ISSN-2394-2657

THE INDIAN JOURNAL OF LAW & PUBLIC POLICY

SUMMER 2016

VOLUME II

ISSUE II

NEW DELHI

INDIA

DISCLAIMER/ DECLARATION

- The views expressed in the articles, comments and all other contributions in any other form to The Indian Journal of Law & Public Policy are those of the individual authors and not necessarily of the Board of Editors of The Indian Journal of Law & Public Policy. No part of this work may be produced and stored in a retrieved system or transmitted in any form or by any means, electronic, mechanical, photocopying recording or otherwise without written permission from the Board of Editors of Indian Journal of Law & Public Policy.
- Though the editorial board has tried its best to ensure that each contribution has adhered to the international academic standard on originality content. Nevertheless, in future, if any contribution or part thereof is discovered to be plagiarised, the liability shall be of the individual author and not of the editorial board.
- This journal is a solemn effort by students under the stewardship of various acclaimed members of the academia and the bar to promote discernment of knowledge in the field of public policy and law. This entire process is fully funded and supported by the members of the editorial board themselves.
- For any suggestion or clarification please mail us at : *journaloflawandpublicpolicy@gmail.com*

THE INDIAN JOURNAL OF LAW AND PUBLIC POLICY

GOVERNING BODY

THE INDIAN JOURNAL OF LAW AND PUBLIC POLICY

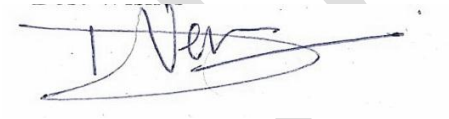
BOARD OF EDITORS

BOARD OF ADVISORS

FOREWORD

I am delighted to welcome the publication of The Indian Journal of Law and Public Policy (Volume II; Issue II (2016)). The Journal is a novel endeavour by budding young lawyers to provide a platform to legal scholarship in the realm of public policy. The Current Issue of the journal is very informative confluence of different areas of law and public policy. The issue begins with an Article on Judicial Over-Reach, which delves into the legality and necessity of the judicial reaction to economic policies and deliberates the changing contours of Public Policy as a consequence of such judicial reaction. The Second Article deals with the very important issue of Patentability of Human Genes and underscores the need for appropriate policy measures in the field. The Third Article sheds light on Mass Surveillance Programmes and the myriad legal issues emanating in the cyber domain. The next Article is a Critical Appraisal on Trade Dress Infringement leading to the action of Passing Off. Furthermore, the Fifth Article is a Critique on Curative Petition propounded in 2002 by the Apex Court in the case of Rupa Hurra v. Ashok Hurra & Anr. The Journal also features an Article on Future Options on Currency and finally concludes with an Article on Right to Information. This journal fills an important gap between legal academia and public policy and the efforts made towards integrating the two are laudable. In my view, law reviews play a pivotal role in bridging the gulf between academia and practice and assumes a bigger importance today when the art and passion for reading is on the wane amongst students and practitioners alike. I am convinced that in times to come The Indian Journal of Law and public Policy would serve as the pioneering forum for deliberations and discourse on Law and Public Policy. I wish the entire editorial team the best and urge them to continue the good work and leave behind a treasure of knowledge through their efforts for posterity's sake.

Best Wishes



Justice Deepak Verma

Former Judge, Supreme Court of India

CONCEPT NOTE

The Indian Journal of Law and Public Policy is a peer reviewed, biannual, 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 statement 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 exclusively and independent. The focus has been to give a multi-disciplinary approach while recognizing the various effect of law and public policies on the society.

(EDITOR IN CHIEF)

TABLE OF CONTENTS

SCRUTINIZING JUDICIAL OVER-REACH WITHIN THE DOMAIN OF THE "NEW WEALTH": PUBLIC POLICY POST THE COALGATE ERA

*Devarshi Mukhopadhyay**

"Courts are not to interfere with the economic policies in the country, which is the function of experts. It is not the function of Courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies."[1]

INTRODUCTION

The disposal of a group of Public Interest Litigations by the Supreme Court of India on 25th August 2014, in the matter between *M.L Sharma vs. Principal Secretary*, occupies a significant position in multiple and cross cutting issues in contemporary politico-legal debates, across the country. Amidst multiple allegations against the Executive, on counts of administrative highhandedness, nepotism, favoritism and mass corruption, the petitioners in this case, sought the allocation of 218 coal blocks to interested parties from the period ranging from 1993 until 2010 to be declared as violative of Article 14 of the Constitution of India, the Mines and Minerals Act of 1957 and the Coal Mines Nationalization Act of 1973. While one of the two prayers that was sought by the petitioners was heard and decided, it is interesting to note that the Court went on to hold that *"if the allocation of coal blocks is found to be unfair, unreasonable, discriminatory, non-transparent, capricious or suffers from favoritism and nepotism, the consequences of such illegal allocation must follow".* Following this, in its September 24th order, it cancelled the allocation of 214 out of the 218 coal blocks which were in dispute, after the 25th August decision had already found the allocation of the coal blocks as constitutionally improper. Having kept the generally negative reaction to the *"interventionist"* 2G judgment in mind[2], the author argues that in matters of economic policy-making, the presumption of informed decision making by the Executive may often bypass preset constitutional standards, as was clearly observed in both the 2G as well as the Coalgate scenarios. That being said, it becomes crucial to examine the legality and necessity of this alleged *"over-reach"* of the judicial reaction to economic policy matters, in specific situations where this over-reach may very well be required to ensure that the acts of the Executive are in conformity with set constitutional

* The Author is a 5th year student at NALSAR, Hyderabad.

[1] *Peerless General Finance and Investment Co. vs. Reserve Bank of India*, 1992 AIR 1033.

[2] T.R Andhyarujina, *Disturbing Trends in Judicial Activism*, THE HINDU, August 6th, 2012.

standards. It is in that regard that the author argues that (a) the declaration of the illegality of the Screening Committee's recommendations and the subsequent cancellation of allocations work to positively redefine the boundaries of judicial review and dilute the presumption of the Executive's policy making *"expertise",* and (2) the distinction drawn between judicial deference and judicial self-restraint works to defeat the purpose of judicial review in protecting the spirit of constitutionalism in the country, in light of the flexible Indian application of the separation of powers doctrine.

EXPANDING THE SCOPE OF STATE ACTION IN ECONOMIC LIFE POST 1992: A BRIEF OVERVIEW OF EXECUTIVE ACTION UNTIL 2014

The Ministry of Coal, in July 1992, issued instructions for constituting a Screening Committee, the duty of which was to screen proposals for captive mining by private parties.[3] It is worthwhile to mention here that in a post 1991 Indian economy, and following the Planning Commission's recommendations to the Government of India[4], this policy directive came in to counter the general shortage of electricity production in the country, and the inability of Coal India Ltd. to meet the rising targets of power generation in a liberalizing economy[5]. Further, this Screening Committee, which was comprised primarily of central and state government officials,[6] were also conferred the duty of inviting proposals and allocating an additional number of blocks of coal that were not already within the production plan of Coal India.[7] The gross number of coal blocks, at 194[8], was to be allocated within a guidelines framework, which included qualification criteria such as production capacity, net worth, technical experience, recoverable reserve, track record and others.[9] The power to exploit coal resources, that was derived from Rule 22 of the Mineral Concession Rules of 1960[10] , Sections 4 and 10 of the Mines and Minerals Act of 1957[11] as well as the amended Section 3 of the 1973 Coal Act,[12] changed the status of government monopoly in the exploitation of coal and brought in private parties to the transaction interface,

[3] The Indian Express, *Chronology: Coal Blocks Allocation and Related Judgments*, August 25th 2014.
[4] Montek Ahluwalia, *Economic Reforms since 1991: Has Gradualism Worked?* Journal of Economic Perspectives, 2002.
[5] *Ibid.*
[6] *Id.*
[7] The Hindu, *Supreme Court quashes allocation of 214 coal blocks*, September 24th, 2014.
[8] *Ibid.*
[9] The Times of India, *Supreme Court's Order puts Accused in Tight Spot*, August 26th, 2014.
[10] Rule 22, Mineral Concession Rules of 1960.
[11] Section 4 and Section 10, Mines and Minerals Act of 1957.
[12] Section 3, Coal Mines Nationalization Act of 1973.

thereby including power generation, cement producing and gas generation companies as a general departure from the usual end users of coal.[13]

The first draft report of the Comptroller and Auditor General of India (hereafter *"CAG"*), which came in March of 2012, accused the government's allocation of coal blocks from 2004-2009 as being *"inefficient",* and responsible for a loss of rupees 10.7 lakh crore to the Central Exchequer.[14] The CAG Report, which explicitly stated that although *"there was no legal impediment to the introduction of a transparent and objective process for competitive bidding"*,[15] the Ministry of Coal went ahead with the allocation of coal blocks on the recommendations of the Screening Committee, thereby leading to excessive losses to the central treasury and the current allegations of statutory violations. Until the insertion of Section 11A[16] into the Mines and Minerals Act of 1957, it was the recommendations of the Screening Committee that formed the basis of the Government's allocation of coal blocks to interested parties. [17] Also, Pages 32-34 of the Draft Report of the CAG accuse the Government's allocation process of leading to *"windfall gains"* of close to 10,67,300 Billion Indian Rupees (which was later reduced to 1,85,600 billion in the Final Report of August 17th 2012) to the interested parties, something which could have been avoided if the process of competitive bidding had been provided for.[18]In order to unearth the larger thematic surrounding the redefinition of constitutionalism rendered by the judgment, the brief historical perspective as provided above is to allow for sufficient context in order to analyze the accusations of favoritism, unfairness, arbitrariness and several other violations of public and administrative law principles.

CONTEXTUAL INJUSTICES OF JUDICIAL DEFERENCE: EXAMINING WHY THE CIVIL CONSEQUENCES THEORY AND THE DOCTRINE OF LEGITIMATE EXPECTATION MUST BE CONSTRUCTIVELY AND PURPOSIVELY INTERPRETED

In this section, the author argues that the fact that the Executive deliberately failed to play by its own rules in the allocation process, amounts to a constructive violation of both the civil

[13] The Deccan Herald, *Coalgate Report Rocks Parliament*, March 2012. Also see the Economic Times, Coal Scam: Full Text of PM Manmohan Singh's statement in Parliament. March 2012.
[14] Draft Report of the Comptroller and Auditor General, Government of India, March 2012.
[15] CAG Draft Report, Page 23, March 2012.
[16] Section 11A, The Mines and Minerals Act of 1957.
[17] *Supra* Note 9.
[18] Page 32-34, Draft Report of CAG, March 2012.

consequences doctrine[19] as well the doctrine of legitimate expectation[20] in the field of public law. It is also argued that the presumption of *"expertise"* of the Executive branch extends only to the point where the manner and means of allocation is to be decided, but doesn't limit the scope of judicial review. Given the fact that the Executive had itself formulated a set of rules for the allocation, its consequent failure to abide by it is a clear abdication of settled principles of administrative law and constitutional jurisprudence. One of the more potent elements of the increasing role of the administrative State in the lives of its citizens is a publicly defendable support function of the State, where private parties are allowed to contract with the State and be the beneficiaries of economic policies without having to fear adverse and arbitrary decisions.

At a very preliminary level, one must take due cognizance of the fact that the expanding role and functions of the political State in the achievement of the socio-economic and socio political goals of the country, widens the scope for the applicability of public law principles to the dealings of the State with private parties, at a time when State action affects the lives of individuals in a way it never has before. In fact as Matthew, J. notes in his landmark reflection in *Sukhdev vs. Bhagat Ram*,[21] that by virtue of the fact that the State could no longer be seen as a *"thunderbolt of authority"*[22] and should in fact be viewed as a *"social agent"*[23] and a *"service provider"*[24], limitation on the arbitrary exercise of authority by the political State must necessarily be kept in check. In fact with particular reference to the process of economic policy making, Mathews' view of the United States Supreme Court's decision in the matter between *McCullough vs. Maryland,*[25] wherein the Court had pointed out that constitutional limitations form a pivotal and core area of the transactions of federal corporations, underlines the essence of judicial review as a necessary tool for the protection of constitutionalism in the face of the economic goals of the country. Although the opinion of Matthew's formed the bare thematic of a different context namely that

[19] The specific essence of the civil consequences doctrine in this particular case is that when certain policy measures or routes are resorted to by the State for the achievements of certain objectives, it is likely that it will bear *"civil consequences"* such as the grant/denial of opportunities in the State-individual interface. Having acknowledged that such consequences may arise, it becomes even more pivotal to enhance the scope of judicial review in such situations and expand the applicability of public law principles to it.

[20] The doctrine of legitimate expectation essentially entails that in dealing with the State, every individual who contracts with it in a private capacity, can *"legitimately expect*" the State to play by its own rules, and not arbitrarily flout them at will.

[21] AIR 1975 SC 1331.
[22] *Ibid.*
[23] *Id.*
[24] *Id.*
[25] 17 U.S 316 (1819).

of *"State"* within Article 12[26], the essence of public law principles applying all across the public interface of the State's dealings or transactions must be appreciated and noted.

In fact, as Bhagwati, J most pertinently points out in the case of *R.D Shetty vs. Airports Authority of India,*[27] the allocation of quotas, licenses, subsidies and other governmental privileges towards the citizens of the country, essentially work outside the *"traditional forms of wealth"* and the typical political domain of civil liberties.[28] In essence, as part of the expanding operations of a welfare State, and in the achievement of its socio political objectives, the level of scrutiny in terms of the support functions of the State must pass the test of non-arbitrariness , fairness, transparency and general principles of public law.[29] Now, having assumed that State conferred benefits are generally secure and that the doctrine of legitimate expectation must govern interface between the State and the people, we must further look into the substantive question of constitutionalism and judicial review. [30] Clearly, a summary dismissal of the question on grounds of the institutional incapacity of the judiciary in policy processes is misconceived because irrespective of the presumption of the Executive's policy making expertise, the final arbiter of the legality of Executive processes is the judiciary itself. Having been granted the power of judicial review by the Constitution, which also *"confers"* authority upon the Executive, we cannot draw such rigid lines of institutional incapacity and strict boundaries of judicial deference.

In furtherance of fulfilling the State's larger policy agenda, through the Directive Principles of State Policy, one must note that in instances where the consequences of such State action through an increased public interface leads to civil consequences upon any individual (contract or any other civil engagement), either directly or constructively, it must necessarily be non-arbitrary and reasonable.[31] In fact, while one may contend that such actions don't arise out of positive law obligations, Bhagwati explicitly opines that the increased executive interface of the political State, seeking to achieve its economic objectives and the public, who interact and who lives are affected beyond the domain of civil liberties, must stand the test of fairness and non-arbitrariness.[32] In both the abovementioned cases, Mathew, J as well as Bhagwati, J confirmed the applicability and the validity of Justice Frankfurter's opinion in the matter between *Viteralli vs. Seton*, whereby the learned judge held that *"an executive agency*

[26] Article 12, Constitution of India 1949.
[27] 1979 AIR 1628.
[28] *Ibid.*
[29] *Id.*
[30] This is the general thematic of the paper, but has also been looked into in detail in the following sections of this paper.
[31] *Supra* Note 26.
[32] *Ibid.*

must be rigorously held to the standards by which it professes its actions to be judged". This judicially evolved rule of administrative law is now is now firmly established and rightly so."[33]

In the discharge of its aspirations under the statutory scheme of the Directive Principles, judicial review becomes increasingly important in ensuring that the State action, which ultimately leads to civil consequences upon the individual interacting with it, is not one that violates a legitimate course of action, as expected by him or her, either directly or constructively. The reason as to why one must undertake a more sensitive and careful analysis into the doctrine of legitimate expectation, as propounded by Bhagwati, is (a) because a certain level of stability and guarantee of public policy formulation and enforcement is reasonably expected from various public State actions and (b) because the political State as the representation of the will of the sovereign and the people is under a legal as well as a philosophical obligation to ensure a certain standard by which its actions should be judged.

It is in view of the prevention of the arbitrary change in rules of transaction that the interface must come within the scrutiny of the judiciary. The *"perpetration of an abuse of power"* as was observed by the Court in the case of *CCSU vs. Minister of UPSC,*[34] further highlights the need for the judiciary to undertake a level of enquiry that does justice to the fact that individuals are reasonably entitled to rely upon State policies[35], even though they may or may not act in furtherance of them, by ensuring the application of public law principles to it. Although in the present matter, one could possibly contend that there wasn't *directly* any civil consequence upon an individual, it is submitted that the lack of a competitive bidding process, especially when the executive had the option of doing so, constructively violated the essence of the State's support function in enabling private parties to be beneficiaries of the coal allocation process and is an arrogant display of favoritism and arbitrariness. In the same way in which a situation of failure to exercise administrative discretion in a particular manner may very well result in the wrongful exercise of discretion, the State breaching its own rules also results in an absolute lack of public accountability or transparency in the decisions of coal block allocation.

It is submitted that apart from such recommendations being violative of the doctrine of fairness and non-arbitrariness, such procedural impropriety work as a major detriment to the lives of *"ordinary citizens coming into direct encounter with State power holders".* [36]In this regard, it is finally submitted that the methodology of assessment of the State actions constitutional validity must allow for a

[33] 359 U.S 535 (1959).
[34] House of Lords, United Kingdom (1983).
[35] *Ibid.*
[36] *Ibid.*

scheme whereby although the judiciary does not encroach upon the terrain of the legislature's policy framing authority and expertise, it does not allow the Executive to encroach upon the larger normative scheme of the Constitution.

CONSTITUTIONALISM AS ANTITHETICAL TO PROGRESS? REDEFINING JUDICIAL REVIEW IN THE "NEW FORMS OF PROTECTION"

Having said that, it is now widely believed that the most potent hindrance faced by the process of judicial review, (as S.N Ray pertinently observes), is the *"possibility of an antithesis between a rigid and doctrinaire attitude in preserving fundamental human liberties and the effective pursuit of a social welfare objective"*. [37] Clearly, as Ray correctly observes, judicial review emerges as one of the *"most effective instruments in the protection of constitutionalism"*[38], especially in the backdrop of the increasing support function of the State. One must agree that irrespective of whether the structure of the political state is to be viewed as a class formation or as the Austinian reflections[39] of the relationship between the governors and the governed or even in the contemporary contexts of a community *"organized for action under legal rules"*[40], Mathew J's enunciation of the different contextualization's of State in the case of *Sukhdev vs. Bhagat Ram,*[41] ties up with Bhagvati J's statements when he contends that *"the law has not been slow to recognize this new form of wealth and the need to protect individual interest in it and the development of new forms of protection"* , thereby establishing the paramount importance of fairness in executive action and the need to redefine judicial review within the cross cutting domain of public policy and civilian interface, even in immensely varying State structures. [42]

Therefore, although one may validly contend that as far as matters of policy-making are concerned, the Executive is (a) a publicly accountable body which directly represents the will of the electorate and (b) has the necessary technical expertise to determine the specifics of a policy route and its ultimate objective, we must necessarily allow for a greater flexibility to this rule, considering that (a) when the State acts beyond the traditional boundaries of law and order and acts as a party entering into a contract with private players, it must ensure that the inequality of the bargaining power of both parties doesn't translate into an abuse of the due process involved and (b) that the pursuit of the State's larger policy

[37] S.N Ray, *The Crisis of Judicial Review in India*, The Indian Journal of Political Science, Vol. 29, 1968.
[38] *Ibid.*
[39] *Id.*
[40] B.N Cardozo, *The Nature of Judicial Process*, Page 94.
[41] *Supra* Note 20.
[42] *Ibid.*

agenda cannot be allowed at the cost of violating constitutionally guaranteed rights. Therefore, although the scope of this judicial review could possibly be curtailed to the Wednesbury grounds of illegality, irrationality and procedural impropriety, it cannot be entirely done away with. As long as the Court doesn't substitute *"it's"* own vision for a particular policy objective, it is well within its constitutional mandate to strike down a particular policy action as constitutionally improper.

JUDICIAL REVIEW AS *"CONFERRED POWER":* EXPLAINING GRANVILLE AUSTIN'S INTERPRETATION OF LEGISLATIVE INTENT

In the case of India, it would be particularly interesting to note the observations of Prof. Granville Austin when he contends that the deliberations in the Constituent Assembly clearly envisaged the role of the judiciary as *"an extension of the Rights"*[43] and *"an arm of the social revolution"*[44], and highlighted the need of this institution for the *"essential enforcement of Fundamental Rights".*[45] The reason as to why Professor Austin's conceptualizations of the debates becomes pivotal to the thematic of this study is because he makes a distinct line of difference between the role of the judiciary in the United States, where it has *"inferred power:"*[46] and India, where the constituent assembly intended it to possess "*conferred power:"*[47] and thereby intended its role to be that of ensuring the identity of the federal scheme in the country included this particular role of judicial review in ensuring the adequate review of the executive's path of India's progress. Although such interpretation has been the issue of long standing argumentative discourse, and as Prof. D.D. Basu also points out, that the actual intent behind the growth of judicial review in India is *"either absent or not too much prominent in our constitutional system"*,[48] the manner in which Prof. Austin interprets the debates, is pivotal to our understanding of what the judiciary's role in policy making was envisaged to be, before such arguments can be insensitively dismissed in the way it was either in *Bennett Coleman*[49] , *Balco*[50] or *Premium Granite*.[51]

[43] Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Page 164.
[44] *Ibid.*
[45] *Id*.
[46] Munshi Papers and Ayyar Papers, *The Indian Constitution: Cornerstone of a Nation*, Pages 171-173.
[47] *Ibid.* Also see A.K Ayyar, *Constituent Assembly Debates*, and Vol. 2.
[48] D.D. Basu, *Commentary on the Constitution of India*, Vol. 1, Page 160-162.
[49] 1973 AIR 106.
[50] Civil Writ Petition 104 of 2001.
[51] 1994 AIR 2233.

FROM HENKIN TO SARTORI: ESTABLISHING THE NEED TO SUSTAIN BRUCE ACKERMAN'S *"HIGHER LAWMAKING"* THEORY IN THE INDIAN JUDICIAL REVIEW PROCESS

The common emerging theme from the observations of both Louis Henkin's nine elements of constitutionalism[52] as well as Giovanni Sartori's definition of liberal constitutionalism[53] is the supremacy of the constitution, and the spirit of the law that it envisages.[54] It is most pertinent to note that Sartori's mention of the *"method of law making that works as an effective brake on the bare will conception of law"*[55], forms the theoretical basis of this paper, in furthering the reflections of the Supreme Court in the case of *I.R Coelho*[56] when it observes that *"the constitution is a living document and an independent judiciary with the powers of judicial review are some of the principles and norms that promote constitutionalism in the country"*[57]. It is submitted that by constraining and limiting the power of State action, especially in the context of contemporary economic policy making where civil consequences either through contract engagement or otherwise are bound to affect the lives of people at the level of public interface, a country and its model of governance may effectively realize the an *"institutional realization of liberalism".*[58] Now, in furtherance of Sartori's hypothesis surrounding the *"independent judiciary dedicated to legal reasoning in order to safeguard the supremacy of the constitution",*[59] it is submitted that judicial deference to the extent that it works as mere *"declaratory* "of the illegality but does not work to offer a remedy, undermines the true essence of the constitutionally enshrined principles as the *"higher law"*, from which emanates the basis of rule of law. In Bruce Ackerman's theory of *"higher lawmaking",* he enunciates the theoretical framework for contending the manner in which *"the tyranny of the majority"* may be controlled.[60] The idea emanating from Ackerman's theories analyzes constitutionalism within the domain of the democratic process, whereby the by virtue of the fact that the voting process in a democracy includes the electorate acting under the Rawlsian conceptualization of a *"veil of ignorance"*, it must necessarily be given the status of the *"higher law".*[61]

---

[52] Bo Li, *What is Constitutionalism*, Pages 2-7.
[53] Sartori, 1987, Page 309.
[54] *Ibid.*
[55] *Id.*
[56] Civil Appeal 1344 of 1976.
[57] *Ibid.*
[58] *Supra* Note 54.
[59] *Supra* Note 55.
[60] *Ibid.*
[61] *Id.*

The constitutional mandate of the Federal Legislature in the United States of America only partially sustains the supremacy of the American constitution, considering its existence without unilateral powers of amendment.[62] In the case of India however, given the status of the judiciary's decisions as *"law"* under Article 141[63] of the Indian constitution and its existence as part of the *"basic structure"* or as pivotal to the maintenance of the *"constitutional identity"* (as envisaged in *M Nagaraj*[64]), we must begin the process of debunking myths surrounding the need to balance priorities and deference to the parliament's domain.

APPLYING KRISHNASWAMY IN JUDICIAL RE-SCRUTINY: BALANCING PRIORITIES OR UPHOLDING THE "COMMITMENT OF THE CONSTITUTIONAL TEXT"?

As an extension of such a model of analysis, Krishnaswamy's structural characterization[65] of the 1993 Supreme Court decision in the matter of *Raghunath Rao*,[66] also deserves applause when he contends that the test of State action (which for the purposes of this theoretical framework shall be judicial review) must seek to *"preserve the normative identity, not involving a quantitative assessment of textual effacement"*.[67] In fact, in Krishnaswamy's urge to ensure the *"protection of the moral and political pre commitment of the constitutional text"*[68], it is submitted that such a theoretical framework of interpretation may also be extended in understanding how the manner in which judicial review being held as a part of the basic structure in the case of *Keshavananda Bharti*,[69] and the 7:6 majority voting against the addition of clauses 4 and 5 to Article 368 of the Indian constitution, must govern the sensitivity of assessment involved in judicial deference. [70]

Now, although the limits of the basic structure test are manifold, and which shall not form a thematic in this study, there is hardly a legal ground to doubt the existence of such a structure.[71] In ensuring the structural coherence of the constitution as a normatively expansive but institutionally limited space, the basic structure test, as an independent test of constitutionality must effectively seek to lay down the highest levels of judicial functioning in the country, through its legal assessment of executive action.

---

[62] The Constitution of the United States of America, The Wilson Quarterly, Vol. 11, 1987.
[63] Article 141, Constitution of India 1949.
[64] Civil Writ Petition 61 of 2002.
[65] Raju Ramachandran, *Sudhir Krishnaswamy: Democracy and Constitutionalism in India: A study of the Basic Structure Doctrine,* Oxford University Press, 2009.
[66] 1993 AIR 1267.
[67] *Ibid.*
[68] *Id.*
[69] AIR 1973 SC 1461.
[70] Article 368 (4) and (5) were added by the Constitution 39th Amendment Act.
[71] *Supra* Note 71.

It is submitted that judicial review, by virtue of its existence in preserving the identity of constitutionally enshrined principles as well as its establishment as part of the basic structure, works as an independent substantive test of constitutionality, and must work to raise the standards of the executive's expected role in the lives of its own people. But, how is this to be done?

The *"new forms of protection"*[72], as propounded by Bhagwati, J ties up coherently with the fact that in a contemporary economic and policy making context, when the State takes decisions pertaining to the exploitation of the natural resources of the country, and has made a statutory amendment to that effect, the accommodation of the *"new forms of protection"* must be made to give judicial review enough authority (which includes the power of effectively strike down) to *effectively* assess the constitutional validity of the State's actions. In fact, in as much as the operation of the separation of powers and the checks and balances principles are concerned, and is required for the smooth attainment of the nation building process, can such prioritization work at the cost of the supremacy of the governing law of the land? In the next section of this paper, I shall seek to debunk certain widely prevalent myths surrounding the alleged *"balancing of priorities"* that the executive must carry out , followed by an assessment of the current subject matter in light of the checks and balances principles and the separation of powers.

The presence of a sufficient number of precedents in this subject matter (which have been dealt with in the subsequent sections of this paper), has helped the author in identifying a wider platform of analysis, in showing (a) that the mere declaration of illegality works as mere lip service to what is meant by *"review"* and (b) that the balancing of priorities of the executive's actions cannot work outside the domain of constitutional limits. As part of the second subsection, the question of whether or not the Wednesbury Tests of patent irrationality works too strictly in favour of the separation of powers doctrine shall also be discussed.

EXAMINING WHY JUDICIAL DEFERENCE AND SELF RESTRAINT HAS LEFT A SHALLOW UNDERSTANDING OF CONSTITUTIONALISM: DOES *COALGATE* MARK THE BEGINNING OF A NEW ERA?

India has been long witness to fiercely contested debates surrounding the need for the judiciary to restrain itself from encroaching upon the expertise and foresight of the executive in formulating and carrying out policy prerogatives. It is also believed that unless the State action in question

[72] *Supra* Note 26.

involves a *"patent irrationality"*[73] as formulated by Lord Greene while articulating the Wednesbury Tests, the legislature's ability and intent in charting out the path for the attainment of socio economic objectives should not be questioned. [74] The Wednesbury standard, which restricts the scope of the judicial review to questions of illegality, irrationality and procedural impropriety, have found a definite place in the Indian judicial review model, in the post *E.P Royappa*[75] period, beginning 1974. The following precedents are a few of the more notable ones in which the doctrine has found an implied application.

In the 1981 Supreme Court decision in *R.K Garg vs. Union of India*,[76] the Court while dealing with the question of the constitutional validity of the Special Bearer Bonds Ordinance of 1981,[77] lay down (with reference to the scheme of this particular study) that (a) there would always be a presumption of constitutionality of a statute (b) an allegation of "a *clear transgression of constitutional principles"* must be shown by he who alleges it , considering that the legislature *"correctly appreciates the needs of its own people".*[78] Further, the Court, in observing Holmes' articulation of the State having to deal with *"complex problems",* seems to agree with the factum of greater judicial deference "in *the field of economic regulation than in other areas where fundamental human rights are involved".* Interestingly, the Court also observes that *"legislation in economic matters is essentially empiric and is based upon experimentation and a trial and error method",* and therefore the power of the Court was to *"destroy and not reconstruct".* [79]

Further, in the case between *M.P Oil Extractions vs. State of M.P*,[80] the Court went on to observe that *"unless the policy is absolutely capricious and not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded ipse dint of the executive functionaries thereby affecting Article 14 of the Constitution"*, the Court must not *"tinker"* with the policy decisions of the executive.[81] A similar line of reasoning was also adopted in the cases of *Delhi Science Forum vs. Union of India*[82] as well as in *Narmada Bachao Andolan vs. Union of India*,[83] both being cases where the question of national

[73] The Wednesbury Tests, as has also been applied in the post 1970 period, has found backdoor entry into Indian Constitutional Jurisprudence.
[74] (1948) I KB 223.
[75] 1974 AIR 555.
[76] (1981) 4 SCC 675.
[77] *Ibid.*
[78] *Id.*
[79] *Id.*
[80] AIR 1982 MP 1.
[81] *Ibid.*
[82] 1996 AIR 1356.
[83] Civil Writ Petition 328 of 2002.

policies came into being decided by the Court, who subsequently agreed that the judiciary's engagement with either the logic or the fairness of policy matters of the Government or matters taken up by the executive's policy wing in the larger interest of the country, it was well beyond the judiciary's domain.[84] In the *Delhi Science Forum* case, referring to the opinion of the Justice Frankfurter in *Moray vs. Dond*[85], the Court further goes on to hold that *"it has its own limitations",* but concludes by saying that *" if there is any legal or constitutional bar in adopting such a policy, then it can certainly be examined by the Court".* [86]

It is important for us to identify the increased levels of insensitivity (read: a summary dismissal of the matter in dispute on grounds of executive expertise without even entirely applying the Wednesbury threshold) to both the norms of constitutionalism and the very idea of judicial review, if one notices the manner in which the Court has often assessed disputes involving economic policies, one such demonstration of insensitivity being in the 2000 Supreme Court case of *Bhavesh Parish vs. Union of India*,[87] where the constitutionality of Section 45-s of the Reserve Bank of India Act of 1934 was in question. The Court, speaking in the context of the informal sectors of the country, and the economic policies related to it, refers to its earlier decision in the matter between *Papnasam Labor Union vs. Madura Coats*[88], to reiterate that the judicial approach to the legislation dealing with the *"complex issues facing the people"* , must be *"dynamic, pragmatic and elastic".* [89]

Justice Bhagwati, in the matter between *National Textile Workers Union vs. P.R Ramakrishnan*,[90] when laying down that the *"court must take care to see that it does not overstep the limits of its judicial function"*[91], draws a line of distinction between locus standi and justiciability, and establishes the need for the judiciary to pay deference to the matters of policy. Also, in the matter between *S.P Gupta vs. Union of India*[92], while laying down that *"judicial review is a constitutional fundamental"*, and that the higher judiciary must *"defend the values of the constitution and the rights of Indians",*[93] the

[84] *Ibid.*
[85] *Id.*
[86] *Id.*
[87] Civil Writ Petition 168 of 1997.
[88] AIR 1959 Mad. 360.
[89] *Ibid.*
[90] 1983 AIR 750.
[91] *Ibid.*
[92] *Id.*
[93] *Id.*

Court would ordinarily leave the reader in confusion when it also observes that while the judiciary must stay within its *"judicially permissible limitations",* but also *"harness their power in public interest".* [94]

Similar reasoning was followed by the Court in establishing that the separation of powers between the executive and the judicial domain is one that cannot be disturbed, owing to the priorities of good governance in the nation, and the need for it to effectively realize its socio economic goals and policy objectives. I would like to begin my analysis of whether the statements of the court in always ensuring that its highlights the duty of the judiciary to act for the welfare of the people or to assess a *transgression of constitutional principles* , has inevitably been in the nature of mere lip service to the end that judicial review seeks to serve.[95]

The author argues that (a) the curtailed operation of judicial review by virtue of the Wednesbury threshold is a mandatory standard which in any case makes a presumption which is favorable to the Executive and (b) by limiting the validity of a particular State action even further, it amounts to an abdication of a constitutional duty by the Judiciary, while drawing deferential lines between its own expertise and that of the executive agency.

MONTESQUIEU ON POWER SEPARATION: THE NEED TO PUT CHECKS AND BALANCES ON THE HIGHER PEDESTAL

At a very preliminary level, Montesquieu' theory of the separation of powers[96] , which states the need to preserve fundamental human liberties by the limitation of absolutism, ties up with Lord Acton's famous quote of *"power corrupts and absolute power corrupts absolutely".*[97] The fundamental theoretical basis of the abovementioned theory is in terms of the defense of the individual against the State and in the inalienable function of State organs in the protection of fundamental human liberties.[98] It is widely believed that the core basis of the doctrine of separation of powers is also to ensure a system of checks and balances so as to prevent the concentration of the powers of governance in one particular organ. In the case of the United States of America, a rather strict division is observed, with a statutory limitation in Articles 1, 2 and 3 of the Constitution, clearly demarcating the said division, while in the case of India, the separation is not so rigid[99].

[94] *Id.*
[95] *Supra* Note 77.
[96] Maxwell Cameron, *Federalism and the Sub national Separation of Powers*, Publius, Vol. 35 (2005).
[97] The words of Lord Acton.
[98] *Supra* Note 97.
[99] Victoria Nourse, *The Vertical Separation of Powers*, Duke Law Journal, Vol. 49, (1999).

In the case of the *In Re: Delhi Laws Act* case for instance, Chief Justice Kania, lays down that within the constitutional scheme of India, the three organs are often required to work in sync with each other, which is the reason why the fact that there the constitution did not provide for an *"express separation of powers"*, has to be respected[100]. The fusion of powers that continues to be inevitable by virtue of India's existence as a parliamentary democracy, involves a close sense of co-ordination between the three primary organs of the State.[101] Having kept that in mind, it is submitted that the debate regarding the encroachment of either organ into each other's domain is misconceived. If one has to pay due respect to the contemporary context of the modern welfare State and its omnipresence in the lives of its people, a minimal and non-interventionist State structure model cannot be followed to an absolute extent. [102]

While in the case of the United States of America, the separation of powers also contains certain exceptional situations like the President's power to veto a Congress Bill, in the case of India, it is submitted that the checks and balances principle is an integrated part of the doctrine of separation of powers, by virtue of the fact that even apart from the non-existence of a rigid division, the socio economic context of India requires a close functioning of the three organs[103]. In fact, even by virtue of the fact that the Parliament can decide matters on the breach of its privileges or in the impeachment of the President are essentially judicial functions, but are performed by the legislature. Similarly, the Courts perform functions relating to the rules and appointments of the justice structure in the country, something which essentially is a non-judicial function. Therefore, the 5:2 majorities in the *Delhi Laws Act* case,[104] holding that the doctrine of separation of powers cannot be given a constitutional status, imply the existence of a constitutional scheme where checks and balances of each State organ on the actions of another are given greater priority over the rigid separation of powers. Having said that, we must first make a case for this separation in the context of the Coalgate case and then seek to debunk it.

It is widely believed that the foremost reason as to why the Courts must not go into the *"unchartered ocean of governmental policy"*[105], as pointed out in *Bennett Coleman*,[106] is because of the institutional incapacity of the judicial forum to debate policy issues, which require high levels of choices, interests and priorities. However, although cases such as the *Narmada Andolan* or the *Premium Granite*[107]

[100] 1951 AIR 332.
[101] The Hindu, *CJ For Close Co-ordination amongst Three State Organs*, October 2003.
[102] *Ibid.*
[103] *Id.*
[104] 1951 AIR 332.
[105] *Supra* Note 51.
[106] *Ibid.*
[107] 1994 AIR 2233.

case seem to take an extreme stance , advocating for absolute judicial deference to executive policies, it has generally been observed that caveat exists to the extent that such policies cannot abrogate constitutionally established principles of fairness and equality. In fact, in Lord Greene's famous formulation of the triple fold Wednesbury Test in the matter between *Associated Picture Houses vs. Wednesbury Corporation*,[108] has also found a significant position in Indian constitutional jurisprudence in the post 1970 period, finding application in cases including *E.P Royappa*[109] and *Maneka Gandhi*.[110] The Wednesbury Tests, including the tests of procedural impropriety, illegality and irrationality, have governed several matters before the apex court of the country.[111] The essence of such tests however, is to ensure that if any State action is patently irrational, then the Court may undertake judicial review of the same. It is submitted that given the non-existence of a rigid separation of powers, the Wednesbury Tests work effectively in ensuring the balance between administrative action and unfairness, as envisaged in the case of *Tata Cellular vs. Union of India.*[112]

"REVIEW" INCLUDES THE "*POWER TO DESTROY, NOT RECONSTRUCT*": FROM *R.K GARG* TO *2G*

Having established the need to strike this balance, let us work with the term *"review"*. Now, as far as the policy objectives are concerned, there can be no credible doubt as to the domain exclusivity of the executive in deciding the best for its own people. However, in doing so, the question that is to be asked is the extent of the *"greater latitude"*[113] (R. K Garg) that can be allowed in this *"trial and error method"* (R.K Garg),[114] especially in the context of economic policy making where the probability of the State action being unfair and arbitrary in the disposal of natural resources is high, as has been witnessed repeatedly in this country. Given this context, the duty of the judiciary is to evaluate the State action at the altar of constitutionally established principles, with the power to *"destroy it, not reconstruct it"*. (R.K Garg)

It is therefore amply clear that the merit of the policy objective or the means it seeks to serve is not one within the judicial domain, but how it goes about doing this or achieving the objective. The distinction drawn between judicial deference and self-restraint in drawing up the executive's priorities

[108] *Supra* Note 76.
[109] 1974 AIR 555.
[110] 1978 AIR 597.
[111] *Supra* Note 109.
[112] 1996 AIR 11.
[113] *Supra* Note 77.
[114] *Ibid.*

in the country's economic and political progress must pass the test of constitutionality, without which no executive action has any form of legitimacy. While on one hand, the *"transgression of constitutionally established principles"* may be declared as illegal, the past has seen the actual incapacity of the judiciary, not in assessing policy matters, but in offering a remedy, even in terms of *"destruction"* and not *"reconstruction"* (which the judiciary is obviously not equipped to undertake).[115] Therefore, although a wider margin of appreciation must be given to the actions of the executive and even if a thinner judicial review is all that the Wednesbury Tests allow, it must be a review in the complete sense of the word, ensuring that State action that violates the supremacy of the constitutional laws cannot hold good ground.

Although the Court's cancellation of 122 spectrum licenses in the 2G case, triggered widespread debate amongst critics in the country[116], who contended that the judiciary had clearly overstepped its domain while declaring such illegality, it is submitted that this decision followed both the Wednesbury Test (which has been widely used in India post the 1974 *E.P Royappa* case[117]) as well as the essence of *"review",* when the first come first serve rule in the 2G case was held absolutely illegal.[118] Although in effect this left the executive with few alternatives in terms of choices apart from auction (which is not mandatory for the executive), it is submitted that in protecting the spirit of constitutionalism in terms of the constitution's supremacy, the Court had done rather well in its process of review, because it fulfilled both its tasks of protecting the constitutional spirit as well as in only *"destroying, not reconstructing",* which is what essentially substitutes the views of the executive with the views of the court and is not permissible under the separation of powers doctrine.[119] In fact, in Para 148 of the judgment of the court, the word *"preferred"* has been used , which clearly indicates that if the executive would have been able to formulate a policy even other than auction,[120] it would be held valid so long as it didn't violate the constitutional laws of the country. The opinion of Justice Jain ties up closely with that of Justice Khehar's, when he contends in Para 149, that *"when precious natural resources are alienated for the commercial pursuits of profit maximizing private entrepreneurs", adoption of means other than those which are competitive , may face the wrath of Article 14".*[121]Although the 2012 Presidential reference was in essence much less interventionist than the 2011 decision of the court in the case of *Subramanian Swami*

[115] *Ibid.*
[116] *Supra* Note 2.
[117] *Supra* Note 75.
[118] See the text of the 2G Judgment. The "first come first serve" policy was resorted to by the Government of Indian in allocation of the 2G spectrum.
[119] Special Reference 1, 2012.
[120] *Ibid.*
[121] *Id.*

vs. Union of India,[122] what must be appreciated is the fact that the Court once again highlighted the paramount importance to be given to the governing law of the land, the constitution. Even after paying sufficient deference to the *"executive prerogatives",*[123] the Court warned the executive against the possibilities of facing the *"wrath"*[124] of the constitutional limitations put on its pursuit of policy objectives. Having tied up closely with the conception of thinner judicial review, it is essential to note that the Court once again establishes the real nature of judicial review in policy, which is one of assessing patent irrationality, without assessment of policy objectives or methodologies per se, and cancels 122 2G spectrum licenses. In effect, although the excessively interventionist stance of the court in its original Ganguly-Singhvi bench judgment was sufficiently reduced in the Advisory opinion, the remedy still found reflection in the form of the en masse cancellation of the licenses. It is hereby submitted, that the failure of the court to effectively *"destroy but not reconstruct"* has often diminished established principles of the constitutional text. [125]

It is hereby submitted that even within the framework of a thinner review, the courts in this country, by virtue of a mere declaration of illegality of State action have only offered mere lip service to what judicial review means to constitutionalism. If one carefully deconstructs the reasoning given for restraint and deference, it is perhaps not very hard to see that even in cases where the Court has undertaken the assessment of State action and has found it as violative of the laws of the constitution, the outcome of the review has worked to defeat the purpose of review in protecting the constitutional pre-commitments, as was clearly seen in Bhagwati's formulation of *"pragmatic constraints"* in *Ajay Hasia.*

EXPANDING THE SCOPE OF THINNER REVIEW: THE COURT IS NOT A *"DISINTERESTED UMPIRE"*

In the present case of *M.L Sharma vs. Principal Secretary,*[126] the Court, while adjudicating upon the alleged violations of Article 14 of the Indian Constitution, the Mines and Minerals Act of 1957 as well as the Coal Act of 1973, formulates three major questions which it seeks to answer , as formulated in Paragraph 82 of the judgment: (a) whether the allocation of coal blocks should have been executed only through the method of public auction (b) whether the allocation of coal blocks done through the process of the screening committee's recommendations can constitutionally hold ground and (c) the allocation of

[122] Civil Appeal 1193 of 2012.
[123] *Supra* Note 117.
[124] *Ibid.*
[125] *Supra* Note 77.
[126] Civil Writ Petition 120 of 2012.

coal blocks made by government dispensation route is consistent with the fundamental principles of equality enshrined in the constitution.[127]

As regards the first question before the Court, it followed a very similar line of reasoning as the 2G Presidential Reference in 2012, opining that *" the court cannot conduct a comparative study of the of various methods of distribution of natural resources, and cannot mandate one method to be followed in all matters and circumstances".*[128] Deference is further shown in Paragraph 105 of the judgment when it also says *that "it is not the domain of the Courts to evaluate the advantages of competitive bidding viz. other method methods of disposal/distribution of natural resources".*[129] In the same paragraph however, the Court goes on to explicitly mention that if the allocation is found to be *"unfair, unreasonable, discriminatory, non-transparent, capricious and suffers from favoritism or nepotism and violative of the mandate of Article 14, the consequences of such unconstitutional allocation must follow".*[130] Clearly, as observed in the abovementioned observation of the Court, that in fulfilling the statutory mandate under Article 39 (b) of the Constitution,[131] it fell within the domain of executive privilege that determined the means of disposal of natural resources. The Court having established the need for deference, then goes on to mention that such allocation or distribution must not be at the cost of constitutionally established principles of fairness and equality, even after observing that the method of competitive bidding could very well have provided for a *"level playing field to all applicants".* Thereafter, holding that the shortage of electricity in the country at the time, auction could not have been adopted as the prices would have risen considerably. Therefore, the court provides enough reason to infer that it would not warrant *"judicial interference".* [132]

In Paragraphs 108 to 149 of the judgment, the Court tries to deal with the second and third questions. The Court goes into the detailed minutes of the 36 meetings which were held by the Screening Committee between 1993 and 2010 and finds that *"diverse infirmities"* were to be associated with these meetings, thereby going on to highlight them in detail in the subsequent portion. The Court begins by stating that the *"inter se priority or merit of the applicants had not at all been determined"*, in reference to the 21 meetings which took places between 14.7.1993 until 19.08.2003. In the immediate next section of the same paragraph, the Court goes on to hold that there was no *"objective criterion, for determining*

[127] Paragraph 82 of the Judgment.
[128] *Ibid.*
[129] Paragraph 105 of the Judgment.
[130] *Ibid.*
[131] Article 39(b), Constitution of India 1949.
[132] *Ibid.*

the merit of the applicants". In fact, while stating that there were no norms to prevent the *"unfair distribution of coal in the hands of applicants"*, the Court highlights the author's previous urge of sensitive analysis, when it lays down the unfairness in the lack of objective criterion, wouldn't be able to prevent the allocation in the *"hands of a few private companies".*

In sub-paragraphs 3 and 4, the Court went on to highlight the blatant lack of a transparent system of allocation, thereby citing instances where even for applicants outside the scheme of allocation, there was no methodology laid down to verify the credentials of the applicants. In fact, the Brahmadiha block which was allocated to Castron Technologies pursuant to the 14th meeting of the Screening Committee, didn't fall into the category of captive blocks, and were arbitrarily allocated on the basis of what the court calls the *"peculiar approach".* Several other instances included the allocation of Utkal B-2 block to the applicant namely Monnet Ispat, Palma IV-6 and IV-7 blocks to the applicant Jayaswal Neco Ltd. for their Sponge Iron Plant, Chotia Blocks 1 and 2 to Prakash Industries even when it could lead to possible misuse, amongst several others.

The Court ultimately concludes by saying that the entire process of allocation, through the 36 meetings of the Screening Committee suffered from the *vice of arbitrariness and legal flaws*. Referring to the process as *"pick and choose",* the court , concludes by observing that the entire process of coal allocation was inconsistent, not transparent, callous in following its own guidelines without the proper application of mind, ad hoc , casual and arbitrary, all of which led to the *"unfair distribution of national wealth*". Therefore, *"common good and public interest have suffered heavily".* [133]

Much unlike the usual levels of deference which the Court observes with regards to economic policies, the order of the Court in its September 24th decision, has reformulated the context of judicial review in this country. In the 27 page order, the Supreme Court began by highlighting the two major questions it was to answer, one about the fate of 46 coal blocks which were virtually in the process of production, and the applicability of the principles of natural justice in hearing those who would be adversely affected by the cancellation of licenses.

The contentions of Mr. Venugopal, who listed a host of reasons as to why the cancellation would have far reaching consequences were manifold, including (a)the inability of Government companies in adequately supplying coal , (b) the investment wastage of close to 7 lakh crore in end use plants and coal blocks, (c) employment of 10 lakh people (d) the loss of 78263 Crores to the State Bank of India through loans (e) negative impact in investor confidence , inflations, tax losses (f) the delay of

[133] *Supra* Note 124.

roughly a decade before the utilization of coal could be made effective. It was also submitted on the behalf of the allot tees that in view of the decision of the Court in the matter between *Samaj Parivartana vs. Karnataka*,[134] the appropriate remedy would be to set a up a committee to look into the matter on a case to case basis. In fact, Mr. K.K. Venugopal also relied on the case of *Hurra .vs. Hurra*[135] to contend that the allotees deserved a hearing before the cancellation of their allocations, in accordance with the principles of natural justice.

Mr. Harish Salve, also appearing on behalf of the same side, agreed largely with the submissions of Mr. Venugopal. In an outstanding reply to the contentions of both Mr. Venugopal and Mr. Salve's submission on legal relativity and fairness, the Court, while quoting *Sheela Barse*,[136] establishes that the *"court is not a passive, disinterested umpire but has a more dynamic and positive role in supervising the implementation. The pattern of relief need to be logically derived from the rights asserted or found. Remedy is imposed, negotiated and quasi negotiated".* Also taking little cognizance of the cases of *Onkarlal Bajaj*[137] and *Chingleput Bottlers*[138], the Court rules out the option of setting up a committee as it would have the effect of *"nullifying the judgment".* For what is possibly the first time in the history of this country, the Court makes absolutely no mention of deference whatsoever, and lays down in clear and simple terms that since the process of allocation was *"fatally flawed",* the *"beneficiaries of the flawed process must suffer the consequences* "of such allotment. The Court effectively cancelled the arbitrary and illegal allocation of 214 coal blocks to the beneficiaries, on grounds of arbitrariness, unfairness and an absolute lack of transparency and seriousness.

The primary reason as to why the author stands in complete agreement with the model of examination of the Court is because the task of charting out the precise scope of judicial review in high profile executive policies such as the one in question is a very delicate one. Although one may validly contend that affected third parties must not be made to pay the price for the Executive's unconstitutional allocation process, the fact that the State failed to play by its own rules and therefore effectively denied other private parties a level playing field, forms the basis of the constitutional analysis which was undertaken in the present instance. In fact, with the Court highlighting that it is the *"process"* that is to be deemed unconstitutional, and not the planned objective or policy route, it pays both the Wednesbury

[134] Civil Writ Petition 562 of 2009.
[135] Civil Writ Petition 509 of 1997.
[136] JT 1986 136.
[137] Civil Transfer 80 of 2002.
[138] 1984 AIR 1030.

standard as well the doctrine of judicial deference sufficient territory of operation. It is this question that the author seeks to examine in detail in the concluding section of the paper.

CONCLUSION: PRESERVING THE NORMATIVE IDENTITY OF THE CONSTITUTIONAL TEXT THROUGH JUDICIAL REVIEW

In the aftermath of the widespread criticism of the 2G advisory, even after it was seemingly less interventionist than its original judgment, one would ordinarily have expected the judiciary to pay sufficient deference to the policy prerogatives and decision making domain of the executive. Much in contravention to the expectations of critics from the *Coalgate* decision, the declaration of the Court's role as *"dynamic and positive"* form the core basis of Austin's interpretation of the judicial role envisaged by the founding fathers of the country. In fact, by virtue of the fact that the Court, even after fully weighing the consequences outlined by Mr. Venugopal and Mr. Salve, goes on to strike down 214 arbitrarily and unfairly awarded allocations , citing the beneficiaries as having gained from a *"flawed process",* the limits of judicial review in protecting the supreme law stands to be redefined from precedent.

This action of the Court effectively highlights what must be borrowed from *R.K Garg*, which is the power of the court to *"destroy, but not reconstruct".* In the two extremes of judicial response, one of absolute deference as was observed in *Bennett Coleman* or *Balco*, or one where the Court substitutes its own views in places of that of the executive, as was done in the original 2G judgment, one would have to undertake the balancing of priorities to arrive at the middle ground proposed by Garg. In effectively *"reviewing "* an executive action or process, the Court must necessarily be able to preserve the *normative identity* and the *moral and political pre commitment of the constitutional text*, something which is paramount in protecting constitutionally accepted principles. As both Ackerman and Sartori also point out, the democratic process is *"higher law",* because of the additional legitimacy that governance gains from the electorate acting under a veil of ignorance. Therefore, the Court's role in judicial review works to respect the existence and the legitimacy of this *"higher law"* and process, which is something that has been observed in the Coalgate judgment. In appreciating the expansive role of the welfare State in being a *"service provider"* and a *"social agent",* economic policies and processes of the executive affect individuals in a direct manner today, something which must stand the test of fairness and equality in Article 14 of the Indian constitution.

Carrying on from Mahler's comparative politics thesis, it is submitted that although the balancing of priorities with regards to the DPSP's is essential to progress, the absence of a strict division of power in India, gives the checks and balances doctrine the chance to remain at a higher pedestal,

something which is essential in the contemporary influence of the political State in our lives. While *"latitude"* may be granted to the *"trial and error"* of policymaking, judicial self-restraint, as observed in *Coalgate*, cannot work to destroy the constitutional identity of the supreme law of the land.

The only plausible way to effectively realize this role of judicial review as part of the basic structure of the constitution is to (a) acknowledge its separate existence as a test of constitutionality, (b) purposively and constructively of the civil consequences theory and the doctrine of legitimate expectation in the support function of the State and (c) establish the status of the checks and balances on a higher pedestal than the separation of powers, in light of the contemporary context of the political State in the lives of its people.

PATENTABILITY OF HUMAN GENES: SCALING AN INDIAN PERSPECTIVE

*Himangshu Rathee**

PIONEERING THE BASIC CONCEPTS

These days many projects across the globe are being carried out by universities, research institutions, hospitals with research institutions etc. contributing to the excellent development in the field of medicine vis-à-vis mankind. These medicines and such life-saving techniques are not only driven by the emotion to accelerate general good but also by greed of money which the inventor gets by the way of patents. In the past few decades patents have indeed been life savior in the form of medicines (life-saving drugs), biotechnology (for research and analysis of the body, genes etc.), medical instruments (heart stents) etc.

Patent is a monopoly right conferred by Patent Office on an inventor to exploit his invention subject to the provisions of the relevant Patent Act of a country for a limited period of time. During this period, the inventor is entitled to exclude anyone else from commercially exploiting his invention[1]. Although there are few differences between countries, there are a couple of broad principles that are common to all patent systems. A patent is a limited-term monopoly in most cases lasting 20 years, to prohibit others from making, using, selling or importing an invention. According to The Patents Act, 1970 (Indian law on Patents), patent means a patent for any invention granted under this act[2]. As per Halsbury's Law of England, the word patent is used for denoting a monopoly right in respect of an invention[3]. Thus there are three basic essentials of a patent which are Invention, Novel and Industrial application.

Invention mean a new product or process involving an inventive step and capable of industrial application[4]. A bare perusal of the definition of invention clearly shows that even a process involving an inventive step is an invention within the meaning of the act. It is, therefore, not necessary that the product developed should be totally new. Even if a product is substantially improved by an

* The author is a 3rd year student at School of Law, The Northcap Umiversity, Gurgaon (Haryana), Delhi NCR.
[1] VK Ahuja, Law Relating to Intellectual Property Rights, LexisNexis, at p. 479 (2nd Ed, 2013).
[2] The Patents Act, Section 2 (1) (m) (1970).
[3] *Bajaj Auto Ltd*. v *TVS Motor Company Ltd*, 2008 (36) PTC 417 (Mad) at p. 439.
[4] The Patents Act, Section 2 (1) (j) (1970).

inventive step, it would be termed as an invention[5]. "New Invention" means any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification, i.e., the subject matter has not fallen in public domain or that it does not form part of the state of the art[6].

The next requirement of Patent Act, 1970 requires an invention to be new in the sense that on the date of filing a patent application, it should not form part of the state art. The state of art comprises all matter made available to the public before the priority date of the invention by written or oral description, by use or in any other way[7]. The Apex Court in a recent landmark case[8] held that in case of pharmaceuticals additional requirements of clauses (j) which says "inventive step" means a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art; and clause (ja) of section 2(1) and the test of efficacy as provided explanation to section 3 (d)[9] have to be satisfied.

Capable of industrial application means that the invention is capable of being made or used in an industry[10]. Mere usefulness is not sufficient to support a patent but must have industrial application[11].

A gene is the basic physical and functional unit of heredity. Genes, which are made up of DNA, act as instructions to make molecules called proteins. Every person has two copies of each gene, one inherited from each parent. Most genes are the same in all people, but a small number of genes (less than 1 percent of the total) are slightly different between people. Alleles are forms of the same gene with small differences in their sequence of DNA bases. These small differences contribute to each person's unique physical features[12]. Due to these differences in the genes various medical treatments from cancer has been discovered in USA.

The medicines or other treatments which are made or use genes clearly indicate that the above criteria is satisfied but due to section 3 (i)[13] of the Patent Act, 1970 human genes cannot be patented

[5] *Dhanpat Seth & Ors* v. *Nil Kamal Plastic Crates Ltd*, 2008 (36) PTC 123 (HP)(DB) at p. 127.
[6] The Patents Act, Section 2 (1) (l) (1970).
[7] A similar provision may also be found in Article 54 of the European Patent Convention 1973.
[8] *Novartis AG & Ors* v. *Union of India*, 2013 (54) PTC 1 (SC) at p. 80.
[9] For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy.
[10] Patents Act, 1970, Section 2(1) (ac) (1970).
[11] *Indian Vacuum Brake Co. Ltd.* v. *ES Luard*, 1926 AIR (Cal) at p. 152.
[12] What is a gene, Genetics Home Reference, National Institute of Health, USA, (http://ghr.nlm.nih.gov/handbook/basics/gene, retrieved on February 15, 2016).
[13] States that what are not inventions for the purposes of Patents in India.

in India. In USA such patents are allowed leading to a flourishing American economy and India is behind in the research and development of medicines as, patents cannot be claimed over human genes in India. No patents over a subject matter (referring to human genes) means that there is very little source of motivation for the inventor that is good to mankind.

TURNING BACK THE PAGES OF HUMAN GENES PATENT

In 1953, the foundation for modern genetics was laid when the scientific journal, Nature, published Watson and Crick's hypothesis about the double helix structure of DNA[14]. Their article suggested a mechanism by which genetic material could be stored, transferred and copied. The first gene patent (US 4,447,538) did not appear until 1982. It claimed a recombinant DNA transfer vector containing the *Chorionic Somatomammotropin gene*[15]. Commercialisation of genetic technology followed soon after when, in 1976, Boyer and Swanson established the first known biotechnology company, Genentech Inc, in Berkeley, California. In 1977, Genentech reported the production of the first human protein manufactured in a bacterium. The technology demonstrated that molecules could be produced in large quantities in bacterial vectors and then administered to patients, raising hopes that recombinant technology could aid the treatment of human disease. A second crucial breakthrough in genetic science occurred in 1977 when Sanger identified a method for reading DNA sequences. A third major innovation in genetics was the development of PCR (P*olymerase chain reaction).* Developed in the 1980s by Mullis and others at Cetus Corporation, PCR provided a quick and easy method for selective amplification of DNA fragments, removing the need for cloning in micro-organisms. The process has become the foundation for almost all genetic laboratory work, making access to the patented technology crucial[16].

Across the world Human Gene Patent was highlighted in the year of 1980 after the decision of US Supreme Court in the case of *Diamond v Chakrabarty*[17] held that manmade, living organisms could be patented. In its decision, the Supreme Court urged a broad interpretation of patent eligibility, holding that "anything under the sun that is made by man," including living organisms can be patented, which in turn clearly highlights that genes if modified by some technology juxtapose their natural form, genes can

[14] Watson J.D. and Crick F.H.C. , A Structure for Deoxyribose Nucleic Acid, Nature at p.737-38 (1953).
[15] Goodman, Howard M., Shine, John, Seeburg, Peter H. Microorganism containing gene for human chorionic somatomammotropin. U.S. Patent 4,447,538 (1984).
[16] A brief History of Gene Patents, Australiam Government, Australiam Law Reform Commission; *available at* http://www.alrc.gov.au/publications/3-gene-patents/brief-history-gene-patents#_ftnref21.
[17] *Diamond* v. *Chakrabarty*, 447 US 303 (1980).

be patented. This decision is considered as the founding case of the patentability of Human Genes. Therefore, the triumph of Human Genes Patent started from the USA and slowly and gradually affected the entire global world, leading to generation of endless debates on the issue of patentability of genes and human cloning.

Following this US Supreme Court decision, the 1982 Canadian case of *Re Application of Abitibi*[18] compelled the Canadian Intellectual Property Office to allow patenting of biological organisms and genes. The permissive nature of USA patent policy led to changes in international instruments like NAFTA, TRIPS, and GATT[19], thereby provisions were also made in such international instruments for patentability of human genes.

There were various other judicial precedents in the Unites States which shaped their law of patents relating to genes like *Mayo v Prometheus*[20] where the Apex Court of US laid the principle that an application of a law of nature to a known structure or process may deserve patent protection. However, in order to transform a law of nature into something worthy of a patent, the applicant must do more than simply state the law of nature while adding the words 'apply it'. Following the case several diagnostics tests were rendered non-patentable. In the recent case of *Association for Molecular Pathology, et al. v U.S. Patent and Trademark Office*[21], the case was for getting specific genes patented which helped in analysis of breast cancer, Supreme Court of US didn't allow the patent and held that naturally occurring gene sequences, and their natural derivative products, are not patent eligible. However, the Court observed that the creation of a new product in a lab exempts that product from being a product of nature. Therefore, gene sequences refined by synthetic processes to create molecules that do not occur naturally are patent eligible.

In India, law is still silent on genetic inventions and their protection in the form of patents. In 2002, the Calcutta High Court, in its decision in *Dimminaco AG* v. *Controller of Patents and Designs*[22], opened the doors for the grant of patents to inventions where the final product of the claimed process contained living microorganisms. The court concluded that a new and useful art or process is an invention, and where the end product (even if it contains living organism) is a new article, the process leading to its

[18] Re Application of Abitibi, 62 Patent Board and Commissioner of Patents CPR (2d) 81 (1982).
[19] B.M. Knoppers, Biotechnology: Sovereignty and Sharing, Springer Science and Business Media, In: Caulfield T, Williams-Jones B, eds., The Commercialisation of genetic research, ethical, legal and policy issues. New York, Kluwer Academic/ Plenum Publishers, at p. 1-11 (1999).
[20] *Mayo* v *Prometheus* 566 U.S. (2012).
[21] *Association for Molecular Pathology*, v. *U.S. Patent and Trademark Office* 569 U.S. 2013.
[22] *Dimminaco AG* v. *Controller of Patents and Designs* 255 IPLR (Cal) 2002.

manufacture is an invention. The Dimminaco case was related to a process for the preparation of a live vaccine for protecting poultry against Bursitis infection. The Controller of Patents had refused the application for grant of patent on the ground that the vaccine involved processing of certain microbial substances and contained gene sequence. The Controller had decided that the said claim was not patentable because the claimed process was only a natural process devoid of any manufacturing activity and the end-product contained living material. The subsequent major step, which amended the patent policy in the field of biotechnology, was in the year 2002 when the Patents Act, 1970 was amended by the Patents (Amendment) Act, 2002 where biochemical, biotechnological and microbiological processes were included within the scope of chemical processes for the grant of patent. The definition of "invention" was also changed to "any new product or process involving an inventive step and capable of industrial application" thereby deleting the word "manner of manufacture" as mentioned in the earlier Act. The debate in India for genetic inventions is still on and not yet settled.

A GLIMPSE OF SCIENTIFIC BACKGROUND AND PATENT REGIME

In the early 1970s, scientists developed techniques to remove a section of one organism and insert into genetic sequence of another[23]. The cell uses the sequence of bases in genes to build proteins[24]. The simplicity of DNA of which genes is a part, is what allows genetic engineering to work. The basic composition of DNA, that is, sugar, phosphate etc. is the same whether the DNA is in an insect, plant, animal or a human being[25]. This compatibility in chemistry makes it possible to recombine genes from different organisms and different species. Such hybrid of genes has served as solution to many contagious diseases including detection of certain diseases. In USA patents can be claimed over such modified genes by way of biotechnology and hence serves as motivation for the patent owners to develop such genes. United Kingdom is in race with USA when it comes to the patenting of genes[26].In India Human Genes or even gene patenting regime does not exist due to which the scientists do not even think in the backdrop of gene development, which has majorly created a setback for the country not only in terms of economy by way of importing technology from the developed world for such patent regime (gene) exits but also in domain of public health by way of expensive medicines and treatment.

[23] E.S. Grace, Biotechnology Unzipped: Promises & Realities Washington, Joseph Henry Press DC at pp 41-12 (1997).
[24] S.R. Barnum, Biotechnology: An Introduction, Cole Publishing Company, Chicago at page 34 (1998).
[25] L.Burlingame, 'Lamarck, Jean Baptiste Pierre Antoine de Monet de' in C.C. Gillispie, Dictionary of Secientific Biography, Volume 7, New York: Charles Scribner's son at p 584,589-90 (1973).
[26] GeneWatch UK, *available at* http://www.genewatch.org/sub-531144.

PATENTING HUMAN GENES: GATE TO BRIGHT FUTURE OR UNETHICAL CATCH

Though India does not have a human genes patent regime or as intensive research as the advanced countries like USA. The world's first Human Genome Sequence was a result of the International Human Genome Project comprising scientists from the US, UK, France, Germany, Japan and China. The Project began in 1990, and the sequencing was completed in 2003. India has research on human genome, that is to say, in layman language studying the sequence of DNA. Using as little as 10 milliliters of blood from a "healthy 52-year-old-man", scientists at the Institute of Genomics and Integrative Biology (IGIB) in Delhi successfully mapped the Human Genome Sequence for the first time in India. The breakthrough paves the way for predictive healthcare and the possibility of identifying why certain people (with particular gene sequences) do not respond to certain medications, and what diseases a particular gene carrier, or a population, is likely to develop. India can further excel once the patent in the domain of genes are allowed as India spent much less on human genome project juxtapose other countries[27].

India can benefit from the project mainly in the field of health and good trim. This can be seen from the case of *Asahi Kasei Kogyo's Application*[28] , the patent was claimed for the protein known as Human Tissue Necrosis Factor produced by recombinant DNA technology. Its use was in reducing brain tumours in humans, patent was granted and thereby enabling to improve human life. Research findings from the human genome project and the cancer genome projects in India are starting to make personalised medicine a reality. However, given that such applications are in its infancy (due no patent system regarding genes), it will be sometime before all the information is fully applied in mainstream practice of medicine[29]. This has an economic facet also, research scientists who work in public institutions often are troubled by the concept of intellectual property because their norms tell them that science will advance more rapidly if researchers enjoy free access to knowledge. By contrast, the law of intellectual property rests on an assumption that, without exclusive rights, no one will be willing to invest in research and development. When genes are patented by responsible scientists who have discovered their existence, it is easier to check on their use and misuse, as it is the owners of these genes that are responsible for the

[27] Express News Service, India Maps First Human Genome Sequence, The Indian Express (Dec 09, 2009, 08:49 a.m.) *available at* http://archive.indianexpress.com/news/india-maps-first-human-genome-sequence/551844/1.

[28](1991) R.P.C 485,(HL).

[29] Sreekanth Ravindran, 'Genome Man' Of India (10-March-April-2013), available at <http://www.futuremedicine online.com/detail_news.php?Id=78>.

effects of these where-ever they are used. Just as a company is liable when there are toxic spills, the owner of a gene is liable if the gene does not act as promised[30].

Now it is imperative to comprehensively see the ethical or unethical basis of patentability of human genes, Vitalists believe that there is some sort of vital force running through living beings and that life is due to force. The force is immaterial and cannot be explained by science. Materialists on the other hand, believe everything can be explained by science. The first argument by materialists in favour of patentability of human genes because human being can control life and manipulate its genetic composition in a straightforward and predictable manner, on the contrary Vitalists state that the human beings are unpredictable, Vitalists argue the complexity and autonomy of life defy true control because the force is larger than the humans. Therefore Vitalists considered it unethical to patent any kind of genes as the lives of all creatures are beyond the control of human beings.

The next ethical basis is based on 'Uniqueness and Fungibility'. Fungible means that the life forms are no longer unique, rather they are 'freely exchangeable or replaceable for one another of like nature or kind'. Patenting genes would consider an animate thing as in inanimate and thus patent of living organisms or any part thereof should not be allowed. Such organisms are the outcome of the same complexity that led to existence of the humans. Forcing living organisms patentable ignores these ethical concerns.

The third set of ethical basis is indeed derived from the second, that is, sanctity and violability. It premise rests on the question of whether the limits of what is ethical and right are equal to what is legal and can be legally enforced. Some scholars suggest that there are ethical restrictions above law. Sacred covers in its scope two fundamental values, vis-à-vis, profound respect for life and protection of human spirit[31]. Violability is a product of control and fungibility. If these two principles (sanctity and violability) are undermined then it is unethical to patent lives of any kind including human genes[32]. These were a few theoretical ethical concerns for patentability of human genes.

Ethical concerns with the patenting of genes, however, are not limited to worries that people may be unable to buy, lease or sell services that they ought to be able to buy, lease or sell. On the contrary, many people object to the patenting of genes because they deny that genes should be thought of

---

30 The Human Genome Should Be Patented, *available at* http://debatewise.org/debates/3693-The-Human-Genome-Should-Be-Patented/.

31 M. Somerville, *'Making Health, Not War- Musings on Global Disparities in Health and Human Rights: A Critical Commentary by Solomon R. Benatar'*, American Journal of Public Health, at p 295 (1998).

32 Johanna Gibson, *'Patenting Lives: Life Patents, Culture and Development (Intellectual Property, Theory, Culture)*, Routledge, at p. 34-37(September 28, 2008).

as property at all. Some of these objections reflect explicitly religious premises and others appear to have an implicitly religious character, albeit with no definite theological content which is similar to Vitalists point of view[33]. Hence doing business on natural phenomenon which is genes according to such people is unethical

There is another view which states that patent of human genes is ethical or unethical depending on the purpose of research which is related to the genes, if the patent research of human genes is against the public policy and morality then it must not be permitted, but it is difficult to interpret what amount to public policy and morality as these are dynamic concepts and keeps on changing with the passage of time and society[34].

The people who consider patenting human genes ethical believe that the critics of human gene patents are often accused of being ungrateful, or of being unwilling to reward those who have advanced scientific and medical knowledge, or they are thought to have overlooked the fact that patented inventions are not spontaneous natural occurrences, but require human effort and skill to produce[35].

India, like other major countries have immensely involved in various biotech and medical research area, being one of the topmost competitor in commercial market in biological therapeutic and diagnostic domains globally. Gene patent cannot be granted in the light of section 3(c) of the Patent Act, 1970[36]. More or less in India the ethical concerns remain the same as in any other country as stated above. But the call of the hour is that human gene regiment should be structured in the country with a formalized procedure. These days the burning ethical issue related to the practice of human cloning and is prohibited across the globe. The debate is still on ablaze and the flame is not conceived to doze off any sooner.

EXTENT OF GENE PATENTING: HUMAN CLONING ANALYSIS

Cloning generally means the isolation and duplication of genes or cells. Researchers have been cloning animal, plant and other organism cells and genes for over twenty years. Cells can be cloned by isolating them from the body through a biopsy and culturing them. The cells will grow and divide,

[33] S. R. Munzer (2002) J. Burley and J. Harris (eds.), A Companion to Genetics: Philosophy and the Genetic Revolution, Oxford: Blackwells, at pp. 438-454 (1st Edition).
[34] Thambisetty S. "*Understanding Morality as a Ground for Exclusion from Patentability Under European Law"*, EU Bio Science Journal, Asian Int. Bioethics at pp. 46–52 (2002); also see Article 27 (2) of the TRIPS.
[35] P. Ossorio (2002) 'Legal and Ethical Issues in Patenting Human DNA' in J. Burley and J. Harris (eds.) A Companion to Genethics: Philosophy and the Genetic Revolution (Oxford: Blackwells) pp. 418.
[36] a*ny process for the medicinal, surgical, curative, prophylactic, diagnostic therapeutic or other treatment of human beings or any process for a similar treatment of animals to render them free of disease or to increase their economic value or that of their products*' are not patentable.

producing new cells identical to the original cells. The resulting cells, called a 'cell line', have an identical genetic makeup[37].

On July 5, 1996 Dolly (sheep) was cloned using a technique known as 'somatic cell nuclear transfer technology'. A somatic cell is any cell of the embryo, fetus, child or adult which contains a full complement of two sets of chromosomes. Germ cells, i.e., an egg or a sperm, contain only one set of chromosomes. In this technology, a cell nucleus containing complete DNA from any somatic cell is transferred into an egg from which the nucleus has been removed and grown into an embryo. In Dolly's case the nucleus from an udder cell of one lamb was introduced into an egg from another lamb. The announcement of the birth of Dolly the transgenic sheep, and the announcement by Richard Seed that he plans to start a human cloning business; the world's attention has focused on the biotechnology of cloning. The U.S. Patent and Trademark Office turned down that application, however, citing a federal law that restricts the subject matter of a patent to exclude "laws of nature, natural phenomena, and abstract ideas." So did the US Federal court said on this case[38].

Taking in terms of human cloning, the patent covers a way of turning unfertilized eggs into embryos, and the production of cloned mammals using that technique. But unlike some other patents on animal cloning, this one does not specifically exclude human from the definition of mammals; indeed, it specifically mentions the use of human eggs[39]. But the patenting of modified genes can be said to exist as in *Parke-Davis and Co. v. H. K. Mulford and Co*.[40], a lower Court held that purified human adrenaline was patentable because, through purification, it became "for every practical purpose a new thing commercially and therapeutically". Thus even patenting such a process is prohibited in India but for micro-organisms the case is not the same. Critics claim, the difficulty with the main moral objections to human gene patents is not simply that they confuse legally patentable genes with naturally occurring genes. In addition, they confuse patenting with owning. Thus, they fail to see that whatever the complexity involved in legal ownership, a patent simply does not confer legal ownership of anything. One can have a legal patent on a bicycle without owning any bicycles. Indeed, one can have a legal patent on an invention, but lack any legal rights to use that invention, let alone to license others to use or manufacture it. This is

[37] William S Feiler, Patent aspects of human cloning in the US, Grain (28 September 1998),*available at* https://www.grain.org/article/entries/2125-patent-aspects-of-human-cloning-in-the-us.

[38] Kelly Servick, No Patent for Dolly the Cloned Sheep, Court Rules, Adding To Industry Jitters, (may. 14, 2014 , 7:30 am) *available at* <http://www.sciencemag.org/news/2014/05/no-patent-dolly-cloned-sheep-court-rules-adding-industry-jitters>.

[39] Andrew Pollack, Debate on Human Cloning Turns to Patents, The New York Times (May 17, 2002), http://www.nytimes.com/2002/05/17/us/debate-on-human-cloning-turns-to-patents.html.

[40] 189 F. 95 (SDNY 1911), affd 196 F. 496 (Second Cir. 1912). P.102. Quoted In Ossorio, p. 413.

because the only legal right conferred by a patent is the right to prevent others from using or possessing one's invention: "…patents do not grant rights of use or possession, only rights to exclude". Hence, Ossorio (a leading scientist in USA) concludes, a human gene patent cannot be identified with legal ownership of human bodies, not simply because human gene patents confer no rights over naturally occurring genes, but because patent rights confer none of the positive rights to possess and use in which ownership typically consists[41].

At various instances such human clones can prove to be real assets to humanity. The main aim of China's one child norm policy was to control the population of the country but to introduce such a policy proved to be fatal in the long-run, indicated by a rise in the old-age population which is indeed as a matter of fact inappropriate to work. To counter this problem China shifted to two child norm policy whereby in China a couple can have two children. This was done to boost up the young population[42]. Though there is no guarantee that such akin situation would not arise in China once again and also China was late in adopting such a policy. But this can be countered by human cloning, producing human being with desirable qualities and cloning the desirable number of humans. Such a measure may be needed in India because by 2022 India is expected to overtake China in terms of population[43]. Therefore, India may allow such practice though may be unethical but should be made legal considering its developmental needs and International commitments. India has started its human genome project even though genes are not a subject-matter of patent as afore stated (in pioneering the basic concepts). The country should give serious thoughts about expanding the project to human cloning project due to its benefits as mentioned above[44].

LEGAL BASIS OF LIFE PATENTS IN EUROPE AND USA

The Agreement on Trade Related Aspects of Intellectual Property (hereinafter referred to as TRIPS) mandates that patent protection must be extended to all fields of technology which by necessary implication includes biotechnology[45]. Such inventions might include inventions based on genes or whole organisms; known as life patents (here, life patents refer to patents of human genes). Life patents can be understood by laws relating to it in Europe and USA.

[41] P. Ossorio (2002) 'Legal and Ethical Issues in Patenting Human DNA' in J. Burley and J. Harris (eds.) A Companion to Genethics: Philosophy and the Genetic Revolution (Oxford: Blackwells) pp. 408-19.
[42] The great graying of China: Why the new two-child policy is too little, too late (December 24, 2015), http://qz.com/580784/the-great-graying-of-china-why-the-new-two-child-policy-is-too-little-too-late/.
[43] 'India to Overtake China's Population By 2022' – UN, BBC NEWS (30 JULY 2015), *available at* http://www.bbc.com/news/world-asia-33720723.
[44] See Supra: Patenting Human Genes: Way Ahead or Unethical Catch.
[45] Article 27.1 of TRIPS.

The European patent system displays a disciplined yet inclusive regime of according patent rights to biotechnology and its numerous progenies. The guideline prescriptions for the European nations regarding municipal patent laws are incorporated in two primary documents–the European Patent Convention (EPC) and the Biotechnology Directive of 1998[46] (the Directive). Four criteria are highlighted in the EPC for determining patentability of any subject matter. The EPC directs that for successful patent protection, the matter concerned should be patentable; should display novelty and include an inventive step; and must prove industrial usage. These four criteria were reaffirmed in the Directive of 1998. In fact, for the purposes of ensuring compatibility between the EPC and bio-patents, the Directive categorically under Article 3.2 specifies that biological material, after considerable human processing and intervention, cannot be precluded from the ambit of patent protection simply because its initial existence was inherent in nature. The decision in Harvard/Onco mouse represents adoption of these attributes by the European Patent Office (EPO). In this case, inventor successfully patented the Onco mouse, a transgenic organism, which was mutated and altered by sufficient human and technical intervention to improvise it into a novel organism. The Onco mouse was receptive to breast cancer and therefore, could successfully facilitate an early diagnosis. The EPO deliberated over Harvard's application for securing a patent for the 'Onco mouse'. However, this was dismissed by the EPO as it considered the subject matter 'a variety of animals' and thus barred from patent protection under Section 53(a) of the EPC. On appeal, numerous parties enjoined briefs to the motion before the appellate body which did not uphold EPO's decision of declaring Onco mouse as an animal variety. It did however, recommend the patent office to consider the briefs of the enjoined parties and determine if the invention in question was in violation of public order or morality. The EPO ultimately, in 1994, ruled in favour of applicants granting them the disputed patent. Du Pont, the main sponsor of the research and creation of the organism, was also granted the patent rights. The Harvard mouse case vividly shows willingness and urge in Europe to grant patents to adequately humanly engineered biological products. Again in 1995, the Court granted a patent for a DNA sequence encoding a human protein, produced by pregnant women, which assisted with the pregnancy[47]. It was held that the subject matter in question was more than a mere discovery as it 'had to be isolated from its surroundings and a process had to be developed to obtain it.' This case restricted the applicability of the 'products of nature' doctrine. The European position, as far as life patents are concerned, has been lax and derives a lot from the TRIPS Agreement. However practically, a stricter practice is followed in Europe.

[46] Directive 1998/44/EC on the legal protection of biotechnology inventions.
[47] Harvard/Onco mouse, 1992 O.J. E.P.O. 588 (Examining Div.), reprinted in 1991 Eur. Pat. Off. Rep. 525, 525-27.

The American law on patentability of life is liberal as against the European law on it, The Constitution of the United States empowers Congress to 'secure for limited times to authors and inventors exclusive rights to their writings and inventions' for the promotion of innovation[48]. Under US law[49], there are four requirements for granting a patent vis-à-vis the invention must be novel, must not statutorily be barred from acquiring patent rights, must have utility, and must be non-obviousness. There is no imposition of any statutory bar on the patentability of the subject matter, other than these aforementioned four prerequisites. The American law regarding patentability of life patents is 'all inclusive'. With the inclusion of biological material to patentable subject matter disputes over their 'inventive' status and private ownership or monopoly over life, on the face of it emerged. There exists a debate over whether new advances in technology mandate a new patent regime. The US Supreme Court however, seem to favour patentability on human genes as it says that if an invention is of novel nature that it cannot be regarded as 'product of nature and hence patented'[50].

The Supreme Court, while expanding the functional framework of § 101, held that if a product were novel and portrayed characteristics which were hitherto unknown to mankind, it would suffice the clause's requirement[51]. As a result of US patent regime it has 3,000–5,000 patents on human genes and 47,000 on inventions involving genetic material[52].

INDIA AND INTERNATIONAL COMMITMENTS: A STEP TOWARDS HARMONISING HUMAN GENES PATENT SYSTEM

The international inconsistencies in gene patentability pose an abstruse problem. Inconsistent patent regimes can result in uncertainty among biotechnology firms, as well as unequal access to genetic testing and health care for patients. Due to the global nature of biotechnology, a solution will likely need to come from international organizations. Some nations have argued for amending TRIPS to ban patents on life forms[53]. But previous attempts at this have failed, and it seems unlikely, given the

[48] U.S. Constitution. Art. I, § 8, Cl. 8.
[49]U.S. Patent Act (35 U.S.C.) August 16, 2008 (The US Patent Act is found in Title 35 of the US Code and contains the federal statutes governing patent law in the United States), http://www.bitlaw.com/source/35usc/index.html.
[50] *Diamond* v *Chakrabarty*, 447 US 303 (1980).
[51] Funk Bros Seed Co v Kalo Inoculant Co, 333 U.S. 127 (1948) .
[52] Robert Cook-Deegan, Gene Patents , The Hastings Center, *available at* http://www.thehastingscenter.org/Publications/BriefingBook/Detail.aspx?id=2174, also see Robert Cook-Deegan, "Gene Patents, in*From Birth to Death and Bench to Clinic: The Hastings Center Bioethics Briefing Book for Journalists, Policymakers, and Campaigns*, at pp 69-72, Mary Crowley edition (Garrison, NY: The Hastings Center, 2008).
[53] Cydney A. Fowler, Comment, Ending Genetic Monopolies: How the 1IRIPS Agreement's Failure to Exclude Gene Patents Thwarts Innovation and Hurts Consumers Worldwide, 25 Aus. U. INT'L L. Rev. 1073 (2010).

WTO's (World Trade Organisation) "law-making deficit" that any substantive response will occur in the future. Article 27 of the TRIPS require patent for all inventions in all fields of technology including biotechnology.

TRIPS principally regulates domestic laws of signatory countries. It requires that countries should have an effective patent system for virtually all areas of technology which is subject to two exceptions provided in second and third clauses of the provision. First, Article 27(2) provides that members may exclude inventions from patentability where preventing the commercial exploitation of the invention is 'necessary to protect order public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment'[54]. Secondly, Article 27(3) provides that members may exclude diagnostic, therapeutic and surgical methods for the treatment of humans or animals and plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. It would be pertinent to mention that Article 30 of TRIPS ensures that enforcement of such exceptions does not interfere with normal exploitation of patent and legitimate interest of the patent holder.

The WTO has remained relatively silent on the patentability of genes, although more recent conferences have noted some countries' growing concerns regarding access to diagnostic testing[55] which is to say, the human genes which help in detecting a disease, patent should be allowed on them.

International patent cooperation has been extensive and largely successful in coordinating procedural patent protections. Under the Paris Convention, signatory countries committed to offer "the same opportunity to receive and enforce patent rights to other signatories as they offer to their own nationals." "Subsequent treaties have led to the standardization of the form of patent applications, the procedure for applying, and the terms of protection. However, the term "international patent harmonization" was originally understood to mean "uniform patent laws throughout the world," which would require more uniform substantive, as well as procedural, standards.

WIPO has issued many of its own guidelines regarding genetic patents and resources. In the past decade, it made an attempt to streamline and clarify policies as they apply to gene patents, during

[54] Adelman and Baldia, Prospects and limits of the patent provision in the TRIPS Agreement: The case of India, Vanderbilt Journal of Transnational Law, George Washington University , at pp 507-533 (1996).

[55] See, for example, World Trade Organization, Trade Policy Review, at 76, WT/TPR/S/177 (2005) (pointing out that, as of 2005, the Commission "has not taken a position on Member States' interpretations on the preferable type of protection for gene sequence"); see also World Health Organization, World Trade Organization, and World Intellectual Property Organization Technical Symposium, Access to Medicines, Patent Information and Freedom to Operate (Feb. 18, 2011), *available at* http://www.wto.org/english/news e/news11 e/trip_ 18feb11 summary e.pdf (briefly noting the role of gene patents in vaccines for influenza and the human papillomavirus).

negotiations for the Substantive Patent Law Treaty, it sought to clarify patent requirements and exceptions, including those on "life forms and public health patents."[56] An increasing number of voices in the debate over gene patents, WIPO members have struggled to reach agreement regarding the scope of patentable material. The Director General of WIPO, Dr. Francis Gurry, has identified a shift in patent law from a "unimodular" to "interactive" system where a broad range of actors influence patent policy[57].

India is member of TRIPS, WIPO, Paris Convention etc[58], which provide for patentability of human genes and USA has already availed benefit of it. Even the European system is on its shift by allowing genetic patenting of small organisms and debate of the genetic patents of large organisms. India should also avail benefit of it as is permissible by the TRIPS Article 27 and prohibiting it is violating Article 30 of TRIPS indirectly as it restricts creativity and gives no protection to a person who has made wonders in the field of human genetics. Therefore India should align its patent protection policy in the line of the developed world patent policies.

CRITERIA FOR PATENTABILITY OF HUMAN GENES IN INDIA

Though patentability of human genes is barred in India per se from the very letters of section 3 of Indian Patent Act, but criteria for patentability is almost the same in India as in USA[59]. Therefore such life patents should be allowed in India. This would further be in compliance with the International commitments that India has made (already stated in the immediate afore discussed topic) and would foster the economy and innovation in the field of science and medicine which would be in turn beneficial to public at large. *Salus Populi Suprema Lex* which means the welfare of public is the supreme law[60]. Granting life patents in India justifies the maxim.

In India the patent criteria is the item should be new (novelty); involve an inventive step (non-obviousness of the invention); and should be capable of industrial application[61]. The first condition, that is, of novelty with regard to genes and gene products is fugaciously complied with, since they are considered chemical entities, and these can be patented in most patent offices if they are purified and

[56] WIPO Standing Committee on the Law of Patents, Experts' Study on Exclusions from Patentable Subject Matter and Limitations to the Rights, SCP/15/3 Annex 1 (Feb. 3, 2011), *available at* http://www.wipo.int/edocs/mdocs/scp/en/scp_15/scp_15-3-annexl.pdf. See also World Intellectual Property Organization, Comments Made by Members and Observers of the SCP on Document SCP/15/3 (October 11-15, 2010), available at http://www.wipo.int/edocs/mdocs/scp/en/ scp-j 5/scp 15_3-comments.pdf.

[57] Francis Gurry, Intellectual Property, Knowledge, Policy and Globalization, Going Global 2006 (Helsinki, Finland, Sep. 21, 2006), available at http://www.6cp.net/downloads/ 06helsinkigurry.pdf.

[58] India, WIPO, available at http://www.wipo.int/wipolex/en/profile.jsp?code=IN.

[59] *Ibid* pg. 12.

[60] *Lala Ram (D) by LRS & Ors*. v *Union of India*, Civil Appeal Nos. 243-247 of 2003

[61] *Ibid* pg. 1 & 2.

isolated from the form in which they occur in nature. In most countries, a claimed gene is considered novel if the claim covers the isolated and purified gene. The applicant must be able to prove that the existence of the gene was not known and that he was the first to isolate it, characterize it and define its utility.

An invention in biotechnology is obvious if the prior art provides motivation for the invention and enables one of skill in the art to invent with a 'reasonable expectation of success'[62]. In 1996, the US Supreme Court in *Graham v John Deere Co*[63] articulated four factors to determine non-obviousness. The four factors include: (1) the scope and content of the prior art, (2) the difference between the prior art and the claimed invention, (3) the level of ordinary skill in the art; and (4) other secondary considerations. Secondary considerations may include commercial success; long felt but unsolved need; unexpected result; other's failure to solve the same problem.

The Court of Appeals for the Federal Circuit in, *In re Deuel*[64], held that 'general motivation to search for some gene that exists does not necessarily make obvious a specifically defined gene that is subsequently obtained as a result of that search'. Hence, it was possible to obtain a gene patent using an obvious method[65]. Furthermore, even if the prior art provides the motivation for success and a 'reasonable expectation of success,' the exhibition of 'unexpected properties' will render an invention non-obvious[66]. Examples of unexpected properties are superior purity, specific activity, and unexpected yield[67]. Therefore the criterion of inventive step (invention) is fulfilled.

DNA sequences, such as Genes, ESTs (Expressed Sequence Tag) or SNPs (*Single Nucleotide Polymorphism)*, have a wide variety of applications. In many cases, there are known uses of DNA, like for producing proteins or diagnostics or in forensic sciences (DNA fingerprinting). However, there are also increasingly innovative uses for DNA, like the sensor developed by the University of Illinois at Urbana-Champaign that can detect lead using specially designed DNA[68]. The use of DNA sequences for (pre and post symptomatic) diagnostic testing requires, identification of the disease-causing gene(s), sequencing the gene and identifying the ESTs or SNPs that characterize the disease-causing nature of the gene and production of said DNA fragments. Once this knowledge is available, testing a patient's genome

[62] In re O'Farrell, 853 F 2d 894, 903-04, 7 USPQ 2d (BNA) 1673, 1681 (Fed Cir 1988).
[63] 383 US 1 (1996).
[64]51 F3d 1552 (Fed Cir 1995).
[65]Morrison I E Anna, The USPTO's New Utility Guidelines: Will They be Enough to Secure Gene Patent Rights? , The Hohn Marshall Law School http://www.jmls.edu/ripl/vol1/issue1/ morrison-middle.html.
[66] *In re Vaeck*, 947 F 2d at 494, 20 USPQ 2d (BNA) at pp 1443-44.
[67] Hill Laurie L, The race to patent the genome: free riders, hold ups, and the future of Medical breakthroghs, Texas Intellectual Property Law Journal, 11(2) at p 221 (2003).
[68]Illinois News Bureau, *available at http*://www.news.uiuc.edu/scitips/00/11lead.html.

for the gene is made simple. However, since not all diseases are Mendelian (single gene) diseases, and since these identified genes may only predispose a person to the disease and not actually cause it, diagnostic testing of DNA must also be accompanied with pre and post-test counselling. Patented diagnostic tests are available for Diabetes (Harvard, University of Chicago), Canavan disease (Miami Children's Hospital) etc[69]. The examination guidelines for patent applications relating to inventions in the field of chemicals, pharmaceuticals and biotechnology (Annexure 1, Manual of Patent Practice and Procedure, Patent Office, 2005, India) states that gene sequences and DNA sequences are not patentable if functions (utility for the genetic inventions) are not disclosed. However, a lack of case laws in India requires looking at utility or industrial applicability requirements in other countries. Therefore, the third and last criterion of patentability of human genes is yet again satisfied. But the only step required is from the Government of India, to implement this system of Human Gene Patent System.

The Trilateral Project (US Patent and Trademark Office, Europe Patent Office, and Japan Patent Office) has studied in detail the patentability of ESTs and DNA fragments (including genes) which are worth of studying while shifting towards the life patent system in India. The conclusions that were drawn are:

1. A mere DNA fragment without indication of a function or specific asserted utility is not a patentable invention.
2. A DNA fragment, of which specific utility, e.g. use as a probe to diagnose a specific disease, is disclosed, is a patentable invention as long as there are no other reasons for rejection.
3. A DNA fragment showing no unexpected effect, obtained by conventional method, which is assumed to be part of a certain structural gene based on its high homology with a known DNA encoding protein with a known function, is not a patentable invention (EPO, JPO). The above-mentioned DNA fragment is unpatentable if the specification fails to indicate an asserted utility (USPTO).
4. The mere fact that DNA fragments are derived from the same source is not sufficient to meet the requirement for unity of invention[70].

Another aspect, which has to be considered for patentability of gene/DNA sequences, is

[69] Malathi Lakshmikumaran, Patenting of Genetic Inventions, Journal of Intellectual Property Rights, Vol 12 at pp 44-56, January 2007.

[70]Trilateral project B3b. Comparative Study on Biotechnology Patent Practices Theme: Patentability of DNA Fragments *available at* http://www.trilateral.net/projects/biotechnology/patentability.pdf.

the sufficiency of the specification of such inventions. In many cases the disclosures are unable to describe the inventions sufficiently well so as to achieve the results as claimed by it. The effect of making a broad claim has frequently led to invalidating the patent for lack of subject matter. However, in the case of biotechnological inventions a new scenario arises where a given result may be obtained by different means and the various means have nothing in them, which can relate to the subject matter disclosed in a specification. This is a type of insufficiency, which is called the *Biogen* insufficiency. The term was coined in the House of Lords decision in *Biogen v* Medeva[71]. The patent claimed a recombinant DNA molecule characterized by the sequence of the antigens, namely core and surface antigens. The patent was held invalid by the House of Lords which consented that even though the patent enabled the production of both antigens by the single method described, the claims were for every way of achieving the stated result, namely the production of antigens (was not there).

SUGGESTIONS: ROAD AHEAD WITH THE HUMAN GENE PATENTS IN INDIA

As seen from the above discussions it can be sufficiently gauged that Indian patent system needs a fresh look because all the essentials of patent are fulfilled and the criteria of patentability in India is that akin to USA, yet in USA genetic patents are allowed but not in India. Even Europe is moving in the same direction as USA. Hence, India should not lag behind and take advantage of genetic patent regime and not rely on the developed nations for successes by way of biotechnology (including genetic transformations and uses).

India being a signatory to the international conventions of which America is also part allows the Life Patent regime. Though the truth that natural phenomenon or genes per se are not patentable per se pervades all the patent system across the world and for only modified genes patents are granted (in the USA) provided essential patent criteria as reiterated above[72]. To implement such a patent protection system conspicuously amendments in the Indian Patent Act, 1970 are required allowing patentability of genes by appending an explanation to section 3(j) which provides patentability of genetically modified genes satisfying the three-pronged stated criterion for patent protection. Additionally criteria of sufficient disclosure of patent should also be introduced[73]. This would help India to give competitive edge in terms of economic advantage and welfare measures. Global inequity is not a new problem, but it is of central importance. Because of the importance of international protection of IPRs for technological and cultural

[71](1997) RPC 1 (HL).
[72]*Ibid* pg. 1&2 read with pg. 15 & 16.
[73]*Ibid* pg. 17.

exchanges and promotion of free trade, there is an international system for Intellectual Property Rights. In 1883 the Paris Convention for the Protection of Intellectual Property was established. India not granting genetic patents is leading to inconsistencies in the Global Patent Regime. This enables other countries where such patents are allowed lead to exploitation of the Indian market, which could be avoided by bringing the Indian Patent System in alignment with the patent system of such other countries where patentability of Human Genes is allowed.

Although being intended to promote the facilitation of genetic diagnosis using patented genes, as well as Research and Development activities using patented research tools, several policy measures are required like compulsory license, voluntary relinquishment of patent etc. Where there is issue of public and private ownership of patented inventions by having patent holders issue a non-exclusive license under reasonable terms and conditions, instead of an exclusive license to a single licensee. Furthermore, the degree of public ownership can be increased by having patent holders issue a non-exclusive license to any applicant in a non-discriminatory manner, because such non-discriminatory issuance would effectively provide prospective users with inexpensive access to patented invention. In other words provide a license under reasonable and non-discriminatory conditions.

Genetic research will make further advances and eventually almost all human genes, which form the foundations of research, will come to be known. When this happens, a patent will be obtained each time a disease-causing mutation of a specific gene is identified, which would easily bring about a situation where a multiple number of entities held patents for a multiple number of mutations of a single gene. In order to facilitate the provision of genetic diagnosis under such a situation, it is desirable to have a mechanism in which all such patents for mutations are gathered at and provided by a single organization. In the Life Science Research, respondents were asked under what situation they would be willing to offer their parents to the consortium (association of companies) if they were patent holders. It was found that 46 percent of the respondents were in favour of a system based on principle of reciprocity; in other words, they would offer their patented inventions for free use id they were entitled to the free use of patented inventions owned by others. They exceeded the 27 percent of the respondents who replied they would provide their patents if they received sufficient financial compensation. There were very few people who did not want to offer patented inventions under any conditions. Moreover, such a mechanism could be severely convenient and expedient tool for genetic diagnosis providers, if the mechanism is designed in such a way those users, by accessing the organizations, can easily search databases for gene patents held

by the organisation and conclude the necessary license agreement[74].

This calls for appropriate policy measures to provide for establishment of consortiums which supports development of human resources, make it a rule to have all the results derived from governmental funded research projects placed under a consortium. However such policy actions should also be binding for research activities not financed by the government. It is correctly stated that "Drastic Times calls for Drastic Measures".

[74]Stephen A. Bent, Intellectual Property Rights in Biotechnology, Macmillan, at pp 85 to 92 (1987).

CYBER SPACE MASS SURVEILLANCE PROGRAMS AND VIOLATION OF HUMAN RIGHTS: THE WAY AHEAD

*Shubhankar Das & Sarthak Patnaik**

INTRODUCTION

With the advent of modernization, the word "technology" and "internet" has become synonymous to the lifestyle of the human beings around the world. As per a survey conducted by the World Internet Usage and Population Statistics, as of November 2015, there are around 8 billion internet users all over the world which is roughly around 40% of the total population in the world put together.[1] India amounts to around 8.33% of the total users of the world which means that around 2.5 crore people across various age groups are Indian citizens.[2]

In the current scenario of cyber revolution, modernization and globalization, the best way to describe citizens would be as "Netizens".[3] Pursuant to the advancements in technology, there has been an improvement in the different techniques for surveillance and intercession by the State for intruding into someone's personal data or privacy.[4] The Governments of various countries across the world in today's era are keeping a track of singular's developments, organizational exchanges and methods of correspondence, incorporating cyberspace.[5] Moreover, a project known as PRISM run by the NSA (National Security Agency) of the U.S.A empowers the government to access discussions, pictures, e-mails and even personal date of people on social networking cites such as Twitter, Facebook, etc. and the official email accounts with Yahoo, Microsoft or Google for that purpose.[6] In todays' era, the ineffectiveness of the cyber laws and also the states observation on the individual activities has led to utter

* The Authors are 3rd year Law Students at National Law University Odisha.

[1] Internet World Stats, World Internet users statistics and 2015 world population stats, INTERNET USAGE STATISTICS (Nov. 30, 2015), http://www.internetworldstats.com/stats.htm.

[2] India Internet Users, Asia Internet usage stats Facebook and population statistics, Internet Live, (Dec. 21, 2015), *available at* http://www.internetworldstats.com/stats3.html.

[3] Yusuf Kalyango Jr., Benjamin Adu-Kumi, Impact of Social Media on Political Mobilization in East and West Africa, Global Media Spring Journal, Sept. 2013, at 2.

[4] Nick Taylor, State Surveillance and Right to Privacy, 1, Surveillance and Society, 2, 5 (2002).

[5] Big Data and Privacy: A Technological Perspective (31 Dec, 2014), *available at* https://www.whitehouse.gov/sites/default/files/microsites/ostp/PCAST/pcast_big_data_and_privacy_-_may_2014.pdf.

[6] Dave Maas, Computer COP: The Dubious 'Internet Safety Software' That Hundreds of Police Agencies Have Distributed to Families(1 October, 2014), https://www.eff.org/deeplinks/2014/09/computercop-dangerous-internet-safety-software-hundreds-police-agencies.

disregard to the privacy of the individuals in their personal space.[7] Many scholars and learned people, have termed the infringement of privacy by the states as a cover-up for their inability to keep a proper regulating mechanism due to lacuna in the prevalent cyber security laws.[8]

Through this paper the authors will be predominantly concentrating on the major issue of privacy infringement and examine as to whether such a regulation on behalf of the state is a legitimate or is it a cybercrime committed under the garb of National security and surveillance. Moreover, the paper would also be aimed at providing of solutions as to the provisions of law that are to be incorporated in India for protection of privacy which is a major issue concerning the social security of individuals in the modern era of technology and globalization.

PRIVACY AS AN INTERNATIONAL RIGHT

We are confronting an always expanding dependence upon innovation, and especially the internet, in our normal lives. The way of the internet implies that it is unthinkable precisely to gauge the quantity of individuals with access to it. However, its criticalness and pervasiveness are sure to continue to expand.

On account of the exponential development of the internet, legitimate institutions face genuine questions , how to control the internet , as well as about whether it ought to be managed or monitored or put under observation by state for the sake of national security or national investment . Up to what degree it is genuine to meddle with the privacy of Netizens. The nations who claim themselves to be the champion of majority rule government and common freedoms, if themselves participate in such sort of encroachment of privacy of not just of their own nation natives additionally encroach the privacy of subjects of other nation too. Is such sort of demonstration of states is true blue to monitor what one search over internet , to check the personal conversations, sends and profile information of people for the sake of national security , does it not sum to violation of human rights. Article 12 of The Universal Declaration of Human Rights expresses that: "*Nobody might be subjected to discretionary impedance with his privacy, family, home or correspondence, nor to assaults upon his honor and reputation. Everyone has the right to the protection of the law against such obstruction or assaults*." [9]

[7] Nicole P. Grant, Mean Girls and Boys: The Intersection of Cyberbullying and Privacy Law and It Social-Political Implications, 56, Harvard Law Journal, 8, (2012).
[8] Hiro Onishi, Paradigm Change of Vehicle Cyber Security, 4th International Conference on Cyber Conflict (Sep.2012), *available at* https://ccdcoe.org/publications/2012proceedings/CyCon_2012_Proceedings.pdf.
[9] Article 12 ,Universal Declaration of Human Rights, UN General Assembly Res. 217/A/(III), 10 December, 1948.

Privacy is a central human right perceived in the UN Declaration of Human Rights, the International Covenant on Civil and Political Rights and in numerous other international and regional settlements. Privacy underpins human respect and other key values, for example, opportunity of association and flexibility of discourse. It has turned into one of the most paramount human rights issues of the cutting edge age.

As it was the situation with the majority of the past innovative revolutions all through history, the law has been, and will continue to be extended to its commonsense and hypothetical cutoff points in its exertions to defeat the difficulties raised by the internet. The powerful advancement of the Internet and online administrations in the course of the last a few years speak to the most huge period for international streams of personal information since the first wave of computerization in the 1970s. Amid the beginning of information transforming, apprehensions of transcendent and inescapable collections of personal information were generally conceived regarding incorporated registering and outside information safe houses likened to duty asylums.[10]

As the USA Supreme Court has noted on account of Reno v. ACLU, cyberspace is "accessible to anyone, anyplace on the planet, with access to the Internet." AS we know the Internet is the overall collection of machine systems and portals that uses TCP/IP, a particular sort of programming conventions for communication. We can likewise express that in an easier way, the Internet is a system of connected machines including all the millions of personal machines that are connected to it. On the off chance that we take a gander at the historical backdrop of Internet, it is the outgrowth of a legislature project called ARPANET, which was made to empower exchanges of information between machines worked by the military, guard contractors, and colleges. Internet is high velocity information communication lines between real have machines, additionally called hubs, that course information and messages. [11] The Internet's specialized qualities additionally have a negative influence; they make conceivable an extraordinary reconnaissance of exercises in cyberspace. As the Digital the truth is constructed through understanding about specialized standards. By cyberspace code, surfing and other cyberspace conduct produce finely granulated information about a singular's exercises regularly without his or her permission or even learning.[12]

[10] Privacy Protection Study, Common, Personal Privacy In An Information Society (1977) (expressing concern about intrusions into personal privacy by government and large corporations).
[11] Fred H. Cate, Privacy in the Information Age (1997) pp.50-51.
[12] Scott Ruthfield (1995) The Internet's history and development: from wartime tool to fish-cam, ACM Crossroads Student Magazine.

THE NEED OF PROTECTION OF PRIVACY

Privacy is a wide concept. It incorporates the private space (such as home), private items (such as letters and photos), private relationships, for example, sexual relationships) and private information, (for example, information about people).one of the soonest definition of privacy that still holds well is that it is a right to be left to remain solitary purposely, though not necessarily maliciously .' This definition is backed by two more up to date concepts, 'substantive privacy 'and informational privacy'. The hypothesis behind substantive privacy is that individuals ought to be allowed to settle on substantive decisions about how they lead their lives, free from obstruction by the state or by others. The hypothesis behind informational privacy is that individuals ought to have the capacity to control the stream of information about them. These two concepts are interconnected and a condition of informational privacy is frequently essential to happiness regarding substantive privacy.[13]

Despite the fact that there is no all-around concurred definition of privacy, by and large the trouble does not lie in choosing whether information is private, yet rather, whether the impedance with privacy was legitimate. In fact, in an imperative case, A v B&C, Lord Woolf said:

> "The question of whether there is an investment equipped for being the subject of a case for privacy ought not to be permitted to be the subject of point by point contention. In those cases in which the answer is not self-evident, an answer will regularly be unnecessary." [14]

The statement privacy has been gotten from the Latin term "Privatus" which mean separate from rest. It can be characterize as limit of an individual or gathering confines themselves or information about themselves and accordingly uncover themselves specifically. Privacy can be seen as an issue of a single person to choose who can get to the information, when they can get to the information, what information they can get to. [15]

MASS SURVEILLANCE PROGRAMS ENDANGERING THE PRIVACY OF INDIVIDUALS

In this advanced world, Digital exchanges propels additionally the trades innovations have enhanced the utmost and benefit of Governments, tries and individuals to lead surveillance, catch endeavor and information gathering. Suggesting the Special Rapporteur give a record of the right to adaptability of articulation and assumption, it has communicated that mechanical progressions suggest that the State's

[13] Katie Hafner & Matthew Lyon, (2006) Where Wizards Stay Up Late: The Origins of the Internet 43-218.
[14] Brian Underdahl & Edward Willett, (1998). Internet Bible pp.124-26, 147.
[15] S.D. Wareen and L.D. Brandies(1890) , The Right to Privacy , Harvard Law Review,4(5).

sufficiency in heading surveillance is no more limited by scale or term. Declining costs of innovation and information stockpiling have demolished budgetary or reasonable disincentives to guiding surveillance. The State now has a more huge capacity to coordinate synchronous, meddlesome, concentrated on and wide scale surveillance than whatever other time in the later past. So it could be reasoned that, the mechanical progression of automated stadium, whereupon overall political, monetary and social life are logically penniless are not simply frail against mass surveillance, they have truly energize it. [16]

It is a matter of significant stress that mass surveillance programs by states have been impelling regulated and interfering into the lives of individuals unnecessarily under the spread of state security. More state methodologies and practices are prepared and guided to misuse the security of individuals through electronic surveillance and catch. There are various examples of unmistakable and covert automated surveillance in districts far and wide have duplicated, with administrative mass surveillance climbing as a hazardous and draconian penchant rather than an uncommon measure. Various Governments around the globe have evidently have weakened to blacklist the administrations of telecom and remote rigging organizations unless given quick get to correspondence development, tapped fiber-optic connections for surveillance purposes, and obliged organizations deliberately to divulge mass information on customers and specialists. In reality there have been affirmations that a couple of Governments have apparently made wrong utilization of surveillance of information exchanges frameworks to target political enemies and political nonconformists.[17] As indicated by reports that predominating voices in a couple of States routinely record all telephone calls and hold them for investigation, while the checking by host Governments of correspondences at overall occasions has been represented. This kind of demonstration of state is genuinely annihilating for the mainstream government and force of a nation. Mass surveillance tasks have turned the progressed innovation from an issue that has yet to be determined bane the extent that individual rights and security. In a matter of seconds even non-State on-screen characters are probably making present day electronic surveillance limits. Mass surveillance innovations are presently entering into the overall business, endangering that progressed surveillance will escape managerial controls.[18]

The matter of mass surveillance have come into lime light after revelations in 2013 and 2014 by sources, for instance, Edward Snowden who had been a past NSA foreman. Revelations of mass

[16] Rowland, Diane, Uta Kohl, and Andrew Charlesworth. Information Technology Law. Abingdon, Oxon: Routledge, 2012.
[17] Murray, Andrew. Information Technology Law: The Law and Society. Oxford: Oxford University Press, 2010.
[18] Cavazos, Edward A., and Gavino Morin. Cyberspace and the Law: Your Rights and Duties in the on-Line World. Cambridge,(1994) Mass: MIT Press.

surveillance ventures, for instance, PRISM that recommended that together, the National Security Agency in the United States of America and General Communications Headquarters in the United Kingdom of Great Britain and Northern Ireland have made advances allowing access to much overall web movement, calling records in the United States, individuals' electronic location books and enormous volumes of other progressed exchanges content. These innovations have purportedly been conveyed through a transnational framework containing key intellectual competence connections between Governments, regulatory control of exclusive organizations and business contracts.[19] Considerable debilitating of traditional information protections." In a few States, information-imparting administrations have been struck around legal survey on such a premise. Others have recommended that such utilize limitations are a decent practice to guarantee the powerful release of a State's obligations under article 17 of the Covenant, with compelling sanctions for their violation. [20]

Additionally the United Nations General Assembly have insisted that the rights held by individuals disconnected from the net must likewise be ensured online, and called upon all States to appreciation and ensure the right to privacy in computerized communication. There is a need that States might survey their strategies, practices and legislation identified with communications surveillance, interception and collection of personal information. Likewise there is a requirement for the protection and promotion of the right to privacy in the context of household and extraterritorial surveillance and/or the interception of computerized communications and the collection of personal information, including on a mass scale.[21]

It is additionally a matter of concern that whether access to and utilization of information are custom-made to particular true blue points likewise bring up issues about the expanding dependence of Governments on private division performing artists to hold information "to be safe" it is required for government purposes. Mandatory outsider information retention – a repeating gimmick of surveillance administrations in numerous States, where Governments oblige telephone organizations and Internet administration suppliers to store metadata about their clients' communications and location for ensuing law implementation and knowledge organization access – seems redundant or proportionate.[22]

[19] Av.B&C[2002]EWCA Civ 337 , 11 March 2002.
[20] Julia Brande Earp, David L. Baumer(2012) Innovative web use to learn about consumer behavior and online privacy. Communications of The ACM.
[21] Carlos Jensen, Colin Potts (2004) Privacy policies as decision-making tools: an evaluation of online privacy notices.
[22] Rowland, Diane, Uta Kohl, and Andrew Charlesworth(2012). Information Technology Law. Abingdon, Oxon: Routledge.

One variable that must be considered in deciding proportionality is what is done with mass information and who may have admittance to them once gathered. Numerous national skeletons need "use limitations", rather permitting the collection of information for one honest to goodness point, however consequent utilization for others.[23] The unlucky deficiency of compelling utilization limitations has been exacerbated since 11 September 2001, with the line between criminal equity and protection of national security smudging altogether. The resulting sharing of data between law enforcement agencies, intelligence bodies and other State organs risks violating article 17 of the Covenant, because surveillance measures that may be necessary and proportionate for one legitimate aim may not be so for the purposes of another.[24]

NEED OF STRENGTHENING CYBER LAWS IN INDIA TO PREVENT PRIVACY INFRINGEMENT

India is one of those nations which has been by and large influenced by the Information Technology revolution. Since India is one of the second greatest nation in regards to people, in this way making it one of the greatest customer of web. Right away the request develops whether, India have palatable order to secure the benefits of its subject on the web. The Indian constitution describes the security as individual freedom in Article 21. "Protection of Life and Personal Liberty".[25] No individual ought to be prevented from securing his life or individual freedom with the exception of according to system constructed neighborhood law. The protection is considered as one of the focal rights gave by constitution in rundown.

Considering the Indian setting there is a nonappearance of genuine security order along these lines, so it has wound up to an incredible degree hard to ensure protection of protection rights. Yet without specific laws there are some few substitute laws or related law that the council is using for protection reason of privacy.

Certain authoritative schema that gives backhanded backing to privacy concerns in India, in the same way as Article 21, Indian Constitution, IT Act 2000 Indian Contract Act 1872, Indian Penal Code, Indian Copyright Act, Consumer Protection Act, Specific Relief Act, Indian Telegraph Act [26].
The fundamental regulations for ensuring the privacy of people are as per the following:

[23] Mark S. Boddy, Johnathan Gohde, Thomas Haigh, Steven A. Harp(2012) Course of Action Generation for Cyber Security Using Classical Planning.
[24] Su Sheng, W. L. Chan, K. K. Li, Duan Xianzhong, Zeng Xiangjun(2012) Context Information-Based Cyber Security Defense of Protection System.IEEE Transactions on Power Delivery 2007.
[25] Article 21 of the Constitution of India.
[26] Ponnurangam Kumaraguru, Privacy in India.

- **Information Technology Act 2000 (IT Act):** Section 43a of the IT Act accommodates protection of delicate personal information and information of people. A body corporate having, managing with or handling delicate personal information or information in a machine asset must actualize and keep up reasonable security practices and strategies. On the off chance that the body corporate is careless in actualizing these security practices and strategies and as an issue causes wrongful misfortune or wrongful increase to any person, it might be obliged to pay harms to the influenced person.[27]
- **The Information Technology** (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) **Rules 2011 (IT Rules)**. The IT Rules, encircled under section 43a of the IT Act, set out the reasonable security practices and methodology that must be executed to ensure delicate personal information. [28]

While the IT Act and the IT Rules control the collection and utilization of delicate personal information, the legislature has proposed to authorize a particular legislation on (Privacy Bill) which will override the IT Rules. The Privacy Bill perceives a singular's entitlement to privacy and gives that it can't be encroached aside from in specific circumstances, for example, for reasons of:

- Protection of India's power or honesty.
- National security.
- Prevention of commission of wrongdoing.
- Public request.

In the present worldwide-computerized situation, the unauthorized collection, handling, stockpiling and revelation of personal information is dealt with as encroachment of privacy under the Privacy Bill. The IT Act, and correspondingly the IT Rules, have additional regional appropriateness. Then again, through a press discharge dated 24 August 2011, the legislature elucidated that the IT Rules only apply to bodies corporate or persons spotted in India. Thusly, the IT Rules don't matter to remote corporations or persons found outside India, or when information is gathered from persons spotted outside India. The press discharge further cleared up that the provisions of the IT Rules administering collection and revelation don't make a difference to bodies corporate gathering information from information subjects (that is, an information processor) for benefit of an alternate element (that is, an information controller) under a contract between the information processor and the information controller.

[27] The state of e-commerce laws in India: a review of Information Technology Act. International Journal of Law and Management 2010.

[28] Subhajit Basu, Richard Jones (2012) Indian Information and Technology Act 2000: review of the Regulatory Powers under the Act. International Review of Law, Computers & Technology.

Nonetheless, the provisions identifying with exchange of touchy personal information continue to apply to information.[29]

After going through the above information relating to the Indian legislation with regard to the privacy of individuals online. We can infer the following loop holes in present Indian legal framework for protection of privacy in cyber space are as follows:[30]

- There is no comprehensive law and particular law, still the privacy issue is dealt with some proxy laws which has no convergence on the privacy issue.
- There is no classification of Information as public information, private information or sensitive information.[31]
- There is no legal framework that talks about ownership of private and sensitive information and data.
- There is no accurate procedure of creating, processing transmitting and storing the information.
- There is no guideline that defines about Data Quality, Proportionality and Data Transparency.
- There is no framework that deals with the issue of cross-country flow of information.[32]

ARGUMENTS IN FAVOUR OF SURVEILLANCE: AN ANALYSIS OF RECENT CASES IN INDIA

Though surveillance by the state has been discourage or even criticized to a larger extent as has been enunciated in the analysis made so far by the authors. However, a certain degree of surveillance is required by the states so that privacy of individuals are not infringed even by the private parties.

- **The Case of Union HRD Minister Smriti Irani**

Union HRD Minister of India, Smt. Smriti Irani, was allegedly filmed while changing clothes in the trial room of FabIndia a famous clothing outlet in Goa.[33] Thankfully she was able to notice the same and then saved herself from becoming a victim of cybercrime. However, this whole incident again gave an ample evidence as to how the laws are not stringent enough for the purpose of checking the cybercrimes in our

[29] Singh, Yatindra.(2010) *Cyber Laws: A Guide to Cyber Laws, Information Technology, Computer Software, Intellectual Property Rights, E-Commerce, Taxation, Privacy, Etc., Along with Policies, Guidelines, and Agreements*. New Delhi: Universal Law Pub. Co.

[30] Law, Wai K. (2007) *Information Resources Management: Global Challenges*. Hershey: Idea Group Pub.

[31] Gour, Hari Singh, and A. B. Srivastava, (2010) *The Penal Law of India: Being an Analytical, Critical & Expository Commentary on the Indian Penal Code, Act XLV of 1860: As Amended by Information Technology Act, 2000 (Act No. 21 of 2000)*. Allahabad (India): Law Publishers.

[32] Bhansali, Sanwat Raj, (2007) *Information Technology and Cyber Law*. Jaipur: University Book House.

[33] Omar Rashid, *Union HRD minister Smriti Irani spots CCTV camera at changing room; FIR filed*, Other States (The Hindu Apr. 3, 2015), http://www.thehindu.com/news/national/other-states/union-hrd-minister-smriti-irani-spots-cctv-camera-at-changing-room-fir-filed/article7065251.ece.

country. This whole incident brought to notice the incidents of voyeurism in our society. Only because Smriti Irani was an HRD minister, she with her influence could punish those who were guilty as she had the power to do so. But what about those who are common people, who use the internet for socializing, uploading pictures and for completing their official works.[34] This case again showed that instead of encroaching upon the privacy of common people in name of cyber surveillance and national security, the state should be focusing on making laws stringent for punishing the alleged wrong-doers.

- **The Case of Air Force Personnel Ranjith KK Being Honey Trapped**

The defense or the military personnel of the country hold certain information which is essential to the security of our country. Once they are lured into sharing such information with outsiders that exposes the weak links in the defense of our country and jeopardizes the safety and security of the country. The case of senior Air Force officer Ranjith K.K. being honey trapped by a British woman suspected to be an agent of the ISI has put the nation's security at stake and serves as a classic example of how important information pertaining to defence of the country can go into wrong hands if no checks and balances are imposed. [35] The abovementioned case again brings about the issue of the state ensuring limited and careful use of social networking sites by the defense personnel, namely the officers of the Indian Air Force or the Indian Army.[36] This case further brings about the fact as to cyber surveillance and control to be exercised by the state so that the security of the nation is not jeopardized.[37]

CONCLUSION

Hence in this advanced time of information and engineering such escape clauses in legitimate schema can't be overlook and which can prompt extreme encroachment of privacy of people and additionally of the Nation. Which comes about is appalling regarding human rights and crucial rights of a single person. Subsequently, it is the need of great importance that , government ought to accompany legislations which will guarantee the protection of people privacy in the cyber space, being one of the nation having biggest number of internet clients, India ought to make prompt stride in this respect , such that rights of individual can be guaranteed in the cyber space. Addition to getting the information subjects'

[34] India Intenet Users, Asia Internet usage stats Facebook and population statistics, Internet Live, http://www.internetworldstats.com/stats3.htm.

[35] Nirmalya Dutta, *IAF man seduced online – what is a honey trap? | latest news & updates at daily news & analysis*, INDIA (dna Dec. 30, 2015), http://www.dnaindia.com/india/report-iaf-man-seduced-online-was-it-really-a-honey-trap-2160682.

[36] Man Aman Singh Chhina, The Indian express (The Indian Express Dec. 30, 2015), http://indianexpress.com/article/india/india-news-india/second-case-of-online-honeytrap-in-air-force/.

[37] Rajshekhar Jha, ISI used Facebook to honeytrap IAF airman into spilling secrets (The Times of India Jan. 20, 2016), *available at* http://timesofindia.indiatimes.com/india/ISI-used-Facebook-to-honeytrap-IAF-airman-into-spilling-secrets/articleshow/50373342.cms.

consent at the purpose of collection of delicate personal information, the information controller must guarantee that reasonable steps are taken to give the information subjects. All the nations must guarantee that their surveillance projects ought to be in understanding to the current international laws and should not disregard the individual right to privacy. Governments ought to guarantee that, Rights of people should be ensured and regarded both online and logged off.

TRADE DRESS INFRINGEMENT LEADING TO THE ACTION OF PASSING-OFF

*Anushka Trivedi**

INTRODUCTION

Patents, registered industrial designs, copyrights are ensured for an exceptionally restricted period only. What's more, a trademark is ensured when it is utilized and re-established occasionally and if encroached then the enrolled proprietors take a strong and instant action thereof. An unregistered trademark however can be kept sheltered and alive till the time it is not utilized and passed off by an alternate individual and a strict action for the same has been given taken by the proprietor.

Trade Marks are the words, images or any name appended to the products delivered and fabricated by the producer, with a specific end goal to make the item separated from different products of different people. The statue for the majority of the India was represented by Trade and Merchandise Marks Act, 1958. And after that it got later revised and supplanted by Trade Mark Ac, 1999.

Trade Dress incorporates visual and also sensual appearance of the item that incorporates its packing, shape, visual computerization, size, wrappers and marks, surface, outline, representation, business writing, and even blend of shading utilized as a part of designing that item which may be enrolled and ensure structure being utilized by different manufacturers. Recently Apple Inc. had secured design of its flagship as trade dress by enrolling it.

The definition of Trade Dress in Trademark Act, 1999 is as follows:

Section 2- Definition and Interpretation:-

. . .

(m) "mark" includes a device, brand, heading, label, ticket, name, signature, words, letter, numeral, shape of goods, packing or combination of colors or any combination thereof;

…

* The Author is a Law Student at University of Petroleum and Energy Studies, Dehradoon.

(q) "Packing" includes any case, box, container, covering, receptacle, vessel, casket, folder, bottle, wrapper, label, band, ticket, reel, frame, capsule, cap, lid, stopper and cork;

In case shape of goods is needed to be registered, few other criteria are still subjected to, clause (3) of section 9 of Trademark Act, 1999, which reads as follows:

Clause (3) a mark shall not be registered as a Trademark if it consists exclusively of-

(a) The shape of goods which results from the nature of the goods themselves; or

(b) The shape of goods which gives substantial value to the goods.

This is carried out to shield the merchandise from getting imitated by different products and in any capacity befuddling the clients in connection to the visual look of the item. On account of *Colgate Palmolive Company* v. *Anchor Health and Beauty Care Pvt Ltd*,[1] the court held that even the shading blend utilized as a part of the item can't be duplicated by the other organization and it is even secured and goes under passing off. As for this situation Anchor had dispatched there toothpaste in year 1996 having the same hues i.e. white and red and in same proportion has been utilized by them as a part of their pack as being utilized by Colgate as a part of their toothpaste since 1956.

Similarly in the case of *Cadbury India Limited and Ors*. v. *Neeraj Food Products*,[2] Delhi High Court held that the trademark "JAMES BOND" to be physically and phonetically like the offended party's enrolled trademark "GEMS". The court further held that the respondents product was additionally like that of offended party's item and in the end litigants were limited from utilizing the said trademark and in addition product itself, as it was encroaching the privileges of the Plaintiff in first case.

DEVELOPING DIMENSIONS OF TRADE DRESS

Prior trade dress was just use to comprise of the presence of marks, wrappers and holder, utilized as a part of the item for its pressing. Be that as it may, now it comprises of its all over appearance from its product to the design and format of the item. E.g. Mc Donald's Burger packing. Also, even Coca-Cola bottle shape is its trade dress and if whatever other assembling tries to make same state of bottle and begin offering oil in them, still it will be held as encroaching the trade dress of Coca-Cola. Trade dress encompasses all over picture of the item to the clients. Trade dress insurance incorporates assurance of

[1] (2003) 27 PTC 478 (Del).
[2] (2007) 142 DLT 724.

allover picture of the item. As the respondent's trade dress if is marginally like that of offended party's it makes perplexity in the brains of the clients and afterward there is encroachment of the offended party.

The idea of trade dress has been begun in US. Being an extremely expansive idea, it incorporates cover page of a magazine, appearance of a lamp, design of a shoe, and so on however a generic thought or idea is also secured under trade dress. In the case of *Wal-Mart stores v Samara Brothers*[3], where the trade dress of Samara Brothers Inc. consisted of a line of spring/summer one piece seersucker outfits decorated with flowers, fruits and the like. The court held that Wal-Mart was liable of encroachment and that an unregistered item plan is ensured as trade dress in the event that it is naturally unmistakable or has gained an optional significance.

PROTECTION OF TRADE DRESS IN INDIA

In India, Trade Dress is secured under Trademark Act, 1999. It gives the privilege to the offended party to file and action against the respondent for passing off his merchandise in any capacity. What an offended party is obliged to demonstrate is that there was goodwill connected to the merchandise, further there was distortion of the same and that prompt harm to the offended party notoriety/goodwill. And after that it is to be examined whether there was the intention of the litigant in replicating the offended party's merchandise as its own or it was carried out in an honest conviction.[4]

The greater part of the deception and trademark encroachment originate from medicinal and pharmaceutical sectors where respondent duplicate the getup of the product of the drug as that of plaintiff's. In the case of *Novartis AG* v. *M/S Wanbury Ltd and Anr.*[5], the plaintiff prayed the court to grant injunction on the defendant cough syrup named CORMINIC which was as similar to that of plaintiff's syrup names TRAMINIC's packing yet shading, style, text styles, style, stage, letters, sythesis, presentation and so forth were altogether diverse to that of offended party's product. The court held that there was no such likeness that may make disarray in the brains of the clients, so declined to concede directive as against litigant.

[3] 529 U.S. 205 (2000).
[4] *Supra* note 1, at 2.
[5] (2005) 121 DLT 316.

ESSENTIALS OF TRADE DRESS INFRINGEMENT

1. Anything which creates the overall look of the brand similar to the other product producer by the other producer.
2. This type of similarity creates confusion in the minds of the ultimate customer related to the originality of the product, as to which is the original product and which one is copied.
3. The setup of shapes, plans, hues, or material that is utilized as a part of the product makes up the trade dress being referred to is meaning to make disarray in the psyches of the purchasers.
4. The statutory prerequisite of the enlistment of trade dress is like that of any trade mark or name.

TRADE DRESS INFRINGEMENT: FUTURE PROSPECTS

With the advancing advertisement through media and so on, the different brands have been attempting to catch the business sector at a huge scale and additionally the psyches of a definitive clients. So this is extending to all over horizon of the trade dress piracy. Presently new vitals to the trade dress are been incorporated, for example, Hotel industry and in addition trade dress security in web are currently went under encroachment of trademark of an individual.[6] The further improvement in the field of trade dress is helping in energizing up the law of passing off under basic law standards.

These improvements will held the courts in deciding the instance of the encroachment of trade dress under the law of passing of:

"Deception" it could be yet an alternate criteria to focus the encroachment of trade dress while managing the instances of the trade dress, as court will see whether there are similar products presented in the business sectors to that of the offended party and once they get it, then it will be all the more simple for the courts to focus in what perspectives both the products are indistinguishable and whether it is making any disarray in the brains of the consumer or not. Rather the inquiry would be of business morals and about the genuineness and honesty of the product designing. It would imply that further stronger insurance of the trade dress to be given to the IP holder so as to protect his rights. Accordingly, while managing the encroachment of the trade dress court ought to not just see whether the same is making perplexity in the psyches of the clients or not additionally the same is distorting the product of an alternate i.e. of offended party.

It is recognized that trade dress is wide enough to include descriptive materials such as slogans, or visual images in Television's or radios, or any other portrayed in newspaper, which leads to

[6] Bell Tom W, Virtual Trade Dress: A very real problem, Maryland Law Review, 56 (1997) 384.

the customer to associate the same with the plaintiff's goods/product and therefore these descriptive material gets associated with the goodwill of the plaintiff's product and further to the goodwill of the firm.[7] This is same in India as well, as to test the infringement one has to see whether it is copying the product's 'distinctive feature' as its own.[8]

Aside from considering the distortion made by the litigant there are numerous more viewpoints which are to be remembered. That is, the business sectors in which two products are based upon. The reason why all manufactures protect their trademark/name is so as to make it distinct from other manufactured goods and services. Furthermore, their goodwill relies on the imprint or name they had embraced. It is carried out so that the centered clients can review the name effectively and don't get mistook for the same.[9] Actual confusion in the minds of customers is to be proved by the plaintiff while filing the suit for the passing off as against the defendant. If the markets are totally different and products sold are also very different in all aspect with each other, then no relief by the court will be granted in favor of plaintiff.

Finally, it is likewise important to figure out the level of 'buyer consideration' while assessing the level of customer disarray identified with the product. Clients' perplexity is more noticeable in purchasing immoderate products. However, encroachment is generally decided in less expensive products for the most part. As when a shopper purchases car he gets confused yet at the same time it can't be held as encroachment, yet the same perplexity for purchasing pencil box can be held as encroachment if there is deception of the product by other maker.

ACTION OF PASSING-OFF

Passing Off is a kind of tort i.e., a civil wrong. It is a wrong against the producer of one brand by method of quietly utilizing their unregistered trade mark as one's own and picking up benefit thereof. The object of passing off law is to ensure the goodwill of the business from getting infringed by the contenders.

The damages claimed thereof are 'un-liquidated damages'. The action against the passing off is based upon the principle which was held by the Court in the case of *Singer v. Loog*[10], that 'No man is entitled to represent his goods as being the goods of another man, and no man is permitted to use any

[7] Kellner Lauren Fisher, *Computer user interface: Trade Dress protection for 'look and feel'*,University of Chicago Law Review, 61 (1994), 1011.
[8] Cadbury Schweppers Pty Ltd v. Pub Squash co Pty Ltd, (1981) RPC 429.
[9] Apple Computer Inc. v. Apple Leasing Industries, (1992) 1 Arb LR 93,137.
[10] 18 Ch D 395 at 412.

mark, sign or symbol device, or any other means whereby, without making a direct false representation himself to a purchaser who purchases false representation to somebody else who is the ultimate customer'.

The law of passing off has been extended to professional as well as non-trading activity. In fact, it is now applied to all forms of unfair trade practices, where the activity of one person damages the goodwill of another. Though intention has no play in passing off, an innocent can also be held guilty if he passed off the goods of another.

Similar view related to passing off was held in the case of *ICC Development (International) Ltd* v. *Arvee Enterprises*[11] that "the passing off action depends upon the simple principle that nobody has any right to represent his goods as the goods of somebody else".

PROCEDURE FOR ACTION OF PASSING OFF

Indian Intellectual property holder many a times confronts issue identified with forging and encroachments of their trademark, symbol, name and so on. The basic idea behind passing off is to get a character which is anything but easy to be recalled by the costumers and even gives the impression of being connected with a reputed brand.

In past IT well-known brands, for example, NTEL, DELL, INFOSIS, YAHOO and so forth had ended up casualties of such passing off. Furthermore, once this movement happens the onus of demonstrating their goodwill and notoriety falls upon the Original brand holders.

There are inquiries asked by these IP holders that for what reason these fake organizations are permitted to get themselves enlist by the enlistment center in any case.

Once the organizations make themselves enlist through Registrar of Companies are just those organizations whose names or imprints are not by one means or another indistinguishable with the old brand names. So ones the applicant records the suit for the passing off, the respondent took the supplication that they had looked for earlier support of the Registrar and afterward just continued utilizing their mark and even takes the request that they were ignorant of such a brand officially existing. As the pursuit framework is not a full evidence, so the infringer exploits the way that there is no such kind of engine to inquire the current organizations name or mark.

There has been an amendment in Section 20 of the Trade Marks Act, 1999 which says that *'a company name that is identical to a registered trade mark or a trade mark which is subjected of an*

[11] (2003) 26 PTC 245(Del).

application for registration may not be registered. The Registrar of Trade Marks would be consulted for confirming this'.

The change of Companies Act and also new Trade Mark Act 1999 likewise give that an application can be made to the Central Government by the managers of the enlisted trademarks within the period of 5 years from the date when the new organization was enrolled with the same name or mark, and so forth. The holder of the IP needs to inform existing of an organization's name that is as indistinguishable to the enlisted trade mark. And once the Central Government gets satisfied by the same gives three months' chance to the infringer to change its organization's name.

FUNDAMENTAL ELEMENTS TO BE FULFILLED TO CONSTITUTE PASSING OFF

Earlier in the case of *Erven Warnink v. Towened*[12], House of Lord identified five characteristics to be present in the case to constitute a valid cause of action for passing off. They are:

"1. A misrepresentation;
2. Made by a trader in the course of trade;
3. To prospective customers of his or ultimate consumers of goods or services supplied by him;
4. Which is calculated to injure the business or goodwill of another traders;
5. Which causes actual damage to business or goodwill of the trade by whom the action is brought or (in a *quia timet* action) will probably do so."

But later in the case of *Reckitt Colman ltd v. Borden Inc.*[13] the court held three elements also known as *'Classic Trinity'*,

1. Goodwill had been attached by the trademark;
2. Misrepresentation of the Name/Mark;
3. Damage to the Goodwill.

To build the instance of passing of one needs to establish that, firstly the goodwill was attached to his merchandise, also he must prove the deception of the same openly, and ultimately he must attempt to show that he had endured a loss due to the act of the respondent.

1. **Goodwill:** Although damage is the gist of an action for passing off, but one has to prove that there had been reasonable reason for him to believe in such an injury which has been directly or indirectly caused

[12] (1979) A.C. 731.
[13] (1990) 1 All E.R. 873.

by the defendant's action. It is merely an intangible asset of a firm accrued by his good conduct towards his customers. The definition of the same had been given in the case of *Tergo v. Hunt* by Lord Macnaughten as:

> *"Goodwill is the benefit and advantage of a good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from the new established business at its first start. The Goodwill of a business must emanate from a particular center or source. However, widely extended or diffused its influence may be, goodwill is nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates."*

In the case of *CIT* v. *B.C. Srinivasa Setty*[14], that once the goodwill of a firm is effected it effects everything i.e. personality of the owner, the nature and characteristics of the business, its impact on the customers and market at large and many other intangible assets.

Further in the case of *Deepam Silk International* v. *Deepam Silks*[15], while ordering injunction on the defendant usage of plaintiff's trade mark, The Karnataka High Court observed that "once the plaintiff has shown that he has been doing business for more than a decade with the trade name and that he had not only registered it but also spent lakhs of rupees on gaining the goodwill/reputation towards advertisement in almost all the medals available, and loss that would be caused to plaintiff, on the usage of the same by the defendant cannot be ascertained in the terms of money. It is the reputation of the plaintiff's trade name that will be in jeopardy. Therefore, there are every likely of the plaintiff losing its customers too and getting its trade name defamed."

2. **Misrepresentation:** when the infringer uses the trade name or mark of the other as its own, gets it register and then sells the goods in the name of it only, so as to earn profit. So this type of activity by the infringer is known as misrepresentation. As the person is using the trade name of another. This creates confusion in the minds of customers.

   In its classical form of misrepresentation which gave rise to passing off, it is implied representation by the defendant that his goods are the goods of the plaintiff. In the Advocate case[16], Lord Dipluck explained that:

[14] 128 ITR 294(SC).
[15] (1998) 18 PTC 18 Kar.
[16] (1979) AC 731, p.741-742.

"Where the plaintiff and defendant were not competing traders in the line of business, a false suggestion by the defendant that their business were connected with each other would damage the reputation and thus the goodwill of plaintiff's business."

In the case of *Khemraj* v. *Garg*[17], in this case defendant had copied the layout, design and color schemes, etc. and the name "manavpanchang, mani ram panchang" and "shri vallabh Mani Ram panchang" of the plaintiff's panchang. The court in this case held that it is similar as of plaintiff's product so granted interim injunction as against the defendant.

Further in the case of *Rupa & Co. Ltd* v. *Dawn Mills Co. Ltd*[18], in this case defendant started manufacturing underwear with the name, layout and color combination as same as of plaintiff's product named 'Don'. So this created confusion in the minds of the customers and thereby losses to the plaintiff.

3. **Damages:** If because of passing off by the defendant the loss occurs to the plaintiff. He has the right to institute the suit for the same and claim injunction against the defendant from using the similar trade name/mark etc.

   In the case of *Laxikant V. Patel v. Chetanbhai Shah*[19], the Hon'ble Supreme Court held the elements of passing-off actions are:-

   Reputation of the goods; Possibility of deception; and Likelihood damages to the Plaintiff.

CHARACTERISTICS OF PASSING-OFF ACTION

1. **Fraudulent intent not necessary while passing-off**: It not always necessary that while passing off the plaintiff's goods or services, fraudulent intention of the defendant should be present. While granting permanent injunction against the defendant using the trademark "Horlicks" in the case of *Horlicks Ltd v.Bimal Khamrai*[20], the Delhi High Court held that *"the use of the offending trade mark by the defendant appears to be flagrant and blatant attempt on his part towards the plaintiff, in order to deceive the customers and encash on their goodwill in order to pass their goods as that of the plaintiff. And when there is a possibility of such confusion in business an injunction would be thereby granted even though the defendant adopted the name or mark innocently."*

[17] AIR 1975 Delhi 130.
[18] AIR 1998 Guj 247.
[19] (2002) 24 PTC 1 (SC).
[20] (2003) 26 PTC 241 (Del).

2. **Evidence of Misrepresentation is necessary but not of deception:** plaintiff while filing action of passing-off has to prove that there was misrepresentation to proceed with the case but he has no liability to prove that there was actual deception, As it is a matter of fact itself. The ultimate question which one has to keep in mind is that whether the deception is likely to create confusion in the minds of the ultimate buyers or not.
3. **There is no necessity that plaintiff and the defendant should be of same field**: it is immaterial to see whether the plaintiff and defendant trade in the same field or in different, or in same productions or different. What the court is required to see whether there is infringement on the part of the defendant. As in the case of *Honda Motors Co. Ltd v. Charanjit Singh*[21], remedies in the form of injunction was granted in favor of plaintiff, though both the defendant and plaintiff where trading in altogether different fields and in products.
4. **Passing-off is not limited to tangible goods only:** Action of passing off can be instituted for not only goods which have been passed off by the defendant it can be instituted for a particular name though the defendant trader are not selling the goods but just using the name. So when a person had adopted the name and used it the other person whose trade name is getting infringe, can obtain aid from court.
5. **Prior user of the trade name or mark to be hence established:** While filing the suit for aid from the court, the first thing the court will investigate is which firm was using that conflicting trade name or mark in priority to the other. First user of the sale of goods is the owner and the senior one. So if it is found that the plaintiff was using it, and then injunction for the same is granted in favor and against the defendant.

DEFENSES TO A PASSING-OFF ACTION

In a suit for passing off, the defendant are given some defenses which he can plead in order to take defenses in his case:-

1. If defendant can prove that the business carried out by the plaintiff is either fraudulent or illegal in nature. Then in these cases the owner of the trade mark/name cannot claim aid from the court.[22] In the case of *Leather cloth Co. Ltd. v. Neptune Waterproof Paper Co. Ltd.*,[23] the trader who use to

[21] (2003) 26 PTC 1.
[22] *Nweman* v.*Pinto*, (1887) 4 RPC 508, p.519.
[23] (1865) 11 ER 1435 (HL).

do business in selling counterfeit versions of sound recording and DVD's bearing a famous trade mark may not be allowed to file a suit for another seller using the trademark.

2. The plaintiff is guilty of acquiescence, latches, etc. or the defendant has prior used the trade mark/ name.
3. Though there may be a false representation but the trade mark which was used was itself fraud and was used for a fraudulent trade, then the defendant can take the defense of the same.[24]
4. Innocent misrepresentation on the part of the defendant is a valid defense. As Under section 135(3)[25], where the defendant is able to prove before the court that he had innocently adopted the plaintiff's trademark and once he get to know about the same, he had stopped using it.
5. If the defendant is able to prove that the misrepresentation done was by his employee outside the scope of his authority.[26]

CONCLUSION

The conclusion which can be drawn out after such an extensive amount exploration is that an enrolled trademark is the property of the owner and it is specifically connected with the notoriety, goodwill and with the nature of the product sold to the customer. Also, once the infringer tries to duplicate the style of the product to win benefits out of the offer of those products, he is straightforwardly and in a roundabout way attempting to encroach the privileges of the IP holder. Also, even an unrecognized organization can't utilize the trademark of an alternate organization to make perplexity in the brains of definitive centered costumers in connection to the originality of the product. No organization is permitted to utilize the trademark of the organization which has a remarkable notoriety in the country and in addition in global circle and one which is not enlisted in India.

Trade Dress is likewise the piece of trademark and nobody has the privilege to encroach it. It incorporates from the exceptional character of the product to its packing, color, layout and shape. Indeed a solitary shading utilized as a part of the packing of the product can be held as its trade dress and if any organization tries to encroach it, the organization would be held at risk for the same. An insinuation of trade dress doubtlessly adds up to passing-off as nobody is fit for appreciating products of another person's work. The pressure is presently between the protectionism on one hand and inspiration for rivalry on the other.

[24] *Newton Chambers & Co. Ltd*.v.*Neptune Waterproof Paper Co. Ltd*, (1935) 52 RPC 399; p.406.
[25] Trademarks Act, 1999 (India).
[26] *Boston Marine Parents Co. Ltd* v. *Wheeler & Thomson,* (1954) 71 RPC 432.

RE-COLOURING THE COLOURED WALLS OF THE CONSTITUTION: A FUTILE JUDICIAL EXERCISE OF CREATING THE CURATIVE PETITION

*Dhruv Tiwari & Anand Vardhan Narayan**

INTRODUCTION

From '*Balaji rule*'[1] to *Mandal Commission's case*,[2] from '*doctrine of basic structure*'[3] to the '*procedure established by law*',[4] from *Golakhnath's case*[5] to the *case of Minerva Mills*,[6] the Indian judiciary has travelled a long way to act as a holder of the fundamental rights and guardian of the Constitution rather than being an adjudicating body. At times, when legislature and executive have tried to exercise their jurisdiction in an excessive manner, judiciary being the third organ endeavours to bring them back on track. Nevertheless, it raises certain doubts over the extent of such boundless judicial review.

Among all the institutional features of the Indian Constitution, none is more significant than the separation of power.[7] Will of the people is expressed through three distinctive bodily processes in every form of government, viz. legislature, executive, and judiciary. This doctrine was evolved in order to remove any kind of difficulty which may arise out of the arbitrary actions of an autocratic government ensuring that all the powers must be separated and should not be vested in one body.[8] Our Constitution

* The Authors are 5th year Law students at National Law University, Odisha.

[1] *Balaji* v. *The State of Mysore*, AIR 1963 SC 649, wherein the reservation made should be less than 50 percent in general and broad sense.

[2] *Indra Sawhney v. Union of India*, AIR 1993 SC 477, the current law of the land on the subject of reservation where the Supreme Court rejected the system of more and more layers formed by the Government.

[3] *His Holiness Kesavananda Bharti v. State of Kerela*, AIR 1973 SC, 1461 it constitutes the high water mark of judicial creativity where the doctrine of basic structure gets originated and some of features of the Constitution which are so fundamental in nature that they cannot be amended, held to be the basic features of the Constitution of India.

[4] *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597, where the development of Art. 21 have been marked as the new approach since the Gopalan's case in 1950. The golden rule of triangle between Arts. 14, 19, and 21 has been held as not mutually exclusive.

[5] *L. C. Golakhnath* v. *State of Punjab*, AIR 1967 SC 1643, where the highest court of law relied on marginal note of Art. 368 and said that this provision only laid down the procedure to amend the Constitution while the power must be derive from Art. 246.

[6] *Minerva Mills Ltd.* v. *Union of India*, AIR 1980 SC 1789, which is an extended and a modified version of development of the doctrine of basic structure after the case of Kesavananda Bharti.

[7] THE INDIAN CONST., ch. I, II, IV of part V; ch. II, III, V of part VI (1950).

[8] BARON DE MONTESQUIEU, *ESPIRIT DE LOIS* (THE SPIRIT OF LAWS) (1748). He concluded that,

"When the legislative and executive powers are united in the same persons or body there can be no liberty because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to enforce them in a tyrannical manner...were the powers of judging joined with the legislature the life and liberty of the subject would be exposed to arbitrary

has patently outlined the separate roles and functions for these organs; however, each organ has always inclined to interfere in the sphere of other two organs.[9] Yet that does not *ipso facto* authorise the judiciary to enter into the shoes of legislature by enacting any judicial norm. During the drafting of the Constitution, independence of the judiciary was one of the main priorities amongst the drafters. Legal provisions concerning the utmost freedom of the Union Judiciary were incorporated in the Constitution with a view to provide a sense of security to promote independence of such institution. A perusal of the debate of the Constituent Assembly reveals that members of the Assembly were very much concerned with the judicial independence.[10] The same has been noticed by the Supreme Court asserting that the concept of "judicial independence" is an integral part of the Indian Constitution.[11] Nonetheless, such autonomy should not be mishandled by the judiciary itself. The authors opine that the creation of curative petition is an inevitable consequence of abuse of this power which rests with the judiciary. To demonstrate this argument, the authors have put forth two fundamental contentions.

Firstly, it will be explicated that the Supreme Court has gone beyond the boundaries of the Constitution while giving birth to the judicially-devised mechanism of curative petition. It was the intention of the Constitution framers that the constitutional provisions with regard to judicial review must be construed strictly.[12] They intended to impose limitation on the power given to the Supreme Court for reviewing its own judgment. This is evident from Article 137 of the Constitution of India which starts with "*Subject to any law made by the Parliament...*" rather than a non-obstante clause. On the contrary, in *Rupa Ashok Hurra v. Ashok Hurra*[13] *(hereinafter referred as 'Rupa Hurra case'),* the court has made a conjoint reading of Article 137 with Order XLVII Rule 6 of the Supreme Court Rules[14] for propounding the constitutional basis for curative petition. In our view, evolving new procedural mechanism for curative petition would amount to violation of mandate of Article 137.

Secondly, there is no substantive difference between a curative petition and a review petition, hence without any separate need and purpose, curative petition is nothing but a futile exercise of judicial activism. By creation of such *modus operandi*, the Supreme Court has over-burdened itself, which is already loaded with umpteen pending cases.

---

control. For the judge would then be the legislator. Were it joined to the executive power, the judge might be having with all the violence of an oppressor."

[9] BOWIE AND FRIEDRICH, STUDIES IN FEDERALISM 65 (2001).

[10] ANJA SEIBERT-FOHR, JUDICIAL INDEPENDENCE IN TRANSITION 29 (2012).

[11] *Union of India v. Sankalchand Seth*, AIR 1977 SC 2328.

[12] ASIM PANDYA, WRITS AND OTHER CONSTITUTIONAL REMEDIES 605 (1st ed. 2009) [hereinafter referred as 'ASIM PANDYA']

[13] *Rupa Ashok Hurra* v. *Ashok Hurra*, AIR 2002 SC 1771 [hereinafter referred as '*Rupa Hurra's case*'].

[14] THE SUPREME COURT RULES, order XLVII rule 6 (1966).

This paper *at first* provides an account of the evolution of curative petition by the Supreme Court where its origin and rationale behind its dawn is discussed. Thereafter, this paper will demonstrate that curative petition is nothing but a futile judicial creativity as the existing constitutional structure is adequate to prevent any miscarriage of justice. It is contended that Article 136 and Article 142 are sufficient to redress such prejudice. Following this, it will be proved that curative petition is simply a 'second review petition', thus serving no meaningful purpose. The nest part will present an empirical data vindicating author's argument.

ORIGIN OF CURATIVE PETITION

The Supreme Court of India has always contributed in innovating and developing the constitutional jurisprudence. As a result, the order of the Supreme Court is amenable for rectification if it results in a miscarriage of justice.[15] In lieu of this, a process has been conceived by the apex court- termed as Curative Petition under which an aggrieved person may request the Supreme Court to reconsider its judgement by showing gross miscarriage of justice and violation of principles of natural justice, even after the final verdict of the Supreme Court and dismissal of review petition. The Supreme Court of India itself evolved the concept of curative petition through a judicial pronouncement in *Rupa Hurra's case*, whereby the court reconsidered its judgement after referred to it by a three-judge bench.[16]

The Constitution of India has provided a proper mechanism for the cases falling under the jurisdiction of the Supreme Court. The powers and functions of the Supreme Court are provided under the Constitution.[17] The original, appellate and writ jurisdiction is conferred upon the Supreme Court while the discretionary jurisdiction is being provided in order to grant special leave petition to appeal from any judgement.[18] In order to fulfil the constitutional obligations, wide discretionary powers are given under its plenary jurisdiction.[19] Moreover, the power to review its own judgement is also given to the court so that there will be no scope of any mistake on the part of judges as they are human beings too and can commit mistakes.[20]

There was a time, in India, when it became the tendency of the people to challenge the judgement of the Supreme Court via Article 32, being violation of their fundamental rights.[21] The practice

---

[15] *Harbans Singh* v. *State of Uttar Pradesh*, (1982) 2 SCC 101 [hereinafter referred as '*Harbans' case*']; *Supreme Court Bar Association* v. *Union of India*, (1998) 4 SCC 409.
[16] *Rupa Ashok Hurra* v. *Ashok Hurra and Anr.*, AIR 1999 SC 2870.
[17] THE INDIAN CONST., art. 124 (1950).
[18] *Id.*, at art. 32, art. 131, art. 132, art. 133, art. 134, and art. 136.
[19] *Id.*, at art. 142.
[20] *Id.*, at art. 137.
[21] *Harbans' case*; *Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr.*, (1966) 3 SCR 744.

became too detrimental for the apex court itself because no forum was provided to those affected people so that they can challenge the decision even after the dismissal of their review petition. This is the reason why most of the cases came before the Supreme Court demanding writ of certiorari against its own verdict.[22] The very nature and history of that writ suggests that it was issued to bring the decisions of an inferior court, tribunal, public authority, or any other body of persons before the High Court for review. It also follows that a High Court cannot issue a writ to another High Court and within the bench of the same High Court since no hierarchy is present among the different High Courts.[23] Similar rider applies to the Supreme Court. Though the orders of the High Courts are liable to be corrected through the appellate jurisdiction of the Supreme Court, yet the former are not established as inferior courts in our constitutional scheme.[24]

Another reason for rejecting the review petition under Article 32 is that since Article 32 can be invoked only for the purpose of enforcing the fundamental rights as guaranteed under Part III of the Indian Constitution, and if the Supreme Court allows such petition under Article 32 then by such action it would conclude that judiciary is a 'State' in the legal meaning of Article 12 of the Constitution- an issue which the Supreme Court is denying till date.[25]

In *Rupa Hurra's case,* a constitutional bench of five judges has unanimously held that in order to rectify the gross miscarriage of justice in its final judgment, the court could allow the curative petition to the victims of injustice who are entitled to a relief of *ex-debito justitia* to seek a second review of the final order of the court. In this case, writ petitions were filed under Article 32 before the three-judge bench and they were dismissed in the light of Supreme Court's earlier judgment wherein the final judgment of the Supreme Court was not reviewed by it through a writ petition filed under Article 32 in *A.R. Antulay's case*.[26] Circumstances were different in *Rupa Hurra's case* than the precedent set by the *A.R. Antulay's case* as in the former, the petitioner was left with no other option but to file a review petition for the second time under Article 32 but in the latter case, the constitutional bench was unanimously of the view that though the judges of the highest court do their best to render justice to the parties still situations may arise, in the rarest of rare cases, which would require re-consideration of a final judgment

[22] ABHE SINGH YADAV, LAW OF WRITS- JURISDICTION AND ITS EFFICACY 14 (2nd ed. 2009) [hereinafter referred as 'ABHE SINGH YADAV'].
[23] ASIM PANDYA, at p. 322.
[24] ABHE SINGH YADAV, at p. 1776.
[25] *A.R. Antulay v. R.S. Nayak*, (1988) 4 SCC 409 [hereinafter referred as '*A.R. Antulay's case*'], where it has been observed that when the rule making power of judiciary is concerned it is State, however, when exercise of judicial power is concerned it is not State.
[26] *A.R. Antulay's case*, at p. 559; *Naresh Shridhar Mirajkar and Ors. v. State of Maharashtra and Anr.*, (1966) 3 SCR 744.

to set aside the miscarriage of justice.[27] It was observed that it would be the legal and moral obligation of the highest court in the country to rectify an error in such a decision that would remain in the cloud of uncertainty. The court's concern for re-affirming the justice in a cause was not less important than the 'principle of certainty' in its own decisions because there could be a violation of principles of natural justice. The Supreme Court has formulated such a remedy which can maintain a balance between the finality clause of the judgement and avoiding any chance of miscarriage of justice.

WHETHER CREATION OF CURATIVE PETITION WAS A RULE OF NECESSITY?

This part of the paper will ponder upon the question as to whether the 'curative petition' was really required or not? Amongst academicians and lawyers, questions have been raised regarding the necessity on the part of the Supreme Court to introduce the modalities of curative petition despite the existence of 'review petition' in our constitutional framework.

Prior to *Rupa Hurra's case*, the Supreme Court in a number of decisions, where the court was approached under Article 32, has held that its earlier order resulting in a miscarriage of justice is amenable for correction.[28] In all these decisions, the Court invoked its inherent power under Article 142 to do complete justice. The question that needs reflection is that why did the concept of curative petition evolved in *Rupa Hurra's case* only and not in any other case? The Court had never evolved such procedural mechanism as it did in *Rupa Hurra's case*. It is because before *Rupa Hurra's case* none of counsels from either side had argued for such framework. Moreover, the states of affairs were changed in *A. R. Antulay's case* where court had ruled that a final Supreme Court judgment cannot be assailed *via* a writ petition. In a scenario where the remedy of review petition, the Supreme Court stated that it cannot re-examine its own decision under Article 32.[29] However, there were instances where even after exhaustion of such remedy, the Supreme Court had rendered complete justice by invoking its inherent jurisdiction in *Harbans' case*.[30] The moot point being that the procedure of curative petition is nothing but the hobbyhorse of advocates and not of judges because had it been the judicial creation, it would have created way back by the judges like in *Harbans' case*.

---

[27] *Rupa Hurra's* case. In the words of Justice Syed Shah Mohammed Quadri, at ¶ 41,

"... we are persuaded to hold that the duty to do justice in these rarest of rarest cases shall have to prevail over the policy of certainty of judgements as though it is essential in public interest that a final judgement of the final court in the country should not be open to challenge."

[28] *M. S. Ahlawat v. State of Haryana & Anr.* (2000) 1 SCC 270; *Harbans' case*; *Supreme Court Bar Association v. Union of India* (1998) 4 SCC 409.

[29] *A.R. Antulay's case*.

[30] *Harbans' case*.

A. Power of the Supreme Court encapsulated under the existing Constitutional Framework is sufficient to cure the Injustice

The authors, by highlighting the constitutional regime incorporated in the Indian Constitution, raise serious doubts over the rationale given by the judges for creating the curative petition.

The review jurisdiction of the apex court is expressly specified in the Constitution, under Article 137, while the Supreme Court can frame rules with regard to review of any judgement or order and procedure for the same, only after prior approval of the President of India.[31] Corresponding rule-making power is prescribed under Order XL Rule 5 of the Supreme Court Rules.[32] The Supreme Court has the power to pass any decree or order as it deems fit for doing complete justice in any matter pending before it.[33] This power is often referred as the '***insignia of judicial supremacy of the Supreme Court***.'[34] Its corresponding rule-making power is specified under Order XLVII Rule 6 which has a wider ambit to frame rules for the inherent power.[35]

Since no explicit power has been provided for curative petition thus, the Supreme Court made a conjoint reading of Article 137 and Order XLVII Rule 6 so that review of review petition can be done in the name of rendering complete justice. The authors are of the opinion that if any rarest of the rare situation arises, where it becomes indispensable for the Supreme Court to reconsider its own judgement even after dismissal of review petition, it can rectify the error by invoking its powers under Article 136 and Article 142. Once a review petition is rejected then the court, if it finds that a grave miscarriage of justice has taken place, can grant special leave to file an appeal from the impugned judgment under Article 136 of the Constitution. The word 'any' under Article 136 includes Supreme Court itself. Once this appeal is allowed, then the Court can always invoke its inherent jurisdiction under Article 142 to meet the ends of justice, if required.

i). Discretionary Power of the Supreme Court

Article 136 empowers the Supreme Court of India to grant special leave to file an appeal against any judgement or order or decree in any matter or cause passed or made by any Court or Tribunal

[31] THE INDIAN CONST., art. 145(1)(e) (1950).
[32] THE SUPREME COURT RULES, order XL rule 5 (1966).
[33] THE INDIAN CONST., art. 142 (1950).
[34] ASIM PANDYA, at p. 602.
[35] THE SUPREME COURT RULES, order XLVII rule 6 (1966).

in the territory of India.[36] Two important points can be made out of this; firstly, leave can be granted against *any judgement, order or decree*, and secondly, such judgement, order or decree can be made or passed by *any Court or Tribunal*. Such special power is bestowed upon the Supreme Court so that it can grant leave to appeal against any decision passed by any court.[37] Here, it is submitted that the term 'any' will logically include the Supreme Court itself. The Supreme Court has rightly stated that Article 136 confers unfettered discretionary power upon it in order to render justice to any person. Mahajan C.J. said that,

> *"It being an exceptional and overriding power, naturally it has to be exercised sparingly and with caution and only in special and extraordinary situations...when the court reaches the conclusion that a person has been dealt with arbitrarily or that a Court or tribunal within the territory of India has not given a fair deal to a litigant, then no technical hurdles of any kind like the finality of finding of facts or otherwise can stand in the way of the exercise of this power because the whole intent and purpose of this article is that it is the duty of this Court to see that injustice is not perpetuated or perpetrated by decisions of Courts and tribunals because certain laws have made the decisions of these Courts or tribunals final and conclusive*".[38]

Even at the time of commencement of the Indian Constitution, the Supreme Court stated that the only uniform standard which can be laid down in the circumstances is that the Court should grant special leave to appeal only in those cases where special circumstances are shown to exist.[39]

The Supreme Court has observed that Article 136 has been inserted with an intention not to confer any kind of right to any person aggrieved by any decision of the court. Nevertheless, the aggrieved person has to seek a special leave from the court, and when the court decides to grant a special leave then only that person can file an appeal.[40] Therefore, it was concluded, by the court, that the legal provision is 'residual' in nature, enabling the Supreme Court to interfere with any of the decision only on its own discretion.[41]

---

[36] THE INDIAN CONST., art. 136(1) (1950).
[37] DURA DAS BASU, SHORTER CONSTITUTION OF INDIA 825 (14th ed. 2009) [hereinafter referred as 'D.D. BASU'].
[38] *Dhakeswari Cotton Mills Ltd. v. Commissioner of Income Tax, West Bengal*, AIR 1955 SC 65.
[39] *Pritam Singh v. The State*, AIR 1950 SC 169.
[40] *Kunhayammed v. State of Kerela*, (2000) 245 ITR 360 (SC).
[41] *N. Suriyakala v. A. Mohasdas and ors.*, (2007) 9 SCC 196.

ii). Plenary Jurisdiction of the Supreme Court

Article 142 vests the Supreme Court with a repository of discretionary power that can be wielded in appropriate circumstances to deliver 'complete' justice in its true sense in a given case.[42] This power exists as a separate and independent basis of jurisdiction.

No enactment made by the legislature can limit or restrict the inherent power of the Supreme Court, though the court may take into consideration the statutory provisions regarding the matter in dispute.[43] In the opinion of the apex court, the words, in Article 142, '*Such order as is necessary for doing complete justice*' are of the widest amplitude and empower the Supreme Court to make any order as may be necessary for doing complete justice in a case before it.[44] As observed by the Supreme Court that the power to deliver complete justice is entirely on a different level and of a different quality that any prohibition or restriction contained in ordinary laws cannot act as a limitation on the constitutional power of the Supreme Court.[45] The phrase 'complete justice' engrafted in Article 142(1) of the Constitution is the word of width couched with elasticity to meet myriad situations created by human ingenuity or cause or result of operation of statute law or law declared under Article 136.[46]

The application filed under Article 142 is curative in nature and the same is entertained to avoid the perpetration of manifest injustice on any ground, including the violation of principles of natural justice or suffering from an element of bias.[47] Elucidating the scope of curative nature of the power conferred upon the Supreme Court under Article 142, it was observed that,

> *"The plenary powers exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of supplementary powers. It stands upon the foundation and the basis for its exercise may be put on a different and perhaps even wider footing, to prevent injustice in the process of litigation and to do complete justice between the parties*".[48]

Henceforth, the authors would like to propose a *modus operandi* that in the presence of explicit constitutional provisions which can deal both with the normal and special circumstances, the

---

[42] D.D. BASU, at p. 1045.
[43] *State of Uttar Pradesh v. Poosu*, AIR 1976 SC 1750; *Delhi Judicial Service Association v. State of Gujarat*, (1991) 4 SCC 406, at ¶ 51.
[44] *K.M. Nanavati v. State of Bombay*, AIR 1961 SC 112, at p. 120.
[45] *Delhi Judicial Service Association v. State of Bihar*, AIR 1991 SC 2176, at p. 2210.
[46] *Ashok Kumar Gupta v. State of U.P.*, (1997) 5 SCC 201, at ¶ 60.
[47] *Murtaza v. Yasin*, AIR 1916 PC 8.
[48] *Supreme Court Bar Association v. Union of India*, (1998) 4 SCC 409.

creation of curative petition can be declared as redundant. Even after the rejection of review petition, if the judgement suffers from any human fallibility then the same can be cured by taking special leave under Article 136, and then the 'complete justice' can be rendered by invoking the inherent power given under Article 142.

B. Ex Debito Justitiae Obligation Empowers the Court to Set Aside any Irregular Judgement

The obligation of *ex debito justitiae* imposes a duty on the court to exercise its power to rectify any judgment which suffers from any gross violation of natural justice. It is an aphorism expressing the most fundamental guiding principle of the common law, evolved in the Anglo-American jurisprudence. It refers to that segment of inherent power which must be exercised by the court as a matter of judicial duty, if proper circumstances are pleaded.[49] It is a well-established principle of law that every court has an inherent power to act *ex debito justitiae*, to do that real and substantive justice for the administration for which alone it exists or to prevent the abuse of the court.[50]

In common law jurisprudence, such obligation is often called as '**as of right rule**' and it entitles defendants to claim for setting aside an irregular, default judgment without considering the merits.[51] The rule ensures that litigants comply with the relevant procedural rules and that defendants have notice of proceedings and, is protected from the injustice that might result if a judgment is unfairly passed against them. The similarity between the *ex debito justitiae* obligation used in England and in India is that, the Court has no discretion than to set aside the impugned judgment.[52] Therefore, it can be said that an *ex debito justitiae* does not impose a duty on the Supreme Court to enact a separate process to fulfil such obligation. Even the seven-judge bench in *A.R. Antulay's case* stated that to correct the *ex debito justitiae* obligation, the Court can treat the second application for review as a first application under the inherent jurisdiction and can reconsider its own decision even after the dismissal of review petition.

In lieu of this common law principle, it was unnecessary on the part of the Judiciary to create a separate course of action for curative petition. By creating such mechanism, the Supreme Court has given enough leeway to the litigants to challenge the judgment till the time the curative petition gets dismissed, thus, there will be no end to the litigation of a case for a long time.

---

[49] T.K. TOPE, CONSTITUTIONAL LAW OF INDIA 799 (3rd ed. 2010).
[50] *Dinesh Dutt Joshi v. State of Rajasthan*, AIR 2001 SC 308.
[51] *Anlaby v. Praetorious*, (1888) 20 QBD 764; Camille Cameron, *Irregular Default Judgments: Should Hong Kong discard the 'as of right' Rule?*, 30 HK L.J. 245 (2000).
[52] M.P. JAIN, INDIAN CONSTITUTIONAL LAW 213 (6th ed. 2010).

C. Curative Petition is Against the Doctrine of Finality

Republicae ut sit finis litium elucidates that it is for the public good that there must be an end of litigation after a long hierarchy of appeal.[53] Certainty and continuity are essential ingredients of rule of law. Certainty in the law would be considerably eroded and suffer a serious setback if the highest court of the land readily overrule the views expressed by it in earlier cases even though those views had held the field for a number of years.[54]

In light of such notion, what will happen if the Supreme Court keeps on altering its own decisions? What will happen if the petitioners challenge the final judgment of the Supreme Court, even after the disposal of review petition, complaining gross abuse of the process of the Court and injustice cause to them? What will happen to the doctrine of *stare decisis* and finality and certainty of the law? It appears that the Supreme Court has moved beyond the spirit of said doctrine and evolved curative petition in the name of justice and...justice only. Conjoint reading of Articles 32, 136, and 142 of the Constitution of India provides for imparting 'justice' under every given circumstance,[55] thus, annihilating the need of curative petition.

With regard to the finality of judgment, it is noteworthy to mention that any decision of the highest court will not be considered as the final verdict on its own because it will always be subject to curative petition. The concept of curative petition has not only opened the floodgates for more litigation, but also brought uncertainty in the law laid down by the Supreme Court. Whenever the Supreme Court adjudicates any case, a legitimate assumption is there that it decides the matter abundant caution and a notion of finality attach to it. In a scenario where the scope for mistake is apparent, then provision for review the final order is always available. Assuming that the review petition could not cure the error in the judgement or any additional circumstances arise then the proposed *modus operandi* will serve the purpose of curing the defect. There will only be a single case out of million, which will satisfy the conditions of curative petition: being violated of principles of natural justice. Therefore, the paper endeavours to bring forth the viewpoint that there was no need to generate a new mechanism merely on the ground by providing one more opportunity to the affected party.

[53] *Sita and Ors. v. State of Uttar Pradesh and Ors.*, AIR 1969 All 342.
[54] JOHN W. SALMOND, JURISPRUDENCE 40 (4th ed. 1913).
[55] *S. Nagaraj and Ors. v. State of Karnataka and Anr.*, 1993 Suppl. (4) SCC 595.

A counter argument can be made against the authors' mechanism that since no appeal lies from the judgement of the Supreme Court thus one more chance should be provided to the people to present their case as mistakes can be made due to human fallibility.

Nevertheless, there is no chance of any mistake as two-phase level protection is specified in the Constitution whereby the original application is heard by the Supreme Court and for any human fallibility- review petition is provided. Lastly, for any rarest of rare cases wherein miscarriage of justice could happen then inherent jurisdiction of the Supreme Court can be invoked, as suggested. Hence, there is no need to set-up a separate bench to hear curative petitions as it will add only litigation and nothing more. In the absence of curative petition, litigation will end only at the stage of filing review petition and will not go beyond.

NO SUBSTANTIVE DIFFERENCE BETWEEN A CURATIVE PETITION AND A REVIEW PETITION

This section will establish that curative petition is nothing but a 'second' review petition. The idea is to equate curative petition with second review petition and subsequently it is shown that the Supreme Court erred in creating the mechanism. For the sake of clarification, it is to be noted that 'second' review petition is purely a hypothetical term[56] and used merely for illustrative purpose. There is a court-induced difference between a curative petition and a 'second' review petition. For the purpose of such differentiation, it is important to analyse curative petition in the light of the paradigm of review petition. The analysis between both the petitions is restricted to their modalities and constitutional provisions involved in filling such petitions.

Curative petition is filed before the Supreme Court seeking to prevent the abuse of court process and to cure any miscarriage of justice. It is filed after the disposal of review petition under Article 137 of the Constitution. The Supreme Court has laid down grounds for filing a curative petition-

1. Where there is violation of principles of natural justice and in that, the aggrieved party filing a curative petition was not a party to the *lis* but the judgment adversely affected his interest, or if he was a party to the *lis* but was not served with notice of the proceedings and the matter proceeded as if he had notice.

[56] After the Supreme Court has propounded the curative petition, legal jurists and scholars believed that this curative petition is different from a 'second' review petition.

2. Where in the proceedings a learned judge failed to disclose his connection with the subject matter or the parties, giving scope for an apprehension of bias and the judgment adversely affects the petitioner.[57]

A 'curative petitioner' must aver specifically that the grounds mentioned in the curative petition had been taken in the review petition and that the same were dismissed by circulation.[58] In addition, a curative petition needs to include a certificate by a Senior Advocate indicating that the same grounds in the curative petitions had been taken in the review petition. Further, the curative petition is required to be circulated to a bench of three senior most judges and the judges who passed the judgment complained of, if available.[59]

On the other hand, a review petition is filed under Article 137 of the Indian Constitution. It is notable this review power is not an inherent power.[60] However, this special power is exercisable in accordance with / subject to any Parliamentary legislation and its rule making power.[61] The Supreme Court Rules *of* 1966, made in exercise of the powers under Article 145, prescribes that in civil cases review lies on any of the grounds specified under Order XLVII Rule 1 of the Code of Civil Procedure:

a) Discovery of new and important matter of evidence.

b) Mistake or error apparent on the face of the record.

c) Any other sufficient reason.

Whereas, in criminal proceedings, a review lies on the ground of an 'error apparent on the face of the record'.[62] A review petition lies with the Court if filed within thirty days after the pronouncement of a final Supreme Court judgment.[63] The purpose of review is to ensure that justice is not defeated and that errors leading to miscarriage of justice are remedied.[64] The manner in which the Supreme Court takes cognizance of both the re-considerations is almost similar, save for slight differences. Firstly,

---

[57] *Rupa Hurra's case*, ¶ 51.
[58] *Id.*
[59] *Id.*, at ¶¶ 52 and 53.
[60] The Supreme Court in *Patel Narshi Thakershi v. Pradyumansinghji Arjunsinghji*, AIR 1970 SC 1273, at ¶ 4, has held that it is well settled that the power to review is not an inherent power. *See* also *Lily Thomas v. Union of India*, 2000 (6) SCC 224, at ¶ 52 where the Supreme Court has retaliated that review is the creation of a statute.
[61] THE INDIAN CONST., art. 145 (1950).
[62] THE CODE OF CIVIL PROCEDURE, order XLVII rule 1 (1908), grounds for a review petition are laid down but the Supreme Court under its powers in Article 145 has made a distinction between grounds for filing a civil review petition and those for filing a criminal curative petition; THE SUPREME COURT RULES, Order XL Rule 1 (1966).
[63] THE SUPREME COURT RULES, order XL (1966).
[64] *Lily Thomas v. Union of India*, (2000) 6 SCC 224, at p. 252.

circulation of the petition in both the cases is made in a similar manner.[65] Secondly, in both the processes, certification from a senior counsel is essential.[66] Thirdly, for any curative petition to be accepted it has to meet the requisite conditions. Grounds for filing a review petition are more flexible as compared to narrower grounds required for a curative petition.[67]

Thus, no substantive difference lies between a 'second' review petition and a curative petition. In simple words, as long as the Supreme Court is re-considering its earlier judgment, it amounts to review. Both the petitions are distinct from each other merely in terms of their modalities; otherwise a curative petition is fulfilling the same objective as address by a review petition, i.e. reconsidering a judgement but for a second time. Henceforth, this paper put forth thus new mechanism serves no meaningful purpose and proves to be a nugatory in nature.

POST RUPA HURRA'S JUDGEMENT: CURRENT SCENARIO

Since its evolvement in the year 2002, many litigants across the country have filed number of curative petitions,[68] but not a single petition has been succeed, except one.[69] Recently, one such curative petition was allowed to be heard by the Supreme Court.[70] So far only two curative petitions have been able to make out a case within the parameters of *Rupa Hurra case. Litigants, irrespective of* the fact that whether their case actually fulfils the prerequisites of curative petition or not, they file a curative petition with a hope that the Supreme Court will adjudicate and pronounce favourable judgement. The intention of the constitutional bench in *Rupa Hurra's case* was that the curative petition will be filed in only exceptional cases, however, in practice it is just opposite.

[65] For review petitions, circulation is to the judges who passed the impugned judgment whereas in case of curative petitions, circulation is made to the three senior most judges of the Supreme Court and the judges who had passed the impugned judgment- if available.

[66] The purpose of the certification is to aver that very strong reasons exist for the Supreme Court to admit the petition. In case of curative petition, the Court can impose exemplary costs for those petitions which are unwarranted, this not being so in case of review petition.

[67]The grounds for filing a curative petition seem to be based on natural justice principles unlike those of filing review petition which are broader in nature and scope, and not necessarily restricted to natural justice.

[68] The official website of Supreme Court of India (available at <http://www.supremecourtofindia.co.in>) from where the empirical data was collected which shows that by the time of October 2013, around 1225 curative petitions were filed.

[69] On April 21, 2004, a bench headed by Chief Justice K.G. Balakrishnan had allowed a curative petition filed with respect to a 21-year-old murder case, and corrected a mistake by rectifying the wrongful detention of four accused persons which was directed without providing any hearing to the offenders.

[70] On March 13, 2013, a bench headed by Chief Justice Altamas Kabir has allowed the curative petition filed by the National Commission for Women on behalf of the victim daughter-in-law, and gave directions to set aside the 2007 verdict wherein the Supreme Court had reversed the Delhi High Court's judgement of summoning the accused husband, father-in-law and mother-in-law for the offence of matrimonial cruelty.

In Bhopal Gas Tragedy case, CBI filed a curative petition in 2011 after 15 years of rejection of the review petition.[71] Needless to say, the said petition did not fulfil the requirements of a curative petition and was rejected by the Supreme Court on May 11, 2011. The Court reasoned that the pre-requisite condition for accepting a curative petition is that not only there should be violation of principles of natural justice but also, due to the earlier judgement there a miscarriage of justice has occurred.

In another criminal case, an aggrieved party filed a curative petition on the ground that the evidence and the factors taken into account by the High Court have not been properly appreciated by the Court when it allowed the appeal of the State against the judgment of acquittal. The Court held that grounds taken in the curative petition by the aggrieved party makes it obvious that an attempt is made to have another opportunity for re-appreciation of evidence. By rejecting and strongly criticizing such curative petition, the Supreme Court said that such re-appreciation of evidence is impermissible.[72]

The Supreme Court rejected the curative petition of BJP leader Subramaniam Swamy who was seeking the CBI probe on P. Chidambaram's role in 2G scam. Again, the Supreme Court has denied re-examining its earlier verdict relating to Indo-Mauritius Tax Treaty through curative petition. Surprisingly, a curative petition was also filled in the 2G-scam case, and it is needless to say that such petition was without any merit. To the relief of the public at large, this curative petition was rejected by the Supreme Court.[73]

Thus, it can be inferred from the above mentioned cases that curative petitions possess stringent modalities and by enacting such mechanism, only floodgates have been opened-up. If no curative petition was available, then people would have stopped at the stage of review petition only, and for rarest of rare cases, meritorious cases will invoke the inherent jurisdiction and only such matters will be entertained where the judgment genuinely suffers from any miscarriage of justice.

CONCLUDING REMARKS: CURATIVE PETITION IS AN EXCESSIVE JUDICIAL CREATION

This paper has made an endeavour to present the true picture of curative petition in terms of its legality and its need. The authors have evaluated the concept of curative petition, keeping in mind the present and future scenario. Sometimes our Supreme Court, in the pursuits of dispensing justice, knows

[71] *Central Bureau of Investigation and Ors. v. Keshub Mahindra*, 1996 (6) SCC 129.
[72] *Sumer v. State of Uttar Pradesh*, (2005) CriLJ 540.
[73] Sistema Shyam Teleservices Ltd. (SSTL) on May 4, 2012 filed a curative petition in the Supreme Court seeking re-examination of the order cancelling its 21 2G licences and spectrum that were allocated by former Telecom Minister A. Raja. This move from the company follows the Supreme Court dismissing the review petition challenging the February 2 verdict. Nevertheless, the Supreme Court has rejected the curative petition as well.

no bound and in such quest it has given birth to a mechanism which in our opinion is beyond the mandate of the explicit provision of the Constitution. The Supreme Court should adhere to the Constitutional framework while propounding such mechanism. Contrary to the popular perception, the modalities of curative petition have not achieved any purpose as it has been shown earlier through an empirical data.

The Supreme Court in plethora of cases has held that it would be the legal and moral obligation on the apex court to rectify its own decision. Perhaps this was the rationale behind the creation of curative petition. But, what will happen in a situation where a genuine case cannot come within the ambit of *Rupa Hurra's case* parameters? Will the Court succeed in dispensing justice in such case? The answer is 'No'. In such a case, the court will be restrained in invoking its inherent jurisdiction, since it has already created a curative petition to cure any defect. By creating a rigid framework, a scenario may emerge where the court may not be able to dispense justice. The apex court by giving a nomenclature and procedure to this mechanism of 'second' review has erred. Rather than such creation, the Court could have provided justice in its true sense on a case to case basis and could have invoked its inherent jurisdiction under Article 142, if required.

To recapitulate, curative petition was not required in the first place. The proposed *modus operandi* by the authors could have been the mechanism adopted by the apex court for a 'second' review of a case. If this proposed mechanism was the channel to cure any defect, then justice would have delivered in its true sense. The Supreme Court could have constitutionally justified the proposed *modus operandi* by way of conjoint reading between Article 136 and Article 142.

FUTURE OPTIONS ON CURRENCY

*Swatilekha Chakraborty**

INTRODUCTION

The term 'derivatives', alludes to an expansive class of money related instruments which principally incorporate alternatives and fates. These instruments get their quality from the cost and other related variables of the fundamental resource. They don't have worth of their own and get their quality from the case they provide for their proprietors to claim some other monetary resources or security. A basic sample of subsidiary is spread, which is subordinate of milk. The cost of spread relies on cost of milk, which thus relies on the interest and supply of milk. The general meaning of derivatives intends to get something from something else. Some different implications of word derivatives are: a determined capacity: the aftereffect of scientific separation; the immediate change of one amount with respect to another; df(x)/dx, b subsidiary instrument: a money related instrument whose quality depends on another security, (etymology) a word that is gotten from another word; "`electricity' is a subordinate of 'electric'. The benefit fundamental a subordinate may be merchandise or money related resource. Derivatives are those budgetary instruments that get their quality from alternate resources. For instance, the cost of gold to be conveyed following two months will depend, among such a large number of things, on the present and expected cost of this merchandise.[1]

The meaning of Financial Derivatives, Section 2(ac) of Securities Contract Regulation Act (SCRA) 1956 characterizes Derivative as: a) "a security got from an obligation instrument, offer, credit whether secured or unsecured, danger instrument or contract for contrasts or whatever other type of security; b) "an agreement which gets its quality from the costs, or list of costs, of basic securities".[2]

HISTORICAL BACKGROUND

It first rose as supporting gadgets against vacillations in merchandise costs, and thing connected subsidiaries remained the sole type of such items for very nearly three hundred years. Monetary derivatives came into spotlight in the post-1970 period because of developing shakiness in the money related markets. In any case, subsequent to their rise, these items have turned out to be extremely prevalent

[1] Department of Computer Science and Information Technology, *Forwards, Futures, Future Options and Swaps*, Chapter12, <http://www.csie.ntu.edu.tw/~lyuu/Capitals/lessons_der.pdf> accessed on 17:00 hours on 05th April, 2016.

[2] Awastin Damadoran, 'Valuing Future and Forward Contracts', <http://people.stern.nyu.edu/adamodar/pdfiles/valn2ed/ch34.pdf> accessed at 13:00 hours on 28th March, 2016.

and by 1990s, they represented around 66% of aggregate exchanges in subordinate items. As of late, the business sector for budgetary derivatives has become enormously regarding assortment of instruments accessible, their intricacy furthermore, turnover. In the class of value derivatives the world over, fates and alternatives on stock records have increased more notoriety than on individual stocks, particularly among institutional financial specialists, who are significant clients of file connected subsidiaries. Indeed, even little speculators locate these valuable because of high relationship of the well-known lists without lifting a finger of utilization.[3]

Derivatives markets in India have been in presence in one structure or the other for quite a while. In the range of wares, the Bombay Cotton Trade Association began fates exchanging path in 1875. In 1952, the Government of India banned money settlement and alternatives exchanging. Subsidiaries exchanging moved to casual advances markets. As of late, government arrangement has moved for an expanded part of business sector based evaluating and less suspicious subsidiaries exchanging. The initial move towards presentation of budgetary derivatives exchanging India was the declaration of the Securities Laws (Amendment) Ordinance, 1995. It led to withdrawal of disallowance on alternatives in securities. The most recent decade, starting the year 2000, saw lifting of restriction on prospects exchanging numerous products. Around the same period, national electronic thing trades were additionally set up. Subsidiaries exchanging started in India in June 2000 after SEBI allowed the last endorsement to this impact in May 2001 on the proposal of L. C Gupta advisory group. Securities and Exchange Board of India (SEBI) allowed the subordinate sections of two stock trades, NSE and BSE, and their clearing house/organization to start exchanging and settlement in endorsed subsidiaries contracts. At first, SEBI affirmed exchanging record prospects contracts taking into account different securities exchange lists, for example, S&P CNX, Nifty and Sensex. In this manner, list based exchanging was allowed in alternatives and in addition singular securities. The exchanging BSE Sensex alternatives started on June 4, 2001 and the exchanging choices on individual securities initiated in July 2001. Prospects contracts on individual stocks were propelled in November 2001. The subsidiaries exchanging on NSE initiated with S&P CNX Nifty Index fates on June 12, 2000. The exchanging list choices started on June 4, 2001 and exchanging choices on individual securities initiated on July 2, 2001. Single stock prospects were propelled on

[3] Rajib, 'Indian Currency Market' (Financial Hub India, 8 January, 2016)<http://www.financialhubindia.com/indian-currency-market-trading-operations-explained/> accessed at 11:00 hours on 29th March, 2016.

November 9, 2001. The record prospects and alternatives contract on NSE depend on S&P CNX. In June 2003, NSE presented Interest Rate Futures which were in this way banned because of estimating issue.

DERIVATIVES IN INDIA

The administrative system in India depends on the L.C. Gupta Committee Report, and the J.R. Verma Committee Report. It is generally predictable with the IOSCO standards and locations the normal worries of speculator security, market productivity and respectability and budgetary uprightness. The L.C. Gupta Committee Report gives a point of view on division of administrative obligation between the trade and the SEBI. It prescribes that SEBI's part ought to be limited to favoring standards, bye laws and regulations of a derivatives trade as likewise to endorsing the proposed subsidiaries contracts before initiation of their exchange. It accentuates the supervisory and consultative part of SEBI with a perspective to allowing attractive adaptability, boosting administrative adequacy and minimizing administrative expense. Administrative necessities for approval of derivatives specialists/merchants incorporate identifying with capital sufficiency, total assets, accreditation prerequisite and beginning enrollment with SEBI. It likewise proposes foundation of a different clearing enterprise, most extreme presentation limits, imprint to market edges, edge accumulation from customers and isolation of customers' assets, regulation of offers practice and bookkeeping and revelation prerequisites for subsidiaries exchanging. The J.R. Verma board of trustees recommends an approach for danger control measures for file based fates and alternatives, investment opportunities and single stock fates. The danger regulation measures incorporate computation of edges, position limits, introduction points of confinement and reporting and revelation.[4]

Derivatives Market India as specified in the former talk, subsidiaries exchanging initiated in Indian market in 2000 with the presentation of Index fates at BSE, and along these lines, on National Stock Exchange (NSE). From that point forward, subsidiaries market in India has seen huge development regarding exchanging esteem and number of exchanged contracts. Here we may talk about the execution of derivatives items in India markets as takes after. 2.2.1. Subsidiaries Products Traded in Derivatives Segment of BSE the BSE made history on June 9, 2000 when it dispatched exchanging Sensex based prospects contract interestingly. It was trailed by exchanging list alternatives on June 1, 2001; in investment opportunities and single stock prospects (31 stocks) on July 9, 2001 and November 9, 2002, individually. Right now, the quantity of stocks under single fates and choices is 1096. BSE accomplished

[4] Ashutosh Vasisitisha, 'Development of Financial Derivatives in India' <https://casi.sas.upenn.edu/sites/casi.sas.upenn.edu/files/iit/Derivatives%20-%20Vashishtha.pdf> accessed on 03rd April, 2016

another development on September 13, 2004 when it dispatched Weekly Options and one of a kind item unparalleled worldwide in the derivatives markets. It allowed exchanging the supplies of four driving organizations to be specific; Satyam, State Bank of India, Reliance Industries and TISCO (renamed now Tata Steel). Chhota (smaller than expected) SENSEX7 was propelled on January 1, 2008. With a little or "smaller than normal" business sector part of 5, it takes into account nearly bring down capital expense, lower exchanging expenses, more exact supporting and adaptable exchanging. Currency prospects were presented on October 1, 2008 to empower members to support their currency dangers through exchanging the U.S. dollar-rupee future stages.

Subsidiaries Products Traded in Derivatives Segment of NSE began exchanging list fates, taking into account famous S&P CNX Index, on June 12, 2000 as its first derivatives item. Exchanging on list alternatives was presented on June 4, 2001. Fates on individual securities began on November 9, 2001. The prospects contracts are accessible on 2338 securities stipulated by the Securities and Exchange Board of India (SEBI). Exchanging choices on individual securities initiated from July 2, 2001. The alternatives contracts are American style and money settled and are accessible on 233 securities. Exchanging loan cost prospects was presented on 24 June 2003 however it was shut hence because of valuing issue. The NSE accomplished another point of interest in item presentation by propelling Mini Index Futures and Options with a base contract size of Rs 1 lac. NSE crated history by dispatching currency prospects contract on US Dollar-Rupee on August 29, 2008 in Indian Derivatives market.[5]

PARTICIPANTS IN THE MARKET

The accompanying three general classifications of members - hedgers, speculators, and arbitrageurs exchange the derivatives market. Hedgers face danger connected with the cost of a benefit. They utilize fates or alternatives markets to diminish or dispense with this danger. Speculators wish to wager on future developments in the cost of a benefit. Prospects and alternatives contracts can give them an additional influence; that is, they can increment both the potential increases and potential misfortunes in a theoretical endeavor. Arbitrageurs are ready to go to exploit an inconsistency between costs in two unique markets. On the off chance that, for instance, they see the fates cost of an advantage escaping line with the money value, they will take counterbalancing positions in the two markets to secure a benefit.

[5] Bombay Stock Exchange Training Module, 'Basics of Equity Derivatives', <http://www.bseindia.com/ downloads/Training/file/BCDE.pdf>, accessed on 02nd April, 2016.

A. Hedgers

Hedgers are individuals who endeavor to minimize their danger. In the event that someone holds shares and is apprehensive that the cost of these shares may fall in the short run, they can ensure themselves by offering Futures. On the off chance that the business sector really falls, they will make a misfortune on the shares, yet will make a benefit on the Futures. In this way they will have the capacity to set off your misfortunes with benefits. When any person utilizes some other resource for supporting purposes other than the benefit you really own, this sort of fence is known as a cross-support. Supporting is implied for minimizing misfortunes, not amplifying benefits. Supporting makes a more sure result, not a superior result. Assume you are a merchant of rice. You hope to purchase rice in the following month. In any case, you are worried about the possibility that that costs of rice could go up inside of the following one month. You can utilize Rice Futures (or Forwards) by purchasing Rice Futures (or Forwards) today itself, for conveyance in the following month. Along these lines you are ensuring yourself against cost increments in rice. Then again, assume you are a gem dealer and you will be offering some adornments one month from now. You are worried about the possibility that that costs of gold could fall inside of the following one month. You can utilize Gold Futures (or Forwards) by offering Gold Futures (or Forwards). In this way, if the cost of gems and gold falls, you will make a misfortune on gems however make a benefit on Gold Futures (or Forwards). On the off chance that you are a shipper and you require dollars to pay for your imports in the following month. You are anxious about the possibility that that dollar will acknowledge before that. You ought to purchase fates/advances on Dollars. Consequently regardless of the possibility that the dollar values, you will at present have the capacity to get Dollars at costs chose today.

In the event that you are an exporter and you are expecting dollar installments in the following month. You are anxious about the possibility that that Dollar may devalue in that period. You can offer prospects/advances on Dollars. Consequently regardless of the possibility that the dollar deteriorates, you will in any case have the capacity to get Dollars changed over at the costs chose today.[6]

B. Speculators

Speculators speculate expected value developments and take agreeing positions that augment benefit. Examiners are to a great degree high daring people who are in the Derivative markets just with the end goal of making benefits. They have to successfully gauge business sector patterns to take

[6] VK Sarang, 'Evolution of Currency Futures' <http://investorsareidiots.com/wpcontent/uploads/2012/ 07/Evolution-of-Currency-Futures-Trading-and-its-Impact-on-Exchange-Rate-Volatility-in-India-2.pdf>, last accessed on 04th April, 2016

positions that don't in any capacity ensure securely of contributed capital or returns. Speculators depend on quick moving patterns to gauge conceivable business sector moves these could extend from changing buyer tastes to fluctuating rates of premium, monetary development pointers harmonizing with business sector timing and so on. Speculators can make tremendous benefits or a just as colossal misfortune and are regularly high net financial specialists hoping to expand holding with a perspective to amplify benefits in a brief timeframe. In the event that an examiner feels the stock cost of XYZ Company is relied upon to fall in the following two days given some upcoming business sector advancements, he would regularly short offer these shares in a subsidiary business sector without really purchasing or owning those shares. Should the stock then fall of course, he would rake in a sizeable benefit contingent upon his holding. Be that as it ought to the stock buck desires, he would make a similar misfortune.

C. Arbitrageurs

Arbitrage implies to the purchasing and offering of shares, items, prospects, alternatives or any blend of such items in diverse markets in the meantime to exploit any mis-valuing opportunities in such markets. An arbitrageur for the most part has no perspective available and tries to profit by value differentials between business sectors.[7]

ECONOMIC FUNCTION OF DERIVATIVES MARKET IN INDIA

1. Costs in a composed subsidiaries business sector mirror the impression of business sector members about the future and lead the costs of fundamental to the apparent future level. The costs of subsidiaries unite with the costs of the hidden at the close of the subsidiary contract. Along these lines derivatives help in disclosure of future and also current costs.
2. The derivatives business sector exchanges dangers from the individuals who have them yet may not care for them to the individuals who have voracity for them.
3. Derivatives, because of their inalienable nature, are connected to the basic money markets. With the presentation of subsidiaries, the hidden business sector witnesseses higher exchanging volumes as a result of support by more players who might not generally partake for absence of a plan to exchange hazard.
4. Theoretical exchanges movement to a more controlled environment of subsidiaries business sector. Without a sorted out subsidiaries market, examiners exchange the hidden money markets. Margining,

[7] VK Sarang, 'Evolution of Currency Futures', <http://investorsareidiots.com/wp-content/uploads/ 2012/07/Evolution-of-Currency-Futures-Trading-and-its-Impact-on-Exchange-Rate-Volatility-in-India-2.pdf>, last accessed on 5th April, 2016

checking and observation of the exercises of different members turn out to be to a great degree troublesome in these sorts of blended markets.

5. A vital accidental advantage that spills out of derivatives exchanging is that it goes about as an impetus for new entrepreneurial action. The subsidiaries have a background marked by drawing in some brilliant, innovative, knowledgeable individuals with an entrepreneurial state of mind. They regularly stimulate others to make new organizations, new items and new vocation opportunities, the advantage of which are enormous. More or less, subsidiaries markets build reserve funds and interest over the long haul. Exchange of danger empowers market members to grow their volume of action.[8]

CURRENCY FUTURES

A currency future, otherwise called FX future, is a fates contract to trade one currency for another at a predefined date later on at a value (conversion scale) that is altered on the buy date. On NSE the cost of a future contract is as far as INR per unit of other currency e.g. US Dollars. Money future contracts permit speculators to support against outside trade hazard. Currency Derivatives are accessible on four currency sets viz. US Dollars (USD), Euro (EUR), Great Britain Pound (GBP) and Japanese Yen (JPY). Money choices are as of now accessible on US Dollars.

Currency Futures are an institutionalized remote trade subordinate contract exchanged on a perceived stock trade to purchase or offer one money against another on a predefined future date, at a cost indicated on the date of agreement, yet does exclude forward contract. The Chicago Mercantile Exchange (CME) initially conceived the thought of a currency prospects trade and it dispatched it in 1972 with impressive doubt, subsequent to generally fates business sector had exchanged horticultural wares and not financial instruments. Prof. Milton Friedman stated:

> *"Changes in the global money related structure will make an incredible development in the interest for remote spread. It is exceptionally alluring this interest is met by as expansive, as profound, as strong a fates market in outside monetary standards as could be allowed so as to encourage foreign exchange and venture. Such a more extensive business sector is practically sure to create because of the demand. The real open inquiry is the place. The US is a characteristic spot and it is very much in light of a legitimate concern for the US that it ought to create here."*

[8] Peter Clark, 'Exchange Rate Volatility and Trade Flows', https://www.imf.org/external/np/res/exrate/2004/eng/051904.pdf, last accessed on 05th April, 2016.

RATIONAL BEHIND INTRODUCTION

There are solid experimental confirmations to propose that supporting lessens the unpredictability of profits and considering the wordy way of currency returns, there is solid need to fence currency risk and this need has developed with quick development in cross-fringe exchange and speculations streams and along these lines the justification for building up the money prospects business sector has expanded drastically. Likewise both inhabitants and non-occupants buy residential currency resources and if the conversion scale stays unaltered from the season of procurement of advantages for its deal, no additions and misfortunes are made out of money exposures. Be that as it may, if household currency deteriorates or acknowledges against the foreign money, the exposure would bring about misfortune for inhabitants acquiring outside resources or increase for non-occupants obtaining local resources. In, therefore, scenery, unpredicted developments in return rates open speculators to currency dangers.

Currency fates empower financial specialists to fence these dangers. As saw in the most recent decade the instability in USD/INR has expanded the need to moderate danger supporting in subsidiaries market. Currency exchanging was dispatched from this point of view.

REGULATORY FRAMEWORK

A. Scope of RBI

The Reserve Bank of India (RBI), which directs issues identified with outside trade, has issued an arrangement of rules for the dispatch of money prospects exchanging India amid November 2007. The expectation behind the presentation of trade exchanged rupee prospects is to: 1. Give an open access to outside trade business sector to a bigger area of the populace. 2. Bring more prominent straightforwardness into the business sector and 3. Decrease expense of exchange. Taking after are the rules issued under the Reserve Bank of India Act, 1934. Definition of Currency Futures implies an institutionalized outside trade subordinate contract exchanged on a perceived stock trade to purchase or offer one money against another on a predefined future date, at a cost indicated on the date of agreement, yet does exclude a forward contract. 2. Currency Futures business sector implies the business sector in which currency fates are exchanged.

The Reserve Bank might every once in a while alter the qualification criteria for the members, change member shrewd position breaking points, endorse edges and/or force particular edges for recognized members, settle or adjust some other prudential cutoff points, or take such different

activities as considered fundamental in broad daylight enthusiasm, in light of a legitimate concern for money related solidness and deliberate advancement and upkeep of outside trade market in India.[9]

B. FEMA regulations

The rules for domestic foreign exchange market are covered largely under the Foreign Exchange Management (Foreign Exchange Derivative Contracts) Regulations, 2000. The permission to a person resident in India to enter into a foreign exchange derivative contract is covered under Regulation 4 of FEMA, which states that "a person resident in India may enter into a foreign exchange derivative contract in accordance with provisions contained in Schedule 1, to hedge an exposure to risk of a transaction permissible under the Act, or rules or regulations or directions or orders made or issued there under". Schedule 1 of FEMA deals with the foreign exchange derivative contracts permissible for a person resident in India.

The various products permitted to be used by residents in India include foreign exchange forward contracts, options – both cross currency as well as foreign currency rupee, and foreign currency – rupee swap. While these products can be used for a variety of purposes, the fundamental requirement is the existence of an underlying exposure to foreign exchange risk.

Similarly under Schedule II of FEMA, the foreign exchange derivative contracts permissible for a person resident outside India are dealt with. The category "person resident outside India" includes foreign Institutional Investors. After introduction of currency futures, if an entity is permitted to take a speculative position, then this would clash the FEMA requirement of hedging for permitted purposes which currently doesn't include speculation/leveraging.

RELATIONSHIP WITH EXCHANGE RATE VOLATILITY

In 1984 the IMF (1984) created a study for the General Agreement on Tariffs and Trade (GATT) on the effect of conversion scale unpredictability on world exchange. That study was persuaded by an increment in protectionist weights, extensive swapping scale developments among the real monetary standards, and a noteworthy lull in world exchange. Some of these advancements have returned. For instance, the development in world fares of merchandise and administrations declined strongly in 2001 and 2002 from the twofold digit pace in 2000, and the trade estimation of the U.S. dollar has varied

[9] Swati Bhat, 'Currency futures stifled by RBI rules: MCX-SX', (Reuters.in, 22 April, 2013), <http://in.reuters.com /article/fx-summit-mcx-sx-idINDEE93L07N20130422>, accessed on 7th April, 2016.

reasonably forcefully in the most recent year. The 1984 concentrate additionally mirrored a longing to take supply of the suggestions for currency instability and exchange of the movement from the settled rates among the real monetary standards to coasting after the breakdown of the Breton Woods framework in 1971–1973.

QUANTITATIVE ANALYSIS OF CURRENCY FUTURES AND ITS PERFORMANCE IN INDIA

The development of the money prospects in India has been surveyed by measuring the development in two variables which are open premium and contracts exchanged. an) Open Interest -Open Interest is the aggregate number of remarkable contracts that are held by business sector members toward the day's end. It can, likewise, be characterized as the aggregate number of fates contracts or alternative gets that have not yet been worked out (squared off), terminated, or satisfied by conveyance. By checking the adjustments in the open interest figures toward the end of every exchanging day, a few decisions about the day's movement can be drawn. Expanding open premium implies that new currency is streaming into the commercial center. The outcome will be that the present pattern (up, down or sideways) will proceed. Declining open premium implies that the business sector is exchanging and infers that the predominant value pattern is arriving at an end. Information of open premium can demonstrate valuable toward the end of significant business sector moves. A leveling off of open enthusiasm taking after a maintained value development is regularly an early cautioning of the end to an up slanting or buyer market.

Contract Traded- The quantity of agreements exchanged on a stock trade demonstrates the aggregate volume of agreements exchanged. An increment in the quantity of agreements exchanged on a stock trade communicates the development of exchange that specific stock trade for currency future. The number contracts exchanged in the NSE expanded to 973344132 contracts on 2011-12 from 32672768 contracts on 2008-09.[10] What's more, subsequently normal every day turnover likewise expanded from Rs.1167.43 crores in 2008-09 to Rs.19479.12 crores in 2011-12.[11]

POLICY ISSUES IN INDIA

A. Currency v. Physical Settlement

There has been much debate about the two methods of settlement that are accessible for subordinate contracts, viz. money and physical settlement, contrasting the two on the premise of their

[10] Dr. Devvajit Mahanta, 'Indian Currency Futures: An Analytical Study Of Its Performance'(2012), http://indian reseachjournals.com/pdf/IJMFSMR/2012/November/6.pdf, last accessed on 6th April, 2016

[11] Dr. Devvajit Mahanta, 'Indian Currency Futures: An Analytical Study Of Its Performance'(2012), http://indian researchjournals.com/pdf/IJMFSMR/2012/November/6.pdf, last accessed on 6th April, 2016

helplessness to hypothesis and control. Physical settlement, it is contended, gives the connection to the genuine markets of the hidden securities. On the other hand it is powerless to twists, for example, "short squeezes". Money settlement, then again, gives the advantages of staying away from the issue of conveyance expenses and bringing down the viability of business sector controls, for example, cornering and pressing. Quickly, all subordinate contracts in India are money settled. Taking a gander at the level headed discussion on money versus physical settlement of derivatives in India; we find that the LCGC Report underestimated it that physical settlement would be utilized for subsidiary contracts on individual stocks. It noticed that, "On account of individual stocks, the positions which stay extraordinary on the lapse date must be settled by physical conveyance. This is an acknowledged standard all over the place. The fates and the money business sector costs need to unite on the lapse date. Since Index fates don't speak to a physically deliverable resource, they are money settled everywhere throughout the world on the reason that the file quality is gotten from the money market. This, obviously, suggests the trade business sector is working out a sensibly solid way and taking into account it can be securely acknowledged as the settlement cost. Nonetheless, when single stock derivatives were presented in India, it was chosen to utilize money settlement in the first place in light of the fact that the trades did not then have the product, legitimate system and regulatory base for physical settlement. It was suggested that money settlement would be supplanted by physical settlement as the trades built up the abilities to accomplish physical settlement productively. In April 2002, SEBI's Advisory Committee on Derivatives (ACD) proposed a wide structure for physical settlement showing the dangers and advantages of physical settlements alongside conceivable danger control measures.[12] The ACD noticed the accompanying as the essential issues included in physical settlement without a dynamic component for securities loaning and acquiring, physical settlement of stock particular subsidiary contracts, particularly investment opportunities, may raise worries on the likelihood of a short pricing.

B. OTC v. Exchange traded derivatives

Derivatives exchanging can be composed in two ways. The main route is through bi-parallel assertion between counterparties, called the `over the counter' or `OTC subsidiaries' exchanges. Another route is through the unknown request coordinating stage of the stock trade. Trade exchanged contracts are institutionalized, as to development date, contract size and conveyance terms, while OTC contracts are exceptionally custom-made to the customer's requirements.

[12] Citation needed

The development in this business sector has been driven by the advancements happening in organized fund and other redid subsidiaries items. These advancements are driven by the financial specialist's requests and the opposition among the institutional intermediaries to take into account these requests. A percentage of the upsides of OTC contracts are:

- Buyers and Sellers can arrange the agreements according to their particular needs to accompany tweaked items
- Transaction expenses can be lessened. The expenses like trade charges, clearing charges can be wiped out
- OTC derivatives business sector can be utilized for executing mass requests without the danger of business sector sway

In any case, there is another part of this verbal confrontation which contends that we are in no time seeing an inexorably reducing limits between the trade exchanged and OTC subsidiaries markets. We take note of the accompanying: a. Trade exchanged contracts are by and large considered as having been institutionalized (with respect to development date, contract size and conveyance terms), though OTC contracts are custom-tailored to the customer's requirements. A few trades, then again, have presented subsidiary instruments that can give a huge level of customization.[13] A remarkable case is the "Flex" choice, which was presented by the Chicago Board of Options Exchange (CBOE) in February 1993. Flex alternatives permit financial specialists to pick strike costs, close date and style. The Chicago Board of Trade (CBOT) has presented "Adaptable Treasury Option" composed on U.S. Treasury bonds and bills which takes into account speculators' decision of activity value, termination date and style. Such items are currently likewise being offered by the Toronto Stock Exchange, the Philadelphia Stock Exchange, the American Stock Exchange and the London International Financial Futures Exchange and so on. Additionally, practically speaking, OTC markets may take after certain streamlining business sector traditions that give a sure level of institutionalization. For instance, most financing cost swaps in Canada are genuinely institutionalized, normally including the trading of money streams on an agreement's notional worth in light of 1-month or 3-month investors' acknowledgments (drifting loan fee) for 2-to 5-year Government of Canada securities (altered).[14]

[13] Deutsche Borge Group, 'The Global Derivative Market: An Introduction', <https://www.math.nyu.edu/faculty/avellane/global_derivatives_market.pdf>, accessed on 28th March, 2016.

[14] Anuradha Guru, 'Indian Derivative Markets: Some Policy Issues', <http://www.nse-india.com/content/press/NS_jan2009_2.pdf>, accessed on 29th March, 2016.

C. Position in India

Financial substances in India presently have a menu of OTC items. In appreciation of forex subsidiaries including rupee, occupants have entry to outside trade forward contracts, remote currency rupee swap instruments and currency alternatives - both cross money and in addition, outside currency rupee. For derivatives, including just outside currency, a scope of items, for example, IRS, FRAs, choice are permitted. [15]

The OTC subsidiaries markets in India are far bigger than the trade exchanged business sector for derivatives. The level headed discussion on decision between the two methods for exchanging subsidiary, viz. on trade and OTC, in India is on the same lines as the worldwide open deliberation. It is perceived that OTC exchanging, while allowing boundless adaptability in the agreement, experiences non-straightforwardness, and wasteful value revelation and by and large includes counter party hazard. Be that as it may, there are a few advantages of OTC markets, as pointed out by Prof J.R. Verma, who advocates for the production of an OTC value subsidiary business sector in India.[16] He is of the perspective that opposition between OTC markets and trades drives every business sector to lower expenses and to receive the best practices of the other business sector. He further holds that institutionalized and exceedingly fluid contracts are best exchanged sorted out trades in view of the upgraded straightforwardness and lower systemic danger. However, new contracts are frequently best hatched in OTC markets until they accomplish a minimum amount of liquidity and across the board interest and soon thereafter, they can be moved to the trade exchanged organization. Since quite a while ago dated value choices are today best brooded in OTC markets. Then again, on the part of trade exchanged versus OTC derivatives, the late report of Government selected High Powered Expert Committee on Making Mumbai an International Financial Center has focused on a more noteworthy part for trade exchanged subsidiaries in an Indian International Financial Center, inter alia, for the accompanying reasons: - The present OTC business sector in India, to a great extent, exchanges plain vanilla items for which trade exchanged stage is a superior alternative as it gives straightforwardness and liquidity at no expense in adaptability. - In a domain where India's administrative and supervisory limit in the derivatives markets in still incipient, however developing, trade exchanged markets are simpler to manage than the hazy OTC markets which make more

[15] Srinivasan P. and Kalaivani, 'Exchange Rate Volatility and Export Growth in India', <https://mpra.ub.uni-muenchen.de/43828/1/Exchange_Rate_Volatility_and_Export_Growth_in_India-MPRA_Working_Paper.pdf>, accessed on 29th March, 2016.

[16] Planning Commission of India, *A Hundred Small Steps: Report of the Committee on FInancialSector Refordms*, (), <http://planningcommission.nic.in/reports/genrep/rep_fr/cfsr_all.pdf>, last accessed on 02nd April, 2016.

noteworthy interest upon regulation and administration. - Exchange exchanged markets fit better with non-institutional clients who are not ready to get to the phone system through which OTC exchanging happens. - Exchange exchanged subsidiaries exchanging plays to India's qualities in running trade foundations. Our two national trades (BSE and NSE) and clearing companies (NSCCL and CCIL) are a solid arrangement of organizations who can contend in the worldwide business sector for trade exchanged derivatives. The report, on this issue, reasons that India needs both trade exchanged subsidiaries and OTC derivatives. Then again, in light of the above contentions, it is attractive to lay uncommon spotlight on getting world-class liquidity on the trade stage, after which OTC business sector can spring up in view of usage of the costs and liquidity delivered on this stage.

CONCLUSION

The estimation of a futures contract is derived from the estimation of the fundamental asset. The open door for arbitrage will make a solid linkage between the futures and spot prices; and the genuine relationship will rely on the level of loan costs, the expense of putting away the basic asset and any yield that can be made by holding the asset. Moreover the institutional attributes of the futures markets, for example, price points of confinement and 'stamping to showcase', and additionally conveyance choices, can influence the futures price.

The cash futures business sector will have more noteworthy price straightforwardness for the end-client. Indeed, it has made an excellent showing with regards to consider both stock and product trades for propelling money futures contracts. Stock trade will empower their substantial system of customers, brokers, agents, judges and theorists to exchange money subsidiaries; the product trade MCX will empower the hedgers, specifically merchants and exporters, who have real supporting requirements for security against bank rate vacillation. By the presentation of trade exchanged coin futures in India can now kept away from the legitimate tangle furthermore bring the stage of outside trade in India same as created nations. The upward pattern of the open interest, number of contracts exchanged and normal day by day turnover since its review clarify the entire story in subtle element. In this way, it can be in this way presumed the cash futures business sector will get more accomplishment in the coming future and the economy and the danger hedgers will be profited from this exchange.

"A DECADE OF THE RIGHT TO INFORMATION ACT, 2005"- CRITICAL EXPLORATION OF THE SCOPE AND IMPACT OF THE ACT.

*Aishwarya Deb & Prithwish Roy Chowdhury**

INTRODUCTION

"Democracy requires an informed citizenry and transparency of information which are vital to its functioning and also to contain corruption and to hold governments and their instrumentalities accountable to the governed..." [1]

The relationship between information and authority is intense. Without information, the citizens of a State would have no power to make choices about their government – no ability to significantly participate in the decision-making process, to hold their government accountable, to put a stop to corruption, to reduce poverty, or, ultimately, to live in a real democracy. In such a scenario, citizens' access to information can ensure transparency and accountability in government systems and processes.[2] Such a right to information could be secured by a Statute in order to ensure the citizens of their right to question, scrutinize, audit, assess and evaluate government acts and decisions, to ensure that these are consistent with the principles of public interest, probity and justice. In India, such access to governmental information has been provided under the *Right to Information (RTI) Act, 2005* in order to strengthen democracy by ensuring *transparency* and *accountability* in the actions of public bodies.

THE RAISON D ÊTRE FOR THE EVOLUTION OF RIGHT TO INFORMATION IN INDIA

The struggle to institutionalize the right to information has been extensive and hard-fought. Demands for transparency and the need for accountability in public action are said to have arisen soon after Independence.[3]In 1975, the Supreme Court of India[4] recognized the right to information to be a

*The Authors are 4th year Law students at Department of Law, Calcutta University and Institute of Law, Nirma University, Gujarat respectively.

[1] Right to Information Act, 2005, Preamble.

[2] Simi T.B, Madhu Sharma & George Cheriyan, *Analysing the Right to Information Act in India*, (CUTS CART Briefing Paper Series, Paper No. 1, 2010), available at http://www.cuts-international.org/cart/pdf/Analysing_the_Right_to_Information_Act_in_India.pdf (last visited on October 3,2015)

[3] Shobha SV, *The Central Information Commission: A Nut and Bolt Analysis* in RIGHT TO INFORMATION: FOR INCLUSION AND EMPOWERMENT (2013), available at http://rti.gov.in/rti_fellowship_report_2011.pdf (last visited on October 3, 2015).

[4] State of U.P. v. Raj Narain, AIR 1975 SC 865.

fundamental right of every citizen of India under *Article 19* of the Constitution of India.[5] This was followed by a chain of progressive judgments by the Supreme Court elaborating this right. Yet, practically, citizens could not enjoy this right. The impetus for recognizing the right to information, as have been enshrined in the Constitution of India, arose principally out of the failure of the government to thwart corruption and to ensure efficient and empathetic governance. The main reason behind the gradual and strong advancement of RTI in India is the *Mazdoor Kisan Shakti Sanghatan (MKSS)*, a grassroots organization based in Rajasthan, where the poor wage workers, asserted their right to access information by responding against wrong entries in muster rolls, which was the sign of rampant corruption in the system, and demanding official information recorded in government rolls related to drought relief work. The inhabitants were aware that local officials had engaged in corruption, but it was impossible to prove it without access to the muster rolls. MKSS began to demand access to the muster rolls from local bodies and were met with strong resistance, including claims by the local authorities that the muster rolls were "secret documents." [6]

However, MKSS opposed this resistance with local rallies, hunger strikes, and sit-ins. In 1994, MKSS began to arrange *public hearings* to which it invited villagers, government officials, and impartial mediators such as a journalist, lawyer or academic. However, the government officials did not participate, and on various events they tried to squash the hearings by intimidating the people. The public hearings gave the people a platform and helped to incline the balance of power in favor of the people, allowing them to hold their administration accountable for its actions. Until these public hearings, the right to information in the region was considered an elite urban preoccupation, perhaps useful in the "intellectual arena and not on the street corners."[7] But the hearings caught the imagination of lawyers, journalists and social activists and allowed MKSS to play the role of an auditor, demonstrating that social action exposes corruption.[8] The demand for national law started under the leadership of National Campaign on People's Right to Information (NCPRI). *The Freedom of Information (FOI) Bill 2000* was passed in the Parliament in 2002 but not notified, hence, it never came into effect. It was as a result of years of campaigning at the national and regional level that the right to information gradually started

[5] *Id*.
[6] Article 19, *Access to Information: An Instrumental Right for Empowerment*, July 2007, available at https://www.article19.org/data/files/pdfs/publications/ati-empowerment-right.pdf (last visited on October 10, 2015).
[7] *The Right to Know, The Right to Live: People's Struggle in Rajasthan and the Right to Information*, July 1996, available at http://www.mkssindia.org/wp-content/uploads/2010/08/MKSS-Threefold.pdf (last visited on October 3,2015)
[8] *Supra* note 8.

taking a real form – first through legislation passed by certain states and then by the Centre through the Right to Information Act 2005 (RTI Act).[9]

10 YEARS OF RTI ACT- WHERE DOES IT STAND?

The 12th of October, 2005 was significant for a very special reason, a reason which made the Indian populace rejoice; it marked the beginning of an era of empowerment of a special kind. It was the day on which the Right to Information Act, 2005 came into force in India. For a population familiar with the dense veil of secrecy which shrouded most institutions, the promise of the 'sunlight'[10] of transparency meant a return of power to the people. The enactment of the RTI Act in 2005 has often been termed as the zenith of the campaigns, but the struggles have hardly ended. For every success story that the RTI Act puts forward, there are many that have left citizens disheartened and discontented with this path-breaking legislation. From non-responsive public information officers to evasive responses to harassment experiences of information seekers across the country are telling a story about the RTI Act which is not as bright. On the other hand, there are specific reasons which enshrine upon the RTI Act the status of a *revolutionary legislation* – firstly, the citizens can demand disclosure of governmental records and documents in a time-bound manner[11];secondly, the burden lies on the governmental department to explain refusal to disclose information;[12]thirdly, public authorities are mandatorily required by law to *suo moto* place information about themselves in the public domain;[13] lastly, the government officials are individually accountable for not discharging their duties under the Act.[14]

A. Analysing The Scope Of The Act

The Right to Information Act, 2005 subjects the public institutions and the Government machineries to unparalleled levels of scrutiny. To ensure that the ideals of transparency and government accountability do not remain mere rhetoric, the Act sets up a clear structure to facilitate access to information – starting from the Public Information Officers (PIOs) in every public authority to the first appellate authority (FAA) and Information Commissions as the second appellate forum. The Act specifically bestows upon every "citizen" of India the right to access information, including overseas citizens of India and persons of Indian origin. Such a citizen, who wishes to obtain any "information"[15]

[9] *Supra* note 6.
[10] *Id.*
[11] *Supra* note 6.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] The Right to Information Act, 2005, § 2(j).

under the said Act, must submit an application along with an application fee, to the Public Information Officer (PIO) of the respective public institution. If the institution fails to dispose of the applications within the specified time limits, the applicant would have to be provided with such information free of cost.

Irrespective of whether a citizen seeks for such information, the statute, in particular, requires every public authority to publish[16] categories of information, for instance, particulars of its organisation, functions and duties; norms set for discharge of its functions; rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions and the like. Apart from the enabling provisions, the said Act enumerates the kinds of information that are exempted from disclosure.[17] However, these exempted information or those exempted under the *Official Secrets Act, 1923* can be disclosed if public interest in disclosure overweighs the harm to the protected interest.[18]Notwithstanding such exemption, such information would cease to be exempted if twenty years have lapsed after happening of the incident to which the information relates.

The said Act provides *two levels of appellate* mechanisms – the first appellate forum being an officer senior in rank to the *Public Information Officer* (PIO) in the same department and the second being the Central/State Information Commission. The appeal procedure forms a vital part of the Act and was one of the rallying points for the civil society during the drafting of the law. We must also concede the fact that without an autonomous, speedy and effective redressal mechanism under the Act, citizens would be left at the whims and fancies of Information Officers who may act irresponsibly. The appeal procedure enshrined under this Act ensures that the citizens are not forced to come up to the Courts at every occasion to enjoy their fundamental right to information. If a claimant is not supplied information within the prescribed time of 30 days or 48 hours, as the case may be, or is not satisfied with the information furnished to him, he may prefer an appeal to the first appellate authority. If still not satisfied the applicant may prefer a second appeal with the *Central Information Commission* (CIC)/State Information Commission (SIC) within ninety days from the date on which the decision should have been made by the first appellate authority or was actually received by the appellant.

No statute can meet the requirements of the society, unless penalties are laid down for the contravention of its enabling provisions. Where the Information Commission at the time of deciding any complaint or appeal is of the opinion that the Public Information Officer has without any reasonable cause,

[16]*See id.* §4(1) (b).
[17] *See id*. § 8.
[18] *See id*. § 8(2).

refused to receive a request for information or not furnished within the time specified or denied the request for information or knowingly given incorrect, incomplete or misleading or distorted information it shall impose a *penalty* of Rs.250 each day till application is received or information is furnished subject to the condition that the total amount of such penalty shall not exceed Rs.25,000.

B. Central Information Commission- The Regulator, Balancer and Educator

Apart from being an appellate organ, the Central Information Commission (CIC), also plays a critical role in the implementation of the Act in many ways. In the words of the former President of India, it plays a critical role as the '*regulator, balancer and educator'*.[19] It is the ultimate appellate body under the statute for RTI applications relating to public authorities under the Central Government. It has the power to impose penalties on the erring PIOs, grant compensation to the aggrieved applicants and decide whether an institution falls within the domain of the Act.

For a fairly new legislation, the CIC's analysis and application of the law is central to building a consistent body of right to information jurisprudence in the nation. Given its powers and functions and as '*the most visible aspect of the RTI-regime*'[20], the CIC's working has an obvious impact on the implementation of the RTI Act in the country. Through some *landmark decision*s, the CIC has paved its path towards securing transparency in administrative activities. For instance, soon after the enactment of the Act, the CIC while responding to one of the RTI applications, asked the UPSC to show marks to Civil Services aspirants The CIC directed the Union Public Services Commission (UPSC) to declare individual marks scored by 2,400 candidates appeared for the Civil Services Preliminary examinations in 2006 and ordered it to declare cut-off marks for each subject.[21]. Subsequently, in a somewhat similar case[22], applicants applied for information regarding merit list for selection of candidates to various posts in the university. However, no proper information having been provided by the authorities, the Commission directed such information to be enlarged to the applicants and held that that every public authority, must take all measures in pursuance of § 4(1) (a), to implement efficient record management systems in their offices so that the requests for information can be dealt promptly and accurately.[23]In *Shyam Yadav v. Department of Personnel Training*[24], where the applicant had sought details of property

[19] Smt. Pratibha Devisingh Patil, 4th Annual Convention of the Central Information Commission, October 12, 2009, available at http://cic.gov.in/convention-2009/PresidentSpeech.pdf (last visited on October 2, 2015) (discussed during the inauguration speech).
[20] *Supra* note 6.
[21] CIC/WB order dated November 13, 2006.
[22] Paramveer Singh v. Punjab University, CIC/OK/A/2006/00016.
[23] *Id*.
[24] CIC/WB/A/2009/000669, dated June 17, 2009.

statements filed by bureaucrats, it was held by the Commission that property statements filed by civil servants are not confidential and information can be disclosed after taking the views of concerned officials as per the provisions of the RTI Act. The Commission took a step ahead in *Ram Bhaj v. Delhi government*[25] by formulating guidelines for redressal of the grievances of the citizens and directed the Delhi Government to notify the common people about the same.

There is no doubt that the Commission has effectively worked to bring about transparency in administrative activities, but such actions itself *do not* make it *infallible*. The lack of proper reasoning has been the ground for High Courts to strike down orders of the CIC on certain occasions[26] . The Courts have also held in some cases that the CIC has erred by not giving an opportunity of hearing to the necessary parties.[27] In *Dr. (Mrs.) Sarla Rajput v. CIC*, [28]the High Court of Delhi while quashing the penalty order against the Petitioner held that "*before imposing penalty of Rs. 25,000/- vide order dated 15th December, 2007 reasonable opportunity of hearing was not granted to the Public Information Officer i.e. the petitioner. No notice was issued to the petitioner to explain her stand and justify her position…*"[29]As a young institution set up under a comparatively new and path-breaking legislation which questions several antiquated standards of governance, the CIC has to establish itself as a self-governing, efficient and trustworthy quasi-judicial body. If a significant number of its orders are struck down by Courts, the CIC's efficiency and decision-making abilities come into question. According to the opinion of the Karnataka High Court, the Commission no doubt, is a necessary party to a proceeding because the presence of the Commission is indispensable for a complete and ultimate decision on the question involved in the proceedings.[30]

C. Judiciary and The Right To Information

The independence of judiciary has been a subject of debate within the purview of the RTI Act. Since the past few years, the legal critics have come up with such views regarding the "transparency" of the judicial activities which insist on the judicial fraternity the need to re-examine its previously adopted conformist approach with respect to surrendering itself before this socio-beneficial legislation designed to ensure transparency and accountability in working of every public authority so that it gives a clear and

[25] CIC/SG/A/2010/000537+000538/7492, dated April 19, 2010.
[26] *See* Union of India v. Vivek Bhatia, W.P. (C) No.3573/2008 (Delhi H.C.).
[27] *Id.*
[28] W.P. (C) 5204/2008(Delhi H.C.)
[29] *Id.*
[30] Poornaprajna House Building Cooperative Society Ltd. v. Karnataka Information Commission, AIR 2007 Kant 136.

strong signal to all those critics who often condemn its image as an institution functioning in a surreptitious and obscure manner. In a very recent decision[31], which has given a new dimension to this long-reverberating debate, a three-judge bench of the Hon'ble Apex Court of India dismissed a Special Leave Petition (SLP) preferred by one Mr. S.C. Agarwal who was discontented with the decision of the lower court wherein the latter Court had disallowed his prayer so as to direct the disclosure of information regarding details of medical facilities availed by the individual Judges of the Apex Court and their family members including those relating to expenses on personal treatment in India or overseas.[32]What has to be noted is that the petitioner had, relying on an earlier decision of the Delhi High Court, consequently filed an RTI majorly focusing on the point that *"the information on the expenditure of the government money in an official capacity cannot be termed as personal information".* [33]

The CPIO, while following the orders of the CIC, furnished the applicant with the actual total expenditure for the preceding three years but expressed that the maintenance of judge-wise information regarding actual total medical expenditure was not mandatory. Being dissatisfied with such an approach of the CPIO, the applicant again come up to the CIC following which the Registry of the Supreme Court contested the same firstly before the Delhi High Court and then before itself *though* on the judicial side. Though the Apex Court disclosed the total amount reimbursed on medical treatment from the budget grant for relevant years in respect of Supreme Court Judges (sitting and retired) and employees of the Court, this case turned out be a major example witnessing the conflict between the higher judiciary and the statutory watchdog of the RTI, CIC.

We must also recall the efforts of our learned parliamentarians who raucously mired the introduction of the *Judges (Disclosure of Assets and Liabilities) Bill, 2009* on the ground that a certain clause[34] in the aforesaid legislation overtly excluded the public and judicial scrutiny of such details submitted by members of the Higher Judiciary to their respective competent authorities.

The Commonwealth Human Rights Initiative had recommended that "The CJI, as the competent authority, may invoke his powers under section 28 of the RTI Act and immediately frame Rules relating to the collection of fees and the disposal of first appeals in the Supreme Court." [35] Further, in

[31] S.C.Agarwal v. Registrar, Supreme Court of India, Special Leave to Appeal (C) No. 15291/2015(SC) (Unreported).
[32] Hemant Kumar, *RTI vis-à-vis Judiciary*, available at http://lawyersupdate.co.in/LU/8/1909.asp (last visited on October 2, 2015)
[33] CPIO, Supreme Court of India v. S.C. Agarwal, W. P. (C) No. 188/2009 (SC)
[34] Clause 6.
[35] *An Analysis of the RTI Rules of the Supreme Court, the Delhi High Court and the Subordinate Courts*(2010), available at http://www.humanrightsinitiative.org/publications/rti/rti_in_the_judiciary_series_1.pdf (last visited on October 3, 2015)

pursuance of a recent development wherein the Supreme Court has sought response from all National political parties over why they should not be brought under the ambit of the RTI while hearing a writ petition [36]by the Association for Democratic Reforms in this regard, it becomes all the more necessary for the Apex Court to revisit its prevalent conservative approach with respect to adequately submitting itself before the RTI so that there is no scope for our politicians to accuse the Judiciary of adopting double standards when a question comes regarding inculcating transparency in the public life.

Notwithstanding the aforesaid issues, the fact that the Apex Court has broadly complied with the provisions of the RTI Act, cannot be over-looked. Also, apart from appointing a CPIO and FAA as required under the pertinent provisions of the *RTI* Act, it has even nominated one officer of the rank of "Registrar" as Transparency Officer for the Supreme Court.

The CIC, having, time and again held that the judicial proceedings would not be covered under the RTI, it becomes a clear option on the part of the Apex Court, to formulate suitable regulations preferably in consultation with other judges to keep in check the impending instances of any misuse of the RTI law affecting the principles of judicial independence.

What is desirable is the formulation of a "Code of Transparency" by the Hon'ble Apex Court which would provide for the broad outline with respect to publishing and disseminating of information in relation to itself in wider public domain, after wisely deciding what it considers to be apposite and fit. After all, judicial independence does not necessarily mean that judges are above the law.

D. Limitations of The Transparency Law

The RTI legislation aims to govern the *bureaucracy* so that it functions efficiently and impersonally, but changing a culture of secrecy to one of openness is, in reality, like a path tinted with thorns. Not one, but many people have fallen prey to the nasty activities of the bureaucratic officials and the infallible efforts made by them to suppress any voice which stood against their activities. Back in 2010, one RTI activist named Amit Jethwa was gunned down outside the High Court of Gujarat for naming an MP while exposing illegal mining on the Gir Forest.This was just the beginning of such outrageous killing of RTI applicants and informants, followed by the murders of Mr. Arun Sawant and Vishram Dadodiya who were also murdered shortly after they had filed the RTI applications. Apart from the aforesaid deaths, what caught attention of the whole nation was the murder of Mr. Satyendra Dubey, an engineer of the National Highways Authority of India, as a consequence of his writing a letter to the Prime Minister regarding corruption in the construction of highways. Then again, the mysterious death of

[36] Union of India v. Association of Democratic Reforms, (2002) 10 SCC 111.

Mr.Ramdas Ghadegavkar, an activist who had exposed the sand mafia in Nanded, drew the attention of the Government towards the issue of protection of whistle-blowers. Subsequently, the legislature enacted the *Public Interest Disclosure (Protection of Informers) Act, 2013* which sought to establish a mechanism to register complaints on any allegations of corruption, intractable abuse of power and provide safeguards against the victimization of the individual who makes the complaint. But even after such enactment the problems did not decrease and in order to mitigate such problems, the legislature again had to come up with a *Public Interest Disclosure (Protection of Informers) Amendment Bill, 2015* with some additional changes in the previous Act.

Apart from the above-mentioned problems, there are various other issues (as discussed below) attached to the implementation of the RTI Act, which, if not addressed comprehensively, will continue to be an issue.

- The Act empowers the appropriate Government to develop and organize educational programmes to advance the understanding of the public, especially disadvantaged communities, regarding how to exercise the rights contemplated under the Act.[37] But, *no proper educational programme* having been organized by the Government has led to a *low level of awareness* amongst the commoners of the country, particularly the disadvantaged and ostracized sections of the society.
- The Act *does not* prescribe for a *standard format* of RTI Application which would help in getting basic information regarding the informant, making it easier for the public authorities to identify the nature of frequent information requests so that it can be provided as a suo-moto disclosure[38].However, as per the provisions of the said Act, only few states have prescribed a standard form for an application.
- The *mode of request* or filing an application being only in writing has made it *inconvenient* for majority of the mass. In spite of living in a digital age, hardly any initiative has been taken by the RTI officials to receive applications through electronic submission channels; also no provision has been made for the applicants to pay the prescribed fees through electronic means.
- It is the duty of the Public Information Officers to assist the citizens in filing the applications[39] as per the said Act, but in reality the officials *hardly* put a step forward to *help* the *people seeking assistance* while drafting and filing applications.

[37] Supra note 18, § 26.
[38] *Id*. § 4(2).
[39] *Id*. § 5(3).

- The Act also provides that the information has to be provided in the form it has been requested by the applicant, unless such information would unreasonably divert the resources of the Public Authority[40]. However the officers never make use of this provision for the *inspection of records* as was found out in an information provider survey.[41]
- *Lack of infrastructure* and the slipshod attitude of the RTI officials have resulted in failure to provide information sought by the applicants within the prescribed period. As observed in the reports of various surveys, as and when the appeal or complaint is filed by the pursuer, the Information Commission gets to know the *failure* of the public institutions in providing the requisite information *within prescribed time* to more than half of the applicants.
- Though the legislation provides for an appellate authority[42], but *no such judicial power* has been enshrined upon the said authority. Also the appeal process is a very l*engthy and rigorous* one, making it really difficult for the dejected applicants to proceed further.

E. Exclusion from The Scope of RTI

Though the scope of the right to information legislation is wide, there are certain other statutes, namely the *Sexual Harassment of Women at Workplace (Prevention Prohibition and Redressal) Act, 2013,* which have expressly excluded some of its provisions from the purview of the RTI law. The Act of 2013 prohibits publication or making known contents of complaint and inquiry proceedings[43], related to the disposal of the sexual harassment complaint made by a victim. While it is commendable that this provision promises to contain such delicate matters within the purview of the organizations in which they occur, the same information should also be made available on request to a concerned party. Expressly excluding such information from the scope of the Right to Information (RTI) Act, 2005, will not only hinder the interest of the community at large but also keep the false or fabricated cases covered under its protective umbrella.

F. Appropriateness of The Amendment Bill, 2013 with Respect to The Objective of The RTI Act

The Right to Information (Amendment) Bill, 2013 was prompted by a recent judgment delivered by the Central Information Commission in *Anil Bairwal v. Parliament of India*[44], wherein "political parties" were held to be "public authorities". This Bill seeks to restrict the scope of the term

[40] *Id.* § 7(9).
[41] *Supra* note 6.
[42] *Supra* note 18, § 18.
[43] The Sexual Harassment of Women at Workplace (Prevention Prohibition and Redressal) Act, 2013, § 16.
[44] CIC/SM/C/2011/001386, dated June 3, 2013.

"public authorities" by overtly excluding from its purview the respective political parties. Such a change in the RTI legislation aiming to guard political parties from providing information under the transparency law is against the very purpose of the Act[45]. The Act which promises to enable the citizens to have at least the bare minimum information needed for making a well-versed decision and to hold all the instrumentalities of the government accountable for their respective actions, cannot undergo such a radical change.[46] It is crystal clear that the recent amendment, in the disguise of eliminating the catastrophic effects of the above-mentioned decision, is in fact a devise to invalidate the "politically inconvenient" judgment. While the political leaders contend that such an inclusion of "political parties" as "public authorities" would overturn the functioning of the RTI system, we strongly disagree with such views supporting the "self-seeking" exclusion of political parties.

THE PATH AHEAD OF RTI

The objective of this paper has been to analyse the position of the Act after a decade of its implementation. Our society, having essentially reacted to the changes brought about by the RTI regime, has also occasionally witnessed violence and its victims, but the fact that the legislation promises a much more *progressive* method of making governments answerable should not over-looked. The RTI Act 2005 have had a far-reaching, even reformative, impact on our pursuit for fulfillment of the major egalitarian and constitutional objectives, and its efficacy cannot certainly be questioned, but improved. For this reason, even as it strives to improve in the future, the legislation has proved it worth and can legitimately take great pride in what it has already accomplished this far. Secrecy being an old habit of the bureaucracy, they are usually cautious while parting with any information and usually do not divulge information unless there is a reason good enough to enlarge it. Such being the case, implementation of the RTI Act has, arguably, become the most intricate task. Thus in order to make the Act more user-friendly and implementation much easier, certain changes are required to be made in the legislation itself..

In furtherance, the following agendas for action towards the implementation of the Act are proposed:

[45] Akarshita Dhawan & Himaja Bhatt, *RTI on Political Parties- Towards a more democratic Democracy*, available at http://www.manupatra.co.in/newsline/articles/Upload/3AB4D1B7-2C61-4CDB-9871-2687E903A677.pdf (last visited on October 3, 2015)
[46] *Id.*

- The *sine qua non* for effective implementation of the Act is raising the awareness levels amongst the common people, especially the rural sections and women. This can be done by promoting Right to information as a brand name and using effectual marketing strategies for the same.
- Most of the work being mechanical in nature, a lot of pressure will be reduced if such tasks are relatively carried out through standardized or *summary procedures*.
- The RTI functionaries must set for themselves certain transparent performance appraisal criteria, and then make *bona fide* efforts to meet these criteria. It has been observed in a seminal book on public institutions that "*assessing the performance of public institutions requires clear yardsticks and criteria. Indeed, one measure of the performance of any institution is whether it has developed any criteria to assess its own performance*."[47]
- Qualitative and quantitative efforts have to be made to *train effectively* the civil servants and the RTI officials and provide them proper orientation regarding the usage of the Act and further implementation of the Act in facilitating common people's right to information.
- If there is *pro-active disclosure of information* by the public institutions themselves, there will be less number of requests and applications. Also, apart from saving time and money of thousands of applicants, a proactive regime of information disclosure will lead to the proper implementation of the Act. It is expected of the public authorities to monitor this aspect more stringently and involve external professional agencies to help them carry out the said task.
- Though the Act provides for detailed instructions regarding the whole procedure, poor infrastructure and poor state of record management is a major constraint in providing requisite information within the prescribed time. To overcome this problem, a proper management of records, especially their *computerization and digitization*, is a must. It has to be noted that only posting of materials on government websites will not guarantee the access information. At the least, the officials should provide and promote awareness through digital media and also provide the exact URLs to the applicants seeking any information.
- The Chief Information Commission should inexorably function in a way that is *people-friendly* and uphold the spirit of the legislation. Starting from interacting with the commoners outside the

[47] Pratap Bhanu Mehta, *India's Judiciary: The Promise of Uncertainty* in PUBLIC INSTITUTIONS IN INDIA: PERFORMANCE AND DESIGN 13 (2005)

traditional adjudicatory set-up to actively complying with the obligations[48] under the Act, the Commission must make it *accessible for the common people* and open to public engagement.[49]

- Though the RTI Act gives a fair amount of authority to the information commissions and there being no legal compulsion to follow the governmental rules of procedure with respect to its internal functioning, there is a huge scope for improvisation. But hardly any sort of improvised ways are developed as most of the officials are not properly acquainted with the tenets of good governance the RTI legislation itself. There, there is a need to strengthen the legal background of the officials and also increase consistency and the ability to learn from each others' experiences.
- The appellate authority should be given *judicial powers* in accordance with the Code of Criminal Procedure. This will lead to speedy disposal of applications and provide adequate relief to the dejected applicants. Also, it should be made mandatory on the part of the public authorities to provide adequate reasons in writing if they refuse to provide complete information sought by any applicant within the prescribed period.

CONCLUSION

There is no doubt that the Right to Information Act has the *potential* of turning the *balance of power* in favour of the common people of India and transform the democracy into a *participatory* one, making the governmental institutions answerable to the people for each and every actions. However, such a potential can only be nurtured if the Act is properly *implemented.* Also, success on the part of the Act must be gauged, not by the quantum of applications or information sought, but by its effectiveness in improving the *quality of governance*. In order to accomplish this, the scope of the legislation has to be expanded and innovative measures, as discussed earlier, should be taken into consideration to promote *institutional integrity*.The contributions made by the public institutions and the legal institutions towards the implementation of the RTI regime will go in vain if such efforts are unaccompanied by a social change. If the common people make it a point to exercise their right to access information under the Act, it will become all the more difficult for the government to meddle with it, to weaken it or to repeal it in total It is quite a possibility that with exposure of the misdeeds, the government might turn out to be more accountable thereby leading to a gradual but predictable movement towards enhanced governance. The struggle is going to be difficult, but it isn't impossible as Fidel Castro says, *"A revolution is not a bed of roses. A revolution is a struggle between the future and the past.*

[48] *Supra* note 18, §4.
[49] *Supra* note 6.