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FOREWORD

CONCEPT NOTE

The *Indian Journal of Law and Public Policy* is a peer reviewed, bi - annual, law and public policy publication. Successive governments come out with their objectives and intentions in the form of various policies. These policies are a reflection of the Executive's ideologies. Laws, concomitantly, become the means through which such policy implementation takes place. However, there might be cases of conflicts between the policy and the law so in force. These contradictions have given way for a continuing debate between the relationship of law and public policy, deliberating the role of law in governing and regulating policy statements of various governments.

This journal is our solemn effort to promote erudite discernment and academic scholarship over this relationship, in a way which is not mutually dependent on each of these fields but which is mutually exclusive an independent. The focus has been to give a multi – disciplinary approach while recognizing the various effects of law and public policies on the society.

(Editor in Chief)

EDITORS' NOTE

The purpose of law was never to be confined within the corridors of court rooms and miniscule fonts of gargantuan law books. As citizens of the nation, we are entwined with any change that occurs in the public policies by the policy makers. Through this journal we explore the transformations in the laws of our nation.

As a platform for sharing public opinion, the *Indian Journal of Law and Public Policy* has taken up the task to emulsify various ideas and thoughts of law students, academicians and professionals for the articulation of this indispensable view of the public.

Any change in law or public policy has its direct or indirect impact on all the citizens. To understand this change, and the purpose behind, it becomes quintessential to address to the legal issue itself in a way that people at the largest scale can relate to it. We, as editors of this the journal, consider it our responsibility to dispense this awareness to people and the task of creating consciousness of law and public policy as perceived by all.

We, initiate this journal with the principle of constructing accessibility to the intricate aspects of law and public policy in an effortless manner for our readers. In this inaugural issue, we cover diversified legal topics in concurrence to the contemporary necessity. The *journal* will serve as a platform for sharing and discussing ideas on laws and public policies, and it shall appreciate all those who wish to contribute in this regard.

(Editorial Committee)

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INDIA'S "TOO MUCH CONSTRUCTIVISM" SYNDROME: A CRITICAL ANALYSIS OF INDIAN CONSTITUTIONAL REGIME IN THE LIGHT OF AMERICAN LEGAL REALISM

Hakim Yasir Abbas*

INTRODUCTION

The most intriguing -- though not accepted -- jurisprudential development in the decade before World War II was legal realism. Seen as a pivotal event in the U.S. legal tradition,¹ legal realism emerged in the late 1920s as a jurisprudential movement that criticized the formalist approach to law,² expressed skepticism about the influence of the rules of law, and sought to demystify how courts operated and judges made decisions. The legal realists generally urged the incorporation of social science into efforts to understand how courts operated and to improve their operations.³ The Indian legal system can be said to be the best manifestation of the 'realist' philosophy; however, it is unfortunate to see that very few scholars have taken up this approach to study the system of judicial decision making in India. Some may regard our 'reaction to judicial-activism' as a synonym to legal realism, however, it would be wrong to do so. Even though these two have some common points, however, they cannot be treated as same. This article is an endeavour to highlight this difference and to critically analyse the conduct of Indian Judiciary through the prism of American Legal Realism. It is vital to point out at the out-set that the objective for writing this article is not to criticize the manner in which judiciary performs its task. The objective has been to create awareness among the legal fraternity about the manner in which courts perform this task.

This article argues that Indian Constitutional set-up has been to a very large extent doctored by the use of extra-judicial tools of interpretation⁴ which gives judges the window to inculcate

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¹ Brian Z. Tamanaha, *Understanding Legal Realism*, 87 Texas Law Review 731, at 731.

² See Hilaire McCoubrey & Nigel D. White, *Textbook on Jurisprudence*, 3rd Edition, Oxford University Press, 1999, at 202; See also Brian Bix, *Jurisprudence: Theory and Context*, 5th Edition, Thomson Reuters (Legal) Limited, 2009 at. pp. 191-193.

³ Rodger D. Citron, *The Nuremberg Trials and American Jurisprudence: The decline of Legal Realism, the revival of Natural Law and the Development of Legal Process Theory*, Michigan State Law Review, 2006, at 385.

⁴ See Justice G.P.Singh, *Principles of Statutory Interpretation*, 13th Edition, LexisNexis Butterworths Wadhwa, Nagpur, 2012. Justice G.P. Singh in his book on "Interpretation of Statutes" has classified the tools of interpretation as into two categories viz. 'internal' and 'external' tools. I am going to argue that the use of external tools enables the

their own subjective thinking within the judgments. The article argues that the claim that judges decide the cases according to statutes and laws made by the legislature and are not affected by the milieu of the outside society is a myth. Part I of this article deals with the purpose of studying Indian Legal and Constitutional Regime using the “realist” approach; with what are the core claims of American Legal Realism upon which I will analyze the Indian Legal and Constitutional Set-up and; with what are the similarities and dissimilarities between “judicial over-activism” and “American Legal Realism? Part II will provide a manifestation of legal realism by the judiciary in course of Constitutional interpretation. This part will provide a critical analysis of the manner in which the hon’ble Supreme Court and the High Courts have interpreted certain provisions of the Constitution. Part III will summarize the topic and provide the conclusions about the same.

PART I: UNDERSTANDING REALISM

A. REALISM: A BRIEF INTRODUCTION

The emergence of legal realism in the early twentieth century is widely seen as a pivotal event in the U.S. legal tradition.⁵ A legal theorist recently attested to "the enormous influence Legal Realism has exercised upon American law and legal education over the last sixty years."⁶ Above all else, legal realism is credited with bringing about a revolutionary shift in views about judging in the American legal tradition. The standard account, as put by a legal historian, is this:

“Formalist judges of the 1895-1937 period assumed that law was objective, unchanging, extrinsic to the social climate, and, above all, different from and superior to politics [.....] The Legal Realists of the 1920s and '30s, tutored by Holmes, Pound, and Cardozo, devastated these assumptionsThey sought to weaken, if not dissolve, the law-politics dichotomy, by

judges to include their subjective philosophy within a judgment and that this has been used by judges without any restriction.

⁵ A common misunderstanding about American Legal Realism is that it is a school of jurisprudence. However, it is just a misconception. American Legal Realism is neither a ‘school of jurisprudence’ nor is it a ‘legal theory’. The reasons for this are many. The most argued one is that there are varying versions of realism which have never been consistently changing their substance. See R.W.M Dias, *Jurisprudence*, 5th Edition, Aditya Books Private Limited, New Delhi, 1994, at p. 447.

⁶ Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy*, 15 (2007). [Cited in Brian Z. Tamanaha, *Understanding Legal Realism*, Texas Law Review, March 2009, at p. 731. Hereinafter Tamanaha, 2009]

showing that the act of judging was not impersonal or mechanistic, but rather was necessarily infected by the judges' personal values.”⁷

American Legal Realism is nothing but an attempt to make us realise that contrary to the popular claims that judges stick to black-letter law and use syllogistic reasoning to decide, a judge may not necessarily stick to the established norms of interpretation or decision-making. One of the most vociferous proponents of this philosophy, Oliver Wendell Holmes, Jr. writes:

*“The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”*⁸

The realist-belief is that realist approach to the study of law would help the lawyers to predict the judgements and prepare their arguments accordingly. What needs to be kept in mind is that American Realism is all about court-scepticism where the realists argue that while giving judgements the judges do not restrict themselves to strict rules of interpretation but incorporate within such judgment their subjective understanding of the issue at hand.

B. REASONS BEHIND ADOPTING THIS APPROACH.

One may be skeptic about the necessity of critically analyzing Indian constitutional or legal set-up through the prism of “realist-approach”. There are two primary reasons behind taking up this study: 1) To obliterate the myth that ‘judges interpret the law and do not create law’; and 2) to point out the dangers behind the judges using the extra-judicial tools and their philosophy in the judgments. This portion will basically argue that the judiciary in India has long forgotten its traditional role of ‘interpreting the law’ and has tread a new path of using extra-legal tools to

⁷ William M. Wiecek, *Liberty Under Law: The Supreme Court in American Life*, 187 (1988). [Cited in *Supra*. Tamanaha, 2009, at p. 731].

⁸ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harvard Law Review 457 (1897), reprinted in 110 Harvard Law Review 991 (1997), at 460-461.

‘construct new laws’. Even though the logical consequence of interpretation is that something new is created, what I will argue is that judiciary has in a number of cases done too much interpretation. This has given completely different meaning to the provisions of law as they were originally enacted by the legislature. This raises a very critical question i.e. what is the legitimacy or legality behind this. I will deal with those aspects of Indian judiciary where I feel that the judiciary has gone a step ahead of performing its task.

a. REACTION TO FORMALISM

There are two-fold reasons behind taking up the realist approach to study the manner in which constitutional and legal set-up has evolved in India. Firstly, this approach makes us aware about certain fundamental misconceptions created by positivist approach of law. It primarily argues that the general presumption that judges do not make law but simply interpret the statutes enacted by parliament is a myth in India as well. Secondly, a clear advantage of the comparative study of courts is the diverse range of courts and political contexts in which they are suited. Such diversity can provide researchers with the opportunity to identify a wider range of conditions and experiences of courts in order to help develop more general understandings of how courts function in relation to other government institutions. American realism has its core in a reaction to the ‘black-letter’ approach to the law which advocates the formal syllogistic application of law to the facts, an approach sometimes labeled as “formalism” or the “mechanical” approach to jurisprudence. However, it was felt that when it came to the courts this philosophy was never practiced. Judges did not adhere to the established rules of interpretation and used extra-judicial techniques and their own personal subjective philosophy to decide the cases. Thus, we see that formalism and realism are interconnected to each other.

C. CORE CLAIMS OF ALR.

This approach criticizes the positivist approach of defining and understanding law. Formalism offers us right and wrong answers, it encourages rigidity and a dismissive attitude to any analysis of the impact of non-legal factors on the law; in other words it treats law as an isolated, closed and logical system. It thus becomes necessary for us to familiarize ourselves with the positivist school

of law so as to better understand legal realism. It is very difficult to actually pinpoint the exact contentions of realists. Considering the enormous influence Legal Realism has exercised upon American law and legal education over the last sixty years, and considering, too, as the cliché has it, that "we are all realists now," it remains surprising how inadequate - indeed inaccurate - most descriptions of Realism turn out to be. Ronald Dworkin, for example, claims that according to Realism, "judges actually decide cases according to their own political or moral tastes, and then choose an appropriate legal rule as a rationalization."⁹ Dworkin is echoed by Judge Jon Newman of the Second Circuit who asserts that Realists believe that "the judge simply selects the result that best comports with personal values and then enlists, sometimes brutally, whatever doctrines arguably support the result."¹⁰ John Hart Ely says the Realists "'discovered' that judges were human and therefore were likely in a variety of legal contexts consciously or unconsciously to slip their personal values into their legal reasoning."¹¹ Steven Burton remarks that it is often "claimed, in legal realist fashion, that judges decide whatever they want to decide when the law is unclear (and it is often or always unclear)."¹² Fred Schauer describes Realists as holding "that legal decision-makers are largely unconstrained by forces external to their own decision-making preferences."¹³ And Robert Satter, a Connecticut trial judge, says in a recent popular work that Realists "assert that a judge exercises unbridled discretion in making decisions; he works backward from conclusion to principles and uses principles only to rationalize his conclusions. [Realists] consider the judge's values all-important."¹⁴

The term realism has two integrally conjoined aspects - a skeptical aspect and a rule-bound aspect which gives legality to the former. Realism refers to an awareness of the flaws, limitations, and openness of law – an awareness that judges must sometimes make choices, that they can manipulate legal rules and precedents, and that they can be influenced by their political and moral views and by their personal biases (the skeptical aspect). But realism about law and judging also conditions this more skeptical awareness with the understanding that the judges then use the legal

⁹ Ronald Dworkin, *Taking Rights Seriously*, Cambridge: Harvard University Press, 1977, at p. 3.

¹⁰ Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 Cal. L. Rev. 200, 203 (1984).

¹¹ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, 44 (1980). [Cited in Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, Texas Law Review, December 1997, at p. 267. Hereinafter Leiter, 1997].

¹² Steven J. Burton, *Judging in Good Faith*, 43 (1992). [Cited in Leiter, 1997, at 268].

¹³ Frederick Schauer, *Playing by the Rules*, 191 (1991). [Cited in Leiter, 1997, at 268].

¹⁴ Robert Satter, *Doing Justice: A Trial Judge at Work*, 64 (1990). [Cited in Leiter, 1997 at 268].

rules to give finality to their own personal ideology. This second criteria is used as a cover-up by the judges to put-forth their own personal philosophy. Have we not seen judgments which have dissenting opinions? If the formalistic approach is followed, then by applying the established legal rules to a given factual problem will provide only one correct solution. But the fact that judgments have dissenting opinion which are later taken up as a basis of subsequent judgment which overrules the earlier one, shows that the decision in the first case was not the right one.

The seminal formulation of this view of judging is *The Nature of the Judicial Process*, in which Cardozo explicitly invoked the term realism in this balanced sense:

Those, I think, are the conclusions to which a sense of realism must lead us. No doubt there is a field within which judicial judgment moves untrammelled by fixed principles. Obscurity of statute or of precedent or of customs or of morals, or collision between some or all of them, may leave the law unsettled, and cast a duty upon the courts to declare it retrospectively in the exercise of a power frankly legislative in function. In such cases, all that the parties to the controversy can do is to forecast the declaration of the rule as best they can, and govern themselves accordingly. We must not let these occasional and relatively rare instances blind our eyes to the innumerable instances where there is neither obscurity nor collision nor opportunity for diverse judgment.¹⁵

This above statement of Justice Cardozo evidently shows that whenever a judge is faced with a *hard* case whereby the legal principles are not well-settled, they have to either willingly or unwillingly provide one. This is a situation where it is highly probable that the judges induce their own personal intuitions and make it a part of the problem. The Core Claim of Legal Realism consists of the following descriptive thesis about judicial decision-making: “judges respond primarily to the stimulus of facts”. Put less formally - but also somewhat less accurately - the Core Claim of Realism is that judges reach decisions based on what they think would be fair on the facts of the case, rather than on the basis of the applicable rules of law. An applicable rule of law makes certain facts relevant, and thus even a judge who is following the legal rule must take these facts

¹⁵ Benjamin N. Cardozo, *The Nature of the Judicial Process*, 128 (1921). [Cited in Tamanaha, 2009 at pp. 732-733].

into account. Conversely, a judge must first look at the facts to see which legal rules are relevant. But this is a plainly trivial sense of fact-responsiveness. The Realist idea is that judges are responding to the underlying facts of the case, facts that are not made relevant by any legal rule. A useful statement of the point comes from the eminent UCC scholar James J. White, discussing what he correctly calls "the central tenet" of the Realist Movement, namely that "judges' decisions arise not merely from the rules they state in their opinions, but at least as much from unstated reasons - from the facts before them, from the expectation of the parties in the trade, and from the judges' own judgment about fairness."¹⁶ Writings of large number of other scholars also contain a tincture of this version of Core Claim.¹⁷

PART II: MANIFESTATION OF REALISM IN INDIAN CONSTITUTIONAL SCHEME

A. LEGAL REALISM, JUDICIAL ACTIVISM AND JUDICIAL OVERREACH

One can rightly argue that the court-sceptic approach of American realism exists in India as well under the name 'judicial over- activism'. However, to say that both are same would be wrong. There are certain fundamental differences between the two which places 'legal-realism' on a completely different pedestal.

¹⁶ James J. White, *The Influence of American Legal Realism on Article 2 of the Uniform Commercial Code, in Prescriptive Formality and Normative Rationality in Modern Legal Systems*, 401, 401 (Werner Krawietz et al. eds., 1994). [Cited in Cited in Leiter, 1997 at 268]

¹⁷ Oliphant, for example, gives us an admirably succinct statement; he says that courts "respond to the stimulus of the facts in the concrete cases before them rather than to the stimulus of over-general and outworn abstractions in opinions and treatises [Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 75 (1928)]; Oliphant's claim was confirmed by Judge Hutcheson's admission that "the vital, motivating impulse for the decision is an intuitive sense of what is right or wrong for that cause." [Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 Cornell L.Q. 274, 285 (1929).]; Similarly, Jerome Frank cited "a great American judge," Chancellor Kent, who confessed that, "He first made himself "master of the facts.' Then (he wrote) "I saw where justice lay, and the moral sense decided the court half the time; I then sat down to search the authorities ... but I almost always found principles suited to my view of the case"; Precisely the same view of what judges really do when they decide cases is presupposed in Llewellyn's advice to lawyers that, while they must provide the court "a technical ladder" justifying the result, what the lawyer must really do is "on the facts ... persuade the court your case is sound." [Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 399-406 (1950).

B. USE OF FOREIGN AUTHORITIES: DEMOCRATIC AND CONSTITUTIONAL LEGITIMACY

One area of law which reflects the extent of over-activist nature of Indian judiciary is the reckless use of foreign authorities by it without any proper, legitimate and effective methodology. The courts have used these authorities to fuse in subjectivity within judicial precedents and have compromised the democratic and constitutional legitimacy of the same. An ephemeral look at Indian constitutional jurisprudence will suggest that the courts have used these authorities as tools to “construct” new laws. The Indian constitutional jurisprudence is disseminated with the practice of using foreign (non-Indian) legal authorities and international law as tools of interpretation.¹⁸ Cross-border judicial decisions and international law have influenced a plethora of judicial opinions in India, ranging from right to privacy¹⁹, freedom of press²⁰, restraints on foreign travel²¹, constitutionality of death penalty²², protection of women against sexual harassment at work place²³ and prior restraints on publication²⁴. Unlike USA, where engaging in cross-jurisdictional constitutional dialogue is looked upon with a lot of scepticism²⁵, the constitutional courts in India have accepted/adopted this practice with a lot of enthusiasm.²⁶ Even though the hon’ble Supreme Court of India has from time to time cautioned against the disproportionate and inconsiderate use

¹⁸ Hakim Yasir Abbas, *Critical Analysis of the Role of Non-Indian Persuasive Authorities in Constitutional Interpretation*, CALQ (2013) Vol. 1.2. [Hereinafter Abbas 2013].

¹⁹ *Kharak Singh v. State of Uttar Pradesh & Ors.*, AIR 1963 SC 129, [hereinafter Kharak] [Unauthorised police surveillance considered as violative of right to privacy].

²⁰ *Bennett Coleman v. Union of India*, AIR 1973 SC 106, [Challenge against governmental limits on import of newsprint].

²¹ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597, [hereinafter Maneka] [Challenge against government’s refusal to issue passport to petitioner].

²² *Bachan Singh v. Union of India*, AIR 1980 SC 898. [Majority opinion approving of death penalty in rarest of rare cases].

²³ *Viskhaka v. State of Rajasthan*, AIR 1997 SC 3011.

²⁴ *R. Rajagopal v. State of Tamil Nadu*, AIR 1995 SC 264.

²⁵ Cheryl Saunders, *The Use and Misuse of Comparative Constitutional Law*, 13 Ind. J. Global Legal Stud. 37, 39 (2006). See also A.E Dick Howard, *A Traveller from an Antique Land: The Modern Renaissance of Comparative Constitutionalism*, 50 Va. J. Int’l L. 3, 11-14 (2009); Ran Hirschl, *Comparative Law: The Continued Renaissance of Comparative Constitutional Law* 45 Tulsa L. Rev. 771.

²⁶ The evolution of Indian environmental jurisprudence by the constitutional courts is the perfect reflection of this enthusiasm. Virtually all of the Indian legal jurisprudence in relation to environmental law has been developed by the Supreme Court through the Constitution. The Supreme Court has developed a reputation of being an activist Court that has, since mid-1980s, transformed itself into a guardian of India’s natural environment; See Upendra Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]Justice*, in *Fifty Years Of The Indian Supreme Court: Its Grasp And Reach*, pp. 156-210 (S.K. Verma , et. al. eds., 2000) [hereinafter Avatars]; Saptarishi Bandopadhyay, *Because the Cart Situates the Horse: Unrecognised Movements Underlying the Indian Supreme Court’s Internationalization of International Environmental Law*, 50 Indian J. Int’l. L. 204 (2010) [hereinafter Saptarishi 2010].

of foreign authorities in statutory²⁷ and constitutional²⁸ interpretation, it has failed to lay down an objective test, guidelines or proper methodology for engaging in such practice.²⁹

C. JUDICIAL OVER-ACTIVISM I: REFLECTIONS IN INDIAN ENVIRONMENTAL JURISPRUDENCE

India's environmental jurisprudence is an essential manifestation of how judges have used to veil of 'interpretation' to make new laws. Major chunk of Indian environmental law is judge made. In this regard, the constitutional courts in India have applied international laws and other foreign norms as persuasive authority for deciding domestic legal issues. Virtually all of the Indian legal jurisprudence relation to environmental law has been developed by the Supreme Court through the Constitution. The Supreme Court has developed a reputation of being an activist Court³⁰ that has, since mid-1980s, transformed itself into a guardian of India's natural environment.

In order to better appreciate the important role of foreign law in relation to protection of environment in India and to understand the reasons for placing the same within this category, it is important firstly trace the source of environmental principles within international law and secondly to show how the courts have incorporated the same within our domestic legal jurisprudence. Tracing the international origin of these principles and highlighting the fact that same were not found within any Indian statutes, this part of the thesis will show how the Supreme Court incorporated these new principles within our legal system. Majority of principles of environmental governance find their origin in international law. Principles like sustainable development, precautionary principle, polluter pays principle, and principle of inter-generational equity owe their existence to international law. The sources of international law as elucidated in Article 38 of the Charter of ICJ apply equally to international environmental law. However, being a very new area of international law, international environmental law is mostly found in international and

²⁷ In this regard, Chief Justice Bhagwati stated in *M.C. Mehta v. Union of India*, (1987) 1 SCC 395 as follows: "We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for that matter in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence." [Id. at 421].

²⁸ *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1 [The Hon'ble Supreme Court denied to apply the concept of "affirmative action" as it exists in U.S.A. to Indian conditions and stated that: "under these circumstances [where the social context in which the law is made], judgments from the US, while entitled to respect, must be approached with great caution, for their adoption would lead to jettisoning of over half a century of our jurisprudence." Ibid. at 307.

²⁹ S.P. Sathe, *Judicial Activism In India: Transgressing Borders And Enforcing Limits*, (2003); See also Saptarishi 2010, *supra* note 27.

³⁰ Baxi, *supra* note 27.

regional conventions and treaties. The existing international environmental law principles have been enshrined in a number of international law instruments such as the Stockholm Declaration, the Rio Declaration and various framework conventions. A number of international institutions have also spelled out principles in resolutions or declarations such as the 1978 UNEP Draft Principles of Conduct on Natural Resources Shared by Two or More States (UNEP Draft Principles).³¹

a. SUSTAINABLE DEVELOPMENT

The concerns of the international community to preserve and protect the environment from future destruction culminated into a number of international conferences and treaties for the same. The leading among them is the Stockholm Declaration, 1972 and the Rio Declaration, 1992. The origin of principle of sustainable development can be traced back to these international instruments. In order to develop a sound and effective environment regime in India, the Supreme Court of India while incorporating principles of international environmental law within our law has referred to these instruments exhaustively. In *Vellore Citizens Welfare Forum v. Union of India*³², the Supreme Court while highlighting the importance of international environmental principles, particularly sustainable development stated as follows:

The traditional concept that development and ecology are opposed to each other is no longer acceptable. Sustainable Development is the answer. In the international sphere _Sustainable Development as a concept came to be known for the first time in the Stockholm Declaration of 1972....During the two decades from Stockholm to Rio, Sustainable Development has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting eco-systems. Sustainable Development as defined by the Burndtland Report means Development that meets the need of the present without compromising the ability of the future generations to meet their own needs.”³³

³¹ The full title of this instrument is the 1978 UNEP Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States.

³² (1996) 5 SCC 647: AIR 1996 SC 2715.

³³ *Id.* at pp. 657-60.

b. PRECAUTIONARY PRINCIPLE³⁴

The precautionary principle is one of the most important principles of international environmental law which has indeed been incorporated within India's legal mechanism for the protection of environment. The evolution of principle of precautionary principle has been a slow one. While the origin of precautionary principle for the protection of environment can be traced to 1991 London Dumping Convention, the same was properly incorporated within an international instrument as Principle 15 of Rio Declaration on Environment and Development.³⁵ For the purpose of this thesis what is pertinent to note is this principle is a very crucial part of international environmental law. This principle of international law has been incorporated by the hon'ble Supreme Court of India within Indian environmental jurisprudence. Acknowledging precautionary principle 'to be a customary law the Supreme Court stated that it had —no hesitation in holding that the precautionary principle and polluter pays principle is part of environmental law of the country.³⁶ The Supreme Court has since then reiterated to this principle time and again to highlight the obligation of the State to apply this principle while dealing with matters of environment. The Supreme Court stated in *T.N. Godavarman Thirumulpad v. Union of India*³⁷ that —duty is cast upon the Government under Article 21 of the Constitution of India to protect the environment and the two salutary principles which govern the law of the environment are: (1) the principles of sustainable development, and (2) the precautionary principle.³⁸

D. ARTICLE 124 AND 217: PANDORA BOX OF BLUNDERS.

Judicial independence was not designed as, and should not be allowed to become, a shield for judicial misbehavior or incompetence or a barrier to examination of complaints about injudicious conduct on apolitical criteria.³⁹ In the similar manner it should also not be used to interpret Constitution unconstitutionally. The way in which the hon'ble Supreme Court has handled the

³⁴ For the purpose of this thesis following terms have been used interchangeably and are intended to refer to Precautionary Principle: precaution, precautionary action, precautionary measures, and precautionary approach.

³⁵ U.N. Doc. A/CONF.151/5/Rev. 1, June 13, 1992, reprinted in 31 I.L.M. 874 (1992); See also Bergen Ministerial Declaration on Sustainable Development in the ECE Region, May 1990.

³⁶ *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 SCC 647: AIR 1996 SC 2715.

³⁷ (2002) 10 SCC 606.

³⁸ *Id.* at 630.

³⁹ David Pannick, *Judges*, Oxford University Press, 2011.

interpretation of article 124⁴⁰ and article 217⁴¹ of the Constitution is one such example where the court has used the cloak of ‘independence of judiciary’ to do something that is unconstitutional. A ‘sordid saga’ is what one of the leading constitutional authorities in India have called the manner in which the hon’ble Supreme Court of India has interpreted Article 124 of the Constitution.⁴²

a. APPOINTMENT OF JUDGES: FROM ‘CONSULTATION’ TO ‘CONCURRENCE’.

Article 124(2) of the Constitution of India provides as follows:

“...(2) Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years.

Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted.”

Article 217(1) of the Constitution states:

“(1) Every judge of the High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the governor of the State, and, in the case of appointment of a Judge other than the Chief Justice of the High Court,.....”

The fundamental principles of interpretation provide that when the words of a statute are clear, plain and ambiguous. *i.e.*, they are reasonably susceptible to only one meaning; the courts are bound to give effect to that meaning irrespective of consequences.⁴³ A clear and plain meaning of the above provision leads us to only one single conclusion which is that the

The three cases around which the appointment of judges of the Hon’ble Supreme Court and High Courts revolves are the First Judges Case [*S.P.Gupta v. Union of India*, AIR 1982 SC 149],

⁴⁰ Article 124 provides for the establishment and constitution of the Supreme Court.

⁴¹ Article 217 provides for the appointment and conditions of the office of a judge of a High Court.

⁴² Arvind P. Datar, *Commentary on the Constitution of India*, 2nd Edition, Vol. 1, Wadhwa Nagpur, 2007.

⁴³ *Nelson Motis v. Union of India*, AIR 1992 SC 1981, p. 1984; (1992) 4 SCC 711; *Gurudevdata VKSSS Maryadit v. State of Maharashtra*, AIR 2001 SC 1980, p. 1991; (2001) 4 SCC 534; *State of Jharkhand v. Govind Singh*, AIR 2005 SC 294, p. 296; *Nathi Devi v. Radha Devi Gupta*, AIR 2005 SC 648, p. 659; (2005) 2 SCC 271, p. 277.

the Second Judges Case [*Supreme Court Advocate on Record Association v. Union of India*, (1993) 4 SCC 441 and the Third Judges Case [*Special Reference No. 1 of 1998*, (1998) 7 SCC 739]. Instead of adhering to the established rules of interpretation, the Supreme Court went on to construct “collegium” system of appointment, thereby circumventing the provisions of the Constitution and imposing their own will.

Supreme Court stated in the case of *DMDK v. Election Commission of India*⁴⁴ is under an obligation to correct a wrong principle laid down by it as early as possible “as perpetuation of a mistake will be harmful to public interests.” The principles regarding the appointment of judges laid down in *Supreme Court Advocates on Record Association v. Union of India* and then modified in the third judges case should be corrected by the Supreme Court.

b. APPOINTMENT OF CHIEF JUSTICE: FROM “PRESIDENT’S DISCRETION” TO “APPOINTMENT OF SENIOR MOST JUDGE”.

The argument that it is a ‘constitutional convention’ to appoint the senior most judge of the Supreme Court as the Chief Justice is a myth with no legal or constitutional background. In 1958, the Law Commission of India criticized the practice of appointing the senior most judge of the Supreme Court as the Chief Justice on the ground that a Chief Justice should not only be an able and experienced Judge but also a competent administrator and, therefore, succession to the office should not be regulated by mere seniority.

PART III: CONCLUSION

There is a thin line between judicial activism and judicial overreach. Even though as a philosophy a lot of scholars and practitioners in USA have accepted realism as a part and parcel of the judicial system, same is not the case with India. However, the primary reason is that the judges in USA are elected and they are not in India. Therefore, there is a need to tread the path of interpretation very carefully.

⁴⁴ (2012) 7 SCC 340.

JUDICIAL IMPLEMENTATION OF DIRECTIVE PRINCIPLES OF STATE POLICY: CRITICAL PERSPECTIVES

Devdatta Mukherjee*

I. INTRODUCTION

The Directive Principles of State Policy set forth the humanitarian precepts that were and are the aims of the Indian social revolution.¹

The negatively worded civil and political rights enshrined under Part III of the Constitution that the people of independent India gave to themselves, and the positive socio-economic and cultural rights that are sought to be progressively achieved incorporated under Part IV of the Indian Constitution roughly represent the two streams in the evolution of human rights. The distinction on the basis of justiciability therein mirrors the traditional division between civil and political rights, which restrain the State from intruding; and socio-economic rights, which elicit protection by the State against want or need. These in turn reflect two distinct views of liberty: liberty as freedom from State interference; and liberty as freedom from want and fear.² Yet it has long been recognized that the two sorts of freedom are inextricably intertwined.

It is noteworthy that the Universal Declaration of Human Rights indicates two sets of Rights- traditional Civil and Political rights³ and the Economic and Social Rights,⁴ and the sets are reflected in the Constitution of India; the first set under Fundamental Rights of the Constitution and the second set under Directive Principle of State Policy respectively. The incorporation of the Directive Principles is in pursuance of the Preambular objective of socio-economic justice. In fact, Part IV has been referred to as the socio-economic Magna Carta of the Indian Constitution.⁵ Although it is noted that the framers of the Constitution intended them to guide elected representatives towards improving socioeconomic conditions, yet somehow, the Indian Supreme

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¹ Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, p. 50 (Oxford: Clarendon Press, 1966).

² Sandra Fredman, *Human Rights Transformed: Positive Duties and Positive Rights*, available at: <http://ssrn.com/abstract=923936> (Visited on January 08, 2014).

³ Articles 2-21.

⁴ Articles 22-28.

⁵ *State of Bihar v. Kameshwar and Others*, AIR 1952 SC 252.

Court has held that the right to life in Article 21 of the Constitution should be read more broadly to encompass a 'right to live with dignity.'⁶ The Court has relied on this interpretation to make many Directive Principles justiciable, including rights to food and education.

There has been much debate and discussion on the Judiciary's attempt to implement the Directive Principles, and these works either criticize the Court for 'judicial activism' or applaud it for proactively defending the rights of the poor and marginalized, for recognizing the fact that existence precedes excellence and that existence is guaranteed by according recognition to socioeconomic rights. The Judiciary, while interpreting these provisions of the Constitution, has apparently not limited the scope of the various Articles to what was laid and understood by the Constitutional framers as reflected in the Constitutional Assembly Debates. Arguably, for the advancement of socioeconomic justice and well-being of the nation as a whole, the Courts have read the Directive Principles of State Policy in the Fundamental rights, and additionally, in this process of deciding case after case on the aspect of human rights of the citizens, the Court has consistently read the scope of human rights as in consonance with the provisions of the Universal Declaration, along with the other International Covenants.

This paper aspires to delve into the origin of incorporation of positive rights in the form of the Directive Principles in the Indian Constitution, taking a cue from the Irish Constitution, proceeding to draw a note of distinction between the two that has not been amply appreciated. The South African model of incorporation of positive rights as justiciable, but moulding the positive duty to reflect the difficulty of providing resources in immediate fulfilment shall be referred to as a replicable model, after delving into the quandary pertaining to whether Directive Principles are mere sentiments or do make sense in the Indian Constitutional fabric. The Indian Judiciary's adventurism of interpreting the positive rights as justiciable within the precincts of Article 21 shall be perused; the ambivalence towards ensuring the right to quality of life and liberty in real sense and the jurisprudential quagmire that Judiciary has drawn itself into that threatens to strike at the Constitution's legitimacy discussed in depth critically.

⁶ *Maneka Gandhi v. Union of India*, AIR 1978 SC 59.

II. INCORPORATION OF DPSPs IN THE INDIAN CONSTITUTION: TAKING A CUE FROM THE IRISH CONSTITUTION

When the people of independent India gave to themselves a Constitution, they chose to embody in Part IV of the Constitution a set of provisions entitled Directive Principles of State Policy. The framers were undeniably inspired by the Irish Constitution of 1937 which contained a similar set of provisions, named 'Directive Principles of Social Policy', but in framing the provisions they did make departures from the Irish model. Article 45 of the Irish Constitution reads:

The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the case of the Oireachtas exclusively, and *shall not be cognizable in any Court* under any of the provisions of this Constitution.

On the contrary, Article 37 of the Indian Constitution reads:

The provisions contained in this Part *shall not be enforceable by any court*, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

It would be pertinent to note from the semantics of Article 37 that doctrine of separation of powers proposes *non-enforceability* by the Judiciary, and not *non-cognizability* in the Court is literally provided for in the Indian provision, implying that the judicial exclusion is more strongly worded in the Irish Constitution.⁷ 'Cognizance' is defined as judicial recognition or hearing of a cause, jurisdiction or right to try and determine causes, and 'justiciable' is defined as the power to be examined in courts of justice, subject to action of court of justice., whereas 'enforceable' means to cause to take effect.⁸

The Irish Constitution places all the directives under one Article while the Indian constitution frames them separately in sixteen Articles. The provisions spread out in different Articles would, thus, receive separate construction unlike when they are placed together in one article. Additionally, homogeneity of language formulating the directives in the Irish Constitution contrasts with the diversity of expressions chosen in the Indian Constitution, the diversity necessarily stemming from the typical Indian conditions as envisaged during the freedom struggle.

⁷ *Supra* note 2.

⁸ Justice Y.V. Chandrachud (ed.), *P. Ramanatha Aiyar Concise Law Dictionary* (Wadhwa and Company, Nagpur, 2006).

The discretion in timing the action in regard to the directives in the Indian Constitution is quantified in the respective Articles themselves, thus providing the necessary elasticity in devising and timing methods for reaching the given socio-economic objectives. The directives collectively aim at pragmatic socialism, not doctrinaire socialism and it is for that reason all the more commendable in that it seeks to avoid the well-known extremes in other attempts at social welfare, extremes pertaining to usher in overnight reforms, or calling for socio-economic empowerment and upliftment regardless of resource constraints.

However, some scholars including Prof. Upendra Baxi deem the aforementioned differences as minor and not noteworthy.⁹ K.P. Krishna Shetty, considering the difference as not material, observed that the only significant change made by the Drafting Committee in the provisions contained in the Supplementary Report was the substitution of the phrase ‘shall not be enforceable’ for the words ‘shall not be cognizable.’ The ambit and scope of the provisions, therefore, remained almost the same.¹⁰

Subsequent to the appreciation of the difference, as noted above, Prof. T. Devidas has gone to the extent of suggesting that clear departures from or oppositions to the directives can be prevented by the court action, for what is contemplated by Article 37 is only *non-enforcement*. It is conceivable to think of State action in furtherance of the directives, neutral vis-à-vis directives and opposed to the directives. Preventing State action which is opposed to the directives would not amount to the enforcement of the directives. It would indeed promote the chances of realizing the constitutionally given socialistic values.¹¹ This appreciation of the fact that the directives are non-enforceable, and not non-cognizable, in a way, provides for a logical justification of the judicial implementation of the Directives which in the text of the Constitution has not been explicitly imbibed with enforceability by the Courts. A further extension of the justifiability of the justiciability of the Directives under the precincts of Article 21 is discussed hereinafter.

The primary pattern of distinction followed in framing parts III and IV separately is that the latter is not backed with the enforcing power of the law i.e., justiciability. Pursuing his argument from another angle, Prof. T. Devidas contends that this devise can be said to be a matter of policy for there is no compulsion that every rule of law should be backed by a sanction.¹² That Part IV

⁹ Upendra Baxi, *Directive Principles and Sociology of Indian Law- A Reply to Dr. Jagat Narain*, 11 JILI 245 (1969).

¹⁰ K.P. Krishna Shetty, *Fundamental Rights and Socio-Economic Justice in the Indian Constitution*, p. 80 (1919).

¹¹ T. Devidas, *Directive Principles: Sentiment or Sense*, 17 JILI 478 (1975).

¹² *Ibid.*

provisions are law can be seen from the following characteristics: *firstly*, they are embodied in the Constitution; *secondly*, they can be altered only by a constitutional amendment; and *thirdly*, they confer power to the State to legislatively formulate restrictions on Part III provisions. Prof. Devidas differs from Prof. Upendra Baxi's view¹³ that directive principles can be considered 'a massive footnote to the Preamble,' as it is an accepted canon of interpretation that the text of the law is a more deliberate exercise of power than the Preamble, which is considered a draftsman's preface to the statute.

Proceeding to focus on the semantics of Article 37, it would be apt to note that the state is made duty bound to apply these principles in law-making. Here, the term 'duty' should be understood jurisprudentially to understand the extent of state's obligation. 'Duty' as it is used in this Article can either be fit into the bracket of Austinian 'absolute duty' or Hohfeldian 'liberty'.¹⁴ Absolute duties are those duties which do not have a correlative right. Absence of corresponding right does not mean anything more than that it can't be enforced by another person. Absolute duties need to be contrasted with Hohfeldian 'duty' which has a clear correlative claim-right. Hohfeldian 'liberty', on the other hand, has its correlative as 'no-claim', which means presence of liberty in one person mean presence of 'no-claim' in other person.

According to Professor P.K. Tripathi, 'duty' means as absolute duty (without a corresponding right) as 'it is a constitutional obligation of the law-making organ of the state to apply the directive principles in making laws' and 'it shall be unconstitutional and illegal on their part to ignore them.'¹⁵ Thus, Tripathi's reading of the constitutional text renders the state as duty-bound to follow the Directives. Ignoring them is not only unconstitutional but even illegal. However, there are other readings of the semantics of the constitutional text. For instance, Joseph Minattur,¹⁶ T. Devidas¹⁷ and many others treat this duty to be a 'liberty' as the state may/may not apply them while making laws. Since these jurists only assert that laws in contravention of Directives are unconstitutional but do not consider laws neutral to Directives obligations as illegal, they do not impose a definite positive obligation to apply these principles.¹⁸ When Supreme Court reads unenforceable Directive

¹³ *Ibid.*

¹⁴ R.W.M. Dias, *Jurisprudence*, pp. 26- 31, Aditya Books Private Limited, New Delhi, 1994.

¹⁵ P.K. Tripathi, *Spotlights on Constitutional Interpretation* 293 (N.M. Tripathi Publications, Bombay, 1972).

¹⁶ Joseph Minattur, *Directive Principles: A step towards their Implementation*, 11(3) *Law Quarterly* 162 (1974).

¹⁷ *Supra* note 11.

¹⁸ Latika Vashist, *Enlivening Directive Principles: An Attempt To Save Their Vanishing Present*, 1(2) *ILI Law Review* 205 (2010).

Principles into enforceable Fundamental Rights, it seems to take Professor Tripathi's position, but when it refrains from striking down a law on the touchstone of Part IV, it is even blind to the observations made by Minattur and Devidas. Thus, if the judiciary does not want to over-reach itself so as to make the Directive Principles enforceable, it can definitely ensure that laws made by the state in contravention with the Directive Principles can be declared as unconstitutional.¹⁹

III. DIRECTIVE PRINCIPLES IN THE INDIAN CONSTITUTION: SENTIMENT OR SENSE

The trilogy of fundamental rights, directive principles of state policy and fundamental duties is the bedrock of the Indian Constitution. Granville Austin calls them as 'the conscience of the Constitution.'²⁰ They together constitute the vision of a particular type of society which the Constitution envisages for India; a society which affords an equal opportunity to its entire people for an all-round development, and in which citizens bear responsibilities towards nation and society as such.²¹ The Directive Principles embody the philosophy of the Indian Constitution and contain a system of values, some of which are borrowed from the liberal humanitarian traditions of the West,²² some are peculiar to, and have grown out of the Indian milieu and yet some others represent an attempt to fuse the traditional and modern modes of life and thought.²³ It is notable that though the Fundamental Rights and Directive Principles appear in separate parts of the Constitution, the leaders of the independent movement drew no distinction between the positive and negative obligations of the State.²⁴ The Assembly separated them on the ground of justiciability. The Fundamental Rights and the Directive Principles were not just formally introduced into the Constitution, but 'they had their roots deep in the struggle for independence' of the country,²⁵ in the increasing influence of socialism and Gandhian philosophy in the independence movement. One can find explicit manifestation of a demand for both positive and negative rights as early as in the Constitution of India Bill of 1895, Commonwealth of India Bill

¹⁹ *Ibid.*

²⁰ *Supra* note 1.

²¹ Mahendra P. Singh and Surya Deva, *The Constitution of India: Symbol of Unity in Diversity*, 53 *Jahrbuch des Offentlichen Rechts der Gegenwart*, Yearbook of Public Law, Germany 649-686 (2005).

²² Western liberal tradition accords a higher pedestal to conventional civil and political rights or the negative rights than socio-economic or positive rights.

²³ M.P. Dubey, *Directive Principles and the Supreme Court under the Indian Constitution*, 16 *Journal of Constitutional and Parliamentary Studies*, p. 269 (1982).

²⁴ *Supra* note 1.

²⁵ *Ibid.*

introduced by Mrs. Besant in 1925, the Nehru Report, the Karachi Resolution, 1931 and finally the Sapru Report published at the end of 1945.²⁶

At the time these directives were drafted into the Constitution, opinions on them varied from ‘a variable dustbin of sentiment’²⁷ to ‘the instrument of instructions.’²⁸ Views were expressed in the Constituent Assembly that the Directive Principles are no more than mere ‘pious hopes’, ‘pious expressions’ and ‘pious superfluities’, that they can be equated to ‘resolutions made on New Year’s day which are broken at the end of January’, that they are ‘vague’ and ‘a drift’, that they are ‘a cheque on a bank payable when able’. According to Sir Ivor Jennings, Part IV expressed Fabian Socialism without socialism.

Undoubtedly, this animated discussion stemmed from the fact of unenforceability of the directives. Nevertheless, they are not mere platitudes. It is necessarily deemed to flow from the directives that whoever captured power would not be free to do whatever he liked with them, and would have to respect the instrument whilst exercising power. The directives are declared fundamental in the governance of the country and the State is given the duty of applying these principles in making laws. This duty, however, would not be less onerous; though the duty is made not compellable, a departure from the duty can be prevented. A. Gledhill makes the point that laws contravening directive principles can be challenged as unconstitutional by the opposition.²⁹ And this point is well taken, as the opposition is part of the constitutional scheme for law making by the legislature and as the duty is cast on the State to follow the directives in law making.³⁰ He may not have to answer for their breach in a court of law and though the directive principles have no legal force behind them, yet it cannot be said that the directives have no binding force.³¹ It would, therefore, not be possible for any government to act pursuant to the passions of the moment or the whims of the chance majority of the time. Dr. B. R. Ambedkar observed that in enacting Part IV the Constituent Assembly was giving certain directions to the future legislature and future executive to show in what manner they are to exercise legislative and executive powers they will

²⁶ *Ibid.*

²⁷ Per T. T. Krishnamachari, VII Constituent Assembly Debates, (1948-49) 583.

²⁸ *Id.* at 473.

²⁹ *Supra* note 11.

³⁰ *Ibid.*

³¹ *Id.* at 476.

have, that these principles should be made the basis of all executive and legislative action that they may be taking hereafter in the matter of the governance of the country.³²

However, it was only Sir B.N. Rau who, in pursuance of the discussions in Dublin with President De Valera on the working of the Directive Principles in relation to Fundamental Rights under the Irish Constitution,³³ entertained doubts as to the efficacy of the unenforceable positive obligations in the face of the justiciable fundamental rights, and he suggested the addition of a provision that noted that a law made by the State in pursuance of directive principles shall not be void merely on the ground that it contravenes or is inconsistent with fundamental rights. The object behind the suggestion had been to ensure that general welfare prevail over individual's rights.³⁴ The fact of non-adoption and of implicit rejection by the Drafting Committee of the aforesaid provision which sought to give primacy to the Directive Principles over Fundamental Rights leads us to the implication that legislative implementation of the directive principles was designed to be achieved within the framework of Fundamental Rights. This issue was not adverted to even the Constituent Assembly, although, as already noted, its members believed that in spite of their unenforceable nature, Directive Principles would have to be legislatively implemented as their implementation was fundamental to effective governance. That the judicious use of the intended scope of the directives, the consultation of *travaux preparatoires*, can considerably aid in arriving at the legislative intent, and that the plea obligates the judges to think teleologically and discover a new role for themselves in the implementation of Directive Principles has dawned upon the Judiciary now, and has generated much hue and cry.

IV. A BRIEF PERUSAL OF THE CONSTITUTIONAL PROVISIONS RELATING TO THE DIRECTIVE PRINCIPLES

In the pursuit to attain socioeconomic justice as enshrined in the Preamble, Part IV of the Constitution containing Articles 36-51 deals with Directive Principles. As noted earlier, Directive Principles signify the belief of the Constitution makers in the interdependence of civil and political rights on the one hand and the socio-economic rights on the other.³⁵ The directives can be broadly

³² *Ibid.*

³³ Shailja Chander (ed.), *Justice V.R. Krishna Iyer on Fundamental Rights and Directive Principles*, p. 59, Deep and Deep Publications Pvt. Ltd., New Delhi, 2003.

³⁴ B. Errabbi, *The Constitutional Balance and Harmony between Fundamental Rights and Directive Principles of State Policy: Nehru's Perception*, 14(1) Indian Bar Review 151 (1987).

³⁵ B Shiva Rao (ed.), *The Framing of India's Constitution: A Study*, p. 319 (New Delhi: Indian Institute of Public Administration, 1968)

categorized into eight categories, viz., socioeconomic reforms under Articles 38, 39(b) and (c); means of livelihood, right to work and legal welfare under Articles 39(a), (d), (e), 41, 42, 43; women and children welfare and right to education under Articles 39 (e), (f), 42, 45; upliftment of vulnerable sections of the society under Articles 41 and 46; protection of public health and environment under Articles 47 and 48A; legal and administrative reforms under Articles 39A, 44, 50; protection of national heritage under Article 49; and promotion of international peace and security under Article 51. Thus, Gandhian principles are reflected under Articles 40, 43, 47 and 48; and Socialistic principles under Articles 38, 39, 39A and 43A. The clauses therein highlight the constitutional objectives of building an egalitarian social order and establishing a welfare state, by bringing about a social revolution assisted by the State.³⁶ Article 38 signifies the essence of the Directives by enjoining the State to strive to promote the welfare of the people by securing and protecting, as effectively as it may, the social order in which justice- social, economic, and political- shall inform all the institutions of the national life striving to minimize inequalities in income and endeavour to eliminate inequalities in status, facilities, opportunities amongst individuals and groups of people residing in different areas or engaged in different avocation.³⁷ Apart from the Directives contained in Part IV, certain other directive principles have also been laid down for achieving the Preambular goals.³⁸ Further, in exercising its interpretative role, the Judiciary does at times take note of the ideals of social welfare state even though some of the ideals may not be expressly incorporated in the Constitution.³⁹

V. THE MECHANICS OF DIRECTIVE PRINCIPLES AND FUNDAMENTAL RIGHTS

*The Directive Principles of State Policy represent a dynamic move towards a certain objective. The Fundamental Rights represent something static, to preserve certain rights which exist. Both again are right.*⁴⁰

-Jawaharlal Nehru

All the twentieth century Constitutions have given a definite place in their systems to the provisions of social welfare and these provisions have gathered larger sweep, greater emphasis and more definite legal obligations as the lapse of years brought in more of governmental

³⁶ Durga Das Basu, *Shorter Constitution of India*, pp. 449-450, Wadhwa and Co., Nagpur, 13th Edn., 2003.

³⁷ *Air India Statutory Corpn. v. United Labour Union*, (1997) 9 SCC 377.

³⁸ Articles 335, 350A, 351 etc.

³⁹ Mukherjee, C.J., in *Ram Jawaya v. State of Punjab*, AIR 1955 SC 549.

⁴⁰ In the Lok Sabha in the course of discussion on the Constitution (First Amendment) Bill, quoted by Bhagwati J. in *Minerva Mills Ltd. v. Union of India* (1980) 3 SCC 625, at p. 711.

experience to bear.⁴¹ Moving away from the extreme *laissez-faire* position previously taken, we have perceived that there came about a radical change in the outlook of the US Supreme Court after the New Deal Programme, wherein it took an enlightened view of the new balance between the Fundamental rights and social needs, and permitted the governmental authority enough leeway for efficient action. British Courts also gradually relaxed the restrictions on governmental agencies and permitted greater scope for their discretion in response to the same new social needs as in the USA.⁴²

The Indian Constitution is, at core, a social document.⁴³ Yet, there had been less conviction about the utility of the Directive Principles as well as their justifiability. Their justifiability was tested mostly in relation the fundamental rights and the directives were relegated to a subordinate position. The implementation of the Directive Principles of State Policy have placed great strain and demand on the legislative power of the State at times running counter to the Fundamental Rights guaranteed under Part III of the Constitution. This dialectical and dynamic conflict that arises between the directive principles and the fundamental rights is one of most enduring interest in Indian Constitution. The interrelation among the Fundamental Rights and the Directive Principles is manifested clearly in the judicial decisions, especially in the last two decades, as the judiciary has relied on one of these to interpret the contents of the other or even of the rest of the Constitution.

Initially, the difference pertaining to justifiability led the Supreme Court to hold that the directive principles have to conform to run as subsidiary to the chapter of fundamental rights.⁴⁴ This position was disapproved through constitutional changes,⁴⁵ juristic writings,⁴⁶ and subsequent judicial decisions. In the second wave, we have perceived in *M.H. Qureshi v. State of Bihar*⁴⁷ the Court adopted the rule of harmonious interpretation, so as to implement the directive principles in such a way as not to take away or abridge fundamental rights. Imparting a slightly more emphatic form to the doctrine of harmonious interpretation, the Court noted in *Kerala Education Bill, In re*⁴⁸

⁴¹ P.K. Tripathi, *Directive Principles of State Policy: The Lawyer's Approach to them Hitherto, Parochial Injurious and Unconstitutional*, 17 SCJ 7 (1954).

⁴² *Supra* note 23.

⁴³ *Supra* note 1.

⁴⁴ *State of Madras v. Champakam Dorairajan* AIR 1951 SC 226.

⁴⁵ The Constitution (First Amendment) Act, 1951, Section 2.

⁴⁶ *Supra* note 41.

⁴⁷ AIR 1958 SC 731.

⁴⁸ AIR 1958 SC 956.

that in determining the scope and ambit of the fundamental rights, the court may not entirely ignore the directive principles, but should adopt the principle of harmonious interpretation and should attempt to give effect to both as much as possible. In the case of *Chandra Bhawan Boarding v. State of Mysore*⁴⁹ J. Hegde observed in obiter that fundamental rights and directive principles are complimentary and supplementary to each other and hence there is no conflict between them.

The position that emerged upon drawing of logical inference is that where a legislation violates fundamental rights, its validity cannot be upheld on the basis of directive principles; but, where a legislation has not violated any fundamental right, the court can rely on the directive principles for the supporting the validity thereof, relying for the purposes of upholding reasonableness of restrictions, and for finding out the public purpose in legislation.

In the case of *State of Bihar v. Kameshwar Singh*⁵⁰ the Supreme Court relied upon article 39 in arriving at its decision that certain *zamindari* abolition legislations had been passed for a public purpose within the meaning of Article 31 of the constitution. The Court recognized that the reasonableness or public purpose concepts on the basis of which legislation would be made to stand or fall in relation to the fundamental rights could be justifiably given a content with reference to the ideals of the directive principles. The same approach was adopted by the Court in the cases of *Bijay Cotton Mills v. State of Ajmer*⁵¹ and in *Pathermma v. State of Kerala*.⁵²

Further, the Supreme Court has held that every executive action, whether in pursuance of a law or otherwise, must be ‘reasonable and informed with public interest and the yardstick for determining for reasonableness and public interest is to be found in the directive principles and therefore if any executive action is taken by the government for giving effect to a directive principle, it would ordinarily *prima facie* be reasonable and in public interest.’⁵³

Apparently proceeding to accord primacy to the directive principles over the fundamental rights and to realize consequentially the Preambular socio-economic ideal, 25th⁵⁴ and 42nd⁵⁵ Constitutional Amendment Acts were enacted. The former was held valid by the Supreme Court

⁴⁹ AIR 1970 SC 2042.

⁵⁰ AIR 1952 SC 52.

⁵¹ AIR 1955 SC 33.

⁵² (1978) 2 SCC 1.

⁵³ *Kasturi Lal v. State of Jammu and Kashmir* AIR 1980 SC 1992.

⁵⁴ In 1972, Article 31C was inserted by virtue of which the directive principles contained in Article 39 (b) and (c) were conferred a status superior to the fundamental rights guaranteed under Articles 14, 19 and 31.

⁵⁵ Alteration of Article 31C under Section 4 of the Amendment Act, authorizing the State to make law giving effect to all or any of the principles laid down in Part IV which shall not be void on the ground of inconsistency or abridgement of fundamental rights guaranteed under Articles 14, 19 and 31.

in *Kesavananda Bharati v. State of Kerala*,⁵⁶ wherein J. Chandrachud noted that the principles should not be permitted to become ‘a mere rope of sand’ and that together, the principles and the fundamental rights, form ‘the core of the Constitution.’ Similar views were expressed by the Court in the case of *Narendra Prasad v. State of Gujarat*.⁵⁷ The latter was struck down in *Minerva Mills v. Union of India*.⁵⁸ J. Chandrachud noted that the Indian Constitution was founded on the bedrock of balance between Parts III and IV of the Constitution and that to give absolute primacy to one over the other was to disturb this harmony and balance between Fundamental Rights and Directive Principles, and this harmony and balance constitutes an essential feature of the Basic structure of the Constitution. He opined that the attainment of the ideals set out in Part IV would become a pretence or tyranny if the price to be paid for achieving that ideal is human freedoms.

Justice Bhagwati, in his dissent, pained to emphasize that under the present socio-economic system it was the liberty of the few that was in conflict with the liberty of the many and that the directive principles impose a positive obligation on the State to bring about an egalitarian social order with social and economic justice to all so that the individual liberty would become a cherished value not only for a few privileged persons, but the entire people of the country.⁵⁹

The expectation of the Indian society today has been appropriately elucidated by Madon, J. in the following words:

The collective will of the society today wants that if the rich sleep in luxury apartments, the poor should sleep with at least a roof over their head.....that if the rich can live in opulence, the poor should at least be able to afford basic comforts of life. If the law is to operate today, so as to secure social justice to all, who else can do it but the Judges whose constitutional task is to interpret and apply the law.⁶⁰

This has definitely set in action a new movement. Mandate has been given to the State to implement the principles as and when the time is ripe economically, socially and politically. But we have perceived lack of political will or legislative effort, and economic incapacity or mis-utilization or non-utilization of resources, which has necessitated the proactive role of judiciary

⁵⁶ AIR 1973 SC 1461; the first part of Article 31C was upheld, the second part declared unconstitutional.

⁵⁷ AIR 1975 SC 2098.

⁵⁸ AIR 1980 SC 1789.

⁵⁹ *Id.* at 1847.

⁶⁰ Conference Paper Proceeding of the Third International Conference of Appellate Judges, New Delhi, March 1984, Supreme Court of India, 210, *Cf.*, Anand Kumar, “*Purpose and Objectives of Directive Principles of State Policy: Its Relevance in 21st Century*” 8 MLJ 20 (2012).

that is so commended and so deprecated. Within the widening precinct of right to life under Article 21, the right to free legal aid (Article 39A),⁶¹ the right to live in a pollution free environment and right to ecological protection (Article 48A),⁶² right to equal pay for equal work (Art 39(d)),⁶³ right to education (Article 45)⁶⁴ and right to health (Article 47)⁶⁵ have been read, the list being merely illustrative! No doubt, Max Weber has noted that the Judiciary has by and large served as an agent of positive change.⁶⁶ Since then the Court has invoked the Directive Principles not only to uphold the validity of legislative measures directed towards socio-economic welfare⁶⁷ but also to derive the contents of Fundamental Rights. The right to life and personal liberty under Article 21 has almost become a residuary Fundamental Right encompassing each and every aspect of dignified and meaningful life.

This trend of integration of Fundamental Rights and Directive Principles, in a way, indicates that the executive and legislature have not always taken their mandatory obligations under Part IV seriously, and the Judiciary has to remind them again and again about their constitutional mandate.⁶⁸ But one positive outcome is that the government has not resisted such integration and has, in fact, amended the Constitution to acknowledge such integration by making right to education, to all children between the age of 6 to 14, a Fundamental Right.⁶⁹ It can be expected that more Directive Principles would cross the bridge in near future, though the impact of such crossing over on realization of rights is an issue that questions the very legitimacy of the Constitution, as discussed hereafter. It might be noted in this context that the NCRWC has

⁶¹ Case of *M.H. Hoscot*, AIR 1978 SC 1548.

⁶² *M.C.Mehta v. UOI*, (1987) 4 SCC 463.

⁶³ *Randhir Singh v. Union of India*, AIR 1982 SC 879.

⁶⁴ *Mohini Jain v State of Karnataka*, (1992) 3 SCC 666 and *Unni Krishnan v State of Andhra Pradesh* (1993) 1 SCC 645.

⁶⁵ *Consumer Education & Research Centre v. U.O.I.* AIR 1995 SC 922.

⁶⁶ G. Bikshapathi Reddy, "The Changing Facet of Directive Principles of State Policy and Fundamental Rights: the Role of Judicial Activism" 1 *SCJ* 56 (1997).

⁶⁷ For example, *State of Bombay v. F. N. Balsara*, AIR 1951 SC 318; *State of Bihar v. Kameshwar Singh*, AIR 1952 SC 352; *Mohd. Hanif Qureshi v. State of Bihar* AIR 1958 SC 731; *Orient Weaving Mills v. Union of India* AIR 1963 SC 98.

⁶⁸ Article 45 originally had provided that that state shall provide 'free and compulsory' education to all children up to the age of 14 years 'within a period of ten years from the commencement of the Constitution'. Failure of state to do so even after 42 years lead to the judicial recognition of right to education as a FR in *Mohini Jain v State of Karnataka* (1992) 3 SCC 666 and *Unni Krishnan v State of Andhra Pradesh* (1993) 1 SCC 645. See also the obligation to enact the Uniform Civil Code under Article 44 and the Supreme Court judgments in *Mohd Ahmed Khan v Shah Bano Begum*, AIR 1985 SC 945 and *Sarla Mudgal v Union of India*, AIR 1995 SC 1531.

⁶⁹ The Constitution (86th Amendment) Act 2002 inserted Article 21A in the Constitution and also made appropriate modifications in corresponding DP under Article 45.

recommended for establishing a body which can review the level of implementation of Directive Principles.⁷⁰

Verbose doubts have been expressed with respect to the issue whether Directive Principles hold the same status in the Constitution as the Fundamental Rights. The most elaborate expression of such doubts finds place in the monumental work of H.M. Seervai.⁷¹ He agrees with the initial position taken by the Court and disapproves subsequent efforts to raise the Directive Principles to the position of equality with the Fundamental Rights. He revives the old argument that non-justiciability of Directive Principles excludes them from the category of law, and therefore from the category of constitutional law.⁷² The Directives are in the Constitution, but are not a part thereof, and nothing would have happened if Directive Principles ‘had been struck out of the Constitution, but if fundamental rights ‘had not been enacted or struck out, the result would have been disaster’.⁷³ Such a view is undeniably deeply rooted in the Austinian positivist tradition, and stands negated in view of the realization that sanctions are not the only factors that impart authoritative force. Justiciability has indeed ceased to exercise the determining influence it once so unquestionably wielded. Article 37 does, no doubt, withdraw from the courts the jurisdiction to enforce them but it takes due care to emphasize their obligatory nature.⁷⁴ The point gets corroborated by the fact that there are several other provisions in the Constitution which exclude matters from the preview of courts, but which are, nevertheless, treated as law.⁷⁵ Some of the Fundamental Rights also, by their very nature are judicially unenforceable unless suitable laws are made in support of them,⁷⁶ so judicial enforceability is dependent on laws enacted. Directive Principles are not very different from these Fundamental Rights as once a law is enacted based on a Directive Principles the courts get the authority to enforce that Directive Principles through the enacted law. This is a contingent condition on which enforceability of Directive Principles rests

⁷⁰ The Report of the National Commission to Review the Working of the Constitution (2002), vol. I, paras 3.35.2 and 3.35.3. The Commission has also suggested insertion of certain new principles and a change in the heading of Part IV. It has recommended for the insertion of the term ‘Action’ in the heading of Part IV so as to read as ‘Directive Principles of State Policy and Action’. *Id.*, para 3.26.3., available at: <http://lawmin.nic.in/ncrwc/finalreport.htm> (Visited on Jan 08, 2014).

⁷¹ H.M. Seervai, *Constitutional Law of India*, Vol. 1-3 (4th Edn, 1991-96).

⁷² U. Baxi, *The Little Done and Vast Undone- Some Reflections on Reading Granville Austin’s The Indian Constitution*, 9 JILI 322, 362 (1967).

⁷³ *Supra* note 71.

⁷⁴ *Supra* note 15 at 295.

⁷⁵ Articles 74(2), 122, 163(2), 212, 329, 350, 350A, 350B, 351 and 363.

⁷⁶ Articles 17 and 23 could never be invoked until the supportive laws were made.

but even prior to the fulfilment of this condition, Directive Principles are as much a part of constitutional law as Fundamental Rights, or any other part of the Constitution. Thus, the argument of judicial non-enforceability is unwisely employed to indicate the inferiority of Directive Principles against Fundamental Rights.⁷⁷

However, two more implicit doubts could be inferred from the processes of development of law. Firstly, for quite some time a process of incorporation of Directive Principles into the Fundamental Rights through judicial interpretation has been on, and the mere fact that the courts are unable to do anything about the Directive Principles so long as they are Directive Principles, but could enforce them if they were Fundamental Rights, points out in the direction of ineffectiveness, if not inferiority of the directives. Secondly, a process of explicitly shifting those directives to the chapter of fundamental rights through constitutional amendments has been set in, and such selective transfer implies the primacy of fundamental rights over the directives as well as further weakens the position of the directive principles, especially the ones left. This would disturb the balance between the fundamental rights and the directive principles, which the Court has held to be a basic feature of the Constitution in *Minerva Mills*.⁷⁸

VI. JUDICIAL IMPLEMENTATION OF DIRECTIVE PRINCIPLES AND OBJECTIONS

THERETO

Analyzing from a Rawlsian perspective, whilst addressing concerns of judicial overreach, it is argued that the Supreme Court's reasoning for locating justiciable socioeconomic rights in the Indian Constitution raises a more fundamental concern: it threatens the Constitution's legitimacy.

According to John Rawls's liberal principle of legitimacy, political power is justified only when it is exercised in accordance with a Constitution that all citizens would accept assuming they are rationally self-interested and reasonable.⁷⁹ Extending this premise, Michelman questions the wisdom of conferring constitutional status on socioeconomic rights.⁸⁰ He makes a positive case for including socioeconomic rights in a Constitution, which must overcome two major objections. The first is a 'democratic objection', where broad 'social citizenship rights' would leave 'no

⁷⁷ Latika Vashist, *Enlivening Directive Principles: An Attempt To Save Their Vanishing Present*, 1(2) ILI Law Review 205 (2010).

⁷⁸ AIR 1980 SC 1789.

⁷⁹ John Rawls, *Political Liberalism*, 217 (1993).

⁸⁰ Frank I. Michelman, "The Constitution, Social Rights, and Liberal Political Justification", in *Exploring Social Rights: Between Theory And Practice* (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

leading issue...untouched' in the political sphere.⁸¹ Therefore, a Constitution that includes enforceable rights to housing, food and clean water would constrain policy choices in any area involving the allocation and distribution of resources, including taxation, trade, immigration and education. In extreme cases, representative democracy would be rendered meaningless, as elected representatives would not be able to 'make the basic choices of political economy.'⁸²

Conferring constitutional status on socioeconomic rights also invites a 'contractarian objection'.⁸³ Social contractarians believe that a Constitution is legitimate if rational citizens, acting reasonably, can understand its terms and agree to be governed by them. To accept a constitution's terms, citizens must be able to determine whether their government actually abides by constitutional principles. If they cannot make this determination, they will not regard the Constitution as a legitimate basis for political rule.

However, the indeterminacy with respect to gauging if a government satisfies socioeconomic rights, and furthers the dictates of an individual citizen's views of distributive justice, is potentially fatal for contractarian legitimacy, as citizens cannot determine when their government violates socioeconomic rights.⁸⁴ Rawlsian theory avoids this difficulty by defining as 'legitimate' a constitutional scheme that includes certain 'constitutionally essential' civil and political rights. Judicial and policy decisions with respect to socioeconomic rights are held to a lesser standard – what Rawls calls the 'constraint of public reason.'⁸⁵

While the U.S. Constitution has no provisions pertaining directly to socio-economic justice and the South African Constitution has enumerated socioeconomic rights,⁸⁶ India's Constitution takes the middle ground. It does not include binding socioeconomic rights, but lists them as Directive Principles of State Policy. They empowered the Supreme Court to enforce fundamental rights through Articles 32, 21 but specified in Article 37 that directive principles are not justiciable. Nevertheless, these principles give 'a certain inflection to political public reason' to guide legislators towards the progressive realization of socioeconomic justice.⁸⁷

⁸¹ *Id.* at 30-33.

⁸² *Id.* at 33.

⁸³ *Id.* 35-37.

⁸⁴ *Id.* at 35.

⁸⁵ John Rawls, *Justice As Fairness: A Restatement* 90 (2001) at 214-21: public reason requires citizens (including elected representatives and judges) to present publicly acceptable reasons to each other for their views, at least with regard to basic justice (which includes socioeconomic justice) and constitutional essentials.

⁸⁶ Sections 26, 27.

⁸⁷ *Supra* note 80 at 39.

Giving socioeconomic guarantees this non-justiciable status should have avoided both the democratic and contractarian objections. When directive principles do not legally bind elected officials, but guide them towards improving socioeconomic conditions, then no serious democratic objection arises. Also, if representatives make policy decisions reflecting their honest judgment of how to best pursue socioeconomic justice and they are willing to fully and transparently explain their votes to citizens- that is, they fulfill the constraint of public reason- then the contractarian objection does not arise.

Surveying the evolving constitutional status of socioeconomic rights, it would be pertinent to note that over the past forty years, the Indian Supreme Court has moved away from its early precedents and understanding of the Indian Constitution, and has ruled that the Constitution confers on citizens enforceable socioeconomic rights that, if violated, can be redressed in court. Under this prevailing interpretation, India faces serious democratic and contractarian objections to its basic constitutional framework.

The Court has required both central and state governments to adopt specific distributive policies. This robust exercise of judicial review prevents elected officials from deliberating, negotiating and crafting policies concerning socioeconomic justice. The Court does not simply declare socioeconomic policies unconstitutional, but creates and enforces its own policy solutions.⁸⁸ In several cases, the Court has essentially dictated policies to elected officials that allocate resources to assist disadvantaged communities. It has even instituted timelines for the completion of these policies, which it enforces through interim orders.⁸⁹ This sort of policymaking is precisely what the democratic objection opposes, as it appears to seriously undermine representative democracy.

For Rawls, however, a robust form of judicial review may be acceptable in some societies. He stated that judicial review ‘can perhaps be defended given certain historical circumstances and conditions of political culture.’⁹⁰ Since India is beset with chronic inequality, poverty and malnourishment that its elected representatives have been unable or unwilling to improve, it has arguably fallen to the Supreme Court to remedy these conditions. In other words, justice might

⁸⁸ *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802.

⁸⁹ *PUCL v. Union of India*, Writ Petition (Civil) No. 196 (2001).

⁹⁰ *Supra* note 79 at 231.

require the Court's intrusion into matters usually assigned to the elected branches given these political and historical circumstances.

Article 21 of the Indian Constitution states that no person shall be deprived of his life...except according to procedure established by law. The Indian Supreme Court has held that socioeconomic guarantees are judicially enforceable by interpreting this provision to encompass a broader right to 'live with dignity.' It has since held that rights to adequate food, education and shelter, *inter alia*, are essential for citizens to live with dignity and are justiciable under Article 21. Through this capacious reading of Article 21, the Indian Supreme Court has essentially shoehorned socioeconomic guarantees into a 'constitutionally essential' civil right. This judicial sleight of hand makes the right to life indeterminate under the Indian Constitution, as a right to 'live with dignity' could extend to a range of guarantees that rational citizens could not reasonably foresee and therefore could not endorse. More troublingly, the Court does not explain how it gets past the clear textual command in Article 37 of the Constitution that directive principles 'shall not be enforceable by any court.'

Rawls called the Supreme Court the 'exemplar of public reason'⁹¹ to convey that it has a greater obligation than other branches of government to justify its decisions with transparent and clearly articulated reasons that are acceptable to all rational and reasonable citizens. When it fails to set forth such reasons, as with its expansive interpretation of Article 21, citizens might not assent to be governed by the Constitution, as they could not know with any clarity or certainty what this constitutionally essential right requires and therefore could not determine if it is being met.

VII. CONCLUSION

According to Granville Austin the Directive Principles were incorporated in our Constitution with the hope and expectation that someday the tree of true liberty would bloom in India.⁹² The State, in addition to obeying the Constitution's negative injunctions not to interfere with certain of the citizen's liberties, must fulfill its positive obligation to protect the citizen's rights from encroachment by society. He further notes that the directive principles aim at making the Indian masses free in the real sense, and by establishing these positive obligations of the State, the members of the Constituent Assembly made it responsibility of the future Indian Governments to

⁹¹ *Ibid.*

⁹² *Supra* note 1.

find a middle way between individual liberty and public good.⁹³ It needs no reiteration that the Constitution commands justice, liberty, equality and fraternity as supreme values to usher in the egalitarian social, economic and political democracy.

Though the Directive Principles are not justiciable, they are ‘nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws’.⁹⁴ It could be argued that there is a difference in the nature of enforceability enjoyed by Fundamental Rights and Directive Principles; the former are enforceable in the court whereas the latter are enforceable by the electorates. However, mere lack of justiciability should not be a ground for discrediting their importance vis-à-vis the Fundamental Rights or otherwise,⁹⁵ although that the Fundamental Rights tend to override the Directive Principles is a fact that has been established in unambiguous terms. It is when these Directive Principles are read into Fundamental Rights, within the precincts of Article 21 by the creative construction of the Judiciary that they tend to enjoy a status equivalent to Fundamental Rights. And, it is this mode of implementation by the Judiciary that has drawn both bouquets and brickbats. The view that the Constitution of India envisages necessarily that Parts III and IV have to operate complementary to each other, that the fundamental rights and directive principles enshrined in the Constitution forms an ‘integrated scheme’ and are elastic enough to respond to the changing needs of the society,⁹⁶ is praiseworthy and reflects a shift from the *Champakam Dorairajan*⁹⁷ days. However, if the first stage of declaring the Directive Principles subservient to Fundamental Rights drew criticism, paving way for harmonious construction of the two, the imparting of judicial enforceability thereto despite the explicit restraint under Article 37 has drawn a whole panoply of objections. Judiciary has indeed gone into the domain of enforcing them, under the pretext of effectuating that could have been permissible by noting the linguistic differences in the Irish and Indian Constitutions. The new wave of selectively transferring Directive Principles to Fundamental Rights’ domain appears to be incorrect, although deemed good in intent.

A legitimate constitutional system requires more than acceptable institutional arrangements and desirable political outcomes- it demands honesty and clarity in the reasoning employed by

⁹³ *Ibid.*

⁹⁴ Article 37.

⁹⁵ M.P. Singh, *The Statics and Dynamics of the Fundamental Rights and the Directive Principles- A Human Rights Perspective*, 5 SCC 1-14(2003).

⁹⁶ Subba Rao, J. in *Golaknath v. State of Punjab* (1967) 2 SCJ 486.

⁹⁷ *State of Madras v Champakam Dorairajan* AIR 1951 SC 226.

public institutions on matters of basic justice and constitutional essentials. The Court has not only expanded the meaning of Article 21 to make socioeconomic rights justiciable under the Constitution, but has also overseen several modifications to fundamental rights litigation under Article 32.⁹⁸ Three significant changes emerge from the Court's approach, the first is substantive and the latter two are procedural: firstly, the judiciary can enforce a greater number of rights; secondly, through relaxed standing rules, public interest groups and concerned citizens may file petitions under Article 32; and thirdly, courts have become significant players in formulating and enforcing socioeconomic policy.

The democratic objection implicates both the substantive and procedural changes described above, as the Court today does not simply adjudicate on a greater number of issues, but has become the central forum for social movements and public interest organizations to affect far-reaching policy changes with regard to socioeconomic justice. The contractarian objection, though, forces us to distinguish among the substantive and procedural changes in the Court's jurisprudence. While all three changes contribute to the democratic objection, the contractarian objection only arises in response to the substantive change- the Court's broad reading of Article 21, and evasion of Article 37, to make socioeconomic rights justiciable. As discussed, the Court's interpretation of Article 21 is not justified by the text or clearly explained in the Court's opinions and therefore fails to meet the constraint of public reason.

Therefore, it would be appropriate to suggest an alternative. An alternative model sees socioeconomic rights as justiciable, but moulds the positive duty to reflect the difficulty of providing resources in immediate fulfilment. Thus, under the International Covenant for Economic, Social and Cultural Rights each State Party undertakes 'to take steps to the maximum of its available resources, with a view to achieving progressively the full realization' of the rights in the Covenant.⁹⁹ This has been adapted by the South African Constitution, which makes socioeconomic rights justiciable, while expressly providing that the duty on the State is to take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realization' of each of the rights. Herein, firstly, although the State need not achieve the full realization immediately, it does have an immediate duty to construct a programme to

⁹⁸ P.P. Craig and S.L. Deshpande, *"Rights, Autonomy and Process: Public Interest Litigation in India"* 9 *Oxford J. Legal Stud* 356 (1989).

⁹⁹ ICESCR, Article 2(1).

realize the duty. Secondly, every State party has a ‘minimum core obligation’ to ensure minimum levels of essential foodstuffs, primary health care, basic shelter and housing, and basic forms of education. State parties ‘must demonstrate that every effort has been made to use all resources at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.’¹⁰⁰

The recognition of structural constraints on individual autonomy has led to a well-established acknowledgment of State responsibility to provide for the welfare of individuals. At the same time, as newer ideas of active citizenship suggest, freedom consists in people being actively involved in promoting and shaping their own destiny rather than being passive recipients. Thus, as Amartya Sen argues, the State’s role is to safeguard and strengthen human capability through supportive and facilitative measures, rather than through a readymade delivery.¹⁰¹ Similarly, poverty should not just be seen as low income, but should include other sources of deprivation of basic capabilities.¹⁰² Thus the right is not only a transfer of income or package of goods. It also includes a facilitative dimension, enhancing individuals’ capability to achieve their desired functioning. Therefore, the aforesaid minimum core obligations must enshrine the measures aimed at empowerment, and not just upliftment, aspiring to invest in human capital.

¹⁰⁰ General Comment No 3.

¹⁰¹ A Sen, *Development as Freedom* 53 (OUP Oxford 1999).

¹⁰² *Id.* at 87.

JURISPRUDENTIAL ASPECTS OF DISTRIBUTIVE JUSTICE

Shamsul Arif Makhdoomi*

INTRODUCTION

Only the just man enjoys peace of mind.
– Epicurus

The memory of the just survives in heaven.
¹– Wordsworth

To start writing on the concept of justice is to invite, to my mind, a serious risk. The reason is quite simple. In the realm of political and legal philosophy it is the discussion of this concept that has generated perhaps the worst, and on occasion's quite loud and violent, controversies. In fact, while philosophers and jurists from the time of Plato down to the present day have spared no efforts in clarifying the concept, our experience, however, has not been a very happy one. The moral philosophers and jurists have somehow made the issue more complex and debatable, leaving behind a trail of confusion. Thus, it is a very vague and ambiguous concept, having its abstract, universal and all-pervasive characteristics. These prompt one to raise two questions. First, how does the idea of justice emerge in human mind? Secondly, since the notion of justice is invoked to define the righteousness of a cause, is justice essentially a moral concept?²

ORIGIN

Ever since men have begun to reflect upon their relations with each other and upon the vicissitude of the human lot, they have been preoccupied with the meaning of justice. It is the subject of the most famous philosophical discussion in literature, the Republic of Plato (that "noble romance", as Huxley called it³. Man's craving for justice can be explained as "the active process of preventing or remedying what would abuse the sense of injustice"⁴. It is men's necessity for remedying injustice that prompts him to resist it through all possible acts of solidarity and then

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¹ All the quotations quoted in, S.M.N. Rana, *Law Judges and Justice*, (1979), p. II.

² See Sobhanlal Datta Gupta, *Justice and the Political Order in India*, (1979), p. 1.

³ In 'Administrative Nihilism', *Methods & Result*, Vol. 4 of Collected Essays, quoted in C.K. Allen, *Aspects of Justice*, (1958), p. 3.

⁴ Edmond Cahn, Justice, in *International Encyclopedia of the Social Science*, (London: Macmillan), (1968), Vol. 8, P. 347.

justify these acts and urges in the name of justice. This awareness of injustice arises in society in the context of a prevailing system of human relationships. Thus, the origin of justice, therefore, has to be traced to man's awareness of injustice in society and, consequently, to his search for changing the situation. Hence justice, primarily, is a social concept, which has its origin in man's life in society.⁵

Even since the birth of human society justice has been one of the most important quests of human endeavor. *Fiat Justitia ruat caelum* - let heavens fall, justice has to be done, became the main pre-occupation of many religious, political moral and legal philosophers of all ages.

Law and justice are two distinct concepts. No doubt, they are interrelated but each has a distinct sphere of its own. The concept of justice is even older than that of law. Justice is the legitimate end of law. According to **Salmond**, right or justice comes first in the order of logical conceptions and law comes second as is derivative.⁶ Thus, from St. Thomas Aquinas to **Salmond** many philosophers and jurists considered justice as a goal of law. It must, therefore, necessarily precede law because people thought of law as they wanted justice.⁷ Justice as a force of civic equilibrium presented a much simpler problem to the ancient static society than the modern dynamic world.

The importance of law and justice has also been referred in Hindu *Dharma Shastra* as well. **Manu**⁸ in his code obverse:

Destruction of Law and Justice brings about the destruction of society; the protection of law and justice has a protective influence. Therefore, law and justice should not be destroyed. Thus, there exists an intimate relationship between the theory of law and theory of justice.

MEANING AND FUNCTION OF JUSTICE.

Justice means giving one what is due to him. "For justice consists precisely in not singling persons out for special treatment in the absence of significant differences, but in treating like cases alike and meeting out fair and equal treatment to all".⁹ As a principle of law, justice delimits and harmonizes the conflicting interests and claims in the social life of a man. The result of law is

⁵ Datta Gupta, *op.cit.* No. 2, p. 2.

⁶ Glanville Williams, *Salmond on Jurisprudence*, (11th ed.), p. 61.

⁷ Raina, *op.cit.* No. 1, p. 26.

⁸ Manusmriti, viii, 15.

⁹ P.J. Fitzgerald, *Salmond on Jurisprudence*, (12th ed.), (1966), p. 61.

justice; therefore, conflict amelioration is the law's basic function.¹⁰ Thus, law is an 'integrated' mechanism.¹¹ The function of law is the orderly resolution of disputes¹² which ultimately leads to justice. Hence, the main function of law is justice, which further leads to social change. Justice is politically and legally directed mechanism so as to balance the conflicting interests' people concerned and to eliminate social, economic, and political inequalities existing in all societies.

Justice lies in the domain of morality and the instinct for justice is a part of human nature.¹³ Justice is essentially a social virtue and the question of justice is mainly in the context of one person's conduct in relation to other. The purpose of justice is to maintain or restore equilibrium in human affairs.¹⁴ Thus, *C.K. Allen* acknowledges that it is the concept of harmony, balance or reconciliation of interests that has been the dominant theme in the treatment of justice from Aristotle to Roscoe Pound. He feels that in a modern democracy it is the function of justice to blend the different tones of society into a satisfying wholeness through the very differences of parts.¹⁵

In modern society, if we take the view, that all its problem are an outcome of distribution, then the recourse is left open to justice and nothing else. Justice then demands equality in the distribution of advantages or burdens as such. These advantages or burdens which are to be distributed are of numerous kinds for instance, wages, property, power (political i.e., right to vote, right to participation and proportional representation etc. honour, dignity, taxes punishment, individual and social performances or rights and duties as allocated and apportioned by the legal or political system. In all cases, justice demands equitable distribution.

DISTRIBUTIVE JUSTICE - AN EVALUATION

According to Aristotle Justice is of two kinds. One is 'Distributive Justice (DJ) and the other is 'Corrective Justice' (CJ). CJ is 'that which supplies a corrective principle in private

¹⁰ C.J. Friedrich, *Constitutional Government and Democracy*, (rev. ed.), (New York: Blaisdell), (1950), p. 102.

¹¹ T. Persons, 'The Law and Social Control', in W.M. Evan (ed.), *Law and Sociology*, (New York: The Free Press of Glencoe), (1963), pp. 56, 58.

¹² Robert B. Seidman, *The State, Law and Development*, (1978), p. 14.

¹³ Allen, *op.cit.* No. 3, p. 5.

¹⁴ Id., p. 14.

¹⁵ Id., pp. 16-17; See also, Datta Gupta, *op.cit.* No. 2, p. 7.

transactions,¹⁶ and is exercised by judge in settling disputes and inflicting punishments upon offenders (Aristotle point out this is a complex matter. For example, he distinguishes between formal and substantive justice. A fine of a certain amount for a minor offence may seem to embody justice when applied equally to all offenders. However, the fine will affect the rich man much less than a poor man.)¹⁷ DJ is an entitlement to a share in social goods relative to a person's function in the social body. Commentators have called this principle of proportionate equality: it is not a question of subjectively preferring one man to another and, therefore rewarding him more, but of justifying the preferences by means of identifiable, generally accepted criteria. The differing functioning of men in the social body justifies a natural inequality-it corresponds to the nature of things. The structure of distributive justice is such that those who excel at their functions-e.g., the excellent teacher-should receive greater rewards. The less deserving should receive lesser rewards. Much of this appears unproblematic: it enables, perhaps a thesis of equality in so far all are human, but an inequality in so far as each offer different skills and performs different tasks. It is these skills and tasks which determine differential distribution. If persons are equal they must have equal shares: if persons are unequal they must have unequal shares. Contravening this principle amounts to injustice, but what are to be determining standards and criteria of equality and difference? Even if the standard were to be 'contribution to the true interests of society; both the nature of society's true interests and the nature of contribution are deeply contestable. Aristotle suggests that in practice we can resolve this difficulty through exchange processes and social rules within which we calculate fair and equal deals(in Book V of the Nichomean Ethics, Aristotle enters into a discussion of the economics of transaction ,taking into account the mechanics of money and demand.) The legal system can create normative structure for this process.¹⁸ DJ works to ensure a fair division of social benefits and burdens amongst the members of a community. This concept of justice has been universally accepted by almost all philosophers.¹⁹ In fact, it was in accordance with this concept that Bentham asserted that so far as right to vote is concerned, each should count for one and no one for more than one.²⁰ As, the notion of DJ was initially formulated by Aristotle the idea being of proportionate equality. In distributing such things as honour and

¹⁶ Nichomean Ethics(trans Rackham)1131a

¹⁷ Wayne Morrison, *JURISPRUDENCE: from the Greeks to post-modernism* p.47

¹⁸ Wayne Morrison, *JURISPRUDENCE: from the Greeks to post-modernism* p.47-48

¹⁹ Raina, *op.cit.* No. 1, p. 29.

²⁰ Fitzgerald, *op.cit.* No. 9, p. 61.

offices of the state must take account of the differences in individuals. It is as unjust to treat unequals equally as to treat equal unequally.²¹

The Aristotelian principle suffers from certain weakness. The first is distribution of what? Aristotle spoke of the distribution of 'honours or money or the other things that fall to be divided among those who have a share in the constitution.'²² Such a formula is imprecise. More important is the criterion of 'equal' and who decides equality. Equal distribution among equals means according to a given criterion of discrimination, unequal cases are to be treated differently, which still leaves the question whether it is just to select that particular criterion.²³ Also, amongst those classed as equals one person may complain of injustice if he is treated worse than others. What if he is treated better? For example if , black people are treated as less privileged than white people, but one black man is given same privileges as whites, this would be unjust as far as other black people are concerned. Would it be just or unjust as far as he himself is concerned; or white people? This harks back to the justice of the criterion of discriminating between the two groups in first place.²⁴

Another difficulty is that equal treatment in law of things unequal in fact, such as power, talents etc. may widen or create inequalities. Thus for the law to insist on sanctity of contract on the ground that the contracting parties stand on an equal footing when in fact there is inequality in their respective bargaining positions, has led to various form of injustice, e.g., between employer and employee, or public authorities and individuals. To take account of inequalities in fact there has to be unequal treatment in law, which means that the question when the law should depart from equality has to be determined on some principle other than equality.²⁵

Lastly, the distinction between distributive and corrective equality is by no means clear.

Distributive justice is traditionally characterized as being concerned with sharing of good and bad things, benefits and burdens, among members of society. In the modern world we more commonly talk of social justice, but we should be chary of regarding the two terms as synonymous. For one thing society, takes many other decisions which raise the questions of justice. For another, we need

²¹ Datta Gupta, *op.cit.* No. 2, pp. 12-13.

²² Nichomean Ethics V,3

²³ Honore' 'Social Justice' in *Essays in Legal Philosophy* (ed. Summers)p.68-69

²⁴ R W M Dias,*Jurisprudence*,5th Ed.,p.65-66

²⁵ Ibid

to distinguish; distributions carried out in the name of society as a whole from those undertaken within more limited organizations, such as firms, families or societies.²⁶ The traditional term is on these counts preferable to the more idiomatic one, so long as we take care not to assume that burdens and benefits are *pari passu* when it comes to distributing them. It follows from the asymmetry of justice that being offered benefits and being assigned burdens raises different issues of justice.

Not all benefits can be distributed. My feelings are necessarily my own. If I am happy, I can invite you to share my happiness, but my own happiness is not diminished thereby, but rather enhanced. No issues of distributive justice can arise over non assignable goods, like truth, or non-privative ones, like happiness or knowledge. Distributable goods are typically assignable, privative, and transferrable, so that if I have more, you or someone else must have less, and it makes sense to maintain that you should give me some of yours, or vice-versa. Money is the paradigm, but money raises special problems of its own. In dealing with these aspects we deal with the problem of benefits more generally, in which we divide the spoils of conquest, sharing out cankers, cutting up cake or allotting houses. There are other goods, such as credit, prestige, power, education and health, which are not exactly or not completely transferrable, but give rise to some issues of justice in their distribution or allocation. Fairness demands, I may say that you should give credit where credit is due, and not take it all for yourself. Power is not exactly like money, inasmuch as my having it does not necessarily exclude your having it, but may, even, enhance it. Nevertheless, we can intelligibly call for power to be shared in a fairer way than at present.²⁷ Different writers put forward different potential bases of apportionment for maintaining the equitable distribution.

Alf Ross²⁸ formulates the following principles,

Everyone according to merit

Everyone according to his performance

Everyone according to need

Everyone according to ability

Everyone according to rank and station

²⁶ F.A.Hayek, *Law, Legislation and Liberty*, II, 1976, ch.9, p.62

²⁷ J.R.Lucas, *On Justice*, (ed.) Hepi Aikaioy, p.164-165

²⁸ Alf Ross, *On Law and Justice*, English Translation, ch. 12, p.39-40

C.PERLEMAN²⁹ cites as some of the principles

- 1) To each according to his merits
- 2) To each according to his works
- 3) To each according to his needs
- 4) To each according to his rank
- 5) To each according to his legal entitlement.

A.M.Honore,³⁰ itemizes;

1. The justice of special relations
2. The justice of conformity to rule
3. The justice of allocation according to desert
4. The justice of allocation according to need
5. The justice of allocation according to choice.

Gregory Vlastos³¹ cites;

1. To each according to his need
2. To each according to his worth
3. To each according to his merit
4. To each according to his work
5. To each according to the general agreements he has made.

Nicholas Rescher³² itemizes;

1. As equals (except possibly in the case of certain negative distributions such as punishments).
2. According to their needs.
3. According to their ability or merit or achievement.
4. According to their efforts and sacrifices.
5. According to their actual productive contribution.
6. According to their requirements of the common good, or public interest, or the welfare of mankind, or the greater good of greater number.

²⁹ C.PERLEMAN, *The idea of Justice and the problem of Argument*, .John Petrie,p.6-7

³⁰ A.M.Honore, “*social justice*”,8 McGill Law Journal,1968,p 77-103;reprinted in R.S.Summers(ed.),essays in legal philosophy,p66-81

³¹ Gregory Vlastos, *Justice and equality*”in R.B.brand(ed.),Social Justice,p.35

³² Nicholas Rescher,*Distributive Justice*,Indianpolis1966,p.73 Note,supra notes 16-20,adopted from J.R.Lucas ,On Justice,(ed.)Hepi Aikaioy,p.164-165

7. According to a valuation of their socially useful services in terms of their scarcity in the essentially economic terms of supply and demand.

The problem of DJ, therefore, is to decide what differences are relevant, for Aristotle, the criterion of these differences was merit. As Aristotle points out in *Politics*, “Justice is relative to persons, and a just distribution is one in which the relative values of things given correspond to those of the persons receiving a point which has already been made in the *Ethics*”.³³ The object of CJ is to restore the equilibrium in a society which is disturbed by another. For example, if ‘A’ wrongfully seizes ‘B’s property, CJ acts to restore the *status quo* by compelling A to make restitution. Justice in its distributive aspect serves to secure, and in its corrective aspect to redress, the balance of benefits and burdens in a society.³⁴

The aim of DJ is to strike a balance in the socio-economic structure of the society and bring equipoise between conflicting interests of individual citizens. One way of looking at the problem of DJ is from the perspective of the disparity between himself and his rich friends, and always yearning on the grounds of justice for equalitarian and egalitarian rectification. Another perspective is what of an uneasily contented rich man who, ill at ease about the same disparity, is always eager to defend strongly on systematic grounds of a particular social system which permits and perpetuates such disparities. Thus DJ then serves to secure a balance or equilibrium among the unequal or unbalanced members of the society which according to Prof. Roscoe Pound is social engineering.³⁵

The idea of DJ particularly with respect to economic dimension of social justice is not new one. There are references of DJ in *Dharma Shastras* as well.

The reference to DJ occurs in a late hymn of the Rigveda³⁶

The God of death not only takes the lives of poor or destitute, but does not even spare the lives of rich and wealthy people as well. The peace of mind, and wealth of virtuous can never be destroyed while greedy and other persons can never get their peace of mind and happiness in their life. Therefore, the best way of removing disabilities (inequalities) is to donate or distribute the

³³ *The Politics of Aristotle*, III, IX. 3. Translated with an Introduction, Notes and Appendices by Ernest Barker, (Oxford: The Clarendon Press) (1948), p. 177.

³⁴ Fitzgerald, *op.cit.* No. 9, p. 61.

³⁵ See, also, Aniruth Prasad, *Social Engineering & Constitutional Protection of Weaker Sections in India*, (1980), (Introduction), pp. 17-20.

³⁶ Rigveda, 10.117.1.

collected wealth among the poor in order to bring them at par with the other people of the society. In this way the poor people will have respect and honour for them and also their wealth will not even destroy. If the rich people will not follow this distributive principle of justice the people will destroy their property and honour leading to destruction in their life instead of peace and happiness.

Distributive justice is the base of all other justices. Economic justice, whether in participation or distribution of wealth, would remain unreachable without distributive justice. Because distributive justice provides for adequate distribution of wealth, it gives an opportunity to develop and participate economically in the society. Legal justice will be meaningless without access to it. Distributive justice can create a social condition where everyone will be able to receive legal justice. It is not mere the distribution of wealth and property that distributive justice covers. Rather, in the present world, it would include education, employment and other necessities of life. Distributive justice, which conditions justice in other fields would help in removing inequalities and bring in social justice

Thus, the DJ embraces “the whole economic dimension of social justice, the entire question of distribution of goods and services within the society”.³⁷ The different principles of DJ have been expressed through number of maxims: (i) to each according to his need; (ii) to each according to his worth; (iii) to each according to his merit and (iv) to each according to his contributions to the common good etc.³⁸ These maxims do not represent a perfect formula or solution for DJ or equity, since the needs of individuals may be in inverse proportion to their abilities and to their contribution to society, and in any case they will normally differ from person to person, what these maxims express, is simply an ethic of brotherhood as such.

In the modern age of economic engineering, economic goals have uncontested claims for priority over ideological one's on ground that excellence comes only after existence.³⁹ The twentieth century juristic thinking has formulated two jural postulate such as: (i) everyone is

³⁷ Nicholas Rescher, *Distributive Justice*, (1966), p. 5.

³⁸ Id., pp. 73-78, DJ has been held to consist, wholly or primarily in the treatment of all people as (a) equal; or according to their (b) need; ability or achievements; (c) efforts and sacrifices; (d) productive contribution; (e) requirement of common good and its equivalents; (f) a valuation of their useful economic services (the so called cannon or supply and demand).

³⁹ See, A.R. Blackshield, 'Fundamental Rights and the Economic Viability of the Indian Nation', 10 JILI, (1968).

entitled to assume that the burdens incident to life in society will be borne by society (ii) everyone is entitled to assume that at least a standard human life will be assured to him; not merely equal opportunities of providing or attaining it, but immediate material satisfaction.⁴⁰

AN OVERVIEW OF THEORIES OF DISTRIBUTIVE JUSTICE -A CRITICAL TREATMENT

Various theories of justice have been propounded from time to time in search of an ideal standard of justice. For merely the concept of justice was closely linked with property. Locke, who looked upon the law of nature as the principal foundation of justice and of all just order, attached a good deal of importance to property and considered justice mainly in the context of property.⁴¹ Thus, the various writers and philosophers such as, Nicholas Rescher, John Rawls, Julius Stone and Roscoe Pound etc. have formulated different theories of justice in order to explain the concept of DJ. Important of these theories, which contain all the above mentioned principles of DJ are, namely, (i) the utilitarian and (ii) contractarian. The former represents an established tradition of ethical thought, though subject to continuing requirements and restatements.⁴² The latter owes much to John Rawls who in recent times has most illuminatingly used the idea of primordial social contract to arrive at the basic principles of justice.⁴³

The utilitarian doctrine, as is well known, rests on the principle of utility prescribing that goods or, utility be so distributed as to secure “the greatest good of greatest numbers”.⁴⁴ But the principle suffers from incompleteness, ambiguities and frequent discard with moral judgments. The inherent weakness of utilitarian theory from the perspectives of DJ is that it accords more importance to the quantity of good or welfare distribution at the cost of equality. If quantity of welfare be raised by grossly unequal distribution, for instance, as in an efficient system of slavery, then we have to favour inequality. Equality, on utilitarian scheme is servant of quantity of welfare. But the discord with the intuitively felt ideas of justice becomes even more acute, when we shift our attention from inequality to deprivation even of the most minimal utilities and necessities of life.

⁴⁰ Roscoe Pound, *Jurisprudence*, Vol. I, (1959), p. 528.

⁴¹ Carl, J. Friedrich and John W. Chapman (eds.), *Justice (Nomos VI)*, (1974), p. 269.

⁴² Rescher, *op.cit.* No. 23, pp. 25-69.

⁴³ See John Rawls, *A Theory of Justice*, (1972)

⁴⁴ Julius Stone, *Human Law and Human Justice*, (1966), pp. 122-146.

John Rawls rejected utilitarianism as an adequate criterion of justice. According to him, justice when applied to an institution requires the elimination of arbitrary distinctions and the establishment structure of a proper balance or equilibrium between competing claims.⁴⁵

According to John Rawls the principles of justice are collectively formulated “by free and independent persons” in a primordial situation. On this basis, he has formulated the following two principles of justice governing a just order:

First Principle: Each person; is to have an equal right to the most extensive total system of equal basic liberties-compatible with a similar system of liberty for all.

Second Principle: Social and economic inequalities are to be arranged so that they are both: (a) the greatest benefit of the least advantaged, consistent with the just savings Principle, and (b) attached to offices and positions open to all under the conditions of fair equality of opportunity.⁴⁶

The theory as propounded by him has been criticised by Brian Barry.⁴⁷The above mentioned principles of Rawls lacked both in clarity and completeness. Therefore, in order to make more understandable and clear, Rawls put forward two more principles. There are:

Assuming the framework of institutions required by equal liberty and fair equality of opportunity, the higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of the society.⁴⁸

The above observation is based on the “difference principle’ whose aim is that the social order should not help securing advantages to those who are better off, unless doing so is to the advantage of those who are less fortunate.

The second principle is known as ‘redress principle’. It aims at compensating the underserved or inevitable inequalities. Thus, the principle holds:

That in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favourable social positions.⁴⁹

Hence after explaining the fundamentals of these theories, it is often reiterated that these theories must take into consideration at least three important aspects of distributive process: (a)

⁴⁵ Friedrich and Chapman, *op.cit.* No. 27, p. 302.

⁴⁶ Rawls, *op.cit.* No. 29, p. 302.

⁴⁷ See, Raina, *op.cit.* No. 1, p. 35.

⁴⁸ Rawls, *op.cit.*, No. 29, p. 75

⁴⁹ Id., p. 100.

the ‘total amount of goals (or utility) to be distributed, (b) the pattern of distribution arrived at and (c) ‘the distributional procedure, described aptly as ‘the principle of selection by means of which the distribution is arrived at’.⁵⁰

Thus, the Rawls’s construction of the theory of justice is ambiguous and absolutely conditional on the existence of hypothetical “original Position”.⁵¹

The philosophy of Karl Marx is also not free from controversy in regard to his approach to justice. Although according to Harold J. Laski and A., D. Lindsay, his fundamental passion was passion for Justice, he definitely rejected justice as an ideal.⁵² One of the basic requirements of justice is that the means are as important as the ends. Those who deny the relevance of justice may, therefore, attempt to achieve ends by any means which they considered proper regardless of the considerations of justice.

The Thomistic conception of DJ is not at all relevant in modern context. The Thomistic premise is that in matter of social justice the individuals does not have separate inherent right, whatever, rights he possesses are those which belong to a member of the group.⁵³ In the present situation, the distributive realm is thought of primarily in terms of opportunities. The US Supreme Court held in one of the case:

*The fundamental rights to life, liberty and the pursuit of happiness considered as individual possessions are secured by those maxims of constitutional law which the monuments are showing the progressive progress of the race in securing to men the blessing of civilization under the reign of just and equal law... The very idea that one man may be compelled to hold his life or means of livelihood or any material right essential to the enjoyment of life at the mere will of another seems to be intolerable in any country where freedom prevails.*⁵⁴

However, Marx has a different approach with respect to the distributive aspect of justice. People will receive according to their needs. At this point Marx quotes, for the first time and only

⁵⁰ Rescher, *op.cit.* No. 23, p. 87.

⁵¹ See critical explanation, of Rawls’s theory based on hypothetical ‘Original Position’, Datta Gupta, *op.cit.* No. 2, pp. 16-20.

⁵² Friedrich and chapman, *op.cit.* No. 27, pp. 306-325.

⁵³ See Coorelius Murphy, “*Distributive justice, Modern Significance*”, The American Journal of Jurisprudence, (1972), p. 17.

⁵⁴ Yick Wo v. Hopkins, 118 US (1886), pp. 356-370

time in his writings, the old French socialist formula, “From each according to his ability, to each according to his needs”. Robert C. Tucker in his article on ‘Marx and DJ’ said that this is not a formula for justice. Nevertheless it does connect the idea of communism with a principle of distribution.⁵⁵

This conception of social life and the values which it embodies need a theory of justice which would account for these substantial transformations in the individual relationship to the society. Prof. Rawls theory of justice as fairness is responsive to this need. “He views the problems of social justice as one of procedure. The subject of justice is the structure of society. To establish a structure the society must create a public system of rules by reference to which the conflicting claims which inevitably arise can be authoritatively determined”.⁵⁶ Ultimately Rawls concludes that DJ is simply a function of just society. The principles of justice as enumerated above provide a theoretical framework for the modern conceptions of freedom and equality. The Rawls rule that the distributive differences must be judged from the perspectives of the least advantaged is a moral hypothesis which must itself be tested by standards of human freedom.

WHICH THEORY SHOULD BE FOLLOWED IN INDIA?

Coming to the question that which of the two theories the utilitarian and the contractarian seem relevant to the Indian economy, the answer is, both are relevant, but the Rescher’s approach is more suitable as it is based on the economy of scarcity, and insufficiency of available utilities and necessities of life. In such an economy our approach should always be directed at the amelioration of the weaker sections of our society and help in reducing, to as few as possible, the number of people whose share of utilities of life fall below the minimal level.⁵⁷

The founding fathers of our constitution were very well aware of the existing socio-economic conditions of the down-trodden communities of our society. In order to ameliorate them; they incorporated various measures of preferential treatment or compensatory

⁵⁵ See, Robert C. Tucker, ‘Marx and Distributive Justice’ in Friedrich and Chapman, *op.cit.* No. 27. p. 318.

⁵⁶ Murphy, *op.cit.* No. 39, p. 154.

⁵⁷ Upendra Baxi, *State of Gujrat v. Shantijal, A Requiem for “Just Compensation”*, Jaipur Law Journal, Vo. IX (1969).

discrimination⁵⁸ in the constitution. These preferential policies have been defended on different arguments, and DJ argument is one of them. The other arguments are, compensatory and utilitarian.⁵⁹ Thus, the framer of the Constitution applied the principle of DJ in the preferential treatment and provided certain provisions in the Constitution⁶⁰ so as to achieve DJ.

The DJ arguments⁶¹ focus mainly on the need to promote the redistribution of income and other important benefits and to reduce the inequalities created by the existing distributive system. Those who have been disadvantaged by the existing distributional system should be given more benefits by altering the ways of distribution.⁶² This notion recognizes that some people are undeservedly poor, some are undeservedly rich and it is the function of the state to reduce poverty and inequalities in the society. The DJ argument typically accompanies the idea of proportional equality which says that justice is apportioning reward to groups on the basis of proportionality and that all groups should be represented at all levels of income and achievement in proportion to their members in the country's population. Justice as proportionality permits numerical quotas.⁶³

According to Aristotle, DJ works to ensure a fair division of social benefits and burdens amongst the members of a community. And thus, the principle of DJ has been successfully applied in the preferential policies –reservation in educational institutions and reservation in services etc. But this principle could not be extended to Political Reservation (PR) as such. However, it can very conveniently be applied to PR as well. It is true that political power cannot be equally distributed, that can only be shared proportionately in democratic hierarchical order. Thus, it is the political right (Right to vote and right to participation etc.) that can be equally distributed. Though, Ibn Khaldum, the fourteenth century Arab Historian very rightly said, “the possession of power is

⁵⁸ Hereafter referred to as reservation. Other synonyms for compensatory discrimination in legal literature are “quotas” and “protective discrimination”.

⁵⁹ These arguments are well analyzed in J.W., Nicket “*Preferential Policies in Hiring and Admission: A Jurisprudential Approach*”, 75 Columbia L. Rev. 534 (1975).

⁶⁰ Articles 14, 15(4), 16(4), 46, 330 and 332 etc.

⁶¹ For other arguments on ‘Compensatory’ and utilitarian see, Paramanand Singh, ‘*Bakke and Thomas: A Comparative Legal Analysis of Emerging Judicial Responses to The Problem of “Equality and Compensatory Discrimination” in USA and India*’, Delhi Law Review, Vols. 6 & 7 (1977 & 1978), pp. 56 and 58 respectively.

⁶² Nickel, *op.cit.*, No. 48, pp. 540-41.

⁶³ See N. Ghazer, “*Individual Rights and Group Rights: Is There any way to Resolve the Conflict*” in E. Kamenka and A.E. Tay (eds.) Human Rights, 87, 97 (1978). But see T. Nagel, “*Equal Treatment and Compensatory Discrimination*”, 2 Philosophy & Public Affairs 348 (1973). He suggests that preferential policies cannot be justified on grounds of distributive justice but only on grounds of utility (at 359).

the source of riches”,⁶⁴ however, the political power is proportionately distributed through proper and proportional representation in legislatures (Lok Sabha and State Assemblies),⁶⁵ in our political system. Hence, our constitution extended DJ in all the three dimensions of reservations i.e., reservation in educational institutions,⁶⁶ in services⁶⁷ and legislatures.⁶⁸

WHY DISTRIBUTIVE JUSTICE FAILED IN INDIA?

The denial of justice in social, economic, political and legal systems in India is due to the failure of distributive justice in India. Despite the attempt to avert inequalities and provide justice in India there exist certain factors that cause failed distributive justice. Some of the main reasons responsible for it are:-

1. UNEVEN DEVELOPMENT OF REGIONS.

A very higher level of disparities could be seen in different regions in India. While central India finds a better conditions of development whereas the Northeastern region is at a worse condition of development. Though the reason for this regional disparities may be directed to uneven distribution of natural resources, it is the wrong developmental policies of the government that have accentuated the regional disparities. Leaders have not bothered to bring about a balanced economic and social development.

2. INEQUALITY OF OPPORTUNITY

The constitution of India upholds the virtue of equality in social political and economic realms. Several provisions in the Fundamental Rights and the Directive Principle of State Policies are aimed at eradicating inequalities India. However, an analysis to the socio –economic conditions exposes the fact that a large number of people in India have been deprived of equal opportunity in the social, economic and legal arenas. There uneven access to economic development, particularly exploitation of natural resources and employment opportunities. However, in spite of the high rate of employment generation in the services sector, poor performance in agriculture and in some industrial sectors has brought down the overall rate of employment generation.⁶⁹ Legal justice

⁶⁴ Quoted in Stanislaw Ossowski, *Class Structure in the Social Consciousness*, (London, 1963), p. 24

⁶⁵ See, Arts. 330 and 332.

⁶⁶ Art. 15(4).

⁶⁷ Art. 16(4).

⁶⁸ Art. 330 and 332.

⁶⁹ Pal, Parthapratim and Ghosh, Jayati (2007), “*Inequality in India: A survey of recent trends*”, DESA

remains a dream unattainable to the lower sections of the society. The most important question that arises when discussing justice and the law in India is access to justice, or the lack thereof. India has had formal institutions in place for several decades, but common citizens are not able to use these institutions to ensure they receive justice. The delays, the expense, and the onerous structure of the courts seem designed to dissuade those who have neither the means nor the ability to maneuver the system.⁷⁰

3. ECONOMIC INEQUALITIES AND OVER EXPLOITATION OF THE NATURAL RESOURCES

Economic inequalities particularly income inequalities in India is very wide. There are over ten Indians in the list of first hundred wealthiest people of the world. At the same time there are millions of people in India who remains in acute poverty. The UN report found that “inequality in the distribution of human development is distinctly pronounced in India” compared to other countries. This is the latest sign that despite government efforts, the benefits of India’s booming economy still haven’t spread widely among the country’s population.⁷¹ Based on indices of real Mean Per Capita Expenditure (MPCE) by fractile groups, Sen and Himanshu showed that whereas the consumption level of the upper tail of the population, including the top 20 per cent of the rural population, went up remarkably during the 1990s, the bottom 80 per cent of the rural population suffered during this period⁷². Poverty and under development are two important realities that expose the presence of disparities in India. The study conducted by the National Council on Educational and Research⁷³ shows that in 20 states and Union Territories the poverty ratio is less than the national average of 26. In other states the poverty ratios are higher than the national average.

CONCLUSION

All these observations lead to the conclusion that “the pivotal concept of our position is coordination, that an acceptable theory of distribution requires the due meshing of consideration of justice (in the narrow sense fairness and equity) with those of utility (in the sense of general welfare). Regarding the rationale of DJ, our position is neither strictly deontological nor strictly

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⁷⁰ Saxena, Sanchita (2008), “*Rule of Law A report from the 2nd FDRI Berkeley conference on Indian Democracy*”, Center for South Asian Studies, University of California.

⁷¹ Stancati, Margherita (2011), “*U.N. Report Criticizes India’s Inequalities*”, India Real Time

⁷² supra note 73

⁷³ NCERT (2009), “*Economic Development in India*”, New, Delhi India.

utilitarian. It is rather deontological utilitarian.⁷⁴ Utility is no longer the queen bee, but becomes merely one among several workers in the ethical hive.⁷⁵

But in spite of all this juristic chivalry, the polemical problem of DJ remains to be incomplete and imperfect in any of the legal system of modern world. Its complete realization is always a utopia. Rescher at another place observed:

*Distributive Justice.... exactly like punitive justice.... can be brought to realization only in this world, that is, in an imperfect world populated by imperfect man. A perfectly just system of punitive justice.... cannot fail to depart from the ideal in several ways (say by catching some of the innocent and by letting escape some of the guilty). And these modes of injustice are interrelated and interlocked: as we modify the system to avoid injustice of one kind, we ipso facto increase those of another.... exactly the same is true in evaluating socio economic arrangements with respect to their accordance or violation with the principles of distributive justice.*⁷⁶

⁷⁴ Rescher, *op.cit.*, No. 23, p. 120

⁷⁵ Id., p. 121.

⁷⁶ Rescher, *op.cit.*, No. 23, p. 8

TAX PLANNING STRATEGIES: LEGITIMATE?

Aman Chaudhary*

INTRODUCTION

In recent times, corporate giants have used certain tax mitigating strategies built around low-tax jurisdictions and favorable treaties between various foreign countries. For Instance, the corporate structure adopted by Google involved two companies incorporated in Ireland, one IP-Holding and one Operating Company, as well as one Conduit Company incorporated in the Netherlands. The IP-Holding Company is a direct subsidiary of the US Parent Company and the single owner of the Irish Operating Company and the Dutch Conduit Company. The IP-Holding is managed and controlled in Bermuda and therefore considered resident in Bermuda for Irish tax purposes. The Irish Operating Company exploits the IP and usually earns high revenues. In this corporate structure the Operating Company acts as the contractual partner of all non-US customers. Hence, no physical presence is created in the country of final consumption and the profits cannot be taxed there. The profits from customer sales earned by the Operating Company are subject to tax in Ireland. However, the tax base of the Operating Company is close to zero because it pays high tax-deductible royalties for the use of the IP held by the IP-Holding Company. In turn, the royalties are not paid directly to the IP-Holding Company but are passed through a Conduit Company in the Netherlands, which sublicenses the IP. The Dutch Company is interposed because the IP-Holding Company is a Bermuda resident for Irish tax purposes and Ireland levies withholding tax on royalty payments to Bermuda. By channeling the royalties through the Dutch Conduit Company, withholding taxes can be completely circumvented as royalties paid from Ireland to the Netherlands are tax-free under the EU Interest and Royalties Directive and the Netherlands does not impose withholding tax on any royalty payments, irrespective of the residence state of the receiving company. The tax liability of the Conduit Company in the Netherlands only consists of a small fee payable for the use of the Dutch tax system. The IP-Holding Company is neither subject to tax in Ireland nor in Bermuda since Ireland considers the company a non-resident and Bermuda

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does not impose income tax on corporations. Hence, the profits earned in the European Union leave the European Union virtually untaxed.

¹ The Irish Operating Company reported sales of 12.5 billion euros (\$16.4 billion) in 2011, but profits of only 24 million euros, and an Irish corporation tax bill of 8 million euros.² Apart from Google, this structure has been popular among several Multinational enterprises (hereinafter referred as ‘MNE’s) such as Apple, Starbucks, Amazon, Yahoo, Oracle, Microsoft, IBM, etc. Apart from Google many MNE’s have adopted similar strategies to reduce their tax bills. The important question that arises here is that does the policy adopted by these companies protect the very essence of law? This is a highly debatable question as these enterprises end up saving large amounts of tax through certain corporate structures, which would have been attributable to them in normal circumstances. Various legal principles are involved in tax avoidance through corporate structures of MNE’s. The legal principles involved are as follows.

SUBSIDIARIES AS SEPARATE ENTITIES

One of the legal principles taken advantage of by Multinational enterprises (hereinafter referred as ‘MNEs’) looking to use tax planning and certain structures to reduce their tax bills are that the subsidiaries and parent companies are considered as separate legal entities altogether. This principle extends to the fact that a subsidiary is not to be considered as a branch of the holding company. This principle has been upheld in many court cases.

1). LEGAL RELATIONSHIP BETWEEN PARENT COMPANY AND ITS WHOLLY OWNED SUBSIDIARY:

In *Vodafone International Holdings B.V. vs. Union of India & Anr*³, the court expounded that *Holding company and subsidiary company are, however, considered as separate legal entities, and subsidiary are allowed decentralized management. Each subsidiary can reform its own management personnel and holding company may also provide expert, efficient and competent services for the benefit of the subsidiaries.* This has been observed in the tax saving strategy adopted by Google where an Irish Subsidiary, through a subsidiary in Netherlands pays royalties

¹ Clemens Fuest, Christoph Spengel, Katharine Finke, Jost H.Heckemeyer & Hannah Nusser, *Profit Shifting and “Aggressive” Tax Planning by Multinational Firms: Issues and Options for Reform*, World Tax Journal, Page 310 (October 2013)

² Tom Bergin, Special Report: How Google UK clouds its tax liabilities, Reuters (U.S.), 1st May 2013, Para 24

³ *Vodafone International Holdings B.V. vs. Union of India & Anr*, 2013 6 SCC 613

to another Irish Subsidiary that in turn has its control and management in Bermuda (low tax jurisdiction).

2).BUSINESS OF THE SUBSIDIARIES IS NOT CONSIDERED THE BUSINESS OF THE PARENT COMPANY:

In a case⁴, where an English company carried out business in the United Kingdom was the holder of all the shares in a German company. The court held that this fact alone did not make the business of the German company the business of the English company so as to render the English company liable to income tax upon the full amount of the profits made by the German company; and that the English company was only liable to pay income tax upon such profits of the German company as had been received in this country. Thereby, upholding that the business of the Subsidiaries is not considered the business of the Parent company. MNE's often use this principle to their advantage by forming a number of overseas subsidiaries and building tax saving structures around them, as a benefit of which they are not held liable for acts done through subsidiaries.

In another case⁵, Subsidiaries were judged to have separate legal identities. In this particular dispute the question before the Hon'ble court was whether the documents in the possession of a foreign subsidiary could be deemed to be in the possession of the "parent". The court answered the question in the negative.

3).HOLDING COMPANY NOT LIABLE FOR FINANCIAL CLAIMS OR OTHER ACTS/ CLAIMS OF THE SUBSIDIARIES:

In another case⁶, English Company created a foreign subsidiary for listing and tax advantages. The foreign subsidiary was used for raising money on bonds through financial banks. The money thus raised was loaned to the holding company. When the holding company became unable to pay and was put under administration, the financial banks lodged their claims for the money provided by them to the subsidiary and the subsidiary also lodged its claims for the same money because it provided the loans to the holding company. The financing bank wanted that the claim of the subsidiary should be ignored because it was a part of the same economic entity. The court refused

⁴ *Gramophone & Typewriter v. Stanley* (C.A.)

⁵ *Lonrho Ltd. v Shell Petroleum Co Ltd.*, 1980 2 WLR 367 CA

⁶ *Polly Peck International Plc. (No 3), Re*, (1996) 1 BCLC 428 Ch. D., *Avtar Singh; Company Law; Fourteenth Edition; Page no. 26*

to do so and said that those two companies could not be regarded as one and the same entity. All the companies in the group are separate legal entities and have to be so regarded unless there are compelling circumstances. The court said that even in certain circumstances the court could go behind the veil to examine the real substance of the transaction it would still be looking at the legal substance and not the economic substance. Hence, the principle of subsidiaries and holding companies being separate legal entities has been expounded several times in the court of law, which has been taken advantage by MNE's looking to reduce their tax bills through tax mitigating strategies revolving around subsidiaries in low tax jurisdictions or tax havens.

PROFITS NOT ACCRUING TO HOLDING

1). WIDE SCOPE OF SECTION 9 OF INCOME TAX ACT

Section 9 of the Income tax act states that:

“All income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India shall be deemed to accrue to arise in India.”

The ambit of section 9 of the Income tax Act is not to be narrowly construed. It is clear from the act that Profits or Losses arising out of any business connection in India shall be deemed to accrue in India. The scope of section 9 is not limited to this as there are exceptions for cases in which all operations of the business are not carried out in India. In such cases, only such income would be accrue or arise in India, which is reasonably attributable to India (according to the operations carried out by it). This provision in law when used along with the legal principle of 'separate legal entities' is of huge advantage to MNE's to reduce their tax bills. As in the corporate structures used by these MNE's, most of the business operations are carried out by subsidiaries located in Tax Havens such as Cayman Islands or Ireland. As these subsidiaries are considered as separate legal entities Income accruing to them are taxable in their territories. Hence, reducing tax bills for MNE's. This strategy is often adopted by MNE's as most of the income becomes taxable in countries with low tax jurisdictions or tax havens. For instance, In the case of Vodafone Group in the recent times as most of the income becomes taxable in countries with low tax jurisdictions or tax havens.

2).PROFITS ACCRUE AT THE PLACE WHERE SALES ARE MADE AND WHERE SOURCE OF INCOME LIES:

With an objective to save taxes, MNE's try to exploit tax havens or low tax jurisdictions by making it the place from there the sales is executed. It has been held in many judgments given in the court of law that profits accrue to the place where sales take place.

It has been held by the Supreme Court of India⁷, Profits are accrued to the place where the sales were effected; in other words, where the property in the goods passed to the purchasers.

In *Vodafone (supra)*⁸, Source of income accrue where the transaction is effected and not where the underlying asset is situated or economic interest lies. Source in relation to an income has been construed to be where the transaction of sale takes place and not where the item of value, which was the subject of the transaction, was acquired or derived from.

In a case before the apex court⁹, it was held that "In the instant case the non-resident assessee did not carry on any business operations in the taxable territories. They acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad does not amount to an operation carried out by the assesseees in India The commission amounts which were earned by the non-resident assesseees for services rendered outside India cannot, therefore, be deemed to be incomes which have either accrued or arisen in India." The High Court was, therefore, right in answering the question in favor of the non-assessee.

*In a case*¹⁰, the assessee was non-resident company with its head office in London. Its business in Calcutta was mainly that of purchasing Tea for its constituents abroad. In respect of dispatch to the head office, the assessee did not charge any commission but charged all other items of expenses. The Tribunal held that, "The London Office did not earn more because of its business connection through the assessee in India and by not paying commission, this earning accrued or arose to the assessee because of its business connection in India. The lordships answered the said question in the negative and in favor of the assessee holding that when the transaction between the London head office of the assessee and its unit in India was a transaction as between principal and principal,

⁷ *Pushalal Mansinghka (P) Ltd vs. Commissioner Of Income-Tax*, SCR (3) 961 (1967)

⁸ *Supra* at 3

⁹ *Commissioner of Income-Tax, Andhra Pradesh, Hyderabad vs. Toshoku Ltd., Guntur*, 1981 SCR (1) 587

¹⁰ *Betts Hartley Huett & Co. Ltd. vs. Commissioner of Income Tax*, 1979 116 ITR 425 Cal

it cannot be held that any income arose in favor of the assessee either directly or indirectly since the gain in London office was offset by the loss incurred in the Indian branch.”

TAX MITIGATION

The above mentioned legal principles i.e., subsidiaries and holding company as separate legal entities and profits accruing to the place where sales are effected are often exploited by MNE's to create tax mitigating corporate structure which results in reduction of their tax bills without violating the law. Creating a structure in which subsidiaries are created at tax havens such as Cayman Islands results in tax mitigations.

1). TAKING ADVANTAGE OF TAX HAVENS AND TAX TREATIES BETWEEN FOREIGN COUNTRIES:

Often sales of goods are effected at low tax jurisdictions as in the case of Google's strategy also called as 'Double Irish Dutch sandwich. Tax treaties between various countries are also taken advantage of to save taxes. For Instance Google created a subsidiary at Netherlands for the purpose of saving Withholding Tax. Subsidiaries around which tax mitigating strategies are built are sometimes pronounced as Colorable devices and though they are within the letter of the law are considered to be against the very essence of law. There have been numerous judgments in the court of law that provide a differentiation among tax mitigation and tax evasion and whether tax mitigating strategies though within the letter of the law can be said to be in violation of the law.

The House of Lords in the *IRC v. Willoughby*¹¹ made a distinction between tax avoidance and tax mitigation schemes and the relevant passage reads as under: "Tax avoidance was to be distinguished from tax mitigation. The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hallmark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option. Where the taxpayer's chosen course is seen upon examination to involve tax avoidance (as opposed to tax mitigation),

¹¹ *IRC v. Willoughby*, (1997) 4 All ER 65

it follows that tax avoidance must be at least one of the taxpayer's purposes in adopting that course whether or not the taxpayer has formed the subjective motive of avoiding tax."

In another case¹², The Hon'ble Madras High Court observed that the assessee handed over the entire investment representing the accumulated income for the concerned previous years to a new charitable trust known as 'M Ct. Muthiah Chettiar Foundation' for the purpose of carrying out certain charitable purposes. The assessee-trust by filing the requisite form and accumulating its income during the course of ten years, had adopted the tax mitigation scheme and the assessee had enjoyed the total freedom of tax during the period of accumulation of income.

2). FORMATION OF SUBSIDIARIES IN LOW TAX JURISDICTIONS:

The decision of the apex court in *Commissioner of Income Tax v. Sakarlal Balabhai*¹³ is of great importance as it emphasizes that a taxpayer may part with his income-producing asset and transfer it to his subsidiary situated in a low tax jurisdiction, so that the income earned is taxable to the place where the subsidiary is located. Tax avoidance postulates that the assessee is in receipt of amount, which is really and in truth his income liable to tax but on which he avoids payment of tax by some artifice or device. Such artifice or device may apparently show the income as accruing to another person, at the same time making it available for use and enjoyment to the assessee. If the assessee parts with his income producing asset, so that the right to receive income arising from the asset which theretofore belonged to the assessee is transferred to and vested in some other person, there is no avoidance of tax liability: no part of the income from the asset goes into the hands of the assessee in the shape of income or under any guise. The court also held that these provisions are intended to and do extend to cover cases in which the transaction in question, if recognized as valid, would enable the taxpayer to avoid payment of income tax on what is really and in truth his income.

In *McDowell & Company Limited vs. The Commercial Tax Officer*¹⁴, a 5 Judge bench of the Supreme Court of India comprising of Justice Y.V. Chandrachud, Justice O. Chinnappa Reddy, Justice D.A. Desai, Justice E.S. Venkataramiah and Justice Rangnath Misra held that, Tax planning

¹² *Commissioner Of Income-Tax vs. M. Ct. Muthiah Chettiar Family*, 2000 245 ITR 400 Mad

¹³ 1968 69 ITR 186 Guj.

¹⁴ *McDowell & Company Limited vs. The Commercial Tax Officer*, 1986 AIR 649

may be legitimate provided it is within the framework of law, Colorable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honorable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges.

LIFTING THE CORPORATE VEIL

1). INTENTION OF THE TAXPAYER OR THE PARENT COMPANY:

Critics have pointed out that such tax mitigating strategies involving subsidiaries at low tax jurisdictions and placing associated enterprises in locations to take advantage of tax treaties between two nations as was done in the case of Google though within the limits of law are not acceptable as they involve colorable devices which are often pronounced as sham or make believe. Experts have pointed out at the intention of the taxpayer or the parent company while locating associated enterprises or subsidiaries in tax havens or in countries involved in certain tax treaties which resulted in tax saving. For Instance in the case of the tax avoidance strategy adopted by Google involving two companies incorporated in Ireland, One IP holding Company and one a Operating Company, and one conduit company incorporated in Netherlands. In such a structure withholding tax was saved on royalties as the royalties were not paid directly to the IP-Holding Company but are passed through a Conduit Company in the Netherlands, which sublicenses the IP.¹⁵

2). SUBSIDIARIES USED AS COLORABLE DEVICES

In the case of *McDowell & Company Limited vs. The Commercial Tax Officer*¹⁶, It was held that, Tax planning may be legitimate provided it is within the framework of law, Colorable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honorable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges.

In the case of *Life Insurance Corporation of India vs. Escorts Ltd. and Ors.*¹⁷, It was held by the Supreme Court of India that even conceding to the fact that subsidiaries are to be treated as separate

¹⁵ *Supra* at 1

¹⁶ *Supra* at 17

¹⁷ *Life Insurance Corporation of India vs. Escorts Ltd. and Ors.*, 1986 AIR 1370

legal entities, in some situations the corporate veil may be lifted so as to hold the holding company liable for acts done by the subsidiary and to hold income earned by subsidiaries to accrue to the holding company. Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern.

The Income- tax authorities are entitled to pierce the veil of corporate entity and to look at the reality of the transaction. It is true that from the juristic point of view the company is a legal personality entirely distinct from its members and the company is capable of enjoying rights and being subjected to duties, which are not the same as those enjoyed or borne by its members. But in certain exceptional cases the Court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal facade. For example, the Court has power to disregard the corporate entity if it is used for tax evasion or to circumvent tax obligation.¹⁸

In the case of *Commissioner of Income Tax v. B.M. Kharwar*¹⁹, the Supreme Court of India expounded, “The taxing authority is entitled and is indeed bound to determine the true legal relation resulting from a transaction. If the parties have chosen to conceal by a device the legal relation, it is open to the taxing authorities to unravel the device and to determine the true character of the relationship. But probing into the “substance of the transaction” cannot displace the legal effect of a transaction

In the case of *State of U.P. & Ors vs. Renusagar Power Co. and Ors*²⁰, On examining the facts of the case which are, Renusagar, a 100% subsidiary of Hindalco, wholly owned and controlled by Hindalco, was incorporated in March, 1964. Hindalco had established the power plant through the agency of Renusagar to avoid complications in the case of a possible take-over of the power plant by the State Electricity Board as power generation is generally not permitted in normal conditions in the private sector. Hindalco controls even the day-to-day affairs of Renusagar. Renusagar has at no point of time indicated any independent volition. Whenever felt necessary, the State or the Board have lifted the corporate veil and have treated Renusagar and Hindalco as one concern and

¹⁸ *The Commissioner Of Income-Tax, Madras vs. Sri Meenakshi Mills Ltd. & Ors*, 1967 SCR (1) 934

¹⁹ *Commissioner of Income Tax v. B.M. Kharwar*, (1969) 72 ITR 603 (SC)

²⁰ *State of U.P. & Ors vs. Renusagar Power Co. & Ors*, (1988) AIR 1737

the generation in Renusagar as the own source of generation of Hindalco. In the impugned order of the profits of Renusagar have been treated as the profits of Hindalco. In the aforesaid view of the matter we are of the opinion that the corporate veil should be lifted and Hindalco and Renusagar be treated as one concern and Renusagar's power plant must be treated as the own source of generation of Hindalco and should be liable to duty on that basis.

In another case²¹, it was held that the subsidiary company has a distinct legal personality does not suffice to dispose of the possibility that its behavior might be imputed to the parent company. Such may be the case in particular when the subsidiary, although being a distinct legal personality, does not determine its behavior on the market in an autonomous manner but essentially carries out the instructions given to it by the parent company. When the subsidiary does not enjoy any real autonomy in the determination of its course of action on the market, it is possible to say that it has no personality of its own and that it has one and the same as the parent company. The modern tendency is, where there is identity and community of interest between companies in the group, especially where they are related as holding company and wholly owned subsidiary or subsidiaries, to ignore their separate legal entity and look instead at the economic entity of the whole group.

In another case²², the Supreme Court of India expounded “Every person is entitled so to arrange his affairs as to avoid taxation, but the arrangement must be real and genuine and not a sham or make-believe.”

The views expressed by Viscount Simon in a case²³ stated as follows: “Tax planning may be legitimate provided it is within the framework of law. Colorable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that is honorable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges.”

In another case²⁴, it has been held that a corporation is a distinct entity, yet in reality it is an association of persons who are in fact the beneficial owners of all the corporate property.

²¹ *Hackbridge and Hewittic Electric Company vs. GEC Distribution Transformers Ltd.*, [1992] 74 Comp Cas 543, 552-557, 563-571 (Mad)

²² *Jiyajeerao Cotton Mills Ltd. v. Commissioner of Income Tax and Excess Profits Tax, Bombay*, AIR 1959 SC 270

²³ *Latilla v. IRC*, (1943) AC 377

²⁴ *Gallagher v Germania Brewing Co*, (1893) 53 Minn: 214 NW 1115

Hence, It has been repeatedly held in the court of law that if tax is evaded with the use of colorable devices which are sham and make believe, then the fact that subsidiaries and the holding company being separate holding company can be pierced to determine the economic realities behind the legal relationship.

In a case²⁵, the Hon'ble U.S. Supreme Court held that it is a general principle of corporate law and legal systems that a parent corporation is not liable for the acts of its subsidiary, but the Court went on to explain that corporate veil can be pierced and the parent company can be held liable for the conduct of its subsidiary, if the corporal form is misused to accomplish certain wrongful purposes, when the parent company is directly a participant in the wrong complained of. In another case²⁶, the Court of Appeal emphasized that it is appropriate to pierce the corporate veil where special circumstances exist indicating that it is mere façade concealing true facts.

CONCLUSION

In recent times, Such tax planning strategies been used by Multinational Enterprises to reduce their tax bills is a common phenomenon in recent times. Using certain corporate structures enterprises often end up avoiding a large chunk of taxes, which may be attributable to them in normal circumstances. Due to the growing trend of such tax planning strategies and corporate structures, which are though within the letter of the law but end up evading large amounts of tax, which in itself is against the essence of law as a whole. These strategies are attractive propositions for Multinational Enterprises and have led to a large number of companies to use similar structures to reduce their tax bills. To counter such corporate structures, lifting of the corporate veil should be encouraged so as to look behind the legal façade and consider the economic reality behind such corporate structures.²⁷ In such cases where the intention of taxpayer is to avoid taxes, attention must be drawn to the fact that the profits made by the company as a whole are being enjoyed by the parent company itself, though in law the profits are attributable to the subsidiaries located in low tax jurisdictions or at the place the sales take place.²⁸

²⁵ *United States v. Bestfoods*, 524 US 51 (1998)

²⁶ *Adams v. Cape Industries Plc*, (1991) 1 All ER 929

²⁷ *Supra* at 22

²⁸ *Supra* at 17

DETERMINING THE “*DOMAIN*” OF TRADEMARK LAWS – APPLICATION IN THE INTERCEPTION OF CYBER SQUATTERS

*Amol Khanna and Sanchit Srivastava

1. INTRODUCTION

Trademarks are the identity of every product in the global market. A trademark serves as a source designator of a product or service, hence it is fundamentally essential to legally protect a trademark lest its usage by anyone but its owner lead to confusion in the minds of a consumer as to its origin

¹. Another, albeit auxiliary, reason for such protection is that none must reap the benefits of the efforts of the other, i.e., investment and labour of another must not be exploited. To put it simply, consumer perplexity and creation of such doubt is the basis for protection of trademark law. However, the caveat being that such protection extends to these limits only, that is to say, the actual protection of trademark is limited to preventing creation of doubts and confusion in the minds of the consumer and to protection of goodwill. This means that wherever there is a possibility that the market has two distinct products or services using the same mark, such usage shall ordinarily be allowed since this wouldn't lead to confusion amongst the consumers². It is imperative to mention here that the general principles and rules of what can be termed as 'trademark jurisprudence' do not extend to the cyber space realm. Cyberspace is colossal and cannot be compartmentalized into spheres to suit jurisdictional as well as jurisprudential convenience. It wouldn't be wrong to label cyber space as an interface catering to millions of consumers at a time.

1.1 ESTABLISHING AN INTERFACE BETWEEN TRADEMARKS AND DOMAIN NAMES

As mentioned above, the general and widely accepted norms of registration with respect to trademark do not apply to registration of domain name. The restrictions applicable to the former may not be the same for the latter. In layman terminology any name, whether invented, generic or arbitrary can be used as a domain name. With the businesses taking to technology and internet as their primary source of advertising and reaching out to the consumers, usage of proper domain names has become significantly important. Thus, businesses tend to prefer their trademarks or

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¹ *WCVBT v. Boston Athletic Association*, 926 F.2d 42 (1st Cir, 1991) (USA).

² *Mead Data Central, Inc. v. Toyota Motor Sales USA Inc.*, 875 F.2d 1026 (2nd Cir. 1989), 1031 (USA).

other famous marks as their domain names. Thus, domain names have attained enormous importance in this regard and hence the need to examine the interface between trademark law and cyber space. This is especially important because trademark law gets affected by domain names in more ways than one, some of which are discussed below.

Then, the Internet Corporation for Assigned Names and Numbers (ICANN) coordinates the Internet Assigned Numbers Authority (IANA) functions, which are key technical services critical to the continued operations of the Internet's underlying address book, the Domain Name System (DNS).³ This may lead to major problems, especially since any person, even if not associated with a known name, can register it, thereby preventing the genuine and rightful owner from using that name. Besides, considering the fact that such domain names are not case-sensitive nor can they be differentiated by virtue of application of distinct fonts, the above problem gets magnified.

Now, a particular website can be accessed from anywhere and hence, no geographical distinction can be made. That is, there is no separate barrier in cyber space. The entire space can be treated as a single territory, thereby greatly impeding and affecting the jurisdictional convenience in trademark law. This follows from the principle that the jurisdiction of courts is confined to national borders; however, cyber space is not governed or restricted by territorial boundaries and is essentially international in character⁴. Reiterating the same, there is a wide gap between the principles of personal jurisdiction which is essentially territorial and internet which defies territorial restrictions⁵.

The trademark law-cyber space interface leads to two conflicting yet interesting points of view. One view rejects the idea of application of trademark law to domain name registration. It supports the comparison of domain name to that of an address or building name, meaning thereby that a domain name acts merely as a way of accessing the cyber space. Following this view, it is often suggested that domain names are not in fact trademarks and hence legal actions based on the foundation of the contrary must be dismissed. Further elaborating on this view, the idea is that just

³ <<http://www.icann.org/en/about/welcome>> Last visited on 15 November 2014.

⁴ Howard B. Stravitz, Symposium, *Personal Jurisdiction in Cyberspace: Something More is Required on the Electronic Stream of Commerce*, 49 S.C.L. Rev. 925(1998), available at <<http://cyber.law.harvard.edu/property00/jurisdiction/stravitz.html>> Last visited on 15 November 2014.

⁵ Andrew E. Costa, Comment, *Minimum Contacts in Cyber Space: Taxonomy of the Case Law*, 35 House. L. Rev. 453, 455-56 (1998), cited in PAUL SIEGEL, COMMUNICATION LAW IN AMERICA 539 2nd ED. (2008).

as a postal address cannot be challenged on the ground that it is similar to a trademark and thus should be treated as such.

The contrary view, however, is that the domain names don't merely indicate the address of a website but play another role too. They serve as identifiers too, given the fact that they are alphanumeric and hence easy to recognize and recall⁶. It is for this reason that the company or person must not lose protection over the mark merely because it is being used in cyber space. Domain name derived from a famous trademark communicates the goodwill as well as the intangible value incorporated in that trademark, even though that trademark may not have been used for commercial benefits. Since identifying the source of product is a vital function of domain name, there is a need to treat them equivalently to trademarks as far as the legal protection and recognition that they are capable of infringing other trademarks is concerned⁷.

All the above finds importance and weightage in the fact that recognizable domain names are extremely valuable for corporations in order to enable them to establish their existence on the Internet. Such corporations lose the privilege of using proper domain names because they have been registered by someone else. This attains paramount significance because through one domain name, only a single address can be accessed, thereby eliminating the possibility of resolution by simultaneous usage. A domain name which mirrors a corporate name may prove to be an invaluable asset as due to this, communication with consumers is facilitated⁸.

1. LEGAL FRAMEWORK IN INDIA FOR TRADEMARK INFRINGEMENT

A person trespassing on the rights conferred upon the proprietor of a trademark subsequent to its registration commits infringement. These rights are contextual in nature i.e. they are dependent upon the terms and conditions imposed upon the proprietor while seeking registration.⁹ Therefore the prerequisites for an act to be termed as infringement can be pinpointed as follows:

- a) The mark used by the defendant must either be identical or deceptively similar to the registered trademark.

⁶ GRAHAM J. H. SMITH, *INTERNET LAW AND REGULATION* 47 2nd ED. (1999).

⁷ Richard L. Baum and Robert C. Combow, *First Use Test in Internet Domain Name Disputes*, 18 NATL. LJ, Feb. 12, 1996, p.30.

⁸ *MTV Networks, Inc. v. Curry* 867 F. Supp. 202, 203-04 (S.D.N.Y.1994).

⁹ P NARAYANAN, *LAW OF TRADEMARKS AND PASSING OFF* 531 6th ED (2004).

- b) The goods or services in respect of which it is used must be explicitly under the purview of the registration.
- c) The use must be in the course of trade in areas covered by the registration.
- d) The use must be in a manner which renders a likelihood of presuming it to be a trademark.
- e) The defendant should not be a permitted user under S. 2 (1) (r).

“Permitted use” under the aforementioned section means the use of a trademark by a registered user or by any person other than the proprietor and registered user in relation to goods and services with which he is connected within the course of trade and in respect of which the trademark is registered. Any person other than the registered proprietor or registered user of the trademark shall require the written consent of the proprietor prior to using his mark.¹⁰

The law also regulates the untoward practice at the stage of registration itself, and these provisions greatly supplement the scope of infringement. Under relative grounds for refusal of registration¹¹, it is provided that a mark shall not be granted registration if:

- a. it is identical with or similar to a registered mark,
- b. goods or services are dissimilar,
- c. the registered trademark has a *reputation* in India,
- d. the use of the mark by defendant must be without due cause, and
- e. the use of the mark takes unfair advantage of, or is detrimental to the distinctive character of the registered trademark.

Usage of the same mark on different services and goods is permissible under the trademark law as long as the said services and goods are away from the possibility of creating any confusion in the minds of the consumers, meaning thereby that concurrent usage is acceptable. Such a prospect is unlikely under the registration system of domain names. Each domain name is unique and hence cannot be used simultaneously. Therefore, a domain name cannot be used by two persons at a time, even if their products are absolutely distinct. In this regard, internet can be regarded as a *large geographic area*¹².

¹⁰ The Trademarks Act 1999, § 2 (1) (r).

¹¹ Id. § 11 (2).

¹² FAROOQ AHMAD, *DOMAIN NAME DISPUTES AND TRADEMARK LAW: CYBER LAW IN INDIA* 139 Pioneer Books (2001).

2. AN EXAMINATION OF THE APPLICABILITY OF TRADEMARK INFRINGEMENT PRINCIPLES TO DOMAIN NAMES

In 1999, USA enacted the Anti-Cybersquatting Consumer Protection Act (“ACPA”) which was solely dedicated to redress the issue of cyber squatters take undue credit of registered trademarks by using identical or similar domain names. However, prior to the enactment of this Act the US courts had recognized the importance of extending trademark protection to domain names at various instances. Therefore these case laws can serve as a tool to interpret the provisions of the Indian Trademark Act 1999 relating to infringement in light of domain names.

3.1 COMMERCIAL USE

According to S. 29 (6) of the Act, a person is deemed to be using a mark in the course of trade if, *in particular*, he – a) affixes it to goods or the package thereof, b) offers or exposes goods for sale, puts them on the market, or stocks them for those purposes under the registered trademark or offers or supplies services under the registered trademark, c) imports or exports goods under the mark, or d) uses the registered trademark on business paper or in advertising.¹³ The phrase “in particular” widens the discretion of the court to treat any other act or practice apart from those enlisted in the section within the meaning of commercial use.

In USA the term ‘use in commerce’ finds mention in Lanham Act and Trademark Dilution Act 1995 on the basis of which the US courts have laid down principles in the context of domain names.

In *Planned Parenthood Federation of America Inc. v Bucci*¹⁴, it was held by the US District Court of Southern New York that commercial use was the effect of the appropriation of the plaintiff’s registered mark by the defendant on the former’s activities. The defendant had registered a domain name <plannedparenthood.com> for a website promoting the sales of an anti-abortion book, which was based on the plaintiff’s federally registered mark “Planned Parenthood” for reproductive health care, maternal and neonatal care.

It was held that the defendant had used the mark as his domain name in order to reach to internet users intending to avail the services and views provided by the plaintiff. He succeeded in providing

¹³ Supra note 10 § 29 (6).

¹⁴ 42 U.S.P.Q. 2d 1930, 1946 (S.D.N.Y. 1997).

the users with “competing and directly opposing information”¹⁵ and preventing them from accessing the plaintiff’s website and as a result his services. The court concluded that the acts of the defendant caused commercial harm to the plaintiff and thus granted a preliminary injunction under § 1125 of the Lanham Act.

However, where a trademark is not used as a trademark but for other purposes it would not constitute commercial use.¹⁶ Mere registration of a domain name would also not amount to commercial use under the Lanham Act, however in a case where the defendant purported to re-sell the domain name it was held that this constituted “use in commerce”.¹⁷ This also answers the delicate question of a registrant obtaining a domain name for the sole purpose of warehousing it and to sell it later for profit. Such an act would also amount to use in the course of trade. Furthermore, the acceptance of domain name registration by the Registrar does not constitute use which would attract the remedy for infringement.¹⁸ The register does not conduct trade with the value of the trademark and any profits made by it arising out of technical function of domain names cannot convert this into trademark use.

3.2 SIMILARITY OF MARK WITH REGISTERED TRADEMARK

The statutory requirement of identity or deceptive similarity of the impugned mark with the registered trademark depends on the facts of the case. The perspective of a reasonable man with average intelligence and imperfect recollection needs to be considered for this exercise.¹⁹

The Bombay HC in *Hiralal Parbhudas v M/s Ganesh Trading Co.*²⁰ crystallized the principles for determination of similarity of marks into nine non-exhaustive rules –

“(a) what is the main idea or salient features, (b) marks are remembered by general impressions or by some significant detail rather than by a photographic recollection of the whole, (c) overall similarity is the touchstone, (d) marks must be looked at from the view and first impression of a person of average intelligence and imperfect recollection, (e) overall structure phonetic simitant

¹⁵ Id. 1938 (Wood U.S.D.J.)

¹⁶ *Avery Dennison Corp. v. Sumption*, 189 F. 3d 868, 980 (9th Cir. 1999).

¹⁷ *Intermatic, Inc. v Toebben*, 947 F. Supp. 1227, 1239 (N.D. III 1996).

¹⁸ *Lockheed Martin Corp. v Network Solutions, Inc.*, 985 F. Supp. 949, 959-60 (C.D. Cal. 1997).

¹⁹ *Harry Reynolds v. Laffeaty's Ltd.* 1958 R.P.C. 387. See also *Corn Products Refining Co v Shangri La Food Products Ltd* AIR 1960 S.C. 142 (INDIA), para 20.

²⁰ AIR 1984 Bom 218 (INDIA).

and both visual and phonetic tests must be applied, (f) the purchaser must not be put in a state of wonderment, (g) marks must be compared as a whole, microscopic examination being impermissible, (h) the broad and salient features must be considered for which the marks must not be placed side by side to find out differences in design and (i) overall similarity is sufficient. In addition indisputably must also be taken in-to consideration the nature of the commodity, the class of purchasers, the mode of purchase and other surrounding circumstances.”²¹

In *Comp. Examiner Agency, Inc. v Juris*²² the plaintiff owned trademark ‘JURIS’ and the defendant registered <Juris.com> as a domain name. Rejecting the contention that the mark and domain name were dissimilar, the court held that although the trademark was visually different from the domain name it could be accorded protection for all possible formats and designs. Furthermore, since upper and lower case letters do not have a functional difference over the Internet, a user would arrive at the same website with either <JURIS.com> or <Juris.com>. In *Hasbro v Internet Entertainment Group Ltd.*²³ the plea taken by the defendant that his domain name <candyland.com> for a website providing sexually explicit content was different from the plaintiff’s mark “CandyLand” used for a children’s board game was rejected on applying the ratio of *Juris*.

Thus the tests laid down by the Bombay HC are a reiteration of the combined principle of law established by the US courts through their judgments on the issue of similarity of marks, with special reference to the issue of squatting.

3.3 DILUTION OF TRADEMARK

Dilution of distinctiveness of trademark is a new cause of action provided under the 1999 Act, which was granted by the American courts. The Federal Trademark Dilution Act 1995 defined “dilution” as lessening of the capacity of a famous mark to identify and distinguish goods and services.²⁴

However, the 1995 Act did not expressly address the issue of domain name squatting. In his statement Senator Leahy²⁵ had opined that this “*anti-dilution statute can help stem the use of*

²¹ Id. para 5.

²² No 96-0213-WMB (Ctx), 1996 W.L. 376600, 1 (C.D. Cal. 22nd May, 1996)

²³ No C96-130 WD, 1996 W.L. 84853 (W.D. Wash. 9th February 1996).

²⁴ 15 USC § 1125 (c).

²⁵ 141 CONG. REC. S19, 312-01. (daily ed. 29 December 1995)

*deceptive Internet addresses taken by those who are choosing marks that are associated with the products and reputations of others.”*²⁶

The Act provides injunctive relief to the plaintiff on substantially establishing that a) he is the owner of a “famous mark”, b) the defendant has used that mark in the course of trade, c) the plaintiff’s mark was famous prior to such use and d) the defendant’s use diminished the distinctive character of the mark.²⁷

The likelihood of consumer confusion as the result of such dilution need not be proved; the mere fact that there has been an unauthorized use by the defendant of the mark is capable of gradually “whittling” away the source of the goods. In *Intermatic, Inc. v Toeppen*²⁸ the defendant had registered the domain name <intermatic.com> for a website displaying photographs of his home town, and “Intermatic” was the plaintiff’s registered famous mark for electronic products. It was found by the court that even though such use would not actually or tend to confuse the average consumer about the source, associating a famous mark with something not connected to the trademark holder invariably amounts to decreasing the latter’s effectiveness to identify and distinguish the proprietor in the market.

The burden of establishing that his mark is famous lies upon the plaintiff – merely proving distinctiveness of the mark does not satisfy this requirement. A famous mark is always distinctive albeit the converse position may not always be true.²⁹ However, the District Court of New Jersey digressed from this rule in *Jews for Jesus v Bradsky*.³⁰ The court observed that the domain name obtained by the defendant <Jewsforjesus.org> was identical with the plaintiff’s registered mark “Jews for Jesus” and website <Jews-for-Jesus.org>. The latter had acquired the status of a famous mark because of the monetary effort put into its advertising by the plaintiff, which they were able to establish. Dilution by tarnishment is another menacing practice adopted by trademark infringers. An instance of this in respect of domain names is the *Hasbro*³¹ dispute.

²⁶ Id.

²⁷ 15 USC § 1125 (d).

²⁸ Supra note 17.

²⁹ *Avery Dennison Corp v Sumpton* supra note 8.

³⁰ 993 F. Supp. 282, 308 (D.N.J.).

³¹ Supra note 23.

3.4 LIKELIHOOD OF CONSUMER CONFUSION

The fundamental principle behind a trademark is to distinguish goods or services provided by one person/organization from those of its competitors in the market. Therefore, trademarks need to be protected in order to ensure that the consumers do not get confused as to the source of any goods or services.

The Delhi HC in its judgment in *Kedar Nath Gupta v JK Organization*³² enumerated the factors which have to be taken into account for determining likelihood of confusion amongst consumers:

*“... For ascertaining confusion, one has to examine, (a) the nature of the two marks including the letters used, the style of using letters, the devise in which they have been used, the colour combination of the trade mark, (b) the class of customers, (c) the extent of reputation, (d) the trade channels, (e) the existence of any connection in the course of trade and, (f) all other surrounding circumstances. No doubt, it is not essential that all such factors should exist in each and every case to make out a case of passing off or infringement or to deny the registration of similar trade mark. But at the same time, it is also true that in case of presence of one single factor, leading to alleged deception or confusion would by itself not be sufficient to uphold the objection for registration of the trade mark.”*³³

The above non-exhaustive list can also be employed in determining consumer confusion in the context of domain names. Nonetheless the first factor may not prove useful in this endeavour, since over the Internet domain names cannot be separated by use of capitalization, stylized format or fonts.

The basis of these factors lies in the Second Circuit judgment in *Polaroid Corp. v Polaroid Electricals Corp.*³⁴ wherein eight non-exclusive grounds known as the “Polaroid factors” were laid down to establish likelihood of confusion. These factors are:

- a) The strength of his mark;
- b) the degree of similarity between the two marks;
- c) the proximity of the products/services;

³² 71 (1998) DLT 818 (INDIA).

³³ Id. para 40.

³⁴ 287 F. 2d 492 (2nd Cir. 1961).

- d) the likelihood that the prior owner will “bridge the gap”;
- e) actual confusion;
- f) the defendant's good faith in adopting its own mark;
- g) the quality of the defendant's product; and
- h) the sophistication of the buyers.³⁵

These principles have been invoked by the American courts while deciding disputes in the cyberspacial context. In *Public Service Co. of New Mexico v Nexus Energy Software*³⁶ the plaintiff was the owner of a federally registered service mark “Energy Place” and the defendant used the same as the domain name for his website <energyplace.com>. It was held that there was a possibility of consumer confusion when the overall impression of the two marks upon the mind of a consumer with “average intelligence” is taken into account.

In *SNA, Inc. v Array, SNA*³⁷ the defendant used the plaintiff's mark “Seawind” (amphibious airplane kits) as his domain name for publishing copies of Seawind builders, newsletters and other allied information. The courts held that the impression created by the defendants was that they were associated with the plaintiff company. Since the quality of the plaintiff's goods was known to the consumers, the defendants intended to ride on the existing goodwill. Thus the users would access the defendant's website under the illusion that it had a patronage with the plaintiff.

The US Court of Appeals (9th Circuit) for the first time in *Brookfield Communications Inc. v West Coast Entertainment Corp.*³⁸ evolved the doctrine of “initial interest confusion”. This is the case wherein a person initially gets confused as to the source of goods but soon realizes the actual identity of the source and no purchase takes place.

The rationale behind this doctrine is that the infringer captures the initial business contact via assumption of association between him and the registered mark. Even if there was no actual loss to the plaintiff, it would be safe to submit that the defendant would gain more consumers by appropriating the goodwill of the registered mark. This doctrine received vehement criticism all over the legal community however it has not been overruled. In a concurring opinion in *Playboy*

³⁵ Id. 495.

³⁶ 36 F. Supp. 2d 436 (D. Mass. 1999).

³⁷ 51 F. Supp. 2d 542 (E.D. Pa. 1999).

³⁸ 174 F. 3d 1036 (9th Cir 1999).

*Enterprises, Inc. v. Netscape Communications Corp.*³⁹, Judge Berzon of the Ninth Circuit asked whether the court wanted to “to continue to apply an insupportable rule”⁴⁰, thus lambasting the expansive interpretation given to the doctrine by jurists subsequent to the Brookfield judgment. Specifically she believes that keying clearly labeled advertisements to the plaintiff’s marks should not give rise to a trademark infringement claim because the consumer is not confused when he elects to visit the clearly labeled web site of the mark holder’s competitor, in lieu of that of the mark holder.

Even if the defendant has registered his website in the top level domain which is significantly different from the top level domain of the plaintiff in which he has registered his website, such a difference would not take away the likelihood of confusion, e.g. <.com> and <.net>.⁴¹

3. TRADEMARKS VIS-À-VIS DOMAIN NAMES IN THE INDIAN SCENARIO – POLICY AND JUDICIAL POINT OF VIEWS

In India there is no legislation expressly dealing with the disputes relating to domain name and cybersquatting. These disputes are dealt with under the Trademarks Act 1999 wherein the two remedies of infringement and passing off are available to the aggrieved parties.

Dispute involving bad faith registrations are typically resolved using the Uniform Domain Name Dispute Resolution Policy (UDRP) process developed by the ICANN. Under UDRP, WIPO is the leading ICANN accredited domain name dispute resolution service provider and was established as a vehicle for promoting the protection, dissemination, and the use of intellectual property throughout the world. India is one of the 171 states of the world which are members of WIPO.

A person may complain before the administration dispute resolution service providers listed by ICANN under Clause 4 (a) of the Policy that the domain name is identical or confusingly similar to his trade mark or service mark; and such use is *mala fides* and without any legitimate right or interest therein.⁴² Clause 4 (b) lists the circumstances in which such a registration shall be treated

³⁹ 354 F. 3d 1020 (9th Cir. 2004).

⁴⁰ Id. 1037.

⁴¹ *Washington Speakers Bureau, Inc. v. Leading Authorities, Inc.* 33 F. Supp. 2d 488 (U.S. Dist. 1999).

⁴² Uniform Domain Name Dispute Resolution Policy ICANN, cl 4 (a)

<<http://www.icann.org/en/help/dndr/udrp/policy>> last visited on 16 November 2014.

as *mala fides*. If the registrant had registered the domain name for “warehousing” it and later selling to either the complainant or his competitor for exorbitant value or to prevent the complainant from acquiring the same domain name, with an intention to accrue commercial gain by creating a likelihood of confusion as to source of the goods or services provided.⁴³

*Yahoo! Inc. v Akash Arora*⁴⁴ is probably the first reported Indian case wherein the plaintiff, who is the registered owner of the domain name “yahoo.com” succeeded in obtaining an interim order restraining the defendants and agents from dealing in service or goods on the Internet or otherwise under the domain name <yahooindia.com>.

In *Bennett Coleman & Co Ltd v Steven S Lalwani*⁴⁵, the complainant held the domain name <www.economicstimes.com> since 1996, using them for the electronic publication of their respective newspapers. The complainant had registered in India this mark for literary purposes. However in 1998 the defendant registered the same domain name. The WIPO judgment made it clear that the complainant had a very substantial reputation in their newspaper titles arising from their daily use in hard copy and electronic publication. It was also categorically held that the registration and use of the domain names by the respondents was in bad faith inasmuch their use amounted to an attempt to attract for commercial gain, Internet users to their web sites by creating a likelihood of confusion with the complainant’s marks as to the source, sponsorships, affiliation or endorsement of those web sites and the services on them.

The Delhi HC in *Dr Reddy's Laboratories Limited v Manu Kosuri*⁴⁶ acknowledged that domain name serve same function as the trademark and is therefore entitled to equal protection as trade mark. The domain name is not a mere Internet address for it also identifies the Internet site to those who reach it. If two domain names are almost identical or similar in nature, there is every possibility of an Internet user being confused and deceived in believing that both the domain names belong to plaintiff although the two domain names belong to two different concerns.

⁴³ Supra note 42.

⁴⁴ 1999 IAD Delhi 229 (INDIA).

⁴⁵ Case No. D2000-0014 < <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0014.html>> Last visited on 17 November 2014.

⁴⁶ 2001 (58) DRJ 241 (INDIA).

In *Aqua Minerals Limited v Mr Pramod Borse*⁴⁷ the Delhi High Court has held that unless the defendant has a credible explanation as to why did he choose a particular name for registration as a domain name or for that purpose as a trade name which was already in long and prior existence and had established its goodwill and reputation, there is an implied presumption that the defendant intended to ride upon the extant reputation and goodwill of the registered mark by using the same as his domain name. Thus the burden of proof of showing honest and *bona fide* use in cybersquatting cases rests upon the defendant.

4. CONCLUSION – HIGHLIGHTING THE NEED FOR EXCLUSIVE LEGAL SETUP

The preceding research shows that there is an eventual involvement of trademark law with its greatest emphasis on domain names. Trademark law has to come to grips with numerous issues thrown open by interception of internet domain names.

The Indian Courts have recognized a distinction between trademarks and domain name; the Hon'ble Supreme Court in *Satyam Infoway Ltd. v Sifynet Solutions Pvt. Ltd.*⁴⁸ observed that:

*"...distinction lies in the manner in which the two operate. A trademark is protected by the laws of a country where such trademark may be registered. Consequently, a trade mark may have multiple registrations in many countries throughout the world. On the other hand, since the internet allows for access without any geographical limitation, a domain name is potentially accessible irrespective of the geographical location of the consumers. The outcome of this potential for universal connectivity is not only that a domain name would require worldwide exclusivity but also that national laws might be inadequate to effectively protect a domain name"*⁴⁹

The Indian Courts though have recognized the lacuna; however in the absence of an explicit legislation, provisions of the Trademarks Act have to be applied to such disputes. The Supreme Court further observed that:

"As far as India is concerned, there is no legislation which explicitly refers to dispute resolution in connection with domain names. But although the operation of the Trade Marks Act, 1999 itself

⁴⁷ AIR 2001Del 467 (INDIA).

⁴⁸ AIR 2004 S.C. 3540 (INDIA)

⁴⁹ Id. para 18.

is not extra territorial and may not allow for adequate protection of domain names, this does not mean that domain names are not to be legally protected to the extent possible under the laws relating to passing off.⁵⁰

The current series of domain name disputes can be attributed to the technological limitations which do not easily allow every trader to have a domain name identical to his trademark. Directory technology, which is based on real name system, can be an alternative to DNS.⁵¹ This technology does not require domain names to access websites as it is essentially a “searching and browsing” system. Each page has a recognizable name and the consumer shall be directed to the website of his own interest by artificial intelligence. The indispensable reliance on domain names can be reduced through the use of this upcoming system.

The Indian legislators have shown reluctance in amending the definition of “mark” as in the Trademarks Act 1999 so as to include domain names within its purview. Enacting a law singularly concerned with regulating the issue of cybersquatting would also help a great deal, since the traditional principles of trademark law do not completely fit the realm of cyberspace. The information technology laws of this country also suffer from the vice of antiquity when compared with cyberspace legislations all across the world. India, in this respect, has lagged behind in its obligations under the TRIPS agreement to maintain sufficient standards of protection of intellectual property rights through municipal laws. The laws of our land are ill suited to the changing technologies and issues arising thereof. Therefore it is imperative that the legal setup of our country dedicated towards protection of intangible intellectual property must be moulded so that it is better equipped to combat the challenges in this era of technological advancement.

⁵⁰ Supra note 48, para 25.

⁵¹ DOMAIN NAME SYSTEM: HEARING BEFORE THE SUBCOMM. ON BASIC RESEARCH OF THE HOUSE SCIENCE COMM, 105th Cong. 1997 W.L. 14151463 (1997) cited in *Lockheed Martin Corp. v. Network Solutions, Inc.*, supra note 18.

JUDGING OF THE JUDGES

[RETURNING OF EXECUTIVE FUNCTION IN APPOINTMENT OF JUDGES OF HIGH COURT AND SUPREME COURT]

Deepika Kulhari*

INTRODUCTION – BREIF HISTORY

“Even so, the creed of judicial independence is our constitutional ‘religion’ and, if the executive use Article 222 to imperil this basic tenet, the Court must ‘do or die’” — Justice Krishna Iyer

In England, Judicial Appointment Commission is responsible for the selection of the members of the Supreme Court. The commission consults the with the senior judges, i.e. the Lord Chancellor and leader of the devolved government, and the Crown acts on advice of Lord Chancellor, who being the judicial head and the member of cabinet, consults his choice with the Prime Minister. Therefore, the system of appointment of the judges of the Supreme Court is done with consultation of the executive in order to secure it from the absolute independency of Judiciary.

But in India it is considered dangerous to let the executive alone decide the matter of appointment of Judges, as it would render the appointment so made on political biasness. Thus, the executive with the consultation of people who are well qualified should give advice on such a matter, also it does not give the sole power to the Chief Justice of India to make decision for his colleagues, as giving sole power may result in decision so made as prejudices of a single person.

The *Sapru Committee report* (1945)¹

¹ Recommended that the Justices of the Supreme Court and the High Courts should be appointed by the Head of the State upon consultation with the Chief Justice of the Supreme Court and in case of High Court with the chief justice of the High Court and head of unit concerned. And judges of all court could be removed on grounds of misbehavior or infirmity of mind by the Head of the States. Then the *Union Constitution Committee* in 1947 added new point in recommendation that all the judges shall be appointed by the President in consultation with the Chief Justice of the

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¹ Justice Shri B.P. Jeevan Reddy, *National Commision tp Review on Working of the constituion Consultation Paper on ‘Superior Judiciary’*, (Sept 26,2011), <http://lawmin.nic.in/ncrwc/finalreport/v2b1-14.htm>

Supreme Court and the High Court as such. In terms of legal provision, it meant that appointments would have to be taken out of the unfettered discretion of the executive, as was the case under colonial rule. Thus, for the first time a consultative method of appointment was proposed and so formed in Article 124 and Article 217 of the Constitution, with judges of the Supreme Court appointed by the President in consultation with the Chief Justice of India. And the judges of the High Court also were to be appointed by the President, in consultation with the Chief Justice of the High Court, the Premier (Governor) of the province concerned and the Chief Justice of India.

The provisions of these Articles were challenged for the first time in case of *Union of India v. H.C. Sheth*², where majority view was that the executive (an unbridled charter) shall inflict injury on a High Court Judge by transferring him from one High Court to another High Court, if the judge gives judgement in any case which does not conform to the expectation of the executive. Thus, a High Court Judge had to work constantly under the threat of transfer, which impeded the independency of a High Court Judge. Thereafter, a letter was issued by the then Law Minister in the year 1981 stating that there was a policy of transferring 1/3rd of the judges of High Court to another High Court.

The second case was *S.P. Gupta v President of India*³, where the validity of transfer of Hon'ble K.B.N. Singh, who was the then Chief Justice of Patna High Court, to Madras High court, was questioned. But while deciding the case majority judges upheld the decision that was mentioned in the letter so issued by the Union Law Minister in 1981. Therefore giving primacy to Executive and considering such transfer valid.

In *Subhas Sharma's*⁴ case the Supreme Court took the view that the correctness of the majority view in S.P. Gupta case should be considered by a larger bench. A direction was issued for constituting a Bench of nine Judges to examine two questions, they are as follows-

1. The position of the Chief Judges Judge of India and primacy of his opinion.
2. Justiciability of the fixation of Judges strength.(Art. 216)

²AIR 1977 SCC 2328

³AIR 1982 SC 149

⁴*Subhas Sharma v. Union of India* (1991) Supp. (1) SCC 574 : AIR 1991 SC 631

Later, in case of *S.C. Advocates- on- Record Association v. Union of India*⁵(*second judge case*), majority view (seven out of nine judges) was of the opinion that the Chief Justice of India has ‘primacy’ in the matter of selection and appointment of the judges of the Supreme Court and the High Court as well. Also when it comes to the transfer of Judge of one High Court to another High Court supremacy remains in hands of Chief Justice of India. Judges Bench also concluded that the word ‘consultation’ would almost mean ‘concurrence or consent’. Therefore, the decision in case of S.P. Gupta’s case was overruled. Similar propositions were laid down in the case of *H.C.S. Sheth’s*.

In 1998 the Supreme Court in case of *In Re Special Reference*⁶ laid down various guidelines where it was suggested that a Collegium shall be formed for the appointment of Supreme Court judges and transfer of High Court Judges.

- Collegium shall comprise of the Chief Justice of India plus four senior judges of the Supreme Court. They can recommend the appointment of a Supreme Court judge; transfer a Chief Justice or transfer of any puisne judges of a HC.
- Views of the judges ‘consulted shall be in writing & conveyed to the government by the Chief Justice of India. If the recommended appointments are not made by the Government, the Chief Justice of India shall act in consultation with other Supreme Court judges.

The purpose behind forming this ‘collegium’ was that of selecting the best available judges for composition of the Supreme Court and the High Courts, it was also essential in order to achieve independency of the judiciary that opinion of Judges was given preference over opinion of executive bodies.

PRESENT SCENARIO

The ‘Collegium’ system was followed until now, but recently some objections were raised in appointment of judges by the ‘Collegium’. The *Special Reference case* left limited scope for judicial review and restrained the justifiability of such recommendations and appointment of Judges. In the case of *Mahesh Chandra Gupta v. Union of India*⁷ the issue regarding the elevation

⁵AIR 1994 SC 268

⁶ 1998 7 SCC 739

⁷(2009) 8 SCC 273

of a High Court Judge on a recommendation of the collegium was raised in the High Court of Allahabad. Yet again it was held therein following decisions of the *special reference case* that suitability of a recommended and the consultation are not subject to judicial review. Only issues regarding lack of eligibility or an effective consultation can be scrutinised, for which a writ of *Quo Warranto* would lie in court.

Few months back a letter was purported by the Chief Justice of the Supreme Court, Altamas Kabir, who considered the names of senior judges, including Justice Mohit S Shah, Justice Bhaskar Bhattacharya and Justice Barin Ghosh, Chief Justice of the Bombay, Gujarat and Uttarakhand High Courts, respectively, for elevation to the top court (SC)⁸. "The collegium has unanimously taken the view that they are not suitable to hold the office of Supreme Court judge and their elevation as such would prove to be counter-productive and not conducive to administration of justice," the CJI wrote.⁹ Appointment of such judges with use of the collegium system for High Court in the first place was criticised on grounds that it is not a transparent system. It also hinders our democratic structure as such.

In order to check this problem and in order to achieve check and balance over such ultra vires power of collegium, on December 9, 2013, the Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, submitted its report on the Judicial Appointments Commission Bill, 2013¹⁰. Though debated, but was passed by the upper house of Parliament, the Rajya Sabha, on September 5, 2013. The proposition has been accepted by lower house and the bill was duly passed on August 11, 2014.

In this 121st amendment bill, 2014, judicial appointment is to be constituted as follow:

- It proposed to insert a new Article 124A to constitute a Judicial Appointments Commission for making recommendations with respect to the appointment of Judges in Higher Judiciary wherein,
- Parliament is supposed to make a law for:
 - Composition of Judicial Appointments Commission

⁸March 2013

⁹ Nagendar Sharma, *Panel finds 3 top judges unfit for SC*, Hindustan Times New Delhi, March 17, 2013

¹⁰ Department-Related Parliamentary Standing Committee on personnel, Public Grievance, Law & Justice, *64th Report -The Judicial Appointments Commission Bill, 2013*, presented to the Rajya Sabha on 9th December, 2013, <http://www.prsindia.org>.

- Functions of the JAC
- Manner of selection of the Chief Justice of India & other Supreme Court Judges, Chief Justices & other High Court Judges.

An accompanying JAC Bill gives details for the composition of the JAC and its terms, both clearly give the executive, a role in deciding judicial appointments to higher courts but to this some says, it jeopardised the constitutional requirement of an independent judiciary.

JAC will comprise of the Chief Justice of India as chair, two senior most Supreme Court judges, Minister of Law and two members who shall be nominated by collegium. And Collegium will consist of the Prime Minister, the Chief Justice of India and the Leader of the Opposition of Lok Sabha.

MERITS OF JAC

A.P Shah, while attacking system of collegium¹¹ which was followed before the bill of 2013 was passed, said, “The present system of judicial appointments in the constitutional courts exemplifies the misalignment between the core values of judicial independence and accountability”. He further added that the system of collegium should step out of democratic structure as it lacks transparency.

Democracy is where government is under duty to look after betterment of its people. It is a government elected by the people themselves; therefore keeping the system transparent is the duty of the Government. The Judiciary is under a duty to support such act of executive government which gives safeguard to our constitutional structure.

The Standing Committee made some good recommendations, as was also supported by Mr.Ram Jethmalani’s-(who was one among other members of the standing committee). The report said that the structure and functions of the JAC should be put into the constitution itself, so that the composition of the JAC cannot be altered without a constitutional amendment.

In prescribing the appointment of judges to the Supreme Court and the High Courts by the collegium (followed before amendment bill 121), the Supreme Court did not realise the burden it was imposing on the collegium for selecting judges for the Supreme Court and High Courts and transferring them from one High Court to another. At any given time there are two to three

¹¹ The times of India, *Collegium system failed: Law panel chief*, July 26,2014

vacancies in the Supreme Court, and 200 vacancies in total 22 High Courts and also various transfer of a number of judges yet are to be made. An administrative task of this magnitude must necessarily detract the judges of the collegium from their principal judicial work of hearing and deciding cases. The collegium neither had a secretariat to shoulder this burden nor an intelligence bureau to make appropriate inquiries of the competence, character and integrity of a proposed appointee. This problem has been solved by JAC.

DEMERITS OF JAC

After the problem which was raised recently, i.e. Chief Justice of the Bombay, Gujarat and Uttarakhand High Courts were considered to be corrupt, therefore not fit for the post of judge in the Supreme Court, so raised by SC Justice Altamas Kabir, JAC seems like need of time. But at the same time JAC also lags on some grounds.

The Standing Committee recommended adding a 7th member to the JAC: one more “eminent person”, who “should be from SC/ST/OBC/Women/minority, preferably by rotation”. This is a dangerous suggestion because it tilts the balance of power on the JAC in favour of its non-judicial members.

It is to be recalled that the JAC, in its present form, has 6 members: three judicial and three non-judicial (the “eminent persons” count as non-judicial members since they’re appointed by a collegium consisting of a majority of politicians). By adding a third “eminent person” to the JAC, the Standing Committee has recommended that the non-judicial members should outnumber the judicial members on the collegium 4 to 3. This will give the executive an upper hand in the judicial appointments process.

As compared to collegium the success of the JAC, assessing from the perspective of judicial independence and impartiality, will depend on how it will frame its own regulations for inviting recommendations and short-listing candidates, and which factors will it consider while discharging its functions. There is chance that the parliament may select its own preferable candidate.

Therefore, these serious issues have been ignored by the new system of JAC, which may bring a dangerous consequence to the Indian Judiciary.

CONCLUSION

The Indian judiciary is one of the most powerful in the world. One of the reasons for this is that our constitution is constituted in a way that it keeps check and balance on each organ of government. Hence, if there is a question of misuse of power by any of the organ, it can be checked by the other organ. Also our constitution provides various provisions such as Article 50, where separation of power gives each organ individuality and independency. Since the Constitution does not provide the power to appoint judges to itself, surely the Judiciary has 'assumed' this power on its own, when it started following (older) collegium system. Such an assumption of a vital democratic function, without any legal source of authority is a trait of autocracy, not democracy.

The amendment bill 121st (JAC bill) has respected this regard of checks and balances i.e. one of the important feature of our constitution. As now that the Executive shall have its hand in appointment of judges therefore, have check on appointment of judges which was functions of judiciary will be there. The JAC committee shall be consisting of the Chief Justice of India as its chairman and two senior judges of the Supreme Court. Hence it providing the balance of power to judiciary as there will be involvement of CJI and other judges in the committee for appointment of judges , also parliament (on part of legislature) will make laws is a positive step towards providing rule of check and balance on other two organs.

Moreover, the primary aim must be to reach an agreed decision taking into account the views of all the consultees, and it should give greatest weight to the opinion of the Chief Justice of India who, as earlier stated, is best suited to know the worth of the appointee. No question of 'primacy' would arise when the decision is reached in this manner by consensus, without any difference of opinion.

Involvement of president under Art.217 (3) in determination of age of High Court judges with consultation of Chief justice was considered as a quasi-judicial function was so held in case of *Union of India v. Jyoti Prakash*¹². Though the president's decision was considered as final, but this too (ouster clause) does not ordinarily oust the power of the court to review decision.¹³

¹²1971 1 SCC 396

¹³*Union of India v. Sankalchand* AIR1977 SC 2328

Decision of the executive was never ouster from judicial review. Even before collegium system it was under control of judiciary, as judicial review of President's decision could be done. So if any problem involving President's Role in appointment of a judge is raised, it can be covered under judicial review for recheck. In the book '*the Supreme court by Lawrence Baum*'¹⁴ he says the president helps to shape the government litigation policy and thus affects the Court's decisions through appointment of the solicitor general (law officer) and occasional intervention in specific cases.¹⁵ Thus, this view of involvement by president in appointment of judges is supported. It was followed before the collegium system was introduced. The view has been supported by the standing committee and has been made part of JAC amendment bill.

And if we give current issue of 'corruption' a close look and think again, was it really system that failed and is system (collegium) to blame for corrupt Judges ? The learned Lord Alfred Thompson Denning states 'Be you ever so high, the law is above you'¹⁶. Here it applies to Judges as well as to officers holding high public office. Therefore corrupt judges should be removed from High court as well. Those who are not fit for SC judge are as well unfit for HC too. Appointment of such corrupt judges of HC should not have been done.

Justice V.R.Krishna Iyer in his case for a council to choose judges says 'in a democracy, even the judiciary must share a people oriented dimension 'even at this stage of an appointment'. In the U.S., president nominates the members of the Senate Judiciary Sub- committee, but it exposes his own nominees to democratic criticism without inhibition, unravelling every angle of a candidate's class, antecedents, character and other socio-economic factors relevant to his role as a potential judge of the Supreme Court. If this system can be followed there successfully, so why can't India follow it?

Further he adds "Whatever touches us all should be decided by all". Therefore, involving role of President and Prime Minister (the Executive) in appointment of judges of HC and SC is a positive step. It is beneficial as the burden of appointing judge will now not be entirely on the judiciary but shall be divided between both the organs of the Government. It is a favourable step as it will also

¹⁴ Lawrence Baum, Ohio State University, *The Supreme Court*, 11th Edition, 2012.

¹⁵Pg. 135

¹⁶ *Gouriet vs Union of Postal Workers* 1977 1 All ER 696

improve relationship between both the organs, for they have to conclude and select Judges after agreeing to each other consent.

Therefore, the 121st amendment bill, 2014 will hopefully change the present condition in Indian Judicial system. Judiciary and law play very important role. It affects all citizens on personal level. It is through judiciary that today a common man seeks justice for even in those matter or issues where legislature failed or could not provide law and protection as such. Where will the common man go, if the judges they stand before are themselves corrupted, from whom will they seek justice? Forming JAC for changing this situation has brought hopes in mind of all of us. Although not perfect, I still personally support such change. And the current issue of corruption in India which judiciary is part of, can be solved with the help of JAC in issue regarding appointment of judges for HC and SC

JUDICIAL ACTIVISM IN INDIA

Nitu Mittal And Tarang Aggarwal*

1. INTRODUCTION

The term "judicial activism" was coined for the first time by Arthur Schlesinger Jr. in his article "The Supreme Court: 1947" published in Fortune magazine in 1947.

¹ Wharton's Concise Law Dictionary defines Judicial Activism as a philosophy of Judicial decision whereby judges allow their personal views about public policy, among other factors, to guide their decisions usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore precedents (Black's Law Dictionary, 7th edition p 850).

The definition of Judicial Activism has been differently stated by different people. Those who favour Judicial Activism say that it is a legitimate form of Judicial Review. However, Thomas Jefferson calls it "Despotic Power" of Federal Judges.² V.D. Kulshrestha says that when the judiciary is accused of actually participation in the law making process and so to say becomes a key player in the law making process, then such move on the part of Judiciary is termed as Judicial Activism.³ Upendra Baxi widens this concept by saying that "*In a sense, the power to interpret law is the power to make them; and the power to manipulate the interpretation process is also the power to make law.*"⁴

There is no end as to how one can define and interpret Judicial Activism. Over the last few years there have been several controversial decisions given by the judges of the Supreme Court and the

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¹ Jha K., "*Judicial Activism in India*", (23 February 2012), Retrieved on 9 August 2014
<http://lawthing.blogspot.in/2012/02/judicial-activism-in-india.html>

² Haines & Sherwood, "The Role of the Supreme Court in American Government and Politics", Vol. 1, University of California Press, pp.209, Retrieved on 2 September 2014,
http://books.google.co.in/books?id=qWIMgSqhRv4C&pg=PA254&lpg=PA254&dq=%22despotic+branch%22+jefferson+adams&source=bl&ots=kjs0wYo4d1&sig=IBv5ditYQw7_M0vY1U148cpcquM&hl=en&sa=X&ei=027uTqLzHcjc0QGErXQCQ&redir_esc=y#v=onepage&q=%22despotic%20branch%22%20jefferson%20adams&f=false

³ Kulshrestha, V.D., "*Landmarks in Indian Legal and Constitutional History*", Lucknow, Eastern Book Company, Ninth Edition, 2009, pp. 491

⁴ Baxi, Upendra, "*Law, Struggle and Change: An agenda for activists*", *Social Action*, 1985, Vol 35

High Courts which have triggered off the debate and has generated a lot of heat. But still, what the term "Judicial Activism" actually connotes is still a mystery.⁵

2. HISTORY OF JUDICIAL ACTIVISM IN INDIA

The transformation of Indian Courts from a restraint one to an activist one has been a long and a complex process. In the beginning the role of Judiciary was so conservative that it interpreted the Fundamental Rights and the Constitution in a static and traditional colonial manner and ignored the Directive principles.⁶ This could be seen in several cases.⁷

Upendra Baxi said that before 1967 the Indian courts were a centre of Political power. In his book he writes that "The home truth is that The Indian Supreme Court is a centre of political power, even though a vulnerable one. It is a centre of political power simply because it can influence the agenda of political action, control over which power politics is in reality all about."⁸ He further added that this was of no help as the Supreme Court still remained vulnerable.

The Court had no consistency in the sense that politicians had. He concluded that the result of this would be negative. By this he meant that when the court would be in crisis, there is no assurance that there would be anyone to support it. That would be the time when even the legal profession would get divided.

3. JUDICIAL ACTIVISM- A PART OF JUDICIAL REVIEW

The public debate over judicial review primarily revolves around denunciations of judicial 'activism'. The term does not have any clear content but some basic notion of activism underlies the normative scholarly debate over judicial review as well.⁹ All those who support Judicial

⁵Saha, Arpita, "Judicial Activism in India: A Necessary Evil", 2008, July Retrieved on September 20, 2014 from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156979&http://www.google.co.in/url?sa=t&rct=j&q=case+s+solved+by+judicial+acctivism&source=web&cd=6&ved=0CEUQFjAF&url=http%3A%2F%2Fpapers.ssrn.com%2Fsol3%2Fdelivery.cfm%3Fabstractid%3D1156979&ei=EBFaUIzrAc_trQfah4CwBA&usg=AFQjCNFunn5AZM-Cu6dJU39GinqFhrsWEEg

⁶Kulshrestha, V.D., "Landmarks in Indian Legal and Constitutional History", Lucknow, Eastern Book Company, Ninth Edition, 2009, pp. 492

⁷*Sri Sankari Prasad Singh Deo v. Union of India*, 1951 AIR 458, 1952 SCR 89; *Sajjan Singh v. State of Rajasthan*, 1965 AIR 845, 1965 SCR (1) 933 ; *ADM Jabalpur v Shivkant Shukla* (1976) 2 SCC 521

⁸Baxi, Upendra, "The Indian Supreme Court and Politics", Eastern Book Company, Law Publishers and Booksellers, pp.10

⁹Whittington, K.E. (2011), "Theories of Judicial Review", Princeton University, Department of Politics, 240 Corwin Hall, 258-3453, Retrieved on September 7, 2014 http://www.princeton.edu/~kewhitt/judicial_review.pdf

Activism say that it is nothing but a legitimate form of Judicial Review. The emergence of judicial review gave birth to a new movement which is known as judicial activism.¹⁰

Justice (Retd.) Janardan Sahay, at the inaugural session of a conference on “*Judicial activism in India: Prospects, challenges and threat*” said that “Judicial activism means expansion of judicial review in both administrative and legislative domains.” These words acquired new meaning with changing times and context. Thus, the emergence of Judicial Activism has been possible only due to review power of Judiciary and unless any Judiciary climbs the ladder of Judicial Review, it can never try upon Activism as it will face immense opposition.

Though there is no article which specifically mentions the term Judicial Activism and it is still a debated issue. However, Article 142 of the Indian Constitution¹¹ is considered as one of the most splendid articles in Indian Constitution that favours Judicial Activism.

4. KESAVANANDA BHARTI CASE- ACTIVISM IN REVIEW

Famously known as the “*Basic Structure Doctrine*”¹² this case is one of the landmark cases in the Indian history. The question raised was that whether the Parliament had the power to take away the fundamental rights of the citizens granted under the articles 25, 26, 14 and 19(1)(f) by way of amendment as mentioned under 368 of the Constitution of India. This was not for the first time that such a question had been raised. It was first raised in *Sri Sankari Prasad Singh Deo v. Union of India*¹³ and then in *Sajjan Singh v. State of Rajasthan*¹⁴. In both the cases the power to amend was upheld by Article 368. The same case was again raised in *Golaknath v State of Punjab*¹⁵. Here it was stated that:

- Amendment in the constitution came within the ambit of law as defined Article 13.
- Article 13 prohibits the state from passing laws which "take away or abridge" the Fundamental Rights.

¹⁰ “*Judicial Activism in India*”, Thursday 23, February 2012, Retrieved on September 7, 2014 <http://lawthing.blogspot.in/2012/02/judicial-activism-in-india.html>

¹¹ Enforcement of decrees and orders of Supreme Court and unless as to discovery, etc

¹²*Kesavananda Bharti v. State of Kerala*, (1973) 4 SCC 225:AIR 1973 SC 1461

¹³ 1951 AIR 458, 1952 SCR 89

¹⁴1965 AIR 845, 1965 SCR (1) 933

¹⁵1967 AIR 1643, 1967 SCR (2) 762

- Article 368 does not give legislature the power to amend the constitution but only provides for the procedure.
- Amendments which "take away or abridge" the Fundamental Rights provisions cannot be passed.

It was finally in *Kesavananda Bharti* that the Hon'ble Supreme Court said that the Parliament by way of amendment could not take away the fundamental rights of citizens or amend the basic structure of constitution. This move of the Supreme Court showed activism on its part. Baxi says "In the sense in which we use the notion of judicial activism, the assertion of judicial reasoning over the amendatory power is the remarkable feature of judicial activism, unparalleled in the history of world constitutional adjudication. The Indian Supreme Court is probably the only court in the history of human kind to have asserted the power of judicial review over the amendments to the constitution".¹⁶

The courts had been known for reviewing and invalidating executive and administrative action, they also reviewed laws made by the legislatures but this had happened first time in the history that courts had assigned themselves the task of judging and invalidating and amendment to the text of constitution.

5. EMERGENCY AND JUDICIAL ACTIVISM (TUSSELE BETWEEN LEGISLATURE AND JUDICIARY)

The political dominance over the Judiciary could be seen in the Emergency period which marked the darkest side in the entire history of Indian Judiciary. It is considered to be the first phase of Judicial Activism. This entire process began with the famous case *Indira Nehru Gandhi v Raj Narain*¹⁷. The case was filed by Raj Narain who challenged Indira Gandhi's Election on the grounds of fraud. The matter was taken to the Allahabad High Court wherein Justice Jagmohan Lal Sinha by his courageous judgment held Indira Gandhi's election to be void and barred her from contesting elections for the next 16 yrs.

The matter was taken to the Supreme Court where Indira Gandhi moved the Supreme Court to grant an "Absolute Stay" on the order of High Court. Justice Iyer refused to grant the stay and

¹⁶ Baxi, Upendra, 'A pilgrim's progress: The Basic Structure Revisited', *Indian Bar Review*- Vol. 24(1&2) 1997, 53.

¹⁷1975 Supp SCC 1: AIR 1975 SC 2299

refused the Prime Minister the right to vote; permitting her to only to address both the houses of Parliament and draw her salary in her capacity as Prime Minister. The next day of the judgment was followed by the imposition of Emergency by Indira Gandhi under Article 352 of the Indian constitution.

5.1 EMERGENCY PERIOD: THE THREE PHASES

The Emergency Period has been divided by Upendra Baxi into three phases in his book “The Indian Supreme Court and Politics”¹⁸.

The first phase lasted from June to December 1975. It was during this phase that the 39th Amendment to the constitution was passed and Article 71 dealing with election of President and Vice President was amended to validate the election of Indira Gandhi and the Supreme Court was to pronounce its decision on the validity of all these retroactive changes in the electoral law. This showed that the Supreme Court had to surrender in front of the politics played by Indira Gandhi.

The second phase lasts from January to June 1976. This period is marked by the search of a new Constitutional census and a general assault on the power of the courts, especially the writ jurisdiction. Sixteen High court judges were transferred in this period without their consent. It was in this period that the famous Habeas Corpus case¹⁹ was heard. The judiciary like the other organs of the government was at the verge of falling in line with Indira Gandhi's concept of “committed judiciary” but Justice Khanna's minority judgment in this case saved it.

The third phase lasts from June 1976 to March 20-24 1977. The crucial aspect of this phase was the supersession of Justice Khanna (due to the Judgment given by him in *ADM Jabalpur* by appointment of Justice Beg as CJI).

The three phases of Emergency showed the powerlessness of the Indian Judiciary. The High Court judge's image was even worse. Baxi says that:

The High Court judges are made of such stuff that they panic at the whiff and whisper of being transferred to another court, they feel readily threatened by the circulars issued by a Law minister; they tremble with fear at every utterance of the Prime Minister of India or some irate Chief

¹⁸See Baxi, Upendra, “*The Indian Supreme Court and Politics*”, Eastern Book Company”, Law Publishers and Booksellers, “*THE TWILIGHT OF LEGITIMACY: THE SUPREME COURT AND THE EMERGENCY*”

¹⁹*ADM Jabalpur v Shivkant Shukla* (1976)2 SCC 521

Ministers of States or by assorted politicians; the additional judges of the High court regard themselves as civil servants litigating over their appointments and promotions.²⁰

This however was not the destiny of the courts of India. The good times came for the judiciary when the Janata Dal government headed by Moraji Desai came into being and did away with the antidemocratic set up of replacing the highest judicial tribunal by a non-judicial body. By the 44th amendment all the powers of the courts were restored in the same manner as they were previously exercised. Several landmark judgments were given by the Supreme Court. One such included the famous case of *Maneka Gandhi v Union of India*²¹. This was the first move of Supreme Court to transform itself into an activist one.

The difference in the opinion of the court from the Gopalan case²² was commendable and showed activism of the court. The famous case of *S.P. Gupta v Union of India and others*²³ further uplifted the judiciary. The case was known as “*Judges Transfer Case*” in which the issue of transfer and appointment of additional judges of High court (along with other issues) was raised. The decision made by the judges was commendable. Justice Gupta, a member of the minority stated that:

“The independence of the judiciary depends to a great extent on the security of tenure of the Judges. If the Judge’s tenure is uncertain or precarious, it will be difficult for him to perform the duties of his office without fear or favour.”

This was just the beginning. After this many remarkable judgments were passed by the judges which strengthened the Indian judiciary and made it as powerful as it is today.²⁴

6. RISE OF JUDICIAL ACTIVISM IN INDIA

6.1 PUBLIC INTEREST LITIGATION

After independence though situations improved for the Indians, however still a large section of population lied below the poverty line. In such a situation, it was natural that the courts and the notion of justice could be used only by the well to do sections. This led to the birth of Judicial

²⁰Baxi, Upendra, “*Judiciary at the Crossroads*”, Journal of Bar Council of India, 1982, Vol. 9(2)

²¹(1978) 1 SCC 248

²²*A.K. Gopalan v State of Madras*, AIR 1950 SC 27 :1950 SCR 88

²³AIR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365

²⁴See, *Mohd. Ahmed Khan v. Shah Bano Begum*, (1985) 2 SCC 556 : 1985 SCC (Cri) 245; *Ram Gopal Sharma v Sukhdev Raj Rudra*, (2001) 9 SCC 201; *Bank of India v. O.P. Swarnakar*, (2003) 2 SCC 721; *Zee Telefilms v. UOI*, (2005) 4 SCC 649.

Activism in India which enabled the High Courts to reach large masses and thus provide justice to the poorest of the poor. The assumption of judicial activism and liberalization of the doctrine of *locus standi* opened the doors of court for large sections of disadvantaged people to seek justice through what is called **Public Interest Litigation** (PIL).²⁵

The emergence of PIL was important in many ways. Firstly, it made justice available to a large section of people. Under this, any person could move approach for any matter regarding public welfare by filling a petition in the Supreme Court under article 32 and High Court under article 226 of the Constitution of India. The seeds of this concept of public interest litigation were initially sown in India by Justice Krishna Iyer in 1976 in *Mumbai Kamagar Sabha vs. Abdul Thai*²⁶.

It was initiated in *Raihvaiy v Union of India*, wherein an unregistered union of workers was permitted to file a writ petition under Art.32 of the Constitution for the redressal of their disputes collectively. Krishna Iyer J. enunciated the reasons for liberalization of the rule of Locus Standi in *Fertilizer Corporation Kamgar vs. Union of India*²⁷ and the ideal of 'Public Interest Litigation' was blossomed in *S.P. Gupta and others vs. Union of India*²⁸. Several new principles have been propounded by the Supreme Court in public interest litigation cases.

For instance, the principle of '**absolute liability**' was propounded in *Oleum Gas Leak case*²⁹. The '**Public Trust Doctrine**' was propounded in *Kamalnath Case*³⁰. Further, the Supreme Court has given variety of guidelines with respect to filing of PIL in various cases like Ratlam Municipality Case, Oleum Gas Leak Case and Ganga Pollution Case etc.

However, this was not the only positive aspect. Baxi in *Law, Struggle and Change* says that PIL led to pro-people renovation of judicial process and led to the rejuvenation of a special kind of confidence in the judiciary in its unequal battle with administrative deviance and crystallization of informed consensus on the need for fundamental reform of the legal system. This shows how

²⁵Menon,N.R, "Law and Justice: A look At The Role and Performance of Indian Judiciary", pp 8 retrieved on September 20, 2014 from <http://indiandemocracy08.berkeley.edu/docs/Menon-LawANDJustice-ALook%20.pdf>

²⁶ AIR 1976 SC 1455; 1976 (3) SCC 832

²⁷AIR 1981 SC 149; 1981 (2) SCR 52

²⁸AIR 1982 SC 149

²⁹AIR 1987 SC 1965

³⁰ 1998 I SCC .388

Judicial Activism strengthened the judiciary and become its backbone by making people believe in judiciary and rise for it whenever it needed.

6.2 WOMEN EMPOWERMENT

The role of Judicial Activism was not limited to PIL only. Another area where this was seen is Women Empowerment. The judiciary has taken major steps to improve the condition of women and prevent exploitation of women at workplace. In *Mohd. Ahmed Khan v. Shah Bano Begum and Others*³¹, the Hon'ble Supreme Court overruled what was written in Muslim Law and extended the period of Iddat from 4 months and 10 days to provide justice to Shah Bano Begum.

This could also be seen in *Air India v. Nargesh Meerza*³² where the Supreme Court struck down the regulation providing for the retirement of Air Hostess on her first pregnancy on the grounds that it was unconstitutional, void and in violation with Article 14 of Constitution of India. Another important judgment was given in *Vishakha v. State of Rajasthan* where the Supreme Court made guidelines to prevent sexual harassment of women at workplace.

There were many more judgments that enhanced women's status in the society and at the same time their trust in the judiciary.

Other areas include **Protection of Ecology and Environment** (*M.C Mehta v/s Union of India*³³); **Bonded Labourers** (*Democratic Rights v/Union of India*³⁴); **Protection against inhuman treatment in jail** (*Sunil Batra v/s Delhi Administration*³⁵); **Professional Ethics and medical men** (*Parmanand Katara v/s Union of India*³⁶); **Child Welfare** (*Lakshmi Kant Pandey v Union Of India*³⁷); **Fake Encounter** (*Union for Civil Liberties v/s Union Of India*³⁸), etc.

7. ARGUMENTS FOR JUDICIAL ACTIVISM

1. The instances of Judicial Activism are actually instances of Judicial Review

³¹1985 AIR 945, 1985 SCC (2) 556

³²1981 AIR 1829

³³1986, Vol. 2 SCC 176

³⁴AIR 1982 SC 1473

³⁵AIR 1980 SC 1759

³⁶AIR 1989 SC 2039

³⁷(1984) 2 SCC 244

³⁸AIR 1997 SC 1203

2. It is the function of judiciary according to the doctrine of checks and balances
3. It is the function of judiciary to interpret law
4. Our constitution does not provide for the doctrine parliamentary supremacy, a doctrine applicable in England
5. In actuality the judiciary cannot help but make rules because this is inherent in the very nature of judicial activism

8. ARGUMENTS AGAINST JUDICIAL ACTIVISM

1. Violates the doctrine of separation of powers as theorized by Montesquieu³⁹
2. It undermines the doctrine of Parliamentary supremacy
3. It sometimes interprets the Constitution against the clear intentions of the Constitution drafters.

9. PROBLEMS REGARDING EXERCISE OF JUDICIAL ACTIVISM IN PIL

Though the use of Activism in the form of PIL has been successful but this has been backed by several limitations. Though PILs were started solely for the purpose of public welfare, they have now been misused to fulfill private interest. In India the number of per capita judges is very less, so it is puzzling why the courts have not done enough to stop non-genuine PIL cases as it leads to wastage of judicial resources and prevents speedy justice. Often judges take up PIL cases which are popular amongst the society and undermine cases which involve an important public interest but are potentially unpopular. Often, the providing of justice to the people through PILs enables the judiciary to intervene in the powers of the executive and legislature.

10. NEED FOR JUDICIAL ACTIVISM IN INDIA

The most important question which has to be addressed is that why do we need Judicial Activism in India? The answer has been explained above and just needs to be summed up. One might say that Judicial Activism is necessary as per the theory of **Legal Skepticism** which says that what the

³⁹Chatterjee, Somnath, "Empowerment through education- Impact on strengthening of democracy", IVth Dr. Shyama Prasad Mookerjee Special Lecture (2007)

judge says is a law; a complete opposition to Austin's theory of Law as a command of sovereign backed by sanctions.

However, this is not the case with India. In India, the law making power lies with the legislature and Judiciary can not intervene in this power. But there have been certain cases where when time required; the legislature failed to provide any law. In such cases the Judiciary may use the notion of Judicial Activism and provide justice to the people (*Vishakha case*). Also there are certain cases termed as the hard cases where the law cannot be applied the way it is. This is the point where judges have to use creativity so as to provide justice to the people and if they fail to do so, there existence is questioned.

Moreover, if we see the way powers are divided in India, there is always a clash between the judiciary and legislature and whenever there is a conflict, the one who has public support genuinely supersedes the other. We had seen how the powers of the Indian judiciary were ruined by Prime Minister, Indira Gandhi at the time of her rule and the saddest aspect was that there was nobody who could stand in support of the judiciary. Justice Khanna who tried to prevent judiciary by his minority judgment in *A.K. Gopalan* was brutally curbed. He in spite being the eldest person, he was not made the CJI of India and resigned in protest.

But, if such a similar situation happens today, the act of legislature will not sustain because the people will stand up for the judiciary, as they have faith in it. And this has been possible because of the exercise of the power of Activism by the judges. In, India where still a considerable part of population lives below poverty line and there is a need to make people aware of the rights they have and the remedies available and this can happen only and only through Judicial Activism, be it in any form. Thus, Judiciary Activism is a necessary evil. At the end, each country has to develop its own system to address its own problems and like in India where the other two wings have consistently failed the people the judiciary is but compelled to act.⁴⁰

11. CONCLUSION

Judicial Activism is and will continue to be one of the most important functions of the Indian judiciary. It is the one who has made the judiciary grow and gain the support of people and stand

⁴⁰Kulshrestha,V.D., "*Landmarks in Indian Legal and Constitutional History*", Lucknow, Eastern Book Company, Ninth Edition, 2009, pp492

at the position where it is today. It has improved the quality of justice being provided to the people and the judiciary cannot function well without the use of Activism. This however does not mean that we will ignore the flaws Judicial Activism has and the risk regarding the misuse of such power by the judges. We cannot say that Judicial Activism is the only option and that every judge should be an activist judge. But we cannot also ignore the good that Judicial Activism has brought and that a judge should not step back from applying this principle wherever necessary.

We cannot rely completely on the laws made by the legislature. Perhaps, Baxi has rightly said that an activist assertion cannot lie on state laws and its processes. An activist judge has to use his own reasoning and opinion rather than completely relying on laws stated in the constitution or made by the legislature. Thus, he has to be creative and apply Judicial Activism. It is the justice of the people which is the first and the most important thing.

CASE COMMENTS

SHATRUGHAN CHAUHAN V. UNION OF INDIA: EXAMINING THE ROLE OF SUPERVENING FACTORS IN COMMUTATION OF DEATH SENTENCE

Ananya Kumar Singh and Vatsal Joshi*

I. INTRODUCTION

The Supreme Court of India has constantly attempted to widen the paradigm of "right to life" under Article 21 of the Constitution of India and expand its horizons to give it the widest import. *Shatrughan Chauhan and Anr. v. Union of India and Ors.*

¹ is another milestone in the history of Indian judiciary as it exhorts the commutation of death sentence on the ground of existence of supervening circumstances. The Court has affirmed that the "right to life" of a person subsists even after he has been sentenced to death and continues till his last breath, and that *it will protect that right even if the noose is being tied on the condemned prisoner's neck.*² The rights of the death row convicts, who in the instant case have been magnanimously recognised as victims by the honourable Supreme Court, emanate from the Constitution of India and standards prescribed by the International law. The most important ground for commutation of death sentence was considered to be an inordinate delay in disposal of mercy petition by the President. Thus, the Court overruled its own decision and line of reasoning in the *Bhullar Case*³ which was also declared to be *per incuriam*. The death sentence of 15 convicts was commuted in the instant case.

Justice VR Krishna Iyer described death penalty as a judicial murder which was no different from a criminal murder. It may also be characterised as inhuman, excessive and also irreversible, offering the accused no chance of reformation. Thus, more than two-third countries of the world have abolished death penalty.⁴ This judgment may be perceived as the first step towards the abolition of death penalty in India. The Court has also laid down certain guidelines for

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¹ *Shatrughan Chauhan and Anr. v. Union of India and Ors.* MANU/SC/0043/2014. (The case is yet to be reported by AIR or SCC)

² Ibid.

³ *Devendar Pal Singh Bhullar v. State (NCT) of Delhi* (2013) 6 SCC 195

⁴ <http://www.amnestyusa.org/our-work/issues/death-penalty> [accessed on February 20, 2014]

safeguarding the interests of the death row convicts, and ensures that that the mercy petitions are dealt with expeditiously.

II. COMMUTATION OF DEATH SENTENCE BY THE COURT -- OVER RIDING THE PRESIDENT'S/GOVERNOR'S POWER UNDER ARTICLE 72/161?

The power of the President/Governor to grant pardon, reprieves, respites or remissions under Article 72/161 is a constitutional responsibility of great significance. It has been reposed by the people through the Constitution in the Head of the State.⁵ The power of pardon is executive in nature, and is essentially distinct from the judicial power exercised by the Courts. This special power does not operate to alter the judicial records or absolve the guilt of the accused. The edifice of the quasi federal polity in our country is built upon the cornerstone of separation of powers between the executive, judiciary and the legislature. The Court's decision to commute the death sentence of 15 convicts unilaterally was considered to be upsetting this balance.

The Supreme Court has time and again reiterated that Article 21 is the paramount principle on which the rights of accused are based.⁶ Article 21 guarantees that *no person shall be deprived of his life or personal liberty except according to a procedure established by law*. The protection under this Article is available to all the persons, including convicts and continues till their last breath. Unexplained and inordinate delay in disposal of mercy petitions subjects the convict to an excruciatingly long wait, along with severe mental, physical and psychological suffering. Delay in execution of death sentence has a dehumanizing effect on the person, and is in contravention to Article 21 as it deprives a person of his "*right to life*" without any compliance to the procedure established by law. The expeditious disposal of mercy petitions would be acting as per the the procedure established by law.

Thus, the Court was merely acting as the protector of the very fundamental rights to which the convicts are entitled, and this must not be seen as overriding the President's power to pardon. The Court intervened in the instant matter on the grounds of infringement of the fundamental right accorded by Article 21.

⁵ *Kehar Singh v. Union of India and Anr.* (1989) 1 SCC 204

⁶ *Shatrughan Chauhan v. Union of India*, MANU/SC/0043/2014

LIMITED JUDICIAL REVIEW

The Court was of the opinion that the President's power was discretionary in nature, and there was a presumption that the constitutional authority acts with application of mind.⁷ Therefore, the executive orders under articles 72 and 161 are subject to limited judicial review. The Court has maintained that the executive orders may be challenged, if found to be suffering from mala fide, arbitrariness and extraneous or wholly irrelevant considerations.⁸

In the instant case, Court examined the claims of the petitioners to find the effect of supervening circumstances and whether they fell within the ambit of the limited judicial review. These supervening events were Delay, Insanity, Solitary Confinement, Judgments declared per incuriam and procedural lapses.

III. SUPERVENING EVENTS: GROUNDS FOR COMMUTATION OF DEATH SENTENCE

The Court examined following events as grounds for commutation of death sentence:

DELAY

The Court accentuated a disturbing trend in the disposal of mercy petitions. The average time taken for disposal of mercy petitions had gone up from an average of 5 months to 4 years, and in some exceptional circumstances even up to 12 years. Such unexplained, unreasonable and inordinate delay in execution of death sentence would be an infringement of Article 21. The procedure which deprives a person of his life and liberty must be just, fair and reasonable.⁹ The Court emphasised that a condemned prisoner has the right to a fair procedure at all stages of the judicial process. Inexplicable delay in execution of death sentence subjects the condemned person to severe mental agony, psychological stress and creates adverse physical conditions for the accused. Such a lapse on part of constitutional and statutory authorities is inexcusable.

⁷ *Bikas Chatterjee v. Union of India* (2004) 7 SCC 634

⁸ *Narayan Dutt v. State of Punjab* (2011) 4 SCC 353

⁹ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248. The ambit of Article 21 covers not only the procedural aspect, but also the substantive aspect. Therefore, the Courts have given a wide interpretation to Article 21 in subsequent cases.

The Court relied upon *Vatheeswaran*¹⁰ and *Triveniben*¹¹ and reiterated that it will examine the nature of delay caused and the circumstances that ensued after the sentence was finally confirmed by the judicial process. This case has been followed as a precedent in many commonwealth countries.¹² The Universal Declaration of Human Rights, 1948 and United Nations Covenant on Civil and Political Rights have declared cruel and degrading treatment of prisoners as unlawful. India is a signatory of both these declarations. Thus, the philosophy of humane treatment of prisoners is enshrined in the Constitution, as well as the international law. Therefore, Court has recognised delay as an important supervening factor for the commutation of death sentence.

INSANITY/MENTAL ILLNESS

Out of all the writ petitions filed in the present case, two convicts filed for the commutation of death sentence on the ground of mental illness. They contended that the unusual delay in processing of the mercy petition has caused them unfathomable mental agony and severe psychotic suffering. According to a well settled principle of criminal law, and human rights jurisprudence, a person suffering from any form of mental illness is not deemed fit for infliction of such punishment. The major question before the apex court was to consider insanity as a ground for commutation of death sentence.

India is a member of the United Nations (U.N.) and has ratified numerous conventions and covenants passed by the same. Clause 3(e)¹³ of one such Resolution 2000/65 of the U.N. Commission on Human Rights titled '*The question of Death Penalty*' posits that death penalty should not be imposed/executed on a person who was suffering from any mental disorder.

A similar report¹⁴ published by U.N. Human Rights in its clause 89 stated that infliction of capital punishment on pregnant ladies, recent mothers and mentally retarded convicts is prohibited.

¹⁰ *T.V. Vatheeswaran v. State of Tamil Nadu*, (1983) 2 SCC 68

¹¹ *Smt. Triveniben v. State of Gujarat*, (1988) 4 SCC 574

¹² *Earl Pratt v. AG for Jamaica*, (1994) 2 AC 1-Privy Council; Catholic Commission for Justice & Peace in Zimbabwe v. *Attorney General* 1993 (4) S.A. 239- Supreme Court of Zimbabwe; *Attorney General v. Susan Kigula*, Constitutional Appeal No. 3 of 2006- Supreme Court of Uganda; *Herman Mejia and Nicholas Guevara v. Attorney General*, AD 2000 Action No. 296-Supreme Court of Belize.

¹³ Clause 3(e) Not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person;

¹⁴ The report of the Special Rapporteur on Extra-Judicial Summary or Arbitrary Executions, Dated 24-12-1996.

Furthermore, Clause 116 of the same report suggested that the state should have legislations which would bring them in line with the international standards with respect to treatment given to the minors' delinquents and mentally retarded convicts¹⁵. William Blackstone in his treatise "*Commentary on the Laws of England*", suggested that idiots and lunatics must not be punished for their acts, if committed when they are not in a sound state. Execution must be stayed if the prisoner is found to be suffering from mental illness or insanity.

Sections 386¹⁶ and 387¹⁷ of the State Jail Manuals of Uttar Pradesh and Uttarakhand provide that a convict should not be executed if he develops insanity after conviction, and should not be executed unless he is fit. Taking cue from various U.N. published documents, treaties signed by India, International Laws, our own territorial legislations, European conventions and 8th Amendment of the U.S. (which prohibits the execution of an insane person), the Supreme Court was of the view that Insanity/ Mental Illness/ Schizophrenia were indeed a part of the supervening circumstances which warrant for commutation of death sentence.

SOLITARY CONFINEMENT¹⁸

It was contended by most of the Petitioners that they were kept in Solitary Confinement since the death penalty was confirmed by the Apex Court. Such act would be a violation Articles 14, 19 and 21 of the Indian Constitution and amounts to torture. The State submitted an affidavit to the effect that the convicts were kept in Statutory Segregation, which was different from solitary confinement for security reasons.

¹⁵Eric Prokosch, *Human Rights V. Death Penalty Abolition and restriction in Law and Practice*, <http://www.amnesty.org/en/library/asset/ACT50/013/1998/fr/76c3bb34-e77d-11dd-9edc-8be7e550cfe5/act500131998en.pdf> (24-02-2014)

¹⁶ Section 386: Condemned convicts developing insanity:

When a convict under sentence of death develops insanity after conviction, the Superintendent shall stay the execution of the sentence of death and inform the District Magistrate, who shall submit immediately a report, through session judge, for orders of the State Government.

¹⁷ Section 387: Postponement of execution in certain cases:

The execution for a convict under sentence of death shall not be carried out on the date fixed if he is physically unfit to receive the punishment, but shall not be postponed unless the illness is both serious and acute (i.e. not chronic). A report giving full particulars of the illness necessitating postponement of execution should at once made to the Secretary to the State Government, Judicial (A) Department for the orders of the Government.

¹⁸ Section 73 of IPC provides that Solitary Confinement is '*Confinement in a room where the prisoner is not even permitted to have a sight of the other human-beings*' *Prabhudas Tribhavandas Sanghvi V. The State Of Maharashtra and Anr.* (1976 CriLJ 1788)

In a landmark judgment¹⁹, the Court had distinguished between solitary confinement and non-punitive custodial isolation of a prisoner awaiting execution. The Supreme Court laid down a clear distinction between Section 30(2)²⁰ of the Prison Rules Act and Sections 73-74 of IPC. The court was of the view that a convict on death row cannot be given solitary confinement unless directed by the court. The court gave a plentiful interpretation to Section 30(2). The expression ‘to be confined in a cell’ and ‘apart from all other prisoners’ does not imply that the confinement should be in a solitary cell. The convict may be confined to the limits of the same cell, apart from the other prisoners and yet not being solitary confined. The Court held that a prisoner should not be considered ‘under the sentence of death’, until his mercy petition has been rejected by the President. Therefore, prisoners who are awaiting a response to their plea of mercy, do not fall under the purview of this section. Thus, the scope of Section 30 has been defined very clearly by the honorable Court.

Supreme Court was of the view that solitary confinement is a rigorous form of punishment and should not be given unless expressly specified by the court. The apex court in *Triveniben case*²¹ was of the view that keeping a convict in solitary confinement amounts to ‘additional and separate’ punishment, which is contrary to the intent of the court as established in *Sunil Batra case*²². They observed that the actual implementation of provisions is far from the reality and directed the jail authorities to comprehend and implement the actual intent of the judgment. However, the Court did not consider it as one of the supervening circumstances which may warrant for commutation of the death sentence.

JUDGMENTS DECLARED PER INCURIAM²³

The Supreme Court was of the view that the judgments which were contended to be per incuriam by the parties were not wrongly decided. The Court did not rely upon them because of the peculiar

¹⁹ *Suni Batra v. Delhi Administration and Ors. Etc* (1978) 4 SCC 494

²⁰ Section 30(2) of the Prison rules act: Every such prisoner, shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under charge of a guard.

²¹ *Smt Triveniben v. State of Gujarat* (1989) 1 SCC 678

²² (1978) 4 SCC 494

²³ According to the BLACK'S LAW DICTIONARY, *Per Incuriam* means ‘Through inadvertence; ignorance of the relevant law.’; BRYAN A. GARNER, A DICTIONARY OF MORDERN LEGAL USAGE, 651 (second edition, Oxford University Press 1987) (1995) In the case of *Morrelle Ltd. v. Wakeling*, [1955] 2 Q.B. 389, 406, it was held that “As a general rule the only cases in which the decisions should be held to have given per incuriam are those of decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned”; “When the essence of a pervious decision with which a judge disagrees cannot so easily be

facts and different circumstances of the case. Thus, the court was of the view that this contention was not of great significance with respect to the present case.

PROCEDURAL LAPSES

The Home Ministry has laid down an elaborate procedure with respect to the handling of mercy petitions.²⁴ The Prison Manuals of various states also provide for the manner in which a convict in death row is to be treated till a final decision is taken by the President of India. These guidelines lay down a strict responsibility upon the Ministry of Home Affairs and the Jail Superintendents. The elaborate procedure clearly shows that the convicts are entitled to be treated fairly in light of Article 21 of Constitution of India. However, the Apex Court decided that they will look into the alleged procedural lapses on a case to case basis, and did not lay down any specific instruction with respect to this supervening factor.

IV. CONCLUSION

In the instant case, the Supreme Court commuted the death sentence of 13 convicts on ground of delay and of 2 convicts on the ground of insanity. The Court has done a commendable job by adopting a humanistic approach and recognising the fundamental rights of prisoners and death row convicts. Justice Satahasivam opined that *retribution has no place in the constitutional scheme of our country*. The Court has responded to the evolving human rights jurisprudence which has urged various countries to abolish death sentence. The Court has laid certain guidelines²⁵ to ensure an efficient disposal of mercy petitions. However, it refrained from providing a specific time frame for the processing of mercy pleas. The judgment may be viewed as a progressive step, and the first one towards the abolition of death penalty in India.

dismissed as *obiter dictum*, the judge may, as a desperate last resort, categorize the previous decisions as per incuriam (an acceptable legal euphemism for a judgment [that] was obviously wrong).” David Pannick, *Judges* 159 (1987)

²⁴ Discussed in paragraph 91 and 92 of *Shatrughan Chauhan and Anr. v. Union of India and Ors.* MANU/SC/0043/2014.

²⁵ Certain guidelines issued by the Court in this case: 1. Solitary Confinement prior to the rejection of mercy petition by President was declared as unconstitutional. 2. Legal Aid was recognised as a fundamental right of such prisoner. 3. Post mortem was made obligatory. 4. Prison authorities must facilitate and allow a final meeting between the prisoner and his family. 5. There should be a regular evaluation of the mental health of death row convicts.

IMPLEMENTATION OF VISHAKA GUIDELINES: POST VISHAKA JUDGEMENT

Divya Devarsha*

Sexual Harassment is a heinous reality in workplace. A number of surveys and studies indicate that sexual harassment is a significant and prevalent problem

¹. Studies indicate that due to the conservative nature of women in India, majority of them do not resort to any kind of formal action against sexual harassment². Furthermore, the surveys show that it is prevalent in both the organized and the unorganized sector. The small scale manufacturing sector and the domestic helps are the most unsafe sectors for women.

Although with the increasing awareness and emphasis on gender justice, there is an increase in the efforts to guard against certain violations. Naturally, the resentment towards incidents of sexual harassment is also increasing. There have been quite a few decisions and regulations regarding this subject from *Vishaka* to the present *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013* [Sexual Harassment Act]. To quote Zia Modi,³ the Judicial activism reached its pinnacle in *Vishaka v. State of Rajasthan*⁴ [*Vishaka*]. In *Vishaka*, the Supreme Court acknowledged and relied, to a great extent, on international treaties that had not been transformed into municipal law; the Supreme Court provided the first authoritative decision of 'sexual harassment' in India; and confronted with a legislative vacuum, it went innovative and projected the route of 'judicial legislation'. In this paper I will outline the various judicial pronouncements implementing Vishaka Guidelines. I will also further discuss development of the law on Sexual Harassment and critically analyze the same.

Before examining the implementation of the judgment, it is essential to go through the pronouncement. The brief facts of the *Vishaka* case are discussed here: Bhanwari Devi was a social worker at the rural level in a development project initiated by the State Government of Rajasthan, aiming to curb the evil of child marriages. As a part of her work, she tried to stop Ramkaran

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¹<http://www.stopstreetharassment.org/resources/statistics/statistics-academic-studies/><Last accessed on October 3, 2014>

² 17% women sexually harassed at workplace, Times of India, Nov 28, 2012

³ Sexual harassment and Vishaka guidelines: All you need to know, Firstpost India, November 21, 2013

⁴*Vishaka v. State of Rajasthan* (1997) 6 SCC 241.

Gujjar's infant daughter's marriage due to which she was subjected to boycott and in September 1992, was gang raped by five men, including Ramkaran Gujjar in front of her husband. The only doctor in the Primary Health Centre, refused to examine Bhanwari and the doctor in Jaipur only confirmed her age, without any reference to rape in his medical report

At the police station, the women constables also taunted her throughout. The Trial Court acquitted the accused, but Bhanwari was determined to fight further for justice. In the months that followed, the saathins and women's group countrywide launched a concert campaign for justice for Bhanwari. In December, 1993, the High Court declared the incident to be a case of gang rape which was committed out of vengeance.

This writ petition was filed for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India in view of the prevailing climate in which the violation of these rights is not uncommon. The petition was brought as a class action by certain social activists and NGOs with the aim of focusing attention towards this societal aberration, and assisting in finding suitable methods for realization of the true concept of gender equality; and to prevent sexual harassment of working women in all work places through judicial process and to fill the vacuum in the existing legislation. As a result, the Supreme Court gave the judgment on August 1997 and the Vishaka guidelines came into existence.

OBSERVATIONS MADE BY THE COURT

The Supreme Court observed that since such incidents are a recurring phenomenon, the writ of mandamus needs to be accompanied with guidelines to fill the legislative vacuum.⁵ Apart from highlighting the importance of gender equality (Article 14), right to a safe working environment (Article 19(1)(g)) and right to life with dignity (Article 21), the Supreme Court referred to certain other provisions of the constitution which envisage judicial intervention for eradication of social evil. These included Article 15(1) and 15(3), Article 51A (a) and (c), Article 51(c), Article 73 and Article 253 read with Entry 14 of the Union List.⁶ Thus, the court laid emphasis on the executive power of the Union to enact legislations to curb this evil.

⁵*Vishaka* at p. 247

⁶ *Vishaka* at pp. 247- 248

Further, the court relied upon the Beijing Statement of Principles of the Independence of the Judiciary which was accepted by the Chief Justices of the Asia and Pacific in Beijing in 1995 to emphasise on the role of the judiciary in laying down guidelines in the absence of legislation.⁷

The Court then reflected on Article 11 and 24 of the Government of India ratified⁸, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which state that right to work is an alienable right and state should take all measures to protect this right to prevent discrimination against women.⁹ The Court also referred to the recommendations of CEDAW respect of Article 11 which discuss impairment of equality in employment due to violence against women, define sexual harassment¹⁰ and emphasize on role of the state to eradicate the same respectively.¹¹ It also referred to an official commitment made by the Government of India in the Fourth World Conference on Women in Beijing to formulate and operationalize a national policy on women, setting up of a commission for women to act as a defender of their rights and to monitor the implementation of the Platform for Action.

Finally, the court held that the meaning and content of Fundamental Rights is wide enough to encompass prevention of sexual harassment and the independence of judiciary forms a part of our constitutional scheme. It is a principle of judicial construction to pay regard to international norms and conventions where the same are not inconsistent with the domestic law and a void exists in domestic law. In making this analysis, the court also referred to the judgement of *Nilabati Behra v. State of Orissa*¹² where the court had relied on ICCPR to hold compensation as an enforceable right under Article 32 of the Constitution.

Thus, the court held that in light of the above, it has the power under Article 32 of the constitution to lay down the necessary guidelines for prevention of sexual harassment of women.

The court decided that the consideration of "International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human

⁷ *Vishaka* at p. 249.

⁸ *Vishaka* at p. 250.

⁹ *Vishaka* at p. 249.

¹⁰ Recommendations, CEDAW.

¹¹ *Vishaka* at p. 250.

¹² *Nilabati Behra v. State of Orissa*, 1993CriLJ2899

dignity in Articles 14, 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein."¹³

The Court held¹⁴ that gender equality includes protection from sexual harassment and the right to work with dignity as per our constitution. The judgment emphasized upon the fact that safe working environment is fundamental right of a working woman. Working with full dignity is the fundamental right of working women and the right to work is an inalienable right of all working women.

Further, the Court laid down certain points to specify that sexual harassment includes such unwelcome sexually determined behavior (whether directly or by implication) as:¹⁵

a) physical contact and advances; b) a demand or request for sexual favors; c) sexually colored remarks; d) showing pornography; e) any other unwelcome physical verbal or non-verbal conduct of sexual nature.

Where any of these acts is committed in circumstances where the victim has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary, whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment.

Thus, sexual harassment need not involve physical contact. Any act that creates a hostile work environment - be it by virtue of cracking lewd jokes, verbal abuse, circulating lewd rumours etc. counts as sexual harassment.

The Court laid down following guidelines for the purpose. It is an obligatory requirement for employers:¹⁶

¹³ *Vishaka* at p. 248.

¹⁴ *Vishaka* at p. 249.

¹⁵ *Vishaka* at p. 250; Article 11 CEDAW

¹⁶ *Vishaka* at p. 251.

- Appropriate notification/advertisement to be issued for prohibition of sexual harassment at workplace for the employees of the company.
- State government, central government and PSU bodies to include in their conduct and discipline rules/regulations prohibiting sexual harassment plus mention of penalties for those found guilty of sexual harassment.
- For private employers, prohibition of sexual harassment and penalties to be included in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.
- Employers need to provide conducive & appropriate work conditions for women staff in the view of: work, health, hygiene & leisure. In short there mustn't be any conditions creating hostile environment towards working women staff and any conditions which could put women at a position of disadvantage with regards to her career compared to other male employees of the company.
- The employer will need to have a written complaint mechanism which will need to include time frame of resolution of sexual harassment claims.
- Employer should help the victim psychologically with counseling etc.
- Employer should maintain confidentiality of the complaint and the identity of the woman who raised the complaint and complaint specifics.
- Employers are bound to inform the details of sexual harassment complaints to appropriate government bodies/labour department etc, every year. In short it'll be illegal to hide any sexual harassment complaints raised in the company or with the employer and not report to government authorities.
- Employer should allow and encourage the employees to raise sexual harassment issues in worker's meetings and at appropriate forums. And all those complaints need to be affirmatively discussed. In other words the employer must provide easy ways to discuss sexual harassment issues and should not show any lack of interest.
- Employer should take steps to make working women aware of their rights to equality in everything in workplace by prominently notifying the guidelines by appropriate means (like sending emails, sending letters, displaying rules on notice boards).

POSITION AFTER VISHAKA JUDGMENT – VARIOUS JUDICIAL PRONOUNCEMENTS

There have been a range of cases after Vishaka judgment dealing with the issues varying from the implementation of the guidelines to various other administrative and technical aspects. For instance, in various cases post - Vishaka judgment, questions has been raised regarding the status of the inquiry held by the complaint committee. As per the Vishaka case, the report of the complaint committee should be treated as a preliminary report against accused government servant.

But later on, in an order dated April 26, 2004, Supreme Court directed that “the report of the Complaints Committee shall be deemed to be an inquiry report under the (*Classification Control and Appeal*) Central Civil Services Rules.” Thereafter the disciplinary authority will act or the report in accordance with the rules. Sub rule (2) of rule 14 of (CCA) CCS Rules, 1965 was amended accordingly to bring this into effect.

Whether an action of the superior against a female employee, which is against moral sanctions and does not withstand the test of decency and modesty, amount to sexual harassment, was the issue of contention in *Apparel Export Promotion Council v. A.K. Chopra*.¹⁷ This was the first case where the law laid down by *Vishaka* was applied. This judgement also considered the question whether the allegation that the superior tried to molest a female employee at the place of work constituted an act unbecoming of good conduct and behaviour expected from the superior. These were certain questions posed to thr Court in the present case. Before the case appeared before the Supreme Court, the Enquiry Officer concluded that woman was molested by the respondent at Taj Palace Hotel on 12th August, 1988. The Disciplinary Authority agreeing with the report of the Enquiry Officer imposed the penalty of removing him from service with immediate effect on 28th June, 1989. The learned single judge of the High Court allowing the writ petition opined that “..... *the petitioner tried to molest and not that the petitioner had in fact molested the complainant.*”¹⁸ The learned single Judge, therefore, disposed of the writ petition with a direction that the respondent be reinstated in service but that he would not be entitled to receive any back wages. The Division Bench of the High Court also while dismissing the L. P.A. filed by the appellant did

¹⁷*Apparel Export Promotion Council v. A.K. Chopra* 1999 (1) SCC 759 (Herein After referred as “*Apparel Export*”)

¹⁸*Apparel Export case* at p. 768

not doubt the correctness of the occurrence. The Division Bench agreed with the findings recorded by the learned single Judge that the respondent had tried to molest and that he had not actually molested.

Further, before the Supreme Court in the appeal it was clarified that the High Court appears to have overlooked the settled position that in departmental proceeding, the Disciplinary Authority is the sole Judge of facts and in case an appeal is presented to the Appellate Authority, the Appellate Authority has also the power/ and jurisdiction to re-appreciate the evidence and come to its own conclusion, on facts, being the sole fact finding authorities.

“Once findings of fact, based on appreciation of evidence are recorded, the High Court in writ jurisdiction may not normally interfere with those factual findings unless it finds that the recorded findings were based either on no evidence or that the findings were wholly perverse and / or legally untenable.”¹⁹

Thus, in the final judgment, the Apex Court set aside impugned order of the High Court and upheld the punishment as imposed by the Disciplinary Authority and upheld by the Departmental Appellate Authority of removal of the respondent from service.

Apart from the aforementioned issue, various other contentions have been dealt in a range of judicial decisions. In *U.S. Verma, Principal & Delhi Public Society v. NCW & Ors.*²⁰, a 2009 judgment, the main issue was whether schools followed the Vishaka guidelines suitably, in addressing the allegation of sexual harassment at the workplace, by the teacher. It was held that after consideration of whole procedure adopted by committee established by schools, Vishaka guidelines were not followed. No proper hearing was provided to teachers. Therefore, the teachers were entitled to get the compensation.

Similarly, the validity of report of expert committee was questioned in *Dr. Punita K. Sodhi v. Union of India*²¹. It was held that the approach of expert committee was limited and narrow. Committee failed to consider context in which complaint was made and incidents of harassment

¹⁹ Apparel Export case, at p. 770

²⁰*U.S. Verma, Principal & Delhi Public Society v. NCW & Ors*, 163(2009)DLT557

²¹*Dr. Punita K. Sodhi v. Union of India* , (2011)ILLJ371Del

which the petitioner was alleged to have faced. The ratio of the judgment was that expert committee can be constituted for a fair investigation of the matter.

In another judgment, *Dr. Anil Seth v. Delhi Commissioner for Women*²², power and functions of the commissioner were discussed. Court directed the Delhi Commission for women to formulate a procedure for its inquiry with 8 weeks in consonance with Vishaka Guidelines. Moving on to another issue relating to the third party obligation, in *Srinivas Rajan v. Director of Matriculation Schools office of Directorate of Matriculation Schools, DPI Complex, Chennai*²³, respondent misbehaved and sexually harassed not only teachers but also parents. The Madras High Court in the present case observed that the guidelines given in the Vishaka judgment not only dealt with women employees, but also sexual harassment faced by the third party or outsiders and employer's obligation to take action. It was held that the minutes of special enquiry committee was not in conformity with Vishaka Guidelines. Supreme Court framed these guidelines as per Article 141 of constitution and as per Article 142 all authorities were bound to implement the same. Also, in *Sunita Sharma v. Union of India*²⁴, complaint committee of bank was held void on the basis that there is no third party representation as per the guidelines.

Despite the guidelines being given in the Vishaka judgment, there was not much change in the condition and status of women at workplaces. Lack of effective implementation of Vishaka guidelines was the centre of discussion in *Medha Kotwal Lele v. Union of India*²⁵. Implementation has to be not only in form but substance and spirit so as to make available a safe and a secure environment for women at their workplace in every aspect and thereby enabling the working women to work with dignity, decency and due respect.²⁶ Further directions were also issued. In this judgment, concerns were raised over the non - formation of Complaints Committee in various states as per guidelines. It was also held that an aggrieved person can approach to the High Court for non-compliance of Vishaka guidelines.

Consequently, it can be observed that Supreme Court has aptly applied the law laid down in *Vishaka* to various judicial decisions. *Vishaka* judgement is rightly considered to be one of those

²²*Dr. Anil Seth v. Delhi Commissioner for Women*, 2010(119)DRJ87

²³*Srinivas Rajan v. Director of Matriculation Schools office of Directorate of Matriculation Schools, DPI Complex, Chennai* , W.P. No. 2116 of 2011

²⁴*Sunita Sharma v. Union of India*, Petition (Civil) No(s). 240 Of 2012

²⁵*Medha Kotwal Lele v. Union of India*, AIR 2013 SC 93

²⁶*Ibid*

judgments confirming the importance of judicial activism. Further, we will analyze the new legislation which has come into being recently regarding the sexual harassment at workplaces.

JURISPRUDENTIAL ASPECT OF THE JUDGMENT

The New Law i.e. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 has been enacted with the objective of providing protection to women against sexual harassment at the workplace and for the prevention and redressal of complaints of sexual harassment. The act was framed in pursuance of the direction issued by Justice Verma in *Vishaka* and further taking into consideration protection of the fundamental rights of women to equality [Art.14], right to life [Art.21], and Right to carry on profession [Art.19(1)(g)]²⁷. The policy reason behind the act is essentially to contribute to the understanding of women's right to gender equality, liberty and moreover, equality in their working conditions. Further with the belief that the sense of security at the workplace/study place will improve women's participation in overall progress, resulting in their economic empowerment and inclusive growth as whole²⁸.

It is interesting to note that the Sexual Harassment Act makes no reference to the *Vishaka Case*. However, it is important to further note that the definition of what constitutes "sexual Harassment" has been adopted from the *Vishaka* decision. Several analysts have been arguing that the new law is certainly not sufficient. As per the new Act, under the provisions, a complaint is to be made in writing by an aggrieved woman within 3 months of the date of the incident or extended for appropriate reasons.²⁹ Upon receipt of the complaint, the (Internal Complaints Committee)³⁰ ICC or (Local Complaints Committee)³¹ LCC must proceed to make an inquiry in accordance with the service rules applicable. The inquiry must be completed within a period of 90 days.³² Where the

²⁷Newsletter On Sexual Harassment Act, Available at <http://www.eshwars.com/SHA.pdf><Last accessed on October 4, 2014>

²⁸<http://adcet.in/Committee%20against%20Sexual%20Harassment%20of%20Women%20at%20Workplace.pdf><Last accessed on October 4, 2014>

²⁹ Section 9, Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("The SH Act")

³⁰ Section 4, The SH Act

³¹ Section 6, The SH Act

³² Section 11 (4), The SH Act

ICC finds that the allegations against the respondent are proven, a report is submitted to the employer pursuant to which disciplinary action must be taken within 60 days³³.

Certain women's groups and activists vociferously argue that the internal committee system institutionalized in *Vishaka* guidelines and the 2013 Act allows complainants quicker access to redress due to its redefinition of sexual harassment in ways which remove sexual harassment from the ambit of graver sexual offences like rape that involve criminal procedures³⁴.

The relegation of investigation and adjudication of sexual harassment to the realm of the private or to intra institutional players fits well with this larger scheme of deregulation. The employer has emerged as a quasi-state in the realm of workplace relations.³⁵

Another important aspect of this new act is that of Section 10 of the Sexual Harassment Act which provides for conciliation to settle the matter between her and the respondent. But this might be problematic due to certain reasons such as the power to nominate members of the ICC is with the employer vide Sec. 4(2) of the Act which questions the transparency and fairness of the procedure. Apart from this, as per Rule 7(5) the ICC will have the power to terminate the application ex parte if the complainant does not appear for more three hearings. Thus, again there are chances that the complainant would be forced to not appear, in order to terminate the inquiry. There are probabilities where co-workers and seniors were able to sense harassment and thus supported the complainant to file a complaint, but later due to coercion the complainant chooses not to pursue the matter further.

One of the many important aspects is that it is not likely that the panel members taken from the organization's employees will possess such skills, besides the fact that they may well think twice before indicting a superior³⁶. Further, no appeal can be made against an order of settlement arrived at through conciliation. Thus, an employer aggrieved with such an order has no alternative but to implement it³⁷.

³³ Section 13 (4), The SH Act

³⁴ <http://sanhati.com/excerpted/8796/#sthash.nE6XW4El.dpuf><Last accessed on October 5, 2014>

³⁵<http://www.livelaw.in/understanding-the-sexual-harassment-of-women-at-workplace-prevention-prohibition-and-redressal-act-2013/>< Last accessed on October 4, 2014>

³⁶Protecting women at workplaces, The Hindu, December 21, 2013

³⁷<http://governancenow.com/news/regular-story/new-sexual-harassment-law-difficult-implement>< Last accessed on October 4, 2014>

Therefore, it is evident that there are several other lacunae in the present law which makes the present Act ineffective to solve the rampant problem. The parliament has not come up with an effective legislation. Various lacunae including the flaws in the nomination process, the inadequacy of the ICC, the difficulties revolving around a conciliation with no appeal remedy, and the practical difficulties around the time limit to end the inquiry and send the report. Sexual harassment, or more generally, violence against women is a result of deep rooted prevalence of direct, indirect, explicit or implicit discrimination against women prevalent across cultures³⁸.

Despite the Vishaka judgment and the further legislation thereon, the effectiveness of the same remains to be a grave problem. I began discussing how the court in *Vishaka* came up with an unprecedented decision by providing guidelines for the first time with regard to sexual harassment when there was no existing law on the subject matter. In fact, there are other cases post-*Vishaka* that reflect on the passing of a few regulations. Despite the unprecedented effort by the judiciary, the implementation of the guidelines remains discretionary and there is no mechanism that has been created to monitor its implementation. Although the Government has enacted the Act as discussed above, there is great hope on the parliament to come up with a comprehensive legislation to address all the policy concerns in an efficient manner that have been persistent.

³⁸INDIA: No redress for sexual harassment at the work place, Asian Human Rights Commission, December 30, 2013 Available at: <http://www.humanrights.asia/news/ahrc-news/AHRC-ART-146-2013>< Last accessed on October 4, 2014>