certain agenda or to settle the political scores[59], and the same may be seen in this case as the situation arose because the political parties in the Government at the Centre and at the NCT were entirely in disagreement with power sharing though status of NCT was defined way back in the year 1991. The electors are the same but representatives belong to different Parties and therefore, the Constitution stands as the classic legal document containing the general principles to last longer than the life of Legislative Houses with a fixed term. Growth of democracy follows the good governance. The Constitution should be read in its spirit so that the democratic nature in the form of representative participation is not annihilated[60].

Principles of federation linked to democracy, another aspect of constitutional morality was also highlighted by the Chief Justice, who observed, "founding fathers of our Constitution envisaged a fusion of federalism and democracy in quest for achieving an egalitarian social order"[61]. Concept of Union Territory is alien to the concept of traditional federalism but within the permitted field the Legislative Assembly of the Union Territory does enjoy the same authority of law making as that of any State Assemblies. NCT Delhi like any other Union Territory is not a State and so a separate entity under Article 246 (4) of the Constitution but distinguished from other Union Territories by an exclusive provision under Article 239-AA. This Article deals with the power of the Legislative

58. Supra note 56, para 54
59. In the past many times Article 356 has been invoked to impose President Rule in the States in governance by a different Political Party
60. Ibid, para 277
61. Ibid, para 107

Assembly for making laws with respect to the subject matters meant for the State Legislatures with exclusion of Entries 1, 2 and 18 in List II, almost at par with the States' powers. The Union and the State Government must embrace a collaborative federal structure by displaying harmonious co-ordinate and interdependence without any constitutional discord[62].

Parliament, by virtue of Article 239-AA, envisages parliamentary form of Government of NCT of Delhi. With the exceptions, the L-G is to act on aid and advice of the Council of Ministers so long he does not exercise power under proviso to Article 239-AA(4). The L-G has no independent decision making power. The executive power of NCT is coextensive with the power of the Legislative Assembly of Delhi. Union of India has exclusive executive power with respect to matters excluded against NCT of Delhi in the State List. Following the New Delhi Municipal Corporation case Chief Justice observed that NCT of Delhi was a class by itself and he further observed:

> "it is necessary that we give a purposive interpretation to Article 239-AA so that the principles of democracy and federalism which are part of the basic structure of our Constitution are reinforced in NCT of Delhi in their truest sense"[63].

The words "any matter" employed in the proviso to clause (4) of Article 239-AA cannot be inferred to mean "every matter". "The power of the Lieutenant Governor under the said proviso represents the exception and not the general rule which has to be exercised in exceptional circumstances by the Lieutenant Governor keeping in mind the standards of constitutional trust and morality, the principle of collaborative federalism and constitutional balance", Chief Justice, Misra observed. He took support of Corwin who coined the term, collaborative federalism as:

> "the National Government and the States are mutually complementary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of government"[64].

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62. Ibid
63. Ibid Para 203
64. Edward S. Corwin, *The Passing of Dual Federalism*, 36 (VA. L. REV), 1 p 4 (1950)

Interpretation of the Constitution cannot be restricted to the literal meaning of the word; purposive interpretation takes to the real intent of the framers as well as the Parliamentarians who have incorporated certain provisions by way of amendment. The court should secure the object of the law so that use of the word be justified rather it is reduced to void. In the words of Viscount Simon L.C.:

> "If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result."[65]

In construction of word, "any matter" if "every matter" is substituted it would deviate the meaning what the Parliament intended to give and so the collaborative sense of federalism is misplaced. "Every matter" is of wider latitude and may cover safely "any matter" but the converse is not true. To mean "any matter" for "every matter" amounts to prodigal use of the common word that could not be taken as an appropriate meaning. The Court, therefore, observed that procedural and substantive nuance must be adopted while interpreting the proviso, failing which the salutary constitutional purpose underlying Article 239AA will be defeated.[66] Such interpretation if accepted would defeat the federal nature of the power of Legislative Assembly of the NCT.

VIII. PARLIAMENT'S INNOVATION TO OUTWIT THE COURT'S OBSERVATION ON CONSTITUTIONAL POSITION

The Supreme Court of India, the final interpreter and custodian of the federal and democratic Indian Constitution, through a constitution-bench having given interpretation to the clauses intended for a coordinate collaborative status to Legislative Assembly of the NCT opposite to L-G of Delhi, however, could not convince the Union Government in its zeal to prevail over the Government elected by the people of Delhi. An

65. *Nokes* v *Doncaster Amalgamated Colieries* (1940) 3 ALL E R 549 p 554 (H L)
66. Supra note 56, D.Y. Chandrachud, J. para, 134

overriding constituent power of Parliament to legislate by way of amendment to the provisions under the Principal Act, of 1991, to obviate the 5 judge-bench decisions was invoked and Parliament passed the National Capital Territory of Delhi (Amendment) Act, 2021. It aimed at nullifying the decision of the Supreme Court on constitutional status of powers of Council of Ministers *vis-a--vis* L-G in the instant case. The amended law focuses directly and primarily on the issues of the scope of powers of Government formed through a democracy process and the coordinate status of the NCT government in the federal context. It has advanced a dominating and pervasive control in exercise of power of the L-G, an appointee of the Central Government over the elected government of the people of NCT. The amendment to the Principal Act may be summarised as below:

a) The expression "Government" referred to in any law to be made by the Legislative Assembly shall mean the Lieutenant Governor'.

b) The Legislative Assembly shall not make any rule to enable itself or its Committees to consider the matters of day-to-day administration of the capital or conduct inquiries in relation to the administrative decisions, and any of the rules made in contravention of this proviso, before the commencement of the GNCT (Amendment) Act 2021 shall be void.

c) Before taking any executive action in pursuance of the decision of the council of Ministers or a Minister to exercise power of Government, State Government, Appropriate Government, Lieutenant Governor, Administrator or Chief Commissioner, as the case may be, under any law in force in the capital, the opinion of the L-G in terms of proviso to clause 239-AA of the Constitution shall be obtained on all such matters as may be specified by a general or special order by L-G.

The above amendments stand against and outreach the judgment of the Supreme Court. The legislative body of the Union of India in exercise of sovereign law making power has whittled down the coordinate sovereign power of the legislative body of the NCT as it falls short to be called as the Government of the people and has been substituted by the L-G an Administrator who has no reference to the people but he would be performing functions and discharging constitutional obligations for the people who has no chance to assign the governance to him. The executive action of the Council of Ministers shall have the favourable opinion of the

L-G before execution. The Legislative Council of the NCT is restrained from taking decision on matters pertaining to even day-to-day administration. The amendment Act is in operation, however, facing judicial scrutiny by way of Public Interest Litigation before the High Court of Delhi.

IX. CONCLUSION

Indian federalism since the commencement of the Constitution with flexibility in action has been found to be successful leaving no scope of review for the other viable options. In natural ordinary course it ensures balance and prompts a collaborative approach but sometimes it has worked by assigning the authority of the constituent units to the Union Government to cope up with the extra-ordinary political crisis or the national emergency. It empowers the Union Government to create States or Union Territory. After creation of such units, however, the constitutional mandates on exercise of power need to be enforced and the wishes and whims of the majoritarianism have no role to affect the business of the designated institution. Formation of the Governments both for the Union and the States through electorate participation inculcates belongingness in the people as they have Government of their choice and option to change on the next occasion for failure to withstand their desire. The court through the process of purposive interpretation has strengthened the concept by alluding to doctrine of basic feature of the Constitution. Constitutional conscience activates the court to stand as *sentinel qui vive* for preservation of the constitutional mandates. Supreme Court has maintained the spirit of the Constitution by upholding the feel of federalism and the democracy. But to nullify the verdict of the court the amendments in the Principal Act brought by Parliament retrogrades the development of the constitutional law. Such arrangement between the Administrator and the House of representatives is novice in independent India where sovereignty percolates down to a little man on the street and stimulates to participate though the representatives from Parliament to *Panchayat* level in the decision making process. An ordinary statutory amendment tempts to erode and cause indentation to the settled principles of basic structure doctrine by superseding an Administrator's role in the governance over a constitutionally elected Government of the people in performing the permitted functions. The court needs to examine this broader issue to uphold the constitutional morality in the country.

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NEW DIMENSIONS OF CONSUMER JUSTICE IN INDIA

*C. P. UPADHYAY**

ABSTRACT : A consumer is an inevitable actor of any economy. No economy can flourish without protecting the rights of consumers. Nowadays, protection and promotion of consumer rights has become a very high necessity because in the present times the demands and expectations of the consumers have changed due to globalization and growing awareness. A new phase in consumer justice system in India has started with the enactment of Consumer Protection Act 2019 (hereinafter called as C.P. Act 2019) with additional features. In this paper an effort has been made to distinguish the functional aspects of competition law and consumer law in the field of consumer protection. Further the main highlights of new consumer laws have been analysed which are meant to protect and promote the rights of consumers.

KEY WORDS : Consumer, Consumer justice, Consumerism, Mediation cell, E- Commerce

I. INTRODUCTION

Consumer protection laws have originated and developed as a natural response to the recognition of the rights of every consumer to be protected against exploitation and abuse by manufacturers, suppliers or service providers. So far as the question as to who is covered under the term consumer is concerned it cannot be said that public at large comes under it. All the consumers are covered under the head 'public' but public is not covered under the term consumer. Consumer is rather a relative term and each of us is a consumer at some time. The protection of consumers has

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been a continuous process with different dimensions but the modern legislations have initiated an era of clear distinction of consumer rights and their protection with a formal system of enforcement. A major change in the consumer justice system in our country has been brought through the replacement of C.P. Act 1986 by a new enactment named C.P. Act 2019.

The contemporary era is marked as the era of consumers. No economy can flourish by disregarding the interest of consumers. The growing interdependence of world economy and international character of many businesses have contributed to the development of universal emphasis on consumer rights protection. Throughout the world, new wave of state control has emerged in the shape of legislations which have activated the administrative machinery created for welfare of consumers. With the emergence of the welfare state concept and industrial revolution in almost all countries, consumer protection has assumed great importance in modern jurisprudence. Consumer is regarded as the king of the market.

Those days are gone when the needs of human beings were few. Modern life has increased the dependence of human beings upon industrial products. One cannot live without keeping touch with the global developments. Style of life has changed making scientific and technological instruments a necessity for decent living. Consumers are victims of unscrupulous and exploitative practices of traders and businesses. Exploitation of consumers assumes numerous forms such as adulteration of foods, spurious drugs, high prices, poor quality, deficient services, deceptive advertisements, hazardous products and many more. 'Consumer is sovereign' and 'consumer is king' are nothing more than myths in the present scenario. Consumer exploitation has become the fashion of day because the producer, supplier, manufacturer and retailer are in superior position as compared to consumer. In an environment of limited choice, inadequate supply, incomplete information and unlimited demand, it is inevitable that consumer gets cheated[1]. In this background it is primary responsibility of the government to protect the consumers' interests and rights through appropriate legal structure and administrative framework.

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1. Joyeeta Gupta : *Emerging challenges and opportunities in consumer confrontation.* Vol. 7, No. 3. March 87, p-2

In the early age of individualism it was considered that a buyer possesses the capacity and is able to use his care and skill while making purchases in the market. The maxim 'caveat emptor' let the buyer beware was the rule. The other principle of individualism was the freedom and sanctity of contract. In the beginning of 19th century doctrine of laissez faire dominated the whole economic scene all over the world. It was an era when supporters of individualistic approach thrived and it was believed that government should make least interference in the freedom of contract so that sanctity of contract may be maintained. However by the end of 19th century the globalization brought in an era of consumerism. In order to maintain social harmony the legal intervention was called for[2].

The concept of welfare state adopted in the constitution has called for greater intervention of state in protecting the rights and interests of consumers. Hence a plethora of laws came to be enacted from time to time aiming at for providing better protection to the interests of consumers.

In the old days the principle of caveat emptor which meant buyer beware governed the relationship between seller and buyer. It was assumed that consumer would use all care and skill while entering into transaction. This maxim relieved the seller of the obligation to make disclosure about the quality of the product. But with the growth of trade and its globalization the rule no more holds true. Further on account of complex structure of modern goods only producer can assure the quality of goods. Thus producers / sellers became stronger and organized whereas consumers are still weak and unorganized as they are being misled, duped and deceived by the producers. That's why the doctrine of caveat emptor has given way to doctrine of *caveat venditor*.

The Consumer Protection Act 1986 was enacted on the principle of caveat emptor. Through the Consumer Protection Act 2019[3] the prevalent consumer laws have been overhauled and we landed in the era of '*caveat emptor*' similarly by enactment of competition act 2002 replacing the MRTP Act 1969, new dimensions to consumer justice have been added in India[4]. But much has yet to be done and achieved by dwelling upon the various perspectives of consumerism.

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2. Rakesh Khanna ,*Consumer Protection Laws* CLA, 3rd ed. 2005, p-13.
3. It has come into force from 20 July, 2020 replacing the C.P. Act 1986.
4. Supra note 2 at 3.

II. CONCEPT OF CONSUMERISM

Dr. James turner a leading consumer expert has said that consumers are to economics what voters are to politics. Consumerism is a recent and universal phenomenon. In present situation it has assumed greater importance and relevance. Consumerism is all about protection of interests of the consumers[5]. According to Mc Millan Dictionary (1985) consumerism is concerned with protecting consumers. It encompasses the set of activities of government, businesses, independent organizations and concerned consumers that are designed to protect the rights of consumers. Consumerism is a movement aimed at regulating the products or services, methods or standards of manufacturers, sellers and advertisers in the interest of buyers, such regulation may be institutional, statutory or embodied in a voluntary code occupied by a particular industry or it may result more indirectly from the influence of consumer organizations[6].

In common parlance consumerism refers to wide range of activities of government, business and independent organizations designed to protect rights of consumers. It is a process through which consumers seek redress, restitution and remedy for their dissatisfaction by their efforts and activities. The term consumerism is related to modern consumer movement launched in the mid 1960's by President Kennedy to establish the rights of consumers[7]. Consumerism today is an all pervasive term meaning nothing more than people's search for getting better value for the money they spend[8]. Consumerism should not be considered as consumer's war against business. It is collective consciousness on the part of consumers, business, government and civil society to enhance consumer's satisfaction and social welfare which will in turn benefit all of them and finally make the society a better place to live in. Consumer's satisfaction will benefit not only business but government and society as well[9]. It is in fact a social movement.

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5. The new shorter Oxford Dictionary, 1993, p-490
6. Encyclopedia Britannica ,Vol. III, p-108
7. David A. Aker and Georges Day : *Introduction : A guide to consumerism : Search for the consumer interest,* 2nd ed. (1974). The Free Press, New York
8. P.G. Krishnan : *Consumer Protection and the Law in consumer protection and legal control,* at Pp-121- 122
9. Joyeeta Gupta : *Consumerism : Emerging Challenges and Opportunities Consumer Confrontation,* vol. 3, 1987, pp-2-11

There are various components of consumerism – **1.** Self protection by consumers: consumer must be aware of his rights and to protect them. Consumers' consciousness determines the effectiveness of consumerism, **2.** Voluntary consumer organizations: which organize the consumers and encourage them to safeguard their interest, **3.** Self regulation of business: it will not only serve the consumers but also benefit the business, **4.** statutory regulation: regulation of business through legislation is one of the important means of protecting the consumers. It may humbly be submitted that consumerism is still in its infancy in our country due to sellers' market and government monopoly in most services. Consumer awareness is low due to apathy and lack of education among the masses. Consumerism in India lacks in education, information resources, testing facility, competent leadership, price control mechanism etc. Effect of consumer movement is emergence of the consumer rights.

III. HISTORICAL PERSPECTIVE OF CONSUMERISM

A brief discussion of historical development of consumerism and the laws prevailing in the field is worth discussing. As any effective solution to some problems cannot be thought without making an insight into their historical growth. It is notable that consumerism has already marched much forward in USA and UK in comparison to India[10]. The consumer protection laws have originated and developed as a natural response to the recognition of rights of consumers against exploitation and abuse by manufacturers or service providers. The idea of consumer protection can be found to have existed in every kind of social order and judicial mechanism with varied extent. Hence, protection of consumers has been a continuous process with different dimensions.

In early economic history of America free competition was given fullest recognition which led to the passing of Sherman Act in 1890. By 1940 the consumer movement became a concern for all. Recognition of consumer rights in 1962 by President Kennedy gave further impetus to movement. Following this declaration several enactments were made of which Uniform Commercial Code 1952 is of prime concern. Thus consumer awareness along with legislative consciousness, improved the

10. Supra note 2 at 17.

consumers condition in USA[11].

In England the condition of consumers was not satisfactory and they were protected by judicial activism alone upto 1965. Certain laws were also enacted which provided penal punishments. Before commencement of consumer movement, the consumers had to depend upon the ordinary remedies for defective products. The consumer consciousness grew in intensity and this started influencing political and economical atmosphere. In 1962, the report of Royal Commission known as Malony Report made several proposals[12] to make laws more consumer oriented. These proposals formed the basis of Consumer Protection Act 1987 and Consumer Credit Act 1978. Afterwards Lord Peasson Commission in 1973, recommended application of strict liability to consumer sales.

Historical development of Indian legal system reveals that consumer's interests were protected from the ancient times. Legal development in India may be divided in 3 stages for convenience the ancient period the medieval period and the modern period. In ancient India human values were cherished and ethical practices were given importance. Social and economic life of the people was regulated by rules to protect the interest of buyers. In Hindu jurisprudence criminal wrongs, overshadowed civil wrongs and punishment was provided even in case of breach of contract[13]. *Manusmriti* provided for ethical trade practices and prescribed the code of conduct to traders. Breach of contract was treated as an offence and punishable by fine[14]. Kautilya's *Arthshastra* is a treatise mainly concerned with general administration of state but also describes the role of state in regulating trade and its duty to prevent crimes against consumers[15]. In the medieval period Muslim rulers strictly regulated the market. There was a mechanism for price enforcement in the market. Thus law of sales was much concerned with the interest of consumers[16].

Modern period may be characterized as pre-independence and post-

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11. E W Kinter, *A Premier on Law of Deceptive Practice*, at p-18, 19.
12. Brain W. Harvey, *The law of consumer protection and fair trading*, p-21.
13. P.N. Sen , *The General Principles of Hindu Jurisprudence*, p-244.
14. B.B. Brihaspati, *Smriti Chandrika* at p-503.
15. K.M. Agrawal, *Kautilya on Crimes & Punishment*, p-80.
16. N.B.E. Baillie, *The Mohammedan Law of Sale, from Fatwa Alamgiree*, p-XV.

independence period. In pre-independence or British period traditional system was replaced by common law system. Codification of laws was embarked upon and India picturised a plethora of laws which in some way or other protected the consumers. These laws transformed the socio-economic seen from duty based to a right based society.[17] From consumers angle important enactments were: the Indian Contract Act 1872, the Indian Penal Code 1861, the Transfer of Property Act 1881, the Sale of Goods Act 1930, and the Law of Torts etc. After gaining independence we adopted welfare state concept in our constitution. Various protections to consumers were sought to be ensured through legislative consciousness and judicial activism.

The constitution of India does not contain explicit provisions on the subject of consumers but there are many provisions that have direct bearing on consumer's interest. Most of these provisions pertain to the Directive Principles of State Policy[18]. Furthermore, as part of fundamental freedoms Article 19(1)(g) guarantees freedom of profession, trade and business. Similarly, Article 21 guarantees every person life with dignity free from all kinds of exploitations. Government was to pursue the policies according to directives set out under the IV chapter. These directives came to be reflected in various Industrial Policy Resolutions[19]. Process of codification of laws in the country continued to favour consumers as against producers. The enactments in addition to constitutional provisions, dealing with consumer protection include: the Prevention of Food Adulteration Act 1954, Essential Commodities Act 1955, Prevention of Black marketing Act 1980, Standards of Weight & Measures Act 1976, Bureau of Indian Standard Act 1986, Food Safety and Standards Act 2006, The Competition Act 2002 etc. The Indian Legal System experienced a revolution with the enactment of the Consumer Protection Act 1986. This Act was passed basically to provide cheap, easy and speedy justice to consumer. It was a laudable step at that point of time and amended from time to time[20]. However, this legislation failed to keep pace with developments in the market and digital technology in the country. Now a new phase in Consumer Rights in India has begun with the Parliament

17. Supra note 2, at 20.
18. The Constitution of India, Art 38, 39, 39-B, 42 and 47
19. Industrial Policy Resolution 1980, Quoted in National Industrial Policy at p-32

passing the Consumer Protect Act 2019 and repealing the Consumer Protection Act 1986, making the consumer more powerful than before[21].

IV. CONSUMER MOVEMENT AT INTERNATIONAL LEVEL

Due to increase in International Trade and Commerce the consumer protection has attained enormous International dimensions. The world economy has become interdependent due to International character of business practices. The problems encountered by consumers are often not exclusive to any one country. Hence with regard to consumer protection International co-operation was needed[22]. At the international level, many international organizations, inter-governmental organizations and non-governmental organizations have been contributing towards developing a global consumer co-operation.

FAO[23] is not only pursuing programs for food but also providing necessary guidance for pursuing consumer objectives. The food Science Control and Consumer Protection Group of FAO has played very important role in raising the quality and quantity of food and its distribution system. ILO[24] promotes the interest of workers as consumers by providing education to workers and welfare facility at work place. The expert committee of WHO[25] is also active in protecting the interest of consumers by preparing the list of essential drugs and procurement of drugs at reasonable price. UNIDO[26] has made contributions with regard to safety of consumers by providing institutional machinery to improve the quality of goods and products. UNICEF[27] has done appreciable work in the area of food for infants and children and the safety and nutritional value of such foods. The OECD[28] has constituted a committee on consumer policy

20. This Act had two major amendments in 1993 and 2002.
21. It has come into force from July 20, 2020.
22. Report of Secretary General, "International Activities for Consumer Protection" in IOCU, International Seminar on Law and Consumer, Hongkong, January, 6, 1980
23. Food and Agriculture Organization established in Rome.
24. International Labour Organization situated in Geneva.
25. World Health Organization is situated in Geneva.
26. United Nations Industrial Development Organization situated in Vienna.
27. United Nations International Children's Emergency Fund situated in New York.
28. Organization of Economic Co-operation and Development situated in Paris

to study the position of consumers in member countries. The IOCU[29] has done valuable work in this field by coordinating between Inter Government Organizations and National Governments. The ICC[30] also deliberated on the issue of consumer protection in 1997 and established an International Council on advertising practice.

The Economic and Social Council recognized that consumer protection had an important bearing on economic and social development and council was aware of the need for an international policy framework. With due negotiations with Economic and Social council, the UN General Assembly adopted by consensus a set of guidelines on consumer protection on April 9, 1985[31]. These guidelines provide a framework to strengthen policy and legislation to protect consumers and to promote international co-operation in this field. These guidelines have identified the main concerns in consumer protection with reference to consumer's basic needs, safety, choice, information, consumer education, redressal, representation and healthy environment.

V. PROTECTION OF CONSUMERS IN INDIA

In the second half of 19th century it was felt that existing legal provisions administrative methods and judicial norms available to consumers were not effectively providing redressal to consumers. The enactment of the Consumer Protection Act 1986 was an important milestone in the history of consumer movement in the country. It can be said to be a boon for the Indian consumers. The Act was made to provide for better protection and promotion of consumers rights through establishment of Consumer Protection Councils and Quasi Judicial Machinery. This Act has been amended from time to time to bring it in accordance with changes brought about by economic liberalization, globalization of markets and digitalization of products and services[32]. However its practical implementation was far from fulfilling its desired objective of being a socio-economic legislation which sought to provide

29. International Organization of Consumers Union was Constituted in 1960
30. International Chamber of Commerce established in 1920 in Paris
31. UN Guidelines for consumer protection, Resolution No. 39/348 dated April 9, 1985
32. Satvik Verma, Bar & Bench, Consumer Protection Act 2019 : Enhancing Consumer Rights, Sept. 2019

for better protection of interests of consumers.

Now a new phase in consumer movement in India has begun with the parliament passing the Consumer Protection Act 2019 and making the consumers more powerful than before[33]. The C.P. Act 2019 provides for consumers interest and establishes authorities for timely and effective administration and settlement of disputes. This Act has substantially enhanced the scope of protection afforded to consumers by bringing within its purview advertising claims endorsements and product liability, all of which play a fundamental role in altering consumer behavior and retail trends in 21st century[34]. At this stage consumer markets witnessed drastic transformation with the emergence of global supply chain, rise in international trade and rapid development of E-commerce leading to new delivery system besides new options and opportunities for consumers. This act makes provisions for punishment regarding UTP and misleading advertisements and many more changes which keep the rights of the consumers upto date with the contemporary changes in the market. Some of the important new additions are being discussed:

i. Product Liability

A significant addition to the C.P. Act 2019 is the introduction of concept of product liability whereby manufacturers and sellers of products or services have been made responsible to compensate for any harm caused to consumer by defective product or for deficiency in service[35]. For instance if a consumer is harmed by explosion of pressure cooker owing to manufacturing defect, then manufacturer is liable to compensate the consumer for injury. Earlier compensation was in the ambit of time consuming civil courts. Indian courts dealing with product liability have gone much ahead by not applying the exceptions to the strict liability as laid down in the *Ryland v Fletcher case*[36]. It has come to be established in India through the decision given by Supreme Court in M.C. Mehta V. Union of India[37] case that in case of consumers suffering there will be

33. Vipin Kumar and Adya Sharma "Strengthening Consumer Rights: The Advent of Consumer Protection Act 2019" available at *http://ssrn.com/abstract*
34. Supra note 32 at 2.
35. Chapter VI of C.P. Act, 2019
36. (1868) L.R. 3 H.L. 330
37. AIR 1987, S.C. 1086

absolute liability. Different from negligence based liability of earlier consumer law the C.P. Act 2019 imposes strict liability on manufacturers of defective products for harm caused by those products.

Designing defect of a product has also been codified to be a part of the product liability[38]. This means that even a product is free from manufacturing defect but has a faulty design, it would be ground for product liability as product manufacturer. The expectations from a service provider are higher and standards are stricter. The Act provides that a product service provider shall be liable for providing imperfect, deficient, inadequate service or for being negligent[39]. This would include a seller on an e-commerce platform as well as the e-commerce platform themselves. Also the law explicitly provides the break-up of liabilities of the product manufacturer, product service provider and product seller[40]. Considering the fact that product manufacturer and product seller are defined separately, the commission may hold both of them jointly and severally liable, as the case may be.

ii. Separate Regulatory Authority

An endeavour has been made under the new Act to provide a separate regulator for protection of interest of consumers[41]. Central Consumer Protection Authority (Authority) shall consist of a Chief Commissioner and such number of other commissioner as may be prescribed, to exercise the powers and discharge the functions under the Act[42]. The Central Authority has to regulate matters relating to violation of rights of consumers, unfair trade practices and false or misleading advertisements which are prejudicial to the interests of public and consumers and to promote, protect and enforce the rights of consumers as a class[43]. To enforce this provision, the Authority is empowered to inquire and investigate through a dedicated investigative wing set-up headed by a Director-General, similar to the competition commission[44]. The

38. The Consumer Protection Act, 2019, s. 2(36)(V)
39. Id, s. 2(11)(i)
40. Id, ss.84, 85, 86
41. Id, s.10
42. Id. s.10(2)
43. Id, s.10(1)
44. Id, s. 15

establishment of a regulator along with an investigative wing shall prove to be a major milestone in the protection of consumer rights.

Central Authority is empowered to conduct investigations into violations and institute complaints / prosecution, order recall of unsafe goods and services, order discontinuance of unfair trade practices and misleading advertisements, order reimbursement of the price paid and impose penalties for misleading advertisements[45]. Additionally the Authority can also file complaints and intervene in matters before the consumer commissions. Central Authority has the power to inquire or investigate into matters *suo- moto* or on a complaint received or on the direction of the central government. While conducting an investigation after preliminary inquiry officers of the investigation wing will have the power to enter any premise and search for any document or article and to seize them[46]. Earlier there were no specific rules pertaining to recall of product and withdrawal of services. The new Act empowers the Authority to order the recalling of goods or withdrawal of services which are dangerous, hazardous or unsafe. Non-compliance of such recall orders shall be punished with imprisonment up to 6 months or with fine up to Rs. 20 Lakhs. The only remedy against such order is an appeal before National Consumer Disputes Redressal Commission within 30 days[47].

iii. Consumer Redressal Commissions

The three tier consumer disputes redressal forums have been retained under the new Act[48]. However the pecuniary jurisdiction i.e. monetary value of complaints that can be entertained, have been substantially increased to reduce the burden of state and National Commissions. Now district commissions are empowered to dispose the matters of value of up to Rs. 1 crore[49]. As far the territorial jurisdiction there is a major change to ease the burden on consumers, now they can institute complaints at the place where they reside and not be compelled to go to other places to pursue their complaints. In the earlier law complaints had to be instituted where opposite party resides or conducted business or where

45. Id, 18, 20, 21
46. Id, s. 22.
47. Id, s. 24.
48. Id, ss 28,42 & 53.
49. Id, ss 47 & 58.

the cause of action arose. In the new enactment the complaints are allowed to be made where complainant resides or personally works for gain.

The admissibility of complaints are to be decided within 21 days. If the issue of admissibility is not decided within such time, the complaint shall be deemed to have been admitted. In contract to 1986 Act, appeals from State Commission to National Commission may be made only when they involve substantial questions of law[50]. Appeals from National Commission to Supreme Court can only be made against complaints which originated in National Commission. With a view to tightening the nose regarding timely filing of appeals, the period prescribed for preferring appeals has now been made more stringent. Provisions for electronic filing of complaints and video-conferencing will make procedural ease and reduce inconvenience. The District, State and National Commissions shall have the power to review any of the order passed by them if there is an error apparent on the fact of the record, either on their own motion or on an application made by any of the parties[51].

iv. Consumer Mediation Cell

Indian judicial system faces the problem of delay in procedure of settlement. Parties to the litigation have to wait for several years for their rights. Keeping in view the pendency of judicial system the new Act proposes the establishment of Mediation cells. Thus it has alternate dispute resolution mechanism to ensure timely settlement of dispute and to reduce the pressure on consumer commissions. These mediation cells shall be attached to the district commissions, state commissions and national commission[52]. Mediation cells under the aegis of the CDRC either in whole or in parts resolve the disputes[53]. These cells will fasten the process of settling the consumer disputes as the parties can approach the mediation cells any time between the arguments. Where ever scope for early settlement exists and parties agree for it, the dispute can be resolved by Consumer Mediation Cell and there will be no appeal against such settlement.

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50. Ibid, s. 51(4).
51. Id. ss. 40, 50 and 60
52. Id, ss. 74(1) & (2)
53. Id, ss. 79(1) & 80(1)

Every consumer mediation cell shall maintain a list of empanelled mediators and the list of cases handled by the cell[54]. The concerned commission shall nominate any person from the panel of mediators as the mediator[55]. Pursuant to mediation the mediator shall prepare a settlement report and forward the signed agreement along with such report to the concerned commission[56]. The concerned commission shall pass suitable order on the basis of settlement report and dispose of the matter accordingly[57].

v. *Misleading advertisements*

One of the biggest changes sought to be brought about by C.P. Act 2019 is with respect to authenticity and accountability attached to advertisements. Defining the 'misleading advertisement'[58] The Central Authority has been empowered to ensure that no false or misleading advertisement is made in contravention of the provisions of the Act and to ensure that no person takes part in the publication of false and misleading advertisement[59]. Central Authority is empowered to take actions against false or misleading advertisements. It may impose a penalty of up to 10 lakh rupees in respect of such false or misleading advertisement by a manufacturer or an endorser[60]. In case non compliance of above order, they shall be punished with imprisonment for a term which may extend to six month or with fine up to Rs. Twenty lakh or with both[61]. The law offers strict punishment for false or misleading advertisement to the extent of imprisonment for a term up to two years and with maximum fine of ten lakh rupees[62]. Also now celebrities acting as brand ambassadors will have to exercise due diligence to verify the veracity of the claims made in the advertisement before endorsing the same[63].

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54. Id, s. 74(4)
55. Id, s. 76
56. Id, s. 80(2)
57. Id, s. 80(1)
58. Id, s. 2(28)
59. Id, s. 18(c) & (d)
60. Id, s. 21(2)
61. Id, s. 88
62. Id, s. 89
63. Id, s. 21(5)

VI. PROTECTION OF CONSUMERS UNDER COMPETITION LAW

A major change in the consumer justice system in India has been brought in through the replacement of MRTP Act 1969[64] by a new enactment named competition Act 2002[64]. Thus the relevant provisions and role of competition law from the consumer's angle is expedient to be discussed. The Act is relevant for the purpose of discussion as it also ensures the protection of consumers by regulating competition in the market which according to established principles of economics automatically provides a beneficial market to the consumers[65]. Protection of interest of the consumer's is a central aspect of competition law as well as direct aim of consumer protection law. Despite their close proximity, competition law and consumer protection law are distinct areas of law with different underlying theories of harm and objective Consumer protection laws are based on the premise that consumers are the weaker party and require direct protection in the dealings by enforcing consumer rights. Competition law indirectly protects the consumer's economic well being by ensuring that the markets are subject to effective competition[66].

Both competition and consumer protection law embrace the interests of the consumer but in different ways. The Consumer Protection Act 2019 does so explicitly while Competition Act 2002 does so by necessary implication, since any trade or business ultimately results in the provision of goods or services to the consumer. Earlier to enactment of Competition Act 2002, UTPs were included within the scope of MRTP Act in 1984 on the recommendations of Sachar Committee[67]. Again scope of the UTPs was broadened in 1991 and rendered the list of UTPs under MRTP Act non-exhaustive[68]. The consumer Act 1986 was to become a parallel legislation for regulating UTPs. But a significant similarity between MRTP Act and Consumer Act was on the issue of Status of Consumers.

64. The Act replaced the earlier enactment on the subject, Monopolies and Restrictive Trade Practices Act 1969.
65. The aims and objectives of the Competition Act 2002
66. Nathani, S and Akman, "The Interplay between consumer protection and competition law in India" *Journal of Antitrust Enforcement* p-2. (2017) 5(2),
67. Report of the High Power Expert Committee under the chairmanship of Rajinder Sachar J
68. The Monopolies and Restrictive Trade Practices Act (Amendment) Act 1991 w.e.f. 27 Sept. 1991.

Consumer Act did not protect the commercial consumers and MRTP Act did not define the consumer. On the basis of similarity of UTPs in both the Acts court relied on the definition of consumers in the consumer Act[69]. Thus neither statute protected the consumers against UTP in commercial sale.

With the liberalization of Indian economy in 1991 and trade protectionism under the WTO, the scope of existing market regulation law (MRTP Act) was found to be insufficient to deal with the competition from globalised trade. The Government of India set up a committee under chairmanship of Mr. SVS Raghavan in 1999 to suggest the measures to adopt a more robust competition policy[70]. The committee proposed that CCI to be established under the new statute to deal with monopolistic and RTPs while UTPs were to be transferred to the adjudicatory machinery under consumer Act. The committee suggested that the ultimate raison *d'etre* of the competition is the interest of consumers. Thus competition policy should have the positive objective of promoting consumer welfare[71].

The important difference between the two Acts is treatment of the consumer. The Consumer Act addresses consumer disputes against traders directly while competition Act addresses consumer welfare indirectly by ensuring more choices to consumers. This distinction is clear from grievance redressal functions under both the statutes. If a person buys goods for commercial purpose can not avail remedy under consumer Act Similarly a consumer can not trigger adjudicatory machinery under the competition Act[72]. In practice this distinction is often blurred. A significant example of direct regulation in favour of the consumer in DLF case[73], wherein, certain apartment owners challenged the Standard form Agreement of DLF. In this case CCI imposed penalty and directed to cease and desist the unfair terms in the agreement.

Thus there was a need to introduce certain level of market regulation in favour of the consumer in the existing system. Fortunately this has been conceptualized under the CP Act 2019 through CCPA to promote,

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69. AIR 1989, Delhi 329, 1988, 64 Comp case 884 Delhi.
70. SVS Raghavan Committee on *Competition Policy & Law*
71. Ibid, 1.1.9 – 1.2.1
72. The Competition Act 2002, s. 26(1)
73. *Belaire Owners Association v DLF Ltd*, CCI Order dated 12 Aug. 2011

protect and enforce the rights of consumers. In India the powers of CCPA are akin to CCI to look specifically at consumer issues to ensure that consumer interest is preserved both in terms of consumer protection by CCPA and consumer welfare through CCI[74].

VI. CONCLUSION

Business in India and world over lure the customers by advertisements, offers, discounts etc. However there are instances wherein qualities of product / service and after sales services do not meet the expectations of the consumers. The consumer markets witnessed drastic transformation with the emergence of global supply chain, rise in international trade and rapid development of e-commerce leading to new delivery system besides new options and opportunities for consumers. In this background there are two strong enactments to keep the pace with the changing scenario and providing new dimensions of consumer justice system in the country. All these changes signify an attempt to create more transparency in the market place through legislative protection, with a view to ensure that consumer interests are above all. The new act is armed with central regulatory authority with punishing power for false and misleading advertisements and provision for alternate dispute resolution mechanism for consumers. All in all the 2019 act is a positive step towards reformation and development of consumer laws but the real test of its implementations and some leeway needs to be given for it to actualize the relief for the consumers. This act may have wide ramifications on businesses. In conclusion it can be said that the consumer rights in India have started to get huge importance which in turn has put more liability and responsibility on businesses.

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74. Supra 66 at 18

DISCUSSION ON PROTECTION OF COPYRIGHT IN DESIGN : INTERPLAY AND APPLICABILITY OF ORDER VII RULE 11 OF CODE OF CIVIL PROCEDURE *VIS-A-VIS* COPYRIGHT ACT 1957 IN INDIA

KAUSHAL JAYENDRA THAKER*

ABSTRACT : This Article, as the title goes, takes into its sweep the applicability of procedural law embodied in Order 7 Rule 11 of the Code of Civil Procedure, 1908, especially the Intellectual Property Rights regime more particularly its applicability to the Copyright Act, 1957 and the Designs Act 2000. The Article discusses the importance of Copyright *vis-a-vis* the exceptions to the benefit granted under the said legislation. The write up also discusses the approach of the Court in applying provisions of Order 7 Rule 11 to such litigations. The Article focuses mainly on the over lapping of provisions of the Designs Act to negate the rights conferred to a party under the Copyright Act and highlights the judgments relating to the Order 7, Rule 11, and its applicability or otherwise to such litigations.

KEY WORDS : Copyright, Designs, IPR, CPC, Order 7 Rule 11

PRELUDE

Ubi-jus-ibi-remediumis is a golden maxim. It is true that where there is right, there is remedy. This write-up conveys that where there is no right, there can be no challenge and if there is challenge, it should be dismissed at the threshold by taking the aid of procedural laws.

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I. INTRODUCTION

The regime of Intellectual Property rights during the last few years has shown us that our planet has technologically advanced. The litigations in this branch occupy one third of law journals. The Indian judiciary has tried to protect Intellectual Property Rights (IPR) by balancing the rights and obligations of people while giving importance to public policy of India. Even Basmati rice cropped in India, its abundance is in India, but it was tried to be patented by United States of America. This fact was brought to the notice of the Apex Court in *Research Foundation of Technology and Economy v Minister of Agriculture*[1].

This is descriptive, expository, and narrative, article to explain meant and penned to clarify and explicate that at times procedural law can inject substantive right. The law expounded to save rights and corresponding duties is discussed in this write up. The applicability of the provisions of the Order 7 Rule 11 of the Civil Procedure Code, 1908 is to challenge infringements under the IPR regime. The Indian regime follows the fundamental rule of copyright law laid down in Article 9(2) of Trade Related Intellectual Property Rights (TRIPs) and Article 2 of WIPO Copyright Treaty (WCT).This article takes within its sweep procedural aspect of ascertaining and negating the rights under the IPR more particularly Copyright Act, 1957 (Copyright Act) read with Designs Act, 2000 (Designs Act) and applicability or overlapping of the two legislations after the 2012 amendment to Copyright Act. The law expounded to save rights and corresponding exceptions is discussed in this essay.

II. BRIEF HISTORY OF THE LEGISLATIONS

In India, Copyright and Design Laws were being governed by the Copyright Act, 1911 and the Designs Act, 1911 respectiviley. Later, the Imperial Act was replaced by 1914 Act. In the Copyright Act, 1914, "Artistic Work" was defined in Section 35, which was not including a diagram, map, chart, or plan. At the same time in the Designs Act, 1911, the "Design" was defined in Section 2(5), which was not excluding the artistic work, as defined under the Copyright Act. Copyright is an automatic

1. 1999 (1) SCC 655

right which protects original literary, dramatic, musical, and artistic works. Copyright is an inherent right, whereas the design is a statutory right. An owner of a design will have to forego protection under copyright law once the design has been granted registration.

India became signatory to WTO and signed GATT (General Agreements on Trade and Treaty). GATT includes 22 different agreements, one of which is TRIPS, i.e., Trade related aspects of Intellectual Property Rights, in the year 1994. Article 9 of Section 1 of Part II of TRIPS is for Copyright and related rights, which provides for the member countries to comply Article 1 to 21 of the Berne Convention, 1971 and appendix thereto. Now, Berne Convention constituted the definition of "Literary and Artistic works" in Article 2, which included maps, plans, sketches, and such other works, perhaps for the first time amongst international affairs. As per Article 51(c) of the Constitution of India, the state shall endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another. Now, the Designs Act, 2000 replaced the Designs Act, 1911, with a view to give effect of the GATT Agreements and further, the Copyright Act is substantially amended in the year 2012 to be at par with the above International Treaties. The Supreme Court of India has given guidance to follow the International Law and Treaty obligations in the case of *GM Exports*[2]. The provisions of the Copyright and Design Laws need to be interpreted accordingly.

Copyright is an automatic right which protects original literary, dramatic, musical, and artistic works. Copyright is an inherent right, whereas the design is a statutory right. An owner of a design will have to forego protection under copyright law once the design has been granted registration.

III. IMPORTANCE OF COPYRIGHT

Foremost amongst the IPR is copyright, importance of which is sought to be protected in India since 1911. It can be seen by analysing the provisions and decisions of the Indian courts that they try to work out balance between the competing values of the parties. The freedom of doing business must be in public interest and cannot infringe rights of

2. *G.M. Exports v. Commissioner of Customs, Bangalore* 2016 (1) SCC 91

others to do business. The term copyright has its genesis in property rights, they are rights which a person who has created and innovated in the realm of outcome of knowledge or information which is/has original brain creation. Such originality requires to be protected as they are not only ideas but innovative ideas. As far as copyright is concerned, Section 13 of the Copyright Act mentions about works in which copyright would subsist. The section starts with a non-obstante clause wherein it legislated that copyright would subsist not only in one state but throughout India. It specifies classes of works also and subparagraphs 2 mentions and illustrates wherein and what work copyright would not subsist.

The term copyright is defined by means of insertions of section 14 which enumerates the term copyright. The Copyright Act (as amended in 2012) provides for application of copyright laws in India. The Copyright Act protects original literary, dramatic, musical and artistic works and cinematograph films and sound recordings from unauthorized uses. Under Section 13 of the Copyright Act, copyright protection is conferred on literary works, dramatic works, musical works, artistic works, cinematograph films and sound recording. Copyright protection is conferred to all original literary, artistic, musical, or dramatic, cinematograph and sound recording work. The terms 'map', 'chart', 'industrial drawings' etc. shall be included in definition of "Artistic Work" embodied in Section 2(c) of the Copyright Act. The protection under the Copyright Act would be available to a person when any article is manufactured by other person from such original artistic work/ drawings.

It is a universally accepted principle that copyright law is not intended to protect ideas themselves. Only the expression of one's ideas in a particular form attracts protection under the copyright law[3] and, therefore, it is artistic skill which must be protected. The copyright and the law pertaining to copyright can be said to be for the benefit of creators of original material from unauthorized use. As far as copyright is concerned it must be in a tangible form. Copyright is a form of legal protection for certain types of intellectual properties. The heart of copyright is "creative and original work" ideas and concepts are not protected under the Copyright Act. An idea which is metamorphosed creativity of steps will

3. N.S. Gopala krishnan and T.G. Aagitha, *Principles of Intellectual Property,*2nd edn, 2014 EBC

receive protection. Copyright once given it protects indefinite times. While going through the subject of Cyber laws, the author came across two recent judgments one claiming what can be said to be in the old parlance challenging non-grant of return of machinery and parts which was said to be creative skilled and ability which falls within the Cyber laws these days and which is in the realm of intellectual property rights which was for restoration and delivery of possession of machine to the original copyright holder of artistic work. Though, the dispute was in the realm of criminal jurisdiction, the decision in *Gurukrupa Mech Tech Pvt. Ltd. Through its Director Subhash chandra Shavjibhai Padasumbiya* v *State of Gujarat*[4] assumes importance.

IV. ROLE OF INDIAN JUDICIARY IN THE MATTERS CONCERNING COPYRIGHT LAW IN INDIA

Now, the dispute which arose before various High Courts was whether the industrial drawing/s, which is/ can be converted into "article" [as defined in Section 2(a) of the Designs Act], would be covered by provisions of Section 15(2) of the Copyright Act or not? Can there be simultaneous protection under Copyright Act qua the original drawing and under the Designs Act also to the article? Law of Copyright does not protect ideas but tangible creations and original work for example drawing and software code. Copyright owner has certain rights embodied namely Business Assets Auxiliary equipment.

There is a sharp cleavage of opinion amongst various High Courts on the question posed for the write up. Delhi High Court has taken a view that the copyright in original drawings/ design when converted into article, then Section 15(2) of the Copyright shall be applicable and there shall not be any protection after 50 articles are manufactured, to which copyright in design is applied, if such design is not registered under the Designs Act. The lead judgment on the issue is *Micro fibres Inc. v Girdhar & Co. and Anr*[5]. The said judgment is followed in several cases, thereafter by the Delhi High Court and the Maharastra High Court in the case of *Indiana Gratings Pvt. Ltd. v Anand Udhyog Fabricators Pvt. Ltd.*[6] has opined

4. 2018(0)AIJELK-HC-239310
5. 2009 (40) PTC 519 (Del) (DB)
6. 2009 (39) PTC 609

otherwise. However, the in-depth discussion is not made as the decision does not relate to Order 7 Rule 11, CPC and its applicability to the copyright litigation. The Court of Gujarat has taken a view *in-line* with the view taken by the Division Bench of Delhi High Court in the case of *Micro Fibres INC*. Two of such precedents are: (i) *Devendra Somabhai Naik v Accurate Transhead Pvt Ltd*[7] and (ii) *Ipeg Inc. and Ors* v *Kay Bee Engineering and Anr*[8] The SLP against the above judgment of IPEG (supra) of High Court of Gujarat[9] is dismissed on merits by observing that the court was convinced that no interference is necessary, the above judgment of *Microfiber INC*. of the Delhi High Court is lead judgment on the issue. The said judgment was in respect of design of floral print printed on the curtain and thus, design was converted into article for commercial use. Later on the Delhi High Court in the case of *J.C. Bamford Excavators Limited v Bull Machines Pvt. Ltd*[10].11, opined that a just because parts of the product have been manufactured by an industrial process for more than fifty times it would not necessarily lead to the conclusion that the copyright in the technical drawings of the said parts has ceased to exists.

The above judgment of J. C. Bamford is pending for adjudication before the apex court[11], notice is issued after recording the submission that the application under Order 39 Rule 1 of CPC, was dismissed by consent and there is no purpose in continuing the suit. The decision is not taken for elaborate discussion as it is *sub judice* before the apex court.

The High Court of Gujarat has considered the aspect of applicability of Section 15(2) of the Copyright Act *viz-a-viz* industrial designs in Criminal Matter, i.e. in the matter of *Gurukrupa Mech Tech Pvt. Ltd. v State of Gujarat and Ors*[12]. This judgment of Gujarat High Court in the case of Gurukrupa is challenged before the Supreme Court[13] , which is pending for adjudication without any interim relief and hence the author

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7. 2005 (31) PTC 172 (Guj) (DB)
8. AIR 2016 Guj104
9. SLP (Civil) No. 18859 of 2016 order dated 29.3.2019
10. SCC Online Del 12700: 2006 (33) PTC 161,
11. SLP (C) no. 7518-7519 of 2018 where vide order dated 28.3.2018
12. (2018) 59 (4) GLR 3324
13. SLP (Criminal) no. 7951 to 7953 of 2018

does not delve further on the merits of the said decision. Further, one of the judgments of the High Court of Delhi deals with the overlapping nature of statutory protection under the Copyright Act and the Designs Act, in the case of *M/s Dart Industries Inc and Anr v M/s Techno Plast and Ors*[14], wherein the Court held that (a) it is not suggested that if any design is registered, copyright under no circumstance exists in the drawings. Section 15 lays down that on registration of a design under the Designs Act, the copyright shall not subsist in that design and not in the drawings.

V. EXCEPTIONS UNDER THE COPYRIGHT LAW IN INDIA

Challenge to intellectual property rights unlike disputes for property rights are normally fraught by showing that the other persons' intelligence is superior but, at the same times, procedure injects the endeavour of the person to assert these rights. The procedural barriers are also not decided at preliminary hearing in such disputes but may be immediately after the other side is served with notice or summons as may be the local procedure. The court, if confronted with an application under Order 7 Rule 11 of the CPC, will be under an obligation to first decide the said application and it would be only thereafter if the court is not satisfied that application under Order 7 Rule 11 requires to be allowed, the Court will permit the defendants to file their reply/ written statements, but if the court is satisfied, it may and should decide the application under Order 7 rule 11 of CPC which is mandatory for the Court. As the titles suggests, this article takes the reader to interplay of procedure with IPR more particularly copyright read with designs. Section 15(2) of the Copyright Act has been brought on the statute book in the year 1958 and importance of copyright is now considered a part of Cyber jurisprudence. In the year 2000, new Designs Act replaced Designs Act of 1911.

There are rights which help innovative ideas being protected and development is encouraged. The creation of mind has to be own and that has to be protected. The Copyright Act came to be amended in 2012 and section 15 came to be amended. The distinction reads as follows:

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14. 2007 (35) PTC 129 (Del)

The Copyright Act, 1957 Sec. 15 (2) before amendment : Copyright in any design, which is capable of being registered under the [3][***][4] Designs Act, 1911 (2 of 1911), but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright or, with his licence, by any other person.	**The Copyright Act, 1957 Sec. 15 (2) after 21.6.2012** : Copyright in any design, which is capable of being registered under the Designs Act, 2000 (16 of 2000), but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright or, with his licence, by any other person.

The Designs Act grants statutory protection under section 22 of the Act against the piracy of registered design. "Design" is defined under section 2(d)[15] of the Designs Act.

The discussion in this article rotates around the interpretation of Section 15(2) read with Section 52 of 1957 Act and applicability of Order 7 Rule 11 of the Code of Civil Procedure 1908. The Copyright Act, 1957 has to be read with Act, 2000. Section 15(2) of the Copyright Act 1957 provides for special provisions regarding copyright in designs, which would partake Section 15[16].

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15. Section 2(d)-"design" means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of the Trade and Merchandise Marks Act, 1958 (43 of 1958) or property mark as defined in section 479 of the Indian Penal Code (45 of 1860) or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957 (14 of 1957)

16. Special provision regarding Copyright in designs registered or capable of being registered under the 3 [***] 4 [Designs Act, 2000 (16 of 2000)].—

(1) Copyright shall not subsist under this Act in any design which is registered under the 3 [***] 4 [Designs Act, 2000 (16 of 2000)].

(2) Copyright in any design, which is capable of being registered under the 3 [***] 4 [Designs Act, 2000 (16 of 2000)] but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright or, with his

(i)Section 15(2) and 52 of the Copyright Act and their interpretation

The question which this article tries to address is whether industrial drawing(s), which can be converted into "article" as defined under the Designs Act, would be covered within the sweep of Section 15(2) of the Copyright Act or not? Whether there is simultaneous protection under the Copyright Act the original drawing and as also under the Designs Act to the article and applicability of Order 7 Rule 11 of C.P.C.? The rights under the Copyright Act is covered by the definition of the term copyright as defined in Section 14 (c) of the Copyright Act which would mean exclusive right subject to the provisions of the Act which would take within itself following acts in respect of work or any substantial part thereof which enumerates about other six items enumerated in section 2(c) of the Copyright Act which reads as follows and it has to be read in conjunction to Section 2(d) of the Designs Act. The term artistic work means (i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan, an engraving, or a photograph), whether any such work possesses artistic quality; (ii) a work of architecture; and (iii) any other work of artistic craftsmanship.

The term 'Design' work means the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by an industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of sub-section (1) of Section 2 of the Trade and Merchandise Marks Act, 1958 or property mark as defined in Section 479 of the Indian Penal Code or any artistic work as defined in clause (c) of Section 2 of the Copyright Act. Section 52 legislates that certain acts would not be infringement of copyright including (w) the making of a three dimensional object from a two dimensional artistic work, such as a technical drawing, for the purpose of industrial application of any purely functional part of a useful device.

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licence, by any other person. 3. The words "Indian Patents and" omitted by Act 23 of 1983, s. 7 (w.e.f. 9-8-1984); 4.Subs. by Act 27 of 2012, s. 6, for "Designs Act, 1911 (2 of 1911)" (w.e.f. 21-6-2012)

The test would mean "purely functional nature". Thus, out of entire drawing, if any part satisfies the functionality test, then *qua* that part there would be no infringement, other interpretation would make the entire Copyright Act nugatory and even the copyright in design shall not be available for first fifty articles to which design is applied, as per section 15 (2) of the Copyright Act itself. The High Court of Gujarat in the case titled *Symphony Ltd v Wim Plast Ltd*[17] has considered the aspect of "Functionality" test. The Division Bench in *Wim Plast Ltd and Anr v M/ S Symphony Ltd*[18] has held that the functional test can be applied if section 15 (2) and sections 52 of the Copyright Act does not apply.

(ii) Comparative provisions of Copyright the legislation and the Designs Act

In the Copyright Act, 1914 definition of "Artistic Work" is embodied under Section 35 , whereas in the Copyright Act, 1957 definition of "Artistic Work" under Section 2(c) "Artistic work" includes works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs. Section 15(2) (after 21.6.2012 amendment) would mean copyright in any design, which is capable of being registered under the Designs Act, 1911 (2 of 1911), but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced for more than fifty times by an industrial process by the owner of the copyright or, with his license, by any other person and copyright in any design, which is capable of being registered under the Designs Act, 2000 (16 of 2000), but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright or, with his license, by any other person.

In the Designs Act 1911, (the Designs Act, 2000), Section 2(5) defines "design," wherein it was defined to mean only the features of shape, configuration, pattern or ornament applied to any article by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of

17. C/SCA/4624/2015
18. 2016 (67) PTC (Guj)

construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of the Trade and Merchandise Marks Act, 1958, or property mark as defined in section 479 of the Indian Penal Code (45 of 1860) and Section 2(d) defines "design" which means only the features of shape, configuration, pattern, ornament or composition of lines or colors applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means,-whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (c) of sub-sec. (1) of Sec. 2 of the Trade and Merchandise Marks Act, 1958 (43 of 1958) or property mark as defined in Sec. 479 of the Indian Penal Code or any artistic work as defined in clause (c) of Section 2 of the Copyright Act, 1957 (14 of 1957).

VI. PROVISIONS OF THE ORDER 7 RULE 11 OF THE CODE OF CIVIL PROCEDURE

The importance of the Order 7 Rule 11 of CPC is recently spelled by the apex court in *Dahiben v Arvindbhai K Bhanushali*[19] wherein the apex court has held that rejection of plaint may be on the grounds of delay in the said matter. However, it has held that remedy under Order 7 Rule 11 is an independent and special remedy, wherein court is empowered to summarily dismiss a suit at threshold, without proceeding to record evidence, and conducting trial without recording of evidence, if it is satisfied that action should be terminated on any of the grounds contained in this provision namely underlying object of Order 7 Rule 11 (a) is that if in a suit, no cause of action is disclosed, or suit is barred by limitation under rule 11(d), court would not permit plaintiff to unnecessarily protract the proceedings in suit – in such a case, it would be necessary to put an end to litigation, so that further judicial time is not wasted. This remedy is a very drastic remedy and, therefore, Order 7 rule 11 CPC along with Rule 14 of CPC provide for production of documents by the plaintiff on which he relies if the documents form part of the plaint and makes out a

19. 2020 (7) JT 101: AIR 2020 SC 3310

cause of action in conjunction with facts narrated, the Court will scrutinize the averments and decide the lies.

The mandate of Order 7 Rule 11 of CPC uses the word "shall", this shall has to be on the basis of the non-disclosure and or grounds as mentioned in any of the clauses is made good by the defendant and or the Court in its opinion comes to the conclusion that the grounds are made out it has to terminate a civil action at the threshold. The plaint would not be returned but rejected. Reference to the decision in *Jageswari Devi v Shatrughan Ram*[20] is very important where it is held that there is a difference between (a) Non-disclosure of a cause of action and (b) defective cause of action: while the former comes within the scope of Order 7 Rule 11, the latter is to be decided during trial of the suit. Thus, exercising of power under Order 7 Rule 11 is a drastic power conferred on the court so as to terminate and bring an end to a litigation which has no future.

The focal point to be decided in such litigation is (a) whether the suit is not at all maintainable being barred by law (b) does not disclose real and genuine cause of action to litigate. If this is demonstrated the plaintiff would have no right to sue, either for alleged breach of copyright and that it is clear case of abuse of process of law where the plaint does not disclose "the real cause of action" or the suit is instituted with mala fide intention just to harass the other side and to protract and drag the other side into unnecessary litigation. Order 7 Rule 11 (a) and (d) of the CPC has to be invoked and applied the principle laid down by the apex Court in *Smt. Patasibai and Ors v Ratanlal*[21], which while dealing with Order 7, Rule 11 and rejection of the plaint on the ground that no cause of action was disclosed just because of summon was issued by the trial court if does not require that the trial should proceed even when no triable issue is shown to arise. The question involved in the case was the maintainability of the suit which had given rise to the appeal. The appellants contended that the suit was not maintainable even on the bare reading of plaint. The trial court held the suit to be maintainable and the High Court dismissed the appellant's revision affirming that view. The Supreme Court, however, observed that on the admitted facts contained in the case itself, the counsel for respondent was unable to demonstrate that all or any of

20. 2007(15) SCC 52
21. J.T. 1990 (3) S.C.68: 1990 SCR (1) 172

the inquiries in the action reveal a cause of action giving rise to a triable issue or disputes the unavoidable consequence that the plaint was liable to be dismissed under Order 7, Rule 11 and, since the summons has been issued, the trial must proceed. The Court then held that, :

> In its opinion, it would make no difference that the Trial Court failed to fulfill its function and proceeded to issue summons without carefully reading the plaint and the Superior Court also neglected this fatal defect. Since the claim was suffering from this fatal defect, the mere issuance of a summons by the Trial Court did not require that the trial should proceed, even when it was shown that a non triable issue had arisen, because allowing such action to continue would be tantamount to a frivolous licensing and vexatious litigation that should not be allowed. It is the Court's duty to examine the claim and need not wait until the defendant files a written statement and points out the defect. If the Court, after examining the complaint, concludes that it does not reveal any cause of action, it is justified to eliminate the pleadings Order 6 Rule 16 of the CPC itself gives the power to the Court to eliminate pleadings at any stage of the proceedings. It may even be before the submission of the defendant's written statement. If the Court is satisfied that the plaint does not present any cause of action and that the judgment would prejudice, embarrass and delay the process, the Court need not wait for the filing of the written statement. Instead, it can proceed to hear preliminary objections and eliminate pleadings. If, after eliminating the pleadings, the Court finds that there are no more triable issues to be considered, it has the power to reject the election petition in accordance with Order 7, Rule 11.

Thus, after striking out the pleadings if the Court finds that no cause of action remains to be adjudicated, it would be duty bound to reject the petition under Order 7 Rule 11, CPC The scope and ambit of Order 7 Rule 11 of CPC is laid down by the Supreme Court in the case of *P. V.*

Guru Raj Reddy v P. Neeradha Reddy and *Ors*[22] that rejection of the plaint under Order VII Rule 11 of CPC is a drastic power conferred in the court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order VII Rule 11, therefore, are stringent and have been consistently held to be so by the Court.

VII. APPLICABILITY OF ORDER 7 RULE 11 TO THE MATTERS UNDER THE COPYRIGHT ACT AND THE DESIGNS ACT

The decision in Gurukripa is in the realm of criminal jurisprudence claiming right what can be said to be drawings which are lying with the court and therefore no much deliberation is made in this article but the decision of the Delhi High Court in the case of *Microfibres Inc v Girdhar and Company and Anr*.[23]and the High Court of Gujraat in *Devendra Somabhai Naik v Accurate Transhead Pvt. Ltd*.[24]and *IPEG INC. and Ors v Kay Bee Engineering and Anr*[25]. The SLP against the above judgment of IPEG of High Court of Gujarat vide SLP(Civil) No. 18859 of 2016 is dismissed vide order dated 29.3.2019, assumes importance as the said decision will have a binding effect under Article 142 of the Constitution though it is a judgment in brevity its importance cannot be ignored.

In contradiction, the judgment of *Micro Fibre INC*., the Delhi High Court's judgment is on merits and not rejection of plaint as per Order 7 Rule 11 of CPC. The said judgment is in respect of design of floral print printed on, but the principles enunciated would be throwing light while deciding such a lies the curtain and thus, design was converted into article for commercial use and hence, it is held that no protection could be afforded.

Thus, it would be relevant for us to see whether the principle of overlapping can be made applicable to the term artistic work and section 2(c) of the Copyright Act. While taking within its sphere whether there is an infringement of copyright coupled with a right under the Design Act also, normally, comparing the actual machine and final product which may not ipso facto amount to infringement of copyright. Section 2(c) of

22. 2015 (8) SCC 331
23. 2006 (32) PTC 157 (Del)
24. 2005 (31) PTC 172 (Guj) (DB)
25. Supra 8

the Copyright Act refers to the term artistic work which has to be read with a purposive interpretation of section 15 of the Copyright Act. The artistic work may not have a visual appeal and may be reproduced in another material form. When there is overlapping of copyright with design, it would be provisions of the Design Act which would be applicable. In *Shrauun Kumar Jaipuriyar v Krishna Nandan Singh*[26], the principles therefore would be that the plaintiff has to prove that the alleged copyright inheres and is not barred by any provisions of the copyright or the design act. The purpose of Order 7 Rule 11 CPC shows that cause of action has to be proved just because a work is termed as artistic work would not be sufficient to nullify the provision and the statutory bar imposed under Section 52 of the Act, 1957. The scenario has changed after 2012. The copyright Act in Section 15(2) would be applicable if the work is reproduced in other material form. The design registration in any other country would not bring it out of the term of Section 15(2). A product for example cannot be artistic work under the Copyright Act, as claimed by the appellants. If loader/ receiver is not covered under the definition or artistic work within the definition of Section 2(c) of the Copyright Act 1957 and second in the case titled *Dahiben v Arvindbhai Kalyanji Bhanushali (Gajra) (D) THR LRS and Ors*[27] which related to provisions of Order 7 Rule 11 of the Code of Civil Procedure, 1908. The application of Order 7 of CPC to matters under the intellectual property rights more particularly to two legislation which at time supplement each and for which litigation lies. The Article specially deals with Copyright Act and the Designs Act and non-applicability of the provisions of these Acts and overlapping principles and applicability of Section 15(2) of Copyright Act and Design Act. The provisions of the Copyright and Design Law need to be interpreted accordingly. Therefore, map, chart, industrial drawings, etc. shall be included in "Artistic Work" in Section 2(c) of the Copyright Act and therefore, the protection under the Copyright Act shall be available to a person when any article is manufactured by any person from such original artistic work/ drawing.

In a recent decision under the copyright Act titled *Shakti Bhog Food Industries v the Central Bank of India and Anr*[28] where the term cause of

26. (2020) 16 SCC 594
27. Supra Note 19
28. AIR 2020 SC 271

action has been explained which would mean the bundle of rights and right would subsist in a party. There is lot of interplay between copyright and design Act, and they overlap each other. The artistic work has been qualified and if copyright falls under the design act Section 2(c) of Design Act would be applicable. The purposive interpretation as envisaged in Section 15(2) and the applicability of Order 7 Rule 11 can only be applied if there is no cause of action, the term cause of action will have to be also gone into. The term cause of action has been defined to mean right to sue and it is a synonyms of term cause of action. Cause of action would mean facts or circumstances that would constitute either the violation or basis of a right. More broadly, it is a set of facts that must be proven to have entitled the parties. Without the proof of these essential facts's a plaintiff would not succeed. The apex court has explained what the term cause of action would mean in *Gurdit Singh v Munsha Singh*.[29] Thus, cause of action means any fact that, if analysed, would be necessary for the plaintiff to prove, in order to seek a decree and claim reparation against the defendant. In *Urooj Ahmed v Preethi Kichen Appliances Pvt. Ltd. and Ors*[30] decided by the Division Bench of Madras High Court (in Original side appeal No.40 of 2009), decided on 25.09.2013, the applicability of Order 7 Rule 11 on the ground of lack of territorial jurisdiction was after considering the provisions of the Copyright Act and the Designs Act came to the conclusion that application Order 7 Rule 11 could not be made applicable as the plaintiff had made out a case , thus, only where the plaintiff does not make out a case in any of the provisions enumerated in Order 7 Rule 11, the Court can dismiss the Suit.

Some of the findings in Ipeg Inc[31] case namely paragraph Nos. 26, 31, 32, 33, 35 & 37 would be beneficial to the reader as this case pertains to the interpretation of the meaning of the word "artistic work" under the (Indian) Copyright Act and the term "design" under the Designs Act and the effect of replication of a design for more than 50 times. The applicability of Order 7 Rule 11 of CPC has been held to be applicable in the circumstances as held in the above paragraphs of the aforesaid judgment. The observations in the above paragraphs of the judgment would show

29. (1977) 1 SCC 791
30. 2013 SCC Online Mad 2969: (2013) 6 CTC 247
31. Supra 8

that for invoking stringent and strict provision, defendant has to prove that case falls within the ambit of Order 7 Rule 11 of the CPC.

VIII. CONCLUSION

The interplay of Order VII Rule 11 of the Code of Civil Prodcedure, the right accrued under copyright matters would be invoked where it is shown that there was no cause of action which arose in favour of plaintiff and that the article is a design within the meaning of Section 2(d) of the Designs Act and not an artistic work as per section 2(c) of the Copyright Act. The synthesis between the two Acts is important as opined in *Kusum Ingots and Alloys Ltd v UOI and Ors case*[32] whereby it was held that where there is no disclosure of cause of action, there should be no protraction of litigation. Averments in plaint have to spell out cause of action. Thus, in the end dismissal of suit in a copyright litigation would depend on several aspects. A reference to the apex court's decision confirming the Gujarat High Court's decision in Ipeg Inc[33] , wherein the appeal preferred by the plaintiff against the concurrent findings of the Courts below was rejected as even on merits the apex court was convinced that there was absence of cause of action and therefore the provision of Order 7 Rule 11 had been invoked. This power must be sparingly exercised only with a view to see that the dispute falls within the said provisions otherwise the suit should be set on for hearing. The industrial drawing/ design is capable of being registered, no copyright in the drawings shall subsist as per Section 15 of the Copyright Act. The interpretation can be that drawings may qualify as original work and may be entitled to the copyright protection and registered design for the shape of the article would also be protected under the Designs Act and if an unauthorised copy is made of the article, it may constitute infringement of the copyright in design.

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32. (2004) 6 SCC 254
33. Supra 8

PROBATION OF OFFENDERS IN INDIA IN SOCIO-ECONOMIC CRIMES

PRADEEP KUMAR SINGH*

ABSTRACT : Socio-economic crimes are committed in organized manner directly against society by use of modern know-how causing serious impacts against all social institutions. Effective measures in dealing with traditional crimes may not be sufficient and proper to tackle socio-economic crimes. Reformation and rehabilitation of criminals may be proper way to deal with criminals involved in traditional crime commission but same measure cannot be appropriate in case of socio-economic criminals. Release of offenders on Probation of Good Conduct is a reformative measure used to reform criminals, and thereby prevent crime. Socio-economic criminals commit crimes due to the greed, it is evident that greed is always limitless, thereby, person infested with greed cannot be restrained by reformation but on getting opportunity such person commit the criminal act. Further, for socio-economic crimes minimum and maximum both punishments are prescribed; minimum punishment is mandatory punishment; hereby, it has to be considered that whether release on Probation is permitted for socio-economic criminal.

KEY WORDS : Criminogenic, Causation, Criminality, Minimum punishment, Probation of offenders, reformation, Sentencing

I. INTRODUCTION

Criminal justice system continuously functions to achieve ultimate objective of protection of society and members of society against criminals and criminality. A misconception is usually identified in beginners in

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criminal justice system that for crime tackling whole legal regime has to be focused on crime only, and in such situation criminal justice system becomes completely punishment centric. Proper understanding and knowledge of functioning of criminal justice system may clear the whole perspectives of criminal justice system that effective crime tackling can be achieved by using measures to tackle criminal and criminality. Tackling criminals and criminality is major and primary means to achieve goal of tackling crime, thereby, achieving ultimate goal of protection of society and members of society. Social atmosphere should be non-criminogenic[1] and for it children living in criminogenic atmosphere, near criminals and criminals have to be resocialised, reformed and rehabilitated. Resocialised, reformed and rehabilitated persons are completely devoid of criminality, and thereby, such persons instead of commission of crime may contribute in betterment of society and ultimately crime problem in the society may be properly and effectively tackled. Probation of offenders is one of such modern and effective measures to deal with criminal and criminality and ultimately graver problem of crime.

Probation of offenders is used to reform the criminal by modification and substitution of criminality with sobriety; criminal causing problem to society becomes person contributing in welfare of society and societal members. Impacts of crimes are such serious and graver that the best measure to deal with crime problem is prevention of crime rather than taking action after commission of crime. Criminals have criminality; therefore, even after serving jail sentence, unless his criminality is properly dealt with and reformed, he may on again getting opportunity to commit

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1 . Criminogenic environment is conducive for criminal production. In such environment differential associations are laden with definitions favourable for crime commission, child socialized in such environment may have priority, frequency for personal group giving rationalization and drive for prohibited acts. In such environment socialized person may be prone to have criminal mentality and mature in criminal culture, thereby, criminality is nurtured and ultimately after learning techniques of commission of crime, such person becomes criminal. For tackling crime problem society have to be restructured in planned manner and non-criminogenic environment be created. In Non-criminogenic environment differential associations provide inclination for sobriety, inculcates values for togetherness, and teaches lessons to work for increasing social solidarity. Child socialized in non-criminogenic environment has rationalization and drive to respect for law. Non-criminogenic environment is not conducive for criminality, in non-criminogenic environment criminals are not produced, thereby ultimately crime problem is effectively tackled.

crime have probability of commission of crime. Release of convict on Probation of Good Conduct and during probation period his reformation is effective measure to prevent crime commission in future. But it is pertinent issue whether Probation may be appropriate measure to deal with criminal, criminality and crime commission in socio-economic crime as socio-economic criminal and his criminality is completely different from traditional criminal and his criminality. Traditional crime is primarily committed against individual, only it is deemed to be committed against society. Further, impact of traditional crime is primarily on individual victim and his nearly related persons, only it is deemed to affect the society. In case of traditional crime instead of imposition of sentence release on probation of good conduct may be effective measure to deal with challenges of traditional crimes but same may not be proper for socio-economic crimes. Socio-economic crimes are directly committed against the society, state and public at large which impact is graver and most serious. Further, criminals of socio-economic crimes are different in comparison to criminals of traditional crimes in reference to education, profession, causation, planning, and modus operandi; in such situation need arises for detailed analysis of release of convict in India on Probation in case of socio-economic crimes.

II. PROBATION OF OFFENDERS

For proper and effective tackling of crime challenge instead of mechanistic approach focusing only on crime has to be changed; for effective tackling of crime problem individualized approach focusing on criminal has to be applied. Even for same category of crime, criminal may have varied causation; causation varies with crime and criminal. In such situation dealing with all criminals in mechanistic manner by imposition of punishment on the basis of kind of committed crime completely forgetting individual causation, may be without any result and in some situation may adversely affect too. Crime problem can be tackled only when criminal and causes of criminality are focused to decide measures accordingly for his treatment. Success of criminal justice depends on well articulated and proper determination of treatment to be inflicted whether it should be penal or reformative. Criminal Procedure Code in Section 235 (2), 248 (2) and 325 (3) has provided explicit directions for bifurcated hearing in reference to sentence determination.

For sentence determination separate hearing and considering of factual matrix of case and criminal is necessary at sentencing stage. In Satis bhushan *Bariyar v. State of Maharashtra*[2] Court cleared that there should be separate hearing for sentence, grounds and circumstances material for sentencing are completely different from grounds and circumstances needed for conviction.[3] When on hearing at sentencing stage it is identified that the convict has prospect of reformation, it is more appropriate that he be reformed by releasing him on probation of good conduct.

The term probation is derived from Latin term 'Probatio' which refers to test, try and prove. Probation of offenders is individualized treatment of convict (criminal) in which case court identifies that though convict is proved that he has committed crime but he has prospect of reformation, convict is not punished but released on probation for certain specified period under supervision of probation officer. During probation period convict tries to reform himself with the help of probation officer, he is tested whether he is reformed and on proving that he is reformed and now he is law abiding person with good conduct. On such proving he is finally released from action in the case and completely absolved from criminal liability. Edwin H. Sutherland observes about probation of offenders:

> "…Probation methods represent a distinct break with the classical theory on which the criminal law is based, for an attempt is made to deal with offenders, as individual rather than as classes or concepts, to select certain offenders who be expected with assistance, to change their attitudes and habits while residing in

2. (2009) 6 SCC498

3. In criminal case trial bifurcated hearing is necessary, otherwise whole proceeding may be vitiated. Factors and evidences relevant at the two stages of trial are different and independent. At conviction stage of trial issues before court are – who committed crime, which crime was committed, how crime was committed, what was motive of commission of crime, and evidences are taken for aforesaid issues determination. At sentencing stage issues before court are – whether convict has prospect of reformation or not, socialisation history of convict, family background, education, maturity in criminal culture of convict and state of his criminality, impact of crime commission on society, rate of crime, fear created in society, brutality in crime commission, impact of crime on victim. For proving issues at both stages of trial of case evidences and arguments are separate and independent.

> the free community…Probation thus is a system for implementing the treatment reaction to law breaking. It does not attempt to make the offender suffer; it attempts to prevent him from suffering."

Measure of probation of offenders is provided in Section 4 of the Probation of Offenders Act 1958 (hereinafter referred as POA). Section 4, POA provides that after conviction in the case for offence not punishable with death or life imprisonment when Court has considered circumstances of case including nature of offence and the character of offender, thereby court has opinion that it is expedient to release the convict on probation of good conduct then Court instead of sentencing release the convict on Probation of Good Conduct. Probation period may be up to three years as determined by the Court. Further, Court may pass supervision order also and direct that the probationer be placed under supervision of Probation Officer. Each and every convict is not released on probation; explicitly it is made inapplicable for serious offences and in this regard offence referred as punishable by death sentence or life imprisonment, and Further, Section 4, POA directs for other offences that Court has to take into consideration nature of offence, thereby, when offence is serious on any other ground like its causation, impact, modus operandi or brutality then also probation cannot be granted. Furthermore, Court is directed to consider character of accused person also, thereby, Court has to consider what is situation of criminality of accused, his socialisation related problems, and possibility of repetition of crime. Not only interest of offender has to be considered but Section 4 (1) r/w 4 (2) and (3) provide directives that dominant consideration is public interest. Section 6 POA is special provision applicable for offender under age of 21 years for release on Probation of Good Conduct. When criminal is under 21 years age, Section 6, POA directs for mandatory considering for releasing on probation of good conduct; here it has to be clear that it is not mandatory provision for grant of probation but mandatory provision for considering for grant of probation. Section, 6 POA no doubt directs that considering for grant of probation should be tilted towards releasing on probation. In Section, 6 POA considering of report of Probation Officer is necessary requisite before the refusal to release on probation. Generally, confusion erupt that section, 6 POA provides compulsorily probation to person of younger age but proper analysis completely clear that there is no such

compulsive provision, it is only compulsive to consider the matter of probation with inclination to grant but there is no compulsion to always release on probation. Similar to Section 4 POA which is general provision applicable to all regardless of age Section 6 POA which is special provision for person below 21 years of age, provides that for serious crime probation is not permitted[4], and further, nature of crime and character of convict have to be consider for grant or refusal of probation. Hereby, provisions contained in Probation of Offenders Act clearly specify that decision to release on probation is not taken as matter of course but it is judicial decision; this decision will decide fate of tackling of crime thereby fate of criminal justice system, therefore, only after due consideration of factual matrix according to directives given in provisions, order for release on probation may be passed.

Release on probation of good conduct does not mean that the offender is absolved from criminal liability; he is only absolved from criminal liability on successful completion of probation period. In Section 4 (1) POA Provision provided – 'the court may instead of sentencing him at once to any punishment direct that he be released' clearly indicate that offender is at once not sentenced, he is released on Probation but sentence is only suspended. Further, it is clear from provisions contained in Section 9 POA that when offender released on probation does not behave properly and commit violation of terms conditions of probation court may sentence the offender for original offence. In reference to Probation either there is suspension of determination and pronouncement of sentence or suspension of execution of sentence; in India system adopted is suspension of determination and pronouncement of sentence. Sentence is only suspended, as soon as it will come out that the offender is not attempting to reform himself or proved as not reformed, court will hear case for sentence determination and sentence will be imposed. Fear of punishment is used for compelling offender for his reformation, and thereby, for success of Probation of offenders. Probation period may be of any period up to

4. Section 6, POA directs that the provisions are applicable for offences punishable with imprisonment but clarifies that it is not applicable for offences punishable with life imprisonment. Hereby, Section 6, POA is not applicable for offences punishable with death sentence or life imprisonment. Further, in Section direction is given for considering nature of offence also. These whole directives indicate that probation cannot be provided in cases of serious crimes.

three years. When supervision order is passed then minimum period for probation is also determined that it cannot be less than one year.[5]

Provisions relating to Probation of offenders are also provided in Section 360 and 361 Criminal Procedure Code but these provisions are exigency provisions applicable in situation when Probation of Offenders Act 1958 is not enforced by any state u/s 1 (3) POA or this Act is repealed. Section 5 Criminal Procedure Code clears any special law and special procedure is not affected by provisions contained in Criminal Procedure Code 1973. In Criminal Procedure Code 1898 matter of probation was dealt u/s 562; after enactment of Probation of Offenders Act 1958 it ceased to apply due to express provision contained u/s 19 POA. Section 8 (1) General Clauses Act 1897 directs that any reference in any enactment is given for any provision contained in another Act; Later Act or Provision contained in later Act is re-enacted or modified then provision contained in former Act shall have same reference to new Provision or Act as it was before repeal or modification. Therefore, Section 19 POA will refer to Section 360 and 361 of Criminal Procedure Code 1973 as it was referring to Section 562 of Criminal Procedure Code 1898. In case of *Chhanni v. State of UP*[6] Supreme Court decided that where probation of Offenders Act is applicable, Section 360 and 361 shall not remain in force.

Hereby, Probation of Offenders Act clearly directs that in providing probation there should be proper evaluation of case particularly nature of offence and nature of criminal, only then decision may be taken regarding release on probation. In such situation when offence is of serious nature, committed against or serious affects society and public at large then probation cannot be granted. Further, when criminal is recidivist or probable to repeat the crime, completely mature in criminal culture then also he cannot be released on probation.

III. IMPACTS OF SOCIO-ECONOMIC CRIMES

Traditionally criminological theories, and further, common societal considerations put forth that criminal belongs to lower strata of society. Criminological theories Indirectly refer the relationship between lower

5. Section 4 (3) POA.
6. AIR 2006 SC 3051

class and crime commission; it may not be based on fact that lower class person is born criminal but it is based on fact that his socialisation, surrounding and circumstances are conducive and facilitating for crime commission particularly crime of violence, need and necessity.[7] Lower class is including lower middle class and lower class; Lower class person is socialized to use body strength, violence is solution for various problems, respect and reputation is prime consideration. Further, lower class person has problem relating to need and necessity satisfaction. In such situation lower class person may commit crime due to his socialisation and problems identifiable with his class; thereby, such person commits traditional crimes. Upper class which is inclusive for upper class and upper middle class is characterized as properly socialized, educated, affluent, and respected. Person belonging to upper class is taken as having all and every quality of sobriety and civility, he cannot commit crime. But Edwin H Sutherland studied and attracted attention of world community that white collar person commit crimes which are harmful and disastrous for society at large, he named it as 'white collar crime'. White collar crimes are committed in course of occupation. Later on it was identified that various such crimes are committed even by person who are belonging to some other class, person is not white collar person. Further, crime committed even out of course of occupation. To include whole perspective of modern criminality now term 'socio-economic crime' is used which is inclusive for white collar crime (occupational crime), corporate crime, and organized crime. Socio-economic crime seriously affects the society at large and causation is economic; on such name is coined as socio-economic crime. A criminal of such modern criminality are respected

7. In this reference criminological theories given by Chicago School, Sub-culture theories, and Anomie theory may be relevant. Chicago School in study found rate of crime is more in central zone resided by lower income group; Sub-culture theory given by Albert Cohen was emphasizing on failure of child of lower class to succeed on middle class measuring school then after formation of peer group and development of sub-culture; Robert Merton gave anomie theory which is also called strain or stress theory according to which a person is prone to become criminal when by means available to him, e is unable to achieve the goal aspired. These all theories indirectly connect lower class and criminal. No theory is stating that lower class person is criminal but shows circumstances of lower class are prone for crime commission. crime for which he is prone are traditional crimes relating to violence, need and necessity. Lower class socialisation and circumstances are not prone for socio-economic crimes.

and influential persons with position, status, standing and means. Against such influential criminals, societal reactions is usually absent, it further complicate and affect the criminal justice measures to effectively deal with modern criminality. To differentiate from traditional crimes, to formulate effective policies, to enact effective law, to enforce law by effective enforcement agencies, crimes committed by influential persons need to have such crime as separate branch and prescribe completely different crime and criminal tackling measures.

Socio-economic crimes are committed against society, state and public at large. Further, impacts of socio-economic crimes are serious and devastating which affect the whole society. Socio-economic crimes are completely different from traditional crimes in every reference of crime, criminal and criminality. Traditional crimes are mostly committed by an individual or few individuals against another individual or few individuals; only legal fiction is made that wrongful act is committed against the whole society, thereby against state. In modern era whole social structure and social philosophy have completely changed. Change in society has caused complete change in nature, cause, mode, rate and impact of crime on individual member of the society and society at large. Further, all and every concept and principle of crime and criminals have completely changed, a new kind of crime called socio-economic crime is posing graver problem before criminal justice. With industrialization, urbanization, and market based economy in which money becomes measure for evaluation of every success, reputation, status and position the whole social structure and social process change. In previous social structure and social process, and even today in lower middle class and lower class, concept was/is money is for life but in new social structure particularly in upper strata of society concept predominates that life is for money. In such situation money gets criminogenic force and such environment changes whole aspect relating to crime, criminal and criminality. Traditional crimes are committed because of need and necessity, enmity and jealousy while socio-economic crimes are committed because of greed, avarice and rapaciousness. Greedy person wants to accumulate more and more money; his starving for money and physical commodities is limitless. Impact of socio-economic crime on the society is serious which affects the well-being of public at large, creates demoralizing effect and augments criminogenic atmosphere. In case M.

H. Haskot v. State of Maharashtra[8] Supreme Court observed:

> "Social defence is the criminological foundation of punishment. That court which ignores the grave injury to society implicit in economic crimes by the upper berth 'mafia' ill serve justice. Soft sentencing is gross injustice where many innocents are the potential victims…it is functional failure and judicial pathology to hold out a benignly self defeating non-sentence to deviants who endanger the morals and morale, the health and wealth of society."

Economic offenders are only concerned with their personal gain even at the cost of irreparable and serious loss to society. Economic offender for the sake of satisfaction of his greed has no hesitation to badly affect the well being of society which provided him status and position, respect and reputation, stature and means. To gain more and more profit, to become rich quick such socio-economic criminal even has no problem to cause problem for the whole humanity, affect safety and security of societal members, misappropriation of public exchequer. In *State of Gujarat v. Mohanlal Jitamalji Porwal*[9] the Supreme Court observed:

> "… the entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national; interest …"

8. (1978) 3 SCC 544
9. (1987) 2 SCC 364

Socio-economic crimes causes heavy loss to public exchequer, affect the whole development process of a nation particularly infra-structural development, adversely affect health and public security of public, ultimately in all the references the whole society, nation and even world at large is affected by socio-economic crime commission. Socio-economic crimes have demoralizing effect and it creates and increases criminogenic environment conducive for disrespect of social values, social solidarity and social institutions, and further, such criminogenic environment provide fertile circumstances for criminal production particularly socio-economic criminals. Santhanam Committee observed:

> "…Strict adherence to a high standard of ethical behaviour is necessary for the even and honest functioning of the new social, political and economic processes. The inability of all sections of society to appreciate in full this need results in the emergence and growth of white collar and economic crimes, renders enforcement of the laws, themselves not sufficiently deterrent, more difficult. This type of crime is more dangerous not only because the financial stakes are higher but also because they cause irreparable damage to public morals…"[10]

Socio-economic crimes completely hamper prosperity, development and well being of society. Socio-economic crime is committed in well planned and organized manner and this crime has no emotional element, committed only to get more and more money only for sake of satisfaction of insatiable greed. Such crime, criminal and criminality have to be dealt effectively and sternly to save the society, nation and public at large.

IV. MINIMUM PUNISHMENT PRESCRIPTION FOR SOCIO-ECONOMIC CRIMES

Socio-economic crimes pose graver challenge for well-being of public at large, create serious security problem in all references to nation, and hamper whole developmental process particularly infra-structural development. Effective tackling of socio-economic crime is primary and

10. Santhanam Committee Report, P. 11.

necessary concern criminal justice system. In this regard criminal justice system prescribes minimum and maximum punishments particularly imprisonment for socio-economic offences. Socio-economic crimes are generally committed by persons with status and position who in traditional considerations of common citizenry are not taken as criminal, and further, their activities are not taken as criminal activities. Thereby, generally society does not react against socio-economic crimes; socio-economic criminals also do not consider themselves as criminals. Such situations completely hamper pursuit of effective tackling of socio-economic crimes. Public at large consider an act as criminal act only when it is punished with severe imprisonment. Therefore, special penal Acts dealing with socio-economic crimes prescribe imprisonment as punishment.

One basic and primary objective behind prescription and infliction of punishment is creation of deterrence in the mind of criminal element. Generally, infliction of punishment is considered as having real deterrence. When on any criminal punishment is inflicted, it creates specific deterrence for him, thereby, he gets lesson for future that crime should not be committed, and further, such infliction of punishment creates general deterrence in all the criminal elements in reference to future crime commission. Socio-economic crimes cause serious impact over the society and further, socio-economic crimes are committed in planned manner by organized group and generally evidences are not available or if available may not be sufficient, thereby, conviction and sentencing in socio-economic crimes are in much minimal cases. In such situation it is taken better that even prescription of punishment should have sufficient deterrent effect. Criminal law dealing with socio-economic crime prescribes mandatory minimum punishment with discretion to trial court to enhance punishment up to certain maximum limit. In case of socio-economic crimes minimum and maximum limits of imprisonment are prescribed in which minimum is mandatory imprisonment which must be compulsorily imposed on conviction and maximum imprisonment is discretionary imprisonment. Hereby, criminal convicted for commission socio-economic crime shall certainly inflicted with at least minimum imprisonment prescribed by substantive penal provisions. Minimum punishment prescribed for offence means, it shall be mandatorily imposed, court has no discretion in imposing lesser punishment and there is no question is release on Probation. Case State of Madhya Pradesh v.

Vikram Das[11] was decided by Supreme Court on 8 February 2019. Supreme Court observed in this case regarding minimum punishment prescribed for the offence:

> "In view of aforesaid judgments that where minimum sentence is provided for, the Court cannot impose less than the minimum sentence. It is also held that provisions of Article 142 of the Constitution cannot be resorted to impose sentence less than the minimum sentence."

A person who is released on Probation under Section 4 or 6 of Probation of Offenders Act 1958 is not sentenced but granted probation. On probation imprisonment is not inflicted, and thereby, probation can be possible only when offence is punishable by maximum punishment only; in such case court will have discretion and may suspend the pronouncement of sentence and convict may be released on probation. In case of minimum imprisonment prescribed for offence, infliction of minimum imprisonment is mandatory; it cannot be suspended, thereby, it shall be compulsive for court to impose such punishment and thereby court cannot release offender on probation in case of such offences. Hereby, Penal laws dealing with socio-economic crimes completely clear the intention that the socio-economic criminals cannot be released on probation.

Case *State through S. P., New Delhi v Rattan Lal Arora*[12] was decided by Supreme Court on 26.4.2004 in which issue relating to prescription of minimum imprisonment as punishment and releasing on probation was considered and Supreme Court decided that where minimum sentence of imprisonment is prescribed, the provisions of Probation Act cannot be invoked. In this case Respondent-accused was serving in DESU office, proceeding against him was initiated under Section 7, 13 (2) read with Section 13 (1) (d) of Prevention of Corruption Act 1988 for demanding and accepting bribe of Rs. 1500/- from a consumer of DESU. Special Judge made trial and accused was found guilty and he was sentenced. Accused made appeal to Delhi High Court which upheld conviction but extended benefit of Section 360 of Criminal Procedure Code and released on probation. Delhi High Court granted probation on

11. Available at - main.sci.gov.in/supremecourt/2013/26115/26115_2013_Judgement_8Feb-2019.pdf visited on 12/5/2021
12. Indiankanoon.org/doc/634266/ accessed on 12/5/2021

the ground that prohibition given in Section 18 for inapplicability of probation Act is in reference to Prevention of Corruption Act 1947 and not in reference to Prevention of Corruption Act 1988, and further, Section 19 Probation Act provides where this Act is notified by state, there Section 562 Criminal Procedure Code 1898 will not be applicable, it is not providing for Section 360 of Criminal Procedure Code 1973. Probation act was not amended to mention present Act and Code, it refers to old Act and Code. Supreme Court interpreted and observed in light of Section 8 of General Clauses Act 1897 when any Act or provision in Act is referring to any other Act or provision in such another Act which later on is repealed and it is re-enacted then former Act will refer to new Act or provision of Act also. On this basis Court decided that Section 19 of Probation Act refers to Section 360 of Criminal Procedure Code, thereby, where Probation Act is notified by State, in that territorial area Section 360 Criminal Procedure Code will not be applicable and under it probation cannot be granted. Further Supreme Court decided that offences under Prevention Act are punishable with minimum sentence of imprisonment and in such situation probation cannot be granted and court set aside order of Probation passed by High Court and sentence order passed by trial court was upheld. Supreme Court observed:

> "That apart Section 7 as well as Section 13 of the Act provide for a minimum sentence of six months and one year respectively in addition to the maximum sentence as well as imposition of fine. Section 28 further stipulates that the provisions of the Act shall e in addition to and not in derogation of any other law for the time being in force. In the case of Superintendent, Central Exise, Banglore v. Bahubali (AIR 1979 SC 1271), while dealing with Rule 126 – P (2) (ii) of the Defence of India Rules which prescribes a minimum sentence and Section 43 of Defence of India Act 1962 almost similar to the purport enshrined in Section 28 of the Act in the context of a claim for granting relief under the Probation Act, this Court observed that in cases where a specific enactment, enacted after that Probation Act prescribes a minimum sentence of imprisonment, the provisions of Probation

Act cannot be invoked…"

Minimum sentence of imprisonment prescribed for an offence is mandatory punishment, it shall be compulsorily imposed on convict; in such case with conviction it becomes also certain that accused shall be inflicted with minimum sentence of imprisonment prescribed for offence and it may extended further up to maximum sentence of imprisonment. Hereby in cae of minimum sentence of imprisonment prescription probation cannot be granted. Case Shyam Lal Verma v. Central Bureau of Investigation[13] was decided by Supreme Court on 21 January 2013 and in this case Supreme Court reiterated its decision given in case State through S. P., New Delhi v. Ratan Lal Arora and expressed opinion that in the case where offence is punishable with minimum punishment, convict cannot be released on Probation. In this case appellant was retired Post Office employee; employees of various departments deposited amounts in their post office. Post office employee did not enter the amount deposited in the record of post office and thereby he misappropriated about Rs. 1,35,240/- . Post office employee was charged u/s 477-A IPC read with Section 13 (1) (c) and 13 (2) Prevention of Corruption Act. Trial Court convicted and then after released under Probation of Offenders Act 1958. CBI filed appeal before High Court which set aside Probation order passed by trial court. High Court imposed one year imprisonment for offence under Section 477-A and one year imprisonment for offence punishable under Section 13 (1) (c) read with 13 (2); High Court directed for concurrent running of both the sentences. Appellant-accused challenged sentence order before the Supreme Court. Supreme Court cited State through S. P., New Delhi v. Ratan Lal Arora case decision with approval and observed that where specific provision prescribed a minimum sentence, the provisions of the Probation Act cannot be invoked. Supreme Court upheld decision of High Court.

Case Mohd. Hasim v. State of Uttar Pradesh[14] was decided by Supreme Court on 28 November 2016; in this case Supreme Court decided that in case of Section 4 Dowry Prohibition Act minimum sentence of imprisonment of six months is provided but with that discretion is given

13. available at - indiankanoon.org/doc/93520640/ visited on 12/5/2021
14. available at - advoatekhoj.com/library/Judgement/announcement.php?WID=8244 visited on 12/5/2021

to trial court to award even punishment less than six months for adequate and special reasons, thereby, in reality section 4 Dowry Prohibition Act does not prescribe minimum punishment for the offence of demand of dowry. In such situation Probation of Offenders Act will be applicable for offence punishable under Section 4 Dowry Prohibition Act. In this case respondent 2 and 10 were convicted under Sections 498-A and 323 IPC and Section 4 Dowry Prohibition Act. all the accused filed appeal before Session Judge, Unnao, UP and prayed for grant of probation. Probation was granted by Session Judge. Informant filed revision petition before the High Court. Before High Court appellant argued that Section 4 Dowry Prohibition Act is punishable with minimum punishment, therefore Probation Act cannot be extended to offenders but argument was not accepted by High Court and it upheld decision of session Judge for release on probation. Appellant aggrieved by decision of High Court filed appeal before the Supreme Court through Special Leave Petition. Supreme Court observed that objective of Probation Act is to reform the convict persons and in case of Section 4 Dowry Prohibition Act Trial Court may impose punishment even less than minimum punishment mentioned therein, it means Section 4 Dowry Prohibition Act does not prescribes minimum punishment; in such situation Probation of Offenders Act shall be applicable and accused may be released on probation. But Supreme Court observed that in this case Court at the time releasing on probation has not properly considered matter like nature of offence and nature of offenders, therefore Supreme Court sent back the case for proper consideration about release on probation. In this case Supreme Court cleared that minimum punishment in reference to making bar on probation means minimum punishment is completely mandatory, lesser punishment cannot be inflicted. Supreme Court observed:

> "At this juncture, learned counsel for the respondents would submit that no arguments on merits were advanced before the appellate court except seeking release under PO Act. We have made it clear that there is no minimum sentence, and hence, the provisions of the PO Act would apply. We have also opined that the court has to be guided by the provisions of the PO Act and the precedents of this Court…"

Socio-economic crimes are punishable with minimum and maximum

sentence of imprisonment both; minimum punishment relates to 'shall imposed' and maximum punishment relates to 'may be imposed' criteria. When minimum punishment of imprisonment is prescribed for any offence, the convict person shall be certainly punished, thereby; he cannot be released on probation. By prescribing minimum punishments for socio-economic crimes, penal provisions contained in criminal law have cleared intention of criminal justice system that in case of socio-economic crimes probation shall not be permissible measure to deal with socio-economic criminals, socio-economic crimes and socio-economic criminality.

V. PROBLEM RELATING TO RE-SOCIALISATION OF SOCIO-ECONOMIC CRIMINALS

In almost cases criminals committing traditional crimes belong to lower class of society, they may have not properly socialized, may have not got proper training regarding life, society and responsibility towards society, and may not have proper environment to become sober and civilized person. When such mal-socialized person is re-socialized through measure of probation by putting under supervision of probation officer, the person may be reformed and may become sober and civilized person contributing for betterment of society. But situation of socio-economic criminal is completely different, in almost cases he is person of status and position. Socio-economic criminal is properly socialized and educated person who has always been in conducive environment for proper excel in every aspect of life. Socio-economic criminal well know about importance of society, social solidarity and impact of his criminality on the society. Socio-economic criminal has no problem relating to satisfaction of his needs and necessities. Only for sake of greed, avarice and rapaciousness, socio-economic criminal has voluntarily, willingly and knowingly chosen path of commission of socio-economic crimes. this crime is committed because of greed to become more and more rich, therefore, such crime commission is unending and once a person starts committing socio-economic crime, he becomes recidivist. In such situation socio-economic criminal has no prospect of reformation.

In Section 4 of POA major consideration is whether convict has prospect of reformation and for this purpose provisions contained in the Section 4 POA directs court to consider circumstances of case including the nature of the offence and character of the offender. Further, for such

consideration court also considers report of Probation Officer. When on such consideration court has opinion that it is expedient to release on probation of good conduct, only then convict is released. Expression 'it is expedient to release' used in Section 4 (1) POA is crucial and when it is read with consideration with nature of offence and character of offender, the whole directive underlying in Section 4 becomes clear that only that convict can be released who has prospect of reformation. Socio-economic criminal has no prospect of reformation, thereby; he cannot be released on probation of good conduct under Probation of Offenders Act.

In *Pyarli K Tejani v Mahadeo Ramchandra Dange*[15] accused was convicted for offence relating to food adulteration and sentenced by trial court imposed fine Rs. 100/-. Revision petition was filed before the High Court which upheld conviction and enhanced the punishment by imposing statutory minimum six months imprisonment and one thousands rupees fine. Supreme Court heard the appeal and upheld of sentence imposed by High Court. Supreme Court observed:

> "…These economic offences committed by white collar criminals are unlikely to be dissuaded by the gentle Probationary process. Neither casual provocation nor motive against particular person but planned profit making from numbers of consumers furnishes the incentive-not easily humanized by the therapeutic probationary measure…In the current Indian conditions the probation movement has not yet attained sufficient strength to correct these intractable. May be, under more developed conditions a different approach may have to be made. For the present we cannot accede to the invitation to let off the accused on probation."

Law Commission in its 47th Report recommended for amendment in all penal Acts dealing with socio-economic crimes to expressly exclude application of probation:

> "We appreciate that the suggested amendment would be in apparent conflict with current trends in sentencing. But ultimately, the justification of all sentencing is the protection of society. There are occasions when an

15. AIR 1974 SC 228

> offender is so anti-social that his immediate and sometimes prolonged confinement is the best assurance of society's protection. The consideration of rehabilitation has to give way, because of the paramount need for the protection of society. We are, therefore, recommending suitable amendment in all the Acts, to exclude probation in the above cases."[16]

VI. CONCLUSION

Socio-economic crimes cannot be leniently tackled by use of lenient reformative and rehabilitative measures; reformative measure may prove to be effective against the criminals who are mal-socialized and have economic handicaps because of which for need and necessity satisfaction they have committed crime but such reformative and rehabilitative measures may not provide any result against rich, educated, well positioned persons who have chosen criminal profession for satisfaction of greed, avarice and rapaciousness. Probation is enlightened measure to reform and rehabilitate criminal but it is not fit and suitable measure to deal with socio-economic criminals. Further, societal reaction against crime is necessary requisite for effective tackling of any crime problem. Common person in society consider an act as criminal act only when death sentence, life imprisonment or imprisonment is inflicted; other kind of punishment infliction or reformative measure use does not communicate common man that act dealt with is criminal act and person dealt with is criminal and in such situation society will not react against such crime and criminal. When imprisonment or other physical punishment is inflicted, criminal with high social status will fear for loss of his reputation, and thereby, he will feel deterrence and will not commit crime. Probation is not an appropriate measure to deal with socio-economic criminal. Section 4 and Section 18 of the Probation of Offenders Act, and further, prescription of minimum punishment in Special Penal Acts dealing with socio-economic crimes manifest the intention of criminal justice legal regime that socio-economic criminals have to be sternly penalized; they should not be tackled by reformative and rehabilitative measure of the Probation of Offenders Act.

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16. Law Commission of India, 47th Report, p. 85

SEXUAL ASSAULT IN INDIA: IMPACT OF LEGAL FEMINISM ON SUBSTANTIVE AND PROCESSUAL LAWS

AKHILENDRA KUMAR PANDEY*

ABSTRACT : Sexual offences against women have agonizing and humiliating effect on the victim. It is not a physical violence rather it defiles the soul. It not only shatters the victim but also leaves scar for whole life. Besides social reasons one of the reasons for such incident may be the deficiency in substantive and processual laws. Legal feminism argues for gyno - centric approach in understanding law. Despite there being differences among legal feminists, the core contention of all versions of legal feminism is protection of women's right. Liberal feminists have argued for 'equality' between sexes and 'sameness' and others argue for the recognition of 'difference' as well. For offences like sexual assault upon women, the liberal feminism fails to address the problems perceived by the victim of such offence. The 'difference approach' may protect the interest of women. This paper seeks to analyze the impact of legal feminism adhering to the principle of 'difference' on laws relating to sexual assault in India contained in the Indian Penal Code and procedural laws.

KEY WORDS : Feminism- Difference and Equality - Rape - Indian Penal Code - Criminal Procedure Code and Indian Evidence Act.

I. INTRODUCTION

Though the expression ‘sexual assault’ as such does not find place in the Indian Penal Code, assaults directed against women exist in the name of assault outraging the modesty, rape and unnatural offence. While

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the first category of assault is body oriented and the latter categories, namely, rape and unnatural offence against women, is sex oriented. The Indian laws on sexual crimes are based on the binary of man and woman. It has made a distinction between natural sex offence, that is, heterosexual offence and unnatural offence which includes sexual offences other than heterosexual. When the offences of sexual assault started increasing disproportionately and the condition of respect and dignity of women deteriorated at a faster rate, which was perhaps never before, the amendment in substantive and processual law became inevitable. The offence of sexual assault is still on increase.[1] Classical legal theory does not address the issues pertaining to women specifically instead it argues for equality. Legal feminism started taking its formal shape and alleged that the reason for sexual assault lies in patriarchy. This paper seeks to analyze the impact of legal feminism in bringing the changes in substantive criminal law i.e. the Indian Penal Code and processual laws, i.e., criminal procedure and the law of evidence.

II. FEMINISM

Legal feminism is the outcome of women's movement. It eulogizes women's experience in order to realize an ideal world in which women are treated as subject. Feminism, in fact, is reflection of women in various disciplines of knowledge. The root of feminist jurisprudence is in feminist sociology, feminist philosophy and feminist history. Legal feminism is reflection of women engaged in the study of law. The women started locating and analyzing their positions in legal principles and in the functioning of legal system. Legal feminism believes that the legal principles have neglected women interest and are based on the understanding of men. To feminists, law is essentially masculine. There are many versions of legal feminism having a central point that the legal order is patriarchal and law contributes in constructing, maintaining and perpetuating patriarchy. Legal feminism thus seeks to eliminate patriarchy and to create a better world for women.[2]

1. In Crimes, National Crime Record Bureau (September, 2020), it has been reported that 87 rapes are committed every day, that is, one rape in every 16 minute. It has increased by 7% over 2019 incidents.
2. Freeman, *Lloyd's Introduction to Jurisprudence* (2001); See also, Pandey, Akhilendra K., *Feminist Versions and Law* (2002) 31 Ban. LJ 87 -104

Legal feminism seeks to inquire into, first, the reason, nature and extent of subordination of women; secondly, through what mechanism and why women continue to occupy the subordinate position; and, thirdly, it makes an endeavour to change the subordinate position of women. The activity of legal feminism revolves around these inquiries and activity. Legal feminism believes that law plays an important role in perpetuating patriarchal hegemony. While classical liberal legal feminists have argued for equality between sexes, i.e., male and female and human have autonomy over body and mind, thus the rights and entitlement which are available to men be extended to women as well. There should be equal distribution of assets and opportunities on the principle of equality. Women are not different from men.[3]

However, there are other feminists who discard classical liberal feminism and the Rawlsian approach of distributive justice. The injustice is beyond distribution, they believe. It argues for elimination of all institutionalized dominations and oppression. The liberal feminists emphasize upon "sameness" and others version of feminist argue for "difference".[4] The denial of difference between sexes contributes to oppression of women. Iris Marion Young has identified five facets of oppression: exploitation, marginalization, powerlessness, cultural imperialism and violence.[5] For the purpose of this paper, elaboration on three facets are essential.

Marginalization is regarded as a worst form of oppression as it blocks the opportunity to exercise capacities to socially defined and recognized ways. Cultural imperialism is an experience as to how the dominant meaning of a society renders the particular perspective of one's own group invisible and the dominant group at the same time makes its perspective visible as stereotyped by declaring the recessive's perspective as "other". In other words, the dominant gives its meaning and content and the meaning given by others is discarded; and it is done in clandestine

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3. Supra note 2 pp. 1122 -1127
4. Gilligan Carol, *In a Different Voice* (1982). She made a gender based distinction in ethics. She made difference between 'ethics of reason and justice' for males and 'ethics of care and relationship' for females.
5. Young, Iris Marion, *Justice and Politics of Difference* (1990); See also supra note 2 pp. 548-555

manner. Another important facet of oppression is systematic violence, inter alia, in the form of sexual assault. In case sexual violence continues, it assumes systemic character and its existence become social practice. The suppressed group is, ultimately, blamed for such violence.[6]

III. SUBSTANTIVE LAW: DEFINITIONAL ASPECT

Feminists have consistently been arguing that there is oppression of women by marginalization, cultural imperialism and violence and the offence of rape as defined in the Penal Code perpetuate these facets of oppression. In rape the intent of the offender is to humiliate and degrade not only through the natural instrument rather it is substituted by other tools like sticks and bottle etc. and the invasion is not limited to traditional assault on female organ but other orifices of women body. [7]Before 2013, the Indian Penal Code contemplated three types of assault against women. First, outraging the modesty,[8] second, rape[9] and, thirdly, unnatural offence.[10] While law viewed offence of rape as a serious offence against women, outraging the modesty of women and unnatural offence against women were not considered so serious despite its traumatic effect on the psyche of women and girl child. In view of increasing sexual assault and violence against women and girl child the law and its interpretation should be in conformity with the need of the time. An attempt was made to extend the meaning of interpretation of expressions 'sexual intercourse' and 'penetration' so as to include every penetration in any orifices of woman and girl child. A writ petition[11] was filed by a Non - Governmental Organization named Sakshi.[12] In this petition a declaratory relief was prayed by extending the meaning of the expression "sexual intercourse" used in Section 375 of the Indian Penal Code so as to include all forms of forcible penetration and not limiting it to age old concept of penile/vaginal penetration; instead it includes penile- oral, penile-anal, finger/anal and

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6. Id. pp.39 -65
7. Susan Brownmiller, *Against Our Will* (1986)
8. Section 354, Indian Penal Code, 1860
9. Section 375, Indian Penal Code, 1860
10. Section 377, Indian Penal Code, 1860
11. *Sakshi v. Union of India* AIR 2004 SC 3566. The Bench consisted of Rajendra Babu, CJI and Mathur G.P. J.

vaginal and object/vaginal penetration. In other words, the words "sexual intercourse" in Section 375 IPC should be interpreted to mean all kinds of sexual penetration of any type of any orifice of the woman's body and the traditional sense is to be discarded. Further, it was contended that as the said word has not been statutorily defined, the court may give it a wider meaning which will be in consonance with the UN Convention on Elimination of All Forms of Discrimination against Women, 1979[13] and UN Convention on Rights of Child, 1989.[14]

The judgment of the International Tribunal for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia since 1991 was also referred to.[15] Article 5 of the Statute of the International Tribunal contemplated rape as a crime against humanity. The Tribunal declared that rape is a grave breach of the Geneva Conventions, violation of the laws or customs of the war or an act of genocide. While giving the definition of rape, the Trial Chamber accepted a wider meaning of the word "sexual intercourse" so as to include not only the sexual penetration but by other objects as well and, further, the penetration could be in other orifices.

The reason advanced by the petitioner for including all sorts of penetration within the ambit of the offence was that the offence of rape is viewed in contemporary civilized world as an experience of humiliation, degradation and violation. In other words, the women are subjected to assault in non - traditional ways also which was unknown earlier. On behalf of the petitioner it was contended that the court has to give life to the words used by the legislature. The meaning of any word cannot remain

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12. Sakshi is an organization to provide legal, medical, residential, psychological or any other help, assistance or charitable support for women particularly for those women who are victims of any kind of sexual abuse and/or harassment, violence or any kind of atrocity or violation. It is violence intervention centre.
13. India ratified the Convention in August 1993
14. India ratified in December 1993. Under Article 253 of the Constitution of India, the Parliament is empowered to make any law for the whole or any part of territory of India for implementation of any treatment, agreement or Convention. Further, Article 51 of the Constitution enjoins State to foster respect for international law and treaty obligation. Thus there is obligation on the State to respect international treaty and Conventions and power to make law implanting it has also been conferred upon the Parliament.
15. The judgment was given on 10th December 1998 and 22nd February 2001

sacrosanct rather it changes with time and prevailing social conditions. Any enactment of former days is to be read today in the light of dynamic processing received over the years with such modification of current meaning of its language as will now give effect to the original legislative intention.[16] The Court has to work on the constructive task in finding out the intention of Parliament and it has to be done not merely from the language of the statute but also from the consideration of the social conditions which gave rise to it and the mischief which it was to remedy. Then the court has to supplement the written words so as to give 'force and life' to the intention of the legislature. It is true that the court cannot alter the material of which the legislation is woven but it can iron out the crease.[17]

The Union of India, on the other hand, submitted that the penal law has appropriately dealt with the sexual violence against women by categorizing the offences as outraging the modesty of woman, rape and unnatural offence and thus there was no need to give any extended meaning to the word "sexual intercourse". The Supreme Court however did not agree to the contention and the prayer of the petitioner for enlarging the definition of the offence while using its power to interpret the law. However, the Court observed:

> The suggestions made by the petitioners will advance the cause of justice and are in the larger interest of the society. The cases of child abuse and rape are increasing at alarming speed and appropriate legislation in this regard is, therefore, urgently required. We hope and trust that the Parliament will give serious attention to the points highlighted by the petitioner and make appropriate legislation with all promptness which it deserves.[18]

Though the effort to extend the meaning of rape to include every

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16. Bennion F.A.R., *Statutory Interpretation*, Butterworths 1984 at 357 as referred to in Sakhshi case Supra note 11
17. *Seaford Court Estates Ltd. v. Asher* (1949) 2 All ER 155 per Lord Denning. This case has been referred to by the Supreme Court of India in *S. Gopal Reddy v. State of A. P.* AIR 1996 SC 2184
18. AIR 2004 SC 3566 at 3582

sort of assault directed against women and intended to offend her dignity as woman to be interpreted as 'sexual intercourse' by judicial interpretation was denied but it is true that the Apex Court realized the need of the hour to have a wider definition of the term. The Supreme Court drew the attention of the Parliament to consider modification in law on urgent basis.

The occasion for the Parliament to extend the scope of the definition as indicated by the Supreme Court in *Sakshi* case did not come till the Nibhaya case in Delhi.[19] To satiate the demand of civil society in dealing with the offenders, a Committee was constituted under the Chairmanship of Justice J. S. Verma, the former Chief Justice of India. A new definition of rape is exhaustive to include every kind of sexual behavior directed against a woman and it includes penetrative and non - penetrative.[20] The

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19. In December 2012, a paramedical student was gang raped and brutalized by iron rod resulting into her death after few days. The assault was horrendous and there was mass protest seeking justice to the victim. A Committee was constituted under the Chairmanship of Justice J. S. Verma and two other members were Leila Seth, J. and Gopal Subramaniam, former Solicitor General of India. The term of reference as per the Notification dated December 24, 2012 was limited to review the law for speedier justice and enhanced punishment for aggravated sexual assault.

20. New definition of rape came into force on February 3, 2013. Section 375 IPC (w.e.f. 3.2.2013) reads as:

A man is said to commit "rape" if he –

(a) Penetrates his penis , to any extent, into the vagina, mouth, urethra or anus of a woman or hakes her to do so with him or any other person; or

(b) Inserts, to any extent, any object or part of body, not being the penis in to the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) Manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) Applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person under the circumstances falling under any of the following seven descriptions:-

First- Against her will.

Secondly - Without her consent.

Thirdly - With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or hurt.

Fourthly - With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly – With her consent when, at the time of giving such consent, by reason of

effect of new law is that the accused, who inserted finger in private part of seven months old girl causing injury, would now be held liable for rape and not for outraging the modesty of woman.[21] Further, the issue of non - consent has been made more explicit.

There was a debate in the Justice Verma Committee on the issue that the crime of rape should be made gender - neutral or gender - specific. The Law Commission in its 172nd Report had recommended for gender neutral definition of rape; according to which the perpetrator of the crime could be 'any person' and similarly the victim could be 'any person' and it was in conformity with the modern approach and adhered to the principle of equality. A provision on these lines were incorporated in the Bill and the Ordinance which was issued by the government after the submission of Justice Verma Committee Report keeping the offence of rape in gender - neutral category. However, the Criminal Law (Amendment) Act, 2013 made it a gender - specific crime with regard to offender and the victim. By not making the offence gender - neutral the Parliament failed to extend the protection of law to males (on some occasion) and transgender. The approach of the Parliament should have leaned towards the 'difference' principle of legal feminism arguing for protecting man falling in different category and woman both along with the interest of transgender.[22]

Despite all these definitional amendment in the Indian Penal Code, the act of the accused with respect to dead body of woman is not covered in it. Ordinarily, the personality of human being commences with birth

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unsoundness of mind or intoxication or the administration by him personally or through another person of stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly – With or without her consent, when she is under eighteen years of age.

Seventhly – When she is unable to communicate consent.

Explanation 1:……..

Explanation 2: Consent means an unequivocal voluntary agreement when the woman by words, gesture or any form of verbal or non verbal communication communicates willingness to participate in the specific sexual act. Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1: A medical procedure or intervention shall not constitute rape.

Exception 2:…….....…….

21. *State of Punjab v. Major Singh* AIR 1967 SC 63
22. Leila Seth, *Talking of Justice* (2014) pp. 4-8

and comes to an end with death. But under certain circumstances, the dead person is also entitled to little legal protection.[23] The law dealing with sexual intercourse with corpse is punishable in several other jurisdictions.[24] The incident of sexual intercourse with dead woman and girl child is being reported in India[25] but in absence of law the accused cannot be punished. The law dealing with sexual assault on dead body of woman that is, provision for rape should be modified in such a manner that the persons having tendency of necrophilia[26], is also covered within the definition. It may be done by adding one more exception in the Section to the effect that - Sexual intercourse or sexual act by a man with the dead woman shall amount to rape. By having such provision, the dignity and the respect for dead body of a woman can be protected. Further, the right of transgender[27] and on some occasion right of male against sexual assault has not been addressed in the new definition. It may be submitted that even if the law could have been made in accordance with the principle of equality, by giving a gender - neutral definition, it could have done justice to transgender.

IV. PROCESSUAL LAWS

When offence of rape is committed upon a woman or a girl child in a tradition bound society holding old values, multiple crimes are committed against such victim. Such crime has cascading effect on woman. The

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23. Fitzerald, P.J. *Salmond on Jurisprudence* (1966) pp. 301 -302
24. In New Zealand, there is a Crimes Act, 1961 where it is provided that anyone who improperly or indecently interferes with or offers any indignity to any dead human body or human remains, whether buried or not may be awarded two years imprisonment. In South Africa committing sexual act with corpse is punishable. In United Kingdom, Section 70 of the Sexual Offences Act, 2003 seeks to punish sexual intercourse with corpse.
25. A case from Ghaziabad, Uttar Pradesh, was reported in October 2015 where a 26 years old woman was gang raped by three accused after digging her dead body from the grave. See also, Agrawal, Dr. Anil, *Forensic Medico Legal Aspects of Sexual Crimes and Unusual Sexual Practices* where he has referred Nithari Murder case in which the accused confessed to have sexual intercourse with the dead bodies of young girls.
26. Necrophilia is a pathological fascination with dead bodies which sometimes takes the form of desire to engage with them in sexual intercourse.
27. *National Legal Services Authority v. Union of India* AIR 2014 SC 1863. The Bench comprised Radhakrishnan and Sikri, JJ.

dignity is invaded in private life, public life and interrogation by the police during investigation and cross- examination during trial causes trauma to the extreme. The media also makes sensational news. The effect of such response by the society and the justice delivery system was more agonizing than the sexual assault committed upon the woman. The legal procedure in such cases was like a 'continuing rape'.[28] While refusing to expand the meaning of offence of rape under the Penal Code, the Apex Court accepted the prayer to modify the rules of procedure as it were hand maiden of justice. In this part of the paper an attempt has been made to discuss the role of judiciary in modifying the rules of procedure in saving the dignity and honour of the victim and its subsequent incorporation into processual law by the legislature.

(i) Lodging of FIR

The criminal law is set into motion usually by lodging the First Information Report in connection with any cognizable offence.[29] The Report should ordinarily be lodged promptly in order to remove any chance of concoction and vexation. There was a time when the First Information Report was discarded on the ground of delay due to suspicion of vexation. The reason for delay in lodging the report in rape case is understandable. First, the prosecutrix may be hesitant to disclose the incident and, secondly, the family members with the view to protect the dignity of the prosectrix and honour of the family may take time in approaching the police for lodging the report.[30] After giving cool thought, the report is lodged. If the reason for delay in such cases is reasonably explained in the light of prevailing facts and circumstances, such delay would not be fatal for the prosecution and the First Information Report cannot be discarded on this ground.[31]In *Santosh Moolya v. State of Karnataka*[32] where offence of rape was committed and the delay in lodging the complaint was of 42 days because there were no male members in the house except two victim girls who were raped. There was no one to help them in lodging the report. The mother of the victim told about the illiteracy of her daughters

28. The opening words of Justice Verma while addressing the members of the Committee on December 26, 2012
29. Section 154(1) Criminal Procedure Code, 1973
30. *Deepak v. State of Haryana* (2015) 4 SCC 762
31. See, *State of Punjab v. Gurmit Singh* AIR 1996 SC 1393

and the fear of the appellant due to which the girls did not dare to come out. The delay was held to be properly explained. Similarly, in *Tulshidas Kanolkar v. State of Goa*[33], the mental faculties of the victim were underdeveloped and it was only when the parents noticed that she was in advance stage of pregnancy, the information was lodged with the police against the accused for committing rape. The delay was held to be satisfactorily explained. Thus delay, if reasonably explained, would not be fatal to prosecution.

There was a time when the victim of assault went to the police station for lodging the report, the victim was not treated properly. A new provision for recording the information regarding the commission or attempt of certain offences against woman was inserted in the Criminal Procedure Code.[34] Now it is the woman police officer or any woman officer who shall record the information when it is given by the woman against whom offence under Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 376, Section A, Section 376B,Section 376C, Section 376D, Section 376E or Section 509 of the Indian Penal Code.[35] Where these offences have been committed or attempted against a woman who is permanently or temporarily mentally or physically disabled then such information shall be recorded by police officer at the residence of the person seeking to report such offence or at a convenient place of such person's choice and such recording should be in presence of an interpreter or special educator.[36] Such recording of the information shall be videographed[37] and the statement of such person before the Judicial Magistrate shall be recorded as soon as possible.[38]

The police officer making an investigation may examine orally any person supposed to be acquainted with the facts and circumstances of the case.[39] But in this regard the statement of the woman against whom

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32. 2010 Cri LJ 2892 (SC)
33. Crim. Appeal No. 298/2003 Date of Judgment 27.10.2003
34. Act 13 of 2013 Section 13 w.e.f. 3.2.2013
35. Criminal Procedure Code, 1973 Section 154(1) Proviso,
36. Id. Section 154(1) Proviso (a)
37. Id. Section 154(1)Proviso (b)
38. Id. Section 154(1)Proviso (c), and Section 164 (5A) (a)
39. Id. Section 161 (1)

offences of sexual assault is committed or attempted is to be recorded by a woman police officer or any woman officer.[40]

(ii) Medical Examination of the Victim of Rape

The provision for the medical examination of the victim was added in 2006 by inserting Section 164A in the Criminal Procedure Code. The medical examination of the victim of rape is to be conducted within 24 hours from the time of receiving the information relating to commission of the offence. The examination is to be done with the consent of the woman or person competent to give consent on her behalf.[41] The registered medical practitioner shall conduct the examination without delay.[42] The object of Section 164A Cr PC is that the medical examination of the victim of rape should be carried out as early as possible without any delay with her consent and preferably by a lady doctor. The delay in taking sample may ruin the possibility of finding any positive sign of rape. The delay caused by medical officer in examination of victim cannot be justified. The Supreme Court has recognized that the rape victim's need for medical examination constituted a "medico – legal emergency" and it is the right of the victim of rape to approach medical services first before legally registering a complaint in police station.[43] Thus the doctor or the hospital is required to examine the victim of rape promptly even if she reports to the doctor directly and voluntarily without a police requisition. The medical professionals are generally not aware of the fact that a victim of rape may voluntarily report for her medical examination even without lodging the formal complaint with the police. The Supreme Court has recognized three ways by which a hospital may receive a victim of rape: first, voluntary reporting by the victim, secondly, reporting on the requisition of police and, thirdly, by reporting on the requisition of the Court.[44]

In *Gujua Majhi v. State of Jharkhand*[45], the prosecutrix, an illiterate old widow was gang raped by the appellants in night. She narrated the

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40. See, Section 161 (3) Proviso inserted by Act 113 of 2013 Section 15, w.e.f. 3.2.3013
41. Section 164A, Criminal Procedure Code, 1973
42. Section 164A (2) Criminal Procedure Code, 1973
43. *State of Karnataka v. Manjana* AIR 2000 SC 2231
44. Id.
45. 2015 Cri LJ 4303 (Jhar.)

fact to her son and grandson on next day evening after they came back from work and then the matter was reported to the police on the next day evening almost after 24 hours of the incident. The samples for DNA profiling were collected after five days. The prosecutrix was brought to the hospital for medical examination and she was examined after 12 hours after her production with police requisition and such a delay of 36 hours diminished the possibility of presence of any positive sign of rape. Resultantly, due to delayed medical examination, the positive sign of rape could not be ascertained. In absence of medical report, the only evidence was testimony of victim. The trial court convicted the appellants which were challenged, inter alia, on the ground that the testimony of the victim remained uncorroborated by medical evidence. The contention was however rejected and the appellants were convicted as it was found that there was no reason for the old widow to falsely implicate the appellants at the cost of her own prestige and honour.

The Supreme Court of in *Bharwada Bhoginbhai v. State of Gujarat*[46] had observed that asking for corroboration in sex offences is like adding insult to injury of the victim. There is no reason to insist on corroboration because of the very nature of the offence, i.e., sex crimes which make it almost impossible to gather independent witness for corroboration. Where the totality of the circumstances of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should have no hesitation in accepting her testimony.[47] Rape, in fact, is not mere physical assault rather it distracts the whole personality of the victim; it degrades the soul of the victim and thus the testimony of the victim must be appreciated in the background of the entire case and in such cases, non- examination of other witnesses may not be a serious infirmity in the prosecution case; particularly, where the witness has not seen the commission of offence.[48] The testimony of the prosecutrix is vital unless there are compelling reasons necessitating corroboration.[49]

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46. AIR 1983 SC 753
47. *State of Maharastra v. Chandraprakash Kewalchand Jain* AIR 1990 SC 658
48. *State of Orissa v. Thakara Besra* AIR 2002 SC 1963
49. Supra note 32

(iii) Recording the Statement of Prosecutrix before Judicial Magistrate

Section 164 (5A) was inserted in the Criminal Procedure Code, 1973 after the recommendations of Justice Verma Committee Report.[50] It provides that in cases punishable under Section 354, 354A, 354B, 354C, 354D dealing with offences against women outraging modesty and other allied offences and offence of rape under Section 376 (1) or (2) of the Indian Penal Code, the statement of the person against whom such offence has been committed shall be recorded by the Judicial Magistrate and it is to be recorded as soon as the commission of the offence is brought to the notice of the police. Further, a special provision of mandatory nature has been made for recording the statement of disabled woman where the Judicial Magistrate shall take the help of interpreter or educator and the statement shall be videographed.[51]

(iv) Issue of certified Copy of the Statement of prosecutrix

The Criminal Procedure Code makes provision for the supply of documents to the accused before the commencement of trial[52] or committal of case.[53] While it is argued that the statement recorded under Section 164 Cr PC is a public document and once it is recorded the accused is entitled to certified copy of that document[54], it is also argued that it cannot be treated as a public document rather it becomes part of the case diary file till the submission of the police report and only if the prosecution wants to rely on this document pertaining to the statement of the prosecutrix, then only the accused is entitled to get those document. Before this stage the accused is not entitled to get the copy of the statement of the prosecutrix recorded under Section 164 Cr PC. The Madras High Court had observed that the statement recorded under Section 164 is a public document falling under Section 74 (1) (iii) of the Indian Evidence Act and the accused will be entitled to copies of the same as a person interested but the right to receive such copy before the filing of

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50. Act 13 of 2013 (w.e.f. 3.2.2013)
51. Proviso to Section 164 (5A)
52. Cr PC, 1973 Section 207
53. Id. Section 208
54. *Raju Janaki Yadav v. State of U.P.* 2013 Cri LJ 78 (All.) F.B.; *Unnikrishnan Nair v. State of Kerala* 2014 (1) KLT 146; *Kunjumuhammed v. State of Kerala* 2014 (2) KLJ 860

the charge-sheet has been taken away and he will be entitled to the copies of the documents only in accordance therewith.[55]

In *Nonavinkare Police v. Shivanna @Tarkari Shivanna*,[56] the Supreme Court by invoking its power under Article 142 of the Constitution of India, *inter alia*, issued the direction to all Police Stations that in case of rape the Investigating Officer shall bring the victim before the nearest lady Judicial Magistrate for the purpose of recording her statement under Section 164 Cr PC and a copy or the statement should be handed over to the Investigating officer immediately with the specific direction that the contents of such statement under Section 164 Cr PC should not be disclosed to any person till the charge-sheet is submitted under Section 173 Cr PC.[57] Thus in the case of rape, the statement of the victim recorded under Section 164 has to be kept secret till the final report is filed. The Court issued this direction with a view to protect the interest of the prosecutrix and to prevent the possibility of threat to her life.

(v) In Camera Proceeding

There is a general principle that criminal trial will be held in open and the Criminal Procedure Code enunciates this rule to hold criminal trial in open court to which public generally may have access.[58] With a view to avoid the harassment and humiliation to the woman victim, an exception has been made for in camera trial for offence of rape which will preferably be done by a woman Judge or Magistrate.[59] The trial of rape cases in camera is a rule and open trial in such cases are now exception.[60] Further, the publication of such proceeding in camera without the permission of the Court is prohibited.[61]

In *Sakshi* case,[62] the Supreme Court extended the application of Section 327(2) of the Criminal Procedure Code in trial of offences under

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55. *State of Madras v. G. Krishna*n AIR 1961 Mad. 92; See also, *Naresh Kumar Yadav v. Ravindra Kumar* AIR 2008 SC 218
56. (2014)8 SCC 913
57. See, Shakeer M.K. v. State of Kerala 2014 Cri LJ 4430 (Ker.)
58. Cr. P.C. 1973 Section 327 (1)
59. Id. Section 327 (2)
60. See, State of Punjab v. Gurmit Singh AIR 1996 SC 1393 per Dr. Anand , J.
61. Id. Section 327 (3)
62. Supra note 11

Section 354 and 377. In addition to it the Court also gave the instruction that while holding the trial of child abuse or rape, that a screen or such arrangements should be made where the victim do not see the body or face of the accused;

(vi) Evidence in Presence of Accused

It is the general rule of procedure of criminal trial that all evidence shall be taken in the presence of the accused.[63] In *Sakshi* case the petitioner had also prayed for necessary changes in the procedural laws with a view to save the victim from trauma. The provision however does not provide that the accused should have full view of the victim during the evidence of the victim. The recording of evidence by way of video conferencing has been permitted by the Court.[64] In *Sakshi* case, the Court while accepting the modification in processual law, observed:

> The whole inquiry before a Court being to elicit the truth, it is absolutely necessary that the victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment… There is major difference between substantive provision defining crimes and providing punishment for the same and procedural enactment laying down the procedure of trial of such offence. Rules of procedure are hand maiden of justice and are meant to advance and not to obstruct the cause of justice. It is therefore permissible for the Court to expand or enlarge the meaning of such provisions in order to elicit the truth and do justice with the parties.[65]

The tendency of trial court in making observation about the character of the prosecutrix has been deprecated with the caution for self restraint. In *State of Punjab v. Gurmit Singh*[66], where a girl was subjected to gang rape and the trial court, without any evidence, made an observation about the prosecutrix that probably she was of lose character, the Supreme

63. Section 273, Criminal Procedure Code, 1973
64. See, *State of Maharastra v. Dr. Praful B. Desai* AIR 2003 SC 2053
65. AIR 2004 SC 3566 at 3581
66. AIR 1996 SC 1393. The bench comprised Dr. Anand and Saghir Ahmmad, JJ.

Court opined that such an observation lacked sobriety of the Judge. Even in cases where there is material on record to show that prosecutrix was habitual to sexual intercourse or was of lose character; no such inference should be drawn. The victim even if was of promiscuous sexual character but she has every right to have physical relation. It was also opined that such observation by the trial court will not only dissuade the victim from making complaint against the accused but also the criminal justice would suffer. The Court observed:

> Such like stigmas have the potential of not only discouraging an even otherwise a reluctant victim of sexual assault to bring forth complaint for trial of criminals, thereby making the society to suffer by letting the criminal escape even a trial. The Courts are expected to use self restraint while recording such finding which have larger repercussions so far as the future of the victim of sex crime is concerned and even wider implications on the society as a whole – where the victim of crime is discouraged – the criminal encouraged and in turn crime gets rewarded.[67]

(vii) Effect of compromise

The dignity and honour of the victim of sexual assault cannot be compared solely in terms of money given to the victim for compromising the criminal proceeding. Rather, it may be more humiliating by treating the woman that she can be bought by paying suitable amount to her. The compromise between the accused and the victim of rape offence has not been accepted by the Court. In *Ramphal v State of Haryana*,[68] it was submitted during the pendency of appeal that the accused have paid Rs. 1.5 lakh to the victim and she accepted the same willingly for getting the matter compromised. It was held that law does not accept such compromise in matters relating to the offence of rape and similar cases of sexual assault.

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67. Id. at 1403

68. Criminal Appeal No 438/2011 in Supreme Court Date of Judgment 27.11.2019; See, State of M.P. v. Madan lal Criminal Appeal No 231 of 2015 before SC date of judgment 1.7.2015

(viii) Right to Appeal

The Criminal Procedure Code makes a provision for appeal against any judgment or order of a Criminal Court. Earlier the right to prefer an appeal was not available to the victim of crime. The victim of crime being an important component – as complainant and witness - in the administration of criminal justice, thus should have right to participate and have access to the mechanism of justice and fairness. The Law Commission of Indian in its 154th Report showed its victim oriented approach in the criminal procedure. However, a proviso was added after the recommendations of Justice Malimath Committee Report. [69] Right to prefer an appeal has been conferred to the victim on limited grounds, namely, against the order passed by the court acquitting the accused or convicting the accused for lesser offence.[70]

V. LAW OF EVIDENCE

The Courts have also interpreted the law of evidence in a manner to reduce the humiliation of the sexual assault victims. These may be discussed under following head:

(i) Conduct of Party

Under the law of evidence, conduct of parties – before, at the time and subsequent to the commission of offence – is relevant fact.[71] Usually with a view to save the honour and prestige of the family and also due to shame women do not disclose the incident of sexual assault to everyone. Thus where, after the commission of offence, the victim, who was left by the accused near the school where the victim was to appear in examination, did not disclose the incident to the lady teacher of the school or any fellow girl student instead narrated the incident only to her mother after taking the examination. Contextualizing the incident in Indian milieu, the Court found such a conduct on the part of the prosecutrix natural and the prosecution case should not be thrown on this ground. The Court observed:

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69. See, the Report of Justice Malimath Committee on Reform *of Administration of Criminal Justice* (March, 2003) Vol. I at pp. 75 - 84
70. See Proviso to Section 372 Criminal Procedure Code, 1973
71. See, Section 8 of the Indian Evidence Act, 1872

> A girl, in a tradition bound non-permissive society in India, would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down by the society. Her not informing the teachers or her friends at the examination centre under the circumstances cannot detract from her reliability….The inherent bashfulness and the tendency to conceal outrage of sexual aggression are the factors which the Court should not overlook.[72]

(ii) Corroboration of Victim's Testimony

It has been the rule of caution for the court not to rely on the statement of the victim alone unless corroborated by independent witness. This practice was humiliating to the victim of sexual assault as such offences are not caused in public gaze and the accused could not be convicted despite his involvement. Under the influence of feminism such practice on the part of trial court is now not insisted upon for conviction. The victim of sex offence is not an accomplice rather she is a victim. The rule of corroboration is applicable to accomplice that the testimony of the accomplice cannot be relied upon unless corroborated. The victim is a competent witness under the law of evidence[73] and her evidence is to be received at par with the victim of any other violence.[74] The testimony of the victim in cases of sexual offences is vital and unless there are compelling reasons which necessitates looking for corroboration of her statement, the Court should not find difficulty to act on her testimony alone to convict.

(iii) Examination -in -Chief of Disabled Victim

Where statement of the victim of sexual offence committed or attempted is temporarily or permanently mentally or physically disabled and her statement is recorded under Section 164 (5A) (a) such statement shall be treated as statement made during the examination-in-chief as per Section 137 of the Indian Evidence Act, 1872 and the maker of the statement can be cross -examined on such statement.[75]

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72. See, *Gurmit Singh* case at 1399-1400
73. See, Section 118, Indian Evidence Act, 1872
74. Supra note 47
75. Section 164A (2) (a) Criminal Procedure Code, 1973

(iv) Role of Court during Trial

At times, the cross-examination of the victim of sexual assault is quite humiliating as the same question is put to her many times and she has to repeat the incident every time. This is done more for showing inconsistencies and contradictions in the statement of the victim so that doubt could be created in the mind of court; the benefit of which may, ultimately, go in favour of the accused. This is a subsequent sexual assault during trial proceedings which shatters the victim many times than the real crime and the Courts have to prevent it. The trial courts are not expected to be a silent spectator on such occasion. An attempt to balance the interest of the accused and the victim has been made. In *Gurmit Singh case*, Dr. Anand, J. observed:

> While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the Court must also ensure that cross-examination is not made a means of harassment for causing humiliation to the victim of crime. A victim of rape …has already undergone a traumatic experience and if she is made to repeat it again and again …she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as "discrepancies and contradictions" in her evidence.[76]

In *Sakshi* case it was directed that the questions put in cross - examination directly relating to incident should be given in writing to the Presiding Officer of the Court who may put them to the victim in a language which is not embarrassing; and the victim while giving testimony should be allowed sufficient breaks as and when required.

The changes in processual laws are certainly intended to protect the honour, dignity and prestige of the victim and the family members; it also protects the victim from continued humiliation. Unfortunately, a trend is growing where either the victim is killed[77] or the accused is killed by

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76. Supra note 66 at 1404 - 1405

77. In September 2020 an incident of rape in Hathras (State of U.P.) took place wherein the victim was subjected to brutal assault who ultimately succumbed to

the police in encounter.[78] The killing of the accused may temporarily give a sense of emotional satisfaction to people but it cannot be appreciated. In both the situations, the administration of criminal justice suffers and all these legislative and judicial efforts appear to be not of much significance. The administration of criminal justice in the matter of sexual assault cannot be satisfactory without robust mechanism and professional approach in investigation.

VI. CONCLUSION

There has been a considerable impact of legal feminism on law relating to sexual assault in India. The judiciary expressed her anxiety to change the procedural law by interpreting the provisions in such manner that the victim of sexual assault is not put to another ordeal during trial and even in pre-trial stage. The Supreme Court adhered to traditional definition of rape even when a matter was brought before it for expanding the purview of offence in changed circumstances. The Court though refused to interpret the expression "sexual intercourse" so as to include every kind of sexual act of the accused within the ambit of substantive offence of rape but has been cautious in protecting the dignity and honour of the victims of sexual assault by giving suitable interpretation to processual laws. The substantive law was amended in 2013 to include many other versions of sexual activity but it did not accept the recommendation of Justice Verma Committee Report on a gender - neutral definition for the offence. In absence of gender- neutral definition, it would be difficult to protect the legitimate interest of the transgender and few male who may fall prey of sexual offence. Further, the amended definition of rape does not cover the cases of sexual assault on the dead body of women- necrophilic sexual behavior of the accused. It may, therefore , be submitted, that a gender – neutral definition of offence of rape be enacted to recognize the right of transgender and those male who may be victim of forceful sexual assault. The necrophilic sexual behavior

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death and her dead body was burnt in odd hours without giving an opportunity to family members for offering last rites.

78. In Hyderabad a young woman, a veterinary doctor, was gang raped and killed in November 2019 and subsequently the accused were arrested and killed in an alleged encounter by the police.

should also be included within the purview of the offence. The difference principle of feminism though not expressly acknowledged in India but the analysis of cases and the provisions of the Penal Code and the procedural laws show its impact that woman at time ought to be treated differently.

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ELECTORAL REFORMS IN INDIA: THE MOVE AHEAD

J.P.RAI*

ABSTRACT : Free and fair electoral procedure is an important hallmark of vibrant and healthy democratic structure of a country. Despite efforts and recommendations of the Election Commission of India, different specialized Committees, Law Commission of India and landmark judgments delivered by the Courts, the system continues to be prone to mischief of criminality and corruption. Little has been done by Parliament in implementing these reforms. This is because of legislative inaction in bringing serious electoral reforms, our electoral system is deteriorating. There is lack of political will in combating these menaces and there also is a wide gap between preaching and practicing in existing political structure of the country. Electoral reforms of revolutionary nature are required to save the country from political deterioration. Our electoral system is not strong enough to curb the distortions which are crept in the Indian political structure, an effective and efficient electoral reform is the necessity, the sooner it is done, and the better will be for the democracy of the country.

KEY WORDS : Free and Fair Elections, Electoral Reforms, Democracy, Election Commission of India, Representation of People

I. INTRODUCTION

A good Constitution may turn to be a bad Constitution if those who are called to work happened to be bad. However, a bad Constitution may turn out to be good, if those who are called to work happened to be good.[1] The Constitution provides a mechanism of governance by

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1. Dr. B.R. Ambedkar, Constituent Assembly Debates, Vol.11, 25 November 1949, page 975

prescribing powers and functions to different bodies of the State, i.e., Legislature, Judiciary and Executive. The crucial factors, on which proper working of these organ bodies depend are attitude of common people and nature of political establishments. Indian democracy is witnessing continuous increase in the level of corruption in the political framework of the country. This incessant rise in evil of corruption and criminality is against the constitutional morality and its values and hits at the foundations of democratic government.

Free and fair elections are indispensable for a parliamentary form of representative democracy to succeed. "Fair and unbiased electoral process, with greater citizen participation is fundamental to safeguard values and ethics of a democracy".[2] Indian Elections are a process not an event. Indian elections are colossal, conducting general election is not an easy task with more than 91.50 Crores voters, 10 Lakhs polling booths, 6 National Parties, 47 State Parties, 1593 unrecognized parties and several independent candidates in the elections. However, issues such as criminalization of politics, paid news, election financing and many other corrupt practices in political structure of the Country and influence of muscle and money power have afflicted the electoral system of the Country and have gradually destroyed the faith of common voters of this Country.

Issues related to the electoral reforms are not limited to the muscle and money power or criminalization of politics. The issues are ever growing and with development of technology and communication, it gets high-tech. One of the major factors for the electoral reforms is change of voting process, defection, election funding, election campaign, paid news, propaganda making, criminalization of politics, growing suspicion on election commission and many more. The Court has expanded the horizons of "Freedom of Speech and Expression conferred under Article 19 of the Constitution and introduced the option of NOTA"[3] in EVM's to provide dissenting rights i.e., right to not choose to voters. Electoral reforms are very important to functioning of parliamentary democracy

2. 255th Law Commission of India, Report on Electoral Reforms *(*2015), available at https://lawcommissionofindia.nic.in/reports/report244.pdf , visited on 10-05-21

3. *PUCL* v *Union of India*, (2013) 10 SCC 1

and to gain back the faith of the voters in the electoral system. In this regard, many steps have been taken by the Supreme Court, High Courts, Election Commission, Law Commission, Parliamentary Committees and the Parliament, but those are not sufficient and time demands some stringent and concrete legislative measures in order to improve on the desirability of the public in the election results.

This paper makes an attempt to understand Indian electoral system; to study the issues before electoral reforms; to find out the electoral reforms so far have been made; to study the existing electoral laws against the current issues pertaining to the electoral politics; to suggest actions to fight the challenges before electoral reforms.

II. ELECTORAL POLITICS: ISSUES

A. Money Power

The role of money power in the elections is quite alarming. The position can better be understood by data of money spend from 1998 to 2019 Lok Sabha elections, the election expenditure multiplied by nine times and it goes from 9000 Crores to 55000 Crores.[4] Thirty five percent of whole expenditure was spent only on campaign and publicity. And, the second largest expenditure is directly giving money in the hand of voters. This is the scenario when Election Commission has put cap on the expenses incurred by candidate on election campaign in the constituency, which in the case of Lok Sabha election is between Rs 50 Lakhs to 70 Lakhs, depending upon the State and between Rs 20 Lakhs to 28 Lakhs in case of assembly election.[5]

Election Funding by big corporate houses was always a threat to the democracy and this was increased enormously since 2009 Lok Sabha election. In the return of the funding, Government faced too much pressure to fulfill the economic and policy related aspirations of those donors. To make political funding transparent, the government came up with the tool of 'Electoral Bonds' through The Finance Bill of 2017. Though, it requires the buyers of electoral bonds to submit 'Know Your Customer (KYC)'

4. Available at https://economictimes.indiatimes.com/news/elections/lok-sabha/india/why-indias-election-is-among-the-worlds-most-expensive/articleshow/68367262.cms, visited on 15-04-21

but doesn't obligate the benefitting political party to disclose the donor's identity. The scheme resulted into recycling of black money and money laundering.[6]

B. Offering Bribery

Offering bribery in one form or the other is a major problem of Indian Electoral System. There are three ingredients of the charge of bribe which comes within the purview of corrupt practices *first*, the bribe has to be offered either by the candidate or his agent or by another person on his behalf; *second*, it is offered with the consent of the candidate or his agent, and *third*, it is made with the avowed object of influencing the voters or influencing a person to stand or not to stand in the election. The gist of the corrupt practice lay in attempting to do something for those who were opposed to the candidate with a view to changing their votes, and as a bargain for votes.[7] While considering the question whether it was probable that a candidate would offer bribes or give bribes to secure his election, the fact that the candidate had no political background in the state and that he was a man of means would be a relevant consideration.[8]

Section 123(1) of the R P Act, 1951 was amended by the Representation of the People's (Amendment) Act, 1958 providing receipt of the bribe, a corrupt practice, by adding part (B) thereto.[9] It was because

5. The expenses incurred by the candidates contesting in elections are meticulously compiled and audited by the special observers appointed by the Election Commission. Each and every contesting candidate in elections has to submit their accounts to special audit party appointed by the commission to avoid money power in elections. The incurring or authorizing of expenditure in contravention of Section 77 is corrupt practice under Section 123(6).
6. Electoral Reforms in India: Needs, Issues and Challenges**,** Dr. Vikash Kumar, Public Policy and Administration Research www.iiste.org ISSN 2225-0972(Online) Vol.10, No.9, 2020
7. *Om Prakash* v *Lalchand,* AIR 1970 SC 1889
8. *Rajendra Prasad Jain* v *Sheel Bhadra Yajee,* AIR 1967 SC 1445
9. See *Mohan Singh* v *Banwar Singh,* AIR 1976 SC 1366 where the returned candidate offered to help one of the other candidates to get employment in a sugar factory. The offer was in order to induce him to withdraw his nomination. Supreme Court said that the acceptance of offer which constitutes a motive or reward for withdrawing from the candidature must be an acceptance of gratification or a thing of some value though not necessarily estimable in terms of money but a mere offer to help in getting employment is not such offer of gratification within the meaning of Section 123 (1)(B) as to constitute it as a corrupt practice.

of decision in *S. B. Adityan* v *S. Kandaswami*,[10] where it was alleged that the respondent paid two sums to two candidates in order to drop them out of the election contest. They withdrew but could not be made party to the election petition. Supreme Court said though gift cannot be made without acceptance of it but the acceptance is deliberately omitted from the corrupt practices, therefore, acceptance of gift is not bribery.

C. Muscle Power

Indian electoral system is also fighting with a major setback which is muscle power. Booth capturing, undue influence, violence before and after the elections, scaring voters and polling staff are some of the forms of muscle power. Booth capturing has been one of the oldest form of the rigging elections. Booth capturing, in simple words, will mean the unauthorized casting of votes by some persons other than the genuine voters either by intimidating or threatening the polling officials to surrender the ballot papers or by preventing the voters from going to the polling stations[11]. Prior to 1989, booth capturing was considered as an interference with the exercise of the electoral right of the voters and was treated as corrupt practice of undue influence under Sec.123 (2) of the 1951 Act. However, in 1989, booth capturing was made a specific corrupt practice under Sec. 123(8) of the 1951 Act by the Representation of the People (Amendment) Act 1988, effective from the 15 March 1989.[12] The shift from paper ballot to EVM machine has eliminated the incidents of booth capturing but for other incidents of muscle power affecting the elections adversely, not much has been done.

Undue influence is considered as any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any

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10. AIR 1958 SC 857
11. In the case of *Baldev Singh Mann* vs. *Gurcharan Singh*, AIR 1996 SC 1109 the Supreme Court held that threatening the polling agent of a candidate and asking him not to go inside the polling station and not to raise objections in regard to the identity of persons coming to vote did not amount to booth capturing within the meaning of Section 123(8).
12. In *Ram Sharan Yadav* v *Thakur Muneshwar Nath Singh*, AIR 1985 SC 24 the appellant was found to be present at the polling booth at the time of voting and his supporters or agents indulged in acts of assault, hurling of bombs, etc, in his presence and he did not stop them from doing so. He was held to be guilty of indulging in corrupt practice of undue influence under Sec. 123(2). Now, such acts would straightway fall within the mischief of Sec.123 (8), i.e. booth capturing.

other person with the consent of the candidate or his election agent, with the free exercise of any electoral right.[13] Undue influence applies to pre-voting stage and not the post-voting stage.[14]

D. Misuse of Government Machinery

Complains are usually raised for misuse of government machinery to further the election prospects of candidates. From government vehicles, government employees to public fund[15], all are used in furtherance of electoral interest of ruling party. This will not be incorrect to say that in the time of election, the government machinery is no more than propaganda machinery for the party in the government.[16] Disqualification[17] of Mrs Indira Gandhi on this ground is the greatest example of misuse of government machinery in elections. [18]

E. Criminalization of Politics

Criminalization of politics is a major reason to weak our electoral system. In 17th Lok Sabha, nearly half of the members have criminal charges against them.[19] It may be due to the widespread mistrust in "the system" that fails to deliver justice in a timely manner which leads voters to think that a political candidate even if having serious criminal past, if

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13. Section 123 (2) of the Representation of the People Act, 1951. See also *Jagannadh Prasad Singh* v *Kamalapati Tripathi,* AIR 1994 SC 853.
14. In *Dharam Vir* v *Amar Singh,* 1996 SCC (3) 158, it was proved that certain ballot paper were double marked in the counting hall during the counting process by the counting agent of the candidate and the returning officer was forced to reject them. Though the manner in which the electors had exercised their franchise was distorted and their votes nullified by the above illegal act, the Supreme Court held that the candidate could not be held guilty of commission of corrupt practice under Sec.123(2), as the provision of that Section applied to pre-voting stage and not at the stage of counting of votes.
15. *Ghasi Ram* v. *Dal Singh*, AIR 1968 SC 1191
16. Hardeep Kaur, *Electoral Reforms in India-Challenges,* 3 Int. Jour. of App.Ssc. 7 256-262. (2016), available at https://scientificresearchjournal.com/wp-content/uploads/2019/11/Social-Science-3_A-256-262-Full-Paper.pdf, visited on 12-03-21
17. As per the Clause 7 of Sec 123 of Representation of People Act, 1951, any form of help from government machinery amounts to Corrupt Practices.
18. *State of UP* v *Raj Narayan,* AIR 1975 SC 865
19. All India Survey on Governance Issues and Voting Behaviour 2018, ADR (2019), available at https://adrindia.org/content/all-india-survey-governance-issues-and-voting-behaviour-2018-1, visited on 18-03-21

belongs to their caste, community or religion, can help them with muscle and money power which our legal system had failed to deliver.[20]

Along with nomination papers, all the contesting candidates of Parliamentary and State Legislative Assembly elections are required to file affidavits about their previous convictions/ acquittal or discharge in any criminal offence; information about all the assets, liabilities and educational qualifications were also made mandatory.[21] Failure on the part of candidates in furnishing this information in affidavits will attract rejection of their nomination papers.[22]

The Supreme Court in *Lily Thomas* v. *Union of India*[23], struck down Section 8 (4) of the R P Act, 1951 and held that once a sitting member becomes disqualified by or under any law made by Parliament under Articles 102 (1) (e) and 191 (1) (e) of the Constitution, his seat will become vacant immediately by virtue of Articles 101 (3) (a) and 190 (3) (a) of the Constitution. It further held that the Parliament cannot make a provision as in Section 8(4) of the Act to defer the date of disqualification on which the disqualification of a sitting member will have effect.

F. Casteism and Communalism

India being diverse in culture, caste and religion, is vulnerable to caste and communal politics. At elections, caste & religious factors become very important as the candidature in a particular constituency is motivated by these considerations. The chance, for a candidate belonging to a caste or religion having majority in a particular area, is always high. In *S.R. Bommai* v *Union of India*,[24] the Supreme Court laid down that introduction of religion into politics is not merely in negation of Constitutional mandate but also a positive violation of Constitutional obligation, duty, responsibility and positive prescription or prohibition specifically enjoined by the

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20. Navin Chawla, *Every Vote Counts- The Story of India's Elections*, Harper Collins India 2019, available at https://www.amazon.in/Every-Vote-Counts-Indias-Elections/dp/9353026008, visited on 11-02-21
21. *Union of India* v. *Association for Democratic Reforms*, (2002) 5 SCC 294
22. Election Commission of India, *Elections in India- Major Events and New Initiatives, 1996-2000, available at https://eci.gov.in/files/file/7438-elections-in-india-major-events-new-initiatives-1996-2000/, visited on 01-01-21*
23. *MANU/SC/0687/2013*
24. AIR 1994 SC 1918

Constitution and the Representation of People Act, 1951.[25]

G. Non- Serious & Many Candidates

Number of candidates in election is gradually increasing in recent years. This swell in number of candidates is due to participation of independent candidates and increase in number of regional parties. Mostly, such candidates are planted by serious candidates with the purpose to cut sizable portion of votes of rival candidate or to make split in votes on the basis of caste and community.[26] It also causes inconvenience for election authorities in management during election. The issue is harming the very soul of electoral system in India. For some ulterior motive and for cheap publicity, the non-serious candidates contest the election. This affects the chances of a good candidate of winning. [27]

H. No Provision of Recall of Representatives

Recall is a process which gives power to electorate to remove the elected officials before the end of the term. It is a power with electorate to de-elect. This is a system which ensures greater accountability and performance of the elected representatives. The Court in *State of Madhya Pradesh* v *Shri Ram Singh*[28] observed that right to recall is one of the ways to achieve corruption free government which is basic tenet of democracy. At present there is no such provision in the Constitution or in any other legislation which allows for recall.

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25. The object of Sec. 123(3) is to ensure that no candidate at an election gets votes only because of his religion and no candidate is denied any vote on the ground of his religion.
26. Summeer Kaul, WHO Wants To Cleaner Electoral System? Not The Politicians, available at https://www.jstor.org/stable/41856573, visited on 10-02-21
27. In Lok Sabha election of 1996, total 13952 candidates contested elections. However, the strength of candidates contesting election fall in 2004, 2009 elections the, may be on account of alliances of major political parties. In 2019 general election, the number of contesting candidate was 8,040 which was 211 less than what was the number in 2014 general election. However, the number of non-serious candidates is still alarming and needed to be curbed. See *2019 General Election Saw Dip in Number of Candidates,* NDTV, May 21, 2019, available at https://www.ndtv.com/india-news/2019-general-election-saw-dip-in-number-of-candidates-2040879 , visited on 20-4-21
28. [2000] INSC 35, available at https://indiankanoon.org/doc/501550/, visited on 23-03-21

I. Paid News

Any news or analysis that appears in any media either Print or Electronic for a price in cash or kind as consideration, is paid news and is the latest challenge to the electoral reforms.[29] Paid news has its impact on everyone i.e., media, candidates and people, and it alone can cause very much damage to the electoral process. Finding the exiting regulatory set-up inadequate and voluntary self-regulatory industry bodies like the News Broadcasting Standards Authority and Broadcasting Content Complaints Council as an 'eye wash', it was recommended[30] for establishment of either a single regulatory body for both print and electronic media or enhancing punitive powers of the PCI and setting-up a similar statutory body for the electronic media. Such regulator(s) should have the power to take strong action against offenders and should not include media owners/interested parties as members.

III. COMMISSION AND COMMITTEES

Free and fair elections form part of the basic structure and foundation of the Constitution and democracy. [31] When elections are contested and won by candidates contesting in a corrupt way, then that is the direct attack on the very foundation of free and fair elections. The real concerns are the rise of criminality, casteism and communalism in our electoral politics.[32] To fight the challenges, Government of India had at several instances constituted committees for electoral reforms.

A. Dinesh Goswami Committee on Electoral Reforms (1990)[33] in its report made recommendation regarding the appointment of Election

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29. See *Paid News*, ECI, available at https://eci.gov.in/files/category/136-paid-news/ , visited on 20-04-21
30. Available at https://prsindia.org/policy/report-summaries/issues-related-paid-news, visited on 12-03-21
31. *State of UP* v *Raj Narain*, AIR 1975 SC 865
32. *Ashwani Kumar Upadhyay* v *Union of India* W.P (c) no. 699 of 2016
33. Available on http://www.google.co.in url?sa=t&rct=j&q=goswami%20committee%20on%20electoral%20reforms%20(1990)&source=web&cd=2&cad=rja&ved=0CCsQFjAB&url=http%3A%2F%2Flawmin.nic.in%2Fld%2Ferreports%2FDinesh%2520Goswami%2520Report%2520on%2520Electoral%2520Reforms.pdf&ei=1LsRU6_bMouCrgeZ8wE&usg=AFQjCNFMb4rz4u5MxZJW4o_m29E1qqxySQ&bvm=bv.62286460,d.bmk, visited on 08-02-21

Commissioners. The recommendations led to the enactment of the Chief Election Commissioner and Other Election Commissioners (Conditions of Service) Act, 1991 and the RP (Amendment) Act, 1996. But no decisions were made on the recommendation made by committee regarding decriminalization of politics and anti-defection law.[34]

B. Vohra Committee (1993)[35], constituted to probe criminal-politician nexus, recommended to constitute efficient independent agency for stringent actions against criminal syndicates operating in the Country. In *Dinesh Trivedi* v *Union of India*[36], till the creation of the said independent agency, the Govt. of India was directed to constitute a High Level Committee to be appointed by the President of India on the advice of Prime Minister and after consultation with the Speaker, Lok Sabha to monitor all the investigations and implementations of the recommendations mentioned in the Report.

C. Indrajeet Gupta Committee on State Funding of Elections (1998)[37] made recommendation for an annual fixed contribution by Centre and States for election corpus fund to support the political parties recognized by EC, mandatory submission of annual account of political parties to income tax department with respect to receipts and expenditure, filing of complete account of expenditure by the political parties to the Election Commission.

D. Law Commission of India 170th Report on Reform of the Electoral Laws (1999)[38] recommended incorporation of definition of

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34. Other recommendations made by the committee are age of voting from 21 to 18, Proportional representation should be adopted as voting system in place of first past the post system, Candidates should not be allowed to contest from more than one constituency. And age of candidates for assembly should be reduced to 21 and for council to 25, Increase in security deposit to discourage non-serious candidates, A model code of conduct should be framed dealing with use of official machinery, media, transport, use of EVM.
35. Available on http://www.indiapolicy.org/clearinghouse/anti-corruption.html, visited on 05-02-21
36. (1997) 4 SCC 306
37. Available on http://www.google.co.in/?gws_rd=cr&ei=LKOyUu6ODsinrgeun4CoDA#q=indrajit+gupta+committee+on+state+funding+of+elections+1998, visited on 03-02-2021
38. Available on http://www.lawcommissionofindia.nic.in/lc170.htm, visited on 10-05-21

'political party' in X Schedule of the Constitution of India, prohibition of the practice of independent candidates in election, scrap of paragraphs 3(split) and 4(merger) of X Schedule of the Constitution of India, insertion of Part IIA in RP Act 1951 for organization of political parties.

E. National Commission to Review the Working of the Constitution (NCRWC), 2002[39] declared failure of anti- defection law to curb defections especially in disguise of splits and engineered mergers. The Commission recommended to revoke the membership of defectors whether defected in group or in individual, debarring the defectors from becoming minister or becoming a holder of any public office, hearing of petition by Election Commissioner and not by Presiding Officer, cap of 10% for number of ministers against total number of memberships of the house and permanent debar of candidates who are convicted and sentenced for commission of serious and heinous crimes. As a consequence, several amendments were made in the Constitution of India.

F. Election Commission of India proposed Electoral Reforms (2004)[40] some of which require making some changes in the Conduct of Election Rules 1961, the Representation of People Act, 1951, and other similar rules and legislations. While some changes were made but major changes were ignored. The Election Commission submitted 22 of these ignored recommendations[41] to the Prime Minister.

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39. Available on http://lawmin.nic.in/ncrwc/ncrwcreport.htm, visited on 07-03-21
40. Available on http://www.google.co.in/url?sa=t&rct=j&q=The%20Election%20Commission%20of%20India%20in%20its%20Proposed%20Electoral%20Reforms%20Report%2C%202004%20&source=web&cd=3&cad=rja&ved=0CDEQFjAC&url=http%3A%2F%2Feci.nic.in%2Feci_main%2FPROPOSED_ELECTORAL_REFORMS.pdf&ei=2scRU4SPCMmPrQeCqYCYBw&usg=AFQjCNHG59KbqN5lxtVWgJpnZVJ1PpSLUQ&bvm=bv.62286460,d.bmk, visited on 03-04-21
41. The major recommendations were: Mandatory maintenance and audit of account by political parties. Ban on advertisement sponsored by Government banned six months before general election, common electoral rolls for elections at all level, false declaration by candidate before the election be made criminal offence, generally no transfer of officials during 6 months prior to election, all officials be included within Clause (7) of Section 123 of RPA, 1951 to curb misuse of government machinery, X Schedule petition be decided by the President or Governor with the consultation of the Election Commission, member if found guilty of corrupt practices by any HC than EC should be empowered to initiate process of disqualification, NOTA be available, candidates be allowed to contest from only one seat, restrictions on opinion/exit polls, all persons, charged with offences punishable by five years' imprisonment, to be disqualified from contesting, until they are cleared of those charges.

G. The Second Administrative Reforms Commission (2008)[42] declared that ethical values in politics play an important role in setting the public discourse while it is unrealistic and simplistic to expect perfection in politics in an ethically imperfect environment, the standards set in politics influence other aspect of governance; participation of criminals in the electoral process, for political parties individuals with criminal background secure votes through use of money and muscle power; and large, illegal and illegitimate use of expenditure in elections is another root cause of corruption. Cleansing elections is the most important route to improve ethical standards in politics, to curb corruption and rectify maladministration.

H. The Law Commission of India 244th Report on Electoral Disqualifications (2014)[43] observed massive increase of criminally tainted politicians, delay in completion of trial process of political candidates and low rate of conviction. Therefore, the Commission recommended that persons charged with 5 years of imprisonment or more, be declared disqualified for contesting elections but for framing of charges 6 months before the announcement of elections and for sitting MP's and MLAs trials be ended and concluded within one year period.

I. The Law Commission of India 255th Report on Electoral Reforms (2015)[44] declared that the proportional representation system is more representative in character while FPTP is more stable and recommended to extend constitutional protection to Election Commissioners on removal from the office similar to CEC, insertion of Section 77A in RP Act, 1951 which requires the candidate to maintain an account. However, the electoral reforms suggested by various Commissions and Committees are left in papers only.

J. Election Commission of India Reforms Committee (2021)[45]

Election Commission of India has decided to set up a Core Committee to identify learning, experiences, shortcomings from recently

42. Available on https://darpg.gov.in/arc-reports, visited on 06-04-21
43. Available on http://lawcommissionofindia.nic.in/reports/report244.pdf, visited on 24-05-21
44. Available on https://lawcommissionofindia.nic.in/reports/Report255.pdf , visited on 10-04-21
45. Available at https://eci.gov.in/files/file/13395-eci-push-for-wide-ranging-reforms/ , visited on 18-05-21

Poll-gone States. The committee is broadly tasked to identify: shortcomings /gaps in ECI regulatory regime, need for strengthening legal/ regulatory framework enabling ECI to more effectively ensure compliance of guidelines / directions including the Covid norms; measures to further strengthen the expenditure management regulation for inducement free election; shortcomings in existing framework in providing protection to electoral machinery from possibility of reprisal after elections; Recommendations of the Core Committee will help the Commission to chalk out way forward for forthcoming polls in future.

IV. JUDICIAL RESPONSE TO THE ELECTORAL ISSUES

The Supreme Court from time to time has issued several guidelines/ directions to prevent our electoral system from getting trapped into a cobweb of criminality and corruption. The judicial activism of the Supreme Court in addressing these issues can be traced through the judgments of the Court. In 1996, mystery shrouded on the sources of political funding and expenditure in election campaigns was attacked by *Common Cause* v *Union of India*[46], where SC pronounced that all political parties in the Country are required to file their tax returns of income as per provisions of the statute. In a democracy where the rule of law prevails, naked display of black money, by violating mandatory provisions of the law, cannot be permitted. [47]

Bringing electoral reforms by declaring that "MPs MLAs are the public servants under Section 2(c) of the Prevention of Corruption Act, 1988 and hence they are accountable to the public and courts for their acts and omissions", the Court in *P.V Narasimha Rao* v *State*[48] case has rightly pronounced that parliamentary immunity provided in Art.105 of Constitution of India, is not available to avoid prosecution against the offence of bribery.

Apex Court in *Indian Nation Congress* v. *Institute of Social Welfare*[49]

46. *Common Cause* v *Union of India,* (1996) 2 SCC 752
47. Income Tax Act, 1961, § 13-A, No. 43, Act of Parliament, 1961 (India)
48. (1998) 4 SCC 626.
49. *Indian Nation Congress* v. *Institute of Social welfare,* (2002) 5 SCC 685

observed that under Section 29-A of the RP Act, in absence of any express provision, it cannot be said that Election Commission possess power to entertain or enquire into any complaint for deregistration of political party for the violation of provisions of the Constitution. The Court, however, said that under three circumstances, the Commission can re-consider its order of registering any political party. The first, when a registration is obtained by fraud; second, under Section 29-A (9) of the RP Act and third, where Central Government has declared a political party unlawful under the provisions of other Acts such as Unlawful Activities (Prevention) Act, 1967.

In order to have well informed voters, the Court in *Union of India* v *Association for Democratic Reforms*[50] declared that every contesting candidate will have to declare criminal, financial and educational records. After this judgment, newly inserted Section 33-A of the RP Act, 1951 with marginal heading as *Right to Information*, mandates that candidates shall furnish all the information related to their accusation in any offence punishable with 2 years or more imprisonment and also in cases where charges have been framed by courts having jurisdiction of the matter.

In *Lily Thomas* v *Union of India*[51], holding Section 8(4)[52] of the RP Act *ultra-vires* to the Constitution, the Court removed the discrimination between fresh candidates and an existing member. Observing NOTA as extremely important in democracy, the Court in *People's Union for Civil Liberties* v *Union of India*[53] held that when the political parties will realize that a large number of people are expressing their disapproval with the candidates being put up by them, gradually there will be a systematic change and the political parties will be forced to accept the will of the people and field candidates who are known for the integrity. After going through the report of ECI, approving introduction of VVPAT, the Court declared in *Dr, Subramanian Swamy* v *Election Commission of*

50. *Union of India* v *Association for Democratic Reforms*, (2002) 5 SCC 294
51. *Lily Thomas* v *Union of India* (2013) SCC 653
52. Section 8(4) provided that "if a person on the date of conviction was a member of the Parliament or Legislative Assembly of a State, and if he files appeal or revision against such conviction or sentence of imprisonment, within three months of his conviction, then he shall not be disqualified till the appeal or revision is decided by said Court".
53. *People's Union for Civil Liberties* v *Union of India*, 2013 SC 161

India[54] that the use of paper trail would verify the vote of voter and raise the confidence in the EVM. Declaring promise of freebies by political parties in their election manifesto to shake the roots of free and fair election, the Court gave direction to Election Commission to frame guidelines for regulation of contents of manifesto.[55] It has been seen that judiciary has acted when there was need of urgent judicial intervention.

V. CONCLUSION

The nexus of crime, money, corruption and politics has been developing in the Country. It cannot be said that, government did not do anything to check criminality, corruption, mis-management in politics, Some reforms were brought, but the serious reforms which are needed to bring real change in our electoral laws are still not implemented. Electoral reforms are necessary for healthy democracy and establishment of responsible government. In India, electoral reforms are not a single time effort, but a continuous process. The degree and nature of electoral reforms will require wider debate, political consensus and strong political will to ensure free and fair elections by introducing various important electoral reforms so that democracy may be strengthened in his country.

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54. *Dr, Subramanian Swamy* v *Election Commission of India*, 2013 SC 9093, 406
55. *Subramanian Balaji* v. *State of T.N.*, (2013) 9 SCC 659

DIFFERENCE OF NOVELTY AND INVENTIVE STEP: READING OR MISREADING OF STATUTORY TEXT IN JUDICIAL DECISIONS

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AQA RAZA**

ABSTRACT : Novelty and Inventive Step are related but two different levels of enquiry under patent law. First level of enquiry, after the enquiry of patentable subject-matter, is that of novelty which is confined to one prior art reference. Second level of enquiry is that of inventive step which spreads over multiple prior art references. If claimed invention is not novel, there is no need to enquire about inventive step. Only three decisions of Supreme Court directly deal with novelty and inventive step. These decisions, however, neither explain nor lay down any test of distinguishing between novelty and inventive step. Central argument of this article is that statutory definitions of new invention (novelty) and inventive step as given under s. 2 (1) (l) and s. 2 (1) (ja) of the Patents Act, 1970[1] and provisions of the Indian Patents and Designs Act, 1911 (hereinafter, Act of 1911) are relatively explicit and clear but the relevant judicial decisions have been either silent as to distinguishing features of novelty and inventive step or have confounded the two making their distinction opaque. The argument

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1. 39 of 1970

proceeds from semantic analysis to legal analysis of the statutory text and relevant decisions of the Supreme Court on novelty and inventive step.

KEY WORDS : anticipation, new invention, novelty, inventive step, non-obviousness, person skilled in the art, prior art.

I. INTRODUCTION

Argument of this article is that statutory definitions of new invention (novelty) and inventive step as given under s. 2 (1) (l) and s. 2 (1) (ja) of the Patents Act, 1970[2] (*hereinafter,* 'Act of 1970') and provisions of the Indian Patents and Designs Act, 1911 (*hereinafter,* 'Act of 1911') are relatively explicit and clear but decisions in *Bishwanath Prasad Radhey Shyam*v. *Hindustan Metal Industries* [3] (*hereinafter, Bishwanath Prasad*); *Monsanto Company* v *CoramandalIndag Products (P)* Ltd.[4] (*hereinafter, Monsanto*); and *Novartis AG* v. *Union of India* [5](*hereinafter, Novartis*)have been either silent as to distinguishing features of novelty and inventive step or have confounded the two making their distinction opaque. No other direct decision of the Supreme Court is available on novelty and inventive step.

Trilogy of these judgments has at least four features in common. *One,* they dealt with question of novelty and inventive step. *Two,* in first two judgments patent was revoked and in the last judgment patent application was denied. *Three,* judgments *in personam* are legally valid and can be hardly contested. *Four,* trinity of judgments has unity of opacity as to distinction between novelty and inventive step. Opacity in and due to judicial interpretation-construction of statutory text creates legal uncertainty. Text of statutes is couched necessarily in abstract language so that present and future fact situations may be subsumed by the statutory provisions. Courts are expected to make meaning of statutory text clear, unambiguous and unequivocal with the help of concrete cases. An analysis of these judgments seems to mirror an inverted image of judicial craft.

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2. *Ibid.*
3. (1979) 2 SCC 511;Full Bench, unanimous judgment delivered by Justice R.S. Sarkaria.
4. (1986)1 SCC 642; Division Bench, unanimous judgment delivered by Justice O. Chinnappa Reddy.
5. (2013) 6 SCC 1;Division Bench, unanimous judgment delivered by Justice Aftab Alam.

Judicial craft is expected to begin from statutory premises and reach a conclusion in such a manner that the meaning is constructed and not destructed as per the scheme of the statute. For purposes of convenience, this article is further divided into three parts. Part – II reproduces the text of the Act of 1970 relating to novelty and inventive step and seeks to provide a plain reading thereof. Part – III seeks to develop the argument by analyzing the three judicial decisions on the threshold of statutory provisions of the Act of 1970and Act of 1911. Part – IV concludes.

II. NOVELTY AND INVENTIVE STEP: A PLAIN READING OF STATUTORY TEXT

First question that naturally occurs or at least should naturally occur to a person dealing with patent law is "what is patent?" Sec 2 (1) (m) of the Act of 1970 defines "patent" to mean "a patent for any invention granted under this Act. These eleven words narrate complete story of patent law in India. Every other provision of the Act of 1970 and the Rules framed there under merely explain and clarify the provisions of Sec 2 (1) (m). As per the scheme of the Act, the applicant for patent must disclose the invention as per the statutory requirements to get a patent. The question: 'What is the meaning of "any invention" is a substantive patent law question is answered by s. 2 (1) (j) of the Act 1970. Provisions of s. 2 (1) (j) are explained by clauses (ja), (l) and (ac) of s. 2 (1) read with ss. 3 and 4 and Chapter VI of the Act of 1970. The question 'what is the meaning of "granted under this Act" is a substantive procedural patent law question. This article makes no attempt to deal with substantive procedural patent law questions. However, it may be appropriate to briefly mention such questions for reasons of clarity. Such questions are four in number, namely: (i) whether claimed invention is fully and particularly described in written description part of complete specification so as to transfer knowledge and technology relating to claimed invention to the public by making full and complete disclosure of claimed invention; (ii) whether the complete specification objectively describes the claimed invention in such a manner that a person skilled in the art can replicate the claimed invention in the laboratory without conducting unnecessary and undue experiment for purposes of research, experiment and significant improvement; (iii) whether the complete specification discloses the best method or mode known to the applicant to replicate the invention without undue experiment for research purposes; and (iv)

whether the claim or claims of the complete specification is/are fairly based on written description, enablement and best mode? If the answer to all the four questions is in affirmative, claimed invention satisfies the requirements of substantive procedural patent law questions.

At this juncture, it may be appropriate to provide a brief historical account of birth and evolution of definition of 'invention' in India since 1911 to 2005 to appreciate the changing dimensions of the definition. After 2005, there has not been any amendment to the definition of 'invention'.

Section 2 (8) of the Indian Patents and Designs Act, 1911[6]—predecessor of Act of 1970—defined an "invention" to mean "any manner of new manufacture and includes an improvement and an allied invention". This definition did not have the requirements of either 'inventive step'/ 'non-obviousness' or 'utility'/ 'capable of industrial application'. However, s. 26(1)(f) of the Act of 1911 recognized lack of utility as a ground of revocation of patent. Definition of 'invention' under the Act of 1911 remained in force for more than sixty years till the repeal of the Act of 1911 by the Act of 1970. Act of 1970 defined 'invention' under s. 2 (j) to mean "any new and useful: (i) art, process, method or manner of manufacture; (ii) machine, apparatus or other article;(iii)substance produced by manufacture, and includes any new and useful improvement of any of them, and an alleged invention." For the first time, Act of 1970 explicitly added the requirement of being "useful" to the definition of 'invention'. However, the requirement of 'inventive step'/ 'capable of industrial application' did not find any mention therein. S. 26 of the Act of 1911 became s. 64 of the Act of 1970. This definition under the Act of 1970 as originally enacted in 1970 survived for around thirty-two years[7] and was amended by the Patents (Amendment) Act, 2002[8] for the first time which substituted clause (j) of s. 2 (1) of the Act of 1970 as under:

> (j) "invention" means a new product or process involving an inventive step and capable of industrial application;

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6. Act No. II of 1911 repealed by s. 162 of the Patents Act, 1970 [39 of 1970].
7. The Patents (Amendment) Act, 1999 (17 of 1999) did not amend the definition of 'invention'.
8. 38 of 2002.

> (ja) "Inventive step" means a feature that makes the invention not obvious to a person skilled in the art.

It is noticeable that the amendment of 2002: (i) deleted the word "useful" from the definition of 'invention' under s. 2 (1) (j) of the Act of 1970, (ii) requirement of 'inventive step' was specified for the first time in the definition of invention under s. 2 (1) (j), and (iii) s. 2 (1) (ja) was inserted for the first time to define 'inventive step'. The Act of 1970 was further amended by the Patents (Amendment) Act, 2005[9] and s. 2 (1) (ja) was substituted to redefine "inventive step" to mean "[A] feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art". A new clause (l) substituting clauses (l) and (m) was inserted by the amendment of 2005 to define "new invention" for the first time to mean "[A]ny invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification, i.e., the subject matter has not fallen in public domain or that it does not form part of the state of the art".

Scheme of Act of 1970 as to substantive patent law question gives an irresistible impression that there is a logical structure of asking substantive patent law questions in the following order one by one:

1. What is the meaning of 'patent' as given in s. 2 (1) (m) of the Act? Answer to this question will tell three things: (i) patent is a grant, (ii) grant is under the Act of 1970, and (iii) grant is for any invention. The first two things relate to the procedural patent law and the third is about the substantive patent law. The third thing will take the question to s. 2 (1) (j) which defines 'invention'.
2. What is the meaning of invention under s. 2 (1) (j) of the Act? This definition has four elements: (i) product or process, (ii) newness (novelty) of product or process, (iii) inventive step involved in making the product or process, and (iv) capability of product or process for industrial application. The third question therefore will be as under:
3. Whether or not the claimed product or process is excluded by ss. 3

9. 15 of 2005.

and 4 of the Act? If the claimed product or process is excluded by any clause of s. 3 or provisions of s. 4, the questions of novelty, inventive step and it being capable of industrial application do not arise. In *Novartis,* the Court should have closed the argument on the basis of finding and holding in view of provisions of s. 3 (d) for the claimed invention did not show any enhancement in the efficacy. The Court, however, decided to ignore the question of novelty and directly went to the question of inventive step. If the claimed product or process is not excluded by any clause of s. 3 or provisions of s. 4, then only the other questions will arise. The next question will be of novelty.

4. Whether claimed product or process is new invention under s. 2 (1) (l) of the Act? If this question is answered in the negative, then the question of inventive step will not arise. In *Novartis,* this question would not have arisen for the claimed invention was already hit by s. 3 (d) of the Act. Be that as it may, the Court did not ask this question and leaped to the question of inventive step raising doubt about the use and purpose of s. 2 (1) (l). If the answer to this question is in affirmative, then only the question of inventive step will arise.
5. Whether the claimed product or process involves an inventive step under s. 2 (1) (ja) of the Act? This question only arises if all the essentials of claimed product or process are not present in single prior art reference. Inventive step question is whether the essentials of the claimed product or process are spread over more than one prior reference and all the references put together makes the claimed product or process obvious to person skilled in the art.
6. Whether the claimed product or process is capable of being made or used in an industry under s. 2 (1) (ac) of the Act?
7. Whether the claimed product or process is useful under s. 64 (1) (g)? It is noticeable that the requirement of usefulness is not specified in s. 2 (1) (j) which defines 'invention'. However, as per the holding in *Bishwanath Prasad* and also in accordance with the scheme of the Act usefulness of the claimed product or process is an essential of invention under s. 2 (1) (j).

Saptpadi identified above constitute the substantive essentials steps in the ceremony of patent grant besides procedural steps thereof. After

the completion of first two steps, following five steps one after the other in accordance with the provisions of s. 2 (1) (j) read with s. 64 (1) (g) of the Act of 1970 are required to be taken:

First, the claimed product or process must not fall under any of the categories prohibited under ss. 3 and 4 of the Act. *Second*, the claimed product or process must not be anticipated by publication in any document or used in the country or elsewhere in the world under s. 2 (1) (l). *Third*, the claimed product or process must not lack inventive step under s. 2 (1) (ja). *Fourth*, the claimed product or process must not lack capability of industrial application under s. 2 (1) (ac). *Fifth*, the claimed product or process must not lack utility under s. 64 (1) (g).First step is discussed in other articles.[10] This article deals with the second and third steps only. Fourth and fifth steps will not be dealt with in this article as they relate to substantive procedural law questions.

As noted earlier, s. 2 (l) (l) defines "new invention" and does not employ the term "novelty". Use of the word 'technology' after 'invention' is merely tautological. 'New invention' means new and first in the whole world by virtue of s. 2 (1) (l) of the Act which provides "country or elsewhere in the world". Elements of novelty (new invention) have not been identified in positive manner. Rather elements negating novelty have been identified as: (a) anticipation of invention by publication, and (b) prior use of invention. Meaning of 'publication' is not given in the Act. 'Publication' means 'act of making known to the public'.[11] 'Accessibility to' and "not affordability of" is the essence of publication. Following may be placed in the category of prior art: (a) publication: patent (granted in any country),book, articles or research paper in any journal, Ph.D. Thesis or any other work to earn a degree from an educational institution provided the public have access to such work, internet, newspaper, magazine, any other media; (b) use anywhere in the world including India; (c) prior knowledge in any form, for example by word of mouth including *shrutis* and *smritis*. Bottom line is that the inventor must give to the society

10. *See*, Ghayur Alam, "Patent Eligible Products and Processes" Dr. Ram Manohar Lohia National Law University Journal 66 (2014); Ghayur Alam, "Monsanto's Bt. Cotton Patent, Indian Courts and Public Policy" 10 WIPO-WTO Colloquium Papers 71 (2019).
11. A.S. Hornby (ed.), *Oxford Advanced Learner's Dictionary of Current English* 675 (Oxford University Press, Delhi, 1974)

that the society did not have. He cannot give to society what it already possesses.

It is noticeable that the above definition neither mentions'single prior art reference' nor does it employ the term 'prior art'. The definition employs the term 'state of the art'. The two terms prior art and state of the art may be used interchangeably.

It would have been more appropriate had s. 2 (1) (l) been captioned as 'new product or process' or simply 'new' instead of 'new invention'. It would have served at least two purposes. Firstly, since the other two terms—inventive step and capable of industrial application—forming part of the definition of invention are separately defined by ss. 2 (1) (ja) and 2 (1) (ac) respectively. Therefore, under the scheme of things, the term—new product or process—also forming part of 'invention' should have been defined. Secondly, a cursory look at the definitions of 'invention' and 'new invention' has given rise to confusion in *Novartis*. *Prima facie*, it is not clear why the Indian statute defines 'invention' and 'new invention' and how these definitions differ from each other. A closer look, however, at the two definitions will show that definition of 'new invention' is an explanation to the definition of 'invention'.

Chapter VI of the Act provides as to what does not constitute anticipation. If a circumstance does not fall in any of the provisions of Chapter VI, it may constitute anticipation. Term 'anticipation' is not defined by the Act rather Chapter VI is entitled 'Anticipation'. 'Anticipation' means 'action of anticipating'.[12] One of the meanings of 'anticipate' is 'do[ing] something before somebody else does it'[13] However, the most appropriate meaning of 'anticipate' is 'expect'.[14] 'Expect' means 'think or believe that something will happen or come'.[15] In other words, the claimed invention should not have been anticipated or expected by the existing knowledge. Inventor must be the first person before anybody else to conceive the invention in his mind and deliver the said conceived invention in the form of a new product or process to claim a patent over it.

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12. *Id.* at 33
13. *Ibid.*
14. *Ibid.*
15. *Id.* at 298

Patent law has evolved a method to determine anticipation. The method is to find out whether alleged invention was obvious to a person skilled in the art in the light of a single prior art reference. If yes, it is not new. If no, then the question will arise, whether claimed invention is obvious in the light of multiple prior art references.[16] If yes, it does not involve an inventive step. If no, it involves an inventive step. In other words, enquiry of inventive step is only needed if the claimed invention is found to be novel.

Since there is no mention of 'person skilled in the art" in s. 2 (1) (1), an impression may be created as if the addressee of 2 (1) (l) is not 'person skilled in the art". This impression seems to neglect the subtext of s. 2 (1) (l). The term 'person skilled in the art' is used in Section 2 (1) (ja) of the Act as forming part of the definition of 'inventive step'. But the term is not defined by the Act. Genesis of this term may be traced to Common Law. Common Law Courts evolved the concept of 'reasonable man', and 'ordinary prudent man' as a standard to measure and judge the act of the defendant—in some cases of the plaintiff—with that of the reasonable man. The reasonable man is a figment of legal imagination and fiction created by common law courts. This legal fiction helps measure conduct and behavior of men and women for legal purposes. The legal category of 'person skilled in the art' therefore functions as the Golden Scale in the realm of patent law which helps distinguish the work of an 'inventor' from that of a 'person skilled in the art'. A 'person skilled in the art' is one who is working in a particular field of science or technology and has fairly reasonable understanding of his subjects. It may be said that the person skilled in the art is a person who knows: (i) entire body of technical literature, (iii) literature teaching towards and teaching away from the claimed invention, and (iii) literature pertinent to his work. This person becomes an inventor if he succeeds in solving a problem that no other person similarly situated has been able to solve. An inventor is not merely a person skilled in the art. He is not a person knowledgeable in the art. An inventor is one who has the knowledge and the skill to translate his knowledge and ideas to make an unprecedented product, process, tool, machine, apparatus, device, manufacture, and/or composition of matter etc. He must be more skilled than a person skilled in the art. He

16. See *Nordberg, Inc*. v. *Telsmith, Inc.*, 881 F. Supp. 1252, 1995

need not be a genius. But he must not be an idiot. He must not be a person of average intelligence. He must know what has been done in his field of technology. What is happening in his field of technology? What is happening in the related field of technology? What has not been done in his field of technology? What are the cutting-edge frontiers in his field of technology? What are the gaps and problems in his field of technology? Finally, he must succeed in making a product or developing a process to fill the existing gap or solve the existing problem in a manner that a person skilled in his field of technology is not able to fill or solve. If claimed invention clears the test of novelty, the test of 'inventive step' kicks in. Following equation may be used to explain the above:

Inventive step = technical advancement or/and economic significance + non-obviousness.

Requirements of technical advancement and economic significance are both alternative and complementary. It is necessary that the product or process must either involve a technical advancement or economic significance. But it is not necessary that the product or process must fulfill both the requirements of technical advancement and economic significance. However, a product or process may be both a technical advancement having economic significance. Nevertheless, technical advancement and economic significance either alone or together are only a necessary condition of inventive step but not a sufficient one. Law further requires that such a technical advancement or economic significance or both must not have been obvious to a person skilled in the art.

Definition of 'inventive step' may be divided into two parts. Part 1 stipulates two alternative conditions: technical advancement and economic significance. None of these terms are defined by the Act. Part 2 stipulates only condition: non-obviousness. Needless to say, these tree elements are related but different aspects of inventive step. Technical advancement is one of the elements of inventive step. However, it is neither a necessary nor a sufficient element. It is not necessary for there is an alternative to this element. It is also not sufficient for it must also be non-obvious to a person skilled in the art.

Technical advancement is to be measured in terms of existing knowledge. It must be advancement over the existing knowledge. Technical

advancement may be of two types: unprecedented (revolutionary) and incremental (evolutionary). Revolutionary technical advancement by its very nature involves inventive step. It is the evolutionary advance which is generally problematic in patent law. Further, most of the technical advancements are evolutionary and incremental. Not every evolutionary advancement, however, meets the requirements of inventive step. Only those evolutionary technical advancements which were not obvious to the person skilled in the art meet the requirement of inventive step. In other words, a human intervention resulting in the improvisation of existing technology does not involve an inventive step unless such an intervention was not obvious to a person skilled in the art but was made obvious for the first time by the inventor.

Existing knowledge is the touchstone to measure whether there is a technical advance. Technical advance is an addition to the existing knowledge. This addition generally is a movement from complex to simple. Technical advancement must make the life simple. For example, there was a time when fourteen (14) injections were administered to a man after dog bite. Now, only one injection is sufficient. Let us take a very recent example of technical advancement in the field of internet technology. India is still using 4G technology of internet. Some countries are using 5G technology. China is leading the research in 6G technology. There will 7G technology and so on so forth.

Economic significance is an element of inventive step. Like, technical advancement it is neither a necessary nor a sufficient element. It not necessary for technical advancement is an alternative. It is not sufficient, for not all economic significance rise to the level of invention. Only that economic significance which was not obvious to the person skilled in the art rises to the dignity of an invention.

So, if a product or process involves either a technical advancement or has economic significance or both, a further question is whether such a technical advancement or economic significance was not obvious to a person skilled in the art.

According to s. 2 (1) (ja) non-obviousness is only an element of the requirement of inventive step. Under Indian law inventive step and non-obviousness may not be considered as identical. For in addition to being non-obvious, the product or process must also be either a technical

advancement or have economic significance or both.

We may also use an Urdu couplet to illustrate the meaning of obviousness:

"Hazaron Saal Nargis Apni BeyNoori Pey Rotee Hai"

"Badi Mushkil Sey Hota Hai Chaman Mein Deedawar Paida"

Translated in English this couplet may basically mean:

"An eye shaped flower 'beauty' weeps for thousands of years[17] on its blindness"

"A visionary is born in the world with great difficulty after a long time"

Nargis, is an eye shaped flower and has been used as a metaphor for human and his inability to see *Chaman* literally means garden and has been used as a metaphor for world. *Deedawar* though literally means any human having eyes but, in the couplet, it means a human having the ability to see the unseen by others. This couplet also underscores the point that ability to see does not occur without difficulty. Similarly, the scientists work for years to invent something. Lots of money is spent to bring about a single invention. Though there are serendipitous inventions, but they are few. It is the sustained and continuous perseverance by the scientists which gives the invention to the world.

Heidegger, a German Philosopher, wrote that the destiny of humanity is in bringing forth what is undisclosed.[18] Patent law encourages this destiny of humanity for disclosing to the world what was undisclosed.

In short it may be stated that inventive step is accomplished when a non-obvious is made obvious to the world. This making may involve either a technical advancement or economic significance or both. To be precise, to be eligible for the grant of a patent a product or process or

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17. The pace of invention and development in the contemporary world is much faster in the comparison to the first half of the twentieth century and before. In the latter half of the twentieth century and thereafter the pace of invention and development has been increasingly increasing. Nevertheless, it still takes time to make the unobvious obvious.
18. Martin Heidegger, "The Question Concerning Technology", in Martin Heidegger, *The Question Concerning Technology and Other Essays* 3, 32 (William Lovitt trans., Garland Publishing Inc, New York, 1977)

both must have been made obvious to the world for the first time. It may be stated that if anyone thinking and working in a particular field of technology would have been able to do what the alleged inventor has done; the work of the alleged inventor does not involve an inventive step for it was obvious to everybody working in his field of technology. But if the persons working in his field of technology express surprise saying that we never thought like this, the work of the alleged inventor involves an inventive step.

In view of the above semantic and legal analysis, it may be concluded that the statutory text under clauses (1) and (ja) of s. 2 (1) of Act 1970 defining "new invention" and "inventive step" respectively are explicitly clear, unambiguous, and unequivocal as to the scope and difference between the two requirements. Following Part, therefore, seeks to develop the central argument of this article.

III. NOVELTY AND INVENTIVE STEP: JUDICIAL INTERPRETATION-CONSTRUCTION

As noted in Part II, basis of difference between the two requirements of novelty and inventive step is number of 'prior art reference'. Single prior art reference negatives novelty. Multiple prior art references negative non-obviousness. Where it is alleged that the invention is anticipated by single prior reference, all the elements of the invention must be exactly present in the single prior art reference. Anticipation is to be determined on the date of filing of the complete specification. Anticipation for purposes of novelty does not mean substantial similarity between a single prior art and the alleged invention. The similarity between the two must be identical. In other words, if the single prior art reference would have been accessible to a person ordinarily skilled in the art, he would have done what the alleged invention is. This single prior art reference may be an old invention, an earlier patent, an earlier publication, an earlier use, or anything else forming part of the state of art or prior art. It may be noted, however, that generally, though not always, the prior art reference may be an earlier patent. To understand the meaning of novelty and non-obviousness it becomes necessary to understand the meaning of prior art reference, anticipation and person ordinarily skilled in the art. Now let us move to examine whether the Court read or misread the provisions relating to

novelty and inventive step. Text of s. 2 (8) of the Act of 1911 was interpreted in *Bishwanath Prasad* as follows:

> "It is to be noted that unlike the Patents Act 1970, the Act of 1911 does not specify the requirement of being useful in the definition of 'invention'. But Courts have always taken the view that a patentable invention, apart from being a new manufacture, must also be useful. The foundation for this judicial interpretation is to be found in the fact that Section 26(1)(f) of the 1911 Act recognizes lack of utility as one of the grounds on which a patent can be revoked."[19]

Had the Court added the phrase 'inventive step' before the word 'useful' in the first and second sentence of above cited paragraph and mentioned s. 26(1)(e) of the Act of 1911 which recognizes lack of inventive step as a ground of revocation, then the interpretation by the Court would have been in accordance with the scheme of the Act of 1911. Approach of the Court gives an irresistible impression as if the requirement of 'inventive step' is specified by the Act in the definition of 'invention' for the Court instead of highlighting this aspect directly went on to observe as under:

> "[T]o be patentable an improvement on something known before or a combination of different matters already known, should be something more than a mere workshop improvement; and must independently satisfy the test of invention or an 'inventive step'. . . must produce a new result, or a new article or a better or cheaper article than before. . . in order to be patentable, the new subject matter must involve 'invention' over what is old."[20]

A reading of above observation reveals that improvement must be either an 'invention' or an 'inventive step'. The above observation not only circuitous but also equates whole (invention) with its part (inventive step) at least in the legal sense. 'Invention' is whole. Patentable subject

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19. *Supra* note 3 at 518(*Biswanath Prasad*).
20. *Ibid.*

matter, novelty, inventive step and utility are the four constituents of the whole called invention. It is trite in patent law that if the claimed invention is an invention in the patent law sense, the only logically valid and legally tenable sequitur is that the claimed invention is patentable. Declaring 'invention' as an alternative to 'inventive step' by using disjunction 'or' between the two expressions not only equates the whole with the part but also neglects the well-established distinction between the two making the bright line distinction opaque and murky. The Court further went on to observe as under:

> "Whether an alleged invention involves novelty and an 'inventive step', is a mixed question of law and fact, . . .Whether the "manner of manufacture" patented, was publicly known, used and practiced (sic) in the country before or at the date of the patent? If the answer to this question is 'yes', it will negative novelty or 'subject matter'."[21]

Use of conjunction 'and' between 'novelty' and 'inventive step' also makes it clear that novelty and inventive step are not one but two distinct requirements. However, novelty and subject matter can never be an alternative to each other. The two are supplementary and complimentary to each other. Enquiry of novelty can begin only if the subject matter claimed is not excluded by patent law. In the same vein, the Court went on to observe as follows:

> "The expression "does not involve any inventive step" used in Section 26(1) (e) of the Act and its equivalent word "obvious", have acquired special significance in the terminology of Patent Law. The 'obviousness' has to be strictly and objectively judged."[22]

In the above paragraph the Court referred to the provisions of the Act of 1911 relating to revocation for lack of inventive step without explaining the distinction between 'novelty' and 'inventive step'. The Court may have clarified that novelty is a necessary condition but not a sufficient condition for grant or validity of a patent. The Court should have clarified that if the claimed invention is found to be novel, the next threshold

21. *Id.* at 519.
22. *Ibid.*

requirement is of inventive step which must be satisfied independently. Be that as it may, the Court went on to cite tests formulated by foreign courts to determine novelty and inventive step in the following words, "Another test of whether a document is a publication which would negative existence of novelty or an "inventive step. . .".[23] This observation of the Court cannot withstand the scrutiny of the text and scheme of the Act of 1911. If a document and a publication can negative both novelty and inventive step, then what is the difference between the two? If novelty and inventive step are same and one, then why the Act of 1911 had two separate clauses (d) and (e) under s. 26 (1)—clause (d) stipulating lack of novelty and clause (e) stipulating lack of inventive step —as separate and individually sufficient ground of revocation of patent? Clause (d) of s. 26 (1) read, "[T]hat the invention was not, at the date of patent, a manner of new manufacture or improvement". Whereas, clause (e) of s. 26 (1) read, "[T]hat the invention does not involve any inventive step, having regard to what was known or used prior to the date of the patent". Clause (a) uses indefinite article a before the words 'manner of manufacture. It is a common knowledge of English Grammar that 'a' means one. On the other hand, provisions of s. 26 (1) (e) do not employ either a definite or indefinite article. Scope of clause (d) appears to be limited to a manner. Scope of clause (e) appears to be all-embracing and all-encompassing having regard to all known's and all use from a manner or manners and from all sources. This should be been the semantic reading of the statutory text as it is. This manner of reading of statutory text may be described as misreading by the Court. Statutory text is unambiguously and unequivocally clear but the construction thereof appears to be confounding and opaque. Before parting with the judgment, the Court observed, "[T]he crucial test of the validity of a patent is whether it involves novelty and an inventive step?"[24] This observation is in accordance with the text and scheme of the Act of 1911.

In *Monsanto,* the Supreme Court relied on the provisions of the Act of 1970 though the "[P]atents in the present case were granted under the Indian Patents and Designs Act, 1911, i.e., before the Patents Act, 1970."[25] The Court observed as under:

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23. *Ibid.*
24. *Id.* at 529.
25. *Supra* note 4 at 649(*Monsanto*).

> "Under Section 64(e) (*sic*), a patent may be revoked if the invention. . . is not new, . . . Under Section 64(l)(f), a patent may be revoked if the invention. . . is obvious or does not involve any inventive step. . ."[26]

In the above paragraph, the Court did not go into the distinction between the scope of two clauses. Expression 'publicly known' appears in both the clauses. It is trite in statutory interpretation-construction that the field occupied by different provisions are different. The Court once did not say anything as to the distinction between novelty and inventive step rather it decided not to decide this question and observed as under:

> "We do not think that it is necessary for us to go into the various questions of law. . . The questions were no doubt interesting and arose for the first time. But we desire to keep our interest purely academic and within bounds. So, we do not pronounce upon those questions."[27]

It is submitted that the Court instead of declaring such questions as 'purely academic' should have decided them for in the words of the Court itself these questions "arose for the first time". *Monsanto* was the second case involving the questions of novelty and inventive step in the thirty seventh year of the establishment of the Supreme Court. After decades, a case involving substantive question of patent law has reached the Court, the Court could have utilized the opportunity to clarify law on the point. The Court, however, decided not to decide these questions.

The first case and perhaps the only case involving substantive question of patent law under the Act of 1970 is *Novartis* decided by the Supreme Court on April 01,2013. Not only the final outcome in this case but also the proceedings before various fora including the Supreme Court were widely reported in newspaper and intensely debated in media and blogs. Decision in this case definitely generated heat. Did it generate light proportionate to the heat is an open question? The Court seemed to have taken a wrong turn in the beginning of the judgment by pronouncing death of s. 2 (1) (l) of the Act of 1970 by not including it in the questions

26. *Ibid.*
27. *Id.* at 650.

formulated by it. This article argues that the Court formulated the questions that it should not have formulated. It is also argued in this article that the Court should have formulated the question of novelty as per the provisions of s. 2 (1) (l) instead of raising doubt as to purpose and usefulness thereof. The two general questions and one specific question as formulated by the Court are reproduced as under:

> "What is the true import of Section 3(d) of the Patents Act, 1970? How does it interplay with Clauses (j) and (ja) of Section 2(1)? Does the product for which the appellant claims patent qualify as a "new product" which comes by through an invention that has a feature that involves technical advance over the existing knowledge and that makes the invention "not obvious" to a person skilled in the art?"[28]

The question how does Section 3 (d) interplay with clause (1) of Section 2 (1) was not asked by the Court despite the mention of "new product" in the third question. Not only that the Court ignored the provisions of s. 2 (1) (l) but went on to observe as under:

> "How is it that some of the provisions of the Act apparently seem to be of no use or purpose, e.g. Sections 2 (1) (l) and 2 (1) (ta)? Why is it that some of the crucial provisions in the Act appear to be wanting in precision and clarity?"[29]

The Court should have answered the above two questions particularly if it was underplaying the questions by using "apparently" and "appear". Further, if some of the provisions in the Act are crucial but appear to be wanting in precision and clarity, then it was incumbent on the Court to construct those provisions so as to make their meaning precise and clear. The Court, however, decided to raise the questions but to leave them undecided. It may be argued that the Court did not declare the provisions of ss. 2 (1) (l) and 2 (1) (ta) of no use or purpose (otiose) and it merely raised questions about them. This argument, however, will fall on all four because of sound of silence as to relevance of s. 2 (1) (l) which was

28. *Supra* note 5 at 118(*Novartis*).
29. *Id.* at 126–127.

inserted for the first time by 2005 amendment to define "new invention". Neglect of s. 2 (1) (l) is not merely a neglect of definition of new invention but is a neglect of one complete Chapter VI of the Act of 1970 which deals with "Anticipation"—the heart and soul of s. 2 (1) (l).

It is not *res integra* that every word of statute has meaning and purpose. There is a very strong presumption against surplus age of statutory text. The Supreme Court of India has time and again reiterated the weight of this presumption as under:

1. "It is not a sound principle of construction to brush aside words in a statute as being inapposite surplus age, if they can have appropriate application in circumstances conceivably within the contemplation of the statute."[30]
2. "It is incumbent on the court to avoid a construction, if reasonably permissible on the language, which would render a part of the statute devoid of any meaning or application."[31]
3. "In the interpretation of statutes, the court always presumes that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect."[32]
4. "The Legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the Legislature will not be accepted except for compelling reasons."[33]
5. "It is a cardinal principle of construction of statute that when language of the statute is plain and unambiguous, then the court must give effect to the words used in the statute."[34]

Had the Court referred to the decisions mentioned in the above paragraph, it would not have raised questions as to the purpose and use of s. 2 (1) (l) of the Act of the Act of 1970. *Novartis* was a Division Bench decision. Judicial discipline mandates a smaller bench to follow and be bound by a decision of larger bench. There are plenty of decisions

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30. *Aswini Kumar Ghose* v. *Arabinda Bose*, AIR 1952 SC 369, 377
31. *Rao Shiv Bahadur Singh* v. *State of U.P.*, AIR 1953 SC 394, 397
32. *J.K. Cotton Spinning & Weaving Mills Co. Ltd.* v. *State of U.P.*, AIR 1961 SC 1170, 1174
33. *Ghanshyam Das* v. *Regional Assistant Commissioner, Sales Tax*, AIR 1964 SC 766
34. *Union of India* v. *Hansoli Devi*, [2002] Supp. 2 SCR 324

since 1952 of the Supreme Court including of Constitution Benches for the well-established and consistent proposition that every word of the statute has purpose and use. The observation of the Court as to s. 2 (1) (l) of Act of 1970 is therefore clearly *per incuriam.* Since the Court has expressed doubt as to the purpose and use of the statutory text, it was necessarily expected of the Court to give sound and convincing reasons to rebut the presumption against statutory surplus age. The Court, however, raised the doubt and moved on.

Be that as it may, in *Novartis*, the Court held and found that the claimed invention was known substance from the Zimmermann Patent itself.[35] This holding is legally sound but logically invalid for Zimmermann Patent is single prior art reference which directly falls under clause (1) of s. 2 (1) and not under clause (ja) of s. 2 (1). Since the Court has raised doubt as to the existence of clause (l) of s. 2 (1), it was impossible for it to rely on it. The Court concluded that the claimed product "[F]ails both the tests of invention and patentability as provided under clauses (*j*), (*ja*) of Section 2 (1) and Section 3 (*d*) respectively."[36] This conclusion could have been very easily reached by just asking the question: whether the claimed invention is anticipated by Zimmermann Patent. There was no need to ask the second as reproduced above. There was no need to ask the question whether the invention involves an inventive step. The first general question and the third specific question were sufficient for the decision in *Novartis.* The second general question seems to irrelevant and unnecessary for purposes of decision in *Novartis. Novartis* did not involve s. 2 (1) (ja) enquiry at all. If the claimed invention is hit by s. 3 (d), other questions of novelty, inventive step and utility etc. do not or at least should not arise. If the claimed invention is hit by s. 2 (1) (l), question of s. 2 (1) (ja) does not arise or at least should not arise.

In view of the above analysis, it may be concluded that the trilogy of decisions of the Supreme Court have not been only silent as to distinguishing features of novelty and inventive step but have also confounded the two features making their distinction opaque.

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35. *Supra* note 5 at 177 (*Novartis*).
36. *Id.* at 187

IV. CONCLUSION

It is a well-established principle that the Supreme Court has the power to declare the constitutional or statutory provisions as unconstitutional. It is also well-established that the Court may read down a constitutional or statutory provision. This judicial power is popularly known as judicial review. Defining feature of judicial exercise of power is reasonableness and fairness of the judicial reasoning. In a constitutional democracy, judicial review amongst other thing is a counter-majoritarian mechanism. Nonetheless, the wisdom of the Parliament manifested in s. 2 (1) (l) of the Act of 1970 should not have been declared "without any purpose and of no use" by just raising a question and that too without assigning any plausible judicial reason about its redundancy or otiose. The Court should have given sound legal reasoning to rebut presumption against surplus age of statutory text. Can it be said that the Parliament made otiose provisions in defining "new invention"? If so, what about the requirement of novelty? Can it be said that where a claimed invention involves an inventive step, it need not be new? If so, why clause (j) of s. 2 (1) employs the term "new" as a qualifier to the words "product or process" along with the requirements of "inventive step". Had the Court also formulated the question as "How does s. 3 (d) interplay with clauses (j), (l) and (ja) of Section 2(1)?" problem of misreading the statutory text or deliberate neglect thereof would not have arisen. Approach of the Court may be described as an example of judicial overreach at best or misreading of the statutory text at worst. Further, neglect of established principle of presumption against surplus age of statutory text reiterated by the Supreme Court in a number of decisions including those of Constitution Benches clearly renders the reading of s. 2 (1) (l) of Act of 1970 *per incuriam*.

In view of the above semantic and legal analysis, it may be claimed that the central argument of the article provides a plausible and convincing explanation for the proposition that statutory definitions of new invention (novelty) and inventive step as given under s. 2 (1) (l) and s. 2 (1) (ja) of the Patents Act, 1970 and provisions of the Indian Patents and Designs Act, 1911 are explicit and clear but relevant judicial decisions have been either silent as to distinguishing features of novelty and inventive step or have confounded the two making their distinction opaque.

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DISSECTING THE CONCEPT OF PROVISIONAL MEASURES UNDER THE STATUTE OF INTERNATIONAL COURT OF JUSTICE: LIMITATIONS AND PROBLEMS OF ENFORCEABILITY

GURPREET SINGH*

ABSTRACT : The provisional measures underArticle 41 of the Statute of the International Court of Justice have generated a lot of controversy among the states and have created tension between international law and municipal law. This becomes apparent from the judgments of the US Supreme Court where the US Supreme Court has asserted the supremacy of domestic law. At the same time, the various reports of the ICJ also reflect two approaches of judges of the ICJ, static and humanistic. Further, the enforcement of provisional measures against any five permanent members has proved futile. The present article discusses these trends and argues that there is a need to maintain a fine balance between international law and municipal law. International law should not be used to obstacle the due process of municipal law and the ICJ should only intervene when the available machinery of the state is exhausted first. Further, the humanistic interpretation of the provisional measures in the latest case, *India v. Pakistan* (ICJ Report, 2017) would have far-reaching impact in future too and certainly, it would operate to widen the jurisdiction of the ICJ. This article analyses the provisional measures under Article 41 of the statute of the International Court of Justice.

KEY WORDS : United Nations, International Court of Justice, Charter, Provisional Measures, ICJ Report.

I. INTRODUCTION

The International Court of Justice (hereinafter referred to as ICJ)

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which is also known as a World Court is one of the principal organs of the United Nations. The importance of this court can be gauged from the fact that the authors of the UN Charter themselves included the provisions regarding the ICJ in the Charter from Articles 92 to 96. These Articles provide *inter alia* for the establishment of the ICJ as a principal organ for solving the disputes among the states. Unlike the ICJ, its predecessor, the Permanent Court of International Justice (hereinafter referred to as PCIJ) was not part of the League of Nations although it was also linked with it in several ways; for example, the members of the Court were elected by the principal political organs of the League, the Assembly and the Council and expenses of the Court were borne by the League.[1] Another remarkable feature of the ICJ is that the ICJ is neither legally identical with the PCIJ nor its legal successor. The United States, the Soviet Union and several other participants at the San Francisco Conference were not members of the Statute of the PICJ. However, the ICJ is intended to be an integral part of the United Nations.

Besides the provisions regarding ICJ in the Charter, the ICJ is further governed by the Statute which is known as a "Statute of International Court of Justice." The Statute is annexed to the Charter, of which it forms an integral part.[2] Thus, the whole Statute is to be treated equal to the UN Charter and must be interpreted in consonance with the UN Charter whereas the Statute of the PCIJ was a separate treaty and not a part of the Covenant of the League of Nations.[3] The Statute includes provisions on the organisation of the Court, its jurisdiction in contentious cases, its competence to give an advisory opinion, and basic rules of procedure.

Interestingly, the Statute of the PCIJ did not provide the provisional measures in its first draft. The provisional measures were inserted in the very last days of the work of the Committee on the proposal of the Brazilian jurist, Raul Fernandes. He also proposed to insert the penalty clause for violation of the provisional measures. However, this proposal was rejected by the majority of members because the Court lacked the means to execute

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1. See, The Statue of the PICJ, Arts. 4,8,10 & 14
2. Mosler in Bruno Simma & Hermann Mosler*et. al.* eds., *The Charter of the United Nations: A Commentary* (Oxford University Press, 1994 p. 978
3. *Ibid*

its order.[4] Article 41 of the Statute of the PCIJ was adopted in the Statues of ICJ with a slight modification of replacing the word "Council" with the "Security Council".

The ICJ is the only international judicial mechanism that is available to all states, even to non-members of the United Nations on fulfilling certain conditions. Thus, it has the qualification to be called a world court of the international community. While functioning as a principal judicial organ of the UN, the paramount duty of the ICJ is to interpret the UN Charter. The Court interprets the Charter according to the same principles which are generally applied to the interpretation of international agreements. During the San Francisco Conference the expectations of the new Court were underlined in the following words:

> 'The First Committee ventures to foresee a significant role for the new Court in the international relations of the future. The judicial process will have a central place in the plans of the United Nations for the settlement of international disputes by peaceful means.... It is confidently anticipated that jurisdiction of this tribunal will be extended as time goes on, and past experience warrants the expectation that exercise of this jurisdiction will commend a general support.'[5]

Keeping these expectations in view, the General Assembly adopted a resolution in 1947 titled, *Need for greater use by the United Nations and its Organs of International Court of Justice*.[6] It recommended that the states, "as a general rule" submit their legal disputes to the ICJ; the UN organs and the organs of the specialised agencies should request the Court to give advisory opinions on important legal questions.[7] Keeping this background and context in mind, the provisional measures will be discussed hereinafter.

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4. Andreas Zimmermann, Christian Tomuschat, *et. al.* (eds.), *The Statute of International Court of Justice: ACommentary,*2nd edn(Oxford University Press,2012) 990
5. Simma,*supra*note 2at980
6. General Assembly Resolution 171 (II), Nov.14, 1947
7. *Ibid*

II. PROVISIONAL MEASURES UNDER THE STATUTE OF INTERNATIONAL COURT OF JUSTICE: ARTICLE 41

The several cases before the ICJ have served to focus attention on the problems concerning the indication of provisional measures of protection to the parties before the Court either on an application by one or both parties or *proprio motu.* Such application if moved has priority over all other cases. The decision shall be treated as a matter of urgency, and if the Court is not sitting it shall be convened without delay by the President for the purpose.[8]Article 41 of the ICJ Statute provides for the provisional measures as follows:

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party; and
2. Pending the final decision, a notice of the measures suggested shall forthwith be given to the parties and the Security Council.'[9]

The Court may indicate if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the rights of either party. Notice of such measures is to be given to the Security Council (SC). At this stage thorough examination of the Court's jurisdiction and the admissibility of the case is not required, since the circumstances call for an urgent decision. According to the case-law of the Court, it is required that the provisions invoked by the applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded.

The application for the request of indication of provisional measures can be brought at any stage of the case. However, generally, it is brought at the very beginning of the case. For example, in the Kulbushan Yadav case, India moved an application at the very beginning of the case and the ICJ had granted the relief sought by the Indian's Council. It may also be in any document of the written proceedings.[10]The Court may accept an application for interim measures in spite of that the simultaneous application has been made to the UNSC either for the same or a

8. Andreas, *supra* note 4 at 991
9. Article 41 of Statue of International Court of Justice
10. *India v Pakistan*, ICJ Report, 2017

complementary complaint by the applicant.[11] The only important thing is to be kept in mind that the existing dispute has been submitted to the Court prior to the bringing of the application.[12]'Unless the Court decides to dismiss forthwith the application requesting the interim measure, the parties must be given an opportunity to present observations, usually at the oral hearings. If there is no application by either party, the Court may, acting *proprio motu*, invoke the power to impose interim measures at any time during the proceedings.'[13] However, one must remember that the power of the Court to impose the provisional measures *proprio motu* is a discretionary power of the Court and against the *non ultra petita* rule, yet this rule is invoked under extreme circumstances.

Provisional measures will be indicated if, in the opinion of the Court, there exists a danger of irreparable damage. Such an order does not prejudice either the jurisdictional issue or the decision on the merits. The Statute does not explicitly set forth that compliance with the measures is binding. No strict obligation follows from a linguistic interpretation of the words "indicate.... provisional measures." On the other hand, the conclusion that the order is binding may be drawn from its character as an important element of the judicial process (the judicial procedure to be followed before an order is made, and the responsibility of a non-complying party to apply damages for any harm as a result of non-compliance with the order.)[14]

The question of whether the UNSC may take action in the case of non-compliance with 'Provisional Measures' indicated by the Court to preserve the respective right of the parties was discussed in the Anglo-Iranian Oil Co. Case (1951).[15] The British government based the request, not on Article 94 but referred to Articles 34 and 35 of the Charter.[16] In its

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11. See, Polish Agrarian Reform Case, 1933 and Aegean Sea Continental Shelf Case, 1966
12. See, *Aegean Sea Continental Shelf Case*, 1966
13. Taslim O. Elias, *The International Court of Justice and Some Contemporary Problems* (Springer-Science Business Media, B.V.1983) 70.
14. Simma, *supra* note 2
15. ICJ Report, 1952
16. Art. 94 of the UN Charter reads: (1) Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party; (2) If any party to a case fails to perform the

view, provisional measures are as fully binding as a final judgment, while Iran restricted the binding effect to the latter and objected to the legitimacy of invoking the UNSC on this assumption. The question remained unanswered because the ICJ denied its jurisdiction. The provisional measures of protection indicated in the jurisdictional phase of the proceedings thus became obsolete. The duty of the Court to give the UNSC notice of provisional measures indicated by it and the widely held opinion that the indication of provisional measures has binding force are arguments in favour of applicability of Article 94(2).[17]

Hence according to Taslim O. Elias, we can summarise the objects and scope of interim measures in the following headings:

a) to maintain the *status quo ante* in order to prevent aggravation or extension of the situation- such measures shall have the effect of protecting the rights forming the subject of the dispute submitted to the Court;

b) to preserve the respective rights of the parties pending the decision of the Court;

c) the measures should not be granted to cover anything beyond what is essential to ensure the effectiveness of the ultimate decision; in other words, nothing is to be done in the interim period which might render the decision nugatory; and

d) the Court may go beyond the proposal of any part and indicate what it deems most appropriate.[18]

III. NATURE AND CONDITIONS FOR INDICATION OFPROVISIONAL MEASURES

As the title of 'provisional' itself indicates that the measures are only temporary in nature and they do not cause prejudice to the final decision in any way. Further, Article 41 is placed in Chapter III of the ICJ

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obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment

17. Simma, *supra* note 2

18. Taslim O. Elias *supra* note 13 at 70-71

Statute which deals with the procedure of the Court. Thus, under a formalistic appreciation, interim protection may be regarded simply as a matter of procedure, and not as a matter of competence.[19] The question of jurisdiction or any question relating to the admissibility of the application or the merits themselves remains unaffected. The Court in *Electric Company of Sofia* case held that Article 41 of the Statute 'applies the principle universally accepted by international tribunals ... that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.'[20]

In order to invoke provisional measures these following conditions are mandatory which could be churned out from the catena of the ICJ judgments:

1) There must be *prima facie* jurisdiction. However, to establish jurisdiction in a definitive manner is not a requirement at this stage.
2) The dispute should appear to exist between the parties on the date of filing the application.
3) The Court must be satisfied that the rights asserted by the party requesting such measures are at least plausible (reasonable).
4) There must be an urgency coupled with a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court.

Elias has rightly observed while commenting on the *prima facie* jurisdiction of the ICJ, 'To follow the course advocated by those who wanted the issue of jurisdiction settled in *liminelitis* would be to go against the grain of the exercise of the Court's normal judicial functions, thus making it possible for a party objecting to the jurisdiction in such a case in effect to veto all proceedings in any dispute brought before the Court, irrespective of the merits or the demerits of the case for either side; such a course might result in endangering international peace and security, contrary to the United Nations Charter.'[21]

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19. Andreas,*supra* note 4 at 994
20. PCIJ Series A/B, No. 79, at 199 (1939)
21. *Ibid,* 76

Further, settling down the issue of the jurisdiction at *lim inelitis* would also hamper a general inherent power of the Court to decide about its jurisdiction. One must remember that the majority of municipal judicial systems of the world bestow this power upon their courts. 'It is only by entertaining a case brought before it that a court can decide whether or not there is anything worth considering at all. Unless an application is patently or manifestly devoid of any merit at all or unless the subject matter is illegal, if it is based on an agreement to begin a war, the Court should be able to decide its competence to indicate interim measures.'[22]

IV. FAILURE OF ONE PARTY TO APPEAR

The power of the ICJ to decide the case in absence of non-appearance of the respondent (*ex-parte*) directly flows from Article 53 of the Statute of the ICJ. It makes the provision,

1. Whenever one of the parties does not appear before the Court or fails to defend its case, the other party may call upon the Court to decide in favour of its claim; and
2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well-founded in fact and law.'[23]

As per this Article, the Court has to ascertain only two things first, jurisdiction under Articles 36 and 37 and also the validity of claim according to fact and law.[24] If these two requirements are fulfilled, then the ICJ could proceed to decide a case in absence of the respondent. The Court's task of ascertaining the facts and, consequently, applying the law is made more difficult where only the applicant participates in the proceedings. Thus, in the reasoning of all judgments in cases of this kind, the Court has expressed its regret that one party failed to appear before it. Non-appearance is not in itself a violation of the Statute. Non-acceptance of a judgment is a case where the Court has assumed jurisdiction is another matter: if the non-appearing state refuses to recognize the judgment it is violating its obligation resulting from Article 36(6) of

22. *Ibid*, 76-77
23. Article 53 the Statue of International Court of Justice
24. See, Articles 36 and 37 the Statue of International Court of Justice

the Statute. Apart from the legal considerations, a state which fails to appear before the Court thereby demonstrates its disregard for the fact that the judicial settlement by the ICJ is emphasized by the UN Charter as one of the means of peaceful settlement of international disputes.[25]

The ICJ has decided the number of cases by invoking this Article in the past. Among them, examples of some are *Fisheries Jurisdiction,* ICJ Report 1974, *Nuclear Tests,* ICJ Reports, 1974, *Aegean Sea Continental Shelf,* ICJ Reports 1978 and *United States Diplomatic Consular Staff,* ICJ Reports, 1979. In all those cases, the respondent states never appeared before the ICJ. In *Case Concerning the United States Diplomatic Consular Staff,* the ICJ held, 'If the respondent state may fail to appear, in which case the Court will normally indicate interim measures of protection only if it does not manifestly lack jurisdiction.'[26] Thus, in the *Aegean Sea Continental Shelf* case, where Greece brought an application for an indication of interim measures, and Turkey did not appear because it rejected the Court's jurisdiction, the Greek application was nevertheless heard, though refused on certain other grounds. At the same time, the ICJ observed in *Corfu Channel Case* 'While Article 53 obliged the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their detail; for this might in certain unopposed cases prove impossible in practice. It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well-founded.'[27]

The Optional Protocol (1963) also provides compulsory jurisdiction of the ICJ under Article 1, 'Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.'[28]

Ina recent case, concerning provisional measures between India and Pakistan, it was noticed by the ICJ that both states have been parties to

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25. Simma, *supra*note 2
26. See,Quoted ICJ Reports 1978 in Taslim O. Elias *supra* note 13
27. ICJ Reports 1974
28. Optional Protocol Concerning the Compulsory Settlement of Disputes, 1963

the Vienna Convention since 28 December 1977 and 14 May 1969, respectively, and to the Optional Protocol since 28 December 1977 and 29 April 1976, respectively. Neither of them has made reservations to those instruments.[29] Under these circumstances, there is no option left with Pakistan but to appear before the ICJ as even in absence of Pakistan, the ICJ has the power to "indicate provisional measures" under Article 41 of the Statute of the ICJ. Yet, one must remember that "indication of provisional measures" does not debar another party to contest the issue of jurisdiction of the Court in the concerned case.[30]

V. ENFORCEABILITY OF PROVISIONAL MEASURES

The ICJ has held in a catena of judgments that the 'orders on provisional measures under Article 41 have binding effect and thus create international legal obligations for any party to whom the provisional measures are addressed.'[31]Under Article 94 of the UN Charter, on the failure of compliance with the obligations incumbent upon any party under a judgment, the other party may have recourse to the Security Council and the Security Council may if it deems necessary, make recommendations or decide appropriate measures to be taken to give effect to the judgment of the Court.

It is worthy to note here that 'an indication of interim measures by the Court, whether it is given in the form of an order or otherwise, has the same force as a decision of the Court which has no binding force except between the parties and in respect of that particular case (Article 59 of the Statute of the Court). An indication of interim measures is at least an interim judgment, and may in certain cases be a final decision on a particular issue.'[32] As Hudson has said, 'The judicial process which is entrusted to the Court includes as one of its features, indeed as one of its essential features, this power to indicate provisional measures which ought to be taken. If a State has accepted the general office of the Court, if it has joined with other States in maintaining the Court, or if it is a party to

29. Jadhav Case (*India v. Pakistan*) ICJ Reports, 2017, All judgments of the ICJ are *available at*<www.icj.org>
30. *Ibid*
31. *Ibid,* also see La GrandeCase, *Germany v USA*ICJ Reports 2001
32. Taslim O. Elias *supra* note 13

a treaty which provides for the Court's exercise of its functions, it has admitted the powers which are included in the judicial process entrusted to the Court. It would seem to follow that such a State is under an obligation to respect the Court's indication of provisional measures; in other words, as a party before the Court, such a State has an obligation, to the extent that the matter lies within its power, to take the measures indicated. This obligation exists apart from and before a determination of the jurisdiction of the Court to deal with the merits of the pending case, but it ceases to be operative when a determination is made that the Court lacks such jurisdiction.'[33]

Such an obligation devolves upon any State which has made a declaration accepting the jurisdiction of the Court 'in conformity with Article 36 of the Statute.' Numerous instruments provide for the Court's exercise of the power to indicate provisional measures and affirm the obligation of the parties to take the measures indicated; e.g. Article 33(1) of the General Act of 1928 (the Briand Kellogg Pact) so provides and Section 33 (3) requires parties to abstain from any action which might aggravate the dispute.[34]

VI. PROBLEMS OF ENFORCEMENT OF PROVISIONAL MEASURES

Provisional measures cannot be enforced against any permanent Member of the Security Council because of veto thus putting limitations on the powers of the ICJ .Belligerent and persistent violation of provisional measures in the past by some powerful countries has reflected the futility of provisional measures.[35]In the Paraguay case the counsel of the USA argued before the ICJ, 'The indication of the provisional measures requested by Paraguay would be contrary to the interests of the States parties to the Vienna Convention and to those of the international community as a whole as well as to those of the Court, and would, in particular, be such as seriously to disrupt the criminal justice systems of the States parties to the Convention, given the risk of proliferation of cases; and whereas it stated in that connection that the States have an overriding interest in avoiding external judicial intervention which would interfere with the execution of a sentence passed at the end of an orderly

33. PCLJ Series A/B, No. 48

34. Taslim O. Elias *supra* note 13, 80

35. See, *Paraguay v. USA*,ICJ Reports 1998 and *Germany v. USA*, ICJ Reports 2001

process meeting the relevant human rights standards.'[36]

In the case of Mexico, the USA argued that under provisional measures, "sweeping prohibition on capital punishment for Mexican nationals in the United States, regardless of the United States Law would drastically interfere with the United States sovereignty rights and implicate important federalism interests."The USA further argued that by giving such sweeping order on prohibition, the ICJ would transfer into a "general criminal court of appeal" which would be contrary to well-established norm that "the function of this court is to resolve international legal disputes between States…….and not to act as a court of criminal appeal."[37]

However, the ICJ rejected these arguments by pointing out to the parties that the Court while considering a request for the indication of provisional measures, 'must be concerned to preserve . . . the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent, without being obliged at that stage of the proceedings to rule on those rights; that the issues brought before the Court, in this case, do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes" that "the function of this Court is to resolve international legal disputes between States, inter alia when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal". Thus, the Court held that it may indicate provisional measures without infringing these principles. Therefore, the Court rejected the argument of the United States 'put forward on these specific points.'[38]

In *Medellín v Texas*[39], the US Supreme Court while overruling the judgment of the ICJ in the Mexico case held by the majority that the decisions of the ICJ do not bind the domestic law without authority from the United States Congress or the Constitution. 'While a treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself

36. ICJ Reports 1998.Case Concerning the Vienna Convention on Consular Relations (*Paraguay v United States of America*), *available at:* https://www.refworld.org/ (last visited on Aug. 10, 2019)
37. *Mexico v USA*,ICJ Report, 2004
38. *Ibid*
39. *Medellín v Texas*, 552 U.S. 491, 2008

conveys an intention that it be "self-executing" and is ratified on that basis.'[40]Further, the Court held that the ICJ judgment in *Avenacase though* creates 'an international law obligation on the part of the United States, but it is not automatically binding domestic law because none of the relevant treaty sources—the Optional Protocol, the UN Charter, or the ICJ Statute—creates binding federal law in the absence of implementing legislation, and no such legislation has been enacted.[41]

The US Supreme Court further held that the ICJ Statute limits the disputes between the nations and are not concerned with individuals. The ICJ decisions have only binding force among parties to the dispute. Therefore, the ICJ judgment in the *Avena* case "does not automatically constitute federal law enforceable in US courts. Medellin, an individual, cannot be considered a party to the *Avena* decision."[42]This judgment of the US Supreme Court establishes that in the USA, there must be an enacted legislation in order to create binding federal law. However, it seems to be a narrow interpretation of the law because it will give free hand to all those errant parties who want to avoid the implementation of the ICJ judgments and constitute a bad precedent for others.

Contrary to the majority opinion, Justice Breyer, Justice Souter and Justice Ginsburg (minority views)gave dissenting opinions. According to them, the Constitution's Supremacy Clause provides that "all Treaties … which shall be made … under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby."[43] The Clause means that the "courts" must regard "a treaty … as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."[44] "The United States has signed and ratified a series of treaties obliging it to comply with the ICJ judgments in cases in which it has given its consent to the exercise of the ICJ's adjudicatory authority. Specifically, the United States has agreed to submit, in this kind of case, to the ICJ's "compulsory

40. See,*Foster v. Neilson*, 2 Pet. 253, 314
41. Medellin *supra* note 39
42. *Ibid*
43. US Constitution, Art. VI, cl. 2
44. Also See, *Foster v. Neilson*, 2 Pet. 253, 314 1829, (majority opinion of Marshall, C. J.)

jurisdiction" for purposes of "compulsory settlement." It agreed that the ICJ's judgments would have "binding force … between the parties and in respect of [a] particular case."[45] Further, the Court held that Congress has done nothing to suggest the contrary. Under these circumstances, the treaty obligations, and hence the judgment, resting as it does upon the consent of the United States to the ICJ's jurisdiction, bind the courts no less than would an act of the [federal] legislature."[46]

Justice Breyer further enunciated the consequences of the majority judgment. According to Breyer, the majority opinion will result in "practical anomalies" as it will "unnecessarily complicate the President's foreign affairs task." For instance, in such situations, there is very likelihood that the UNSC may take enforcement action in order to implement Avena judgment which might result in"worsening relations with our neighbour Mexico" and "precipitating actions by other nations putting at risk American citizens who have the misfortune to be arrested while travelling abroad, or of diminishing our Nation's reputation abroad as a result of our failure to follow the 'rule of law' principles that we preach."Besides, the judgment also burdens the "Congress with a task (post-ratification legislation) that, in respect to many decisions of international tribunals, it may not want and which it may find difficult to execute. At the same time, insofar as today's holdings make it more difficult to enforce the judgments of international tribunals, including technical non-politically-controversial judgments, those holdings weaken that rule of law for which our Constitution stands."[47]

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45. *Ibid*

46. Medellín, *supra* note 39

47. [Quoted in *Medellín v. Texas*, 552 US 491 (2008).Former Secretary of State Charles Evans Hughes stated that "we favour, and always have favoured, an international court of justice for the determination according to judicial standards of justiciable international disputes"); Mr. Root Discusses International Problems, N. Y. Times, July 9, 1916, section 6, book review p. 276 (former Secretary of State and U. S. Senator Elihu Root stating that " a court of international justice with a general obligation to submit all justiciable questions to its jurisdiction and to abide by its judgment is a primary requisite to any real restraint of law' "); Mills, *The Obligation of the United States Toward the World Court*, 114 Annals of the American Academy of Political and Social Science 128 (1924) (Congressman Ogden Mills describing the efforts of then-Secretary of State John Hay, and others, to establish a World Court, and the support therefore)]

These institutional considerations make it difficult to reconcile the majority's holdings with the workable Constitution that the Founders envisaged. They reinforce the importance, in practice and in principle, of asking Chief Justice Marshall's question: Does a treaty provision address the 'Judicial' Branch rather than the 'Political Branches' of Government. And they show the wisdom of the well-established precedent that indicates that the answer to the question here is 'yes.' In sum, a strong line of precedent, likely reflecting the views of the Founders, indicates that the treaty provisions before us and the judgment of the International Court of Justice address themselves to the Judicial Branch and consequently are self-executing. In reaching a contrary conclusion, the Court has failed to take proper account of that precedent and, as a result, the Nation may well break its word even though the [US] President seeks to live up to that word and Congress has done nothing to suggest the contrary.[48]

Thus, it clearly reveals the conflict of interests between international law and domestic law. It is submitted that the minority view is more appropriate and in consonance with International Law. If the majority view was accepted, it would amount to say that the judgment of the ICJ is nothing more than the fine enunciation of international law without any practical utility. It would also make the World Court a defunct institution and be a violation of the UN Charter itself. It would be sheer wastage of time, money and human resources. Further, the majority judgment also reflects the danger of interpretation of international law into domestic law. This interpretation has rendered the international law nugatory and undermined its authority.

VII. PROVISIONAL MEASURES AS A RIGHT OF STATES NOT OF INDIVIDUALS (DISSENTING OPINION OF JUDGE ODA)

In this case, Germany made the request before the ICJ for indication of provisional measures for alleged violation of Article 36 (2) of the Vienna Convention on Consular Relations, 1963 by the USA and prayed for stay of execution of LaGrand till final disposal of the case. However, the prayer was granted but Judge Oda gave a dissenting opinion. His main objections were: Unilateral acceptance of the Application of one party under the

48. *Ibid.*

statute of the ICJ and/or the Optional Protocol concerning the Compulsory Settlement of Disputes, 1963 will lead states which have accepted the compulsory jurisdiction of the Court to withdraw their acceptance.[49] Rightly, the USA withdrew from the Optional Protocol on March 7, 2005.The provisional measures according to Judge Oda, are ordered to preserve the rights of *States*, and not of *individuals*, exposed to an imminent breach that is irreparable. Judge Oda also noted:

> '[the] Court erred in acceding to Germany's request for provisional measures, submitted on 2nd March 1999 together with the Application instituting proceedings. Notwithstanding the delicate position the Court was in (as Walter LaGrand's execution in the United States was imminent), the Court should have adhered to the principle that provisional measures are ordered to preserve the rights of *States*, and not *individuals* exposed to an imminent breach which is irreparable. The Court thus erred in granting the Order indicating provisional measures.'[50]

Further, in the present case, there is no question of interpretation regarding convention or treaty but the alleged violation of a provision of Article 36 of Vienna Convention and the USA has already accepted this violation. 'Individuals of the sending and receiving states should be accorded equal rights and equal treatment under the Convention. Finally, Justice Oda believes that the Court has confused the right, if any, accorded under the Convention to arrested foreign nationals with the rights of foreign nationals to protection under general international law or other treaties or conventions, and, possibly, even with human rights.'[51]

Judge Buergenthal also held that the decision of the Court must ensure that 'no state would get benefit from a litigation strategy amounting to procedural misconduct highly prejudicial to the rights of other states.'[52]

In *Mexico v. the USA*, Judge Oda held when the US has already

49. La Grand Case, ICJ Report, 2001
50. *Ibid*
51. *Ibid*
52. *Ibid*

accepted its failure to provide the "consular notification" which itself shuts the dispute between the parties regarding "interpretation or application of the Vienna Convention". Judge Oda further holds that the Vienna Convention was used by Mexico "as a means to subject the United States to the compulsory jurisdiction of the Court". Judge Oda notes that 'the Mexican nationals were in most cases given consular assistance in the judicial processes that followed their initial sentencing. He stresses that this case cannot be about the domestic legal procedure in the United States because that lies within the sovereign discretion of that country. Nor can it be about the interpretation or application of the Vienna Convention because the United States admits its violation. Nor can the case be about theappropriate remedy for the violation of the Convention because that is a matter of general international law, not the interpretation or application of the Convention.'[53] Judge Oda concludes that 'this case is really about the abhorrence of capital punishment. Judge Oda states that if the International Court of Justice interferes in a State's criminal law system, it fails to respect the sovereignty of the State and places itself on a par with the Supreme Court of the State.'[54]

VIII. PROVISIONAL MEASURES AS A RIGHT OF INDIVIDUAL

In *Mexico v. USA*, Mexico argued, 'the right to consular notification and consular communication under the Vienna Convention is a human right of such a fundamental nature that its infringement will *ipso facto* produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right.' However, the ICJ holds that there is no need to decide the question "of whether or not the Vienna Convention rights are human rights" because "neither the text nor the object and purpose of the Convention, nor any indication in the *travaux préparatoires*, support the conclusion that Mexico draws from its contention in that regard."[55]

In *Paraguay v United States of America*, the Counsel of Paraguay again based his arguments on the basis of violation of human right of Mr.

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53. *Ibid*
54. *Ibid*
55. *Medellín v Texas*, 552 U.S. 491 2008

Breard who was to be executed on 14th April 1998.[56] It was emphasizes that "the importance and sanctity of an individual human life are well established in international law" and "also recognized by Article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall be protected by law."[57]

However, after thirteen years, Judge Cancado Trindada ventured upon including the human rights regime in the realm of international law. In *India v. Pakistan* case, Judge Cancado Trindada "purports to address the selected points bringing them into the realm of juridical epistemology."[58]"Rights of States and of individuals emanate directly from International Law" therefore they are "indeed to be considered altogether, they cannot be dissociated from other." He also tries to "demystifying the constraints of outdated voluntarism positives" (like the autonomy of will of the States) and notices the growing impact of the *corpus juris* of the International Law of Human Rights on Vienna Convention of 1963.He observes:

> 'It so happens that the very emergence and consolidation of the corpus juris of the ILHR are due to the reaction of the universal juridical conscience to the recurrent abuses committed against human beings, often warranted by positive law: with that, the Law came to the encounter of human beings, the ultimate titular's of their inherent rights protected by its norms.'[59]

According to Judge Trindada, 'the states and individuals are subjects of contemporary International law; the crystallization of the subjective individual right to information on consular assistance bears witness of such evolution. In the framework of this new *corpus juris*, one cannot remain indifferent to the contribution of other areas of human knowledge, nor to the existential time of human beings.'[60]

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56. *Paraguay v United States of America*ICJ Report, 1998
57. *Ibid*
58. *India v. Pakistan*ICJ Report, 2017
59. *Ibid.*
60. *Ibid.*

The right to information on consular assistance "cannot nowadays be appreciated in the framework of exclusively inter-State relations, as contemporary legal science has come to admit that the contents and effectiveness of juridical norms accompany the evolution of time, not being independent of this latter."[61]Thus, violations of the rights of the individual under Article 36 [of the 1963 Vienna Convention] may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual.Judge Trindade held that "the right to information on consular assistance with the guarantees of the due process of law set forth in the instruments of the ILHR, bearing witness of the process of humanization of International law, as manifested in particular also in the domain of consular law nowadays."[62]The autonomous legal regime of provisional measures of protection has become "true jurisdictional guarantees of a preventive character, safeguarding the fundamental and non-derogable (rather than "plausible") right to life (in addition to the right to liberty and security of person, and the right to a fair trial)". Even though the proceedings in the contentious case before the ICJ keep on being strictly inter-state ones, this in no way impedes that the beneficiaries of protection in given circumstances are the human beings themselves, individually or in groups. Thus, he concludes that "the awakening of the universal juridical conscience", the "*recta ratio* inherent to humanity," as the ultimate material source of the law of nations, stands well above the 'will' of individual States:

> 'That outlook has decisively contributed to the formation, inter alia and in particular, of an *opinio juris communis* as to the right of individuals, under Article 36 (1) (b) of the 1963 Vienna Convention, reflecting the ongoing process of humanization of international law, encompassing relevant aspects of consular relations.....The ICJ has, after all, shown awareness that the provisional measures of protection rightly indicated by it in the present Order are aimed at preserving the rights of both the State

61. *Ibid.*
62. *Ibid.*

> and the individual concerned (...) under Article 36 (1) the 1963 Vienna Convention. The jurisprudential construction to this effect, thus, to my satisfaction, keeps on moving forward. Contemporary international tribunals have a key role to play in their common mission of realization of justice.[63]

IX. CONTRAST IN TWO APPROACHES, JUDGE ODA *VIS-A VIS* JUDGE CANCADO TRINDADA

The contrast between the outlooks of the two ICJ judges, Judge Oda in the *La Grand* Case and Mexico case and Judge Trindada in the Jadhav case is obvious. It reflects the old debate regarding the subjects of International law. Judge Oda's dissenting opinion gives priority to the rights of the states. In his view, the state is the center and Vienna Convention binds only states, not individuals. This approach is also known as the Statist approach. In contrast, Judge Trindade puts the individuals in the center and treats the human rights regime as a foundation of international law. It is called the Humanism approach. Both approaches have their pros and cons. In future, the ICJ could interfere in the states' jurisdiction in the name of protecting human rights. Then it would result in an expansion of the Court's jurisdiction which was never contemplated by the Statute of the ICJ. At the same time, Judge Oda's approach is pedantic and narrow. He forgets that in the last few decades, the human rights regime has spread its wings too wide to comprehend every sphere of international law. Yet, overzealous advocacy of human rights devoid of rationality and merits would prove fatal as no state wants interference of any other state or international organisations into their domestic jurisdiction. Hence, there needs to make a fine balance approach based on the facts and circumstances of each case.

X. CONCLUSION

Indication of provisional measures under Article 41 of the ICJ Statute has led to more intense conflicts and resentment between the states rather than bringing them together. Enforcement of provisional measures against

63. *Ibid.*, paras 32-33

any permanent member of the UN Security Council has proved futile and it has created two categories, states within the ambit of Article 41 of the Statute and states beyond the ambit of Article 41 of the Statute. Indication of provisional measures by the ICJ in past has led to two diametrically opposite approaches of the judges of the ICJ, statist and humanism, thus rejuvenating the old debate. However, on account of the strengthening of the human rights regime, the arguments given in support of the preservation of human rights of the individual through provisional measures seem to have force. Ultimately, it is the individual who is at the center of the whole discourse. Therefore, Judge Cancado Trindada' arguments regarding the preservation of human rights of an individual are more in consonance with the emerging international human rights legal order. Yet, the respect for domestic laws and sovereignty of the states must also be kept in mind and the enforcement of the provisional measures must not result in abuse of the process of the court. The principle of first exhaustion of legal machinery of the state must also be adhered to before invoking the jurisdiction of the ICJ. The ICJ must keep a fine balance between an individual's human rights and states' sovereignty.

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UNIFORM CIVIL CODE *VIS-A-VIS* GENDER JUSTICE: A CRITICAL ANALYSIS

NAWAL KISHOR MISHRA*

ABSTRACT : Uniform Civil Code, which denotes One Nation One Law, a common code that shows the applicability of the same set of civil rules regardless of their religion, caste, gender, etc., has been the subject of much debate in our country these days. If we talk about the Constitution of India that whether it has been successful in setting a uniform code of civil law then that may be a sagacious question. The uniform civil code has always been aqueduct, as a trenchant weapon, to conceive the women empowerment in India and elate their status in the social institutions like family and marriage. It is essentially important to scrutinize the intelligentsia of legislative and judicial strata on addressing the subject of gender justice through the Uniform Civil Code. This article tries to critically analyse the whole confabulations around the Uniform Civil Code, reflect on its nature and its necessity in the current time, so as to determine the extent to which women have been empowered in the present scenario.

KEY WORDS : Uniform Civil Code; Gender Justice, Human Rights, Personal Law, Secularism.

I. INTRODUCTION

The human rights of Indian women have always been disproportionate to the personal laws which involve social institutions like marriage and family. Certainly, legal contours of the status of Indian women in these social institutions lay down by the personal itself. The characteristics of ethnically diverse, linguistically diverse, culturally and religiously diverse, these not being watertight categories either is inbuilt in India. Thus, they intermingle and form a mash-up of a very dynamic

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but difficult to manage population. Indifferent from the west, India is far from being a homogenous nation-state and is a home to one of the most diverse and variable melange of a population.

Hence, a Brahmin woman in West Bengal will not only have different social and religious norms than a Bengali low caste woman, but it will also differ from a Namboodiri Brahmin of Kerala. A Brahmin woman living in Kashmir will have different existential realities than a Sarayupari Brahmin woman. The despotism of patriarchy seems to be a common experience to all these women from a distance, but when one tries to get into the skin of each and every such woman; we find that what seems similar is actually very identical in its nature and form. In such a panorama, a formula of a uniform personal law is introduced and uniformity is presented as a solution to undo all the repressive villainy that has crept inside our existing personal laws. Under our Indian Constitution, the miraculous cure for all the social problems faced by the Indian women be envisaged by UCC time and again.

Uniform Civil Code, denotes One Nation One Law, a common code that shows the applicability of the same set of civil rules regardless of their religion, caste, gender, etc., has been the subject of much debate in our country these days. The Uniform Civil Code is the result of the contemporary progressive liberal country, which claims that the country has rejoiced in discrimination of religion, race, caste, sex and birth. It designates identical set of secular laws and civil rules for the citizens regardless of their religion, caste, etc. Such laws combine four broad areas: Marriage, Divorce, and Maintenance & Succession.

If it is executed in true spirit, then these three words are more than enough to classify the country politically, religiously, and socially. In India even after 75 years of independence people are still being dominated by the personal laws of their particular /respective religion. The framers of our constitution view to effectuate uniformity of law inserted Article 44 under Directive Principles of State Policies, which provides that: “the State shall endeavor to secure for all citizens a uniform civil code throughout the territory of India.” Uniform Civil Code is a term that has its essence and core from the concept of Civil Law Code. The objective of the Uniform Civil Code is to eliminate discrimination based on religious ideologies and to nurture the concept of national unity. All the communities

of the country would then be judged on a concordant forum in civil matters and would not be governed by various personal laws.

However, Article 37 of the Constitution provides that the guiding principles of state policy are not enforceable by the court. But this does not diminish the primacy of the guiding principles.

Immediately after independence, it was not feasible to impose Uniform Civil Code on citizens depending on the circumstances. That is why the Code has been hidden under the guiding principles of state policy.

In addition, the preamble to the Indian Constitution, which reflects the constitutional spirit, emphasizes the constitution of India as a sovereign, secular, democratic and republican nation. Justice, freedom, and equality to citizens are ensured by it and thus promote solidarity while ensuring the dignity of the individual and the unity and integrity of the nation. Therefore, the importance of the Uniform Civil Code can be estimated in this context.

The Indian Supreme Court has been incessant in admonishing the legislature the renowned promise of a uniform civil law which was retarded to the future by the makers of our Constitution. Recently, the debate of Uniform Civil Code has yet again gained momentum due to *Mohd. Ahmad Khan v Shah Bano Begam and Ors* Case.[1] This has once again raised the question that whether eradication of such practices which are being considered as inhuman and anti-women not only by people belonging to other religion but also by even people belonging to the same religion can be made by Uniform Civil Code as a horoscopy solution.

II. UNIFORM CIVIL CODE AND CONSTITUENT ASSEMBLY DEBATES

After India's independence, the Uniform Civil Code was the subject of intense debate in the Indian Parliament in 1948. Uniform Civil Code was incipiently encapsulated in the Article 35 of the Draft Constitution. There was a demand to add a proviso in the Article 35 which would make the Uniform Civil Code, whenever it would have been enacted, not obligatory in nature and personal laws have been kept apart from it. The proviso read as, "Provided that any group, section or community of people

1. AIR 1985 SC 945

shall not be obliged to give up its personal law in case it has such a law."[2]

Uniform Civil Code was speculated to be a presage of the religious independence envisaged by the Constitution. However, there was much acumen given in favour of a common civil code. *K.M. Munsh*i took an intransigent view in negating the claims of majoritarian over sweep over minorities. He opined that comparing this Civil Code with European nations, everyone has to submit his/her Civil Code. Therefore, he professed for the separation of personal law and secularism from right to religion.

"K.M. Munshi presented the secularism with unifying force, that one way of life shall be the way of life for all. However, this opinion has been the most debated of all since it seems to muffle the voice of diversity. The other reason backing the Uniform Civil Code was the issue of empowerment of women. Since right to equality was already acknowledged to be one of the most coveted rights, the unequal footing of genders through the word of law could no longer be validated. Thus, the practices which undermined a woman's right to equality would necessarily be done away with. A common civil law governing the personal matters would bring all the women under one single umbrella and irrespective of race and religion the discriminatory practices would be put to an end."[3]

Alladi Krishnaswamy Ayyar "gave a much more pragmatic reason to aim for a Uniform Civil Code and bases his argument on the ambiguity of having strict water tight existence of the communities. He stated that in a country like India there is much interaction between the different communities which leads to the altercations between specific personal laws. Not only altercations but one legal system gets influenced by other legal systems." He was of the view that Hindu Code has not only constituted Hindu Law rather other systems also. It is needed for the unification of our country.

Dr. B.R. Ambedkar, opined that to cover all the human relationship aspects, we have in country Uniform Civil Code in the same way like Indian Penal Code and Criminal Procedure Code but the aspect of marriage and succession has been untouched.

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2. Lok Sabha Secretariat, *Constituent Assembly Debates (Proceedings)*, Vol. VII, Tuesday Nov. 23, 1948.
3. Ibid

This statement made by Ambedkar speaks articulately for itself and his devoir towards having a Uniform Civil Code to bring about the much paramount changes in the personal dimensions of an Indian regardless of their religion and community. After Independence, his tooth and nail fought to pass the Hindu Code Bills, which also lead to his resignation from the cabinet is yet again proof of his drive to bring the Uniform Civil Code. Although the proposed amendment to article 35 was not passed, yet there was no clear cut majority on the issue of the Uniform Civil Code, some of the reservations onomatopoeia even in 2016 also.

Therefore, on one hand, personalities like Dr. B. R. Ambedkar, Gopal Swamy Iyenger, Anantasayam Iyengar, KM Munshi supported the Uniform Civil Code but it was vehemently objected to by Muslim fundamentalists like Poker Sahib and people from other religions. As a result, it has found its place in the Directive Principles of state policies.

In the year 1955, Jawarlal Nehru, the then Prime Minister was willing to incorporate it but had failed due to objections raised by the orthodox members. Hence, only Hindu codified Law came into the existence.

III. PRESENT POSITION

Presently, among states of India, only Goa has the Uniform Civil Code. This Civil Code of Goa perfectly harmonizes with the variety of personal codes followed by believers of various faiths. Goa stands alone in the implementation of the directive principle on the Uniform Civil Code as enshrined under Article 44 of the Indian Constitution by incorporating it as law named as Goa Civil Code or the Goa Family Law. Particularly, all the residents of Goa are governed by these civil laws, irrespective of their religious affiliations or ethnic identities.

The Triple *talaq* verdict[4] aggravated the demand for implementation of the Uniform Civil Code throughout India. It is argued that the personal laws are heavily biased towards men and curtail many rights of women in society. All around the world, equal rights, opportunities, protection from discrimination and violence are sought for women and girls. The world is concerned about the position of women. It is evident from the

4. *Shayara Bano v Union of India*, (2017) 9 SCC 1

Sustainable Development Goal 5, which is a part of the primer comprehensive blueprints on sustainable development goals, which aims to achieve gender equality so that women are not denied justice and are empowered to enjoy equal rights. It is believed that the personal laws based on religion in India have a patriarchal notion, thus denying the basic rights to the women in the name of religious practices and culture. There has been a lot of debate in relation to the rights of women in the post-modern era and demands have been made to establish a society where men and women are treated at par. There are also debates running around the positioning of women under personal laws. The predominant role of religion in Indian society and its prejudicial impact on the positioning of women has swamped their role. In the current scenario, a uniform civil code seeking to establish a gender justice code is the need of the hour.

A Uniform Civil Code in a country like India is required significantly to uproot gender based discrimination, unequal treatment, and oppression in the name of religion. UCC will, pave the way to assure gender equality and provide equality regardless of religious faith and beliefs to all its citizens. It is a noteworthy point that various available reports clearly reflect that the personal laws deny equal rights to women against their counterparts who are treated highly. For instance, Men can have multiple wives under Muslim laws whereas women are prohibited from having more than one husband. The reasoning behind such oppressive and discriminatory practices is beyond the understanding of the author. Therefore, the creation of a uniform law for all the citizens which imbibes good features of all the personal laws is very important.

IV. UNIFORM CIVIL CODE, CONSTITUTION AND SECULARISM

The Uniform Civil Code has been surrounded by the controversy between secularism and the freedom of religion guaranteed under the Constitution of India under Articles 25 and 26. It has been held by the court that secularism is the basic structure of our constitution[5]. It is worth mentioning that Uniform Civil Code neither violates Articles 25 and 26 nor it is against secularism. Article 44 is based on the notion that in a civilized society, religion and personal law shall not be significantly connected.

5. *S.R. Bommai v Union of India*, (1994) 3 SCC 1

India is proclaimed to be a "Secular Democratic Republic" under the Preamble to her Constitution. On the ground of religion, a Secular State does not discriminate against anyone; the only concern of the Secular State is the nexus among men, not with the connection of man with God.

The common doctrine accepted by India along with America and some European States is the distinction of spiritualism with individual faith in form of positive secularism which means that there is a wall of separation between the State and religion. This is pertinent to mention here that America and European countries may legislate for non-interference of state in the religious matter, because their development was a result of various stages of renaissance, reformation and enlightenment. But, this has not been the case of India, thus in the governance of the State, to amputate the impediments, there is an intrusion of State in matters of religion.

Articles 25 and 26 of the Constitution of India have provisions regarding freedom of religion and ensure the right to freedom of religion. Every person is provided the freedom of conscience and the right to profess practice and propagate religion under Article 25. It also provides the State, power to regulate or restrict any economic, financial, political or other secular activity associated with any religious practice and also to provide for social welfare and reforms by making a law. The acts or missions in furtherance of religion, which are held to be the integral parts of religion are also guaranteed, protected, and covered under Articles 25 and 26 of the Constitution. Neither the Uniform Civil Code violates Articles 25 and 26, nor it is against secularism. The basic concept of Article 44 is just that the 'personal law' and religion must not be linked in a civilized society.

The matters of secular nature such as Marriage, succession, etc. must be free from the chains of laws. Deliberate distortion is not permitted by any religion. There will not and shall non-interference in religious matters relating chiefly to, inheritance maintenance and succession through the implementation of the Uniform Civil Code. With its multiple ramifications and rising concerns about secularism, the debate for the Uniform Civil Code stands as one of the frontrunner controversial issues of this era.

V. UNIFORM CIVIL CODE AND ROLE OF JUDICIARY

In the post-constitutional era, the judiciary has substantially tried to implement the Uniform Civil Code by the virtue of its power to interpret the law. At the first, in *Mohd. Ahmed Khan v Shah Bano Begum*[6] which was related to maintenance of wife during Iddat period the Supreme Court has declared the secular character of Section 125, Cr.P.C and held that the provision shall applicable to all irrespective of their religion. Shah Bano's case focuses on the necessity for a uniform law that addresses the dire need of a woman in malaise. It whirls to state that it is the suffering of the woman that should be at the core of any gender justice law. The refusal of the husband to maintain his wife after conveniently giving her a divorce is an issue which the law should address rather than addressing what the specific religion has laid down for that woman."

In *Ms. Jordan Deigndeh v S.S. Chopra*[7], while referring to Shah Bano's case the court held that "the present case is yet another event which focuses on the immediate and compulsive need of a uniform civil code. The totally unsatisfactory state of affairs consequent on the lack of uniform civil code is exposed by the facts of the present case".

Justice V. R, Krishna Iyer, who is known to have given an ebullient judgment in *Bai Tahira v Ali Hussain Fissalli Chowthia*[8] also has an Ambedkarian viewpoint on common civil code. Instead of being a majoritarian undertaking, the common code is supposed to be a collection of the best from every system of personal laws. He states:

> "Speaking for myself, there are several excellent provisions of the Muslim law understood in its pristine and progressive intendment which may adorn India's common civil code. There is more in Mohammed than in Manu, if interpreted in its humanist liberalism and away from the desert context, which helps women and orphans, modernises marriage and morals, widens divorce and inheritance."[9]

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6. Supra note 1
7. 1985 AIR 935, 1985 SCR Supl. (1) 704
8. AIR 1979 SC 362.
9. V. R. Krishna Iyer, *The Muslim Women (Protection of Rights on Divorce) Act*, 1986. (Eastern Book Company, Lucknow, 1987).

Justice Iyer asserts that cultural autonomy is not an absolute anathema to national unity. However, religious practices cannot be justified and upheld by sacrificing the human rights and human dignity. Religion cannot and should not be allowed to suffocate the dignity and freedom of the citizens.

In *State of Bombay v. Narasu Appa Mali*[10], "the Supreme Court was face to face with such a situation in which the constitutionality of the Bombay (Prevention of Hindu Bigamous Marriages) Act, 1946 was to be adjudicated by the High Court of Bombay. One of the two major contentions was that it was violative of Articles 14 and 15 since the Hindus were singled out to abolish bigamy while the Muslim counterparts remained at full liberty to contract more than one marriage and this was discrimination on the grounds of religion." "Questions such as these were raised due to an absence of a common civil code and clash of different principles in different personal laws. M.C. Chagla J. upheld the validity of the Act by stating that it was not violative of any Fundamental Right since such prohibition should not be seen through the lens of religious discrimination. In my opinion, therefore, the argument that Art. 14 is violated by the impugned Act must fail."

In "*Srinivasa Aiyar v Saraswati Ammal*[11] the court has upheld the constitutional validity of Madras Prohibition of Bigamy Act on the same grounds."

In the same way in *Sarla Mudgal v. Union of India*[12], the court has emphasized for the Uniform Civil Code. In this case, the Supreme Court firstly, held that conversion of a Hindu male to Islam only to contract bigamous circumvents Section 494 of Indian Penal Code.

Secondly, such marriages have been declared as bigamous and void by the court. Further, the court after referring to various precedents on the point categorically held that till a uniform civil code is achieved for all the Indian Citizens, there would be an inducement to a Hindu husband who wants to enter into second marriage while the first marriage is subsisting to become a Muslim. Here the Court was pointing out the injustice done to the first wife, legally wedded."

10. AIR 1952 Bom 84
11. AIR 1952 Mad 193.
12. (1995) 3 SCC 635

Recently, the Supreme Court in *Shayara Bano v. Union of India*[13], held that "the practice of instantaneous talaq (triple talaq) i.e., *talaq-ul-biddat* is unconstitutional."

VI. UNIFORM CIVIL CODE: GENDER JUSTICE

Women's empowerment in broad areas such as social status, gender biases, health, safety and empowerment is immediately lacking. States in India has in fact galvanized the codification of tribal laws. Article 44 expects from the State "to secure a Uniform Civil Code for all citizens of India." Unlike Uniform Criminal Code, there is no Uniform Civil Code in India. In *Mohammad Ahmed Khan v. Shah Bano Begum*[14]**,** popularly known as Shah Bano's case, the Supreme Court held that "It is also a matter of regret that Article 44 of our Constitution has remained a dead letter." However, it was strongly opposed by Fundamentalists of Muslim communities, in spite that to achieve gender justice it was held to be interpreted in a literal way. Further, in *Ahmadabad Women's Action Group (AWAG) v. Union of India*[15], the Supreme Court became a bit reserved and held that the matter of removal of gender discrimination in personal laws "involves issues of State polices with which the court will not ordinarily have any concern."

The Court in *Lily Thomas etc. v. Union of India and others*[16] held, "The desirability of Uniform Civil Code can hardly be doubted. But it can concretize only when the social climate is properly built up by the elite of the society, statesmen amongst leaders who instead of gaining personal mileage rise above and awaken the masses to accept the change."

"It is in this ambiance those we devoir to apprehend the issue of the Uniform Civil Code…. The Hindu code cannot be enforced uniformly to all religions. On the other hand, *triple talaq* would have to go, as would polygamy and all the advantages that accrue to Hindu undivided families in matters of property and inheritance."[17]

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13. AIR 2017
14. Supra note 1.
15. 17 AIR 1997 SC 3614
16. AIR 2000 SC 1650
17. Shabana Azmi, *Women, Stand Up For Your Rights, The Times of India*, 7 July 2005

VII. UNIFORMITY AND RIGHTS OF WOMEN: A MYTH MOCK

Womens rights uphold the Uniform Civil Code as its dwelling features. Discriminations through religious manifesto and social morphology between genders can be solved by it. Even Article 35 has been considered as a tool to curb discrimination against women by the in the Constituent Assembly Debates itself. On account of cultural imbalance and influence of the majority, it has been ignominiously lurched and objected on the question of upliftment of the status of women by the members. None has thought to the ground realities of operation of a Uniform Civil Code and how it will be useful for the advancement of women's rights in India. Ironically, out of 25 female members no one had participated in the debate on article 35 and the tabled future aspect of retaining a uniform civil code.

As compared to women of Hindu religion that have the backing of a codified uniform personal law, a Muslim woman stands on just opposite side. The rights of Hindu women have taken a secondary since the Hindu personal law has been codified, and a codified personal law, well protected it and in a superior position than women of the Muslim community who have been still suffering from the brunt of their primitive personal law.

Moreover, the goal of equality for women cannot be achieved by legislation alone. This indicates that medium shortcut to discuss the problem of having a uniform civil code and women belonging to a heterogeneous group, get us ready to address the issue of women's rights and religious sects looking forward to abjure reforms to ameliorate their specific existential realities and not a universal social progressive step that might lose its relevance in the effort to unite and integrate. Hence, diverse gender inequalities cannot be curtailed by uniformity alone.

VIII. NECESSITY BEHIND UNIFORM CIVIL CODE

The need for a uniform civil code has been felt for more than a century. India as a country has already written a lot in the absence of a uniform civil code. The company is named after religions, sects and gender etc.

Even now in India, special laws governing individual issues or rights relating to laws such as marriage, divorce, maintenance, adoption and inheritance for different communities. The laws governing inheritance or

divorce among Hindus are very different from the laws relating to Muslims or Christians etc.

Colonial India witnessed many of her laws getting codified by the British such as the criminal law, the law of contract and transfer of property etc., These were legislated by the British while keeping outside it with all religious, cultural factors. Hence, we observe that the law of contract is purely along with the law that existed in Great Britain around that time. The only area that was left out was the personal laws that governed various aspects of people's way of life, such as marriage, family, inheritance, etc.

The British considered such civil topics to come within the purview of the religion and thus specific religious principles should govern these civil laws. It should unquestionably incorporate the most modern and progressive aspects of all existing personal laws while relinquishing those which are retrograde. India has ventilated itself with the essence of a secular society and in that context of achieving a uniform civil code becomes more inciting. Such a code will downy with heterogeneity in matrimonial laws, deciphering the Indian Legal System and endanger Indian society more homogeneous. It will de-link law from religion which is a very desirable equitable to effectuate in a secular and socialist template of society. It will sire a national identity and will help in containing fissiparous proclivities in the country. The uniform civil code will subsume uniform provisions germane to everyone and based on social justice and gender equality in family matters. According to the Committee on the Status of Women in India, "The continuance of various personal laws which accept discrimination between men and women violates the fundamental rights and the Preamble of the Constitution which promises to secure to all citizens "equality of status, and is against the spirit of natural integration". The Committee recommended expeditious implementation of the constitutional directive in Article 44 by adopting a Uniform Civil Code.[18] Goa has shown the way and there is absolutely no reason for the delay. A secular India needs a uniform civil code. To mark time is to march with the communalists. Though, the Law Commission

18. Towards equality: *Report of the Committee on the status of Women in India* (New Delhi: Government of India, Ministry of Social and Educational Welfare, Department of Social Welfare, 1974)

of India in its 272nd Report has suggested that "Uniform Civil Code neither necessary nor desirable at this stage."

However, in July 2021, the Delhi High Court in *Satprakash Meena v. Alka Meena*,[19] held that the modern Indian society was "gradually becoming homogenous" and "the traditional barriers of religion, community and caste are slowly dissipating." And further stated that- The hope expressed in Article 44 of the Constitution that the state shall secure for its citizens Uniform Civil Code ought not to remain a mere hope. Referring to Ms. Jordan case the court stated that even after lapse of three decades steps taken in this regard in unclear.

IX. CODIFICATION

"Drafting is the most colossal and challenging step in the execution of Uniform Civil Code, besides the consensus of people over it. There have been several articles or research papers on Uniform Civil Code but there is no model law drafted. The General view of the people is that under the facade of Uniform Civil Code, the Hindu law will be imposed on all. And by far the speculation of Uniform Civil Code being only a repackaged Hindu law was ruled out by Mr. Atal Bihari Vajpayee (Prime Minister at that time) when he said that there will be a new code based on gender equality and comprising the best elements in all the personal laws. The Uniform Civil Code has to make a balance among various fundamental rights of individuals. It should be a proper legislation having reasonable classification with intelligible in differentia with nexus with the object.

X. CONCLUSION

To attain equality and egalitarian in true spirit a Uniform Civil Code is necessary. It is believed to bring home unity and remove the disparity in the name of personal laws governing people of different religions differently. Though Uniform Civil Code cannot bring a knee-jerk step but essence of secularism in India be entrusted so that a makes it separate from religion and religious ceremonies. Particular personal laws for various religion and their sects create an unnecessary burden on the legal diaspora and it would be reduced by the UCC. Its need can be observed by referring

19. 2021 SCC Online Del 3645, decided on 7-07-2021

to our preamble "To constitute India into a Secular nation" is the ultimate object and it is almost impossible to achieve this object so mentioned in the Preamble of the Constitution without the Uniform Civil Code. It must ensure its execution in the true spirit of the Article-44 of the Constitution on a priority basis. It reflects that we are neither socially culturally rich. Notwithstanding with rapid economic growth of our country in the world, our social growth has not been achieved at all. To overcome technicalities and shortcomings of the existing personal laws, it is necessary to bring the Uniform Civil Code in such a manner that it will make a balance between uniformity and religious sentiments of the people.

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NOTES AND COMMENTS

RIGHTS OF PERSONS WITH DISABILITIES : INDIAN PERSPECTIVE

SONAL SHANKAR*

ABSTRACT : A disabled person faces insurmountable social barriers by way of deep-rooted prejudices, indescribable societal discrimination, and harassment. The biased psyche of the masses perceives disability as a liability, considers them as worthless, and condemns them to isolation and segregation from the mainstream. Thus, the physically and/ or mentally challenged unfortunate persons, who are also predominantly poor, need the greatest protection from a strong law that shows zero tolerance for the discrimination and prejudices of a biased societal mindset and imposes deterrent punishment on them for infringing the provisions of law. The government has come up with '*The Rights of Persons with Disabilities Act, 2016*' (hereinafter referred to as the RPWD Act, 2016) which though a praiseworthy piece of legislation leaves much to be desired and is beset with problems of effective implementation. This Act has repealed '*The Persons with Disabilities (Equal Opportunities, Protection of rights and Full Participation) Act,* 1995*' to bring the law related to disabled in line with the* ' The United Nations Convention on the Rights with Disability'. This article intends to analyze the causes and effects of disability, examine the legal framework provided by the RPWD Act, 2016 and its loopholes, analyze the approach of the judiciary, and provide practical suggestions to make the Act stronger. It needs to be emphasized that the said Act requires strengthening and no steps, whatsoever, should be taken to weaken the protection provided by it to disabled persons.

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KEY WORDS : Disability, Non-Discrimination, Reasonable Accommodation.

I. INTRODUCTION

The first-ever joint report of the World Health Organization (WHO) and the World Bank on disability revealed that 1 billion people i.e. about 15% of the world's population suffer from some form of disability[1]. Disability is not a uniform concept as it can vary from one individual to another. One person will always be more or less disabled than another person in terms of their physical, mental, cerebral, intellectual, or attitudinal capabilities. Today the medical view of disability has been discarded. According to contemporary thinking, disability should be located in the present social context.[2]

The social statistics division under the auspices of the Ministry of Statistics and Program Implementation, Government of India published a report captioned 'Disabled Persons in India: A Statistical Profile, 2016'[3]. The report while defining disability has stated that "there was no universal definition of what constituted a disability. There was no static condition of disability. It defined disability as a result of interaction between a person with the health condition and a particular environmental context". As per Census data 2011, more than 69% of disabled people are poor and come from rural background. A poor person, in general, faces great social barriers in India. However, a physically and or mentally disabled poor person in India is the most defenseless and helpless of the lot.

The "*United Nations Convention on the Rights with Disability*" (UNCRPD) defines "disability as a condition arising from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others. Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in

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1. World Report on Disability, 2011, available at https://www.who.int/ visited on March 3rd,2021.
2. Parmanand Singh, "*Human rights of persons With Disabilities: Some Reflections* ", 23 *Delhi Law Review* 3 (2001).
3. Disabled Persons in India: A Statistical Profile, 2016, available at, http://mospi.nic.in visited on May 6th, 2021.

interaction with various barriers might hinder their full and effective participation in society on an equal basis with others".

The RPWD Act, 2016 was passed by the Indian Parliament to give effect to UNCRPD, which was adopted by the United Nations General Assembly on 13th December 2006. The UNCRPD required its signatories to make appropriate laws in conformity with the propositions of this convention. This Act has repealed the earlier *'the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Ac*t, 1995.'

India ratified the UNCRPD on 1st October 2007 and accordingly framed and passed two new legislations namely RPWD Act, 2016 and The Mental Healthcare Act, 2017. The rules under RPWD Act 2016 were framed by the central government and implemented with effect from 19th April 2017.

The RPWD Act is a praiseworthy step, being a serious endeavor to deal with the issue of the Rights of disabled persons. The preamble to the Act lays down the principles adopted by the UNCRPD to empower the disabled persons like independence, respect for dignity, freedom to choose, non-discrimination, equal opportunity, full societal participation and inclusion, infusion of humanism, and resultant respect for differences and acceptance of disabled, accessibility, equality between sexes and respect for rights and evolving capacities of disabled children. These principles are the guiding light for the entire Act.

The object of the present article is to understand the reasons of disability, the severe effects resulting from disability, the legislative framework dealing with the disabled, the role of the judiciary concerning the protection of the disabled and existing challenges with a view to offer effective suggestions.

II. REASONS AND EFFECTS OF DISABILITIES

The number of disabled persons in India was put at 2.68 crores as per the 2011 population census report. At all India level, disabled persons constituted 2.21% of the total population[4].The mammoth number of

4. *Supra* note 4.

persons afflicted with disabilities in India gives rise to the question that why are the numbers of disabled persons so high? And could something be done to substantially reduce these unacceptably large numbers?

i. Reasons for congenital disability

Disability can be categorized into two distinct types. One is when a child is born with a congenital disability and the second type of disability arises when a person is unfortunate enough to acquire it during his life time owing to a mishap or an accident. The first type of disability arises primarily due to three reasons. The first reason is the lack of nutritious diet and requirement of medical care to pregnant mothers. The second reason being lack of good quality and easily available medical services resulting in diverse medical problems for both the expectant mother and the unborn child, is leading to a permanent disability for the child. The third reason is poverty. There is a direct correlation between congenital disability and poverty. Unusually large numbers of children with disabilities are born in poor households. This is attributable to the fact that owing to financial compulsions poor pregnant mothers are forced to work in very late stages of the pregnancy under very harsh and inhuman conditions. This lack of care along with systemic deficiencies e.g. lack of properly equipped hospitals leads to avoidable medical complications during pregnancy leading to the birth of unfortunate children afflicted with congenital disability in many cases. As per population census data 2011, 69% of total populations of disabled children are born in rural areas. So, lack of proper nutrition and medical care provided to pregnant women coupled with lack of good quality and accessible medical facilities result in a situation in which the number of persons with disability in rural areas is more than double of the corresponding number in urban areas.

ii. Addressing the causes of congenital disability

A large percentage of the population afflicted with disabilities can be substantially reduced if causes for the birth of disabled children can be adequately addressed. The first being lack of awareness, nutritional diet, and medical care to pregnant mothers, and the second, lack of good, proper, and readily accessible medical facilities. For eliminating both these barriers, the governments must invest heavily in public awareness programs, public health and medical infrastructure. It is the third causes that poses the biggest challenge for the government – the scourge of

poverty. This calls for sustained efforts and massive investment in rural infrastructure especially in labour intensive rural industries for some years so as to generate sufficient employment for the rural youth and augmentation in their prosperity levels, besides the adoption of modern agriculture practices. It is necessary to fully address the scourge of poverty as deprivation arising out of it provides a fertile ground for the birth of children with disabilities. Though it is impossible to eliminate cases of congenital disability as many a time there are unavoidable medical complications, however number of such cases can be reduced substantially.

iii. Reasons for acquired disability

The other type of disability is acquired disability. This type of disability arises from various reasons such as accidents, lack of proper medical facilities, natural disasters, wars, communal riots and violence, and other factors. Every year about lakhs of people die in road accidents and tens of thousands of people acquire permanent disability and thus the concerned individuals and the nation's physical potential gets reduced.

iv. Addressing the causes of acquired disability

Most of these reasons are amenable to control with application and enforcement of proper road safety rules and good administration and governance except for natural disasters where with prior proper planning, timely pre-emptive action like the evacuation of people to safer areas, death and disability can be prevented to a large extent. It can be reiterated that elimination of cases of acquired disability, like those of congenital disability, is impossible, though the numbers can be reduced to a large extent.

Various impediments exist in the way of access to healthcare by the disabled like the high cost of treatment which is generally prohibitive in nature, lack of proper health care services for the disabled, physical barriers, and untrained health care workers. Thus, there is a high unmet need for healthcare services among disabled persons due to the unavailability, especially in rural areas.

v. Effects of disability

"Disability causes social stigma on the ground that the condition of disability is considered as 'undesired differentness' from socially defined

norms of normality".[5] The person afflicted with a disability faces severe discrimination in all aspects of life on a daily basis. It starts at home when sending them to school is not regarded as worth the effort and expenditure by many parents. The discrimination magnifies when educational institutions quote various excuses to refuse admission to them as they are not willing to take the responsibility. This discrimination remains unabated throughout their lives. The employers reject them from employment on grounds of unsuitability even though they might be fully suitable on grounds of merit and qualifications. The main problem lies in the biased, prejudiced mindset of people who consider the disabled as good for nothing, worthless people, perceive their disability as a liability or their inability. This rampant societal mindset invariably results in severe discrimination and sustained harassment throughout life and their condemnation to fringe existence in society.

A large number of disabled persons in absence of proper education lack in life skills to lead life by way of gainful employment. The mobility of a large number of disabled persons is restricted as they are dependent for mobility either on a wheelchair or on crutches. Such people face physical barriers in form of even access to buildings, healthcare facilities, unreachable medical equipment settings, poor quality signage, congested passages, staircases, washroom facilities, and inaccessible parking spaces. Most of the infrastructure is not disabled-friendly.

Disabled people are often teased, abused, harassed, bullied and humiliated in public life. Most disabled persons are often not able to find a life partner which makes them feel unwanted, sad, and lonely. Discrimination and stigmatization of Disabled persons have existed for a long time. Such Persons are extremely vulnerable to abuse and violation of their rights. Societal stigma, discrimination, dependency, and helplessness expose people with physical and mental disabilities in India to widespread human rights violations.

It can be said that most disabled people are poorly educated, often without a job, have low self-belief, low self-esteem and confidence, and a poor sense of self-worth. All of them face insurmountable social barriers, discrimination, deep-seated societal prejudices, and preconceived notions

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5. Samual R. Bagenston, "*Subordination, Stigma and Disability*", 86 *Virginia Law Review* 397(2000).

of a biased mindset that perceives them as worthless and a burden on society. These attitudinal barriers create the strongest roadblock in improving the lot of the disabled. A disabled person has to face a lot of physical pain, emotional turmoil leading to devastating psychological consequences and most of them are not able to participate to their full capacities in society thus leading to considerable social cost as well.

III. THE LEGAL FRAMEWORK: *THE RIGHTS OF PERSONS WITH DISABILITIES ACT, 2016.*

The RPWD Act, 2016 is a laudable piece of legislation in India dealing with the rights of the disabled. It repealed the earlier act of 1995 related to persons with disabilities, to bring the law in line with the UNCRPD. The earlier Act defined disability as a mere medical condition[6]. The new Act gives a more inclusive definition of disability showing a clear shift from a stigmatizing mere medical model of disability to the wider social modal of disability. Under the Old Act, only seven kinds of disabilities were recognized whereas the new Act recognizes twenty-one kinds of specified disabilities and the Central Government can add new categories of disabilities. The Act also introduces special provisions for persons with benchmark disabilities. The Act contains 17 chapters with 102 sections. The Act defines a person with a disability as a person having a long-term impairment which may be physical, psychological, intellectual, or sensory which when added with various impediments creates a hindrance in his equal and effective participation in society[7]. A person with benchmark disability is defined as a person with not less than 40% of a disability specified in the schedule i.e. specified disability, where such disability has not been defined in terms that can be measured and include a person with disability where the disability specified in the schedule has been defined in terms which can be measured, however, a certifying

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6. The Persons with Disabilities (Equal Opportunities, Protection of rights and Full Participation) Act, 1995S, s. 2(t) - "person with a disability" means a person suffering from not less than forty percent of any disability as certified by a medical authority.
7. The Rights of Persons with Disabilities Act, 2016, s. 2(s) -"person with disability" means a person having long term physical, mental, intellectual, or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others.

authority needs to certify this fact[8].

The term "barrier" has been defined as "any factor including factors related to communication, culture and environment, and also includes economic, institutional, political, social, attitudinal or structural factors which impedes the effective and complete societal participation of disabled persons[9].

The term discrimination in relation to disability, means any unfavourable treatment which may take the form of total exclusion or distinction or restriction based on disability which results in impairing the equal enjoyment of human rights and fundamental freedoms and includes all forms of discrimination and denial of such appropriate adjustment which is not disproportionate in a specific case so as the entitlement of equal enjoyment of rights along with others, by a disabled person is ensured[10]. Such appropriate modification or adjustment is known as a reasonable accommodation[11].

The term "rehabilitation" under the Act refers to a process aimed at enabling persons with disability to attend and maintain optimum, physical, sensory, intellectual, psychological, environmental, or social function levels[12].

Principals of equality and non-discrimination form the spirit of the entire Act[13]. Chapter II of RPWD Act, 2016 gives details of the comprehensive rights and entitlements of disabled persons. Chapter III, IV, and V of the Act relate to education, skill development, employment, a social security, health, rehabilitation, and recreation respectively of persons with disabilities. Chapter VI of the Act list details of special provisions for persons with benchmark disabilities.

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8. *Id*. s. 2(r) - A person with benchmark disability means a person with not less than forty percent of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority.
9. *Id*.s.2(c).
10. *Id*., s.2(h).
11. *Id*., s.2(y).
12. *Id*., s.2(za).
13. *Id*., s.3.

The Act puts a duty on the appropriate government to take measures to protect disabled persons from cruelty/inhuman treatment, abuse, violence, and exploitation[14]. The Act guarantees a community life to disabled persons[15]; such persons shall have equal protection and safety in situation of wars, humanitarian risks, disasters[16]. A disabled child has a right to stay with his parents till a court order is issued in the best interest of the child. In case parents are not able to take care of the child, the court shall place the child with a near relation failing which child may be placed in a community setting and there is also a provision of putting the child in shelter homes in exceptional cases[17]. The Act guarantees Access to justice to disabled persons, the government is invested with a duty to ensure that disabled persons are able to exercise the right to access any court, tribunal etc without discrimination[18]. Such persons have full legal capacity[19]. Disabled persons are guaranteed social security and the quantum of assistance to such persons shall be 25% higher than the similar schemes applicable to others[20]. The Act also casts an obligation on the government to provide inclusive education to the disabled with a focus on establishing an adequate number of teachers training establishments, establishing of adequate number of resources centers, provision of books, other learning material, and appropriate assistive devices to students with benchmark disabilities, free of cost up to the age of eighteen years, etc[21]. The government is also dutybound to ensure that the educational institutions shall develop an infrastructure suitable for disabled[22]. Appropriate government and local authorities are obligated to provide free healthcare especially in the rural areas subject to notified family income, barrier-free access to hospitals, and priority in treatment[23]. Every person with benchmark disability has a right to free education between six to eighteen

14. *Id*., s.7.
15. *Id*., s.5.
16. *Id*., s.8(1).
17. *Id*., s.9.
18. *Id*., s.12.
19. *Id*., s.13.
20. *Id*., s.24
21. *Id*., s.17.
22. *Id., s.16.*
23. *Id*., s.25(1).

years[24]. An obligation is also cast on the government to develop suitable measures to provide accessibility to transport facilities[25]. A duty is also cast on the government to create opportunities for vocational training and self-employment of the disabled[26]. Provision relating to reservation of 4% to persons with benchmark disabilities in the government establishments finds a place in the Act[27]. The Government within the limit of its economic capacity is required to provide incentives to the private employers so as to ensure that at least 5% of their workforce is constituted of persons with benchmark disability[28]. The Act is welfare legislation with the object of protection of disabled.

The Act visualizes appointment of Chief Commissioner, to be appointed by the Central government, two Commissioners to assist the Chief Commissioner are also to be appointed, out of which one Commissioner shall be a person with a disability[29]. State Commissioner for persons with disabilities is to be appointed by the State Government[30]. The institution of these Commissioners forms a very important part of the enforcement mechanism. Functions of the Chief Commissioner and State Commissioners include identification of any law, policy, or procedures which are inconsistent with the RPWD Act,2016 and suggesting corrective steps, making inquiry into deprivation of the rights of disabled persons, studying treaties and other international instruments on the rights of disabled to make recommendations for their implementation, undertaking research in the field of rights of disabled, implementation of the provisions of the Act, monitor the utilization of funds, promoting awareness about the rights of the disabled, reviewing the safeguards provided in the Act for the protection of disabled and recommending measures for their implementation[31]. To facilitate the speedy trial of cases registered under the Act, the state government shall, with the concurrence of Chief Justice of High Court, by notification specify

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24. *Id*.,s.31(1).
25. *Id*.,s.41.
26. *Id*.s.19.
27. *Id*.,s.34(1).
28. *Id*.,s.35.
29. *Id*.,s.74(1)&(2)
30. *Id*.,s.79(1).
31. *Id*., s.75&80.

that a court of Sessions in each district of the State shall be notified as a Special Court to try offenses under the Act[32].

The Act makes a provision whereby the State Government shall by notification specify a Public Prosecutor or appoint an advocate with not less than seven years of practice, as a Special Public Prosecutor to conduct cases of offences (under this Act) in that Court[33]. The Act lays down for constitution of the National Fund and State Fund for persons with disabilities[34]. Chapter XVI of the RPWD Act, 2016 gives details of offences and penalties. Under the Act contravention of any of the provisions of this Act, or of any rules hereunder has been deemed an offence punishable with a fine up to Rs.10,000/- for first contravention/violation and for any subsequent contravention with a minimum fine of Rs.50,000/- and a maximum fine up to Rs.5 lakhs[35].

The punishment specified for fraudulent attempt to avail any benefit meant for persons with benchmark disabilities is imprisonment for a term up to 2 years or with a fine up to rupees one lakh or with both[36]. This Act lists six types of punishable offences of atrocities-it provides intentional insult or intimidation with the intention of humiliation of a disabled person in public, use of force or assault of any disabled person with the intention of dishonoring him or outraging his modesty, denial of food or fluids to a disabled person by someone having actual charge or control over such person, use of the dominant position to exploit a child or a woman sexually, injuring or damaging any limb, supporting device of a disabled person, performing a procedure or directing a procedure to be performed leading to termination of pregnancy of a disabled woman without her consent except where it is medically required shall be punishable with a minimum imprisonment of 6 months but which may extend to 5 years and with fine[37].

The Act specifies a penalty for failure to produce any book, account, or any other document or to furnish any statement, information, or

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32. *Id.*, s.85.
33. *Id.*, s.85(1)
34. *Id.*, Ss.86 & 88.
35. *Id.*, s.89.
36. *Id.*, s.91.
37. *Id.*, s.92.

particular to any person who is duty-bound to produce the same. Failure to furnish the requisite book, document, or information shall be punishable with a fine up to Rs.25,000/- for each offence and in case of continued failure with a further fine up to Rs.1,000/- for each day of continued failure after the date of the original order[38].

RPWD Act, 2016 aims to uphold the dignity of every disabled person in the nation and prevent all forms of discrimination. It also promotes full and unconditional acceptance of persons with disabilities and seeks to secure their full participation and inclusion in society.

IV. GAPS IN THE ACT.

The RPWD Act, 2016 is through a comprehensive law has loopholes and shortcomings and is best with problems of effective implementation. It needs to be emphasized that the said Act requires further strengthening and nothing should be done to weaken the protection provided by it to the hapless disabled persons. In June 2020, the Union Ministry of Social Justice and Empowerment (MSJE), Department of Empowerment of Persons with Disabilities issued a notification proposing an amendment to RPWD Act, 2016 to enhance the business sentiment and to reduce the burden on the courts. The thrust was that strict penalties for minor offenses which may not be fraudulent or *malafide* are perceived as a big reason impacting business sentiment and investments. A new section 95A was proposed as an amendment to RPWD Act, 2016 where the State Commissioner for persons with disabilities was supposed to have the powers to compound any offence under section 89, 92(a), and 93 under the RPWD Act with the consent of the aggrieved disabled person. The MSJE further proposed that in cases of such compounded offences, the offender under custody shall be discharged and any court proceedings in respect of such offences shall be dropped. In the process of consultation with the stakeholders, the majority consensus was against such an attempt of dilution. The view which emerged was that the existing provisions are required to safeguard disabled persons and are necessary for proper implementation of the Act, such compounding of offences will run against the spirit of the Act which aims at the protection of the Disabled. The

38. *Id*., s.93.

department thereafter did not proceed with the amendment[39].

Since the implementation of the RPWD Act, 2016 with effect from 19th April 2017, there has been laxity in the proper implementation of the Act. The State Commissioner for Disabilities has not been appointed by all the States as yet. The majority of Indian states have yet not framed rules to implement RPWD Act to operationalize it in the states. Those states who have framed rules to operationalize the RPWD Act have yet not made the special courts functional in each of the districts. Segregated data is not maintained on crimes perpetrated on the disabled person. Any Act is as good as its implementation. The welfare spirit of the Act shall fail if it's not implemented properly.

Some clear loopholes are also visible in the Act. Many efforts by the government like welfare schemes, incentives to private employers have been made subject to States' economic capacity and development. e.g. Section 24(1) of the RPWD Act, 2016 provides that the appropriate government shall 'within the limit of its economic capacity and development' formulate necessary schemes and programs to safeguard and promote the right of persons with disabilities. The provision does not appear in sync with the rights-based spirit of the Act. There should be an absolute obligation cast on the government to formulate such schemes. Various obligations like spreading awareness, developing infrastructure, etc. are cast on the appropriate government however no clear mechanism has been created by which states across the country achieve uniformity.

RPWD Act, 2016 specifies six distinct types of offences vide section 92 of the Act which specifies common punishment for all six types of offences stipulating minimum imprisonment of six months to a maximum imprisonment of five years with fine e.g. Punishment for the humiliation of a disabled person and sexual exploitation of a disabled child or woman is on a similar footing, separate punishment must be provided for separate offences depending on the seriousness of the offence, at least minimum punishment must be different for separate offences.

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39. Decriminalization of Minor Offences for Improving Business Sentiment and Unclogging Court Processes Decision not to proceed with the proposal for amendment to the RPWD Act, 2016, available at http://disabilityaffairs.gov.in/(accessed on May 10th, 2021).

What constitutes 'sexual exploitation of a child with a disability has not been defined anywhere in the RPWD Act. The author of this paper is of the view that the term sexual exploitation has an expansive meaning that will include within its ambit such well-defined offences as sexual harassment, sexual assault, and penetrative sexual assault and aggravated penetrative sexual assault as defined elaborately in the Protection of Children from Sexual Offences Act, 2012(POCSO,2012). There needs to be consistency between the RPWD Act, 2016 and POCSO 2012 in terms of punishment in relation to sexual exploitation of a child. The term In fact the Punishment for sexual exploitation of a disabled child should ideally be more stringent than the punishment for sexual exploitation of a normal child. Similarly, sexual exploitation of a disabled woman either be higher than or at least be fully consistent with punishment for similar offences against women prescribed under IPC 1860. The above act therefore requires suitable amendments.

V. ROLE OF JUDICIARY

Judiciary has played a praiseworthy role in the protection of the rights of the disabled in the recent judgment of *Vikash Kumar v. Union Public Service Commission and Ors*[40]. The apex court in a laudable judgment realized the transformative potential of The RPWD Act, 2016, and allowed the use of Scribe to the appellant for appearing at Civil Service examination or any other competitive Government exam as he suffered from a condition of dysgraphia, commonly known as writer's cramp. He was refused Scribe on the ground that The Department of Personnel and Training issued the CSE rules in 2018 which as general instructions provided that candidates must write the papers themselves and will not be allowed the help of a scribe except in the case of blindness, loco motor disability and cerebral palasy with impairment of at least 40%. Though the appellant described himself as a person with a benchmark disability of 40% or more UPSC rejected his request on the ground that he doesn't meet the guidelines. The appellant initially approached the tribunal, where his application was dismissed on the ground that the certificate issued to him failed to mention the extent of his disability. On

40. (2021)2MLJ247 , MANU/SC/0067/2021

the point of direction to UPSE to amend CSE notification, the tribunal considered the relief to be in the realm of advising the executive on policy matters and hence it refrained from interfering. The Appellant thereafter filed a writ petition in High Court; he meanwhile obtained a medical certificate From the National Institute of Mental Health and Neuro Sciences (NIMHANS) declaring that he has Writer's Cramp and that he requires a scribe. However, the court declined to interfere with the decision of the tribunal on the ground that the appellant had not qualified for the preliminary exams and thus relief seeking an amendment to CSE rules was rendered futile. In the Special Appeal, it was argued by UOI that the writer's cramp is not specifically included in the schedule to RPWD Act, 2016 which lays down the list of specified disabilities, the court in a path-breaking judgment held that "definition in section 2(s)[41] cannot be constricted by the measurable quantifications tagged with the definition under section 2(r).[42] To deny rights and entitlements recognized for persons with disabilities on the ground that they do not fulfil a benchmark disability would be plainly *ultra vires* the RPWD Act, 2016." Other than granting the relief in the instant case, the Supreme Court also issued broader direction to the Union Government in the Ministry of Social Justice and Empowerment to frame guidelines regulating the grant of facility of the scribe to persons within the meaning of section 2(s) where the disability is of such a nature as to impose an impediment on the candidate in writing an examination. The court also insisted that there should be participation by stakeholders in the formulation of such guidelines.

Apex court time and again has reiterated that the disabled population deserves equal enjoyment of rights and fundamental freedoms and for that additional support and facilities are required to offset the impact of disability, mere mandate that discrimination against them is impermissible is not enough. The concept of reasonable accommodation in the Act echoes this view. For a disabled person, the constitutionally guaranteed fundamental rights of equality, the six freedoms, and the right to life which means a right to lead a dignified life are worthless if additional support and particular measures are not taken to make these rights meaningful. Each disability requires specific remedies. There has to be

41. *Supra* note 8
42. *Supra* note 9

flexibility in addressing the individual requirements and is an essential feature of reasonable accommodation.[43]

In *Jeeja Ghosh v. UOI*[44], it was observed by the apex court that reasonable differentiation is one of the most important components of equality, and different needs of a disabled person must be recognized and specific measures must be taken to address such needs so that substantive equality may be attained. The notion of positive rights, action in affirmative and reasonable accommodation must be embraced while dealing with the disabled.

In *Syed Bashir-ud-din Qadri v. Nazir Ahmad Shah*[45], it was held that a person suffering from cerebral palasy who is unable to write on the blackboard must be given access to external electronic aid as part of reasonable accommodation.

In *Justice Sunanda Bhandare Foundation v.UOI,*[46]the apex court took a very emphatic tone and observed "In the matters of providing relief to those who are differently-abled, the approach and attitude of the executive must be liberal and relief oriented and not obstructive or lethargic."

In *Union of India v. National Federation of the Blind*,[47]the Supreme court recognized that in the empowerment of disabled, employment opportunities play a crucial role and that it's an alarming reality that disabled persons are out of job not because their disability is an impediment but it is the social and practical barriers which create a block in their way of joining the workforce due to which they live in poverty and deplorable conditions.

The judiciary has tried to be a protector of the rights of the disabled. Considering the obligations cast on the appropriate government in the RPWD Act, 2016 the Apex court has rightly stated that "if the legal entitlements set forth in the RPWD Act are not to remain mere parchment, reflected in our inability to overcome barriers against substantively unequal treatment, the nodal ministry, in coordination with other relevant actors,

43. *Supra* note 41.
44. (2016)7 SCC 761.
45. (2010)3 SCC 603.
46. (2018)2 SCC 397.
47. (2013)10 SCC 772.

must make a concerted effort to ensure that the fruits of the Act must reach the intended beneficiaries[48]."

VI. CONCLUSION

Disability has severe physical, psychological, social, and economic consequences. Disability shouldn't be viewed as purely medical or purely social. There is a requirement of a balanced approach that gives appropriate attention to different aspects of disability as a disabled person most of the time requires treatment because of a specific health condition. Despite the existence of a praiseworthy legal regime, the enforcement mechanism is lacking. The Act also needs to be suitably amended to address few loopholes. Though Judiciary has played a very positive role in the interpretation of the Act to give better protection to the disabled, a lot of work is required to be done to provide relief and justice to the disabled.

Education and awareness about equality and the rights of the disabled must be focused on. The focus must also be on the education of the disabled population. Proper education is one of the strongest tools of empowerment. More of schools should be encouraged to admit disabled students. Special schools catering to the need of autistic students and those with multiple severe disabilities must be established by the government. The Act also casts an obligation on the government to create vocational training and self-employment schemes for the disabled. It is important to create employment opportunities fit for the disabled so that they can earn their living and lead a dignified life. Strong public awareness campaigns and sensitization programs must be launched through various modes- print, electronic, digital, putting across a message that any sort of violence and discrimination against the disabled is morally indefensible and wrong. It is also important to strengthen the institutions and organizations committed to the cause of disabled persons The Act visualizes placement of a disabled child in shelter homes in exceptional circumstances. It is important to establish disabled children-friendly shelter homes. Normal shelter homes do not have a disabled compatible infrastructure. Another very important focus area is the collection of data relating to disabled. "Very few countries collect data to enable disaggregation by disability in the health sector. This became very apparent

48. *Supra* note 41.

during the COVID-19 pandemic where countries failed to include disability consistently in their response to control the pandemic"[49]. In India too, the data collection in relation to the disabled is not very promising. There should be a comprehensive and dynamic database of people with various types of physical and mental disabilities which should be maintained in a national network linked to various hospitals and municipal corporations. Proper maintenance of data on the disabled population must be focused on as such data is an invaluable aid in further research and development of strategies for the welfare of the disabled population. Moreover, disaggregated data on crime against the disabled must also be maintained.

It must be clearly understood that disabled people have a non-derogable right to equal treatment and non-discrimination. Both legislative and attitudinal changes are necessary to grant a dignified life to the disabled. There must be an environment of inclusion, tolerance, and empathy towards the disabled. Eventually, we as a society should strive to reach a level where we have zero tolerance for any kind of discrimination against the disabled.

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49. WHO factsheet on disability and health of December 2020, https://www.who.int/ visited on April 5th,2021.

CONTOUR OF BENEFIT-SHARING IN INDIA: THE HEADWAY IN DIVYA PHARMACY CASE AND AFTER

DIGVIJAY SINGH*

ABSTRACT : The statutory recognition of the contributions made by local and indigenous communities in conserving, developing and making available genetic pool of diversity is acceptance of their natural entitlements. These communities are still denied 'ownership rights' and 'proprietary claims' over such resources in most of the jurisdictions. Their entitlements over genetic resources are still in the state of uncertainty in many jurisdictions. The arguments for their entitlement over genetic resources in the form of ownership rights and proprietary claims are necessary must to do justice with them. The legal instruments are having enough provisions to realize their contribution but it is still a dream for them as the practices across the world are favoring the interest of 'users' of resources and IP holders rather than its 'providers'. The legislative efforts in India recognize their natural entitlements. However, questions including who is authorized under the Indian law to determine the benefit-sharing and whether Indian entities are under obligation to pay benefit-sharing need to be settled. The present paper adopts doctrinal method of research and critically examines the legal provisions and case laws. The main objectives of the paper is to understand the role of State Biodiversity Boards in determining benefit-sharing and obligations of Indian entities to share benefits with providers of biological resources. The decision in Divya Pharmacy case that SBBs are authorized to determine benefit-sharing and Indian entities are also under obligation to pay benefit-sharing is

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now affirmed in Draft Guidelines however, SBBs are required to follow NBA's Guidelines.

KEY WORDS : Benefit-Sharing, Entitlement, Genetic Resources, Indigenous and Local Communities, and State Biodiversity Boards.

I. INTRODUCTION

Biological resources are of huge importance to humanity and have the potential to solve many of our future problems besides giving benefits to other living organisms. In the modern age, such resources are very much important in providing genetic resources for one of the fastest-growing industries that is the biotechnology industry.[1] Any effort put in conserving these resources is an investment for making these resources available for future generations. It provides raw materials for research and development in different areas and also a cause of existence for those who are conserving, protecting, and developing such resources and are dependent for their survival over these resources. Thus, these resources are also equally important for present generations of indigenous and local communities. It justifies natural entitlements of these communities over genetic resources and if such resources are commercialized, they must be shared benefits accruing out of any such commercialization. Access to these resources was free until 1992 as the common heritage of mankind and it was a major cause of misappropriation of these resources. In ethical recognition of entitlements of indigenous and local communities, demands were raised for sovereign rights over biological resources, and regulation of access and benefit sharing accruing out of commercial utilization of biological resources.[2]

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1. The size of the global biotechnology industry was about USD 752.88 billion in 2020 and is expected to grow at a compound annual growth rate of 15.83% from 2021 to 2028. The market is driven by favorable initiatives by different governments and also the growth of the biotechnology sector in developing countries including India. *See* the details at: *https://www.grandviewresearch.com/industry-analysis/biotechnology-market*

2. *See*, Aykut Çoban, "*Caught between State-Sovereign Rights and Property Rights: Regulating Biodiversity*", 11(4) *Review of International Political Economy*, 2004, pp.736-762; Zakir Thomas, "Common Heritage to Common Concern: Preserving a Heritage and Sharing Knowledge", 8(3) *The Journal of World Intellectual Property*, 2005, pp.241-270; and K. Divakaran Prathapan and Priyadarsanan Dharma Rajan, "*Biological Diversity: A Common Heritage*", 46(14) *Economic and Political Weekly*, 2011, pp.15-17.

The demands for sovereign rights over biological resources were also justified as one of the cardinal principles of public international law.[3] In 1992, there came a paradigm shift in the approach after the conclusion of the Convention on Biological Diversity, 1992. Now,these resources are subject to sovereign rights of states and in fact, there started regulation of access to genetic resources and sharing of benefits.[4]In order to check bio-piracy and to give access to genetic resources, mechanisms are devised to the mutual benefit of the owners of genetic resources and those who need access to these resources for the purpose of research and development. These instruments are justified on ethical ground to correct the prevalent imbalance between providers of genetic resources and users of such resources, and the distribution of benefits among those who are contributing to the researches and its commercial outcomes.[5] Further, the development of such mechanisms[6] under the provisions of the Convention has strengthened the entitlements of indigenous and local communities in principle. The debate continues over how to assess what comprises 'equitable', what comprises 'benefits', and how compliance with the CBD's obligation should be made enforceable.[7]

The non-binding Boon Guidelines focused on the procedural aspects of equity in benefit-sharing, considering it as a process rather than a standalone deal.[8] Further, the legally binding Nagoya Protocol becomes a key instrument for the realization of their entitlements. It promotes a transparent and effective implementation of the access and benefit-sharing concept. It places duty and obligation on parties in relation to indigenous and local communities' rights over genetic resources and associate

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3. The United Nations General Assembly adopted Resolution 1803 (XVII) on the "Permanent Sovereignty over Natural Resources" on 14 December 1962.
4. The Convention on Biological Diversity, 1992, Article 15(1) reads as: Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.
5. Rajshree Chandra, *The Cunning of Rights* (New Delhi: Oxford University Press, 2016) pp.91-92.
6. The Bonn Guidelines, 2002 (COP 6), and The Nagoya Protocol, 2010 (COP 10).
7. Rajshree Chandra, *supra* n. 5, at 92.
8. Silke von Lewinski, *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore*, (Netherlands: Kluwer Law International, 2008) at 282.

knowledge. But, the intellectual property (IP) aspect of the issue attracted the developed countries and the parallel adoption of the WTO's TRIPs Agreement gives more importance to the private rights of researchers against the entitlements of the above communities. This imbalance is evident when access to genetic resources is regulated and benefit-sharing is determined by the state because of the unequal bargaining power of providers and users of resources.

India implements all most all the provisions of the Convention on Biological Diversity, and its Guidelines and Protocol in principle. The enactments including the Biological Diversity Act, 2002; the Biological Diversity Rules, 2004; the National Green Tribunal Act, 2010; "NBA' Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014"; and "NBA's Draft Guidelines on Access to Biological Resources and Associated Knowledge and Equitable Sharing of Benefits Regulations, 2019" are evidence of recognition of natural entitlements of indigenous and local communities. The statutory provisions as to who determines benefit-sharing and what should be the share in such benefits are significant in implementing the objectives of the Convention and also in realizing their entitlements. The judgment in *Divya Pharmacy* v. *Union of India*[9] opened up a new window to ascertain the benefit-sharing for providers of genetic resources. This created some controversies as to who is entitled to determine the amount of benefit-sharing under the Biological Diversity Act, 2002. The present paper critically examines who is authorized to determine benefit sharing and what are the obligations of the user of such resources in India. The significant development in *Divya Pharmacy Case* is central point of discussion in this paper.

II. BENEFIT-SHARING ENTITLEMENT: INCEPTION TO REALITY

The entitlement of benefit-sharing under the framework of intellectual property is a model that describes an exchange between 'providers' of biological resources and its 'users'. In such an exchange, the provider grants access by virtue of the generational claim of stewardship that they have over those resources to those who require access to those resources and provide compensation for its use. The benefit-sharing entitlement of

9. MANU/UC/0940/2018.

providers is recognized under the Convention on Biological Diversity, 1992 (CBD) in order to ensure justice to providers of genetic resources in the above exchange.[10] This entitlement is an entitlement of indigenous communities in most of the developing countries who have played the key role of producers, consumers, and conservers. Rajshree Chandra argues that they have a claim as the "original rights holders" of biological resources and the rights of communities demanded legal instruments in the context of their own cultural and communal practice at par with the WTO's TRIPs Agreement.[11] The three key objectives[12] of the CBD are having concerns for developing countries relating to bio-piracy, and sustainable use of biological resources.

The entitlement of benefit-sharing is now institutionalized under the CBD, where it recognizes the rights of traditional communities over their biological resources and associated traditional knowledge. It also encourages equitable benefit sharing accruing to user of resources.[13] Another provision of the Convention which assume significance here is Article 15. It refers the issue of access and benefit sharing (ABS)[14] explicitly and it is argued that Article 15 is an advancement of the provision under Article 8(j) of the Convention.[15] Benefit-sharing entitlement may not be realized only under Article 8(j) as it doesn't provide for mandatory requirement of prior informed consent (PIC) and actual obligation of benefit-sharing on negotiating stakeholders. On the other hand, Article 15 provides more concrete terms that expand the exchange narrative of biological resources. It speaks of mutually agreed terms (MATs)[16], prior informed consent (PIC)[17], and benefit sharing[18] which are mandatory requirements under the Convention. There is no doubt that the language

10. Rajshree Chandra, supra n. 5, at 97.
11. *Id.*, at 92.
12. The Convention, supra n. 4, Preamble. These three objectives are conservation of biological diversity, sustainable use of its components, and fair and equitable sharing of benefits arising out of its commercial use.
13. *Id.*, Article 8(j).
14. *Id.*, Article 15.
15. Rajshree Chandra, supra n. 5, at 92.
16. *Id.*, Article 15(4).
17. *Id.*, Article 15(5).
18. *Id.*, Article 15(7).

of Article 15 has strengthen the idea of rights of traditional community over their biological resources and associated traditional knowledge.

The subsequent development of legal instruments under the Convention has further improved the exchange narrative keeping in the mind the inevitable contribution of indigenous and local communities and equitable benefit sharing for them.[19] A brief discussion of these developments is not out of context.

i. The Bonn Guidelines

"The Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, 2002" was adopted in furtherance of Conference of Parties (COP 6) under the Convention.[20] It was intended to assist governments in enacting legislative or policy measures on access and benefit-sharing based on mutually agreed terms. However, it doesn't have any fixed formula of equitable benefit-sharing rather focuses on procedural aspect of equity in benefit-sharing seeing the sharing of benefits as a process rather than a standalone deal.[21]

The Guidelines focuses on negotiation between providers and user of genetic resources, which is considered a must for equity-based benefit-sharing. It also aims to assist providers and users of biological resources to negotiate on mutually agreed terms (MATs), which may be included in the agreement.[22] Stephen Tully argues that negotiated access arrangements rather than legislation are the primary vehicles for obtaining access to genetic resources. Agreements between providers and users of biological resources in the form of collection permits, memoranda of understanding, research agreements and cooperative partnerships clarify benefit-sharing obligations, record mutually agreed terms, build trust and promote mutual understanding.[23]

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19. Rajshree Chandra, *supra* n. 5, at 94.
20. The Convention on Biological Diversity, 1992, Conference of the Parties (COP 6), Decision VI/24 A (2002).
21. Rajshree Chandra, *supra* n. 5, at 94.
22. The Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, 2002, Clauses 1 & 14(b).
23. Stephen Tully, "The Bonn Guidelines on Access to Genetic Resources and Benefit Sharing", 12(1) *Review of European Community & International Environmental Law*, 2003, at 91.

It calls on countries to adopt measures to encourage disclosure of the country of origin of genetic resources, traditional knowledge, and innovative practices of indigenous and local communities in IP applications.[24] Paul Kuruk argues that "the disclosure requirement is highly relevant in tackling cases of improper patent grants where examining authorities fail to take into account prior uses of associated traditional knowledge in other countries."[25] Ultimately, these disclosures could be used to deny or revoke patents derived from traditional knowledge.[26] Above key features of the Guidelines are of utmost importance to do justice with the indigenous and local community but due to the non-binding character of the Guidelines it is not taken seriously in most of the jurisdictions.

ii. Nagoya Protocol

As the Bonn Guidelines was a non-binding instrument. It elaborates an international regime on access and benefit sharing with the aim to effectively implement, *inter alia* provisions of Article 8(j) and Article 15 of the Convention. Further, a legally binding international instrument called "Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization" (Nagoya Protocol) was adopted in 2010 in furtherance of Conference of Parties (COP 10) under the Convention.[27] The Protocol makes advancement in the area of access and benefit sharing and provides a strong basis of certainty and transparency for providers and users of genetic resources.[28] It recognizes importance of promoting equity and fairness in negotiation of mutually agreed terms (MATs) between providers and users of genetic resources.[29]

The Protocol provides that prior informed consent (PIC) of

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24. The Bonn Guidelines, *supra* n. 22, Clause 16(d)(ii).
25. Paul Kuruk, "*Regulating Access to Traditional Knowledge and Genetic Resources: The Disclosure Requirement as a Strategy to Combat Bio-piracy*", 17(1) *San Diego International Law Journal*, 2015, at 25.
26. *Ibid.*
27. Available at: *https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf*
28. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 2010, Preamble.
29. *Ibid.*

indigenous and local communities will be obtained where right to grant access to such genetic resources is established.[30] According to Article 7[31] prior informed consent and mutually agreed terms are to be reached prior to access of traditional knowledge (TK). It doesn't prohibit customary use/exchange of genetic resources within and amongst local and indigenous communities.[32] To ensure above requirements it also provides that an internationally recognized certificate of compliance that genetic resources are accessed in accordance with PIC and MATs would be issued by the providers of genetic resources.[33] This certificate of compliance would be available to ABS Clearing House established under the Protocol.[34] It also provides a framework within which indigenous and local communities' entitlement could be institutionalized in accordance with domestic legislations.[35] It is argue that the protocol is a significant forward step in institutionalization of bio-culture rights and entitlements of indigenous and local community for benefit sharing, prior informed consent, and access norms.[36] With the adoption of the Nagoya Protocol, the international community sought to improve the protection of traditional knowledge by transforming the guidelines into more specific commitments of governments.[37]

III. REALIZATION OF BENEFIT-SHARING IN INDIA

The entitlement of benefit-sharing under International IP frameworks represents the interests of providers of genetic resources to do justice with them. It describes how the exchange of genetic resources between 'providers' and its 'users' is to be regulated in a manner that fulfills the demand of the world without undermining the interest of its providers. Since the adoption of the Convention on Biological Diversity in 1992, the regulation of access to biological resources is now based on the philosophy

30. *Id.*, Article 6(2).
31. *Id.*, Article 7.
32. *Id.*, Article 12(4).
33. *Id.*, Article 17(1)(a)(iii).
34. *Ibid.*
35. *Id.*, Article 5.
36. Rajshree Chandra, *supra* n. 5, at 96.
37. Paul Kuruk, *supra* n. 25, at 6.

to give due importance to 'providers' of such resources. The above philosophy is seen in the provisions of benefit-sharing in different legal instruments in India. It describes an exchange between those who grant access to a particular resource and those who provide compensation or rewards for its commercial use.[38] It is also evident that the further developments under the CBD have contributed towards the above philosophy. India has acceded to the philosophy and every development in that direction under the CBD. India enacted the Biological Diversity Act, 2002 (BD Act); the Biological Diversity Rules, 2004 (BD Rules) and the Guidelines of 2014 followed by changes proposed under Draft Guidelines of 2019 to realize the above philosophy.

The Act provides an institutional framework and implements the objectives of the CBD.[39] It regulates access to biological resources occurring in India by foreigners as well as Indians and prohibits its access to foreigners for the purposes of research, commercial use, bio-survey or bio-utilization without previous approval of National Biodiversity Authority (NBA) except for collaborative research.[40]It also restricts Indian or foreign applications for grant of IP Rights for any invention which is based on information of biological resources obtained without prior approval of NBA and while giving approval for the same, it may impose benefit-sharing or royalty fee or financial benefit resulting out of IPR grants.[41]The Act does not make it mandatory for the NBA to impose benefit-sharing while granting such approvals. The wide discretion to NBA in imposing benefit sharing seems against the spirit of the objectives of the Act. However, prior approval for access and benefit-sharing agreement by NBA is mandatory when resources are accessed by foreigners for purpose of research or bio-survey and bio-utilization for research and for seeking IPR protection. If biological resources are having high economic value, the above benefit-sharing agreement may also contain a clause to the effect that it shall include an upfront payment by the

38. D. Schroeder, "Benefit Sharing: It's Time for a Definition", 33 *Journal of Medical Ethics,* 2007, pp.205-209.
39. *See*, The Biological Diversity Act, 2002, Preamble.
40. *Id.,* Sections 3 to 5 read with the Biological Diversity Rules, 2004, Rules 14 to 17& 19.
41. *Id.,* Section 6 read with Rule 18.

applicants, of such amount agreed between the Authority and the applicant.[42]

When biological resources are accessed by Indians or foreigners for commercial utilization (including bio-survey and bio-utilization) the NBA or the concerned SSB shall enter into an agreement with the applicant for benefit sharing.[43] The above mandatory requirements are now making it mandatory for NBA and SBBs to enter into benefit-sharing agreements with applicants applying for access to biological resources. Neeti Wilson argues that the Guidelines provide procedure by which financial obligations of users of genetic resources is determined for each of the activity for which biological resources are obtained and the method of sharing the benefits.[44]Indians are not allowed to access biological resources for commercial utilization (including bio-survey and bio-utilization) without prior intimation to concerned SBB except *Vaidyas* and *Hakims* practicing indigenous medicine.[45]

The above provisions regulating access to biological resources and associated knowledge under the Act establish sovereign rights of the state over the biological resources of India.[46] However, despite the provisions of the Act, there is a perception among Indian companies that it is applicable only to foreign companies and Indian companies are only mandated to seek consent and approval from SBB but absolved from the responsibility of the fair and equitable benefit-sharing (FEBS) provisions. The following part of the paper examines the questions who determine benefit-sharing and who are under obligation to pay it.

i. Determination of and Obligation for Benefit-Sharing

The ethical justification for entitlements of local and indigenous communities is now having legal sanction in India. India is amongst only

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42. The Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014, Clause 1.
43. *Id.*, Clause 2.
44. Neeti Wilson, "Guidelines for Access and Benefit Sharing for Utilization of Biological Resources based on Nagoya Protocol Effective", 20 *Journal of Intellectual Property Rights*, 2015, pp.67-70.
45. The Act, *supra* n. 39, Section 7.
46. Shova Devi and Manchikanti Padmavati, "*Biodiversity Monitoring: A Pre-Condition to Access and Benefit Sharing under the Indian Biological Diversity Act*, 2002", 21 *Journal of Intellectual Property Rights*, 2016, pp.-288-294.

a few countries in the world which has implemented the provisions of CBD in real sense. The detailed substantive and procedural laws on the subject show the seriousness of the issue and also its importance. As per the Act, approval for access to biological resources shall be granted in a manner which secures equitable benefit-sharing based on mutually agreed terms and it is determined by the Authority in the manner of joint ownership, transfer of technology, benefit claimers, local people, and payment of compensation *etc*.

A combined reading of Sections 3, 6 and 21, Rule 20 and Clause 1 of Guidelines of 2014 make it clear that if the applicant is a foreigner who intends to have access to biological resources for the purposes including research, commercial utilization, bio-survey and bio-utilization or files application for grant of intellectual property rights over biological resources based inventions the NBA secures equitable sharing of benefits and benefit-sharing agreement by NBA is mandatory in the above circumstance. If biological resources are having high economic value, the above benefit-sharing agreement may also contain a clause to the effect that it shall include an upfront payment of an amount by the applicant agreed between him/her and NBA.[47] A foreigner may also enter in benefit-sharing agreement with SBB if intends to access resources only for the purpose of its commercial utilization, bio-survey and bio-utilization.[48]

When an India applies for grant of intellectual property for any invention based on biological resources, the NBA while granting approvals may impose benefit-sharing in the prescribed manner.[49] But, Indians shall only obtain biological resources for its commercial use, bio-survey, and bio-utilization with prior intimation to concerned SBB. The SBB shall enter into an agreement with the applicant to share benefits.[50]The determination of share in benefits by the SBB shall be based on principles outlined in the Guidelines of 2014 and when a particular biological resource is having high economic value, the benefits may also include an upfront payment

47. *See* for details Sections 3, 6 and 21 of the Act, Rule 20 of the Rules and Clause 1 of Guidelines of 2014
48. The Guidelines, *supra* n. 42, Clause 2.
49. The Act, *supra* n. 39, Sections 6 and 7.
50. The Guidelines, *supra* n. 42, Clause 2.

decided by the SBB on a case by case basis.[51] However, if approval is obtained by Indians from the NBA under Section 6 of the Act and is applying to SBB for access to biological resources for commercial utilization, the SBB shall not fix benefit-sharing because the applicant is already under obligation of sharing-benefits with NBA.[52]

Where benefit sharing is determined in the manner of payment of monetary compensation, it may be deposited to NBA fund or directly to be paid to identified individuals/group of individuals, local or indigenous community.[53]Subjective nature of this benefit requires that benefit shall be determined on case-to-case basis and quantum of benefits shall be mutually agreed between applicant and authority in consultation with benefit claimers.[54]

ii. Amount of Benefit Sharing

The Guidelines of 2014 provides the range of benefit-sharing for trader from 1.0% to 3.0% of the purchase price, and from 3.0% to 5.0% of the purchase price for the manufacturer. When an applicant purchases any biological resources directly from people who are considered having ownership, the benefit-sharing shall not be less than 3.0% of the purchase price for trader and 5.0% for the manufacturer.[55]When the biological resources are accessed for commercial utilization *etc*. the applicant shall pay an amount ranging from 0.1 % to 0.5 % of the annual gross ex-factory sale excluding taxes.[56]

The Draft Guidelines of 2019 proposes changes including if an applicant intends to access resources for commercial utilization *etc.*, the benefit sharing obligations shall extend 3.0 % to 5.0% of purchase price. If the applicant pays levy fee to the BMC, the benefit payable to the NBA

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51. Operational Guidelines to the State Biodiversity Boards for Processing of Applications for Access to Biological Resources received under section 7 of the Biological Diversity Act, 2002, Clause 5.
52. *Ibid.*
53. The Act, *supra* n. 39, Section 21.
54. The Biological Diversity Rules, 2004, Rule 20.
55. The Guidelines, *supra* n. 42, Clause 3.
56. *Id.*, Clause 4.The Benefit sharing component would be 0.1% if the Annual Gross ex-factory sale of the product is up to Rs. 1,00,00,000; 0.2% if Annual Gross ex-factory sale of the product is to Rs. 1,00,00,001-3000000; and 0.5% if Annual Gross ex-factory sale of product above Rs 3,00,00,000.

or SBB shall be reduced by 25% of the total amount due and where such resources are having high economic value, the benefit may include an upfront payment of not less than 5.0% on sale amount.[57] When resources are accessed for commercial utilization *etc*., the applicant shall pay the benefit up to 0.5% of the annual gross ex-factory sale price excluding taxes as per the following rule:[58]

Annual Turnover	**Registration Fee to be paid to NBA/SBB for a period of three years at once, as the case may be**	**Annual gross ex-factory sale price of product using accessed biological resource(s) minus government taxes**	**Benefit-sharing component per annum**	**Benefit sharing component if levy fee paid to BMC**
Up to 1,00,00,000	NIL	Any amount up to one crore	Lump sum 500/- only	NIL
1,00,00,001 to 3,00,00,000	Rs. 25,000/-	Any amount up to three crore	0.2%	Less 25% of the benefit sharing amount due
Above 3,00,00,000	Rs. 25,000/-	Any amount above three crore	0.5%	

Sources: "The Draft Guidelines on Access to Biological Resources and Associated Knowledge and Equitable Sharing of Benefits Regulations, 2019."

The Draft Guidelines of 2019 proposes no substantial changes to the provisions of the Guidelines of 2014 to determine benefit-sharing. The changes proposed include provisions for the registration fee to be paid to NBA/SBB and a benefit-sharing component if levy fee paid to BMC. It seems the purpose of the new draft is to ensure some revenue to the authorities rather than any major change in the existing scheme for the determination of benefit sharing. It also relieves to those applicants who makes payment of levy fee to the BMC, in such a case the benefit sharing component payable to the NBA or SBB shall be reduced by 25% of the total amount due. The author points out that in the title of draft Guidelines of 2019 the word equitable has been used however, the benefit-sharing component remains the same and no substantial changes are done to the existing scheme. The word equitable here is of utmost importance and should be taken in the interest of benefit claimers rather than the NBA or SBB itself.

57. The Draft Guidelines on Access to Biological Resources and Associated Knowledge and Equitable Sharing of Benefits Regulations, 2019, Clause 2(2)

IV. DIVYA PHARMACY DECISION: THE HEADWAY AND AFTER

In *Divya Pharmacy* v. *Union of India*[59]case, Uttarakhand High Court settled the controversial issue relating to the authorities to determine benefit-sharing and obligation of Indian companies to pay fair and equitable benefit-sharing. In this case, *Divya Pharmacy* used some biological resources to manufacture *Ayurvedic* products and against this demand was raised by the Uttarakhand Biodiversity Board for fair and equitable sharing of benefits as provided under the Act. Two issues were raised before the court: *first*, Whether the Uttarakhand Biodiversity Board can raise a demand of "fair and equitable sharing of benefits" as it has no power and jurisdiction to raise such a demand? And Whether *Divya Pharmacy* is actually liable to pay "fair and equitable sharing of benefits"? Determination of these issues in affirmative will definitely strengthen the entitlement of providers of biological resources in the matter and will be a milestone in this direction.

In the first issue, the argument of *Divya Pharmacy* was that entities with "foreign element"[60] cannot undertake an activity related to Indian biological resources or associated knowledge for the purpose of research or commercial utilization (including bio-survey and bio-utilization) without prior approval of the Authority.[61] *Divya Pharmacy* is not having any "foreign element" and thus was not under obligation to get prior approval of the NBA. But, it is required under the Act that the Indian entity shall obtain biological resources for commercial utilization (including bio-survey and bio-utilization) except after giving prior intimation to the concerned SBB.[62]It was argued that the Board has no power to impose fair and equitable sharing of benefits in respect of Indian entities and even NBA has no power to impose such liability upon Indian entities. Against this it was argued by the Board that fair and equitable sharing of benefits is one of the objectives sought to be achieved under the BD Act. "Foreign entity" and an "Indian entity" are not different and if the distinction is made, it would defeat the purpose of the Act. In the case of "Indian entities", the

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58. *Id.*, Clause 2(2)(ii).
59. MANU/UC/0940/2018
60. The Act, *supra* n. 39, Section 3(2)
61. *Id.*, Section 3(1)
62. *Id.*, Section 7

concerned SBB is having regulatory control under the Act, and thus imposition of fair and equitable sharing of benefits by the Board is one of its regulatory functions in the present case.

It justified its argument by giving reference to section 23(b), which gives power to SBB "to regulate the grant of approvals or otherwise to requests for commercial utilization (including bio-survey and bio-utilization) of the resources by Indians and when this provision is read with section 7 it means that although an "Indian entity" has to give only prior intimation it does not mean that SBB has no control over the Indian entity. Further, under section 24(2) of the BD Act the SBB can prohibit or restrict any such activity in consultation with the local bodies and inquiry, if there is reason to believe that such activity is detrimental or contrary to conservation and sustainable use objectives. The Board took note of section 52A of the BD Act, which provides for appeal before the National Green Tribunal against any order passed by Authority or Board regarding the determination of benefit-sharing. It was argued that the above provision implies that SBB has the power to impose benefit sharing.

In the second issue, the argument of *Divya Pharmacy* was that while granting approvals under sections 19 and 20 the Authority has to ensure payment of fair and equitable sharing of benefit to resource providers.[63] It means benefit-sharing question would only arise when approval was taken under the above provisions and in no other contingency, and these provisions are meant for only foreign entities, which require approval from the Authority. Against this, it was argued by the Board that the concept of fair and equitable sharing of benefits focuses on benefits to local and indigenous communities, and the Protocol of 2010 doesn't make any distinction between a "foreign entity" and an "Indian entity". Consequently the ambiguities in the national statute have to be seen in the light of the conventions and protocols and a purposive interpretation should to be made.

Indian companies which are extracting biological resources are equally liable to seek prior approval as well as share their benefit with the local communities who hold rights over such resources. The court rejected the contentions of *Divya Pharmacy* and stated that:

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63. *Id.,* Section 21.

> "…it may seem that an Indian entity is not required to share its revenue, however, what seems obvious, may not always be correct….the rights of indigenous and local communities should be protected from outside as well as Indians."[64]

The Court relied on the provisions of CBD and its Nagoya Protocol to hold that indigenous and local communities are beneficiaries under the Act. The Court held that the SBB has the jurisdiction to demand fair and equitable sharing of benefits from *Divya Pharmacy* and other Indian companies. The real test will be in ensuring that the amount collected by way of fees goes to those communities which have conserved biodiversity, and are used for the purpose of conservation of biodiversity. Then only the objective of the fair and equitable sharing of benefit is to be achieved.

Recognizing the reasoning in the above judgment, the Draft Guidelines of 2019 deals with the issues including that determine benefit-sharing and the obligations to pay benefit-sharing. A plain reading of the regulations makes it clear that SSBs are authorized to determine benefit-sharing and Indian entities are also liable to pay benefit sharing.[65] The important question is whether SBBs are bound to follow the guidelines framed by the NBA in determining the benefit-sharing.[66] The NBA issued guidelines[67] to SBBs for processing of applications and determination of benefit-sharing accordingly. Now this question is addressed in the draft guidelines in a very explicit manner when it says that "SBBs shall follow the regulations for benefit-sharing when exercising powers conferred under Sections 23(b) and 24(2) for person and activities regulated under Section 7 of the

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64. Zafar Mahfooz Nomani, "Case Comment on *Divya Pharmacy* v. *Union of India*" 39(2) *Biotechnology Law Report* 122.

65. The Draft Guidelines, *supra* n. 57, Clause 1(b)

66. The Act, *supra* n. 39, Section 21(4) makes it clear those guidelines there under are for the purposes of Section 21 only, which is limited to benefit-sharing determination by the NBA. Section 18(1), which also repeats Section 21(4) in substance, makes it clear that the guidelines for benefit-sharing are only with respect to Sections 3, 4 and 6; it does not mention Section 7, which provision concerns the SBBs. On the other hand, Section 64 and Section 18(3)(c), however suggest that the NBA may frame regulations or perform other functions for the purposes of the Act.

67. Operational Guidelines to the State Biodiversity Boards for Processing of Applications for Access to Biological Resources received under section 7 of the Biological Diversity Act, 2002, available at: *http://nbaindia.org/uploaded/pdf/Guidelines_for_Processing_ABSapplications_SBBs.pdf*

Act".[68] Adarsh Ramanujan argues that this is a sweeping power and could be argued to cover directions to SBBs on how to determine benefit sharing.[69] It is criticized as it weakens the decentralized scheme of the Act and interferes with theliberty of SBBs to lay down its own standard of procedure in line with the objectives of the Biological Diversity Act, 2002 and with the consultation of the State Government. However, it appears to the author that having common standards of procedure for both NBA and SBB would be a better approach in realizing the objectives of the Act.

V. CONCLUSION

The ethical entitlement of benefit-sharing of local and indigenous communities involved in conservation of biological diversity is culminated in provisions on access and fair and equitable benefit-sharing under the CBD and its protocol.[70] In line with international standards on entitlements of local and indigenous communities as 'providers' of biological resources, India has adopted its legal strategy. The ethical entitlement backed by legal obligations has strengthened the philosophy of bio-cultural rights and community rights of providers of biological resources and associated traditional knowledge. It is decided in the *Divya Pharmacy* case that there is no distinction between 'Indian entity' and 'foreign entity' as to determine the obligation of Indian entities to pay fair and equitable benefit-sharing to its providers. This decision is of far-reaching importance to realize entitlements of local and indigenous communities in the country. The Draft Guidelines of 2019 now deals with the question, how the obligation of benefit-sharing is to be determined and imposed by the authority and makes it obligatory for SBBs to follow the regulations on benefit-sharing when exercising powers under sections 23(b) and 24(2) of the Act. The above provision in the Draft Guidelines should not be taken as it interferes in the decentralized scheme of the Biological Diversity Act, 2002 rather it enforces benefit-sharing scheme in better manner and authorizes SBBs to determine benefit-sharing in their respective jurisdiction.

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68. The Draft Guidelines, *supra* n. 57, Scope.

69. Adarsh Ramanujan, "The New (Draft) Access and Benefit Sharing (ABS) Guidelines- Part I", 2019, available at:*https://spicyip.com/2019/12/the-new-draft-access-and-benefit-sharing-abs-guidelines-part-i.html*

70. Kabir Bavikatte and Daniel F. Robinson, "Towards a People's History of the Law: Bio-cultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing", 7(1) *Law, Environment and Development Journal*, 2011, at 37.

BOOK-REVIEWS

MEDIATION: LEGITIMACY and PRACTICE, by Hemant K. Batra, 1st edn, Eastern Book Company, Lucknow (2020) Pp 138, Price Rs. 295/-

Over the years, mediation has been recognised as the fastest growing method to resolve disputes worldwide. Against the adversarial mode of dispute resolution, non-adversarial ADR mechanisms like mediation is informal, people friendly, less complicated and allows the parties to communicate with each other to the root cause of their conflict, identify their underlying interests and helps them focus on finding out the solution themselves. Mediation, as a form of dispute resolution has not obtained independent force in India but is mostly institutionally annexed to the courts through Section 89 of the Code of Civil Procedure Code 1809.With the introduction of Section 89 in C.P.C. alternative dispute resolution was sought to be invoked and used more, and courts have often started referring many matters under this provision. However, what is required is that students of LL.B and Lawyers are also trained in the art of Mediation and Conciliation to understand it's true benefits and reap it's true fruits which will pave the way for a great reform in the Indian Legal System, which will lead to reduction of burden on courts and quick and efficacious resolution being agreed upon by parties in disputes having varied points of conflict.

In the above background, this book is a unique publication among those which cover dispute resolution particularly mediation. In that context, it is the only textbook dedicated to covering all aspects of mediation from origin to development, applicability and practice. This layman series is well written and easy to understand for reader of any academic background.

The book *Mediation: Legitimacy and Practice* is divided into seven chapters. Chapter one titled as origin is dedicated in ten pages, tracing the history of mediation back thousands of years and across various cultures from Ancient Greece to Vedic Hindu period and from *Bible* to

Dharmashastra. The contents of this chapter is moving around to get the answer of a basic question that where did the mediation come from. Chapter two Connotation is well written in two parts. Part I is Lexicon Connotations which discuss the various dictionary meanings of mediation from around the word. Part II is Legal Connotations is devoted to study and comprehend the meaning of mediation as conceptualized and theorized in the legal domain.

Chapter three which is titled as Legitimacy is devoted to discuss the legitimate recognition of mediation in various jurisdictions of world. This chapter discusses the acknowledgement of mediation by case study method from almost all the legal system in the world particularly British case study, Australian case study, European case study, American case study, Philipino, Malasiyan, Singapurian and Indian case study. Chapter fore is Categories. In this chapter author pointed out that there are categories of mediation which can provide an effective alternative to the litigation dominion. Fact and circumstances surrounding a conflict govern the category and methodology of mediation to be applied. In this connection author discusses the various category of mediation like facilitative mediation, court referred mediation, evaluative mediation, transformative mediation, arbitration mediation and E-mediation.

Chapter five is Skills and Procedure. This chapter discusses the various skill and procedure which may applied in mediation. This chapter focuses on the view that skilled mediator is the most important for mediation because the mediator is neither a judge nor an arbitrator, but rather a catalyst or an instrument whose goal is to facilitate dialogue between parties to mediation. Chapter six titled as Benefits. This chapter discusses in crux that although there are various means of alternative means of alternative dispute resolution options however, mediation has proved to be the most efficacious and amicable. Chapter seven, International Commerce is about the discussion of role and use of mediation for resolving International Commercial disputes by private players. This chapter discusses how mediation clauses, in addition to or instead of arbitration agreements, are increasingly common in private contracts.

Apart from seven chapters discussed above there is one Appendix in this book that is United Nations Convention on International Settlement

Agreements Resulting from Mediation. In conclusion one can say that the author has brought to bear his formidable research skills on what is sure to become an important contribution to the area of alternate dispute resolution particularly in mediation. The beauty and best part of this book is that it gives an overview of mediation in such a way that a layman may use this book to understand the introductory concept and law students and practitioner may keep to brushing his skill by various techniques elaborated in this book.

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TEXT BOOK ON INTRODUCTION TO INTERPRETATION OF STATUTES
(Fifth edn., 2021), By Avtar Singh and Harpreet Kaur, Lexis Nexis, Pp. LIII + 331, Price Rs. 650/=

A statute is an edict of the legislature[1] and the process of interpretation is to determine the true meaning of a word from the intent of the framers of the instrument. It is the art of finding out the true sense of any form of words and enables others to derive the idea which the legislature intended to convey. However, the judicial key to construction is the composite perception of the *deha* and the *dehi* of the provision.[2] Once Justice Krishna Iyer interpreted the term 'industry' in the light of historical perspective, objects and reasons, international thought ways, popular undertaking, contextual connotation and suggestive subject-matters, dictionary meaning and social perspective in Part IV of the Constitution of India. He considered the expression 'undertaking' cannot be torn off the words whose company it keeps. If birds of a feather flock together and *nositur a sociis* is commonsense guide to construction, it must be read down to confirm to the restrictive characteristic shared by the society of words before and after. Nobody will torture to mean this term 'undertaking' as meditation or *Mushaira* which are spiritual and aesthetic undertaking. Wide meanings must fall in line and discordance must be excluded from a sound system.[3]

Since Interpretation of Statutes has prime relevance in the legal studies, this present book on *Introduction to Interpretation of Statutes*

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1. *Vishnu Pratap Sugar Works (P)* v. *The Chief Inspector Of Stamps, U.P,* 1967 SCR (3) 920: a statute is, however, different from a statutory instrument as defined by the Statutory Instruments Act 1946, where power to make…statutory rules is conferred on any rule- making authority, any document by which that power is exercised is a statutory instrument. Thus, whereas a statute is an edict of the legislature, a statutory instrument as distinguished from such an edict is a document whereby the rule making power is expressed; G.P. Singh, *Principles of Statutory Interpretation*, Tenth ed., Wadhwa Nagpur, 2006 at 2.
2. *Chairman, Board of Mining* v. *Ramjee*, 1977 SCR (2) 904
3. *Bangalore Water Supply and Sewerage Board* v. *Rajappa*, AIR 1978 S.C. 548

written by Avtar Singh and Harpreet Kaur substantially elucidates the subject-matter of rules of interpretation and provides broader perspective of the process of the rules of interpretation which stimulate readers to think analytically. It covers main and subsidiary principles of interpretation, internal and external aids to construction, operation of statutes, statutes affecting crown and jurisdiction of courts, expiry and repeal of statutes, construction of tax, remedial and penal statutes as well as delegated legislation. This book, is primarily divided into eleven chapters, covers almost entire gamut of the subject-matter. The authors cogently elucidate the introductory and basic principles of Interpretation of Statutes, such as rules of construction *viz*. literal construction; strict construction; beneficial construction; harmonious construction and purposive construction. Specifying operation of statutes, retrospective operation, presumption against exceeding Constitutional Powers and Territorial Nexus are well explained. This book covers construction of Taxing statutes and Penal statutes too in a lucid manner. Concluding chapter Delegated Legislation discusses the relevant dimensions of judicial review and procedural requirements as one of the notable features.

The authors express the view that the rules of interpretation are drawn from the intention of the instrument or legislation, from the nature of the transaction or the circumstances, from the legal rights of the parties, independent of the instrument or law in question, and from many other relevant particulars. Further, in perplexing cases, they explain how process of interpretation is helpful to discover its meaning and apply it to do justice between others. They are of the view that it's not a science but an art to find out the meaning of words in the context of a given situation. It is to this field of art that the present study is dedicated to enable those who are interested in knowing the elements of the subject. Here, the authors also underline importance of the subject within the framework often studies cannot be overemphasized. The courts have to administer justice according to law. The chief source of law is legislation. The other sources are precedents and customs. Every source of law finds its expression in a language is the property of the people and not that of law, though some words may acquire paralegal meaning and may become a part of the legal terminology.

In this fifth edition of the book, the authors extensively append new case laws dealing with new situations and discuss pertinent issues with

the application of rules of interpretation. The relevant case laws interpreted within the scheme of this book are as follows: *ABC* v *State (National Capital Territory of Delhi)*, 2015 SCC On Line SC 609; *Union of India* v *Sriharan,* (2016) 7 SCC 1; *Shailesh Dhairyawan* v *Mohan Balkrishna Lulla,* (2016) 3 SCC 619; *Abhiram Singh* v *CD Commachen*, (2017) 2 SCC 629; *Macquarie Bank Ltd* v *Shilpi Cable Technologies Ltd*. (2018) 2 SCC 674; *CIT* v *Vatika Township Pvt. Ltd*. (2015) 1 SCC 1; *CIT* v *SRMB Dairy Farming Pvt. Ltd.* (2018) 13 SCC 239; *All Kerala Online Lottery Dealers Association* v *State of Kerala* (2016) 2 SCC 161; *State of Jharkhand* v *Tata Steel Ltd*. (2016) 11 SCC 147; *Indian Performing Rights Society Ltd*. v *Sanjay Dalia* (2015) 10 SCC 161; *Vacher & Sons* v *London Society of Compositors* (1913) AC 107; and *Petroleum and Natural Gas Regulatory Board* v *Indraprastha Gas Ltd*. (2015) 9 SCC 209.

Notably, the authors call attention to harmonize the words with the object of the statute in order to make correct interpretation. The application of a given legislation to new and unforeseen needs and situations broadly falling, within the statutory provision is within the interpretative jurisdiction of courts. This is not legislation in the strict sense but application and within the court's province. They point out that merely activated by some assumed objects or desirability; the courts cannot adorn the mantle of the legislature. It is hard to ignore the legislative intent to give definite meaning to words employed in the Act and adopt an interpretation which would tend to do violence to the express language as well as the plain meaning and patent aim and object underlying the various other provisions of the Act. Even in endeavoring to maintain the object and spirit of the law to achieve the goal fixed by the legislature, the courts must go by the guidance of the words used and not on certain preconceived notions of ideological structure and scheme underlying the law. Picking up of only one word from one particular provision and analyzing it in a manner contrary to the statement of objects and reasons is neither permissible nor warranted.

The authors suitably mention that the language shapes the range of semantic possibilities within which the interpreter acts as a linguist. Once the interpreter defines the range, he or she chooses the legal meaning of the text from among the semantic possibilities. The semantic component thus sets the limits of interpretation by restricting the interpreter to a legal meaning that the text can bear in its language. Purposive construction

can only be resorted to when language of a provision is capable of more than one interpretation. Where literal construction or plain meaning may cause hardship, futility, absurdity or uncertainty, the purposive or contextual construction may be preferred to arrive at a more just, reasonable and sensible result. They remind the duty of the courts to accept a construction which promotes the object of the legislation and also prevents its possible abuse even though the mere possibility of abuse of a provision does not affect its constitutionality or construction. Abuse has to be checked by constant vigilance and monitoring of individual cases and this can be done by screening of the cases by suitable machinery at a high level. They cogently assert that the function of the courts is to expound the law and not to legislate, nonetheless the legislature cannot be asked to sit to resolve the difficulties in the implementation of its intention and the spirit of the law; and every law is designed to further the ends of justice and not to frustrate it on mere technicalities.

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